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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-808

No. COA22-286

Filed 6 December 2022

Buncombe County, No. 19JB259

IN THE MATTER OF: L.D.G.

Appeal by juvenile from order entered 1 November 2021 by Judge James Calvin Hill in Buncombe County District Court. Heard in the Court of Appeals 6 September 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Sarah Grace Zambon, for the State-appellee.

Appellant Defender Glenn Gerding, by Assistant Appellate Defender, James R. Grant, for the juvenile-appellant.

GORE, Judge.

¶ 1 The juvenile, Luke,¹ appeals from an order denying Luke's motions to dismiss for insufficient evidence. Luke argues the trial court erred in denying his motions to dismiss the delinquency petitions alleging simple assault and disorderly conduct, claiming there was insufficient evidence Luke violated any law. We agree.

¹ Pseudonym is used to protect the identity of the juvenile.

I.

¶ 2 Luke appeals as a matter of right under Sections 7B-2602 and 7B-2604 from the trial court's order entered on 1 November 2021. On the evening of 4 July 2021, a crowd was gathered by a fountain at Pack Square Park after a firework display in downtown Asheville. Asheville police officer Captain Michael Lamb was on patrol when he saw a fight break out near the fountain. Captain Lamb was wearing a body camera, the footage from which the State entered into evidence. Captain Lamb testified a group of teenagers were throwing fireworks at one another when the fight broke out, and he pushed through the crowd of ten to fifteen people, shouting "Get back! Get back!" to break up the crowd.

¶ 3 Captain Lamb testified he first saw Luke on the ground underneath the other larger juvenile and both were striking one another. Captain Lamb grabbed the other juvenile's arm to stop him from hitting Luke, and then Captain Lamb testified Luke continued to hit him but stopped and put his hands up prior to Captain Lamb tasing the juvenile. Captain Lamb's camera footage does not show Luke continuing to hit the other juvenile once Lamb pulled the other juvenile off Luke. Luke was charged with simple affray, simple assault, and disorderly conduct by fighting.

¶ 4 On 25 October 2021, at the juvenile hearing before the district court judge, the State presented Captain Lamb's testimony and the camera footage as evidence for all three petitions. Luke moved to dismiss for insufficient evidence as to all petitions;

the trial court dismissed the simple affray charge but denied the motions to dismiss the simple assault and disorderly conduct petitions. Luke did not put on evidence and renewed his motions to dismiss for insufficient evidence of the remaining petitions. The trial court found Luke responsible for misdemeanor simple assault and misdemeanor disorderly conduct, and adjudicated Luke delinquent for six months of probation under a Level 1 disposition, with required participation in “My Dad Taught Me That.” Luke timely filed written notice of appeal on 2 November 2021.

II.

¶ 5

On appeal, Luke challenges the trial court’s denial of his motions to dismiss the delinquency orders for insufficient evidence of a simple assault and disorderly conduct by fighting. This Court reviews motions to dismiss for insufficient evidence de novo. *In re T.T.E.*, 372 N.C. 413, 420, 831 S.E.2d 293, 298 (2019). In its ruling, the lower court must decide “whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.” *State v. Turnage*, 362 N.C. 491, 493, 666 S.E.2d 753, 755 (2008) (citation omitted). “Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996) (citation omitted). The trial court should deny the motion to dismiss if “substantial” direct or circumstantial evidence exists “to support[s] a

finding that the offense charged has been committed and that the [juvenile] committed it.” *In re R.N.*, 206 N.C. App. 537, 539, 696 S.E.2d 898, 901 (2010) (citation omitted).

¶ 6

This Court must consider the evidence “in the light most favorable to the State,” entitling the State to “every reasonable inference of fact that may be drawn from the evidence.” *Id.* at 540, 696 S.E.2d at 901. When a party presents circumstantial evidence, “the court must consider whether a reasonable inference of [the juvenile’s] guilt may be drawn from the circumstances.” *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 919 (1993). When an inference is drawn, the court, as the fact finder in the juvenile matter, must then determine “whether the facts taken singly or in combination, satisfy [the court] beyond a reasonable doubt that the juvenile is delinquent.” *In re Heil*, 145 N.C. App. 24, 29, 550 S.E.2d 815, 819 (2001). However, when the evidence presented advances “no more than a suspicion or conjecture as to . . . the commission of the offense . . . the motion should be allowed.” *In re R.N.*, 206 N.C. App. at 540, 696 S.E.2d at 901 (quotations and citations omitted).

A.

¶ 7

Luke claims the State did not provide sufficient evidence for his adjudication of simple assault. Simple assault is defined under common law by our Supreme Court as:

an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.

State v. Roberts, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967) (citations omitted). At common law, focus was placed upon the intent of the accused. *Id.* Yet subsequent Court decisions for assault, effectively created a “show of violence rule.” *Id.* This rule requires a “show of violence” along with “reasonable apprehension of immediate bodily harm or injury on the part of the person assailed which causes him to engage in a course of conduct . . . he would not otherwise have followed.” *Id.* In result, two rules exist for simple assault. *Id.* While the rules for assault are not complex, the application of these rules are, meaning “[e]ach case must depend upon its own peculiar circumstances.” *State v. Allen*, 245 N.C. 185, 189, 95 S.E.2d 526, 528 (1956).

¶ 8

The State asserts it presented “overwhelming evidence” of assault. Yet, all the State put forth as evidence is Captain Lamb’s testimony that Luke struck the other juvenile repeatedly after Captain Lamb “partially restrained” the other juvenile, and that Captain Lamb feared for his life such that “Lamb felt he had to drive (sic) stun Luke to end the fight.” The State also presented one minute of Captain Lamb’s camera footage of the incident, which was made part of the record on appeal.

¶ 9 In reviewing this evidence de novo, a discrepancy exists between the testimony and the video. While this Court does not determine the credibility of the officer's testimony, it does consider the sufficiency of the evidence the fact-finding trial court relied upon in determining the juvenile committed an assault beyond a reasonable doubt. After reviewing the evidence proffered by the State, this Court determines there is insufficient evidence to meet either the intent common law rule for assault or the show of violence rule. All that is proved through the evidence proffered by the State is that the juvenile was engaged in violence, but it fails to show anything further.

¶ 10 As to intent, the circumstantial evidence advances no more than a "suspicion or conjecture" that Luke "intentionally acted to assault the other juvenile, even after law enforcement intervened." *In re R.N.*, 206 N.C. App. at 540, 696 S.E.2d at 901. This was insufficient evidence when viewed in the light most favorable to the State; to find otherwise would require this Court to speculate as to facts not in evidence. Therefore, the trial court erred in denying the motion to dismiss the simple assault petition.

B.

¶ 11 The juvenile also challenges the disorderly conduct by fighting petition as sufficient to withstand his motion to dismiss. He claims the State failed to present sufficient evidence of the intent element of disorderly conduct by fighting. We agree.

¶ 12 Luke was adjudicated of disorderly conduct by fighting in violation of Section 14-288.4(a)(1). N.C. Gen. Stat. § 14-288.4(a)(1). A conviction of disorderly conduct requires a showing of: “a public disturbance intentionally caused by any person who . . . [e]ngages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence.” *Id.* To determine what is a violation of the statute for disorderly conduct, we must consider the subsections within the statute that specify examples of disorderly conduct. *State v. Strickland*, 27 N.C. App. 40, 43, 217 S.E.2d 758, 760 (1975). Our Supreme Court previously considered this statute and stated that the question is whether “substantial evidence was presented at the adjudication hearing that the juvenile perpetrated an ‘annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place’ by means of ‘engaging in fighting or other violent conduct’” *In re T.T.E.*, 372 N.C. at 421, 831 S.E.2d at 299 (quoting §§ 14-288.1(8), 14-288.4(a)(1)).

¶ 13 When viewing the evidence in the light most favorable to the State, we cannot say there was substantial evidence to meet every element of Section 14-288.4(a)(1). The State provides substantial evidence Luke was in a public place at Pack Square Park, in which a large crowd had gathered for an Independence Day celebration and could observe the fight. However, the evidence merely proves Luke was found underneath the other juvenile, who was larger in size, and engaged in fighting Luke. Captain Lamb testified Luke was hitting the other juvenile back from this weaker

position, but the video evidence taken from the officer's camera footage provided even less evidence Luke was engaged in fighting. In fact, the camera footage tends to contradict the witness's statements. This was insufficient to show the juvenile was delinquent, especially when considering the inferences, alone or in combination, drawn from the facts the State proffered for intent. *In re Heil*, 145 N.C. App. at 29, 550 S.E.2d at 819.

¶ 14 The evidence arouses strong suspicion as to how and who caused the fight to take place, but it does no more than that; a strong inference may exist from the officer testimony and video evidence that Luke engaged in the fight. Yet, this inference does not then culminate in delinquency beyond a reasonable doubt as to each element of disorderly conduct by fighting. Whether Luke was thrown down by the other juvenile, whether he was protecting himself from severe injury (since the camera footage shows the other juvenile was hitting Luke), or whether Luke started the fight and was overpowered by the other stronger juvenile; there is simply no answer, nor did the State provide sufficient evidence to show any intent to cause such a public disturbance. Thus, we determine there was insufficient evidence to survive a motion to dismiss.

III.

¶ 15 The trial court erred in denying the juvenile's motions to dismiss for insufficient evidence. Therefore, we reverse the trial court.

IN RE: L.D.G.

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Opinion of the Court

REVERSED.

Judges ZACHARY and JACKSON concur.

Report per Rule 30(e).