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NO. COA05-1077

NORTH CAROLINA COURT OF APPEALS

Filed: 18 April 2006

STATE OF NORTH CAROLINA

v. Cabarrus County
No. 03 CRS 6469

LARRY DEAN PRUETT

Appeal by defendant from judgment entered 3 December 2004 by Judge Larry G. Ford in Cabarrus County Superior Court. Heard in the Court of Appeals 15 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Mary Carla Hollis, for the State.

Daniel J. Clifton for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from judgment entered 3 December 2004 after a jury verdict of guilty of assault on a child under the age of twelve. We find no error.

On 29 November 2004 the State presented evidence at a trial before a jury tending to show the following:

On 30 December 2002, the nine-year-old victim, S.L., and her family visited a Chuck E. Cheese in Cabarrus County, North Carolina. S.L. was playing games at Chuck E. Cheese when defendant approached the machine beside her and began playing games. After defendant won several tickets playing the game, he handed the

tickets to S.L., who then took them to her mother and pointed out defendant. S.L. began playing a different game when defendant again approached S.L. and began playing games near her. Defendant subsequently invited S.L. to come look at his tickets, at which time defendant walked over to S.L., knelt down and placed his hand on S.L.'s shoulder. S.L. began to move away backing up until defendant's fingertips were the only things remaining in contact with her. Defendant then moved his entire hand back on her shoulder and S.L. moved away once again. Defendant's hand remained on S.L. for about 30 seconds before she left to tell her mother what happened and pointed out defendant as the person who touched her. S.L.'s mother testified that after the encounter with defendant, S.L. appeared uncomfortable and nervous. When defendant noticed S.L. pointing him out to her mother, he quickly left Chuck E. Cheese and drove away. Defendant stipulated at trial that he was the person who touched S.L. on the shoulder on the date in question.

After obtaining a description of defendant and his car, officers set up a surveillance of the Chuck E. Cheese parking lot where defendant and his car were seen and then later stopped by police. At this time defendant indicated to the officer that this was his first time visiting the Chuck E. Cheese. On 24 March 2003, Officer Trafton called defendant and requested that defendant come to the Concord Police Department for an interview. Prior to the interview, the officers informed defendant that he was free to leave at any time, that he did not have to talk to them, and

further informed him several times that he was not under arrest. Defendant was placed in an interview room while at the police station in which the door was open at certain times and closed at others. Throughout the interview, defendant did not have an attorney present and was not given any *Miranda* warnings. At the conclusion of the interview, defendant was told that he was free to leave and that subsequent charges would likely be filed against him. Defendant made a motion to suppress statements made to police officers during this interview which was denied by the trial court.

At the close of the State's evidence and again at the close of the trial, defendant made a motion to dismiss the charges against him which were both denied by the trial court. In instructing the jury on the law at the close of the trial, the trial judge gave the following instructions:

> For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> First, that the defendant intentionally, and without justification or excuse, assaulted the victim by placing his hand on her shoulder in connection with giving her tickets at Chuck E. Cheese.
>
> And second, that the victim had not reached her twelfth birthday at the time the assault was committed.
>
> Now, if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally placed his hand on [S.L.], or on her shoulder in connection with giving her tickets at Chuck E. Cheese, and that at that time the victim, . . . had not yet reached her twelfth birthday, it would be your duty to return a verdict of guilty.

The jury returned a verdict of guilty on the charge of assault on a child under the age of 12 years.

Defendant now appeals.

ANALYSIS

I

Defendant contends on appeal that the trial court erred in denying a motion to suppress defendant's statement. We disagree.

The standard of review in determining whether a trial court properly denied a motion to suppress is whether the findings of fact are supported by the evidence and whether conclusions of law are in turn supported by those findings of fact. *State v. Cockerham*, 155 N.C. App. 729, 736, 574 S.E.2d 694, 699, *disc. review denied,* 357 N.C. 166, 580 S.E.2d 702 (2003). The trial court's findings "'"are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting."'" *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citations omitted). "The determination of whether a defendant was in custody, based on those findings of fact, however, is a question of law and is fully reviewable by this Court." *State v. Briggs*, 137 N.C. App. 125, 128, 526 S.E.2d 678, 680 (2000).

In determining whether a person is "'in custody'" for the purposes of *Miranda* the Court must inquire as to whether there was a "'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest[]'" based on the totality of the circumstances. *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828. We

must look to the objective circumstances of the situation and not the subjective views of those involved to evince restraint. *Stansbury v. California*, 511 U.S. 318, 323, 128 L. Ed. 2d 293, 298, *cert. denied*, 516 U.S. 923, 133 L. Ed. 2d 222 (1995). "Absent objective indicia of such restraint, the fact that police have identified the person interviewed as a suspect and that the interview was designed to produce incriminating responses from the person are not necessarily relevant to the determination of whether the person was in custody for *Miranda* purposes." *Cockerham*, 155 N.C. App. at 736, 574 S.E.2d at 699.

In the instant case, defendant voluntarily came to the police station for an interview pursuant to a request by Officer Trafton. Defendant was informed that he was free to leave at any time, that he did not have to talk to the police officers, and that he was not under arrest. Defendant was interviewed by officers in an interrogation room where the door was closed at times and open at others. At the end of the interview, defendant was allowed to leave but told that charges would likely be filed. It cannot be said that, based on the totality of the circumstances, there was any indicia of restraint on freedom of movement associated with a formal arrest. Therefore, this assignment of error is overruled.

II

Next, we address defendant's contention that the trial court erred in denying the motion to dismiss the charge of assault. We disagree.

When considering a motion to dismiss for insufficient evidence, the trial court must determine whether there is substantial evidence of each element of the offense and that the defendant committed the offense. *State v. Irwin*, 304 N.C. 93, 97, 282 S.E.2d 439, 443 (1981). Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Smith*, 150 N.C. App. 138, 140, 564 S.E.2d 237, 239 (citations omitted), *cert. denied*, 355 N.C. 756, 566 S.E.2d 87 (2002). All evidence is to be considered in the light most favorable to the State and all reasonable inferences are to be drawn therefrom. *Irwin*, 304 N.C. at 98, 282 S.E.2d at 443. Where there is a reasonable inference of a defendant's guilt from the evidence, it is then for the jury to determine whether that evidence "convinces them beyond a reasonable doubt of defendant's guilt." *Id.*

Assault on a female may be proven by finding either an assault or a battery of the victim. *State v. West*, 146 N.C. App. 741, 743, 554 S.E.2d 837, 839-40 (2001). Therefore, under the same line of reasoning, assault on a child under the age of twelve may also be proven by evidence of either an assault or a battery of the victim. On one hand, assault is defined as "'an intentional attempt, by violence, to do injury to the person of another.'" *State v. Britt,* 270 N.C. 416, 419, 154 S.E.2d 519, 521 (1967) (citation omitted). On the other hand battery "is an assault whereby any force is applied, directly or indirectly, to the person of another." *Id.* at 418, 154 S.E.2d at 521.

In the instant case, the evidence showed that defendant placed his hand on S.L.'s shoulder and that when S.L. tried to back away from him, he moved his entire hand back on her shoulder once again. Moreover, defendant stipulated at trial that he was the person who touched S.L. on the shoulder on the date in question. It was further proven that S.L. was under the age of twelve at the time of the incident. It is clear that there was substantial evidence of each element of the crime charged where S.L. was under the age of twelve and defendant committed an assault by battery when he directly applied force to the person of S.L. Therefore, this assignment of error is overruled.

III

Lastly, we address defendant's contention that the trial court committed reversible error in its jury instructions regarding assault on a child under the age of twelve. We hold that this contention lacks merit.

Assuming *arguendo* that the question of whether the trial court committed plain error in instructing the jury on the law is properly before this Court, we address defendant's contention.

The plain error rule "'allows review of fundamental errors or defects in jury instructions affecting substantial rights, which were not brought to the attention of the trial court.'" *State v. Bell*, 87 N.C. App. 626, 634, 362 S.E.2d 288, 293 (1987). In order to obtain relief under this doctrine, defendant must establish that the omission was error, and that, in light of the record as a

whole, the error had a probable impact on the verdict. *Id.* at 635, 362 S.E.2d at 293.

The gravamen of defendant's argument on appeal in regard to the jury instruction is a mere extension of his contention that the touching of S.L. did not amount to an assault under the law. However, this Court has noted, *supra*, that an assault on a child under the age of twelve may be proven by evidence of a battery. The jury instructions on assault in this case are simply an application of the evidence to the law and therefore they are not in error. *See State v. Robinson,* 40 N.C. App. 514, 520, 253 S.E.2d 311, 315 (1979) (A trial court does not err by tailoring its instructions to the specific evidence adduced by the parties.). Therefore, this assignment of error is overruled.

Accordingly, the trial court did not err in denying defendant's motion to suppress, denying defendant's motion to dismiss, or in its instructions to the jury on the crime of assault. Therefore we find

No error.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).