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NO. COA06-1145

NORTH CAROLINA COURT OF APPEALS

Filed: 01 May 2007

IN THE MATTER OF:
S.T.O. (Juvenile)

Wake County
No. 06-J-63

Appeal by respondent from order entered 6 April 2006 by Judge Robert B. Rader in Wake County District Court. Heard in the Court of Appeals 16 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin, for the State.

Brannon Strickland, PLLC, by Anthony M. Brannon for defendant-appellant.

STEELMAN, Judge.

When a juvenile introduces evidence following the denial of his motion to dismiss, this motion must be renewed at the close of all the evidence. Upon the failure to renew the motion, this appeal must be dismissed.

Petitioner's evidence tends to show that between 5:30 and 6:00 p.m. on 19 October 2005, Angela McCarty heard loud popping sounds coming from the area of a private pond. She investigated and saw a duck swimming in circles in the pond. She heard another popping sound. She looked and saw two boys standing in a clearing holding a BB rifle. She identified one of the boys as Juvenile, whom she

had seen many times visiting a boy who lived next to her guest house. She saw Juvenile holding the BB rifle and aiming at one of the ducks. She screamed at the boys to stop. The boys ran. She caught up with one of the boys, who identified Juvenile as the other boy and directed her to the mobile home where Juvenile lived. She knocked on the door and received no answer. She saw a white vehicle leaving the area. She returned to the pond and retrieved a duck that had been shot. This duck died before she could rush it to a veterinarian. A second duck sustained a wound to an eye and is blind in that eye.

Juvenile's mother testified that Juvenile came home from school at 3:30 p.m. that afternoon and went to his neighbor's house to help the neighbor pack boxes preparatory to moving. Juvenile returned home, changed his clothes, and went with his mother to the state fair that evening. They left their residence in a white vehicle at 5:45 p.m. She took a BB gun away from Juvenile as a disciplinary measure so that at the time of this incident, Juvenile did not possess any gun of any kind.

Maria Skipper testified that on 19 October 2005, she was Juvenile's neighbor. Juvenile came to her residence after school that date and helped her take down a bunk bed and pack boxes. Juvenile left her residence at 5:20 p.m. after his mother told him to return home and change his clothes before going to the fair.

Juvenile testified and denied shooting the ducks.

On rebuttal, another neighbor testified that she had seen Juvenile carrying a BB gun.

In his only assignment of error, Juvenile contends that the trial court erred in denying his motion to dismiss based upon the sufficiency of the evidence showing he was the perpetrator of the offense.

This Court has stated that a juvenile "is entitled to have the evidence evaluated by the same standards as apply in criminal proceedings against adults." *In re Dulaney*, 74 N.C. App. 587, 588, 328 S.E.2d 904, 906 (1985). Thus, a motion to dismiss is the recognized method by which the sufficiency of the evidence to sustain a petition alleging delinquency is evaluated. *In re J.A.*, 103 N.C. App. 720, 723-24, 407 S.E.2d 873, 875 (1991). "In considering a juvenile's motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the charged offense and whether the juvenile was the perpetrator of the offense." *In re Rhyne*, 154 N.C. App. 477, 481, 571 S.E.2d 879, 881 (2002), *disc. review denied*, 356 N.C. 672, 577 S.E.2d 637 (2003). Substantial evidence is defined as what "a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury.

State v. Stephens, 244 N.C. 380, 384, 93 S.E.2d 431, 433-34 (1956). In a juvenile proceeding, there is no jury and the trial judge is the trier of the facts who determines the weight and credibility to

be given to the evidence presented. *In re Whichard*, 8 N.C. App. 154, 160, 174 S.E. 2d 281, 285, *cert. denied*, 403 U.S. 940, 29 L. Ed. 2d 719 (1971).

To preserve a right to appellate review of the sufficiency of the evidence, a juvenile who presents evidence after making a motion to dismiss must also make a motion to dismiss at the close of all the evidence. *In re Davis*, 126 N.C. App. 64, 66, 483 S.E.2d 440, 442 (1997). The State argues Juvenile failed to renew the motion to dismiss at the close of all the evidence. Thus, the threshold determination we must make is whether Juvenile made a motion to dismiss at the close of all the evidence.

The record shows that Juvenile presented evidence after the court denied Juvenile's motion to dismiss at the close of petitioner's evidence. After petitioner presented rebuttal evidence and announced it had finished with its presentation of evidence, the court inquired, "All right, care to be heard." The prosecutor responded, "State waive opening." The court then inquired of Juvenile's counsel, "Care to be heard, Ms. Mulligan?" At that point counsel made argument to the court in which she reviewed the evidence and argued petitioner "has not proven its case beyond a reasonable doubt and there is reasonable doubt[.]"

We note the record does not show that counsel moved to dismiss the petition on the ground substantial evidence is lacking. What the record shows is that counsel made a closing argument to the court, asking it as the fact finder not to make a finding that petitioner committed the offense because his perpetration of the

offense had not been proven beyond a reasonable doubt. We therefore conclude Juvenile did not make a motion to dismiss at the close of all the evidence and did not preserve the issue of the sufficiency of the evidence for our review. We accordingly dismiss this assignment of error. There are no other assignments of error. We dismiss the appeal.

APPEAL DISMISSED.

Judges McCULLOUGH and LEVINSON concur.

Report per Rule 30(e).