

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA06-336

NORTH CAROLINA COURT OF APPEALS

Filed: 17 October 2006

IN THE MATTER OF: E.S.,
Juvenile

Durham County
No. 05 J 95

Appeal by juvenile from order entered 10 June 2005 by Judge Marcia H. Morey in Durham County District Court. Heard in the Court of Appeals 25 September 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Barbara A. Shaw, for the State.

Kevin P. Bradley, for juvenile-appellant.

JACKSON, Judge.

E.S. ("juvenile") was adjudicated delinquent for committing a sexual battery upon his female classmate, L.C., in their math classroom at Carrington Middle School on 23 February 2005. In a Level 1 disposition entered 10 June 2005, the district court placed juvenile on twelve months of probation and ordered him to undergo a sex offender specific evaluation and perform fifty hours of community service. Juvenile filed timely notice of appeal from the disposition order.

The State adduced evidence tending to show that juvenile, who was fourteen years of age at the time of the incident, approached complainant from behind, reached under her arm with his left hand,

and grabbed her left breast in the course of walking to the pencil sharpener during their math class. Juvenile smirked at complainant, who then reported the incident to her teacher.

In class the following day, juvenile displayed a hand-drawn picture of a naked boy with spiked hair and an earring resembling himself having sex with a naked girl with braided hair resembling complainant. The boy was depicted as standing behind the girl with his hand on her breast. The drawing was admitted into evidence at the delinquency hearing and was included in the record on appeal.

Juvenile testified that he inadvertently brushed complainant while attempting to move past her in a narrow space in the classroom. Although he only "kind of hit [complainant] and touched her on the shoulder[,] " juvenile averred that "she thought that [he] wanted to touch her breasts." Regarding the drawing, juvenile explained that he "did it just kind of joking around, playing around" without intending any harm. When asked if the drawing portrayed him and complainant, he replied, "No, only her. The guy was some guy."

The trial judge found beyond a reasonable doubt that juvenile committed a sexual battery upon complainant by touching her breast. In announcing her adjudication in open court, the trial judge found that "the very graphic, vulgar drawing that [he] drew. . . . without any doubt, shows his touching [was] for sexual gratification."

In his sole argument on appeal, juvenile claims the evidence was insufficient to support an adjudication of sexual battery,

absent substantial evidence that his purpose in grabbing complainant's breast was sexual gratification. See N.C. Gen. Stat. § 14-27.5A(a) (2005). He argues that the drawing he displayed on the day after the incident did not prove that his intent was "sexual and not merely an inappropriate attempt at humor or to irritate a classmate."

Juvenile's assignment of error is not properly before this Court. Pursuant to the provisions of North Carolina General Statutes, section 7B-2405(6) (2005), 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). Accordingly, as in criminal appeals pursuant to North Carolina Rule of Appellate Procedure 10(b)(3), "a motion to dismiss made at the close of the State's evidence is waived if the [juvenile] presents evidence." *In re Davis*, 126 N.C. App. 64, 66, 483 S.E.2d 440, 442 (1997). Here, juvenile made a motion to dismiss at the conclusion of the State's evidence. After the trial court denied his motion, juvenile testified in his own defense but did not renew his motion to dismiss at the conclusion of all the evidence. Juvenile "is therefore precluded from challenging the sufficiency of the evidence presented at trial." *Id.* (citing *State v. Elliott*, 69 N.C. App. 89, 316 S.E.2d 632, appeal dismissed and disc. review denied, 311 N.C. 765, 321 S.E.2d 148 (1984)).

Juvenile's suggestion that his "closing argument combined a motion to dismiss the sexual battery charge with argument to

acquit" is not supported by the hearing transcript. At no time during his closing argument did juvenile's counsel ask the court to dismiss the delinquency petition; nor did counsel obtain any ruling from the trial court on a motion to dismiss. Rather, counsel "just ask[ed] that [the trial court] find him not delinquent on [the] charge, Your Honor." While we note counsel's averment, several paragraphs into his closing argument, that "in the light most favorable to the State, what we have right here today is basically a quick grope" not amounting to a sexual battery, this mere assertion was insufficient to renew his motion to dismiss at the conclusion of the evidence as required by Rule 10(b)(3).

The record on appeal includes additional assignments of error not addressed by juvenile in his brief to this Court. Pursuant to Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, they therefore are deemed abandoned.

Appeal dismissed.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).