NO. COA08-1078-2

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

IN THE MATTER OF:
D.S.

Robeson County
No. 02 JB 168

Appeal by Juvenile from order entered 16 April 2008 by Judge James G. Bell in Robeson County District Court. Originally heard in the Court of Appeals 10 June 2010. A unanimous panel of this Court affirmed in part and vacated in part the order of the trial court. *See In re D.S.*, __ N.C. App. __, 682 S.E.2d 709 (2009). Now on remand from the Supreme Court of North Carolina, opinion filed 17 June 2010, for consideration of the Juvenile's remaining assignments of error. *See In re D.S.*, __ N.C. __, __ S.E.2d __ (June 17, 2010) (No. 273PA09).

Attorney General Roy Cooper, by Assistant Attorney General Judith Tillman, for the State.

Peter Wood, for Juvenile.

BEASLEY, Judge.

The underlying facts of D.S.'s appeal have been discussed at length in *In re D.S.*, __ N.C. App. __, 682 S.E.2d 709 (2009) and *In re D.S.*, __ N.C. __, __ S.E.2d __ (2010). Relevant here, D.S. appeals from an order adjudicating him as a delinquent for the offense of sexual battery. In its order the trial court found that:

> on or about September 21, 2007 the Juvenile, [D.S.], did unlawfully and willfully assault [A.A.] touching her on her butt, two times with his hands; and that he did unlawfully and willfully for the purpose of sexual arousal or sexual gratification engage in sexual contact, by placing his hand on the buttocks of another person, A.A., by force and against the will of the other person, being offenses in violation of G.S. 14-33(A) and 14-27.5A respectively, and the court finds this beyond a reasonable doubt.

Additional relevant findings of fact and conclusions of law will be discussed as appropriate, throughout the opinion.

D.S. argues that the trial court erroneously failed to grant his motion to dismiss the charge of sexual battery, because the State did not prove that he acted with the "purpose of sexual arousal, sexual gratification, or sexual abuse." We agree.

"[I]n order to withstand a motion to dismiss the charges contained in a juvenile petition, there must be substantial evidence of each of the material elements of the offense charged." *In re Bass*, 77 N.C. App. 110, 115, 334 S.E.2d 779, 782 (1985). "The evidence must be considered in the light most favorable to the State, and the State is entitled to receive every reasonable inference of fact that may be drawn from the evidence." *In re Brown*, 150 N.C. App. 127, 129, 562 S.E.2d 583, 585 (2002).

Our General Assembly has defined sexual battery as:

> (a) A person is guilty of sexual battery if the person, *for the purpose of sexual arousal, sexual gratification, or sexual abuse*, engages in sexual contact with another person:
>
> (1) By force and against the will of the other person; or

> (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.

N.C. Gen. Stat. § 14-27.5A (2009) (emphasis added). In *In re T.S.*, addressing the offense of indecent liberties between children, our Court held that proof of action alone will not sustain a finding that a juvenile committed an indecent liberty "for the purpose of arousing or gratifying sexual desire." 133 N.C. App. 272, 277, 515 S.E.2d 230, 233 (1999) (internal quotation marks omitted). "[W]ithout some evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting, sexual ambitions must not be assigned to a child's actions." *Id.* Our Courts have also recognized that "age disparity, . . . control by the juvenile, . . . location and secretive nature of their actions, and the attitude of the juvenile [are] evidence of . . . maturity and intent[.]" *In re T.C.S.*, 148 N.C. App. 297, 303, 558 S.E.2d 251, 254 (2002). Though addressing the offense of indecent liberties between children, our Court has previously applied the holding of *In Re T.S.* to the offense of sexual battery. *See In re D.W.*, 171 N.C. App. 496, 501-02, 615 S.E.2d 90, 93 (2005).

Here, even when taken in a light most favorable to the State, there is no evidence in the record that D.S.'s actions were "for the purpose of sexual arousal, sexual gratification, or sexual abuse." At D.S.'s hearing the State presented evidence that: (1) D.S. walked over to the far side of the classroom and approached A.A. who was leaning over her desk working; (2) D.S. used a

straw-like candy known as a "Pixy Stix" to touch A.A. on her buttocks and between her legs; (3) A.A. became upset and asked D.S. to stop his behavior on three separate occasions; (4) A.A. then left her seat to tell the teacher. A review of the record reveals that other than D.S.'s alleged actions, the State failed to present any evidence as to D.S.'s intent, maturity, experience, or any other circumstance indicating that D.S. was acting for the purpose of sexual gratification. On appeal the State merely argues that D.S.'s "[act] of sticking a long object between the victim's legs speaks to sexual intent." However, because North Carolina authority clearly holds that proof that a juvenile was acting for a sexual purpose cannot be proven by the action alone, the trial court erroneously failed to grant D.S.'s motion to dismiss. Accordingly, the order adjudicating D.S. as a delinquent is reversed and remanded for entry of order of dismissal.[1] *See In re T.S.*, 133 N.C. App. at 277, 515 S.E.2d at 234.

Reversed and remanded for entry of order of dismissal.

Judges MCGEE and GEER concur.

Report per Rule 30(e).

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[1]Note that our holding in this case is not a reversal of our earlier decision affirming D.S.'s adjudication as a delinquent for the offense of simple assault. *See In re D.S.*, __ N.C. App. __, 682 S.E.2d 709 (2009).