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NO. COA08-318

NORTH CAROLINA COURT OF APPEALS

Filed: 21 October 2008

STATE OF NORTH CAROLINA

v.

Davidson County
No. 04 CRS 53940

CLARENCE JUNIOR WILLIAMS

Court of Appeals

Appeal by defendant from judgment entered 14 September 2007 by Judge Michael Beale in Davidson County Superior Court. Heard in the Court of Appeals 15 September 2008.

Attorney General Roy Cooper, by Assistant Attorney General LaToya B. Powell, for the State

Slip Opinion

Peter Wood, for defendant-appellant.

ELMORE, Judge.

Clarence Junior Williams ("defendant") appeals from judgment entered upon a conviction for assault on a female and raises the following issues: (1) whether the trial court failed to dismiss the charge for insufficient evidence, and (2) whether the trial court sentenced defendant based on matters not properly before the court. For the following reasons, we find no error.

The State's evidence at trial tends to show that on 16 April 2004, L.H. was an employee working at a convenience store in Thomasville. Defendant was her supervisor. The store was small

and box-like, with a window where employees could exchange purchases and money with customers standing outside. L.H. testified she began her shift around two or three o'clock in the afternoon and worked until closing at 11:00 p.m. She was alone for most of the time, until defendant arrived around 9:00 p.m., saying he needed to do some work. L.H. stated that at some point defendant began making remarks to her, telling her that she looked good in her jeans, asking her where her boyfriend was, and telling her she needed to be hugged and cuddled. Around 11:30 p.m., defendant and L.H. locked up the store and headed to their cars in the parking lot. According to L.H., defendant repeatedly asked her if he could give her a hug, and she said no each time. He then asked her to go back in the store with him because he needed to show her something on the computer. She reluctantly agreed.

L.H. testified that once they were back in the store, defendant locked the door, grabbed her and pulled her to him, rubbed up against her, put his mouth on her shoulder, and put his arms around her. She told him to let her go. A security camera in the store taped the incident, and a videotape of that time period showed defendant touching L.H. She stated she did not give him permission to touch her and that she did not want him to touch her. L.H. left and reported the incident to the police the following day. She did not return to work after that, stating that she was waiting for the company to call her to tell her when she could return. She did go by the store occasionally to make purchases, but she did not see defendant when she went there. At the close

of the State's evidence, defendant moved to dismiss the charge for insufficient evidence; the motion was denied.

Defendant testified in his defense that on the day in question he discovered that L.H. had lied on her employment application by stating that she had never worked for the company, when she in fact had worked there previously. He informed her that she was being fired for lying on the application and asked for her store key. She became upset and started to cry. Defendant denied touching L.H. in an inappropriate way. Defendant renewed his motion to dismiss at the close of all the evidence; the trial court denied the motion.

The jury returned a verdict of guilty of the offense of assault on a female. The trial court determined defendant to have five prior convictions, giving him a level III prior conviction level. The trial court sentenced defendant to 150 days confinement. From the judgment entered, defendant appeals.

Defendant first argues the trial court erred in denying his motion to dismiss the charge for insufficient evidence. He contends the State was required to prove that the victim was actually in fear or apprehension of bodily harm as part of the offense of assault on a female, but that it failed to do so. We disagree.

"When ruling on a motion to dismiss for insufficiency of the evidence, the trial court determines whether substantial evidence exists for each essential element of the offense charged, and whether defendant is the perpetrator of the offense." *State v.*

Gay, 151 N.C. App. 530, 532, 566 S.E.2d 121, 123 (2002) (citations omitted), *disc. review denied*, 356 N.C. 685, 578 S.E.2d 315 (2003). Substantial evidence is "evidence from which a rational finder of fact could find the fact to be proved beyond a reasonable doubt." *State v. Davis*, 130 N.C. App. 675, 678, 505 S.E.2d 138, 141 (1998) (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). All evidence is taken in the light most favorable to the State, including all reasonable inferences to be drawn therefrom. *Gay*, 151 N.C. App. at 532, 566 S.E.2d at 123-24. "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.'" *Davis*, 130 N.C. App. at 679, 505 S.E.2d at 141 (quoting *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996)).

The elements of assault on a female are: (1) an assault (2) committed by a male over the age of eighteen (3) against a female. N.C. Gen. Stat. § 14-33(c) (2) (2007); *State v. Wortham*, 318 N.C. 669, 671, 351 S.E.2d 294, 296 (1987). Assault is defined as an attempt or actual commission of an overt act with a threat of force or violence that would put a reasonable person in fear of bodily harm. *Wortham*, 318 N.C. at 671, 351 S.E.2d at 296. However, "[a]ssault 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). A battery is "the offensive touching of the person of another without his/her consent[.]" *City of Greenville v. Haywood*, 130 N.C. App. 271, 275, 502 S.E.2d 430,

433, *disc. review denied*, 349 N.C. 354, 525 S.E.2d 449 (1998). The State need not prove the victim was put in fear where there is evidence of an actual battery. *State v. Thompson*, 27 N.C. App. 576, 578, 219 S.E.2d 566, 568 (1975), *cert. denied*, 289 N.C. 141, 220 S.E.2d 800 (1976).

Here, sufficient evidence was presented that a battery occurred. L.H. testified that defendant touched her several times and that the touching was unwanted. Since the evidence indicates an actual battery took place, the State had no burden to prove the victim was put in fear or apprehension of harmful or offensive contact. We find sufficient evidence was presented for the charge of assault on a female, and therefore the trial court did not err in denying defendant's motion to dismiss. This assignment of error is overruled.

By defendant's second argument, he contends the trial court abused its discretion when sentencing him by stating, "[I]n my opinion the evidence was close to being a charge of attempted rape and I think it's an aggravated case and I'm sentencing you to 150 days" Defendant argues the trial court improperly based its sentencing decision on a crime with which defendant was not charged, and seeks a new sentencing hearing. He also notes the misdemeanor sentencing laws do not provide for aggravating factors.

The trial court enjoys broad discretion in sentencing matters. See *State v. Ahearn*, 307 N.C. 584, 598, 300 S.E.2d 689, 698 (1983) (the appellate courts "defer to the wisdom of the trial judge the appropriateness of the severity of punishment imposed on the

particular offender"). Also, "[w]hen a sentence is within the statutory limit it will be presumed regular and valid unless 'the record discloses that the trial court considered irrelevant and improper matter[s] in determining the severity of the sentence.'" *State v. Davis*, 167 N.C. App. 770, 775, 607 S.E.2d 5, 9 (2005) (quoting *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987)).

In the instant case the trial court properly sentenced defendant as a prior conviction level III offender for the class A1 misdemeanor pursuant to N.C. Gen. Stat. § 15A-1340.23.(2007). Although the trial court sentenced defendant to the maximum allowable sentence under section 15A-1340.23, the sentence is within the statutory limit and is therefore presumed to be valid. We are unable to say the trial court's comments were so improper as to render the sentence invalid. The trial court merely expressed his reason for imposing the sentence he did, that the evidence reflected a serious crime had been committed. This assignment of error is overruled.

No error.

Judges WYNN and GEER concur.

Report per Rule 30(e).