NO. COA08-383

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2008

IN THE MATTER OF: J.T.W. Mecklenburg County
No. 07J438

Appeal by Respondent from judgment entered on 4 December 2007 by Judge Hugh B. Lewis in Mecklenburg County District Court. Heard in the Court of Appeals 23 September 2008.

Attorney General Roy Cooper, by Assistant Attorney General Christine A. Sinha, for the State.

Peter Wood, for Respondent.

ARROWOOD, Judge.

J.T.W. (Respondent) appeals from a judgment adjudicating him delinquent for committing the offenses of sexual battery and indecent liberties between children.

Z.N. was seven years old on 20 May 2007, the date of the alleged offense. Respondent, a fourteen-year-old friend of Z.N.'s cousin, visited Z.N.'s house that day. Z.N. and Respondent were alone on the living room couch watching television. Z.N.'s cousin, Jay, was taking a shower and her mother, M.N., was folding clothes in the bedroom. While the two were alone in the living room, Respondent began touching Z.N. on her chest under her t-shirt. He also touched her buttocks. Z.N.'s mother came back into the living room and saw them on the couch with Respondent's hand under her

shorts. Respondent immediately threw Z.N.'s legs off of him, jumped from the couch and pretended to look at a stack of DVDs by the television.

M.N. called Z.N. to the bedroom and asked her what had happened with Respondent. While Z.N. initially denied any wrong doing, she eventually admitted that J.T.W. placed his hand under her shirt and under her shorts. M.N. confronted Respondent, asking him what happened. Respondent insisted that he did not do anything inappropriate and finally M.N. told him to leave before she called the police.

An officer came to M.N.'s house, but indicated there was no need for Z.N. to go to the doctor since there had not been any penetration. The officer also recommended a counselor who agreed to see Z.N. at school.

In his first argument, Respondent contends the trial court erred in denying his motion to dismiss the charge of sexual battery because the State did not present sufficient evidence that he committed the battery for the purposes of sexual gratification. Respondent also contends the trial court erred in denying his motion to dismiss the charge of indecent liberties because the State did not present sufficient evidence that he committed the battery of indecent liberties for the purposes of sexual gratification. We disagree.

Standard of Review

In order to survive a motion to dismiss based on the insufficiency of the evidence, the State must present substantial

evidence of each element of the offense charged. *In re T.C.S.*, 148 N.C. App. 297, 301, 558 S.E.2d 251, 254 (2002). In addition, such evidence must be "sufficient to convince a rational trier of fact beyond a reasonable doubt of defendant's guilt." *Id.* We review the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference. *Id.* It is irrelevant whether the State's evidence is direct, circumstantial, or both; the test for resolving a challenge to the sufficiency of the evidence is the same. *Id.* This standard, which applies in criminal trials against adults, also applies when evaluating the evidence in a juvenile hearing. *In re T.S.*, 133 N.C. App. 272, 275, 515 S.E.2d 230, 233 (1999).

Offenses

Since the Respondent has chosen to argue both assignments of error together, and since the assignments involve the same facts and legal arguments, we will address the assignments jointly. The essential elements of sexual battery are: (1) sexual contact with another person; (2) by force or against the person's will; and (3) for the purpose of sexual arousal, gratification or abuse. N.C. Gen. Stat. § 14-27.5A (2007). To obtain a conviction for indecent liberties, the State is required to prove the following elements: "(1) the defendant was at least 16 years of age; (2) he was three years older than his victim; (3) he willfully took or attempted to take an indecent liberty with the victim; (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred; and (5) the action by the defendant was for the purpose

of arousing or gratifying sexual desire." *State v. Thaggard*, 168 N.C. App. 263, 282, 608 S.E.2d 774, 786-87 (2005); N.C. Gen. Stat. § 14-202.2 (2007). Respondent contends that the State failed to present sufficient evidence that he made sexual contact with the victim for the purpose of sexual arousal or gratification for both counts. Although "intent is seldom provable through direct evidence[,] . . . intent to arouse or gratify sexual desires may [not] be inferred in children under the same standard used to infer sexual purpose to adults." *T.S.*, 133 N.C. App. at 276, 515 S.E.2d at 233. The legislature's addition of this requirement in a similar juvenile statute indicated a "recognition that a lewd act by adult standards may be innocent between children, and unless there is a showing of the child's sexual intent in committing such an act[,]" the child cannot be held criminally accountable. *Id.* Since a juvenile's intent to act for the purpose of sexual arousal or gratification cannot be inferred from the very act itself, as is the case in certain adult proceedings, the State may meet its burden by presenting some evidence of "[t]he child's maturity, intent, experience, or other factor indicating his purpose in acting[.]" *Id.* at 277, 515 S.E.2d at 233. In *T.C.S.*, the Court held that a juvenile's purpose to arouse or gratify sexual desire can be shown by the "age disparity" between the juvenile and the victim, the control exercised by the juvenile, the "location and secretive nature" of their actions, and the "attitude of the juvenile." 148 N.C. App. at 303, 558 S.E.2d at 254. In *T.C.S.*, the Court found that the following evidence was sufficient to establish the

juvenile's purpose to arouse or gratify sexual desire: the twelve year old juvenile told the five year old victim to undress; he touched his own private parts; he then got on top of the victim;.the two were later seen walking out of the woods hand in hand, and the victim had twigs in her hair; her pants were on backwards, and her socks missing.

In the case *sub judice*, the evidence viewed in the light most favorable to the State showed the following: 1) there was an eight-year disparity in age of the Respondent and the victim; 2) Respondent touched victim on her chest and buttocks while the two were alone in the living room; 3) the victim's mother saw Respondent's hand underneath victim's shorts when she walked into the living room; 4) the Respondent jumped up when the victim's mother walked into the room, signaling suspicious behavior; and 5) Respondent immediately denied the occurrence of inappropriate conduct to the victim's mother, reflecting an attempt to evade being caught in any wrongdoing. These facts, taken in the light most favorable to the State, are sufficient to establish that Respondent made sexual contact with the victim for the purpose of sexual arousal or gratification.

The lack of any non-sexual interpretation of the acts here distinguishes this appeal from the two decisions relied upon by defendant: *State v. Brown*, 162 N.C. App. 333, 590 S.E.2d 433 (2004), and *State v. Cooper*, 138 N.C. App. 495 530 S.E.2d 73 (2000). In *Brown*, 162 N.C. App. at 338, 590 S.E.2d at 436-37, the Court held that evidence of telephone conversations between the defendant and

the alleged minor victim was insufficient to survive a motion to dismiss because, although the calls were socially inappropriate, "the conversations were neither sexually graphic and explicit nor were they accompanied by other actions tending to show defendant's purpose was sexually motivated." In *Cooper*, 138 N.C. App. at 496, 530 S.E.2d at 74, the adult defendant was in the adult victim's presence for five seconds and did not demonstrate a sexual intent. He merely grabbed her elbows and ran when she screamed. *Id.* Here Respondent was touching the victim in a manner that lends itself to no reasonable interpretation other than his actions were sexual in nature.

Defendant also relies on *In re D.B.B.*, but in this case Respondent made no contact with the victim after he pushed her down, while two boys that accompanied him felt inside her shirt. *In re D.B.B.* (unpublished, COA04-1692, filed 4 October 2005). This clearly differs from the situation here since Respondent here unequivocally touched the victim's chest and buttocks by placing his hand under her clothes.

For the foregoing reasons, we conclude there was no reversible error in the trial court's adjudicating Respondent responsible on the charges.

Affirmed.

Judges WYNN and BRYANT concur.

Report per Rule 30(e).