NO. COA08-593

NORTH CAROLINA COURT OF APPEALS

Filed: 6 January 2009

IN THE MATTER OF:

J.D.B.

Wake and Alexander County
Nos. 07 JB 449;
07 JB 79

Appeal by respondent juvenile from an order entered 4 September 2007 by Judge Craig Croom in Wake County District Court and an order entered 19 December 2007 by Judge L. Dale Graham in Alexander County District Court. Heard in the Court of Appeals 19 November 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Gail E. Dawson, for the State.

Hartsell & Williams, P.A., by Christy E. Wilhelm, for respondent-juvenile-appellant.

JACKSON, Judge.

Fourteen-year-old J.D.B. ("the juvenile") appeals his adjudication and disposition for first degree sexual offense of J.G. W. and sexual battery of J.S.W. For the reasons stated below, we affirm.

On 16 June 2007, the juvenile was playing at the pool at his apartment complex. Also at the pool were J.G.W. and her friend

A.W., six years old and nine years old, respectively. J.G.W. and A.W. played a game of "chicken fight" with the juvenile. While J.G.W. was underwater, the juvenile touched her inside her bathing suit. After a few hours, A.W. and J.G.W. left the pool. On their way home, J.G.W.'s brother, J.L.W., overheard J.G.W. tell A.W. about the incident at the pool. At home, the girls changed clothes, and then went to the park, where they again encountered the juvenile. While at the park, the three played a game of "truth or dare." During the game, the juvenile, among other things, dared A.W. to kiss J.G.W., and J.G.W. to pull down her pants.

While the girls were at the park, J.L.W. told his mother, Kimberly W., what he had heard J.G.W. tell A.W. about the incident. Subsequently, Kimberly W. called the police, and a detective came to question each of the children. J.G.W. was later examined by a doctor.

On 17 June 2007, a juvenile petition was filed alleging that the juvenile was delinquent for the offense of first degree sexual offense. At that time, the court entered an order for secure custody. On 10 July 2007, four additional petitions were filed alleging that the juvenile was delinquent for four counts of sexual battery. A probable cause hearing was held 7 August 2007, at which the trial court found probable cause existed.

On 29 August 2007, after two days of testimony, the juvenile was adjudicated delinquent for the felony of first degree sexual offense and the misdemeanor of sexual battery. The trial court ordered the juvenile to remain in secure custody pending

disposition, which was continued until 10 September 2007. After disposition orders were entered on 19 December 2007, placing the juvenile on probation for one year, the juvenile filed Notice of Appeal to this Court.

The juvenile first argues that the trial court erred in denying the motion to dismiss at the close of the evidence. We disagree.

In order to survive a motion to dismiss the charges 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) (citing *State v. Myrick*, 306 N.C. 110, 113-14, 291 S.E.2d 577, 579 (1982)). "The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference of fact which may be drawn from the evidence." *Id.* (citing *State v. Easterling*, 300 N.C. 594, 604, 268 S.E.2d 800, 807 (1980)). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). This evidence may include circumstantial evidence, if such circumstantial evidence allows for a "reasonable inference of . . . guilt." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 919 (1993).

For the charge of first degree sexual offense, the State was required to present substantial evidence that the juvenile (1)

engaged in a sexual act; (2) with a child under the age of thirteen; and (3) was at least twelve years old and four years older than that victim. N.C. Gen. Stat. § 14-27.4(a)(1) (2007). For the first element, a "sexual act" can include "penetration, however slight, by any object into the genital or anal opening of another person's body." *State v. DeLeonardo*, 315 N.C. 762, 764, 340 S.E.2d 350, 353 (1986) (citing N.C. Gen. Stat. § 14-27.1(4)).

Here, J.G.W. testified that the juvenile touched her where she goes to the bathroom, and she used a hand motion to show her mother that she meant "in" her private part. J.G.W. told the police officer that the juvenile touched her on the inside of her "pee-pee." J.G.W.'s brother J.L.W. also testified that he heard J.G.W. say that "a boy touched my private." J.G.W. complained that her "pee-pee" itched on the inside. When meeting with the doctor, J.G.W. rubbed her fingers over the genital area of a doll to demonstrate what the juvenile had done. Although J.G.W. did not describe penetration to the doctor, after her mother sought to clarify, J.G.W. indicated on her mother's hand that the juvenile had touched her on the "inside." Additionally, the juvenile testified that he touched J.G.W. inappropriately by accident in the pool that day. Viewing this evidence together and in the light most favorable to the State, sufficient evidence of a sexual act exists.

As to the elements regarding ages, at trial, J.G.W. gave her birthdate and testified that she had just turned seven years old. At the time of the incident she would have been six years old.

Rachel Johnson, Juvenile Court Counselor, testified to the juvenile's date of birth, establishing that he was fourteen years old at the time of the incident. The juvenile's mother also testified to his date of birth. J.D.B. testified that he should have been entering the eighth grade, but was still in seventh grade. This evidence establishes that J.G.W. was under the age of thirteen; the juvenile was over the age of twelve, and was more than four years older than J.G.W.

We next turn our attention to the sexual battery adjudication. The juvenile argues that there was insufficient evidence to show purpose of sexual arousal, sexual gratification, or sexual abuse. To withstand a motion to dismiss the charge of sexual battery, the State was required to present substantial evidence that the juvenile for the purpose of sexual arousal, sexual gratification or sexual abuse, engaged in sexual contact with another person, by force and against the will of the other person. N.C. Gen. Stat. § 14-27.5A(a)(1) (2007). A.W.'s nine-year-old brother J.S.W. testified that at the pool on 16 June 2007, the juvenile reached his hand down J.S.W.'s bathing suit trunks. As the juvenile was acting against J.S.W.'s will, which the juvenile has not challenged, a purpose of sexual arousal, sexual gratification, or sexual abuse can be found. While the necessary purpose cannot be inferred from the act alone, *In re T.S.*, 133 N.C. App. 272, 277, 515 S.E.2d 230, 233, *disc. rev. denied*, 351 N.C. 105, 540 S.E.2d 751 (1999), the circumstantial evidence of other sexual contact – including the incidents with J.G.W. and the game played at the park

– show a pattern of behavior from which a purpose of arousing or gratifying sexual desire can be inferred.

The juvenile next argues that the trial court erred by allowing testimony into evidence pursuant to Rule 404(b) of the North Carolina Rules of Evidence when defense counsel was not properly noticed of this evidence before the hearing. We disagree.

The juvenile argues that the 404(b) evidence of the "truth or dare" game at the park, introduced by the State to prove lack of accident, was not properly allowed. The standard of review of a trial court's evidentiary ruling is abuse of discretion. *See State v. Fritsch*, 351 N.C. 373, 383, 526 S.E.2d 451, 458, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007). In *State v. Anthony*, 354 N.C. 372, 555 S.E.2d 557 (2001), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002), our Supreme Court held that the juvenile's assertions that disclosure of Rule 404(b) evidence is required by North Carolina law had no support. *Id.* at 391, 555 S.E.2d at 572. "To the contrary, we have previously held that Rule 404(b) 'addresses the admissibility of evidence; it is not a discovery statute which requires the State to disclose such evidence as it might introduce thereunder.'" *Id.* (citations

omitted). Because Rule 404(b) is not a discovery statute, this argument is overruled.

Next, the juvenile argues that the trial court erred in the disposition of the matter and by confining the juvenile in the absence of a completed court-ordered sex offender evaluation. We disagree.

When the juvenile already has been adjudicated delinquent, North Carolina General Statutes, section 7B-1903 provides that "the court may order secure custody pending the dispositional hearing or pending placement of the juvenile pursuant to [section] 7B-2506." N.C. Gen. Stat. § 7B-1903(c) (2007). The juvenile initially was placed in secure custody on 17 June 2007 prior to adjudication because there was a factual basis to believe that he had committed the alleged offenses and that he was charged with a felony and had demonstrated that he was a danger to persons. He was ordered to remain in secure custody on 25 June, 10 July, and 30 July 2007.

Upon being adjudicated delinquent, the trial court ordered the juvenile to remain in secure custody pending disposition, and noted that counsel had waived secure custody reviews until 10 September 2007. On 10 September 2007, the trial court determined that the juvenile should remain in secure custody because (1) he was adjudicated delinquent on charges of felony class B1 first degree sex offense and misdemeanor class A1 sexual battery; (2) he was facing a Level 2 or 3 disposition; (3) his mother was in the process of moving to a different county; (4) he had lived in several counties since the beginning of the case; and (5) a sex

offender specific evaluation was in process to determine his risk level for re-offending. For these reasons and because of his danger to the public's safety, he was ordered to remain in secure custody. Additionally, counsel waived further review hearings until 25 September 2007. On 24 September 2007, the juvenile again was ordered to remain in secure custody. Counsel again waived further review hearings until 23 October 2007. The juvenile subsequently was released from secure custody pending final disposition.

Having adjudicated the juvenile delinquent, it was within the court's discretion to order him to remain in secure custody pursuant to section 7B-1903. Therefore, this argument is overruled.

The juvenile next argues that the trial court erred in the disposition of the matter by referencing a pre-existing offense history when no such history had been presented to the court. We disagree.

After adjudicating the juvenile delinquent, and before his disposition, the trial court requested a sex offender specific evaluation, predisposition report, and risk and needs assessments. Among these reports was made reference to a 2006 assault charge against the juvenile. There also were references to his moderate risk to re-offend, that he was temperamental/unpredictable, and had made statements that he planned to run the first chance he got. In addition, he had spent time at Dorothea Dix hospital while in secure custody. Over the years, he had been treated for

Oppositional Defiant Disorder, Bipolar Disorder, ADHD, and Reactive Attachment Disorder. He had a history of being physically aggressive, and had been suspended from school for fighting. Upon disposition, the trial court found that "due to the juvenile's past offense history" he was a danger to the community without further treatment.

Pursuant to North Carolina General Statutes, section 7B-2501, the trial court "may consider written reports or other evidence concerning the needs of the juvenile" at a dispositional hearing. N.C. Gen. Stat. § 7B-2501(a) (2007). "'The court may consider any evidence, including hearsay evidence as defined in [section] 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.'" *In re D.A.S.* 183 N.C. App. 107, 110, 643 S.E.2d 660, 662 (2007) (quoting N.C. Gen. Stat. § 7B-2501(a)).

Additionally, section 7B-2413 provides that "[t]he court shall proceed to the dispositional hearing upon receipt of the predisposition report. A risk and needs assessment . . . shall be conducted for the juvenile and shall be attached to the predisposition report." N.C. Gen. Stat. § 7B-2413 (2007). The statute makes clear that the predisposition report is prepared for the court's benefit and that such report is received prior to the dispositional hearing.

Pursuant to statute, the trial court requested pre-disposition reports. Based in part upon these reports, the trial court found that the juvenile was a danger to the community. It is not clear

to this Court that by "prior offense history" the trial court meant the prior assault charge. There was additional information in the reports which would support the trial court's assessment that the juvenile was a danger to the community, including his prior physical aggression at school and mental health diagnoses.

Finally, the juvenile argues that the trial court lacked subject matter jurisdiction because his mother was not served with the juvenile summons and notice of hearing issued on 31 July 2007. We disagree.

The standard of appellate review for a question of subject matter jurisdiction is *de novo*. *Raleigh Rescue Mission, Inc. v. Board of Adjust. of City of Raleigh*, 153 N.C. App. 737, 740, 571 S.E.2d 588, 590 (2002).

The juvenile contends that the failure to serve summons on a necessary party is grounds for reversal in other types of cases involving juveniles, in which it has been found that the court does not have subject matter jurisdiction. The juvenile cites *In re K.A.D.*, ___ N.C. App. ___, 653 S.E.2d 427 (2007), a case in which this Court held that the failure to *issue* a summons deprives the court of subject matter jurisdiction. *Id.* at ___, 653 S.E.2d at 429.

The juvenile does not contend that no summons was issued in his case. North Carolina General Statutes, section 7B-1805 governs *issuance* of summons and provides for the contents of the summons and to whom it must be issued. N.C. Gen. Stat. § 7B-1805 (2007). The juvenile concedes in his brief that summons was issued on

31 July 2007. The summons issued on that date complied with section 7B-1805.

The failure to serve a summons is what is at issue in the case at bar. In juvenile delinquency cases, the *service* of summons is governed by North Carolina General Statutes, section 7B-1806, which states that "[t]he summons and petition shall be personally *served* upon the parent, the guardian, or custodian and the juvenile not less than five days prior to the date of the scheduled hearing." N.C. Gen. Stat. 7B-1806 (2007) (emphasis added).

This court recently analyzed section 7B-1806, stating that without valid service of the petition and summons, the trial court may not exercise jurisdiction *over a person*. *In re Hodge*, 153 N.C. App. 102, 105-06, 568 S.E.2d 878, 880, *disc. rev. denied, appeal dismissed*, 356 N.C. 613, 574 S.E.2d 681 (2002) (citing *Ryals v. Hall-Lane Moving and Storage Co.*, 122 N.C. App. 242, 247, 468 S.E.2d 600, 604, *disc. rev. denied*, 343 N.C. 514, 472 S.E.2d 19 (1996)). "'However, a person may submit himself to the jurisdiction of the court, if he makes a general appearance, even if the court has not already obtained jurisdiction over defendant by serving him with process.'" *Id.* at 106, 568 S.E.2d at 880 (quoting *Ryals v. Hall-Lane Moving and Storage Co.*, 122 N.C. App. 242, 247, 468 S.E.2d 600, 604, *disc. rev. denied*, 343 N.C. 514, 472 S.E.2d 19 (1996)). This Court has also stated:

> An appearance constitutes a general appearance if the defendant invokes the judgment of the court on any matter other than the question of personal jurisdiction. The appearance must be for a purpose in the cause, not a collateral purpose. The court will

> examine whether the defendant asked for or received some relief in the cause, participated in some step taken therein, or somehow became an actor in the cause. Our courts have applied a very liberal interpretation to the question of a general appearance and almost anything other than a challenge to personal jurisdiction or a request for an extension of time will be considered a general appearance.

Bullard v. Bader, 117 N.C. App. 299, 301, 450 S.E.2d 757, 759 (1994) (citations omitted).

Here, the juvenile's mother was served with notice of hearing on the initial petition on 18 June 2007. However, she moved and could not be located for service on 31 July 2007 of the sexual battery petitions. She was served next on 28 August 2007, the morning of the juvenile's adjudication hearing. At that hearing, the juvenile was present with his parents and counsel, and counsel denied the allegations on his behalf. At that time, the State informed the trial court that the July petitions for sexual battery were dismissed and replaced by petitions filed 21 August 2007. The juvenile waived service and notice on those new petitions. Although the juvenile's parents were upset that they were not served with the new petitions until the morning of the hearing, they were aware that new petitions could be forthcoming. Counsel for the juvenile stated to the court, "We waive any notice problem because we want to try it all together, keep it all together." Therefore, the trial court did not lack jurisdiction to hear the case.

For the above-stated reasons, we affirm.

Affirmed.

Judges HUNTER and ELMORE concur.

Report per Rule 30(e).