IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-584

Filed: 21 May 2019

Buncombe County, No. 17 JB 211

IN THE MATTER OF: A.R.-V.

Appeal by juvenile from order entered 18 January 2018 by Judge Susan Dotson-Smith in Buncombe County District Court. Heard in the Court of Appeals 23 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Janelle E. Varley, for the State.

Geeta N. Kapur for the juvenile appellant.

BERGER, Judge.

On January 18, 2018, A.R.-V. ("Alex") was adjudicated delinquent following a hearing on a juvenile petition that alleged he had engaged in disorderly conduct. At the close of the State's evidence, Alex made a motion to dismiss for insufficient evidence. The trial court entered a Level 1 Disposition, and placed him on juvenile probation. Alex appeals, arguing that the trial court erred when it denied his motion to dismiss because there was insufficient evidence to convict him of disorderly conduct. We disagree and affirm.

Factual and Procedural Background

At trial, the State introduced body camera footage of the conduct in question and presented two witnesses. The evidence tended to show that on October 26, 2017, while patrolling the exterior of Erwin High School, School Resource Officer Kelly Ball ("Officer Ball") noticed Alex, who was fourteen years old at the time, and another juvenile walking on the road. She stopped them and asked them to walk towards the school in order to get them off of the road. They complied. Officer Ball then asked them for their names and whether they had properly signed out of school. In response, Alex gave her a false name. After confirming his true identity over her radio, Officer Ball informed Alex that she was taking him back to school because he was not old enough to leave the school without his parents' permission. Officer Ball testified that the "minute he heard me say that, he became belligerent and disrespectful and told me that he was not going anywhere with me, and then things kind of escalated from that point."

More specifically, when Officer Ball stated that Alex was not old enough to leave school, Alex responded "I don't give a f**k," while stepping backwards away from Officer Ball. Officer Ball ordered Alex to stop and then grabbed the straps of his backpack to stop him from walking away. She asked Alex what was wrong with him, and he replied, "You lucky you're a police officer and a woman, I swear to God." While Officer Ball was escorting Alex to her police car, he stated, "Can you get the

f**k off of me." After denying his request, Alex responded, "You're nothing but a stupid bitch anyways." Once they got to her police car, Officer Ball informed Alex that he was going to be handcuffed, and Alex replied, "You're dumb as f**k anyways." Officer Ball testified that Alex did not invite her or anyone else to fight him, but she stated that he became "aggressive whenever I was trying to reason with him" and "trying to get him to understand he was getting in my car."

When Officer Ball arrived at the school, she requested assistance from any available administrators. Assistant Principal Anna Austin ("Ms. Austin"), and the school's ROTC chief responded, while the head administrator waited nearby. Alex's handcuffs were removed, and Ms. Austin escorted Alex to her office, where she talked to him about his grades and skipping school. Alex's brother then arrived. Ms. Austin stepped out of her office to inform him what had happened, but "that's when it escalated" between them. While Ms. Austin was trying to explain to him what had happened, Alex and his brother started yelling at each other through the walls. Ms. Austin testified that the shouting by the brothers "was just extremely loud and disruptive to the school day, because we were in the main office, so parents were in there checking kids out. There were adults in the main office. So it erupted to a school disruption at that point."

After cracking open the door so that the brothers could converse face-to-face, Ms. Austin radioed Officer Ball to return to her office, and had also requested that an

administrator assist with the situation. Ms. Austin then called Alex's mother, explained to her what had happened, and informed her that Alex was suspended for two days. Alex was then driven home.

On November 1, 2017, a juvenile petition was filed, alleging that Alex had engaged in disorderly conduct in violation of N.C. Gen. Stat. § 14-288.4(a)(2). The petition stated that the juvenile

> did intentionally cause a public disturbance both in public at 188 Erwin Hills Rd, and inside Clyde A. Erwin High School, by using abusive language intended and plainly likely to provoke immediate violent retaliation and thereby cause a breach of the peace. The acts of the defendant were directed toward, Deputy Kelly Ball a school resource officer, and consisted of calling her a "stupid bitch," stating to her "I don't give a f**k," "get your f**king hands off of me."

The case was tried on January 8, 2018. At the close of the State's evidence, Alex made a motion to dismiss for insufficient evidence, which was denied. The trial court adjudicated Alex as delinquent and entered a Level 1 Disposition, placing him on twelve months of probation. He was also ordered to complete a community-based program and adhere to curfew restrictions. Alex appeals.

Analysis

Alex contends that the trial court erred when it denied his motion to dismiss because there was insufficient evidence that he engaged in disorderly conduct. We disagree.

"[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. 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 M.G.*, 156 N.C. App. 414, 415, 576 S.E.2d 398, 399-400 (2003) (citations and quotation marks omitted). "The trial court's function is to determine whether the evidence will permit *a reasonable inference* that the defendant is guilty of the crimes charged." *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991).

"Disorderly conduct is a public disturbance intentionally caused by any person who . . . [m]akes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace." N.C. Gen. Stat. § 14-288.4(a)(2) (2017). Public disturbance is defined as:

> Any annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place in question which occurs in a public place or which occurs in, affects persons in, or is likely to affect persons in a place to which the public or a substantial group has access. The places covered by this definition shall include, but not be limited to, highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

N.C. Gen. Stat. § 14-288.1(8) (2017).

This Court held the following facts were sufficient under Section 14-288.4(a)(2):

> The State's evidence tends to show that [the officer] arrested the defendant after [the defendant] protested and remonstrated in a loud and boisterous manner against the arrest of [another individual] and after [the defendant] had directed profane, racist, and vulgar epithets at the officers. Under these circumstances, [the officer] could reasonably believe that the statute (G.S. 14-288.4) had been violated in his presence.

State v. McLoud, 26 N.C. App. 297, 299-300, 215 S.E.2d 872, 874 (1975). Similarly, this Court has upheld the adjudication of a juvenile for committing the offense of disorderly conduct in violation of Section 14-288.4(a)(2) where the juvenile "spoke using an elevated voice level as he paced outside the mall entrance, yelled obscenities at the mall security officer, and made threatening gestures toward police officers." *In re J.D.G.*, 235 N.C. App. 655, 764 S.E.2d 700, 2014 WL 4081955, *3 (2014) (unpublished).

In the present case, Alex first argues that the State failed to provide substantial evidence that his language was intended and plainly likely to provoke violent retaliation because Officer Ball testified that Alex's language did not make her want to fight. Even though a police officer "would be expected to show restraint when confronted with abusive language and that as a practical matter the likelihood of violent retaliation may have been slight," the standard is whether a jury or trial court "could reasonably interpret the defendant's utterances as fighting words likely

to provoke the average person to retaliation" in violation of Section 14-288.4(a)(2). *State v. Cunningham*, 34 N.C. App. 72, 76, 237 S.E.2d 334, 337 (1977).

Here, Alex's profane language could be viewed as having a likelihood of provoking an average person to retaliate. The body camera video reveals Alex became increasingly angry and loud as Officer Ball informed him that she was taking him back to school. Throughout this entire encounter, Alex directed abusive, profane, and threatening language at Officer Ball. Furthermore, Officer Ball testified that when she first tried to reason with Alex, he showed resistance. When she informed him that she was taking him back to school in her police car, Officer Ball had to grab the straps on his backpack to stop him from walking away from her. Each time Officer Ball asked Alex to "stop," he defiantly refused. She further testified that he continued to resist when they got to her police car.

Because directing profane language at a police officer in a boisterous manner and resisting a police officer's commands supports an inference that such language and conduct was intended to and could likely provoke retaliation by an average person, the trial court did not err when it denied Alex's motion to dismiss for insufficient evidence. Accordingly, we affirm.

Alex also contends that he did not willfully or unlawfully break the law because the use of profane language is not unlawful and protected by the First Amendment. However,

> the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

In re Spivey, 345 N.C. 404, 414, 480 S.E.2d 693, 698 (1997) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). Here, we have already determined that directing abusive and profane language at a police officer in a boisterous manner and resisting a police officer's commands supports an inference that such language could likely provoke retaliation, and thereby cause a breach of peace. The juvenile's argument is without merit.

Conclusion

Viewing the evidence in the light most favorable to the State, there was substantial evidence that Alex had used abusive language, displayed resistance intended and likely to provoke retaliation by Officer Ball, and caused a breach of the peace. Therefore, the trial court properly denied Alex's motion to dismiss for insufficient evidence.

AFFIRMED.

Chief Judge MCGEE and Judge TYSON concur.

Report per Rule 30(e).