IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-790

Filed: 3 December 2019

Johnston County, No. 17 JB 205

IN THE MATTER OF: L.M.

Appeal by Juvenile from order entered 2 November 2017 by Judge James L. Moore, Jr. in District Court, Sampson County, and order entered 19 February 2018 by Judge Caron H. Stewart in District Court, Johnston County. Heard in the Court of Appeals 9 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love and Assistant Appellate Defender Amanda S. Zimmer, for Juvenile-Appellant.

McGEE, Chief Judge.

I. Factual and Procedural History

The State filed juvenile petitions on 8 July 2016 alleging L.M. (also "Juvenile") was delinquent for committing second-degree forcible rape, second-degree forcible sexual offense, and misdemeanor obstruction of justice. In an adjudication hearing on 1 November 2017 in Sampson County District Court, the trial court adjudicated L.M. delinquent for second-degree forcible sexual offense and obstruction of justice,

while finding him not delinquent for second-degree forcible rape. The dispositional hearing was continued and the case was subsequently transferred to Johnston County District Court. At the 19 February 2018 dispositional hearing, Judge Caron Stewart entered a Level 2 Disposition and placed L.M. on probation for 12 months. At the hearing, L.M. gave oral notice of appeal from the adjudication and disposition orders.

The evidence presented at trial tended to show that, in March 2016, L.M. and Ashley[1] had been in a dating relationship for three or four months. L.M. was 13 years old and Ashley was 15 years old and both attended Midway Middle School. Ashley lived with her godmother, as she did not have a good relationship with her mother at the time. The godmother's daughter also lived in the household. During the time they were dating, Ashley and L.M. had vaginal sexual intercourse at L.M.'s residence. They did not have anal sexual intercourse before 22 March 2016.

On 22 March 2016, Ashley accepted L.M.'s invitation to come over to his house. Ashley testified she took the bus and got off at a stop near L.M.'s house instead of one near her own. L.M. met her at the bus stop and they walked together to his house. L.M.'s cousin and brother were playing video games in the house. Ashley went to L.M.'s bedroom and laid down on the bed. L.M. entered the room and shut the door. Ashley was on her side, facing the wall. L.M. laid down beside Ashley, facing her.

[1] Ashley is a pseudonym used to protect the identity of the minor. *See* N.C. R. App. P. 3.1(b) (2017).

Ashley testified that, when L.M. started kissing her neck, she "told him to stop because [she] didn't want to do that." Ashley testified she did not kiss or touch L.M.

Ashley testified L.M. then "got on top of [her]" and "put his penis in [her] vagina." Ashley testified she "told him to stop" and that "she didn't want to." She testified L.M. then "turned [her]" and "[L.M.] put his penis in . . . [her] anal [(sic)]." Ashley testified that, in order to turn her over, L.M. placed "his hands on [her] waist" and turned her so "[she] was facedown at the time." She further testified that, "[a]t that point I was telling him to stop, get off of me because it was hurting, and I was trying to tell him I don't want to do that." Ashley stated L.M. did not say anything in response and that he did not stop until he finished. When asked if L.M. stopped "right when you told him to[,]" Ashley said no. She testified the anal sexual intercourse hurt. Furthermore, she testified she specifically told him not to penetrate her anally "because [she] do[es]n't do that."

Ashley testified that after L.M. was done, "[h]e pulled his pants up or whatever and left[,]" and "went to play basketball[.]" Ashley exited the room and did not see anyone else inside the house. At that point, she called her mother. Ashley testified she told her mother "a lie"—not "a lie about the rape," but "a different story of what happened because [she] knew [her mother] was going to be mad." She asked her mother to pick her up, as she was ready to go and she had a therapy session to attend with her mother. Ashley testified she was crying while on the phone with her mother

and that she was in pain at the time—specifically she testified her "anal" was "hurting real bad." She testified she then walked down a road away from the trailer park. At one point, the call with her mother was dropped. She had a phone conversation with her godmother after calling her mother. Ashley's godmother came to pick her up. Her godmother asked what was wrong. Ashley was crying and did not respond at first. She then told her godmother she was raped. Ashley testified she did not tell her godmother that it was L.M. who raped her, because "[she] knew [her godmother] was going to be mad[,] [a]nd at the time [she] didn't want to get [L.M.] in trouble because he was [her] boyfriend." Ashley acknowledged that, at the time, she "made a statement that three strange black male subjects in a white vehicle took [her] to a white house and raped [her.]"

Ashley testified that as they were driving away from the trailer park, Ashley's godmother flagged down a police offer. Ashley testified she "told a lie [to the police officer] because [she] didn't want to get [L.M.] in trouble." She did not recall if she told the officer the same story she told her godmother. Ashley's mother and counselor arrived and they all went to the hospital along with her godmother and her godmother's daughter. The hospital staff administered a rape kit. Ashley testified that, when she took her pants off for the kit, she saw blood "on the back of [her] stretch pants" and on her "an[us.]" While at the hospital, Ashley's mother and the police officer asked her "to tell the truth" because her earlier story "d[id]n't add up." Ashley

testified that at that point she told them "the truth." She agreed with counsel that "at that point [she] told the police officer and [her] mother that [L.M.] is the one . . . that had done this to [her]." Ashley also testified that she was bleeding from her anus and experienced pain for three weeks afterwards, that she "couldn't use the bathroom or anything[,]" that she "couldn't hardly sit[,]" and that she "was walking funny" during that time. Treating her injury required three further medical appointments with a specialist.

Shannon Barber ("Ms. Barber"), Director of the Sampson County Child Advocacy Center, conducted a forensic interview of Ashley at the Center on 7 April 2016. Detective Christopher Godwin ("Detective Godwin") of the Sampson County Sheriff's Department observed the interview through a two-way mirror. Ms. Barber testified that, during this interview, Ashley said that on 22 March 2016, she "got off the bus at the trailer park" with some girlfriends, who went to their own homes, and with "[L.M.] and two other males." Ashley went with L.M. and the other males to L.M.'s house. Ms. Barber said Ashley told her that L.M. and the two other males played video games while she went to lie down on L.M.'s bed and L.M. later entered the room. Ms. Barber testified about what Ashley said occurred:

> [Ashley] said [L.M.] started kissing her on the neck. He rolled her over and she told him to stop, she did not want to do that. And she said at that point he pulled her pants down and stuck his penis in her butt and began having sex with her.

> She said that she continued to tell him to stop and was trying to push him away. She described to me he used his arm to hold her top part of her body down and used his other hand to hold her leg up. She told me she was not sure if he stuck his penis in her vagina that day, but when he was done, he got up. She said she felt very wet in that area. And he told her he was going outside to play basketball.

Ms. Barber testified that Ashley told her that she then got up and got dressed, went outside to get her cell phone, reentered the house, locked the door, and called her mother and asked her repeatedly to come get her, although she did not tell her mother where she was. Ashley told Ms. Barber she then walked down the road, when her godmother came by in her car, and Ashley told her godmother she was raped. Ashley told her she did not tell the truth about who the perpetrator was for two reasons: (1) "she did not want to get [L.M.] in trouble, and" (2) "her godmo[ther] was letting her go to this trailer park and she knew her mo[ther] would not allow that and so she did not want to cause any type of . . . 'mess.'"

On 14 April 2016, L.M. went in to the Sampson County Sheriff's Office and was interviewed by Detective Christopher Godwin regarding Ashley's accusation against him. Detective Godwin testified that L.M. told him that, on 22 March, Ashley initiated consensual vaginal sexual intercourse with him, and that they had had vaginal sex about five times since they started dating. L.M. at first denied having anal sex with Ashley, telling Detective Godwin "I don't do that." Detective Godwin then informed L.M. that a sexual assault kit had been collected at the hospital and

asked him "if it would surprise him if they found semen in [Ashley's] butt." In response, L.M. said he and Ashley had anal sexual intercourse the third time they had sex. Detective Godwin asked whether they had anal sexual intercourse on 22 March 2016. Detective Godwin testified L.M. "said he couldn't remember because it had been so long ago. However, eventually, [L.M.] said he put his penis in her vagina and butt that time as well." When asked if Ashley "had told him 'no' that day[,]" L.M. did not answer.

At the delinquency hearing, L.M. testified that he and Ashley met on the bus and began dating. He also testified that, as of 22 March 2016, he and Ashley had had sexual intercourse five times previously. L.M. testified that, during a conversation on the application Facetime, Ashley "had brought up a subject about having sex, and she asked me did I like—have I ever, like, have—stick it in a butt." Asked what he said in response, L.M. said "we should try it." L.M. testified Ashley's godmother overhead their conversation and said "y'all shouldn't be talking about that."

On 22 March 2016, L.M. did not go to school "because [he] was sick." L.M. met Ashley after school. When Ashley got off the bus, L.M. "gave her a hug and a kiss, and then [they] walked back to his house." L.M. testified they went into a room and started kissing and hugging. Then, they laid on the bed. According to L.M., Ashley pulled his pants down, he pulled her pants down and, once she got on top of him, they had vaginal sexual intercourse. L.M. testified that Ashley was "moaning" and

"calling [him] daddy." L.M. testified that five minutes into the sex, Ashley asked him if "[he] want[ed] to try something new[,]" and "then she asked [him] do (sic) [he] want to do anal." He testified that he said "yeah," but that "[he] didn't know what it was, and then she explained to [him] what it was." He testified Ashley never told him no or that she did not want sex. L.M. testified Ashley "turned over on her stomach and then she had put her butt in the air, and that's when [he] had put [his penis] in her butt." He testified that when they had anal sex, Ashley "was moaning and she was calling [him] daddy." L.M. testified the anal sex took ten minutes before he orgasmed. Ashley asked him if he had orgasmed and he responded that he had.

L.M. testified he told Ashley he was going to play basketball and she said she would go as well. L.M. testified that she put her clothes on and came out behind him, but that she was "way behind [him], on the phone." L.M. testified that he "didn't pay no attention[,]" but walked to the basketball court. He testified Ashley called him over to the path, gave him a kiss and a hug, and told him she loved him. He testified "she said her momma was at the end of the path waiting for her[,]" and she left.

L.M. testified that when he talked to Detective Godwin, he did not know what the word "anal" meant. However, he later acknowledged that he already knew what "anal" meant before the interview. He testified he was embarrassed about having anal sex and did not want people to know about it. However, he later testified he simply "didn't feel comfortable about talking about that with another man[.]" L.M.

further testified he and Ashley had previously had anal sexual intercourse the third time they had sex.

L.M.s' cousin testified for L.M. that she lived in the same trailer park as L.M. and that Ashley would sometimes get off the bus at her house. She testified Ashley was dropped off at her house in the morning twice: once she came to her house and the other time she went to L.M.'s house. L.M.'s cousin testified Ashley told her that she was dating L.M. and she saw them "hugging up" on the bus. She said that Ashley told her through the Kik application "that [L.M.'s penis] was "big and that she liked [sex] and wanted to do it again."

L.M.'s cousin also testified that on 22 March 2016, she saw Ashley get off the bus, meet L.M., and that they went to L.M.'s house. She said Ashley was smiling when she met L.M. Later that day, she was at the basketball goal when L.M. was playing basketball and, when Ashley arrived, "[L.M.] ran to her and they hugged and kissed, and then she started calling somebody on the phone, walking down the path." L.M.'s cousin testified that she did not see Ashley crying that day.

Two additional witnesses—another cousin of L.M. and a neighbor of L.M.'s—also testified for L.M. They were both at the basketball court on 22 March 2016. The cousin testified Ashley was "happy and smiling" when she came to the basketball court, and she "[g]ave [L.M.] a kiss and went down the road." L.M.'s neighbor testified

Ashley gave L.M. a hug before walking down the path and he did not see tears on her face at that time.

Ashley's godmother also testified for L.M at the delinquency hearing that Ashley's mother was her best friend for over 35 years. When Ashley's mother told her she was having problems with Ashley, she agreed to take her in. Ashley's godmother testified that when Ashley asked for L.M. to come over, she told Ashley she could not date until she was 16. She would require them to go on group dates and not to be left alone in her house. Once, she overheard Ashley and L.M. having a video conversation on the Facetime application during which they discussed having anal sex. She told them "Y'all are too young to be talking about anal sex or any type of sex. Y'all [are] not old enough to engage in any kind of sexual activity, so that conversation need[s] to stop."

On another occasion, Ashley's godmother testified she heard Ashley talking on the phone with L.M. and telling him "I'mma tell my godmother I'm going to go to [L.M.'s cousin's] house but I'm going to come to your house and we're going to have sex." Ashley's godmother testified she opened the door and told Ashley that she cannot date until she was 16, that she would have to have a chaperone when she was with L.M., and that she could not have sex. She also testified that on one occasion, she witnessed Ashley performing oral sex on L.M. while they were in the back of her car and she was driving.

Ordinarily, Ashley's godmother, who lived in Johnston County at the time, would drop Ashley off at the home of L.M.'s cousin, so she could take the bus to her school in Sampson County. She testified that on 22 March 2016, she believed that she dropped Ashley off at the trailer park. She got a call from Ashley later that day asking if she had to take the bus to her mother's house and wait for her to pick her up there because Ashley and her mother were having an argument. Ashley's godmother responded that she did have to do so. Ashley's godmother testified that at around 5:30 p.m., she received a call and a text from Ashley's mother, with the text reading "Is Ashley with you?" She called Ashley's mother, who answered and said Ashley was gone. After Ashley's godmother left work, she repeatedly tried to call Ashley. When Ashley finally answered the phone, her godmother asked her: "Where you at? What's wrong? What's going on?" Ashley was crying hysterically. Ashley's godmother asked her to calm down and, when she did, Ashley told her she did not know where she was. Ashley's godmother told Ashley she was approaching a caution light and that, if she went straight, she would be going to Ashley's mother's house. Ashley told her to go straight. At some point the phone call dropped. Her godmother called her again and picked her up within walking distance of the trailer park where she had dropped Ashley off that morning.

Ashley's godmother testified she asked Ashley where she was coming from, and Ashley responded "I'm hurt." Her godmother asked her what was wrong and Ashley

said she "was raped by three black guys." Ashley's godmother testified that Ashley told her "some white lady told her to get off the bus and to ride with some girl[,]" but she could not tell her who this person was. She testified that Ashley then said there was a "lady in [a] white car and [a] girl" who "took her[,]" and that "[t]hey drove and then three guys got in." She testified Ashley said they took her to a white house in a field and there the three men raped her and then she ran away across the field. Ashley's godmother testified there were no white houses in the area where she picked Ashley up, only an open field. At that point, her godmother flagged down a police officer she saw. She testified the officer was outside his jurisdiction and called a Sampson County Sheriff's Deputy. Ashley told the same story to the Sheriff's Deputy that she told her godmother.

After Ashley spoke to the officer, her godmother received a phone call from Ashley's school asking whether she gave Ashley permission to be dropped off at her house. She then asked Ashley why Ashley led the school to believe her godmother lived in the trailer park and whether she was at L.M.'s house, which was in the trailer park. Ashley's godmother testified Ashley then admitted she was at L.M.'s house and that she and L.M. had sex. Her godmother then said "Your story [is] not adding up[,]" and "[e]verything you're saying [is] not making sense." Ashley then said "I said no, and he raped me." When her godmother asked who raped her, Ashley responded "I kept saying no. I kept saying no." Her godmother testified that "[w]hen the other

officer talked to [Ashley], she finally said she was with [L.M.]" Shortly after that, Ashley's mother and therapist arrived. Ashley got in the car with her mother and therapist, who drove her to Sampson Regional Hospital, while Ashley's godmother and her godmother's daughter drove behind them.

After his interview with L.M., Detective Godwin filed petitions against L.M. for forcible rape and forcible second-degree sexual offense. Ashley testified she later received text messages from L.M. through Kik, a messaging app. L.M. also acknowledged these messages were between him and Ashley. L.M. testified he did not hear from Ashley until he received the texts from her on Kik. In the messages, L.M. confronts Ashley about her accusation, stating "they trying to lock me up" and "Why you say I rape you for[.]" Ashley said "I told you no." In her last message, Ashley said "They Called It A Sexual Assault[,]" "You Hurted Me and You Know That Shit Wa[s]n[']t Right [L.M.,]" and "At The End Of The Day I'm The Victim Not You." **[R 43]** In a string of responses, L.M. said "Please forgive me[,]" "I'm sorry[,]" "But this was your fault you know im aggressive please drop the charges[,]" and "Ok don't but just remember im going to be out soon."

L.M. testified it was Ashley who texted him first on Kik in April 2016. Although L.M. acknowledged the texts contained in State's Exhibit 1 as being between him and Ashley, he said the exhibit was incomplete. However, L.M. also testified he did not save a copy of the alleged missing messages because "[his] phone

had broke" and he "was grounded." After obtaining and investigating the Kik messages between Ashley and L.M., Detective Godwin filed an additional petition against L.M. for obstruction of justice.

L.M. moved to dismiss all counts based on insufficiency of the evidence at the close of the State's evidence and renewed the motion at the close of all the evidence. The trial court denied the motion. At the close of the hearing, the trial court adjudicated L.M. not delinquent of forcible rape, and delinquent beyond a reasonable doubt of second-degree forcible sexual offense and misdemeanor obstruction of justice. L.M. appeals.

II. Analysis

Juvenile appeals the adjudication and disposition orders alleging three errors: (1) the trial court erred by denying his motion to dismiss because there was insufficient evidence that he committed second-degree forcible sexual offense; (2) the trial court violated N.C. Gen. Stat. § 7B-2405(4) when it permitted Juvenile to testify without advising him of his privilege against self-incrimination; and (3) the trial court failed to make the findings of fact required by N.C. Gen. Stat. § 7B-2411 in the adjudication order.[2] Because we disagree with each of Juvenile's assignments of error, we affirm the adjudication and disposition orders from the trial courts.

[2] Initially, Juvenile also alleged the trial court lacked subject-matter jurisdiction to adjudicate Juvenile delinquent for the second-degree forcible sexual offense because the juvenile court counselor failed to determine whether the petition had been approved for filing as required by N.C. Gen. Stat. § 7B-1703. This assignment of error was subsequently withdrawn.

A. Sufficiency of Evidence to Deny Motion to Dismiss Second-Degree Sexual Offense

Juvenile first argues the trial court erred by denying his motion to dismiss where there was insufficient evidence that he committed second-degree forcible sexual offense because the State failed to show Juvenile used actual or constructive force in the anal intercourse that is the basis of the charge. As an initial matter, we note the State contends the absence of actual or constructive force "was not the basis for [Juvenile's] motion to dismiss before the trial court and therefore it has been waived." We agree and hold that Juvenile waived this argument. Assuming, *arguendo*, we reached the merits of Juvenile's argument as to sufficiency of the evidence on appeal, we would nevertheless affirm.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2017). Furthermore, North Carolina Rule of Appellate Procedure 10(a)(3) provides as follows:

> In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from

> urging the denial of such motion as a ground for appeal.
>
> A defendant may make a motion to dismiss the action, or for judgment as in case of nonsuit, at the conclusion of all the evidence, irrespective of whether defendant made an earlier such motion. If the motion, at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action, or for judgment as in case of nonsuit, at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

N.C. R. App. P. 10(a)(3) (2017).

Our Supreme Court "has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount[.]'" *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). This Court has held that "when a defendant presents one argument in support of [the defendant's] motion to dismiss at trial, [the defendant] may not assert an entirely different ground as the basis of the motion to dismiss before this Court." *State v. Chapman*, 244 N.C. App. 699, 714, 781 S.E.2d 320, 330 (2016) (citation omitted); *see also State v. Walker*, 789 S.E.2d 529 (2017). *See also State v. Shelly*, 181 N.C. App. 196, 207, 638 S.E.2d 516, 524 ("When a party changes theories between the trial court and an appellate court, the assignment of error is not properly

preserved and is considered waived."), *disc. review denied*, 361 N.C. 367, 646 S.E.2d 768 (2007).

In *Chapman*, this Court applied the prohibition against "swapping horses" to hold the defendant, who was charged with robbery with a dangerous weapon, had waived the defendant's argument that there was insufficient evidence to support that the defendant "knowingly committed the crime as an actor in concert or as an aider or abettor," when at trial, the defendant moved to dismiss the charge specifically on the "entirely different ground" that there was insufficient evidence to support the "dangerous weapon" element. *Chapman*, 244 N.C. App. at 714, 781 S.E.2d at 330. As this Court reasoned in *State v. Walker*, "the specific reference to one element of the offense removed the other elements of the offense from the trial court's consideration, and therefore from this Court's consideration, because the consideration of the sufficiency of the evidence on those other elements was no longer 'apparent from the context.'" *Walker*, ___ N.C. App. at ___, 798 S.E.2d at 531 (quoting N.C. R. App. P. 10(a)(1)). Thus, where a defendant makes a specific motion to dismiss for insufficient evidence as to one element at trial and then argues there was insufficient evidence to support an entirely different element on appeal, the issue first raised on appeal is deemed waived, because "the law does not permit parties to swap horses between courts in order to get a better mount." *Sharpe*, 344 N.C. at 194, 473 S.E.2d at 5 (citation omitted).

In contrast, this Court has held that "a general motion to dismiss for insufficiency of the evidence preserves all issues regarding the insufficiency of the evidence, even those issues not specifically argued before the trial court." *State v. Glisson*, ___ N.C. App. ___, ___, 796 S.E.2d 124, 127 (2017) (citing *State v. Pender*, ___ N.C. App. ___, ___, 776 S.E.2d 352, 360 (2015); *State v. Mueller*, 184 N.C. App. 553, 559, 647 S.E.2d 440, 446 (2007)). In *Glisson*, the defendant was charged with felonious conspiracy to traffic opium by sale and delivery and possession of oxycodone with intent to sell and deliver, and the State argued the defendant had waived his motion to dismiss for insufficiency of the evidence as to the existence of a conspiracy when, at trial, he specifically argued that there was insufficient evidence of the weight of the pills involved in the transaction. *Glisson*, ___ N.C. App. at ___, 796 S.E.2d at 127. This Court held the motion the defendant made at trial was a general one in part because "[t]he trial court acknowledged [the d]efendant's contention that the State 'simply failed to offer sufficient evidence on each and every count as to justify these cases to survive a motion to dismiss.'" *Id.* at ___, 796 S.E.2d at 127. The *Glisson* Court further noted the trial court had characterized the defendant's motion as "'global' and 'prophylactic,' acknowledging on the record that [the d]efendant's motion was broader than the single oral argument presented." *Id.* at ___, 796 S.E.2d at 127. Finally, this Court also noted the trial court ruled on the motion to dismiss by stating that "'the State has offered sufficient evidence on each and every element

of all the surviving charges to justify these cases being advanced to the jury.'" *Id.* at ___, 796 S.E.2d at 127. Thus, where the general character of the motion to dismiss is "apparent from the context," N.C. R. App. P. 10(a)(1), a particular argument regarding sufficiency of the evidence does not preclude additional arguments being made on appeal, as the defendant is not "swapping horses . . . to get a better mount." *Sharpe*, 344 N.C. at 194, 473 S.E.2d at 5 (citation omitted); *see Walker*, ___ N.C. App. at ___, 798 S.E.2d at 531 ("A general motion to dismiss requires the trial court to consider the sufficiency of the evidence on all elements of the charged offenses, thereby preserving the arguments for appellate review.").

In this case, Juvenile contends his argument regarding the sufficiency of the evidence to establish the presence of actual or constructive force was preserved because his motion to dismiss at trial was a general one. We disagree.

At trial, counsel for Juvenile moved to dismiss at the close of the State's evidence, stating the following:

> Based on the evidence and testimony that you've heard today, it is our position, Judge, that the State has failed to meet its burden, that they have failed to prove that the charges that my client is accused of, *that those things, in fact, were without consent*.

Counsel for Juvenile made another motion to dismiss at the close of all the evidence, based on the following ground:

> [Juvenile's Counsel]: Judge, I would renew my motion to dismiss after all of the evidence has been heard.

> As to the charge of second-degree forcible sex offense as well as to the other offense of committing first-degree rape in that he did engage in vaginal intercourse with the prosecuting witness against her will.
>
> After you heard all of the evidence, you heard from my client. You've heard from [Ms. Baker] regarding a FaceTime chat that [L.M.] and [Ashley] had when they were actually talking about engaging in sex. In particular, about anal sex. And you heard from my client, they did engage in anal sex twice and did have sex a total of five times. That after all of the evidence, Judge, *I believe that the evidence has shown that there was consent*.

At no point in either oral motion to dismiss did Juvenile's counsel state he was challenging the sufficiency of the evidence as to each element of the sexual offense charge. Indeed, counsel specified "that the State has failed to meet its burden," because "the charges my client is accused of, that those things, in fact, were without consent." In Juvenile's motion to dismiss at the close of all the evidence, Juvenile's counsel reiterated this limited argument, stating "the evidence has shown that there was consent." In response, the trial court merely stated "[t]he motion to dismiss as to each count is denied," and "[i]nsofar as the motions to dismiss, those motions are denied." There is no evidence in the record the trial court understood either motion to be "global," "prophylactic," or that it acknowledged Juvenile's motions "w[ere] broader than the single oral argument presented." *Glisson*, ___ N.C. App. at ___, 796 S.E.2d at 127. Thus, Juvenile's motions to dismiss the second-degree sexual offense

charge were specific and we hold Juvenile waived any argument not specifically raised at trial.

Although Juvenile characterizes his motions to dismiss at trial as "general," he nevertheless also argues in his reply brief that he has not "swapped horses" because "[b]y force and against the will of the other person" constitutes a single element of the crime of second-degree sexual offense, and "[c]onsent to an act shows the act was accomplished without force *and* was not against the will of the consenting person." We disagree.

N.C. Gen. Stat. § 14-27.27(a) provides as follows:

> (a) A person is guilty of second degree forcible sexual offense if the person engages in a sexual act with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who has a mental disability or who is mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know that the other person has a mental disability or is mentally incapacitated or physically helpless.

N.C. Gen. Stat. § 14-27.27(a)(1)-(2) (2017). The phrase, "by force and against the will of another person," found in North Carolina's sexual offense statutes "means the same as it did at common law when it was used to describe *some of the elements* of rape." *State v. Locklear*, 304 N.C. 534, 539, 284 S.E.2d 500, 503 (1981) (emphasis

added).[3] Our Supreme Court has also held the elements of second-degree sexual offense are "the first three" of the elements of first-degree sexual offense: "(1) a sexual act, (2) against the will and without the consent of the victim, [and] (3) using force sufficient to overcome any resistance of the victim[.]" *State v. Jones*, 304 N.C. 323, 330, 283 S.E.2d 483, 487 (1981) (citing N.C.G.S. 14-27.5(a)(1)). Furthermore, our Supreme Court has also held that the analogous crime of "second degree rape involves vaginal intercourse with the victim *both* by force and against the victim's will." *State v. Alston*, 310 N.C. 399, 407, 312 S.E.2d 470, 475 (1984) (emphasis added).

The Supreme Court's decision in *Alston*, the very case upon which Juvenile relies on the merits, illustrates the distinction between the elements of force and consent in a sexual offense. In *Alston*, our Supreme Court held that "the State's evidence was sufficient to show that the act of sexual intercourse in question was against [the victim's] will. It was not sufficient, however, to show that the act was accomplished by actual force or by a threat to use force unless she submitted to sexual

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[3] We note our Supreme Court has characterized "[t]he phrase 'by force and against the will of the other person'" as having the same meaning it did at common law "when it was used to describe an *element* of rape." *State v. Etheridge*, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987) (emphasis added) (citing *Locklear*, 304 N.C. 534, 284 S.E.2d 500 (1981)). However, it consistently cites this passage in *Locklear* for this proposition. *See, e.g., State v. Brown*, 332 N.C. 262, 267, 420 S.E.2d 147, 150 (1992) (citing *Locklear*, 304 N.C. at 539, 284 S.E.2d at 503); *Etheridge* at 45, 352 S.E.2d at 680 (citing *Locklear*, 304 N.C. 534, 284 S.E.2d 500). Moreover, the Supreme Court in those cases continued to discuss force as a discrete element and to cite *Alston* as precedent. *See, e.g., Brown*, 332 N.C. at 268-70 (discussing *Alston* and analyzing whether there was "sufficient evidence of the element of force"). Therefore, we conclude the Supreme Court continues to interpret "by force and against the will of the other person" as describing two distinct elements: the presence of force and the absence of the other person's consent.

intercourse." *Id.* at 409, 312 S.E.2d at 476. The Court concluded the trial court erred in denying the defendant's motion to dismiss because "the State did not introduce substantial evidence of the *element of force* required to sustain a conviction of rape[.]" *Id.* at 409, 312 S.E.2d at 476 (emphasis added).

In this case, Juvenile's specific motion to dismiss below was on the grounds that "the evidence has shown that there was consent." Juvenile now argues, relying on *Alston*, that there was no actual or constructive force present. As these arguments present two different legal theories predicated on two distinct elements of the crime charged, we hold Juvenile, by making a specific motion to dismiss as to the sufficiency of the evidence to show absence of consent, waived his appeal as to the sufficiency of the evidence to show actual or constructive force. He may not now "swap horses between courts in order to get a better mount." *Sharpe*, 344 N.C. at 194, 473 S.E.2d at 5 (citation omitted).[4]

In the alternative, Juvenile asks this Court to invoke North Carolina Rule of Appellate Procedure 2 to prevent manifest injustice. Rule 2 provides that "[t]o prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it . . . ." N.C. R. App. P. 2 (2017). This Court has held that "it is difficult to

[4] Indeed, Juvenile seeks to "swap horses" between his initial brief, in which he argues that "[t]o be convicted of second-degree forcible sexual offense, the state must show that [L.M.] engaged in anal intercourse with Ashley (1) by force *and* (2) against her will," and his reply brief, in which he now claims "by force and against the will of the other person" is "*the* element challenged on appeal."

contemplate a more 'manifest injustice' to a convicted defendant than that which would result from sustaining a conviction that lacked adequate evidentiary support[.] . . ." *State v. Gayton-Barbosa*, 197 N.C. App. 129, 140, 676 S.E.2d 586, 593 (2009). We decline to invoke Rule 2 because, were we to reach the merits of Juvenile's claim, we would hold the trial court did not err for the reasons stated below.

Assuming, *arguendo*, Juvenile's argument on appeal that no actual or constructive force was present was preserved by his motion to dismiss before the trial court, we would nevertheless hold the trial court did not err in denying Juvenile's motion to dismiss. Sufficient evidence in the record supports every element of the crime of second-degree forcible sexual offense, including that the sex act occurred "by force[.]" N.C.G.S. § 14-27.27(a).

> This Court performs de novo review of the denial of a motion to dismiss for insufficiency of the evidence in order to determine *only* whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. In undertaking this determination, any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. So long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence.

Matter of T.T.E., ___ N.C. ___, ___, 831 S.E.2d 293, 298 (2019) (internal citations and quotations omitted) (emphasis in original).

As stated above, second-degree sexual offense includes "engag[ing] in a sexual act with another person . . . [b]y force and against the will of the other person." N.C.G.S. § 14-27.27(a)(1). "Sexual act" is defined to include "[c]unnilingus, fellatio, analingus, or anal intercourse, but . . . not . . . vaginal intercourse." N.C.G.S. § 14-27.20(4).

The phrase "[b]y force and against the will of the other person," as used in N.C.G.S. § 14-27.27(a)(1), "means the same as it did at common law when it was used to describe some of the elements of rape." *Locklear*, 304 N.C. at 539, 284 S.E.2d at 539. "Th[e] element [of force] is present if the defendant uses force sufficient to overcome any resistance the victim might make." *State v. Brown*, 332 N.C. 262, 268, 420 S.E.2d 147, 150 (1992) (citations omitted). "The requisite force may be established either by actual, physical force or by constructive force in the form of fear, fright or coercion." *State v. Etheridge*, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (citation omitted). "Constructive force is demonstrated by proof of threats or other actions by the defendant which compel the victim's submission to sexual acts." *Id.* at 45, 352 S.E.2d at 680 (citation omitted). "Threats need not be explicit so long as the totality of circumstances allows a reasonable inference that such compulsion was the unspoken purpose of the threat." *Id.* at 45, 352 S.E.2d at 680 (citation omitted). "Physical force," in contrast, "means force applied to the body." *State v. Scott*, 323

N.C. 350, 354, 372 S.E.2d 572, 575 (1988) (citing Black's Law Dictionary 1032 (5th ed. 1979)).

In this case, Juvenile argues there was no actual or constructive force present in the act of anal intercourse at issue, relying *inter alia* on our Supreme Court's decision in *State v. Alston* and this Court's decision in *State v. Raines*, 72 N.C. App. 300, 324 S.E.2d 279 (1985). Juvenile's reliance is misplaced.

In *Alston*, the defendant and the victim had a prior consensual, if tumultuous sexual relationship lasting for six months before the act at issue. *Alston*, 310 N.C. at 400, 312 S.E.2d at 471. Evidence showed that when the couple had sexual intercourse, the victim would remain entirely motionless. The defendant struck the victim several times when she refused to do what he wanted or to give him money. *Id.* at 401, 312 S.E.2d at 471. The victim left the defendant and the defendant subsequently confronted her about the breakup in the parking lot of her school by grabbing her arm, saying she must come with him, and threatening to "fix" her face. *Id.* at 401-02, 312 S.E.2d at 472. The victim agreed to walk with him and they talked about the relationship while walking and eventually came to a house where they had previously had sex. *Id.* at 402, 312 S.E.2d at 472. The victim testified she told the defendant she did not want to have sex with him and did not consent at any point; however, the victim did not resist the defendant as he undressed her and had intercourse with her. *Id.* at 403, 312 S.E.2d at 472-73. The victim testified that,

during the relationship, she "often had sex with the defendant just to accommodate him." *Alston*, 310 N.C. at 401, 312 S.E.2d at 471. Furthermore, at some point after the nonconsensual sexual intercourse, the victim had intercourse and oral sex with the defendant, which the victim testified that she enjoyed. *Id.* at 403, 312 S.E.2d at 473.

Our Supreme Court, while holding that the victim did not consent to the act, held as follows regarding the element of force:

> Although [the victim]'s general fear of the defendant may have been justified by his conduct on prior occasions, absent evidence that the defendant used force or threats to overcome the will of the victim *to resist the sexual intercourse alleged to have been rape*, such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape.

Id. at 409, 312 S.E.2d at 476. In *State v. Etheridge*, our Supreme Court noted the "unusual" facts in *Alston* and expressly limited the holding in *Alston* "to its peculiar facts." 319 N.C. at 46, 47, 352 S.E.2d at 680, 681. Subsequently, in *State v. Brown*, our Supreme Court noted that "*Alston* arose upon evidence so peculiar that the decision in that case may well be *sui generis*." *Brown*, 332 N.C. at 268, 420 S.E.2d at 150.

Juvenile in this case asks this Court to apply the reasoning in *Alston* to the present case, arguing that because Ashley had a prior consensual sexual relationship with him, because she voluntarily entered the house, and because there was no

evidence that Juvenile threatened her, that there was no force present. We disagree. Analogy to *Alston* is inapposite in the present case. In *Alston*, our Supreme Court held there was no substantial evidence the requisite force was present where the State relied only on the victim's "general fear" of the defendant's past tendencies for violence to show constructive force and any actual force used by the defendant that day, such as his holding the victim's arm as they walked, was not "sufficiently related to sexual conduct to cause [the victim] to believe that she had to submit to sexual intercourse with him or suffer harm." *Id.* at 409, 312 S.E.2d at 476. Our Supreme Court has held that "the 'general fear' reasoning of *Alston* should be applied only to situations like the peculiar factual situation presented in that case." *Brown*, 332 N.C. at 269, 420 S.E.2d at 151 (citing *Etheridge*, 319 N.C. at 47, 352 S.E.2d at 681; *Strickland*, 318 N.C. at 656, 351 S.E.2d at 283). Here, unlike in *Alston*, there is substantial evidence tending to show Juvenile used actual, physical force during the act in question.

We hold that, based on evidence presented at trial when taken in the light most favorable to the State, the finder of fact "could reasonably find that the defendant in the present case used actual physical force sufficient to overcome any resistance the particular victim . . . might have offered." *Brown*, 332 N.C. at 269, 420 S.E.2d at 151.[5]

[5] Juvenile also asks this Court to consider his evidence in analyzing whether the trial court erred in dismissing Juvenile's motion based on insufficiency of the evidence; however, "[t]he defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v.*

Taken in the light most favorable to the State, the evidence tended to show that Ashley and Juvenile were engaged in a dating relationship. After Ashley came to Juvenile's house and laid down on the bed and Juvenile entered the room, shut the door, and laid down beside her, he began kissing her neck, and she told him to stop because she "didn't want to do that." Juvenile subsequently climbed on top of her and began having vaginal sex with her, while Ashley told him to stop because she did not want to have sex. Juvenile then grabbed her by the waist, turned her over, and had anal intercourse with her. Ashley repeatedly "was telling him to stop, get off of [her] because it was hurting, and [she] was trying to tell him [she did not] want to do that," as she tried to push him away. Juvenile, meanwhile, used his arm to hold the top part of Ashley's body down and his other hand to hold her leg up during the act. Juvenile did not stop the anal intercourse until he orgasmed.

Taken in the light most favorable to the State, the evidence tends to show that Ashley's injury from the act persisted. At the hospital, Ashley's examination of the back of her pants and her buttocks while the sexual assault kit was collected revealed blood on her pants and her anus. Her anus began bleeding again the next week and she could not use the bathroom, struggled to sit, and was walking "funny" from the

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Nabors, 365 N.C. 306, 312, 718 S.E.2d 623, 627 (2011) (citation omitted). Although the defendant's evidence "may be used to explain or clarify that offered by the State" if it is "consistent with the State's evidence," *id.* at 312, 718 S.E.2d at 627 (citation omitted), Juvenile's testimony that Ashley consented to the act of anal intercourse plainly contradicted the State's evidence. Therefore, we do not consider it.

pain. The injury to Ashley's anus required further medical treatment by a specialist and did not heal for three weeks.

Juvenile contends this evidence is insufficient to support a finding that actual physical force was used in the commission of the sexual act at issue. Juvenile cites this Court's decision in *State v. Raines*, 72 N.C. App. 300, 324 S.E.2d 279 (1985), for the proposition that "physical touching that constitutes the sexual act itself is insufficient to establish physical force." In *Raines*, the victim was a patient admitted to a hospital for migraines, nausea, and seizures. *Raines*, 72 N.C. App. at 301, 324 S.E.2d at 280. She had an I.V. and heart monitoring equipment attached. *Id.* at 301, 324 S.E.2d at 280. The defendant was her nurse and the victim testified that, twice during the night, the defendant administered her something through the I.V. that caused a burning sensation, and that he "twice placed his hand in her vagina and attempted to rape her, succeeding the second time." *Id.* at 301, 324 S.E.2d at 280. Subsequent investigation revealed the presence of sperm on her nursing gown and bedsheet. *Id.* at 301, 324 S.E.2d at 280-81. On appeal, the defendant argued there was insufficient evidence of force to support a conviction for second-degree sexual offense. This Court agreed, holding there was no actual physical force, stating the following:

> [W]e decline to accept the State's invitation to expand the "physical force" doctrine and bring within its ambit the conduct—the physical touching—that constitutes the "sexual act" itself in this case. In other words, we reject the

> argument set forth in the State's brief that "[a]s to the second-degree sexual offense, the assailant had used the necessary force to complete the act before his victim had an opportunity to resist or even to become frightened . . . [and] should not be heard to say that because he deliberately surprised his victim and attacked her completely without warning" that he is not guilty.

Raines, 72 N.C. App. at 303, 324 S.E.2d at 281. This Court further held there was no constructive force in that case. *Id.* at 305, 324 S.E.2d at 283.

While we note our Supreme Court has "expressly defer[red]" a decision on "whether the actual physical force which will establish the force element of a sexual offense may be shown simply through evidence of the force inherent in the sexual act at issue," *Brown*, 332 N.C. at 269, 420 S.E.2d at 151 (citing *Raines*, 72 N.C. App. 300, 323 S.E.2d 279), our decision here is not controlled by *Raines*, because there is sufficient evidence to satisfy the force element based on actual physical force beyond the force inherent in the anal intercourse at issue. As our Supreme Court has previously held, "[p]hysical force means force applied to the body." *Scott*, 323 N.C. at 354, 372 S.E.2d at 575 (citation omitted). In *Raines*, the only force the evidence showed was applied to the body of the victim was the defendant twice placing his hand in the victim's vagina, attempted vaginal intercourse, and accomplished intercourse. The Court in *Raines* noted the victim "did not allege any physical force . . ." *Raines*, 72 N.C. App. at 301, 324 S.E.2d at 270. Here, in contrast, taken in the light most favorable to the State, Ashley testified Juvenile placed his hands on

her waist and turned her over so that she was facedown before having anal intercourse with her, while she told him to get off. Ms. Barber testified that in the forensic interview, Ashley told her that Juvenile "used his arm to hold her top part of her body down and used his other hand to hold her leg up," and that she "was trying to push him away." These acts by Juvenile—grabbing her waist, turning her over, holding her body down and her leg up, and Ashley's efforts to push him away—show "force applied to the body" of Ashley. Finally, Ashley's anal bleeding and pain resulting from the anal intercourse, which did not resolve until three weeks later after receiving subsequent treatment, is further evidence that physical force was used.

In his reply brief, Juvenile argues that "only Ashley's testimony should be considered when determining if there was substantial evidence of force, not [Ms. Barber's] testimony about her out of court statements," citing *State v. Minyard*, 231 N.C. App. 605, 617, 753 S.E.2d 176, 185 (2014), because in a bench trial, the judge "will be presumed to know the law[]" and he argues these statements are hearsay. This argument is raised for the first time in the reply brief and is therefore waived. *See* N.C. R. App. P. 28(c)(6) (2017) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."); N.C. R. App. P. 28(h) ("Any reply brief which an appellant elects to file *shall be limited to a concise rebuttal of arguments set out in the appellee's brief* and shall not reiterate

arguments set forth in the appellant's principal brief." (emphasis added)). Furthermore, Juvenile's counsel failed to object to the admission of Ms. Barber's testimony at trial; therefore, the hearsay argument is deemed abandoned. *See* N.C. R. App. P. 10(a)(1). Although the trial court might have limited the testimony regarding the forensic interview to corroborating evidence upon such objection, it also might have admitted it as substantial evidence under a hearsay exception, as our courts have at times done. *See, e.g., State v. McLaughlin*, 246 N.C. App. 306, 327, 786 S.E.2d 269, 285 (2016) (applying excited-utterance exception to mother's testimony about statements of fifteen-year-old victim who disclosed sexual abuse to mother ten days later). Juvenile has waived the benefit of this argument by failing to object. Even presuming Juvenile were to have timely objected to the testimony of Ms. Barber as hearsay on direct examination, Juvenile's trial counsel elicited the same testimony on cross-examination; therefore, the benefit of any objection would have been lost. *See State v. Davis*, 239 N.C. App. 522, 537, 768 S.E.2d 903, 912 (2015) ("When, as here, evidence is admitted over objection, but the same or similar evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." (*State v. Davis*, 353 N.C. 1, 22, 539 S.E.2d 243, 258 (2000)) (internal quotation marks omitted)), *aff'd in part and modified on other grounds*, 368 N.C. 794, 785 S.E.2d 312 (2016); *State v. Wingard*, 317 N.C. 590, 599, 346 S.E.2d 638, 644 (1986) (holding witness' testimony during cross-examination waived defendant's

objection to same testimony on direct examination); *id.* at 599, 346 S.E.2d at 644 ("It is a well-settled rule that 'if a party objects to the admission of certain evidence and the same or like evidence is later admitted without objection, the party has waived the objection to the earlier evidence.'" (quoting 1 *Brandis on North Carolina Evidence* § 30 (1982))).

Juvenile also contends "[the State] does not explain how Ashley's [anal] injuries were more severe than if she had willing (sic) engaged in 'aggressive' anal sex with her boyfriend." This argument misconstrues the force element of second-degree sexual offense. The standard is not whether the force was greater than that used in "aggressive" sex, but whether there was "force applied to the body" of the victim. Moreover, in *State v. Atkins*, our Supreme Court, while holding that anal fissures resulting from anal intercourse were not sufficient to show that a second-degree sexual offense "was especially heinous, atrocious, or cruel," noted that the anal fissures were ". . . evidence that the anal intercourse was forcible." *State v. Atkins*, 311 N.C. 272, 276-77, 316 S.E.2d at 305-06 (1984).

Finally, Juvenile argues that Juvenile's age—that he was two years younger than Ashley at the time of the act—is "a factor which tends to negate the presence of force." In the case of *In re T.W.*, upon which Juvenile relies, this Court held there was insufficient evidence of constructive force where there was no allegation of physical force, there was no threat of physical harm, and the juvenile assailant and

the victims were "all minors of similar ages." *In re T.W.*, 221 N.C. App 193, 197-200, 726 S.E.2d 867, 871-72 (2012). In that case, our Court merely declined to extend our Supreme Court's holding in *Etheridge* that the fear instigated by the father-child relationship to hold the relationship between one juvenile and others of similar ages, standing alone, was sufficient evidence of constructive force. *See id.* at 199-200, 726 S.E.2d at 872 (citing *Etheridge*, 319 N.C. at 48, 352 S.E.2d at 681-82). However, simply because the power imbalance in a relationship between juveniles of similar ages was insufficient to give rise to an inference of constructive force does not imply that a juvenile assailant's age negates actual physical force where it is otherwise present, such as the physical force applied to Ashley here.

We hold there was sufficient evidence of actual physical force—"force applied to the body"—beyond that inherent in the sexual act at issue to establish the element of force for second-degree sexual offense where the State's evidence tends to show Juvenile grabbed Ashley by the waist, turned her over, held her body down, and engaged in anal intercourse resulting in anal injury. The trial court did not err in denying Juvenile's motion to dismiss.

B. Failure to Protect Privilege Against Self-Incrimination Under N.C.G.S. § 7B-2405

On appeal, Juvenile argues in the alternative that the trial court violated N.C. Gen. Stat. § 7B-2405 when it permitted him to testify without advising him of his

privilege against self-incrimination. While we agree that the statutory right was violated, we hold this error did not prejudice Juvenile.

N.C.G.S. § 7B-2405 provides as follows:

> In the adjudicatory hearing, the court shall protect the following rights of the juvenile . . . to assure due process of the law:
>
> (1) The right to written notice of the facts alleged in the petition;
>
> (2) The right to counsel;
>
> (3) The right to confront and cross-examine witnesses;
>
> (4) *The privilege against self-incrimination*;
>
> (5) The right of discovery; and
>
> (6) All rights afforded adult offenders except the right to bail, the right of self-representation, and the right of trial by jury.

N.C.G.S. § 7B-2405 (2017) (emphasis added). "[N.C.G.S.] § 7B-2405 'lists the rights that the trial court *must* protect during juvenile adjudicatory hearings to assure that due process is satisfied.'" *In re J.R.V.*, 212 N.C. App. 205, 208, 710 S.E.2d 411, 413 (2011), *disc. review improvidently allowed*, 365 N.C. 416, 720 S.E.2d 387 (2012) (quoting *In re T.E.F.*, 359 N.C. 570, 574, 614 S.E.2d 296, 299 (2005)) (emphasis added). This Court in *J.R.V.* continued as follows:

> The statute, by stating that the trial court "shall" protect a juvenile's delineated rights, places an affirmative duty on the trial court to protect, inter alia, a juvenile's right

> against self-incrimination. The trial court cannot satisfy this affirmative duty by doing absolutely nothing, as the higher burden placed upon the State to protect juvenile rights would certainly be undermined by ignoring the mandatory language of the statute. While [N.C.G.S.] § 7B-2405, unlike the statute governing admissions at issue in *T.E.F.*, does not provide the explicit steps a trial court must follow when advising a juvenile of his rights, the statute requires, at the very least, *some* colloquy between the trial court and the juvenile to ensure that the juvenile understands his right against self-incrimination before choosing to testify at his adjudication hearing.

Id. at 208-09, 710 S.E.2d at 413 (internal citations and quotation marks omitted) (emphasis in original). In *J.R.V.*, this Court held the trial court erred where there was "absolutely no colloquy between the juvenile and the trial court" when the juvenile took the stand to testify. *Id.* at 209, 710 S.E.2d at 413.

When Juvenile was called to testify in this case, the trial court said "[s]ir, if you would please come up, put your left hand on the Bible and raise your right." After he was sworn, the trial court merely said "[p]lease have a seat." The record shows there was absolutely no colloquy between Juvenile and the trial court regarding Juvenile's privilege against self-incrimination. We hold this was error.

We must next determine whether the trial court's error was prejudicial to Juvenile. "Since the trial court's failure to follow its statutory mandate implicates the juvenile's constitutional right against self-incrimination, the error is prejudicial unless it was harmless beyond a reasonable doubt." *J.R.V.*, 212 N.C. App. at 209, 710 S.E.2d at 413 (citation omitted). In *J.R.V.*, this Court held that "[s]ince the juvenile's

testimony was either consistent with the prior evidence presented by the State or was otherwise favorable to the juvenile, it cannot be considered prejudicial. Consequently, the trial court's failure to advise the juvenile of his privilege against self-incrimination was harmless beyond a reasonable doubt." *Id.* at 210, 710 S.E.2d at 414.

Juvenile in this case contends he "was prejudiced by the trial court's error because his testimony was incriminating." Juvenile testified on matters relevant to the second-degree sexual offense charge and to the obstruction of justice charge. As to his testimony relating to the sexual offense, Juvenile argues he was prejudiced because, during his testimony, he admitted to having anal intercourse with Ashley on 22 March 2016 and on another occasion. Although Juvenile agreed with the State that anal intercourse occurred between him and Ashley, his testimony was not incriminating, and was in fact exculpatory, as he testified that Ashley not only consented to vaginal and anal intercourse that day, but that she initiated both.

Moreover, despite Juvenile's contention he was prejudiced because "the prosecutor used [his] testimony about his sexual history with Ashley in an attempt to question [Juvenile's] credibility" in closing argument, his testimony that the anal intercourse was consensual and initiated by Ashley tended to exculpate him by showing the sexual act was without force and not against Ashley's will. The testimony that he merely committed the sexual act was consistent with evidence

presented by the State, including Ashley's testimony, Ms. Barber's testimony, and the testimony of Detective Godwin, who testified that Juvenile told him he and Ashley had anal intercourse on the date in question. To the extent the prosecution relied in its closing argument on Juvenile's contradiction of his original claim to Detective Godwin that he and Ashley did not have anal intercourse on the date in question, that same contradiction is present in his conflicting statements to the detective.

Juvenile's testimony relevant to the obstruction of justice charge was also not prejudicial. The State had already independently established that Juvenile sent the messages at issue via the Kik application through Ashley's testimony that she had received these messages from Juvenile's account and could identify his account by his username. Furthermore, the State had already admitted the messages themselves into evidence as State's Exhibit 1. Although Juvenile conceded that he sent these messages, the State had already introduced evidence to support his identity as the sender; therefore, this testimony was simply consistent with the State's evidence. Moreover, Juvenile's testimony that the messages the State introduced into evidence were incomplete and his denial that he was attempting to influence Ashley's participation in the prosecution of the case against him were favorable to him. Therefore, this testimony, too, was either favorable to Juvenile or consistent with the State's evidence.

Since Juvenile's testimony relevant to either the sexual offense or the charge of obstruction of justice, like the testimony in *J.R.V.*, was either consistent with the State's evidence or favorable to him, it is not prejudicial. Therefore, we hold the trial court's error in failing to protect Juvenile's privilege against self-incrimination was harmless beyond a reasonable doubt.

C. Sufficiency of the Adjudication Order Under N.C.G.S. § 7B-2411

Finally, Juvenile argues the trial court failed to make the findings of fact required by N.C. Gen. Stat. § 7B-2411 in the adjudication order. N.C.G.S. § 7B-2411 provides as follows:

> If the court finds that the allegations in the petition have been proved [beyond a reasonable doubt], the court shall so state in a written order of adjudication, which shall include, but not be limited to, the date of the offense, the misdemeanor or felony classification of the offense, and the date of adjudication.

N.C.G.S. § 7B-2411 (2017). In *In re K.C.*, this Court held an adjudication order satisfied the requirements of N.C.G.S. § 7B-2411 where it stated as follows:

> The following facts have been proven beyond a reasonable doubt: . . .
>
> After hearing all testimony in this matter the court finds beyond a reasonable doubt that the juvenile committed the offense of Sexual Battery and Simple Assault and he is ADJUDICATED DELINQUENT.

In re K.C., 226 N.C. App. 452, 461, 742 S.E.2d 239, 245 (2013). This Court held the statement in the order, along with a signature of the trial court judge, date for the

signature, and a stamp indicating the date it was filed, "provide[d] the date of the offense, the fact that the assault [was] a class 2 misdemeanor, the date of the adjudication, and clearly states that the court considered the evidence and adjudicated [the juvenile] delinquent as to the petition's allegation of simple assault beyond a reasonable doubt." *In re K.C.*, 226 N.C. App. at 461, 742 S.E.2d at 245.

In contrast, this Court in *In re J.V.J.* held the adjudication order did not satisfy the statutory requirement of N.C.G.S. § 7B-2411 where the order stated the following:

> Based on the evidence presented[,][t]he following facts have been proven beyond a reasonable doubt:
>
> The court finds that [Joseph] is responsible.

In re J.V.J., 209 N.C. App. 737, 740, 707 S.E.2d 636, 637-38 (2011). While this Court "agree[d] with the State that section 7B-2411 does not require the trial court to delineate each element of an offense and state in writing the evidence which satisfies each element," and "recognize[d] that section 7B-2411 does not specifically require that an adjudication order 'contain appropriate findings of fact,' as does section 7B-807, the statute governing orders of adjudication in the abuse, neglect or dependency context," it held that "[n]evertheless, at a minimum, section 7B-2411 requires a court to state in a written order that 'the allegations in the petition have been proved [beyond a reasonable doubt].'" *Id.* at 740, 707 S.E.2d at 638 (quoting N.C.G.S. § 7B-2411).

The adjudication order in this case states the following:

> The following facts have been proved beyond a reasonable doubt:
>
> Found Delinquent by Judge

This order is more similar to the order in *J.V.J.* than the order at issue in *K.C.*, in that it "fails to address any of the[] allegations as required by section 7B-2411. Indeed, the adjudication order does not even summarily aver that 'the allegations in the petition have been proved[.]'" *J.V.J.*, 209 N.C. App. at 740, 707 S.E.2d at 638. Here, as in *J.V.J.*, "[t]he form on which the trial court made its findings contains a large blank area where the court is to state its findings[,]" but "[r]ather than addressing the allegations in the petition in the blank area," the trial court used the space to state that Juvenile was "[f]ound [d]elinquent by Judge[,]" which, like the petition stating the juvenile was "responsible" in *J.V.J.*, "is a verdict and may more properly be characterized as a conclusion of law rather than a finding of fact." *Id.* at 740-41, 707 S.E.2d at 638 (citation omitted). Therefore, since the trial court's findings "insufficiently address the allegations in the petition," we hold the trial court erred by failing to include the necessary findings required by N.C.G.S. § 7B-2411 in its adjudication order. Although Juvenile asks this Court to reverse the order of the trial court and remand for further findings, the appropriate disposition is to remand with instructions to make the statutorily-mandated findings, not to reverse. *See J.V.J.*, 209 N.C. App. at 741, 707 S.E.2d at 638 (remanding without reversing).

III. Conclusion

Juvenile appeals the adjudication and disposition orders from the trial court adjudicating him delinquent of second-degree sexual offense and obstruction of justice. He argues three errors: (1) the trial court erred in failing to grant his motion to dismiss for insufficiency of the evidence on the second-degree sexual offense, (2) the trial court erred by failing to protect his privilege against self-incrimination as required by N.C.G.S. § 7B-2405, and (3) the trial court erred by failing to make adequate findings in its adjudication order as required by N.C.G.S. § 7B-2411. We hold Juvenile failed to preserve his argument that there was insufficient evidence to show the element of force because he made a specific motion to dismiss at trial arguing consent and failing to raise the issue of the element of force.

Alternatively, we hold the trial court did not err in denying Juvenile's motion to dismiss because sufficient evidence of actual force establishes that element of second-degree sexual offense.

We further hold that, although the trial court erred by failing to protect Juvenile's privilege against self-incrimination, any error was harmless beyond a reasonable doubt.

Finally, we hold the trial court did err in failing to include the requisite factual findings in its adjudication order, and remand solely for the purpose of making the statutorily-required findings under N.C.G.S. § 7B-2411. *See generally In re J.V.J.*, 209 N.C. App. 737, 707 S.E.2d 636 (2011).

AFFIRMED IN PART, REMANDED IN PART.

Judges TYSON and BERGER concur.

Report per Rule 30(e).