IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-323

No. COA20-812

Filed 6 July 2021

Cumberland County, No. 19JB477

IN THE MATTER OF: J.U.

Appeal by juvenile-appellant from orders entered 12 February and 16 July 2020 by Judge Rebecca W. Blackmore in Cumberland County District Court. Heard in the Court of Appeals 9 June 2021.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for Juvenile-Appellant.

INMAN, Judge.

¶ 1 Juvenile-Appellant J.U. ("Appellant") appeals from orders adjudicating him delinquent for sexual battery and simple assault and imposing a Level II disposition with 12 months of probation. Appellant argues that: (1) the juvenile petition charging sexual battery is fatally defective in failing to allege the necessary element of force; (2) the State failed to present sufficient evidence of all elements of sexual battery; (3) trial counsel committed *per se* ineffective assistance of counsel ("IAC") in conceding

guilt to simple assault when the trial court did not conduct a colloquy with Appellant to determine whether the concession was knowing and voluntary; and (4) the trial court's disposition order lacked findings of fact sufficient to support the punishment imposed. After careful review, we hold the juvenile petition alleging sexual battery was fatally deficient and vacate the adjudication on that charge for want of jurisdiction. We likewise vacate the disposition order, as it imposed a Level II disposition based on the erroneous sexual battery adjudication. Because we vacate the adjudication for sexual battery and the disposition order for these reasons, we need not address Appellant's remaining arguments challenging those orders. As for Appellant's IAC claim, we decline to hold that trial counsel's concession of guilt to simple assault without a colloquy between Appellant and the trial court amounts to *per se* IAC, but instead remand the IAC claim for an evidentiary hearing to determine whether his trial counsel conceded guilt to simple battery without his knowing and informed consent consistent with *State v. McAllister*, 375 N.C. 455, 847 S.E.2d 711 (2020).

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 In 7th grade, Appellant struck up a platonic friendship with one of his classmates, B.A. ("Betty"). The two became best friends midway through that year. The friendship was ultimately short-lived, however, and ended in the first few months of 8th grade.

¶ 3 Appellant and Betty's friendship ended—at the latest—on 9 October 2019 when Appellant grabbed Betty's shirt from behind and snapped her bra strap as a class was starting. Betty shouted at Appellant to stop, leading a teacher to intervene and ask what had occurred. The teacher then had Betty and two of her classmates, J.A. ("Julio") and P.L. ("Patrick"), draft statements about the incident.

¶ 4 In her initial statement, Betty wrote that Appellant had been snapping her bra strap during school for the past week despite her repeated requests that he stop, eventually leading her to shout at him on 9 October 2019. Julio's statement echoed Betty's. Patrick described an entirely different set of misconduct, writing that Appellant had repeatedly touched Betty on her buttocks, breast, and "something else" on a nearly daily basis and over Betty's verbal objections.

¶ 5 The school principal then met with Betty and showed her Julio's and Patrick's reports. Betty drafted a second statement corroborating Patrick's account of other inappropriate touching, writing that Appellant had grabbed her buttocks, breasts, and vaginal area on a single occasion one week into the school year. Betty wrote that she did not disclose the inappropriate contact earlier because she did not believe anyone else had seen it.

¶ 6 The State filed a juvenile delinquency petition for sexual battery against Appellant on 6 November 2019; that petition was later voluntarily dismissed in favor of three new petitions alleging a total of two counts of sexual battery and one count

of simple assault.

¶ 7 The trial court held an adjudicatory hearing on 12 February 2020. Appellant's counsel informed the trial court his client was pleading not guilty to all charges but, "[a]s to the simple assault, . . . he admits the action that is alleged in the petition; however, he denies the time of offense."

¶ 8 Betty, Julio, and Patrick testified at the hearing consistent with their written statements. Betty and Patrick also testified about additional details. Betty testified that Appellant had grabbed her buttocks, breasts, and vaginal area on a single occasion in September 2019. Patrick testified that he had observed Appellant grope Betty multiple times. Appellant testified that he had snapped Betty's bra strap on 9 October 2019 but denied any other inappropriate contact. Appellant explained that he accidentally snapped Betty's bra strap when trying to pull her away from a student at whom she was yelling.

¶ 9 At the close of all evidence and during closing arguments, Appellant's counsel told the trial court that "it's clear that there was a bra snapping incident on 10/9. We didn't deny that. . . . We wouldn't oppose a verdict on simple assault." After argument, the trial court dismissed one petition for sexual battery and adjudicated Appellant delinquent on the remaining petitions for sexual battery and simple assault. Appellant's disposition hearing was continued to 16 July 2020, during which the trial court ordered a Level II disposition of 12 months' probation.

II. ANALYSIS

¶ 10 Appellant first asserts his adjudication for sexual battery must be vacated because the petition failed to allege all necessary elements of the offense. We agree with Appellant and vacate that adjudication and the disposition order based thereon.[1] Appellant contends his counsel's concession of responsibility for simple assault—without a colloquy between the trial court and Appellant—amounts to *per se* ineffective assistance of counsel necessitating a new adjudication hearing. We agree with Appellant that any accepted concession of guilt must be preceded by record evidence of informed knowledge and voluntariness on the part of the juvenile. But we disagree that counsel was *per se* ineffective. Instead, we remand the matter back to the trial court for an evidentiary hearing to determine whether trial counsel's concession of guilt to simple assault was the result of a knowing and voluntary choice by Appellant.

1. Standards of Review

¶ 11 This Court reviews the sufficiency of a juvenile petition *de novo*, as it concerns the legal question of whether the petition's allegations sufficed to invoke the jurisdiction of the trial court. *Matter of J.S.G.*, ___ N.C. App. ___, ___, 2021-NCCOA-

[1] Because we vacate the disposition order on this ground, we do not address the additional argument raised in Appellant's brief that the disposition order lacked adequate findings of fact.

40, ¶ 6. We also apply a de novo standard of review to IAC claims. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Mayo*, 256 N.C. App. 298, 300, 807 S.E.2d 654, 656 (2017) (citation and quotation marks omitted).

2. Sexual Battery Petition

¶ 12 As with criminal indictments, a juvenile petition "is subject to the same requirement that it aver every element of a criminal offense, with sufficient specificity that the accused is clearly apprised of the conduct for which he is being charged." *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006). Section 7B-1802 of our General Statutes sets out this requirement plainly, providing that "[a] petition in which delinquency is alleged shall contain a plain and concise statement, without allegations of an evidentiary nature, asserting *facts* supporting *every element* of a criminal offense and the juvenile's commission thereof with sufficient precision clearly to apprise the juvenile of the conduct which is the subject of the allegation." N.C. Gen. Stat. § 7B-1802 (2019) (emphasis added). Thus, a juvenile petition for sexual battery must allege facts supporting each of the crime's elements, namely that the juvenile "(1) for the purpose of sexual arousal, sexual gratification, or sexual abuse, (2) engage[d] in sexual contact with another (3) by force and against the will of the other person." *In re S.A.A.*, 251 N.C. App. 131, 135, 795 S.E.2d 602, 605 (2016)

(citation omitted); s*ee also* N.C. Gen. Stat. § 14-27.33 (2019) (classifying sexual battery as a Class A1 misdemeanor and setting forth its elements).

¶ 13 The necessary element of 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 (1987). " 'Physical force' means force applied to the body," *State v. Scott*, 323 N.C. 350, 354, 372 S.E.2d 572, 575 (1988) (citation omitted), and "is present if the defendant uses force sufficient to overcome any resistance the victim might make." *State v. Brown*, 332 N.C. 262, 267, 420 S.E.2d 147, 150 (1992) (citations omitted). "Constructive force is demonstrated by proof of threats or other actions by the defendant which compel the victim's submission to sexual acts." *Etheridge*, 319 N.C. at 45, 352 S.E.2d at 680.

¶ 14 The juvenile petition for sexual battery alleged Appellant "unlawfully [and] willfully engage[d] in sexual contact with [Betty] by touching [Betty's] vaginal area, against the victim[']s will for the purpose of sexual gratification. In Violation of N.C.G.S. 14-27.33." Absent from the petition are allegations showing the use of either constructive or physical force; the petition does not assert Appellant used "threats or other actions . . . which compel[led] the victim's submission to sexual acts," *id.*, and the allegation that Appellant "touch[ed]" Betty does not, standing alone, disclose that he accomplished that act through an application of force to her body "sufficient to overcome any resistance the victim might make." *Brown*, 332 N.C. at 267, 420 S.E.2d

at 150. *See also State v. Raines*, 72 N.C. App. 300, 303, 324 S.E.2d 279, 281 (1985) ("[W]e decline . . . 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."). And, though the petition alleged Appellant touched Betty "against [her] will," the law draws a distinction between the separate necessary elements of force and lack of consent. *See State v. Jones*, 304 N.C. 323, 330, 283 S.E.2d 483, 487 (1981) (noting the three elements of first-degree sexual offense are "(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. Alston*, 310 N.C. 399, 407, 312 S.E.2d 470, 475 (1984) (holding charge of second degree rape must be dismissed when the State introduced evidence of lack of consent but not force, as "[s]econd degree rape involves vaginal intercourse with the victim *both* by force and against the victim's will" (emphasis added)). Thus, while the petition alleges Appellant touched Betty without her consent, it does not allege facts establishing the act was accomplished with the requisite force to commit sexual battery under Section 14-27.33.

¶ 15 The State, acknowledging that the petition failed to allege the touching was "by force," nonetheless contends that the petition was sufficient because it identified the sexual battery statute. However, a petition must "assert[] *facts* supporting *every element* of a criminal offense," N.C. Gen. Stat. § 7B-1802 (emphasis added), and a mere citation to a statute is not a "fact" supporting the necessary element of force.

Indeed, in the context of criminal indictments, citation to the proper statute and the necessity of alleging facts supporting every element of the crime are recognized as separate requirements of distinct significance. *Compare State v. Galloway*, 226 N.C. App. 100, 103, 738 S.E.2d 412, 414 (2013) (recognizing the statutory requirement that an indictment assert facts supporting every element of the crime charged is jurisdictional and noncompliance requires arresting judgment or vacatur), *with* N.C. Gen. Stat. § 15A-924(a)(6) (2019) (requiring an indictment to include "a citation of any applicable statute . . . alleged therein to have been violated" while also providing "[e]rror in the citation or its omission is not ground for dismissal of the charges or for reversal of a conviction"). In sum, citation to the correct criminal statute cannot cure a failure to allege underlying facts supporting every element of the cited crime as required by Section 7B-1802.

¶ 16 The case cited by the State in support of its argument, *In re S.R.S.*, 180 N.C. App. 151, 636 S.E.2d 277 (2006), is inapposite and does not hold that a juvenile petition citing a statute can overcome the absence of facts supporting every element of the alleged crime. In that case, the juvenile was charged with communicating threats based on a petition alleging he threatened the victim by orally stating he was going to bring a gun to school and kill the victim's daughter. *Id.* at 154-55, 636 S.E.2d at 281. Thus, while the petition confusingly alleged that the juvenile threatened to injure the *victim* by claiming he would shoot her *daughter*, the petition was not fatally

defective because the statute cited in the petition expressly criminalized "threaten[ing] to physically injure the person *or* that person's child." *Id.* at 154, 636 S.E.2d at 280 (quoting N.C. Gen. Stat. § 14-277.1(a) (2005)). In other words, the petition in *S.R.S.* actually stated facts sufficient to allege every element of the crime charged. *Id.* at 155, 636 S.E.2d at 281. The petition now before us, on its face, fails to allege facts in support of every essential element of sexual battery. We therefore vacate the order adjudicating Appellant delinquent for sexual battery and, because the disposition order was entered based on that adjudication as the most severe offense charged, we likewise vacate the disposition order.[2]

3. Admission of Simple Assault and IAC

¶ 17 Appellant next contends that his trial counsel committed *per se* IAC in admitting to the offense of simple assault during without a colloquy with the trial court or other record evidence disclosing whether that admission was knowing and voluntary on the part of Appellant. Although we agree with Appellant that the record

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[2] Section 7B-2508(h) provides that a juvenile adjudicated of more than one offense must be subject to a consolidated disposition "specified for the class of offense and delinquency history level of the most serious offense." N.C. Gen Stat. § 7B-2508(h) (2019). Sexual battery is a Class A1 misdemeanor, N.C. Gen. Stat. 14-27.33(b) (2019), whereas simple assault is a Class 2 misdemeanor. N.C. Gen. Stat. § 14-33(a) (2019). The former is also categorized as a Serious offense under the Juvenile Code, whereas the latter is codified as a Minor offense. N.C. Gen. Stat. § 7B-2508(a)(2)-(3) (2019). Because Appellant, who has a low delinquency history, is only subject to the Level II disposition imposed by the trial court based upon commission of sexual battery as a Serious offense under the Juvenile Code, N.C. Gen. Stat. § 7B-2508(f), our vacatur of the sexual battery adjudication requires us to vacate the Level II disposition.

lacks the necessary indication that Appellant knowingly and voluntarily admitted to the charge of simple assault, we decline to hold his counsel's conduct amounts to *per se* IAC and instead remand the matter to the trial court for further proceedings on the issue.

¶ 18 When presented with IAC claims in appeals from juvenile delinquency cases, this Court will address the merits " 'when the cold record reveals that no further investigation is required . . . .' " *In re C.W.N., Jr.*, 227 N.C. App. 63, 66, 742 S.E.2d 583, 585 (2013) (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001)). Such claims should otherwise " [']be considered through motions for appropriate relief and not on direct appeal.' " *Id.* (quoting *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001)). Unless Appellant's counsel's conduct amounts to *per se* IAC, the lack of record evidence disclosing Appellant's knowing and voluntary consent to the admission of simple assault means we must remand the matter for an evidentiary hearing to determine whether such consent was given prior to trial counsel's concession. *See McAllister*, 375 N.C. at 477, 847 S.E.2d at 725 ("[T]he appropriate remedy is to remand this case to the [trial court] for an evidentiary hearing to be held as soon as practicable for the sole purpose of determining whether defendant knowingly consented in advance to his attorney's admission of guilt[.]").

¶ 19 It is well-settled law that an unauthorized concession of guilt by counsel amounts to *per se* IAC requiring a new trial. *State v. Harbison*, 315 N.C. 175, 180,

337 S.E.2d 504, 507-08 (1985). It is likewise established that "there are significant differences between adult criminal trials and juvenile proceedings," *In re T.E.F.*, 359 N.C. 570, 575, 614 S.E.2d 296, 299 (2005), and, as compared to criminal prosecution of adults, "increased care must be taken to ensure complete understanding by juveniles regarding the consequences of admitting their guilt." *Id.* at 576, 614 S.E.2d at 299. Appellant acknowledges in his brief that, had he been an adult subject to criminal prosecution for simple assault, his counsel's concession of guilt to the crime without record evidence resolving whether Appellant consented would ordinarily result in remand for an evidentiary hearing on the issue. He contends, however, that the increased protections afforded juveniles should compel us to hold that any concession of guilt by counsel in a juvenile delinquency proceeding without a colloquy with the juvenile amounts to *per se* IAC in all cases. He premises his argument on Section 7B-2405, which imposes an affirmative duty on the trial court to "protect the . . . rights of the juvenile . . . to assure due process of law." N.C. Gen. Stat. § 7B-2405 (2019).[3]

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[3] Appellant strictly couches his argument as one of IAC; he does not contend that the trial court violated Section 7B-2407, which establishes necessary prerequisites for the trial court's acceptance of admissions of guilt in juvenile proceedings. *T.E.F.*, 359 N.C. at 576, 614 S.E.2d at 299. We therefore limit our analysis to Appellant's assertion that trial counsel committed *per se* IAC. *See In re C.L.*, 217 N.C. App. 109, 114-15, 719 S.E.2d 132, 135-36 (2011) (declining to address whether the trial court strictly complied with Section 7B-2407 under *T.E.F.* because the juvenile-appellant did not argue a violation of that statute on appeal following an *Alford* admission and instead relied upon Section 7B-2405); *see also* N.C.

¶ 20 At the outset of the adjudication hearing, Appellant's counsel stated that Appellant entered a plea of not guilty but "admits the action that is alleged in the petition; however, he denies the time of offense." Following Appellant's testimony in which he admitted to snapping Betty's bra strap, Appellant's counsel conceded in closing argument that the time of the offense was not essential to the petition and "[w]e wouldn't oppose a verdict on simple assault." No colloquy with Appellant took place, as is preferred in criminal prosecutions. *See, e.g., State v. Thompson*, 359 N.C. 77, 119-20, 604 S.E.2d 850, 879 (2004). Appellant argues, and the State apparently concedes, that the record is silent as to Appellant's knowing and voluntary consent to the concession by his counsel. And, though Appellant asserts this lack of a colloquy should amount to *per se* IAC, he nonetheless places the failure to protect his rights squarely on the trial court, writing in his briefing to this court that "*the trial court* did not conduct a *Harbison* colloquy . . . . It should have. *The court's* heightened obligation to protect the juvenile required an express *Harbison* inquiry." (emphasis added).

¶ 21 We decline to hold that the trial court's alleged failure to conduct an adequate colloquy with Appellant amounts to *per se* IAC on the part of his trial counsel for several reasons. First, and most obviously, Appellant's argument that the trial court

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R. App. P. 28(a) (2021) ("The scope of review on appeal is limited to issues so presented in the several briefs.").

should have conducted a colloquy does not conclusively and indisputably establish that his attorney fell short of his obligations to Appellant. Second, while a juvenile's rights are more jealously guarded in juvenile proceedings than the accused in a criminal prosecution, *T.E.F.*, 359 N.C. at 576, 614 S.E.2d at 299, a juvenile has just as much a right to deny guilt as he does to admit it out of contrition, honesty, or in the interest of trial strategy. *Cf. Harbison*, 315 N.C. at 180, 337 S.E.2d at 507 ("This Court is cognizant of situations where the evidence is so overwhelming that a plea of guilty is the best trial strategy. However, the gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands."). Our Supreme Court has held that "the absence of any indication in the record of defendant's consent to his counsel's admissions will not—by itself—lead us to presume defendant's lack of consent[,]" *McAllister*, 375 N.C. at 477, 847 S.E.2d at 725 (citations and quotations omitted), and a *per se* rule would require a new adjudication irrespective of whether the juvenile knowingly and voluntarily consented to the admission in the exercise of his right to direct the course of his defense. Lastly, Appellant has not shown that an evidentiary hearing to determine whether he knowingly and voluntarily consented to his counsel's admission would not adequately protect his rights.

¶ 22 For these reasons, we hold that the appropriate disposition of Appellant's IAC claim is to remand the matter for an evidentiary hearing to determine whether trial counsel's concession of guilt was given after and with Appellant's knowing and

voluntary consent. *McAllister*, 375 N.C. at 477, 847 S.E.2d at 725. "Following the evidentiary hearing, the trial court shall expeditiously make findings of fact and conclusions of law and enter an order. The trial court shall then certify the order, the findings of fact and conclusions of law, and the transcript of the hearing to this Court." *Id.* (citation omitted).

III. CONCLUSION

¶ 23 We hold, as set forth above, that the petition asserting sexual battery was fatally defective and failed to invoke the trial court's jurisdiction over the petition; as a result, we vacate the portion of the adjudication order adjudicating Appellant delinquent for sexual battery. Further, because the disposition order imposing a Level II disposition was entered based upon the improper sexual battery adjudication as the most serious offense, we vacate the disposition order. Finally, as to Appellant's IAC claim related to his adjudication for simple assault, we remand the matter to the trial court "for an evidentiary hearing to be held as soon as practicable for the sole purpose of determining whether [Appellant] knowingly consented in advance to his attorney's admission of guilt." *Id.*

ADJUDICATION VACATED IN PART; DISPOSITION VACATED; REMANDED WITH INSTRUCTIONS.

Judges HAMPSON and ARROWOOD concur.

Report per Rule 30(e).