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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-812-2

Filed 2 January 2024

Cumberland County, No. 19JB477

IN THE MATTER OF:

J.U.

Appeal by juvenile-defendant from orders entered 12 February and 16 July 2020 by Judge Rebecca W. Blackmore in Cumberland County District Court. Originally heard in the Court of Appeals 9 June 2021, with opinion issued 6 July 2021. *See In re J.U.*, COA20-812, 2021 WL 2793556, (N.C. Ct. App. July 6, 2021). The Supreme Court of North Carolina allowed the State's petition for discretionary review of the sufficiency of the juvenile petition. In an opinion filed 16 June 2023, our Supreme Court reversed this Court's decision and remanded for consideration of the issues not previously addressed by this Court. *See* 384 N.C. 618, 887 S.E.2d 859 (2023).

Attorney General Joshua H. Stein, by Assistant Attorney General Janelle E. Varley and Special Deputy Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi E. Reiner, for juvenile-appellant.

FLOOD, Judge.

On remand from our Supreme Court, we must consider whether (1) the State failed to present substantial evidence of touching for sexual gratification and force, and (2) the disposition order failed to make sufficient findings required by N.C. Gen. Stat. § 2501(c) (2021) and erred in setting certain probation conditions. After careful review, we affirm the orders of the trial court.

I. Factual and Procedural Background

A complete factual background of this case is provided in *In re J.U.*, 2021 WL 2793556, and only the facts necessary for our consideration of the issues not previously addressed by this Court are provided here.

On 9 January 2020, the State filed three petitions against Juvenile-Appellant, “Jamie,”¹ alleging two counts of sexual battery and one count of simple assault. These petitions were based on Jamie’s alleged assault of a classmate, “Betty.” The assaults were witnessed by two of Jamie’s and Betty’s classmates—“Patrick” and “Julio.”

On 12 February 2020, the trial court held an adjudication hearing. Julio, Betty, Patrick, and Jamie testified at the hearing. Julio’s, Betty’s, and Jamie’s testimonies were consistent with the written statements they each gave to their school administrator after one of the incidents occurred. The only testimony Julio gave was that he witnessed Jamie pull Betty’s bra strap. Betty and Patrick gave testimonies on a different set of events.

¹ Pseudonyms are used to protect the identity of the minor children involved in these proceedings, including the victim, Juvenile-Appellant, and the two witnesses. *See* N.C.R. App. P. 42(b).

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Betty testified that Jamie had grabbed her buttocks, breasts, and vaginal area on one occasion in September 2019 while they were in a classroom in their middle school. Betty, however, later testified that Jamie did not touch her all in one day, but that “it was separate.” Betty did not give Jamie consent to touch her. Patrick testified that he witnessed Jamie touch Betty’s “butt, her boobs, and then her private part” on “multiple occasions” when they were in the classroom and “walking back from lunch.” Patrick further testified that he heard Betty ask Jamie to stop multiple times. When the trial court asked Patrick to explain what he saw, Patrick said:

It started in math class. . . . And one time we were lining up for lunch and [Jamie] and [Betty], they were in front of each other, where she was in front of him, he was behind her, and they were talking. And I saw [Jamie] reach his hand in between [Betty’s] legs and touch her.

Jamie denied any inappropriate contact with Betty.

After the close of the evidence and closing arguments, the trial court dismissed one petition for sexual battery by touching Betty’s breasts and buttocks, and adjudicated Jamie delinquent on the remaining petitions for sexual battery by touching Betty’s vaginal area and simple assault. A disposition hearing was held on 16 July 2020, during which the trial court ordered a Level II disposition and twelve months’ probation.

Jamie appealed to this Court arguing (1) the trial court lacked jurisdiction to hold the adjudication hearing on the sexual battery petition, because the petition did not allege Jamie used force to touch Betty; (2) the trial court erred by failing to

dismiss the sexual battery petition, because the State failed to present substantial evidence Jamie touched Betty for sexual gratification or used force; (3) Jamie received ineffective assistance of counsel; and (4) the trial court erred by failing to make sufficient findings to support its disposition order and probation conditions.

On appeal, this Court held the trial court lacked jurisdiction, because the sexual battery petition did not adequately allege Jamie used force, and vacated the portion of the adjudication order adjudicating Jamie delinquent for sexual battery. *In re J.U.*, at *5. Because we found the sexual battery petition was deficient, we also vacated the disposition order, as it was based on an improper sexual battery adjudication. Additionally, we remanded the matter to the trial court “for an evidentiary hearing to be held as soon as practicable for the sole purpose of determining whether [Jamie] knowingly consented in advance to his attorney’s admission of guilt.” *Id.* at *5. Having vacated the adjudication order and disposition order, we declined to address Jamie’s remaining arguments. *Id.* at *5.

On 4 May 2022, our Supreme Court allowed the State’s petition for discretionary review to determine a single issue: whether this Court “erred in holding that the sexual battery petition was fatally defective and failed to invoke the trial court’s jurisdiction.”² *See In re J.U.*, 384 N.C. at 621, 887 S.E.2d at 862. The Supreme Court held the element of force was “clearly inferable from the facts alleged in the

² As the ineffective assistance of counsel issue was not appealed to the Supreme Court, the previous decision by this Court is binding.

petition” and reversed and remanded to this Court to determine the issues not considered in our previous decision. *Id.* at 626, 887 S.E.2d at 865.

II. Analysis

The remaining issues not previously determined by this Court are whether (A) the State failed to present substantial evidence Jamie touched Betty for (1) sexual gratification and (2) by force; and (B) the trial court erred in its disposition order.

A. Sufficiency of the Evidence

“We review a trial court’s denial of a juvenile’s motion to dismiss *de novo*.” *In re K.M.M.*, 242 N.C. App. 25, 27, 774 S.E.2d 430, 431 (2015) (citation omitted). A trial court’s denial of a juvenile’s motion to dismiss will be upheld if “there is substantial evidence (1) of each essential element of the offense charged and (2) of [the] juvenile’s being the perpetrator of such offense.” *Id.* at 27, 774 S.E.2d at 431 (alteration in original) (citation omitted). “Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *In re T.T.E.*, 372 N.C. 413, 420, 831 S.E.2d 293, 298 (2019) (citation omitted). Upon our review, we must view the evidence “in the light most favorable to the State and the State receives the benefit of every reasonable inference supported by that evidence.” *In re J.D.*, 376 N.C. 148, 155, 852 S.E.2d 36, 42 (2020) (citation omitted).

Jamie argues the trial court erred by failing to dismiss the sexual battery petition, because the State failed to present sufficient evidence of (1) touching for sexual gratification, and (2) use of force. Jamie’s trial counsel, however, failed to

make a motion to dismiss the sexual battery petition, and the issue therefore is not preserved for our review. *See* N.C.R. App. 10(a)(1) (“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely . . . motion[.]”). Jamie concedes his trial counsel did not make a motion to dismiss but asks this Court to review the merits of the issue under Rule 2 of our rules of appellate procedure. *See* N.C.R. App. 2.

Under Rule 2, this Court may suspend any of the other rules of appellate procedure and hear an issue that was not otherwise properly before this Court “[t]o prevent manifest injustice to a party[.]” N.C.R. App. 2. Rule 2 is “regularly invoked [] in order to address challenges to the sufficiency of the evidence to support a conviction.” *In re I.W.P.*, 259 N.C. App. 254, 257, 815 S.E.2d 696, 700 (2018). “[T]his residual power to vary the default provisions of the appellate procedure rules[, however,] should only be invoked rarely and in ‘exceptional circumstances.’” *In re A.W.*, 209 N.C. App. 596, 599, 706 S.E.2d 305, 307 (2011) (first alteration in original) (citations omitted). Whether to invoke this power depends on “the *specific circumstances of individual cases and parties*, such as whether substantial rights of an appellant are affected.” *In re I.W.P.*, 259 N.C. App. at 258, 815 S.E.2d at 700. For the reasons that follow, we hold the State presented substantial evidence of sexual gratification and force, and we therefore decline to invoke Rule 2 to review the merits of this issue.

1. Sexual Gratification

A juvenile is guilty of sexual battery if they, “for the purpose of sexual arousal, sexual gratification, or sexual abuse, engage[] in sexual contact with another person [] [b]y force and against the will of the other person[.]” N.C. Gen. Stat. § 14-27.33(a)(1) (2021). “[S]exual purpose does not exist without some evidence of the child’s maturity, intent, experience, or other factor indicating his purpose in acting.” *In re S.A.A.*, 251 N.C. App. 131, 135, 795 S.E.2d 602, 605 (2016) (citation omitted); *see also In re K.C.*, 226 N.C. App. 452, 458, 742 S.E.2d 239, 243 (2013) (concluding the State failed to present sufficient evidence of sexual purpose where the parties gave contradictory testimony and there was no third-party observer, the parties were the same age, the incident occurred in a public school room during the day, and the juvenile claimed it was an accident). The juvenile’s maturity and intent may be evidenced by “[t]he age disparity, the control by the juvenile, the location and secretive nature of [the] actions, and the attitude of the juvenile.” *In re T.C.S.*, 148 N.C. App. 297, 303, 558 S.E.2d 251, 254 (2002). The simple act of touching is insufficient to show sexual purpose. *In re K.C.*, 226 N.C. App at 457, 742 S.E.2d at 243.

Here, the evidence presented shows Jamie touched Betty’s vaginal area while in a classroom in their school. Betty and Jamie were of similar age, the touching occurred in a public place, and the parties gave conflicting testimony; however, there was a third-party observer to the incident and evidence of control.

Patrick gave specific testimony regarding the occasion Jamie touched Betty’s

vaginal area. Even though Jamie denied the touching, Patrick corroborated Betty's testimony. We also note that, even though the trial court dismissed the sexual battery petition that alleged Jamie touched Betty's breasts and buttocks, because the State failed to prove the allegations beyond a reasonable doubt, the State still presented some evidence of additional touching by Jamie. Betty testified that Jamie had touched her breasts, buttocks, and vaginal area on a single occasion in September 2019. Additionally, Patrick testified that he witnessed Jamie touch the victim in inappropriate places on "multiple occasions," and that Jamie continued doing so even after Betty asked Jamie to stop. This is evidence of repeated touching that would support a conclusion that the touching of Betty's vaginal area was for sexual purpose.

Further, there was evidence of control based on Jamie's repeated snapping of Betty's bra strap, even after Betty asked him to stop. Patrick and Julio both testified that they witnessed Jamie snap Betty's bra strap on more than one occasion. Patrick testified that he witnessed Jamie pull Betty's bra strap multiple times, even after Betty asked Jamie to stop. When Julio was asked about whether he saw Jamie snap Betty's bra strap, Julio testified that "it had been happening for maybe a week, like sporadically" In Julio's written statement, he represented that Jamie snapped Betty's bra "multiple times in a day," and Betty was "too nice to yell, so she asked nicely" for Jamie to stop.

Accordingly, the State presented substantial evidence of sexual purpose because the evidence, taken in the light most favorable to the State, shows more than

“mere touching.” *See In re J.D.*, 376 N.C. 148, 155, 852 S.E.2d 42 (2020); *see also In re K.C.*, 226 N.C. App at 457, 742 S.E.2d at 243.

2. Force

As for force, our Supreme Court fully addressed this question in its discretionary review of the present case stating, “just as ‘common sense dictates that one cannot unlawfully kidnap or unlawfully restrain another with his consent,’ . . . one cannot engage in nonconsensual sexual contact with another person without the application of some ‘force,’ however slight.” *In re J.U.*, 384 N.C. at 625, 887 S.E.2d at 864 (citations omitted). The evidence, therefore, was sufficient to show Jamie used force when he touched Betty without her consent.

Accordingly, there is sufficient evidence of each element of the allegations in the petition. Thus, there is no “manifest injustice,” we decline to invoke Rule 2, and we therefore dismiss Jamie’s issue on appeal. *See* N.C.R. App. 2.

B. Disposition Order

Jamie argues the trial court erred by failing to include written findings of fact demonstrating it considered the factors listed in N.C. Gen. Stat. § 7B-2501(c) (2021) and erred in the probation conditions it set. This issue, however, is moot as Jamie’s twelve months’ probation period expired in July 2021. We therefore do not reach this issue. *See In re W.H.*, 166 N.C. App. 643, 648, 603 S.E.2d 356, 360 (2004) (holding the disposition order was moot when the juvenile had already served the disposition of which he was charged).

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III. Conclusion

We conclude the State presented substantial evidence that Jamie touched Betty for the purpose of sexual gratification and with the use of force. We therefore decline to invoke Rule 2 to review the issue on the merits. We further conclude Jamie's argument regarding the disposition order is moot.

AFFIRMED.

Judge HAMPSON concurs.

Judge ARROWOOD concurs in result only.

Report per Rule 30(e).