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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-632

Filed 6 February 2024

Davie County, No. 22JB28

IN THE MATTER OF:

K.J.B.H.

Appeal by juvenile-appellant from order entered 17 August 2023 by Judge Mary F. Covington in Davie County District Court. Heard in the Court of Appeals 9 January 2024.

*Attorney General Joshua H. Stein, by Assistant Attorney General Melissa K. Walker, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Franke, for juvenile-appellant.*

FLOOD, Judge.

Appeal by Juvenile-Appellant, “Kyle,”<sup>1</sup> from the trial court’s adjudication and disposition orders finding Kyle delinquent for sexual battery. As the State met its burden of providing sufficient evidence Kyle acted with sexual intent, but the trial court failed to make the requisite dispositional findings under N.C. Gen. Stat. § 7B-2501(c) (2021), we affirm the Adjudication Order and remand the Disposition Order.

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<sup>1</sup> A pseudonym is used to protect the identity of the minor child. See N.C.R. App. P. 42(b).

### **I. Factual and Procedural Background**

In October 2021, Kyle was thirteen years old and in eighth grade at North Davie Middle School. Having been diagnosed with attention deficit hyperactivity disorder and mild intellectual disabilities, Kyle attended the Occupational Course of Study program, where he followed an Individualized Education Plan to assist him with additional time accommodations for reading, writing, and math.

On 27 October 2021, Kyle rode the bus home from school. He walked down the aisle and sat in a seat near the front of the bus and next to a girl named Elizabeth,<sup>2</sup> whom he did not know well nor spoke to often. Elizabeth's book bag was between Elizabeth and Kyle such that Elizabeth was sitting between the book bag and the window. After sitting down, Kyle reached over and tried to "grab her chest area." This behavior continued "three or four times[.]" Elizabeth told Kyle to stop, and she also hit him; he ended up touching her breast once. Elizabeth and her friend told the bus driver what had happened.

Later, the principal of North Davie Middle School, Bryant Copeland ("Copeland"), spoke with both Kyle and Elizabeth about the incident. Kyle first told Copeland that he and Elizabeth were playing rock, paper, scissors, and that the touch was accidental. Kyle then continued to say, however, that the touching was not part of the game, and that he "didn't know why" he touched her. Copeland ultimately

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<sup>2</sup> A pseudonym is used to protect the identity of the minor child. See N.C.R. App. P. 42(b).

reviewed the video surveillance footage from the bus and saw that Kyle sat down next to Elizabeth, she slid her backpack over for him to sit down, and he “did touch her inappropriately.” Kyle was suspended from school for five days, and the school “turned [this case] over to the court system.” The State filed a petition alleging Kyle as delinquent for sexual battery.

This matter came on for hearing on 20 July 2022. Kyle’s counsel twice moved to dismiss for insufficient evidence as to the element of sexual arousal/gratification—once during evidence, and again after the close of evidence. In denying the renewed motion to dismiss, the trial court focused on the sexual nature of the part of Elizabeth’s body that Kyle touched, the fact that he touched her repeatedly and without consent, and the fact that Elizabeth tried to make him stop, but the behavior continued three or four times. In consideration of these factors, the trial court found the State met its burden of showing sexual battery.

After a 17 August 2022 disposition hearing, Kyle was placed on probation for six months as part of a Level I disposition. In filing the Disposition Order, the trial court left blank the section of its order titled “Other Findings.” This Other Findings section notes that the trial court shall “state any findings regarding the seriousness of the offense(s); the need to hold the juvenile accountable; the importance of protecting the public; the degree of the juvenile’s culpability; the juvenile’s rehabilitative and treatment needs; and available and appropriate resources.”

Kyle filed timely notice of appeal.

## **II. Jurisdiction**

Kyle's appeal is properly before this Court pursuant to N.C. Gen. Stat. § 7B-2602(3) (2021) ("Upon motion of a proper party[,] . . . review of any final order of the court in a juvenile matter under this Article shall be before the Court of Appeals. . . . A final order shall include . . . [a]ny order of disposition after an adjudication that a juvenile is delinquent[.]").

## **III. Analysis**

Kyle argues on appeal: (A) the trial court erred in denying Kyle's motion to dismiss where there was insufficient evidence that he touched Elizabeth for the purpose of sexual arousal; and (B) the trial court erred by failing to make findings of fact to demonstrate it considered each of the factors listed in N.C. Gen. Stat. § 7B-2501(c).

### **A. Sufficiency of Evidence**

Kyle contends that, other than the physical contact with Elizabeth, there was nothing in the evidence to indicate he acted for the purpose of sexual arousal. After careful review, we disagree.

"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).

A juvenile is guilty of sexual battery if the juvenile, “for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages 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 demonstrated 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) (articulating the standard for a showing of sexual arousal or gratification for an indecent liberties charge); *see In re*

*K.C.*, 226 N.C. App. at 457, 742 S.E.2d at 243 (applying to a sexual battery charge the standard for a showing of sexual arousal or gratification for an indecent liberties charge); *see also In re D.W.*, 171 N.C. App. 496, 501–02, 615 S.E.2d 90, 93–94 (2005) (citing *In re T.C.S.* to provide, “[t]o prove that [a] defendant had the purpose of arousing or gratifying a sexual desire, . . . there must have been some showing of intent, maturity, experience, or purpose in acting” (internal quotation marks omitted)). 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 shows that Kyle was thirteen years old at the time of the incident, and Elizabeth was thirteen years old at the time of the adjudication hearing, so there was little, if any, age disparity. The touching also transpired in a public location—at the front of a school bus and in view of a surveillance camera. These factors, therefore, run against a finding of sexual purpose. *See In re K.C.*, 226 N.C. App. at 458, 742 S.E.2d at 243.

There is in this case, however, evidence of control by Kyle and a lack of conflicting testimony, and there was a third-party observer to the incident. Per Elizabeth’s uncontroverted testimony, and as corroborated by Copeland’s testimony, at the time of the incident Elizabeth was seated between her book bag and the window, with Kyle on the other side of the book bag towards the aisle of the bus. Kyle three or four times tried to touch Elizabeth’s chest area, he once touched her breast, and throughout this behavior Elizabeth told Kyle to stop and she once hit him. The

circumstances of Kyle's and Elizabeth's seating on the bus and the repeated touching over Elizabeth's objections evince control and also demonstrate Kyle's attitude. This evidence would support a finding of maturity and intent, which in turn would support a conclusion that the touching of Elizabeth's chest was for the purpose of sexual gratification. *See In re T.C.S.*, 148 N.C. App. at 303, 558 S.E.2d at 254; *see also In re S.A.A.*, 251 N.C. App. at 135, 795 S.E.2d at 605. Further, in his viewing of the surveillance footage, Copeland was a third-party observer to this incident, and he testified that Kyle "did touch [Elizabeth] inappropriately." This, too, would support a finding of sexual purpose. *See In re T.C.S.*, 148 N.C. App. at 303, 558 S.E.2d at 254; *see also In re S.A.A.*, 251 N.C. App. at 135, 795 S.E.2d at 605; *In re K.C.*, 226 N.C. App. at 458, 742 S.E.2d at 243; *see also In re D.W.*, 171 N.C. App. at 501–02, 615 S.E.2d at 93–94.

We note that the Record shows Kyle has been diagnosed with attention deficit hyperactivity disorder and mild intellectual disabilities, and that he receives learning accommodations. While this could have had bearing on our analysis, there was no expert testimony as to Kyle's diagnosis and accommodations, and Kyle's appellate counsel makes no argument in its brief regarding Kyle's diagnosis and accommodations. Accordingly, given the facts of this case, the law dictates we find the State presented 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. at 155, 852 S.E.2d at 42; *see also In re K.C.*, 226 N.C. App. at 457, 742 S.E.2d

at 243. The trial court's Adjudication Order is affirmed.

**B. Requisite Findings of Fact**

Next, Kyle contends that the trial court failed to make the requisite findings demonstrating it considered the five factors of N.C. Gen. Stat. § 7B-2501(c) in entering its Disposition Order, and that we therefore must vacate the Disposition Order. The State concedes that this argument has merit, but argues that we should instead remand the case for a new disposition hearing that includes written and oral findings showing consideration of the five factors. We agree with the State.

Under N.C. Gen. Stat. § 7B-2501(c):

In choosing among statutorily permissible dispositions, the court shall select the most appropriate disposition both in terms of kind and duration of the delinquent juvenile. . . . [T]he court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile, based on:

- (1) The seriousness of the offense;
- (2) The need to hold the juvenile accountable;
- (3) The importance of protecting the public safety;
- (4) The degree of culpability indicated by the circumstances of the particular case; and
- (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c). Further, the trial court's "dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law [and the] court shall state with particularity, both orally and in the written order of the disposition, the precise terms of the disposition[.]" N.C. Gen. Stat. § 7B-2512 (2021). This Court has "interpreted that language to require the juvenile court to make



findings demonstrating that it considered the N.C. [Gen. Stat.] 7B-2501(c) factors in a dispositional order entered in a juvenile delinquency matter[.]” and we have remanded such disposition orders for a trial court’s failure to make the requisite findings. *In re K.C.* 226 N.C. App at 462, 742 S.E.2d at 246 (citation omitted).

Here, the Record does not indicate the trial court either orally or in its written order made findings showing that it considered the five factors of N.C. Gen. Stat. § 7B-2501(c). Accordingly, we remand the Disposition Order to the trial court for a new disposition hearing, with instructions that it make both oral and written findings demonstrating it considered the requisite five factors. *See In re K.C.* 226 N.C. App. at 462–63, 742 S.E.2d at 246.

#### **IV. Conclusion**

We conclude that the State presented sufficient evidence of sexual purpose, and that the trial court failed to make the requisite statutory findings in the dispositional order. We therefore affirm the trial court’s Adjudication Order and remand the Disposition Order.

AFFIRMED in part and REMANDED in part.

Judges WOOD concurs.

Judge STADING concurs in result only.

Report per Rule 30(e).