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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-624

Filed: 19 May 2020

Moore County, No. 18 JB 26

IN THE MATTER OF: H.B.

Appeal by juvenile from orders entered 21 December 2018 by Judge Stephen A. Bibey in Moore County District Court. Heard in the Court of Appeals 7 January 2020.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for juvenile-appellant.

DIETZ, Judge.

The juvenile-appellant, Hank,¹ appeals his adjudication on a sexual battery charge, arguing that the evidence against him was insufficient as a matter of law, and that the trial court committed prejudicial error by permitting him to testify at

¹ We use a pseudonym to protect the juvenile's identity.

the adjudication hearing without ensuring that he understood his right against self-incrimination.

As explained below, Hank failed to preserve his challenge to the sufficiency of the evidence by timely asserting it in the trial court. But, even if Hank had preserved that argument, the trial court properly would have rejected it as meritless.

We also agree—as the State concedes—that the trial court erred by failing to engage in the required statutory colloquy with Hank concerning his right against self-incrimination. Because the State failed to show that this error was harmless beyond a reasonable doubt, we vacate the trial court’s orders and remand this matter to the trial court.

Facts and Procedural History

In 2018, a group of teenagers were “hanging out” and smoking marijuana at the home of fifteen-year-old Hank. Among these teenagers was fifteen-year-old Amy.² Amy went inside the house to take a nap in Hank’s bedroom. Hank also went to his bedroom and began to play a videogame. Some time later, when Hank and Amy were alone and Amy appeared to be asleep, Hank moved behind Amy, grabbed and squeezed her buttocks, took off his pants, and rubbed his penis against her. Amy testified that she “just laid there . . . because I was scared.”

² We use a pseudonym to protect the identity of the juvenile victim.

The State brought a juvenile delinquency proceeding alleging that Hank committed misdemeanor sexual battery. Hank testified in his own defense during the proceeding. At its conclusion, the trial court entered orders adjudicating Hank delinquent and imposing a Level 2 disposition of twelve months of supervised probation. Hank appealed.

Analysis

I. Sufficiency of the Evidence

Hank first challenges the sufficiency of the evidence against him. Specifically, he contends that there was insufficient evidence that he committed sexual battery by engaging in sexual contact with Amy “[b]y force and against [her] will.” *See* N.C. Gen. Stat. § 14-27.33.

The State argues that this issue is unpreserved because Hank never actually moved to dismiss on this ground and, during closing argument, argued only that the State failed to meet its burden beyond a reasonable doubt, not that the evidence was insufficient as a matter of law. We agree with the State that there is a difference between a legal argument of insufficiency of the evidence and an argument to the fact-finder that the State has not proved its case beyond a reasonable doubt. But even assuming that Hank preserved this argument, it is meritless.

A trial court properly denies a motion to dismiss if there is substantial evidence that the juvenile committed each essential element of the charged offense. *State v.*

Smith, 186 N.C. App. 57, 62, 650 S.E.2d. 29, 33 (2007). “Substantial evidence” is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* When reviewing challenges to the sufficiency of the evidence, this Court “must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences.” *State v. Fritsch*, 351 N.C. 373, 378–79, 526 S.E.2d 451, 455 (2000).

For a person to be found guilty of sexual battery, the State must show that he engaged in sexual contact with another person; for the purpose of sexual arousal, gratification, or abuse; by “force and against the will of the other person.” N.C. Gen. Stat. § 14-27.33(a)(1). The requisite force may be actual, physical force or “constructive force in the form of fear, fright, or coercion” which “is demonstrated by proof of threats or other actions by the defendant which compel the victim’s submission to sexual acts.” *State v. Etheridge*, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987).

Here, the State presented sufficient evidence to survive a motion to dismiss. The State’s evidence established that Hank waited until he was alone with Amy; that he moved next to Amy on the bed, grabbed and squeezed her buttocks with his hand; and rubbed his penis against her buttocks. Amy testified that she was scared by the way Hank grabbed her and, as a result, she chose to remain motionless and endure the assault. Under controlling precedent, this testimony is substantial evidence of the

force element of sexual battery. *Id.* Thus, even if Hank had preserved this argument by timely moving to dismiss in the trial court, the court properly would have rejected that motion as meritless.

II. Advice on Right Against Self-Incrimination

Hank next argues that the trial court violated its statutory duty to ensure that he understood his right against self-incrimination before testifying in his own defense. This issue involves the trial court's compliance with a statutory mandate and we therefore review it *de novo*. *In re E.A.*, __ N.C. App. __, __, 833 S.E.2d 630, 632 (2019).

During a delinquency adjudication hearing, the trial court has an affirmative, statutory duty to protect certain rights of the juvenile "to assure due process of law." N.C. Gen. Stat. § 7B-2405. One of these rights is the privilege against self-incrimination. *Id.* § 7B-2405(4). There is no statutorily mandated procedure for advising juveniles of their rights, but "the statute requires, at the very least, *some* colloquy between the trial court and the juvenile to ensure the juvenile understands his right against self-incrimination before choosing to testify at his adjudication hearing." *In re J.R.V.*, 212 N.C. App. 205, 209, 710 S.E.2d 411, 413 (2011).

The State concedes that the trial court erred in this case by failing to engage in the colloquy required by the statute, and we agree. The transcript of the proceeding

indicates that the trial court did not engage in any colloquy with Hank before permitting him to take the stand:

[DEFENSE COUNSEL]: Your Honor, the defense would call the juvenile, [Hank].

THE COURT: Okay. Young man, if you would.

Nevertheless, the State contends that this error does not require reversal because it was harmless beyond a reasonable doubt. This Court has held that, when a trial court commits this type of error in a juvenile proceeding, “it is still necessary to determine whether the juvenile was prejudiced by the trial court’s error.” *Id.* Under the applicable prejudice standard, it is the State’s burden to show that the error “was harmless beyond a reasonable doubt.” *Id.*

The State has not met that burden here. To be sure, as the State points out, much of Hank’s testimony was favorable to him and not incriminating. But the State also attacked Hank’s credibility quite effectively by confronting him with inconsistencies in his earlier statements. For example, Hank reluctantly admitted under the State’s questioning that he and his friends were smoking marijuana that night, despite previously claiming there were no drugs at the house.

The State used Hank’s “eventual” admissions during closing argument to highlight that Hank was untrustworthy and had lied about details in the case, thus showing that his version of events should be discredited. Had Hank not testified and instead focused his defense on challenging Amy’s ability to accurately recall the

events of that night—for example, by highlighting Amy’s own admitted drug and alcohol use that night—the State would not have been able to focus its own closing argument so heavily on Hank’s untrustworthiness, which stemmed largely from admissions during Hank’s cross-examination.

Were this case subject to ordinary harmless error review, we might conclude that there was no reasonable possibility that this damage to Hank’s credibility affected the outcome. But that is not the standard here. We must ask whether the State carried its burden to show “beyond a reasonable doubt” that the error had no impact. *Id.* We are unable to say beyond a reasonable doubt that the trial court’s error was harmless. That error strengthened the State’s case and provided the State with arguments to challenge Hank’s version of events that the State otherwise could not have made. Accordingly, we hold that the trial court’s error was prejudicial and we therefore vacate the trial court’s orders.

Conclusion

We vacate the trial court’s orders and remand this matter to the trial court.

VACATED AND REMANDED.

Chief Judge McGEE and Judge YOUNG concur.

Report per Rule 30(e).