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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-24

No. COA21-101

Filed 4 January 2022

Mecklenburg County, No. 16CRS203419

STATE OF NORTH CAROLINA

v.

ERIC PIERRE STEWART, Defendant.

Appeal by Defendant from judgment entered 16 May 2019 by Judge George Cooper Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Brenda Rivera, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for the Defendant.

DILLON, Judge.

¶ 1 Defendant, a massage therapist, appeals from a judgment convicting him of sexual battery, stemming from conduct he engaged in with a client.

I. Background

¶ 2 On 17 January 2016, the complaining witness received a massage from Defendant. She testified that, towards the end of the appointment, Defendant asked

her to turn over and lay on her back “so he could work on the top of [her] legs.” As Defendant massaged her left leg, she felt his pinky graze the fabric of her underwear. Thinking it was an accident, she said nothing.

¶ 3 She then felt her underwear pushed to the side and felt three acts of digital penetration from Defendant. Defendant then massaged the victim’s arms; told her, “I wouldn’t want to do anything that would make you uncomfortable”; and told her to get dressed. Shortly after leaving the appointment, she complained to friends about Defendant’s inappropriate touching. Later that evening, she received text messages purportedly from Defendant. She responded to the messages “in order to get a confession” and called the police the next day to report Defendant’s behavior.

¶ 4 Following a jury trial, Defendant was found guilty of sexual battery and not guilty of second-degree forcible sexual offense. Defendant appealed to our Court.

II. Analysis

¶ 5 Defendant argues on appeal that the trial court lacked jurisdiction over the sexual battery charge because the indictment omitted an essential element of the offense, namely that he committed the act “by force.”¹ Indeed, the grand jury returned an indictment alleging “that on or about the 17th day of January, 2016, in Mecklenburg County, [Defendant], did unlawfully and willfully for the purpose of

¹ We grant Defendant’s petition for writ of *certiorari* in order to address this issue.

sexual arousal, engage in sexual contact with another person, [victim], without her consent,” without expressly stating that Defendant acted with “force.”

¶ 6 We review the sufficiency of an indictment *de novo*. *State v. White*, 372 N.C. 248, 250, 827 S.E.2d 80, 82 (2019). “A defendant can challenge the facial validity of an indictment at any time, and a conviction based on an invalid indictment must be vacated.” *Id.* at 250, 827 S.E.2d at 82.

¶ 7 A valid indictment must contain the “essential elements of the offense” to confer subject matter jurisdiction upon the trial court. *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996).

¶ 8 Our General Assembly has defined the crime of sexual battery as an act done “[b]y force and against the will of the other person” for the purpose of sexual arousal, gratification, or abuse. N.C. Gen. Stat. § 14-27.33 (2016); *see also State v. Corbett*, 196 N.C. App. 508, 511, 675 S.E.2d 150, 152 (2009) (citing an earlier version of the sexual battery statute). Our Court has emphasized the importance of the element of “force” in past sexual battery cases. *See, e.g., State v. Viera*, 189 N.C. App. 514, 517, 658 S.E.2d 529, 531 (2008).

¶ 9 Our Court has previously held an indictment to be deficient when it fails to allege the “purpose” element of sexual battery, i.e., that the defendant acted for the purpose of sexual arousal, gratification, or abuse. *State v. Kelso*, 187 N.C. App. 718, 722-23, 654 S.E.2d 28, 31-32 (2007). More recently, in the context of a juvenile

petition, we concluded that “force” was also a necessary element that must be alleged for the crime of sexual battery. *In re J.U.*, ___ N.C. App. ___, ___, 2021-NCCOA-323, ¶ 16 (unpublished).

¶ 10 The plain language of N.C. Gen. Stat. § 14-27.33 requires that an indictment for sexual battery allege *both* that the act was committed by force *and* against the will of the other person, as the statute uses the conjunction “and” between those phrases. Here, the grand jury merely alleged in its indictment that Defendant acted “without her consent,” omitting any allegation that he committed his act “by force.”

¶ 11 Because this indictment failed to allege an essential element, it failed to confer subject matter jurisdiction upon the trial court to try Defendant for sexual battery. Therefore, we are compelled to vacate Defendant’s judgment. *See State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981) (“When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority.”).

JUDGMENT VACATED.

Judges WOOD and GORE concur.

Report per Rule 30(e).