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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-551

Filed 5 December 2023

Forsyth County, Nos. 20 CRS 986-87

STATE OF NORTH CAROLINA

v.

CHRISTOPHER MICHAEL DAVIS, Defendant.

Appeal by Defendant from judgments entered 9 November 2022 by Judge William Anderson Long, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 15 November 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Erin Hukka, for the State.

W. Michael Spivey for defendant-appellant.

MURPHY, Judge.

Common law battery includes not only the direct touching of a victim's body but also indirect contact within the ambit of the victim's person. Here, where Defendant has raised arguments on appeal concerning the insufficiency of the misdemeanor statement of charges and the trial court's denial of his motion to dismiss, both of which depended, in part, on the lack of alleged contact with the

victim's body, both arguments fail. Thus, the trial court did not err.

However, as Defendant has correctly identified a clerical error in one of the judgments being appealed, we remand for correction of the record.

BACKGROUND

Defendant appeals from an assault on a female conviction arising from an incident in which he allegedly attempted to remove the shirt of his then-girlfriend's twelve-year-old daughter, Kenna.¹ At some point in 2018, Kenna expressed a desire to use the jacuzzi in the residence where Defendant, Kenna, and Kenna's mother cohabitated. Defendant agreed and began showing Kenna how to use the jacuzzi. He then asked Kenna to come to where he was sitting and began to lift up her shirt, purportedly to "help" her. Kenna expressed that she did not need help, at which point Defendant left the bathroom; however, he at some point returned to the bathroom while she was bathing.

After appealing from convictions before the district court, Defendant was tried de novo on three counts of assault on a female in superior court. At trial, Defendant moved to dismiss all charges for insufficiency of the evidence, including the one count arising from the incident described above, but the trial court denied the motion. Defendant was convicted on that count, *inter alia*, on 9 November 2022.²

¹ We use a pseudonym to protect the juvenile's identity and for ease of reading.

² Defendant was also convicted on an additional count of assault on a female arising from a separate incident and was found not guilty on a third count arising from third incident; however, he

At some point before reaching its verdict, the jury had asked for clarification as to which count corresponded to which incident, and the trial court clarified that the “bathtub” incident was “20 CRS 986 case 2[.]” The verdict sheet associated with that incident was labeled “20 CRS 986 Count 2[.]”

ANALYSIS

On appeal, Defendant makes three arguments: first, that the trial court lacked subject matter jurisdiction because the statement of charges failed to allege an assault; second, that the trial court erred in denying his motion to dismiss as to the one contested count of assault on a female; and, third, that the trial court clerically erred in its description of the count. We review all three issues de novo. *State v. Herman*, 221 N.C. App. 204, 209 (2012); *State v. Walters*, 276 N.C. App. 267, 270-71 (2021); *State v. Allen*, 249 N.C. App. 376, 379-80 (2016).

First, we address Defendant’s jurisdictional argument. Defendant argues the misdemeanor statement of charges did not allege an assault in describing his offense as follows: “[D]efendant . . . did unlawfully and willfully ASSAULT [KENNA], A MINOR FEMALE, BY ATTEMPTING TO ASSIST HER UNDRESS BEFORE TAKING A BATH. [] DEFENDANT IS A MALE OVER THE AGE OF EIGHTEEN.” Specifically, Defendant argues this allegation did not constitute an assault on a female because under no formulation of assault recognized in North Carolina would

makes no arguments concerning the additional counts except to contend the trial court clerically erred in its labeling of one of the charges.

the lifting of Kenna's shirt qualify.

"The elements of an assault on a female are (1) an assault (2) upon a female person (3) by a male person (4) who is at least eighteen years old." *State v. Wortham*, 318 N.C. 669, 671 (1987) (citing N.C.G.S. § 14-33(b)(2)). In *State v. Floyd*, our Supreme Court detailed the nature of the offense of assault in North Carolina:

Although our statutes criminalize the act of assault, there is no statutory definition of assault in North Carolina, and the crime of assault is governed by common law rules. In *Roberts* we explained that our common law encompasses two rules under which a person may be prosecuted for assault in North Carolina.

First, . . . we noted that assault may be defined as "an overt act or attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." We stated that this definition of assault places emphasis on the intent or state of mind of the person accused.

Second, we described another definition of assault[] . . . known as the "show of violence rule," which places the emphasis on the reasonable apprehension of the person assailed. The "show of violence rule" consists of a show of violence accompanied by reasonable apprehension of immediate bodily harm or injury on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed. Our jurisprudence regarding the show-of-violence rule appears to have evolved from early cases in which a person caused another to flee, leave a place sooner than desired, or otherwise alter course through the threatened use of a weapon.

State v. Floyd, 369 N.C. 329, 335-36 (2016) (marks and citations omitted). Furthermore, “[a] battery always includes an assault,” *In re K.C.*, 226 N.C. App. 452, 458 (2013) (citing *State v. Britt*, 270 N.C. 416, 418 (1967)); therefore, an allegation of assault in a charging document may describe an overt act or attempt to injure with violence, a show of violence, or a battery. *Cf. State v. West*, 146 N.C. App. 741, 743 (2001) (“Assault on a female may be proven by finding either an assault on or a battery of the victim.”).

Here, the allegation in the indictment, at minimum, qualifies as an assault on a female by way of battery. There is no serious contention that the requisite age and sex requirements for Defendant’s behavior to constitute an assault on a female are absent; rather, Defendant argues, *inter alia*, that the behavior described in the indictment did not qualify as assault on a female by way of battery because he was alleged to have touched Kenna’s clothes rather than her body. However, common law battery is not so limited, as North Carolina’s appellate courts have long held that “battery is the unlawful application of force to the person of another by the aggressor himself or by some substance which he puts in motion.” *State v. Thompson*, 27 N.C. App. 576, 577-78 (1975) (emphasis added) (citing *State v. Hefner*, 199 N.C. 778 (1930)); *see also Britt*, 270 N.C. at 418 (“A battery always includes an assault, and is an assault whereby any force is applied, directly or indirectly, to the person of another.”).

Defendant’s next argument—that the charge for attempting to remove Kenna’s

shirt should have been dismissed by the trial court for insufficient evidence—relies on a similar premise. As to assault on a female by way of battery, Defendant argues only that “those who stand in *loco parentis* to a child routinely touch them without the child’s express consent and at times over the child’s objection” such that the conduct was “not sufficient to support a battery.” In support of this position, Defendant cites *McCracken v. Sloan*, in which we held that “[c]onsent is assumed[,]” for purposes of battery, “to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life.” *McCracken v. Sloan*, 40 N.C. App. 214, 217 (1979).

In *McCracken*, the complained-of conduct was the plaintiff “[s]melling smoke from a cigar being smoked by [the defendant] in his own office” in the year 1975. *Id.* at 215, 217. To be exposed to tobacco smoke in another’s office was, by all accounts, an “ordinary contact[] which [was] customary . . . to the common intercourse of life[,]” especially at the time the case was decided. *Id.* at 217. A physically capable tween girl being undressed by an adult man with no legal or blood relation to her is not. The trial court did not err in denying Defendant’s motion to dismiss.

Finally, we turn to Defendant’s allegation of clerical error. Defendant contends that this matter should be remanded for correction of the record because the trial court clerically erred “in entering judgment upon count 2 of 20CRS986 instead of count 3.” This argument relates to the misdemeanor statement of charges that contained the undressing incident, which was labeled “20 CR 000986” and listed the

incident as count 3 of 3. We agree; therefore, “it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth.” *Allen*, 249 N.C. App. at 379.

CONCLUSION

The trial court had subject matter jurisdiction and did not err by denying Defendant’s motion to dismiss for insufficient evidence. However, the trial court made a clerical error in its labeling of the count of 20 CRS 986 under which Defendant was convicted, and we remand for correction of the record.

NO ERROR IN PART; REMANDED FOR CORRECTION
OF CLERICAL ERROR IN PART.

Judges GRIFFIN and STADING concur.

Report per Rule 30(e).