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IN THE
COURT OF APPEALS OF INDIANA

E.S.,
Appellant-Respondent,

v.

State of Indiana,
Appellee-Petitioner.

October 31, 2022

Court of Appeals Case No. 22A-JV-1197

Appeal from the Posey Circuit Court

The Honorable Craig Goedde, Judge

Trial Court Cause No. 65C01-2109-JD-129

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Respondent, E.S., appeals the trial court's delinquency adjudication for sexual battery, a Level 6 felony when committed by an adult, Ind. Code § 35-42-4-8(a)(1)(A).

[2] We reverse.

ISSUE

[3] E.S. presents this court with one issue on appeal, which we restate as: Whether the State presented sufficient evidence beyond a reasonable doubt to sustain his delinquency adjudication for sexual battery.

FACTS AND PROCEDURAL HISTORY

[4] Starting in fifth grade, B.H.'s parents placed her in an afterschool tutoring program at a local church. E.S. attended the same program but was older than B.H. While attending the program, both children would be left unattended in a classroom for periods of time, while supervisors would check in occasionally.

[5] When B.H. was in sixth grade, E.S. began to regularly sit next to her. He would sit "real close." (Exh. p. 11). When B.H. was in seventh grade, E.S. would "put his hands in the holes [of B.H.'s ripped jeans] and [] just leave his hand there." (Exh. p. 12). Also, while B.H. was in seventh grade, E.S. put his hand under her sweatshirt and touched her breasts over and under her bra. This happened a "couple times" and would last approximately ten minutes. (Exh. p. 13). It would "go on until either he got up and left or [B.H.] got up

and left." (Exh. p. 15). E.S. did not restrain B.H. and she was able "to get up and leave[.]" (Exh. p. 16). At "the end of [B.H.'s] sixth grade or seventh," E.S. had to do some coloring for homework and because he is colorblind, he asked B.H. for help. (Exh. p. 16). While "he was asking what the colors were, [] he'd reach his arm around [B.H.]" and held her really close. (Exh. p. 17). "When [B.H.] tried to move away, [E.S.] would [] hold [her] there." (Exh. p. 17).

[6] B.H. eventually told her friend because she was "freaked out over it." (Exh. p. 20). After a case manager of the Department of Child Services visited B.H.'s house, B.H. disclosed the incidents to her parents. B.H. attended counseling and has suffered emotional trauma.

[7] On September 2, 2021, the State filed a delinquency petition, alleging that E.S. committed sexual battery, a Level 6 felony when committed by an adult. On March 31, 2022, a factfinding hearing was conducted at which B.H. was declared unavailable to testify and her deposition was admitted into evidence. At the close of the hearing, the trial court adjudicated E.S. to be a delinquent, finding that he had committed the act of sexual battery. On May 2, 2022, during the dispositional hearing, the trial court ordered E.S. to participate in probation for twenty-four months, with sex offender specific treatment and supervised internet use.

[8] E.S. now appeals. Additional facts will be provided if necessary.

DISCUSSION AND DECISION

[9] E.S. contends that the State failed to present sufficient evidence beyond a reasonable doubt to support the true finding for Level 6 felony sexual battery when committed by an adult. When the State seeks to have a juvenile adjudicated delinquent for committing an act that would be a crime when committed by an adult, the State must prove every element of that crime beyond a reasonable doubt. *Matter of K.Y.*, 175 N.E.3d 820, 824 (Ind. Ct. App. 2021), *trans. denied*. Upon review, the reviewing court applies the same sufficiency standard used in criminal cases. *Id*. at 825. When reviewing sufficiency of the evidence claims with respect to juvenile adjudications, the reviewing court neither reweighs the evidence nor judges the credibility of the witnesses. *Id*. Rather, the reviewing court considers only the evidence most favorable to the judgment and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id*.

[10] To support a true finding for sexual battery as a Level 6 felony, as alleged in the delinquency petition, the State was required to establish beyond a reasonable doubt that E.S. touched B.H. when B.H. was compelled to submit to the touching by force or the imminent threat of force with the intent to arouse or satisfy E.S.'s own sexual desires or the desires of B.H. *See* I.C. § 35-42-4-8(a)(1)(A).

[11] "Although an element of sexual battery is that the victim was compelled to submit to the touching by force or the imminent threat of force, the force need not be physical or violent, but may be implied from the circumstances." *Perry v. State*, 962 N.E.2d 154, 158 (Ind. Ct. App. 2012). "It is the victim's perspective, not the assailant's, from which the presence or absence of forceful compulsion is to be determined in a sexual battery prosecution." *Id*. "This test is subjective and looks to the victim's perception of the circumstances surrounding the incident in question." *Id*. "Therefore, in a sexual battery prosecution, the issue is whether the victim perceived the aggressor's force or imminent threat of force as compelling her compliance." *Id*. "It is also noteworthy that in a sexual battery prosecution, the fear experienced by the victim must precede the touching for the fear to indicate that the victim was compelled to submit to the touching by force or imminent threat of force." *Id*.

[12] Because the delinquency petition did not specify which incident prompted the sexual battery allegation, we will analyze each situation in turn. B.H. testified in her deposition that while she was in seventh grade, E.S. would "mess" with the holes in her ripped jeans. (Exh. p. 12). "He'd put his hands in the holes and [] just leave his hand there." (Exh. p. 12). No testimony or evidence was presented that B.H. was compelled to submit to E.S.'s touches, nor can we reasonably infer compulsion from this very limited evidence before us. *See Matter of K.Y.*, 175 N.E.3d at 825.

[13] During the same time period, E.S. would put his hand under B.H.'s sweatshirt and touch her breasts over and under her bra, which would "go on until either

he got up and left or [B.H.] got up and left." (Exh. p. 15). E.S. did not hold B.H. there and she was able "to get up and leave[.]" (Exh. p. 16). In fact, when asked directly whether she was restrained during this incident, B.H. categorically denied this and clarified that "sometimes he would just get up and leave" and "other times [B.H.] would get up and leave [if her] mom called or [] it was time for me to leave."[1] (Exh. p. 15). E.S. "wasn't restraining [] or holding" her at that time. (Exh. p. 16). *See, e.g., Scott-Gordon v. State*, 579 N.E.2d 602, 604 (Ind. 1991) (where our supreme court reversed a conviction for sexual battery because no force or threat of force was established when the defendant approached the victim from behind, grabbed his buttocks, and stated that he had a "free feel"); *Perry*, 962 N.E.2d at 159 (this court reversed the sexual battery conviction due to lack of force or the threat of force even though defendant invited underage victims to his house, furnished them with alcoholic beverages, and invasively touched them); *Chatham v. State*, 845 N.E.2d 203, 207 (Ind. Ct. App. 2006) (where this court reversed a sexual battery conviction when the defendant came up behind the victim and put his hand between her thighs and crotch as far as he could because no compulsion to submit to the touching was established as the fear experienced by the victim did not precede the touching).

[1] We caution the State not to conflate the facts relating to separate incidents to fit the statutory requirements. The State's analysis alleges that E.S. was restraining B.H. while touching B.H.'s breasts. Although B.H.'s deposition is not an example of clarity, the incidents can be separated, with B.H. testifying to being restrained in a different incident, not while being touched inappropriately under her sweatshirt.

[14] Lastly, even though B.H. is unsure about the time frame, she testified that at "the end of [B.H.'s] sixth grade or seventh," E.S. had some coloring homework and because he is colorblind, he asked B.H. for help. (Exh. p. 16). While "he was asking what the colors were, [] he [] reach[ed] his arm around [B.H.]" and held her really close. (Exh. p. 17). "When [B.H.] tried to move away, [E.S.] would [] hold [her] there." (Exh. p. 17). Although B.H. was compelled to submit to E.S.'s touch, we cannot say that simply putting his arm around B.H, without more, was done with the intent to arouse or satisfy E.S.'s sexual desires." *See* I.C. § 35-42-4-8(a)(1)(A); *Perry*, 962 N.E.2d at 158; *see cf J.M.M v. State*, 779 N.E.2d 602, 604 (Ind. Ct. App. 2002) (where victim was compelled to submit to the touching when defendant told the victim to give him head, grabbed her head with both hands, pulled her head towards his crotch, and started gyrating his hips while the victim yelled at him and tried to move away), *abrogated on other grounds by R.J.G. v. State*, 902 N.E.2d 804 (Ind. 2009).

[15] We do not mean for our holding and reasoning in this case to be construed as approval for E.S.'s actions. While we acknowledge the emotional trauma inflicted on B.H. as a result of these incidents, the State failed to carry its burden of establishing that E.S.'s conduct amounted to sexual battery. Based on the facts presented to us, E.S.'s behavior did not meet the statutory requirements of the sexual battery statute, and accordingly, we must reverse his adjudication for sexual battery.

CONCLUSION

[16] Based on the foregoing, we hold that the State did not present sufficient evidence beyond a reasonable doubt to sustain E.S.'s delinquency adjudication for sexual battery, a Level 6 felony when committed by an adult.

[17] Reversed.

[18] Bailey, J. and Vaidik, J. concur