IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-431

Filed: 1 March 2016

Halifax County, No. 13 JB 66

IN THE MATTER OF: J.L.H.

Appeal by juvenile from orders entered 23 May 2014 by Judge Brenda G. Branch in Halifax County District Court. Heard in the Court of Appeals 5 October 2015.

Attorney General Roy Cooper, by Special Attorney General Stephanie A. Brennan, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender James R. Grant, for juvenile-appellant.

INMAN, Judge.

Juvenile John[1] appeals from adjudication and disposition orders[2] finding that he unlawfully and willfully sent text messages intended to annoy and harass a school counselor and requiring him to serve periods of confinement. John argues that: (1) the trial court erred by allowing the counselor to testify about the content of text messages; (2) the State failed to present sufficient evidence that John sent the text

[1] Pseudonyms are used to protect the juveniles' identities.

[2] "Generally, when a juvenile appeals a final disposition order, he also effectively appeals the underlying adjudication order." *In re A.J. M.-B.*, 212 N.C. App. 586, 588, 713 S.E.2d 104, 107 (2011).

messages at issue; (3) the trial court erred by failing to consider the factors set forth in N.C. Gen. Stat. § 7B-2501(c) prior to entering a Level 2 Disposition; and (4) the trial court impermissibly delegated its authority to another person or entity to confine John to a group home. For the following reasons, we affirm the adjudication order and vacate and remand the disposition order.

Factual and Procedural History

The evidence presented by the State tended to show the following: On 27 February 2014, John Williams ("Mr. Williams"), districtwide behavior specialist with Halifax County Schools, met with 15-year-old John and his older brother, Robin, at their school. John and Robin "had some rude objections to [Mr. Williams'] presence being there." Mr. Williams left the school and later that morning, started receiving text messages from a number he did not recognize. Mr. Williams testified to the content of the texts, stating:

> The first text I received was at 10:35, and they said, you FB, you fat B-I-T-C-H, but they spelled it B-A-T-C-H, which is a common lingo with the kids. I said, excuse me, are you sure you're talking to the correct person, because I felt like you might have made a mistake. And they texted back at 10:59, said, oh, hell yeah, you FB, you fat B. I said, okay, whoever you are, you must be afraid because you are hiding behind a phone. Please, stop sending me texts. And then I got a text at 11:18, that said, I love you, man, from the same number. And so I said, again, stop texting me. And then I got another text at 11:38, saying - I'm trying to keep my mouth clean—F-U-C-K you fat F-U-C-K-E-R, I hate your fat ass. And then I said, okay, now I know you must be afraid of me. Identify yourself so I can be on the

> same page. And they texted back, ain't nobody afraid of you, you fat A, at 11:46.

Mr. Williams returned to the school because he "kind of felt that it was possible [the texts were] coming from [John and Robin]." Mr. Williams and Officer Jones, the school's resource officer, approached the brothers to ask about the texts, but "neither one of them would admit it." Officer Jones dialed the phone number listed on the text messages. John immediately turned off his phone. Officer Jones inquired why John shut down the phone and asked to see the phone. John admitted that the text messages had been sent from his phone, but stated that Robin had sent the texts. Mr. Williams confirmed that the text messages at issue had come from John's phone.[3]

On 5 March 2014, a petition was filed in Halifax County alleging that John committed a delinquent act by "electronically communicat[ing] with [Mr.] Williams, Behavior Specialist with Halifax County Schools, repeatedly for the purpose of annoying and harassing [Mr.] Williams." Specifically, John was accused of cyberstalking in violation of N.C. Gen. Stat. § 14-196.3(b)(2).

On 15 May 2014, the trial court conducted an adjudication hearing. The State presented the testimony of one witness, Mr. Williams. John's attorney did not cross-examine Mr. Williams and did not present any evidence. Following Mr. Williams' testimony, the trial court adjudicated John delinquent, finding that John "did

[3] At the hearing, counsel for the State asked Mr. Williams whether the phone John was attempting to shut down was "the same phone that was sending [Mr. Williams] those messages[.]" Mr. Williams responded: "Yes. We confirmed that. It came from [John's] phone."

unlawfully and willfully electronically communicate with [Mr.] Williams . . . repeatedly for the purpose of annoying and harassing [Mr.] Williams." The trial court also found that "[t]his offense is in violation of G.S. 14-196.3(b)(2)" and was a "Class 2 misdemeanor."

On the same day, the trial court entered a disposition order. In the order, the trial court found that John's delinquency level was "medium." The order also specified that the trial court had received, considered, and incorporated the contents of the predisposition report, risk assessment, and needs assessment from the Department of Juvenile Justice ("DJJ"). The order prohibited John from possessing a cell phone at school and required him to be confined in a group home for fourteen separate 24-hour periods.

John gave oral notice of appeal, and the trial court stayed its disposition order pending appeal.

Analysis

A. Testimony About Content of Text Messages

John argues the trial court plainly erred by allowing Mr. Williams to testify about the content of text messages he received when the State did not introduce those text messages as required by the best evidence rule.

John's counsel failed to object to Mr. Williams' testimony at trial. Our review is limited to plain error.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4). "Plain error only applies when the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Howard*, 215 N.C. App. 318, 322, 715 S.E.2d 573, 576 (2011) (internal quotation marks and citations omitted). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

Under the North Carolina Rules of Evidence, "every writing sought to be admitted must be properly authenticated," *see* N.C. Gen. Stat. § 8C-1, Rule 901 (2013), and "must satisfy the requirements of the 'best evidence rule'" or one of its exceptions. *See* N.C. Gen. Stat. § 8C-1, Rules 1002-1003; *FCX, Inc. v. Caudill*, 85 N.C. App. 272, 276, 354 S.E.2d 767, 771 (1987). The "best evidence rule" provided in N.C. Gen. Stat. § 8C-1, Rule 1002, states that "[t]o prove the content of a writing . . . the original writing . . . is required, except as otherwise provided in these rules or by statute." Electronic writings such as text messages are "writings" within the meaning of the original writing requirement. N.C. Gen. Stat. § 8C-1, 1001 (defining "writing" to include "letters, words, sounds, or numbers, or their equivalent, set down

by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation").

Here, Mr. Williams testified about the content of the text messages he received; however, as John notes, the "transcript provides no indication as to whether Mr. Williams was testifying from memory, referencing notes, or reading printouts of the texts or the texts themselves off his phone." John relies on *State v. Lukowitsch,* No. COA13-133, 2013 WL 5628898, at *2 (October 15, 2013) (unpublished), for his contention that the best evidence rule was violated because the writing itself was not introduced. In *Lukowitch*, the trial court, upon the State's objection, excluded a copy of text messages that the victim sent the defendant's wife to show the victim's credibility and provide evidence of the victim's animosity toward the defendant. *Id.* at *1–2. This Court held that "the trial court properly excluded the content of the text messages because defendant failed to present any evidence to authenticate the text messages as having been sent by [the victim]." *Id.* at *3.

This case is distinguishable from *Lukowitsch* because here, the State's counsel did not attempt to introduce a copy of the text messages, and John's counsel did not object to Mr. Williams' testimony. Notwithstanding the distinction, Mr. Williams' testimony addressed the content of the text messages at issue, and the State's failure to introduce a properly authenticated text message or similar physical manifestation violated the best evidence rule. N.C. Gen. Stat. § 8C-1, Rule 1001(3) ("[A]ny printout

or other output readable by sight, shown to reflect the data accurately, is an 'original' [under the best evidence rule].").

The State contends that "[e]ven assuming that the failure to offer the text messages themselves violated the best evidence rule, such a violation did not rise to the level of plain error." *See Howard*, 215 N.C. App. at 327, 715 S.E.2d at 579–80 ("Had defendant objected to the evidence now challenged the State could have properly authenticated it and either provided the originals of the social security card and receipts to comply with the 'best evidence rule' or explained why admission of duplicates was appropriate. . . . [W]e decline to conclude the omissions discussed above amount to plain error."); *see also State v. Jones*, 176 N.C. App. 678, 684, 627 S.E.2d 265, 269 (2006) ("Any error in the introduction of the videotape 'into evidence without adequate foundation is not the type of exceptional case where we can say that the claimed error is so fundamental that justice could not have been done.'") (quoting *State v. Cummings*, 352 N.C. 600, 620–21, 536 S.E.2d 36, 51–52 (2000)); *see also State v. Rourke*, 143 N.C. App. 672, 676–77, 548 S.E.2d 188, 191–92 (2001) (holding that where the defendant did not request an original tape at trial and did not present any support for his contention that a clicking noise on the tape admitted into evidence was not an accurate copy of noise from the original recording, the alleged violation of the best evidence rule did not constitute plain error).

John argues that *Howard*, *Jones*, and *Rourke* are inapposite because "[a]ll three cases involved the State's introduction of documentary evidence which did not provoke a contemporaneous objection." John explains that "[t]his Court concluded that the defendants in those cases could not demonstrate plain error because the record clearly indicated that the State could have supplied the foundational prerequisites of the 'best evidence' if prompted." However, John has not met his burden of showing that the error even amounted to plain error. *See Jordan*, 333 N.C. at 440, 426 S.E.2d at 697 ("[U]nder the plain error rule, defendant must convince this Court . . . absent the error, the jury probably would have reached a different result."). In *State v. Jones*, this Court held that "[s]ince defendant has made no showing that the foundational prerequisites, upon objection, could not have been supplied . . . we decline to conclude the omissions discussed above amount to plain error." 176 N.C. App. at 684, 627 S.E.2d at 269. Here, John has not made a showing that upon objection, the State could not have supplied the foundational prerequisites, but merely argues that "the record was not clear that [the State] could have produced an original or admissible duplicate of the texts." Therefore, without further evidence regarding the State's inability to properly authenticate the text messages, we do not hold that the admission of Mr. Williams' testimony amounted to plain error.

B. Sufficient Evidence that John Sent Text Messages

John contends his adjudication must be reversed because the State failed to present sufficient evidence that he sent any text messages to Mr. Williams.

As a general rule, "a defendant [in a criminal case] may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action . . . is made at [the hearing]." N.C. R. App. P. 10(a)(3). John did not properly preserve his sufficiency argument at trial, but requests that this Court invoke Rule 2 of the Rules of Appellate Procedure to suspend the rules and review this issue. Appellate Rule 2 states:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

John cites *In re K.C.* for the contention that "[w]hen this Court firmly concludes, as it has here, that the evidence is insufficient to sustain a criminal conviction . . . it will not hesitate to reverse the conviction, *sua sponte*, in order to prevent manifest injustice to a party." 226 N.C. App. 452, 455, 742 S.E.2d 239, 242 (2013). However, this case is inapposite because, after review of the record, we hold that the evidence in this case was sufficient to sustain the adjudication. *See State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) ("[T]he exercise of Rule 2 was intended to be limited to occasions in which a fundamental purpose of the appellate rules is at stake, which will necessarily be rare occasions.") (citations and internal

quotation marks omitted). Therefore, in the exercise of our discretion, we decline to invoke Rule 2 to review John's unpreserved sufficiency argument.

C. Dispositional Factors Listed in N.C. Gen. Stat. § 7B-2501(c)

John contends that the trial court erred by failing to make any written or oral findings of fact in entering his Level 2 Disposition to demonstrate that it had considered the factors listed in N.C. Gen. Stat. § 7B-2501(c). N.C. Gen. Stat. § 7B-2501(c) (2013) provides that the trial court

> shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile, based upon:
>
> (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.

This Court has held that "the trial court is required 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." *In re V.M.*, 211 N.C. App. 389, 391–92, 712 S.E.2d 213, 215 (2011).

The State contends that "[t]he findings in the trial court's disposition order and its indication in open court that it had read and adopted DJJ's recommendations based on the contents of the predisposition report are sufficient to demonstrate that the court considered the requisite factors in section 7B-2501(c) prior to entering a [l]evel 2 disposition." We disagree.

"The dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-2512(a) (2013). Similar to the disposition order in this case, in *In re V.M.,* "[t]he trial court . . . checked boxes indicating that it had received, considered, and incorporated by reference the predisposition report, risk assessment, and needs assessment." 211 N.C. App. at 390, 712 S.E.2d at 215. This Court further explained that:

> The trial court did not attach any additional findings of fact to its order demonstrating that it considered the seriousness the offense, 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, or the available and appropriate resources. As such, we hold the trial court's written order contains insufficient findings to allow this Court to determine whether it properly considered all of the factors required by N.C.G.S. § 7B–2501(c). For that reason, we must reverse the trial court's dispositional order and remand this matter for a new dispositional hearing.

Id. at 392, 712 S.E.2d at 216.

Here, in the pre-printed fields of the disposition order, the trial court found that John was adjudicated delinquent for cyberstalking and this offense was a class

2 misdemeanor; however, the trial court did not write in the space provided any additional findings addressing the section 7B-2501(c) factors. Nor did the trial court's indication in open court that it had read and adopted DJJ's recommendations based on the reports incorporated by reference satisfy the requirement that court consider the requisite factors in section 7B-2501(c). Because we hold the disposition order "contains insufficient findings to allow this Court to determine whether it properly considered all of the factors required by N.C.G.S. § 7B–2501(c)," we vacate the order and remand this matter for a new dispositional hearing. *In re V.M.*, 211 N.C. App. at 392, 712 S.E.2d at 216.

D. Delegation of Trial Court's Authority

John contends that the trial court's disposition order impermissibly delegated to the court counselor the trial court's authority to place John in a group home. A trial court's level 2 disposition order may provide "for any of the dispositional alternatives contained in subdivisions (1) through (23) of [N.C. Gen. Stat. § 7B-2506]." N.C. Gen. Stat. § 7B-2508(d) (2013). In the disposition order, under the section entitled "Intermediate Dispositions," the trial court checked the box "Intermittent Confinement," a dispositional alternative provided in N.C. Gen. Stat. § 7B-2506(20). Pursuant to the language of the statute, the order provided that John shall "be placed in secure custody for a period of fourteen (24) hour periods at the discretion of this court. That he spend five (24) hour periods in secure custody beginning today." The

form disposition order included boxes to check corresponding to other dispositional alternatives available under N.C. Gen. Stat. § 7B-2506, which the trial court could impose in addition to the intermittent confinement. However, the trial court did not check any of the other boxes in that section. At the end of the written order, the trial court checked the box entitled "Other" and stated that "said juvenile be placed at the multipurpose group home in Winton, NC[4] for a period not to exceed 240 days if recommended by the court counselor."

John contends that the trial court impermissibly delegated the trial court's authority to place John in a group home and accordingly, that portion of the disposition order must be vacated. We agree.

In *In re Hartsock*, this Court held that the trial court improperly delegated its authority "to [o]rder the juvenile to cooperate with placement in a residential treatment facility[,]" where the trial court had ordered the juvenile to "cooperate with placement in a residential treatment facility [i]f deemed necessary by MAJORS counselor or Juvenile Court Counselor[]") 158 N.C. App. 287, 291–92, 580 S.E.2d 395, 398–99 (2003). This Court explained:

> N.C. Gen. Stat. § 7B–2506 does not state, or even indicate, that the court may delegate its discretion. The statute does not contemplate the court vesting its discretion in another person or entity, therefore, the court, and the court alone,

[4] It is unclear from the record whether the "multipurpose group home in Winton" was a multipurpose group home operated by a State agency as contemplated by § 7B-2506(21) or a private group home as described in § 7B-2506(14).

> must determine which dispositional alternatives to utilize with each delinquent juvenile.

Id. at 292, 580 S.E.2d at 399.

Here, the trial court's order that John be placed in a multipurpose group home in Winton for a period "not to exceed 240 days if recommended by the court counselor" impermissibly delegated its authority to place John in a group home and determine the duration of the placement. *But see In re M.A.B.*, 170 N.C. App. 192, 194–95, 611 S.E.2d 886, 888 (2005) (the trial court's order directing the juvenile to "cooperate and participate in a residential treatment program as directed by court counselor or mental health agency" was not an improper delegation of authority because the decision to place the juvenile in the program was made by the trial court, but the specifics of the day-to-day program were to be directed by the Juvenile Court Counselor or Mental Health Agency"). The trial court, and not the court counselor, bears the authority and responsibility for determining the nature and term of a juvenile's placement. Accordingly, we vacate and remand the disposition order.

Conclusion

For the foregoing reasons, we affirm the trial court's adjudication order and vacate and remand the disposition order.

AFFIRMED IN PART, VACATED AND REMANDED IN PART

Chief Judge McGEE and Judge ELMORE concur.

Report per Rule 30(e).