Third District Court of Appeal

State of Florida

Opinion filed November 27, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-45
Lower Tribunal No. 17-2286

Y.N., a Juvenile,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Maria De Jesus Santovenia, Judge.

Carlos J. Martinez, Public Defender, and James A. Odell, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and Linda S. Katz, Assistant Attorney General, for appellee.

Before EMAS, C.J., and FERNANDEZ, and LOGUE, JJ.

FERNANDEZ, J.

The defendant, Y.N., a juvenile, appeals the trial court's judgment of delinquency and probationary sentence. Because the State did not carry its burden of establishing harmless error beyond a reasonable doubt, we reverse and remand for a new trial.

Y.N. was arrested for possession of a marijuana cigarette. Only Y.N. and the arresting officer testified at trial. The arresting officer's direct testimony primarily focused on the officer's observation of Y.N. and the subsequent interaction between the officer and the juvenile. Y.N. testified on direct examination and directly contradicted the officer's testimony regarding the three relevant questions in the case: 1) whether Y.N. had the marijuana cigarette in her possession; 2) whether Y.N. dropped the marijuana cigarette upon the officer's approach; 3) and whether Y.N. admitted to the officer that she was smoking marijuana just prior to the officer's arrival. To each question the officer answered in the affirmative, and Y.N. answered in the negative.

The State's cross-examination of Y.N. focused almost entirely on eliciting from Y.N. that she believed the officer was lying during testimony. The State asked Y.N. on cross-examination if the officer, who testified first, was "not telling the truth." Defense counsel objected on the basis that the question called for improper comment on the credibility of another witness, and the trial court overruled the objection. The following exchange occurred:

Q: You were sitting there when the officer testified, correct?
A: Yes
Q: You hear the officer testify to the fact that he watched a marijuana cigarette go from your right hand to the ground, correct?
A: Yes
Q: Which you are testifying that you never had marijuana in your right hand?
A: Yes
Q: Therefore, you are saying that what the officer said on the stand is not the truth, is that correct?

Defense counsel objected that the question invaded the fact finder's role. The trial court overruled the objection. Y.N. answered, "Yes," in response to the State's question of whether the officer's testimony was not the truth. Y.N. was then adjudicated delinquent and sentenced to a term of probation. This appeal followed.

This Court reviews a trial court's rulings on the scope of cross-examination for a clear abuse of discretion. De la Portilla v. State, 877 So. 2d 871, 874 (Fla. 3d DCA 2004).

In the instant case, the trial court admitted improper evidence when it overruled defense counsel's objection to the State's questions on cross-examination of Y.N. in regards to the truthfulness of the officer's testimony. Joseph v. State, 868 So. 2d 5, 8 (Fla. 4th DCA 2004) ("[I]t is error for one witness to give an opinion about the credibility of another witness."). The State argues that its cross-examination of Y.N. was proper because the subject case was a bench trial and not a jury trial. Relying on Petion v. State, 48 So. 3d 726, 729 (Fla. 2010), the State contends that any error made in the instant case would be "harmless because the trial

court was presumed to have disregarded any inadmissible evidence." We disagree, as the Supreme Court in Petion further states:

> When improper evidence is admitted over objection in this context, the trial court must make an express statement on the record that the erroneously admitted evidence did not contribute to the final determination. Otherwise, the appellate court cannot presume the trial court disregarded evidence that was specifically admitted as proper.

Id. at 737-38. Therefore, as the trial court admitted improper evidence and did not state on the record that it did not rely on the erroneously admitted evidence in making its determination, this Court cannot presume that such evidence was disregarded. See also E.M. v. State, 61 So. 3d 1255, 1257 (Fla. 3d DCA 2011) (finding that no reasonable possibility existed that an officer-witness's statements had no effect on the final judgment where the lower court admitted improper evidence and did not state on the record that it was not relying on the erroneously admitted evidence); McKinney v. State, 579 So. 2d 393, 394 (Fla. 3d DCA 1991) (holding that because the case turned on the competing credibility of witnesses, the matter could not be deemed harmless beyond a reasonable doubt).

The State has not met its burden of establishing that the improperly admitted evidence was not used in the trial court's determination. We cannot conclude that Y.N.'s statement was inconsequential or that the error was harmless beyond a reasonable doubt. Therefore, we reverse the adjudication rendered below and remand for a new trial.

Reversed and remanded.