# Third District Court of Appeal

**State of Florida**

Opinion filed January 2, 2020.
Not final until disposition of timely filed motion for rehearing.

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No. 3D18-2566
Lower Tribunal No. 18-826

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**K.R., a Juvenile,**
Appellant,

vs.

**The State of Florida,**
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Orlando Prescott, Judge.

Carlos J. Martinez, Public Defender and Deborah Prager, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and Kayla Heather McNab, Assistant Attorney General, for appellee.

Before FERNANDEZ, HENDON, and MILLER, JJ.

FERNANDEZ, J.

K.R., the juvenile, appeals the trial court's order withholding adjudication of delinquency and placing him on probation. We reverse as to the first issue K.R. raises because he is correct regarding the charge for carrying a concealed weapon. However, we affirm on K.R.'s second issue on appeal because the trial court did not abuse its discretion in recalling a State witness.

The State charged K.R. with violating section 790.01(1), Florida Statutes (2017) by carrying a concealed weapon and violating section 790.115(2), Florida Statutes (2017), by possessing a weapon on school property. The weapon alleged in each count was "a knife."

At the adjudicatory hearing, the State called two witnesses: Officer Fonseca, a Miami-Dade Schools Resource Officer, and Clinton Bales, the Assistant Principal at Gateway Environmental K-8 Center, where K.R. was a student. On November 7, 2017, the day of the incident, Bales met with K.R., who was thirteen-years-old at the time, in Bales' office. Bales searched K.R.'s backpack, and beneath K.R.'s folders, notebooks, and trash, Bales found a steak knife with a four-and-a-half-inch blade and a black handle.

When Bales began describing the events that led K.R. to his office that day, the defense objected to hearsay, and the following sidebar discussion occurred:

> STATE: For this line of questioning I'm going to be asking [Bales] how he got involved in the case which is present sense impression what led to the search which is going to be the statements made by other students.

> DEFENSE: Judge, at this time there's no relevance to that. I understand that that would be relevant if Defense filed a motion to suppress as to why he searched the bag, but Defense did not file a motion to suppress, so how or why he searched the bag and all of that is not relevant to the account itself. I know the State would like to have a story but in this case it's prejudicial, in fact it much more substantially outweighs the probative value. This doesn't go to proving any element of the [indiscernible words].
>
> JUDGE: So you have no problem with them saying who brought the child down and searched the bag?
>
> DEFENSE: No, we did not file a motion for that.
>
> JUDGE: Okay…. Since reasonable suspicion or probable cause is not being contested by the Respondent, please proceed.

The defense claimed that K.R. had gone fishing with his father, so he had a knife in his backpack. Bales did not notice fishing bait, other fishing-related items, or an odor of fish coming K.R.'s backpack. The State rested after it called Bales and Officer Fonseca. K.R. then moved for judgment of dismissal, arguing that the State failed to prove the knife qualified as a concealed weapon for the unlicensed carrying count and that the State failed to prove K.R. possessed the knife on school property. At the end of K.R.'s argument, the trial court *sua sponte* reopened the State's case and called Bales back to the stand, stating:

> JUDGE: The argument concerning about it being on school property, the State bifurcated its testimony of Mr. Bales because probable cause and reasonable suspicion were not an issue so they started the testimony from bringing him to the office.
> I'm going to let them call Mr. Bales to determine where they got him from, okay? Call your witness. Because it was done through

> concession, so all the other information that Mr. Bales gleaned during this matter were not brought before this Court, and it was at the Court's insistence that we just jump over it based upon the concession made by the Defense. But if it needs to be established the State will have to establish it.
>
> (Mr. Bales then entered the courtroom).
>
> JUDGE: You understand what I'm asking you to do?
>
> STATE: Yes, Your Honor.

The trial court overruled the defense's objection on this point. The State then asked Bale a line of questions that established that K.R. was on Gateway school property in a classroom on the morning of November 7, 2017. After Bales finished testifying, the trial court found that the State established a prima facie case as to both counts. The trial court, thus, denied K.R.'s motions for judgment of dismissal as to each count.

The defense then presented its case, calling K.R.'s father, his mother, and K.R. to the stand. The three witnesses testified that K.R. used the knife to cut bait when he and his father went fishing on Sunday, November 5, 2017, two days before the incident at K.R.'s school. K.R. testified that he always took his backpack with him wherever he went. He further testified that on Tuesday, November 7, 2017, when he went to school, he forgot to take out the knife he had used while fishing with his father, so it was still in his backpack when he went to school that day.

Thereafter, the trial court made the following findings:

> JUDGE: It's four-and-a-half inches. It's not a blunt edge 'typical' butter knife, household knife. This is not that. Four-and-a-half inches, pointed end, sharp blade. So it is a weapon. It's not three-and-a-half inches, it's not a pocketknife; this is clearly not a pocketknife. I find it to be a weapon.

The trial court found that the State proved both charges beyond a reasonable doubt. It withheld adjudication and sentenced K.R. to probation with early termination.

On appeal, K.R. raises two issues. First, he argues that during his adjudicatory hearing, the trial court erred by applying the incorrect standard to determine whether the knife constituted a concealed weapon. Second, K.R. contends that the trial court erred by becoming an advocate for the State when it *sua sponte* reopened the State's case and allowed it to recall Bales to elicit additional evidence. We agree with K.R. as to his first issue but disagree with him on the second.

K.R. was charged with carrying a concealed weapon under section 790.01(1), Florida Statutes (2017). According to section 790.001(13), Florida Statutes (2017), a "weapon" is "any dirk, knife, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon", but not "a common pocketknife, plastic knife, or blunt-bladed table knife." Unlike in section 790.001(13), a knife is not listed in section 790.001(3)(a), which lists "any dirk, metallic knuckles, billie, tear gas gun, chemical weapon or device, or other deadly weapon" as a "concealed weapon." The reasoning for this distinction was outlined by the Fourth District Court of Appeal in Nystrom v. State, 777 So. 2d 1013, 1015

fn.4 (Fla. 2d DCA 2000), when the court wrote that "[p]eople carry knives in handbags or on their persons for many lawful reasons. A coworker bringing a cake knife to work to celebrate a birthday or a homeowner carrying a knife in a back pocket while doing yardwork should not be concerned that he or she may be treated like a criminal."

In order to convict a person of carrying a concealed weapon without a license, the State must prove the item falls under the definition of "concealed weapon" in section 790.001(3)(a). The jury instruction in Florida Standard Jury Instruction (Crim.) 10.1 for unlicensed carrying provides the definition in subsection (3)(a) and does not include the broader definition of "weapon" contained in subsection (13). Thus, according to McNeally v. State, 884 So. 2d 494, 495 (Fla. 5th DCA 2004), a knife must fall within "the other deadly weapon" category to be considered a concealed weapon. Furthermore, an object can be considered a deadly weapon if: (1) its "sole modern use… is to cause great bodily harm," see Robinson v. State, 547 So. 2d 321, 323 (Fla. 5th DCA 1989); or (2) the accused used or threatened to use the object in a such a way that would cause death or great bodily harm. Holley v. State, 877 So. 2d 893, 896-97 (Fla. 1st DCA 2004).

In the case before us, because the knife is not one of the listed items in section 790.001(3)(a), the trial court erred in determining that the knife was a concealed weapon. Here, K.R.'s attorney explained during his argument for judgment of

dismissal that because a knife was not listed in subsection (3)(a), the trial court had to decide whether it fell under the definition of "deadly weapon." However, the trial court instead made a finding that the knife measured four-and-a-half inches and did not fall within the exceptions listed in section 790.001(13). The trial court then determined the knife was a weapon for purposes of the first charge against K.R., unlicensed carrying of a concealed weapon. If the trial court had applied the correct analysis K.R.'s attorney proposed, the trial court would have found that the knife was not a concealed weapon because knives are not listed in the definition, and the State did not proffer any evidence that K.R. used or threatened to use the knife to inflict death or great bodily harm. Thus, as to K.R.'s first issue on appeal, we reverse the trial court's withhold of adjudication of delinquency for the unlicensed carrying of a concealed weapon.

Turning to K.R.'s second issue on appeal, the trial court did not abuse its discretion when it *sua sponte* allowed the State to recall Bales. It is within the trial court's discretion to call a witness. Endress v. State, 462 So. 2d 872, 872 (Fla. 2d DCA 1985). In addition, a trial court's examination of a witness becomes an abuse of discretion "only when it appears that the judge departs from neutrality or expresses bias or prejudice in his comments in the presence of the jury." Poe v. State, 746 So. 2d 1211, 1214 (Fla. 5th DCA 1999).

K.R.'s attorney prevented the admission of any evidence regarding where the incident took place when he objected to the State addressing the issue because defense counsel had told the trial court that the defense was not challenging the search of K.R.'s backpack. As such, it is disingenuous for K.R. to now argue that there was no evidence of the investigation that was conducted because, as the State correctly contends, K.R. received the benefit of this issue not being explored as a result of the parties stipulating that the officers had probable cause to search K.R.'s backpack. The following discussion that occurred when the State questioned Bales supports the State's position:

> Q: I'd like to direct your attention to November 7, 2017. Were you working that day?
>
> A: Yes, ma'am.
>
> Q: And what were you doing that day?
>
> A: I was in my office at the time, just doing some paperwork, going through some emails. I was asked at that time to go over to –
>
> DEFENSE: Objection, hearsay.
>
> STATE: Your Honor, may we go sidebar?
>
> THE COURT: Come on.
>
> (Whereupon, the following sidebar takes place.)
>
> STATE: For this line of questioning I'm going to be asking him how he got involved in the case which is present sense impression what led to the search which is going to be statements made by other students.

DEFENSE: Judge, at this time there's no relevance to that. I understand that that would be relevant if Defense filed a motion to suppress as to why he searched the bag, but Defense did not file a motion to suppress, so how or why he searched the bag and all of that is not relevant to the account itself.
I know the State would like to have a story but in this case it's prejudicial, in fact it much more substantially outweighs the probative value. This doesn't go to proving any element of the (indiscernible words)

THE COURT: So you have no problem with them saying who brought the child down and searched the bag?

DEFENSE: No, we did not file a motion for that.

THE COURT: Okay.

(Whereupon, the sidebar concludes.)

THE COURT: Since reasonable suspicion or probable cause is not being contested by the Respondent, please proceed.

Thereafter, when defense counsel was arguing his first motion for judgment of dismissal, the following discussion took place:

DEFENSE: The other issue is that they did not establish that Mr. R. was carrying the knife or that he was in possession of the knife on school grounds. They did ask Mr. Bales where did the incident happen but they did not specify where exactly which incident, the call that he received, this-that, there's nothing in the record that determines that Mr. R., K., had possession of the weapon on school grounds. So the State failed to provide a prima facie case of guilt as to that.

…

THE COURT: The argument concerning about it being on school property, the State bifurcated its testimony of Mr. Bales because probable cause and reasonable suspicion were not an issue so they started the testimony from bringing him to the office.

> I'm going to let them call Mr. Bales to determine where they got him from, okay? Call your witness. Because it was done through a concession, so all the other information that Mr. Bales gleaned during this matter were not brought before this Court, and it was at the Court's insistence that we just jump over to it based upon the concession made by the Defense. But if it needs to be established the State will have to establish it.
>
> (Whereupon, Mr. Bales enters the courtroom.)
>
> THE COURT: You understand what I'm asking you to do?
>
> STATE: Yes, Your Honor.

Thus, the trial court did not depart from its role as a neutral arbiter when it revised its previous ruling granting K.R.'s objection. Hawker v. State, 951 So. 2d 945, 950 (Fla. 4th DCA 2007). As the transcript reveals, the State began to question Bales about where the incident took place, and K.R.'s counsel objected, claiming the subject matter of the questioning was irrelevant. The trial court granted K.R.'s counsel's objection, and the State was not permitted to continue with that questioning. We thus agree with the State that once K.R.'s counsel made an issue out of the location of the incident in his motion for judgment of dismissal, the trial court properly exercised her discretion to revisit the objection and permit the State to continue its previous line of questioning.

In State v. S.R., 1 So. 3d 221 (Fla. 3d DCA 2008), the defendant was a middle-school student who brought a firearm to school. Id. at 222. Another student at the school told the security guard on duty on the day of the incident that the defendant

had a firearm. The security guard told the school's resource officer, who then patted-down the defendant. Id. The resources officer found a firearm in one of the defendant's pockets. Id.

Defendant moved to suppress the firearm as the fruit of an illegal search and seizure. Id. During the suppression hearing, the only witnesses were the school resource officer and the defendant. The security guard was sworn in and available outside the courtroom but did not testify. At the close of the evidence, the trial court comment that the tip might have been stale. The State thus asked to bring in the security guard and question him as a witness. Id. The judge denied the request and granted the defendant's motion to suppress because there were insufficient facts in the record to prove the timelines of the tip. Id. On appeal, this Court held that the trial court abused its discretion in not allowing the State to reopen its case in to call the security guard as a witness to establish the timeliness of a tip. This Court stated:

> When the Judge perceives that in consequence of the inadvertance [sic] of counsel or other cause, the rigid enforcement of the rules would defeat the great object for which they were established, it is his [or her] duty so to relax them (when it can be done without injustice to any) as to make them subserve their true purpose, which is to aid the court and the parties before it in determining and adjusting their respective rights.

Id.

In K.R.'s case, the trial court directed the State to limit its questioning to the issue of where the incident occurred because K.R.'s counsel no longer contended that this element was not at issue. Defense counsel had originally prevented

testimony on the issue of where the incident occurred because the defense was not contesting probable cause and reasonable suspicion for the search of K.R.'s backpack. Thus, the State initially was not allowed to delve into the issue of where the incident took place. Moreover, K.R. was able to cross-examine Bales without limitation. Thus, the trial court was thus acting within its role as the finder of fact in this adjudicatory hearing and did not abuse its discretion in allowing the State to recall Bales.

In sum, the trial court erred in denying K.R.'s motion for judgment of dismissal as to count I. We thus reverse the trial court's order withholding adjudication of delinquency and placing K.R. on probation, in part, and remand the case to the trial court with directions that K.R. be discharged on the count of unlicensed carrying of a concealed weapon. Because the trial court did not abuse its discretion regarding the second issue on appeal, we affirm the trial court's order with respect to count II, possessing a weapon on school property. On remand, the trial court is directed to grant K.R. a new disposition hearing solely on the possessing a weapon on school property charge.

Reversed in part; affirmed in part; remanded with directions.