NO. COA01-313

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

IN THE MATTER OF:

B.A. New Hanover County
No. 00-J-110

Juvenile-Appellant.

Appeal by respondent from adjudication and disposition orders entered 31 August 2000 and 3 October 2000 by Judge John W. Smith in New Hanover County District Court. Heard in the Court of Appeals 9 January 2002.

Smith, Smith & Harjo, by Jennifer Harjo, for juvenile-respondent.

Attorney General Roy Cooper, by Assistant Attorney General Belinda A. Smith, for the State.

BIGGS, Judge.

B. A. (respondent), a fourteen year old girl, appeals her adjudication of delinquency for one felony first-degree sex offense, and two misdemeanor indecent liberties between children. We affirm in part, and reverse and vacate in part.

The relevant facts are as follows: In March, 2000, following an investigation by the New Hanover County Sheriff's Department, two juvenile petitions were issued against respondent. One petition alleged a first-degree sex offense, committed against R. G., in violation of N.C.G.S. § 14-27.4. The other petition alleged

two charges of misdemeanor indecent liberties between children, committed against C.M., in violation of N.C.G.S. § 14-202.2.

The allegations in these petitions arose from two separate incidents, both occurring during November, 1999. On one occasion, C.M., eight years old, visited after school with respondent's eight year old sister, Allison. The two girls were playing in Allison's room, when respondent entered the room, took C.M. by the hand, and led C.M. to respondent's parents' bedroom. Respondent then asked C.M. to lie on the bed, and "grabbed" or touched C.M. on her genital area, without removing any clothes. C.M. later testified that it hurt and made her mad.

The other incident occurred when R.G., also eight years old, spent the night with Allison. On the evening in question, respondent went to a middle school dance, and, while she was gone, Allison and R.G. fashioned a makeshift "tent" in the living room, using blankets. When respondent returned from the dance, they asked her to sleep with them in the tent. During the night, respondent offered to show the other girls "what boys would do when [they] got older." Respondent persuaded R.G. to pull down her underpants, and then "licked [her] private parts."

Over respondent's objection, the two petitions were joined for purposes of the adjudication hearing. On 31 August 2000, respondent was adjudicated delinquent on two petitions of indecent liberties, and one first-degree sex offense. Disposition was entered on 3 October 2000, following psychological testing of respondent. The trial court placed respondent on juvenile

probation, and ordered that she be in the custody of New Hanover Department of Social Services (DSS), participate in any recommended sex offender treatment, have no contact with the victims, not be alone with small children, be truthful with her therapist, and attend school. On 3 October 2000, respondent gave notice of appeal to this Court.

I.

Respondent argues first that the trial court erred by not dismissing the petition alleging a first-degree sex offense. Respondent asserts that the petition failed to allege all the essential elements of the offense, and argues that the petition was fatally defective, did not confer jurisdiction on the trial court, and the trial court erred by not dismissing the petition. We agree.

Respondent did not raise this issue at her adjudication hearing. Where an issue is raised for the first time on appeal, this Court generally reviews only for plain error. *State v. Sams*, __ N.C. App. __, 557 S.E.2d 638 (2001). However, jurisdiction may be challenged at any time, and, if the petition is invalid, it does not confer jurisdiction on the trial court. *State v. Ackerman*, 144 N.C. App. 452, 464, 551 S.E.2d 139, 147, *cert. denied*, 354 N.C. 221, 554 S.E.2d 344 (2001) ("where an indictment is alleged to be invalid on its face, depriving the trial court of its jurisdiction, a challenge may be made at any time").

To confer jurisdiction, a charging document must "give defendant sufficient notice of the charge against him, to enable

him to prepare his defense, and to raise the bar of double jeopardy in the event he is again brought to trial for the same offenses," and "[a]n indictment not meeting these standards will not support a conviction." *State v. Ingram*, 20 N.C. App. 464, 466, 201 S.E.2d 532, 534 (1974). A juvenile petition is held to the same standard as the charging document in an adult proceeding. *In re Burrus*, 275 N.C. 517, 530, 169 S.E.2d 879, 887 (1969) ("[n]otice must be given in juvenile proceedings which would be deemed constitutionally adequate in a civil or criminal proceeding"). This is underscored by N.C.G.S. § 7B-1802 (1999), which states in part the following:

> A petition in which delinquency is alleged shall contain a plain and concise statement, without allegations of an evidentiary nature, *asserting facts supporting every element of a criminal offense* and the juvenile's commission thereof with sufficient precision clearly to apprise the juvenile of the conduct which is the subject of the allegation. (emphasis added)

In the instant case, respondent was charged with committing a first-degree sex offense, in violation of N.C.G.S. § 14-27.4(a)(1) (1999). The elements of this offense include the commission of specified acts, and also that the perpetrator be both (1) at least twelve years old, and also (2) at least four years older than the alleged victim. The petition on which respondent was adjudicated delinquent states that respondent was fourteen years old, and the victim was under 13 years of age. However, the petition neither states that the victim was at least four years younger than respondent, nor provides the victim's birth date, from which her age could be calculated.

Where the illegality of sexual activity is based upon the relative ages of the parties, age is an essential element. *State v. Locklear*, 138 N.C. App. 549, 531 S.E.2d 853, *disc. review denied*, 352 N.C. 359, 544 S.E.2d 553 (2000) (age of parties essential element of prosecution for statutory rape; new trial awarded where police officer asked defendant his date of birth without being warned of his legal rights). Failure to allege an essential element renders a juvenile petition invalid, and deprives the trial court of jurisdiction. *State v. Bowen*, 139 N.C. App. 18, 533 S.E.2d 248 (2000) (where indictment does not allege that defendant was at least six years older than victim, trial court lacked jurisdiction, and failure to dismiss charge of statutory sexual offense is plain error); *In re Davis*, 114 N.C. App. 253, 441 S.E.2d 696 (1994) (juvenile entitled to adjudication upon valid petition; subject matter jurisdiction cannot be conferred by invalid charging document, or by waiver, consent, or estoppel).

In a recent case, *In re Jones*, 135 N.C. App. 400, 520 S.E.2d 787 (1999), the juvenile was charged with first-degree sex offense upon a petition that failed to allege the respondent's and victim's age. This Court held that:

> [The] petitions did not state respondent's alleged misconduct with particularity, in that they did not contain the crucial allegations of the ages of the victim and respondent as required for an alleged violation of N.C.G.S. § 14-27.4(a)(1). . . . The petitions were fatally defective and the judgments based on them must be arrested.

Id. at 403, 520 S.E.2d at 788. We find *Jones* persuasive on this issue. As in *Jones*, the juvenile petition did not allege that the

respondent was least four years older than the victim, or provide other information from which this could be inferred. We conclude that the petition was fatally defective, and that the adjudication for first-degree sex offense must be vacated.

II.

Respondent's next two arguments pertain to the charges of indecent liberties between children. Respondent argues first that the trial court erred by not dismissing the charges of indecent liberties between children, on the grounds that there was insufficient evidence that respondent acted for the purpose of sexual gratification. We disagree.

Respondent is entitled to contest the sufficiency of the evidence against her by moving to dismiss the petition. *In re Heil*, 145 N.C. App. 24, 550 S.E.2d 815 (2001). The court must then determine whether, viewing the evidence in the light most favorable to the State, there is substantial evidence of each element of the charged offense, and of respondent's being the perpetrator. *Id.*

In the case *sub judice*, respondent was charged with violation of N.C.G.S. § 14-202.2 (1999), Indecent Liberties Between Children. To be guilty of this offense, a respondent must commit specified acts "for the purpose of arousing or gratifying sexual desire."

Proof that a juvenile acted with "the purpose of arousing or gratifying sexual desire," as required under the statute, "may not be inferred solely from the act itself under G.S. 14-202.2," but requires "evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting[.]" *In re T.S.*, 133

N.C. App. 272, 277, 515 S.E.2d 230, 233, *disc. review denied*, 351 N.C. 105, 540 S.E.2d 751 (1999). In *T.S.*, this Court reversed the juvenile's adjudication for first-degree sexual offense, where the evidence indicated that a 9 year old had performed fellatio upon a 3 year old, but did not show a sexual purpose for the children's activity. In contrast, the evidence in another recent case, *In re T.C.S.*, __ N.C. App. __, 558 S.E.2d 251 (2002), indicated that the eleven year old juvenile led a three year old girl into the woods for the purpose of sexual intercourse, and that, when questioned later, the juvenile was rude and defiant. This Court held that "[t]he age disparity, the control by the juvenile, the location and secretive nature of their actions, and the attitude of the juvenile" provided sufficient evidence that the juvenile's actions were undertaken for the purpose of arousing or gratifying sexual desire. *Id.* at ___, 558 S.E.2d at 254.

Against the backdrop of *T.S.* and *T.C.S.* we note that the evidence in the instant case showed that respondent (1) was six years older than C.M., (2) took control of C.M. by taking her hand, (3) led C.M. to another room, away from other people, and (4) did not stop touching C.M.'s genital area until C.M. asked her several times. Taking this evidence in the light most favorable to the State, we hold that it is sufficient to allow a reasonable fact finder to conclude that respondent acted "for the purpose of arousing or gratifying sexual desire." This assignment of error is overruled.

Respondent also argues that the trial court erred by

adjudicating respondent for two offenses of indecent liberties, based on a single incident. We find this argument persuasive. Respondent was charged with violation of N.C.G.S. § 14-202.2, Indecent Liberties Between Children, which provides as follows:

> (a) *A person* who is under the age of 16 years *is guilty* of taking indecent liberties with children *if the person either*:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex who is at least three years younger than the defendant . . . ; *or*
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex who is at least three years younger than the defendant for the purpose of arousing or gratifying sexual desire. (emphasis added)

The statute does not set out two different offenses; rather, it states disjunctively two alternative means of establishing one element of this offense. *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990). In *Hartness*, the North Carolina Supreme Court held that:

> [T]he crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts. . . . [and] in which a single wrong [may be] established by a finding of various alternative elements.

Id. at 566, 567, 391 S.E.2d at 180. Although the statute sets out alternative acts that might establish an element of the offense, a single incident can support only one adjudication or conviction. *See State v. Owen*, 133 N.C. App. 543, 516 S.E.2d 159, *disc. review denied*, 351 N.C. 117, 540 S.E.2d 744 (1999) (defendant argues that

conviction of three charges of rape and attempted rape is invalid because there was only one continuous assault: Court upholds convictions upon finding that defendant was involved in three separate incidents).

The State's reliance on *State v. Banks*, 322 N.C. 753, 370 S.E.2d 398 (1988), is misguided. *Banks* held that a particular act might appropriately be characterized as *either* an "immoral, improper, or indecent libert[y]," *or* a "lewd or lascivious act;" the Court did not hold that a single act could support two convictions for the same offense. *Id.* at 756, 370 S.E.2d at 406; *see also,* N.C.G.S. § 14-202.1 (1999). (emphasis added)

In the case *sub judice*, the evidence is undisputed that there was but a single incident. Under these circumstances, respondent can be adjudicated for commission of only one violation of N.C.G.S. § 14-202.2. We conclude that the trial court erred in adjudicating respondent for two separate offenses, and that one of the adjudications must be vacated.

III.

Respondent argues next that the trial court erred by joining the petitions for adjudication. We disagree.

N.C. Gen. Stat. § 15A-926 (a) (1999), which governs joinder, states:

> Two or more offenses may be joined . . . for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. . . .

This Court has held that, in its determination of whether charges should be joined for trial, the trial court must evaluate "whether the accused can be fairly tried upon more than one charge at the same trial," and that, upon appellate review, "the question posed is whether the offenses are so separate in time and place and so distinct in circumstances as to render a consolidation unjust and prejudicial to an accused." *State v. Wilson*, 57 N.C. App. 444, 448, 291 S.E.2d 830, 832-33, *disc. review denied*, 306 N.C. 563, 294 S.E.2d 375 (1982) (citations omitted). Further, a trial court's ruling on a motion for joinder is discretionary. "Whether defendants should be tried jointly or separately . . . is a matter addressed to the sound discretion of the trial judge." *State v. Rasor*, 319 N.C. 577, 581, 356 S.E.2d 328, 331 (1987).

In the case *sub judice*, respondent was adjudicated delinquent based upon her commission of sexual offenses. We note that "[t]raditionally, North Carolina appellate courts have been willing to find a transactional connection in cases involving sexual abuse of children." *State v. Owens*, 135 N.C. App. 456, 458, 520 S.E.2d 590, 592 (1999). *See State v. Effler*, 309 N.C. 742, 309 S.E.2d 203 (1983) (joinder upheld of multiple incidents of sexual abuse of two different children over period of several weeks).

In the instant case, both victims were the same age; both were friends of respondent's younger sister; both incidents occurred in November, 1999, at respondent's home; respondent's younger sister would likely be a witness at the adjudication of both offenses; and both incidents involved brief genital contact, rather than some

other type of sexual behavior. Under these circumstances, we conclude that the offenses were not "so separate in time and place and so distinct in circumstances" that joinder was inappropriate. We conclude that the trial court did not abuse its discretion in joining the two petitions. This assignment of error is overruled.

Finally, respondent argues that there was insufficient evidence of first-degree sex offense. Because the adjudication proceeded upon a deficient petition, and must be vacated, we find it unnecessary to address this issue.

In sum, we vacate the trial court's adjudication of first-degree sex offense, and one of the adjudications for indecent liberties between children. We affirm the other adjudication for indecent liberties between children, and remand for a new disposition hearing.

Reversed and vacated in part; affirmed in part, and remanded for a new disposition hearing.

Judges WALKER and MCGEE concur.

Report per Rule 30(e).