NO. COA01-624

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

IN THE MATTER OF:
JAMES NICHOLAS ALLEN

Union County
No. 99 J 145

Appeal by juvenile from order entered 25 September 2000 by Judge Joseph Williams in Union County District Court. Heard in the Court of Appeals 25 March 2002.

Attorney General Roy A. Cooper III, by Assistant Attorney General David Gordon, for the State.

Carol L. Huffman for juvenile-appellant.

EAGLES, Chief Judge.

Nicholas Allen ("juvenile") was adjudicated delinquent upon a finding that he committed the offense of attempted second degree sexual offense. In a 25 September 2000 disposition order, the trial court placed juvenile on supervised probation for a period of twelve months upon the conditions that he receive a sex offender evaluation, that he not associate with any juvenile under the age of sixteen unless accompanied by an adult, that he have no contact with his victim, and that he complete 150 hours of community service following probation. Juvenile appeals.

The evidence tends to show the following: Between July and October 1999, juvenile, a thirteen-year old male, offered J.T.

("the victim"), a nine-year old male, an art set if the victim would enter his home, specifically his bedroom. The victim agreed, entered juvenile's bedroom, and laid on the bed. While on the bed, juvenile took off the victim's clothes and "stuck his penis in [the victim's] behind." Based on the evidence in the record, it is not conclusive whether juvenile's penis actually touched the victim on the inside or "outside of [his] bottom." In late October 1999, the victim informed his parents that he had been sexually assaulted by juvenile.

On 29 October 1999, the parents took the victim to see Dr. Gwendolyn Perkins for a sexual assault evaluation. During the evaluation, the victim told Dr. Perkins that "he had had at least three episodes of rectal sex with" juvenile in juvenile's bedroom. Upon a full physical examination, Dr. Perkins found abnormalities in the victim's rectal area -- specifically, redness around the rectum, a relaxed sphincter, and a small healing fissure. Based on the victim's history and her physical examination of the victim, Dr. Perkins opined that the victim had been sexually assaulted.

Thereafter, the parents contacted Detective Robert Rollins of the Union County Sheriff's Office. On 2 November 1999, Detective Rollins interviewed the victim. During the interview, the victim described several sexual acts performed by juvenile upon him beginning in the summer of 1999 and continuing until October 1999. Specifically, the victim detailed one occasion in juvenile's bedroom when juvenile "pushed him to the floor, pulled his pants down, and stuck his . . . private in [the victim's] butt."

On 1 February 2000, three identical juvenile petitions were filed in Union County District Court alleging that juvenile was delinquent in that between July and October 1999 "juvenile did unlawfully, willfully, and feloniously engage in a sex offense with [the victim], age 9 years, by force and against that victim's will," in violation of G.S. § 14-27.5. On 7 August 2000, an adjudicatory hearing was held before the Honorable Joseph Williams. During the hearing, the victim testified that between July and October 1999 juvenile "stuck his penis up [his] behind" in juvenile's bedroom, at the creek near juvenile's home, and in juvenile's living room. Following Dr. Perkins' and Detective Rollins' testimony, juvenile testified and denied all of the allegations.

After the parties presented their closing arguments, the trial court found that

> [i]t's clear to [the court] when these petitions were drawn it was the intent that it be in regard to three instances that allegedly occurred at this juvenile's home. In regards to those three instances [the court] find[s] that the State has proven beyond a reasonable doubt that he did commit one of these offenses and the other two they have not proven.

By order entered 7 August 2000, the trial court further found

> that based upon the evidence presented in this matter . . . the allegations set forth in the petitions are true and correct and that the juvenile is adjudicated to be a deliinquent [sic] juvenile as defined by NCGS 7B-1501(7) for the offense of Attempt 2nd Degree Sex Offense . . .

and ordered that the case be continued for disposition.

Subsequently, a dispositional hearing was held on 25 September 2000. At the conclusion of the hearing, the trial court entered a dispositional order placing juvenile on supervised probation for a period of twelve months dependent upon his compliance with several court-ordered conditions.

At the outset, we note that juvenile's notice of appeal indicates only that he is appealing from the trial court's dispositional order entered on 25 September 2000. However, juvenile focuses in his brief on alleged errors arising from the trial court's adjudicatory order entered on 7 August 2000. "As a general rule, the appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken." *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994). Nevertheless, this Court may liberally construe a notice of appeal to determine it has jurisdiction over a ruling not specified in the notice if the appellant made a mistake and "the intent to appeal from the judgment can be fairly inferred from the notice and the appellee was not misled by the mistake." *Id.* at 452, 451 S.E.2d at 350-51. Here, we conclude that the intent to appeal from the adjudicatory order could be inferred from the notice and the State was not misled. Even assuming that the intent to appeal could not be fairly inferred from the notice, we note that this Court has the authority to review the merits of this appeal by certiorari pursuant to N.C.R. App. P. 21.

First, juvenile assigns error to the trial court's denial of his motion to dismiss. Specifically, juvenile argues that the State failed to present sufficient evidence that he committed any offense. After careful review of the record, we conclude that juvenile is precluded from raising this issue on appeal.

Here, three identical juvenile petitions were filed alleging that

> [t]he juvenile is a delinquent juvenile as defined by G.S. 7A-517(12) in that on or about the date of offense shown [between July and October 1999] and in the county named above [Union], the juvenile did unlawfully, willfully, and feloniously engage in a sex offense with [the victim], age 9 years, by force and against that victim's will[.]
>
> The offense charged here is in violation of G.S[.] 14-27.5. Class C felony.

During the hearing, the victim testified that between July and October 1999 juvenile "stuck his penis up [his] behind" in juvenile's bedroom, at the creek near juvenile's home, and in juvenile's living room. Thereafter, Dr. Perkins testified that the victim told her that "he had had at least three episodes of rectal sex with" juvenile in juvenile's bedroom; and Detective Rollins testified that the victim reported only one episode of anal sex which occurred in juvenile's bedroom. Both witnesses testified that the victim did not report assaults occurring at the creek or in juvenile's living room.

At the close of the State's evidence, juvenile filed a motion to dismiss the charge related to the offense alleged to have occurred at the creek. The trial court denied the motion.

Following the denial, juvenile presented evidence. Pursuant to G.S. § 7B-2405(6), all rights afforded adult offenders are conferred upon respondents in juvenile adjudicatory hearings with certain exceptions not applicable in this case. "N.C.R. App. P. 10(b)(3) . . . provides that a motion to dismiss made at the close of the State's evidence is waived if the defendant presents evidence. The rule requires that a defendant must again move to dismiss the charge at the close of all the evidence in order to challenge the sufficiency of the evidence on appeal." *In re Davis*, 126 N.C. App. 64, 66, 483 S.E.2d 440, 442 (1997). Here, juvenile renewed his motion to dismiss the charge related to the creek at the close of all the evidence. Again, the trial court denied the motion.

After the parties' closing arguments, the trial court found that

> [i]t's clear to [the court] when these petitions were drawn it was the intent that it be in regard to three instances that allegedly occurred at this juvenile's home. In regards to those three instances [the court] find[s] that the State has proven beyond a reasonable doubt that he did commit one of these offenses and the other two they have not proven.

In other words, the trial court found that the juvenile petitions were not intended to be in regard to the offense that allegedly occurred at the creek. Thus, we conclude that the trial court in essence dismissed all charges related to the creek. Accordingly, juvenile's argument in that regard is moot in that dismissal of the offense allegedly committed at the creek has already occurred.

As to the offenses alleged to have occurred in juvenile's home, we note that the record reflects that juvenile did not file any motions for dismissal. "N.C.R. App. P. 10(b)(3) provides that '[a] defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in the case of nonsuit, at trial.'" *Davis*, 126 N.C. App. at 66, 483 S.E.2d at 441. Since juvenile did not move to dismiss the charges related to the offenses alleged to have occurred in his home during the adjudicatory hearing, juvenile is precluded from raising the issue as to the sufficiency of the evidence on appeal. *See id*. at 66, 483 S.E.2d at 441-42; *see In re Clapp*, 137 N.C. App. 14, 19, 526 S.E.2d 689, 693 (2000).

In his next assignment of error, juvenile argues that the trial court committed reversible error by failing to state with particularity which alleged event it found him responsible for -- the event in juvenile's bedroom, the creek, or juvenile's living room. After careful review, we disagree.

As stated above, the trial court found based on proof beyond a reasonable doubt that juvenile did attempt to commit one sexual assault upon the victim in juvenile's home. Here, the victim testified that one of the assaults occurred in juvenile's bedroom, and both Dr. Perkins and Detective Rollins testified that the victim reported that at least one sexual assault occurred in juvenile's bedroom. While we are aware that there were discrepancies in the victim's testimony, we conclude that there is

substantial evidence in the record to support the finding that at least one attempted sexual offense occurred in juvenile's home.

Juvenile is correct in that the trial court did not state with particularity in the adjudicatory order the alleged event for which it found him responsible; however, it is clear from the record of the hearing that the trial court was referring to the offense which occurred in juvenile's bedroom as opposed to those events alleged to have occurred at the creek and in juvenile's living room. Even assuming arguendo that the trial court erred in failing to state with particularity the event for which it found juvenile responsible, the error was harmless. *See* G.S. § 1A-1, Rule 61. "Where the court's decision is clear from the record, the absence of a formal ruling is not prejudicial." *State v. Hicks*, 79 N.C. App. 599, 601, 339 S.E.2d 806, 808 (1986). Accordingly, we affirm the trial court.

In sum, we conclude that juvenile is precluded by his failure to move for dismissal during the adjudicatory hearing from raising any issue as to the sufficiency of the evidence on appeal. Additionally, the trial court's failure to state with particularity which specific offense juvenile committed was harmless.

Affirmed.

Judges HUDSON and BRYANT concur.

Report per Rule 30(e).