

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-856

NORTH CAROLINA COURT OF APPEALS

Filed: 18 April 2006

IN THE MATTER OF:

B.C.

Mecklenburg County
No. 04-J-886

Appeal by juvenile from order entered 15 February 2005 by Judge Regan A. Miller in District Court, Mecklenburg County. Heard in the Court of Appeals 20 February 2006.

Attorney General Roy Cooper, by Assistant Attorney General Judith Tillman, for the State.

Michelle FormyDuval Lynch, for juvenile-appellant.

WYNN, Judge.

To withstand a motion to dismiss charges in a juvenile petition, the State must present substantial evidence of each of the material elements of the offense alleged.¹ Here, Juvenile contends there was insufficient evidence to show that he was the perpetrator of a robbery with a dangerous weapon. Because when viewed in the light most favorable to the State, there was sufficient evidence to show that Juvenile was the perpetrator of the crime, we uphold the denial of Juvenile's motion to dismiss.

¹ *In re Eller*, 331 N.C. 714, 717, 417 S.E.2d 479, 481 (1992).

The facts presented at trial tend to show that around 2:00 or 3:00 a.m. on 7 August 2004, two young men approached and robbed Michael Early outside his apartment. The robbers took Mr. Early's cell phone, put a gun against his head, told him to get on the ground, took \$27.00 and keys from his pocket, and demanded directions to his apartment. When they arrived at the apartment, Mr. Early unlocked the door, dove in, and slammed the door behind himself. The robbers beat on the door as Mr. Early told his wife to call the police.

Mr. Early stated that the robbers had on blue jeans, tennis shoes, black and white shirts, with bandanas covering their mouths. He described one of the robbers as "clean cut," with a dark hat tilted to the side while the other had braided hair, and appeared to be the "ring leader." Both males appeared to be teenagers, had guns, and spoke with a "southern drawl."

Later in the morning after the robbery, Mr. Early saw Juvenile, who lived in the same apartment complex as Mr. Early, at an adjacent building in the apartment complex. Juvenile had on jeans, tennis shoes, and a black shirt over a white undershirt - the exact outfit the "clean cut" robber had on the night before. Subsequently, Mr. Early reported to the police that he had just seen one of the two robbers.

Detective Driggers responded to the report by going to Juvenile's apartment and finding Juvenile at home with his younger sister. At the detective's request, Juvenile's sister called their mother at work. Detective Driggers told the mother that Juvenile

was a suspect in the apartment-complex robbery. Juvenile's mother gave Detective Driggers permission to speak with Juvenile, with the understanding that he was not going to arrest him. Thereafter, Detective Driggers told Juvenile that he was not under arrest, did not have to talk to him, could have his mother present, or could wait until he talked to his attorney. Juvenile said he understood and was "okay to talk." When asked where he was the night before, Juvenile said that he had come home around midnight and "snuck back out" through his bedroom window to buy cigarettes.

Detective Driggers "bluffed" Juvenile, and told him that "[they] knew some calls were made and that [they] knew he had made them." Juvenile then admitted using Mr. Early's cell phone. When Detective Driggers asked who he called that night, Juvenile gave the names of three of his friends. Mr. Early's cell phone bill shows that calls were made from 3:21 a.m. to 9:00 a.m. in the morning of 7 August, however, none of the phone numbers could be traced to Juvenile or any of his friends.

A petition for robbery with a dangerous weapon was filed against Juvenile on 17 August 2004, and he was arrested on 18 August 2004. The Honorable Regan A. Miller conducted a hearing on 28 January 2005 in the Juvenile Court Session of District Court, Mecklenberg County. At trial, one of Juvenile's school friends testified that Juvenile called him around 2:30 or 3:00 a.m. on the morning of 7 August. The friend further testified that they had a short conversation, hung up, and then had a three-way conversation with another party that lasted about an hour. Juvenile's mother

also testified that she woke up around 2:30 a.m. on 7 August and found Juvenile on the phone, whereupon she told him to go to bed.

Juvenile testified that on the early morning of 7 August, between midnight at 4:00 a.m., he talked to several friends on his home telephone, and then fell asleep a few minutes later. Juvenile's home telephone bill indicates that there were several calls to Juvenile's friends in the early morning of 7 August. Juvenile testified that he would have made those calls, as no one else in his home makes calls at that time of night. As it relates to his admission on 7 August to Detective Driggers that he used Mr. Early's cell phone, Juvenile testified that he was pressured into making that admission, and it was untrue. The trial court adjudicated Juvenile delinquent on 28 January 2005. Following a disposition hearing on 15 February 2005, the trial court entered a Level III disposition order. Juvenile appeals.

On appeal to this Court, Juvenile contends the trial court erroneously denied his motion to dismiss the armed robbery charge due to the insufficiency of the evidence. Juvenile's argument is without merit.

A juvenile is entitled to have evidence evaluated by the same standard as those applied in criminal proceedings for adults. *In re Davis*, 126 N.C. App. 64, 483 S.E.2d 440 (1997). To withstand a motion to dismiss charges in a juvenile petition, the State must present substantial evidence of each of the material elements of the offense alleged. *Eller*, 331 N.C. at 717, 417 S.E.2d at 481.

"The evidence must be considered in the light most favorable to the State, and the State is entitled to receive every reasonable inference of fact that may be drawn from the evidence." *Id.*

Moreover, juvenile proceedings are non-jury trials wherein:

[t]he trial judge becomes both judge and juror, and it is his duty to consider and weigh all the competent evidence before him. He passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefore. If different inferences may be drawn from the evidence, he determines which inferences shall be drawn and which shall be rejected.

Knutton v. Cofield, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968) (citation omitted).

Regarding the charge of robbery with a dangerous weapon, the State must prove the following elements:

(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened.

N.C. Gen. Stat. § 14-87 (2005). "Force or intimidation occasioned by the use or threatened use of firearms is the main element of the offense." *State v. Small*, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991) (citation omitted).

In this case, Juvenile does not dispute that Mr. Early was robbed; rather, he contends there was insufficient evidence to show that he was the perpetrator of the crime. However, the evidence in the light most favorable to the State shows that Mr. Early specifically identified Juvenile as the perpetrator of the crime

the morning after the robbery. Mr. Early testified that he saw Juvenile the morning after the robbery and that Juvenile was wearing the same clothing that he had worn during the robbery: blue jeans, tennis shoes, and a black shirt with a white undershirt. He testified, "As soon as I saw him, I had this shiver all over my body and my hair was standing on the back of my neck, and I was like, 'That's the guy.'"

The trial transcript further shows that Mr. Early did not base his identification of Juvenile solely on the clothes that he wore the morning after the robbery. Mr. Early testified that during the robbery, Juvenile wore a bandana across his mouth and a hat turned to the side, and that he could see Juvenile's face from the top of his mouth to the top of his forehead, including Juvenile's eyes, nose, and part of his ears and hair.

Furthermore, Detective Driggers testified that Juvenile told him in their 7 August conversation that he often snuck out of his bedroom window late at night, and that he had done so the night of the robbery to get some cigarettes. This testimony is consistent with Mr. Early's testimony that he and his wife had, on earlier occasions, seen Juvenile sneak out of his bedroom late at night to talk on the telephone. Although the phone records for Mr. Early's cell phone during the early morning hours of 7 August could not be traced to Juvenile, Detective Driggers testified that Juvenile said that he had used Mr. Early's cell phone to call three of his friends. Juvenile corroborated Detective Driggers' testimony on direct examination, but said that he only admitted to using Mr.

Early's phone because Detective Driggers pressured him to. On cross-examination, however, Juvenile testified that he used "somebody's cell phone -- that was up at the store[]" on the night of the robbery.

Regarding the telephone records, the trial judge observed that Juvenile's home telephone records showed a gap in time between 2:07 a.m. and about 3:00 a.m. This gap in the records is consistent with Officer Michael Smith's testimony that three robberies occurred in Juvenile's apartment complex "within about less than an hour of each other," and Mr. Early's testimony that he was robbed some time between 2:30 and 3:00 a.m.

This evidence shows that, when viewed in the light most favorable to the State, there was sufficient evidence to support the trial court's denial of Juvenile's motion to dismiss. Thus, Juvenile's assignment of error is rejected.

Juvenile next argues the trial court erroneously permitted Detective Driggers to testify about a conversation he had with one of Juvenile's acquaintances, implicating Juvenile in an unrelated robbery. Juvenile contends this hearsay was offered to prove he committed the armed robbery in this case, and the trial court's error in admitting this testimony into evidence amounts to prejudicial error, entitling him to a new hearing.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2005). Hearsay is not admissible absent

an applicable exception. N.C. Gen. Stat. § 8C-1, Rule 802 (2005). However, when a statement is not being offered for the "truth of the matter asserted," the statement is not considered hearsay and, therefore, is admissible, even absent an applicable exception. *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473, cert. denied, 537 U.S. 896, 154 L. Ed. 2d 165 (2002) (citing *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998)).

In this case, Juvenile contends the trial court erroneously admitted hearsay within hearsay through the testimony of Detective Driggers. Detective Driggers testified about a conversation he had with one of Juvenile's acquaintances, B.R., who said that someone told him that Juvenile and another male had been involved in a robbery. The relevant portion of the transcript reads:

A: When I -- ask I questioned about [B.R.] about what was going on and why [Juvenile] would mention his name as a phone call or that, he said that he heard that [Juvenile] and another male named Slim --

MS. SURLLES: Well, OBJECTION as to what he said that he heard.

THE COURT: I don't think this is being offered -- you're talking about your investigation right now, is that right?

A: Yes, sir.

THE COURT: Overruled.

A: He said that he had heard that [Juvenile] and Slim had done a robbery, but he really couldn't provide me with any information on this case that was relevant. So that didn't play out. [Juvenile] also gave me the name of a fellow . . .

Statements are not hearsay if they are made to explain the

subsequent conduct of the person to whom the statement was directed. *Id*; see also *State v. Gainey*, 355 N.C. 73, 58 S.E.2d 463, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002) (hearsay from anonymous call that car was at lake was admissible to explain hearer's call to sheriff, sheriff's staking the lake, and hearer traveling to the lake the next day); *State v. Poplin*, 56 N.C. App. 304, 289 S.E.2d 124, *disc. review denied*, 305 N.C. 763, 292 S.E.2d 579 (1982) (hearsay admissible when offered to show why undercover agent and declarant left presence of the defendant to retrieve cocaine from a birdhouse in the defendant's backyard).

The facts in this case, however, are distinguishable from those cases where courts have held that hearsay may be admissible if it is used to show or explain subsequent actions. Here, Detective Driggers did not testify that B.R.'s statement caused him to do anything, or to change the course of his investigation. In fact, Detective Driggers admitted that this information from B.R. did not provide anything relevant to the investigation of Juvenile's involvement in this robbery. Thus, we hold that the trial court erred in admitting Detective Driggers' testimony as to what B.R. said he heard from an unknown third party about Juvenile committing a robbery. Notwithstanding, we must further determine whether the trial court's error rises to the level of prejudicial error.

To show prejudicial error, a defendant must show there is a reasonable possibility that had the error not been committed, a different result would have been reached at trial. See N.C. Gen.

Stat. § 15A-1443(a) (2005) (providing that in order to demonstrate prejudicial error, a defendant must show that there is a reasonable possibility a different result would have been reached had the error not occurred); see also *State v. Rosier*, 322 N.C. 826, 829, 370 S.E.2d 359, 361 (1988). If such a burden is not met, the error is deemed harmless and the decision of the trial court will stand. See N.C. Gen. Stat. § 15A-1443(a). With respect to Juvenile's adjudication, we hold that the erroneous admission of Detective Driggers' hearsay testimony was not sufficiently prejudicial to warrant a new hearing. The trial judge, sitting as the judge and jury in this non-jury hearing, made clear that the only purpose for Detective Driggers' hearsay testimony was to explain his investigation, and not to go to the truth of the matter asserted. Accordingly, we find no prejudicial error, and Defendant's assignment of error is, therefore, without merit.²

² We note that Juvenile does not argue that the trial court's admission of Detective Driggers' hearsay testimony violated the Confrontation Clause under the framework set forth in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). Nonetheless, we have determined that Detective Driggers' hearsay statements are testimonial, as they were made pursuant to his investigation of the armed robbery and, therefore, made in the course of a "police interrogation" under *Crawford*. *Id.* at 68, 158 L. Ed. 2d at 203. Thus, the trial court's admission of Detective Driggers' hearsay testimony violated Juvenile's Sixth Amendment right to confront the witnesses against him. However, "the presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988) (citation omitted); *State v. McKeithan*, 140 N.C. App. 422, 432, 537 S.E.2d 526, 533 (2000), *disc. review denied and appeal dismissed*, 353 N.C. 392, 547 S.E.2d 35 (2001). Our independent review of the record leads us to conclude that the trial court's error in admitting Detective Driggers' testimony regarding his conversation with B.R. does not necessitate reversal of Juvenile's adjudication. See *State v. Champion*, ___ N.C. App. ___,

Juvenile next argues the trial court erroneously admitted his statements as evidence without making findings that he knowingly and willingly waived his rights in violation of N.C. Gen. Stat. § 7B-2101(d) (2005). This argument is without merit.

Section 7B-2101(d) of the North Carolina General Statutes requires the court to "find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights" before admitting any statement into evidence resulting from a custodial interrogation. N.C. Gen. Stat. § 7B-2101(d).

Here, Juvenile contends the trial court erred in admitting statements into evidence obtained as a result of custodial interrogation without making appropriate findings that he knowingly waived his rights. However, a review of the trial transcript reveals that the only statements admitted into evidence attributed to Juvenile were statements Juvenile made to Detective Driggers during their 7 August conversation. During that questioning, Juvenile was in his apartment, and Detective Driggers testified that prior to speaking with Juvenile about the robbery, he told him that he was not in custody, and that he did not have to speak with him. After he said that he understood and agreed to speak with Detective Driggers, Juvenile then admitted to using Mr. Early's cell phone on the night of the robbery. Because Juvenile was not in custody at the time of the 7 August questioning by Detective Driggers, the trial court was not required to make findings of fact under section 7B-2101.

__, 615 S.E.2d 366, 372 (2005).

Likewise, as it relates to the 18 August 2004 conversation after Juvenile's arrest, Detective Driggers testified that Juvenile did not record a statement during that conversation, as the conversation produced "nothing usable," and Juvenile "pretty much held to his same story as before." Detective Driggers testified that Juvenile again talked about using Mr. Early's cell phone, but "he wouldn't talk about the robbery at all." Because the trial court did not admit any evidence resulting from the custodial interrogation of Juvenile, only evidence resulting from a non-custodial interrogation of Juvenile, we conclude the trial court was not required to make specific findings that Juvenile waived his rights under section 7B-2101(d). Juvenile's assignment of error is, therefore, rejected.

In his final argument on appeal, Juvenile argues the trial court erred by not informing him of his privilege against self-incrimination before he testified on his own behalf. Juvenile's argument is without merit.

When a trial court accepts an admission from a juvenile, section 7B-2407 of the North Carolina General Statutes requires the trial court to personally address the juvenile and inform him that he has a right to remain silent and that any statement the juvenile makes may be used against him. N.C. Gen. Stat. § 7B-2407 (2005). Here, Juvenile made no admission at trial, nor did he incriminate himself. Juvenile testified repeatedly that he was at home talking on the telephone at the time of the armed robbery. Juvenile further denied ever having used Mr. Early's cell phone, and said

that he only told Detective Driggers that he had used Mr. Early's cell phone because he felt "pressured." Because Juvenile did not make an admission while testifying, and he did not give any incriminating testimony, we find no error.

Affirmed.

Chief Judge MARTIN and Judge STEPHENSON concur.

Report per Rule 30(e).