NO. COA06-1093

NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2007

IN THE MATTER OF:

H.D.

Harnett County
No. 05 J 226

Appeal by respondent juvenile from order entered 17 February 2006 by Judge George Murphy in Harnett County District Court. Heard in the Court of Appeals 21 March 2007.

Attorney General Roy A. Cooper III, by Assistant Attorney General Vaughn S. Monroe, for the State.

Haakon Thorsen, for respondent-juvenile-appellant.

JACKSON, Judge.

H.D. ("juvenile") appeals her disposition after having been found responsible for misdemeanor assault and misdemeanor breaking and entering. We affirm.

On 19 December 2005, the State filed a petition alleging that the thirteen-year-old juvenile was delinquent for assaulting her mother by striking her mother in the chest with her fist, and on 3 January 2006, the State filed a second petition alleging that the juvenile was delinquent for breaking and entering a neighbor's trailer. The juvenile's attorney filed a motion questioning the

juvenile's capacity to proceed, stating that the juvenile "did not seem to appreciate the charges against her and the possible disposition of her case." While the juvenile's attorney acknowledged that the juvenile "was willing to follow counsel's recommendations, . . . it was not clear that she understood the reasons, so that her participation might not be 'voluntary, knowing and intelligent.'"

On 17 February 2006, the trial court held a competency hearing to determine the juvenile's capacity to proceed. The State called Amy Brown ("Brown"), a licensed clinical social worker and certified forensic screener evaluator. The State tendered Brown as an expert, to which the juvenile did not object, and the trial court accepted Brown as an expert in the field of forensic evaluation.

Brown testified that she interviewed the juvenile on 10 January 2006. During this evaluation, which lasted anywhere from thirty minutes to two hours, Brown determined that the juvenile had a very good understanding of the specific charges against her, as well as the potential consequences of those charges. The juvenile even explained to Brown that she desired probation, acknowledging that "she had poor judgment in the past and that she knew that she needed some supervision in order to have someone watching her to help her make good decisions." The juvenile seemed to have a better-than-average understanding for her age of court proceedings, as Brown noted that the juvenile "was able to identify the role of all of the individuals in the court as far as her attorney, the

district attorney, a judge, jury all — all components of a trial." Finally, the juvenile indicated to Brown that she was able and willing to cooperate with her attorney, that she trusted him, and that she thought that he was working in her best interest.

The juvenile called Gloria Anderson ("Anderson"), a behavioral program specialist at the New Horizon treatment facility, where the juvenile, along with other individuals with behavioral problems, received residential care. Anderson had the opportunity to observe the juvenile for approximately eight hours per day from 28 January 2006 until 6 February 2006. The juvenile did not attempt to offer Anderson as an expert witness, but instead attempted to have Anderson testify as a lay witness who had the opportunity to observe, evaluate, and form an opinion as to whether the juvenile understood the nature of her legal proceedings. The trial court disallowed the testimony and the juvenile did not make an offer of proof as to the substance of Anderson's testimony.

The juvenile's attorney also requested to offer his own observations as to the juvenile's competency. The trial court, however, required the juvenile's attorney to withdraw before it would permit such testimony. Although he refused to withdraw, the juvenile's attorney nevertheless explained to the trial court that "it's apparent to me that — she is not competent," which the trial court twice stated was not admissible.

Following Anderson's testimony and the juvenile's attorney's attempt at offering his opinion on the juvenile's competency, the

trial court found the juvenile competent and able to proceed to trial.

> She understands the nature of these charges. She's able to cooperate with her attorney. She understands the consequences and the role of the Court and she is ably [sic] able to cooperate with her defense.
>
> Therefore, the Court at this time, based upon the evidence presented, finds that she is competent to stand trial.

The case then proceeded to trial, and the court adjudicated the juvenile delinquent for both simple assault and misdemeanor breaking and entering.

On appeal, the juvenile only contests her competency hearing and not her adjudication or disposition. Specifically, the juvenile first contends that the trial court erred in denying her right to due process when the trial court conducted a competency hearing but did not allow either Anderson to fully testify or the juvenile's attorney to explain his reasons for questioning her competency. The juvenile, however, failed to object on this ground before the trial court, and it is well-established that "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Taylor*, __ N.C. App. __, __, 632 S.E.2d 218, 231 (2006). An exception is provided where "plain error" is specifically and distinctly alleged and argued on appeal. *See* N.C. R. App. P. 10(c)(4) (2006). However, the juvenile has not alleged plain error, and accordingly, we dismiss the juvenile's first argument. *See State v. Dennison*, 359 N.C. 312, 312-13, 608 S.E.2d 756, 757 (2005) (per curiam).

In her second argument, the juvenile contends that the trial court erred in denying her rights pursuant to North Carolina General Statutes, section 15A-1002, when the trial court conducted a competency hearing but did not allow either Anderson to fully testify or the juvenile's attorney to offer his own view of the juvenile's competency.

"A defendant has the burden of proof to show incapacity or that he is not competent to stand trial. Once defendant's capacity to proceed is questioned, the court must hold a hearing to determine this issue." *State v. O'Neal*, 116 N.C. App. 390, 395, 448 S.E.2d 306, 310 (internal citation omitted), *disc. rev. denied*, 338 N.C. 522, 452 S.E.2d 821 (1994). Pursuant to North Carolina General Statutes, section 15A-1001(a),[1]

> [n]o person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C. Gen. Stat. § 15A-1001(a) (2005). "When the trial judge conducts the inquiry [pursuant to section 15A-1001(a)] without a jury, the court's findings of fact, if supported by competent evidence, are conclusive on appeal." *State v. Jackson*, 302 N.C.

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[1]"Section 7B-2401 of the North Carolina Juvenile Codes states that the provisions of sections 15A-1001 to 15A-1003 apply to all cases in which a juvenile is alleged to be delinquent. Sections 15A-1001 to 15A-1003 of the North Carolina Criminal Procedure Act relate to a defendant's capacity to proceed." *In re Robinson*, 151 N.C. App. 733, 735, 567 S.E.2d 227, 228 (2002) (internal citation omitted).

101, 104, 273 S.E.2d 666, 669 (1981); *see also O'Neal*, 116 N.C. App. at 395, 448 S.E.2d at 310–11 (noting that the trial court's findings are binding "even if there is evidence to the contrary").

The juvenile first argues that Anderson should have been permitted to testify, based upon her observations of the juvenile, on the issue of whether the juvenile was competent to stand trial. The juvenile further contends that such error was prejudicial because the only other evidence as to the juvenile's competency was from Brown — "someone who saw H.D. for a brief time and made a very brief and limited review of relevant records."

As our Supreme Court has held,

> [a] lay witness may testify, upon a proper foundation, on the issue of a defendant's capacity to stand trial. "A lay witness who has observed, conversed, or dealt with another person and who has had a reasonable opportunity to form an opinion satisfactory to the witness as to that person's mental condition may testify as to the witness's opinion."

State v. Silvers, 323 N.C. 646, 653, 374 S.E.2d 858, 863 (1989) (quoting *State v. Smith*, 310 N.C. 108, 114, 310 S.E.2d 320, 324 (1984)).

In the case *sub judice*, just as in *Silvers*, the juvenile's witness was "asked proper questions after sufficient foundation had been established." *Id.* at 654, 374 S.E.2d at 863. The juvenile's attorney did not ask Anderson for a legal conclusion, but rather, he sought to ask her whether she could provide an opinion as to whether the juvenile "is able to understand the nature and object of the proceedings, or comprehend . . . her own situation in

reference to the proceedings, or assist in . . . her defense in a rational and reasonable way." *Id.* (citing *Smith*, 310 N.C. 108, 310 S.E.2d 320). As the juvenile's attorney explained to the trial court,

> I asked her if she formed an opinion as to whether or not [the juvenile] had an understanding of the nature of the legal proceeding, not whether or not she was legally competent. That's just one of multiple factors that goes into a determination of competency which is ultimately for the trier of fact.

The trial court, nevertheless, refused to allow Anderson to give her opinion in response to the juvenile's attorney's question. In fact, Anderson was precluded from giving her opinion as to any of the factors in the competency analysis.

> DEFENSE COUNSEL: Okay. And during that time, did you form an opinion as to whether or not [the juvenile] understands the nature of her legal proceedings?
>
> DISTRICT ATTORNEY: Objection.
>
> COURT: Sustained.
>
> . . . .
>
> DEFENSE COUNSEL: Did you . . . talk about her attorney with her and the role of the attorney in court?
>
> ANDERSON: Yes, sir, we did.
>
> DEFENSE COUNSEL: Okay. And what did she — and tell me about — tell the Court about that discussion.
>
> DISTRICT ATTORNEY: Objection.
>
> COURT: Sustained.

> DEFENSE COUNSEL: Did [the juvenile] indicate that she thought that I had the power to put her on probation?
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> DISTRICT ATTORNEY: Objection.
>
> COURT: Sustained.
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> DEFENSE COUNSEL: When you discussed the possible outcome of any court proceedings with [the juvenile], did you talk about the role of the Judge at all?
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> DISTRICT ATTORNEY: Objection.
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> COURT: Sustained.
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> DEFENSE COUNSEL: Did you have conversations with [the juvenile] about whether or not she felt like there was a conspiracy against her?
>
> DISTRICT ATTORNEY: Objection.
>
> COURT: Sustained.
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> DEFENSE COUNSEL: Well, Your Honor, if I'm not going to be able to ask her any questions, I have no further questions.

Assuming *arguendo* that the trial court erred in prohibiting Anderson from testifying as to the juvenile's capacity to stand trial, we nevertheless hold that this issue is not sufficiently preserved for appellate review. "It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). As our Supreme Court has explained,

> in order for a party to preserve for appellate review the exclusion of evidence, *the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the*

> *significance of the evidence is obvious from the record*. We also held that the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred.

Id. (citing *Currence v. Harden*, 296 N.C. 95, 249 S.E.2d 387 (1978)) (emphasis added). In short, the record must disclose what the excluded testimony of the witness would have been, such as when a witness answers a question before the opposing party's objection is sustained[2] or when opposing counsel stipulates to the existence of the testimony that the offering party stated it would present.[3] Here, Anderson did not answer any of the juvenile's attorney's questions, and the juvenile's attorney never made an offer of proof. This Court, thus, is left to speculate as to what Anderson would have said. Without knowing the substance of Anderson's testimony, this Court cannot review the merits of the juvenile's argument. Accordingly, this assignment of error is not properly preserved for appellate review and is, therefore, dismissed.

With respect to the juvenile's argument that her attorney was not permitted to offer his opinion on the juvenile's capacity to stand trial, we first note that unlike the questioning of Anderson, the substance and significance of the juvenile's attorney's statement is clear from the record.

COURT: Anything else?

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[2]*See, e.g.*, *State v. McCormick*, 298 N.C. 788, 792, 259 S.E.2d 880, 883 (1979), *superseded on other grounds by statute as recognized in State v. Squire*, 321 N.C. 541, 546, 364 S.E.2d 354, 357 (1988).

[3]*See, e.g.*, *Lloyd v. Babb*, 296 N.C. 416, 434–35, 251 S.E.2d 843, 855–56 (1979).

> DEFENSE COUNSEL: No, Your Honor. Just that my — in my — in my discussions with [the juvenile], it's apparent to me that —
>
> COURT: That's not admissible.
>
> DEFENSE COUNSEL: — she is not competent.

Nevertheless, we find no error in the trial court's refusal to allow the juvenile's attorney to testify as to the juvenile's capacity to stand trial unless the juvenile's attorney withdrew from representation. Our courts have observed there is a natural and justifiable reluctance to allow attorneys to act simultaneously as advocate and witness. *See Simpson*, 314 N.C. at 373, 334 S.E.2d at 62. In fact, "[t]he Supreme Court of North Carolina has historically discouraged the practice of attorneys testifying on behalf of clients, and although it has been allowed, in most instances the lawyer acting as witness for his client has surrendered his right to participate in the litigation." *Town of Mebane v. Iowa Mut. Ins. Co.*, 28 N.C. App. 27, 28–29, 220 S.E.2d 623, 624 (1975). In *Town of Mebane v. Iowa Mutual Insurance Co.*, this Court noted that "while it is a breach of professional ethics for an attorney for a party to testify as to matters other than formal matters without withdrawing from the litigation, he is not incompetent so to testify." *Id.* at 28, 220 S.E.2d at 624. Nevertheless, this Court held that it was not error for the trial court to refuse the attorney's testimony when such testimony would run afoul of the rules of professional ethics and conduct for licensed attorneys in North Carolina. *See id.* at 31, 220 S.E.2d at 626. Similarly, we hold that the trial court did not err in

refusing to allow the juvenile's attorney to testify absent his withdrawal from representation of the juvenile.

Faced with the choice of not testifying or withdrawing from representation, the juvenile's attorney refused to withdraw and instead opted to state on the record that he felt the juvenile lacked the capacity to proceed to trial. The attorney's statement, however, did not constitute competent evidence. *See State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985) (holding that the defense counsel's statements relating to his client's inability to comply with the terms of probation were not competent evidence). Thus, the only competent evidence of record — the testimony of Brown offered by the State — demonstrated that the juvenile had the capacity to stand trial. As such, there is no basis to find that the trial court erred in denying the juvenile's rights pursuant to section 15A-1001(a) of the North Carolina General Statutes. Accordingly, the juvenile's assignment of error is overruled.

In her final argument, the juvenile argues that the trial court committed reversible error when it allowed Brown — the State's expert — to testify as to the legal conclusion of the juvenile's competency. While we agree that the trial court erred, we hold that such error was harmless.

During the competency hearing, the following colloquy took place:

> DISTRICT ATTORNEY: And based on your forensic evaluation of [the juvenile], do you have an opinion as to whether she is competent to stand trial or not?

> BROWN: I do.
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> DEFENSE COUNSEL: Objection.
>
> COURT: Basis.
>
> DEFENSE COUNSEL: Legal conclusion.
>
> COURT: Overruled.
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> DISTRICT ATTORNEY: Based on your forensic evaluation — evaluator specialties, what is your opinion of [the juvenile]?
>
> BROWN: That she is capable of proceeding to trial.
>
> DISTRICT ATTORNEY: Thank you. No further questions.

"Whether a criminally accused is 'competent to stand trial' or, more appropriately, lacks the mental capacity to proceed, is a legal conclusion to be drawn by the trial judge upon appropriate findings of fact." *Smith*, 310 N.C. at 114, 310 S.E.2d at 324 (internal citation omitted); *see also State v. Aiken*, 73 N.C. App. 487, 498, 326 S.E.2d 919, 925 ("We note that in *State v. Smith*, 310 N.C. 108, 310 S.E.2d 320 (1984), our Supreme Court held that a witness could not testify as to whether or not a defendant had the capacity to proceed to trial."), *appeal dismissed and disc. rev. denied*, 313 N.C. 604, 332 S.E.2d 180 (1985). As our Supreme Court has explained,

> North Carolina Rule of Evidence 704 provides that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Under Rules 701 and 702, opinions must be helpful to the trier of fact. *Expert testimony as to a legal conclusion or standard is inadmissible*, however, at least where the standard is a legal term of art

> which carries a specific legal meaning not readily apparent to the expert witness.

State v. Jennings, 333 N.C. 579, 597–98, 430 S.E.2d 188, 196 (internal quotation marks, citations, and alteration omitted) (emphasis added), *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). Indeed, "'[t]o permit the expert to make this determination [*i.e.*, as to a legal conclusion] usurps the function of the judge.'" *State v. Fritsch*, 351 N.C. 373, 385, 526 S.E.2d 451, 459 (2000) (Martin, J., concurring in part and dissenting in part) (quoting *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 587, 403 S.E.2d 483, 489 (1991)).

Although the trial court erred in overruling the juvenile's objection and permitting Brown to testify as to the legal conclusion of the juvenile's competency, it nevertheless is incumbent upon the juvenile to demonstrate that she was prejudiced by the admission of such testimony. Pursuant to North Carolina General Statutes, section 15A-1443(a),

> [a] defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C. Gen. Stat. § 15A-1443(a) (2005); *see, e.g.*, *In re T.R.B.*, 157 N.C. App. 609, 614, 582 S.E.2d 279, 283 (2003) (applying harmless error analysis in an appeal from an adjudication of delinquency), *appeal dismissed and disc. rev. improvidently allowed*, 358 N.C. 370, 595 S.E.2d 146 (2004) (per curiam).

We reject defendant's contention that there is a reasonable possibility that had the testimony been excluded, the trial court would have ruled differently as to the juvenile's competency. As explained above, this Court is unable to review the merits of the juvenile's argument with respect to Anderson's testimony based upon the insufficiency of the record before us. Additionally, we have held that the trial court did not err in refusing to allow the juvenile's attorney to testify as to the juvenile's capacity to stand trial unless the juvenile's attorney withdrew from representation. Therefore, the only competent evidence of record related to the juvenile's capacity to stand trial is Brown's testimony, and based upon Brown's testimony and the lack of evidence to the contrary, we hold there is not a reasonable possibility that the trial court would have found the juvenile not competent to stand trial pursuant to North Carolina General Statutes, section 15A-1001(a). Accordingly, to the extent that the trial court erred in overruling the juvenile's objection to Brown's testimony, we find that such error was harmless beyond a reasonable doubt.

Affirmed.

Judges HUNTER and TYSON concur.

Report per Rule 30(e).