NO. COA06-1603

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

IN THE MATTER OF:

B.P.	Johnston County
N.P.	Nos. 06 J 38-39

By writ of certiorari respondent father appeals from order entered 9 June 2006 by Judge James Etheridge in Johnston County District Court. Heard in the Court of Appeals 9 April 2007.

Jennifer S. O'Connor for petitioner Johnston County Department of Social Services.

Elizabeth Myrick Boone for Guardian ad Litem.

Rebekah W. Davis for respondent-father.

CALABRIA, Judge.

Respondent father ("Jerry P.") appeals from an order adjudicating B.P. ("B.P.") abused and neglected and N.P.("N.P.") neglected. We vacate the order and remand the case to the trial court.

On 12 April 2005, B.P. confided to her boyfriend, B.H. ("B.H."), that Jerry P. had pulled her out of bed and alleged that he had raped her earlier that night. B.H. confronted B.P.'s mother who told B.P. to take a lie detector test and stated she did not believe B.P. Afterwards, B.H.'s mother took B.P. to Johnston

County Memorial Hospital for a medical examination. The findings of the rape kit were consistent with evidence of rape due to the presence of tearing of B.P.'s vagina; however, seminal fluid could not be obtained, since B.P. had showered several times in the previous 48 hours. Law enforcement and the Johnston County Department of Social Services ("DSS") were contacted. DSS removed the children from the home and provided resources for services to the family. A grand jury subsequently indicted Jerry P. on charges of incest, rape and indecent liberties with a minor.

On 9 February 2006, DSS filed juvenile petitions alleging that B.P. was sexually abused and that B.P. and N.P., B.P.'s 11-year-old sibling, were neglected and dependent. The trial court conducted hearings on the petitions in April and May of 2006. At the beginning of the 12 April 2006 adjudication hearing, B.P.'s Guardian ad Litem Attorney Advocate and DSS requested that B.P. be allowed to testify in chambers "due to her age and the circumstances[.]"

Counsel for Jerry P. and the mother objected, arguing that B.P. was seventeen years of age and that their clients needed to hear her testimony since she was the main witness in the case. The trial court allowed B.P. to testify in chambers with all parties' counsel present and gave them the opportunity to cross-examine B.P.

The child's testimony was heard in chambers but was not recorded. After hearing evidence, the trial court entered an adjudication order on 9 June 2006 and concluded B.P. was an abused juvenile and both B.P. and N.P. were neglected and dependent

juveniles. By a disposition order entered the same day, the trial court found that it would be contrary to the children's health and welfare to return them to the care, custody, and control of Jerry P. and the mother. The trial court placed B.P. in the custody of her maternal grandparents and N.P. in the custody of her maternal aunt and uncle. The court also relieved DSS of further efforts towards reunification with the mother and father. From that order, Jerry P. appeals.

On appeal, Jerry P. initially contends the adjudicatory hearing was held in such a manner that deprived him of his rights to due process and to confront witnesses. We agree.

Although there is no right to confront witnesses in civil proceedings, *see In re D.R.*, 172 N.C. App. 300, 303, 616 S.E.2d 300, 303 (2005), N.C. Gen. Stat. § 7B-802 (2005) generally provides that "[i]n the adjudicatory hearing, the court shall protect the rights of the juvenile and the juvenile's parent to assure due process of law." *Id.* This Court has recognized "the troubling aspects of children testifying in court, particularly where a child is called upon to testify against a parent or the perpetrator of sexual abuse." *In re Faircloth*, 137 N.C. App. 311, 318, 527 S.E.2d 679, 683 (2000).

In determining whether a parent's interest is sufficiently protected when a trial court allows a child to testify in closed chambers outside the presence of a parent, this Court has considered factors such as whether: (1) parent's counsel was present; (2) parent's counsel had an opportunity to cross-examine

the child; (3) the excluded parent had the ability to hear or review the testimony; and (4) the excluded parent had the ability to communicate with counsel. *See e.g., Cox v. Cox*, 133 N.C. App. 221, 227, 515 S.E.2d 61, 66 (1999) (holding that it was error for the court to question the children outside the presence of the mother, without her consent, but the error was not prejudicial because the parties' attorneys were present.); *In re Barkley,* 61 N.C. App. 267, 270, 300 S.E.2d 713, 715-16 (1983) (upholding the trial court's exclusion of the parent where each party's counsel was allowed "to question [the child] themselves, in the courtroom, with the questions and answers being recorded."); *see also In re J.B.,* 172 N.C. App. 1, 22, 616 S.E.2d 264, 277 (2005)(holding that the parent suffered no risk of prejudice where the "trial court employed various procedures to allow respondent to view and hear [child's] testimony as well as communicate with her counsel" through the use of a television monitor in an adjacent room with telephonic access to respondent's attorneys).

Jerry P. acknowledges that his counsel was present during B.P.'s testimony and was afforded the opportunity to question B.P. However, Jerry P. asserts that the trial court failed to protect his interests by not allowing him to view and hear B.P.'s testimony and by not recording B.P.'s testimony.

The facts of this case are distinguishable from those of *Cox*, *Barkley*, and *J.B.*, because in those cases the recordation of the minor child's testimony was not at issue. Here, the trial court did not record B.P.'s testimony in violation of N.C. Gen. Stat. §

7B-806 (2005) which provides that all juvenile "adjudicatory and dispositional hearings *shall* be recorded by stenographic notes or by electronic or mechanical means." *Id.* (emphasis added). Failure to comply with this statute, standing alone, is not grounds for a new hearing. *In re Clark*, 159 N.C. App. 75, 80, 582 S.E.2d 657, 660 (2003) (citations omitted).

Our Court has held that an appellant who raises the issue of an inadequately recorded proceeding must show that the failure to properly record the evidence resulted in specific prejudice. *See id. See also In re Bradshaw*, 160 N.C. App. 677, 681, 587 S.E.2d 83, 86 (2003) (general allegations of prejudice are insufficient to show reversible error resulting from the loss of specific portions of testimony caused by gaps in recording).

Unlike respondents in *Bradshaw* and *Clark*, in this case Jerry P. specifically alleges prejudice. First, Jerry P. asserts that the findings of fact in the adjudication orders, to which he assigns error, are improperly based upon B.P.'s unrecorded testimony. He also alleges he was unable to verify inconsistencies with B.P.'s testimony. Finally, Jerry P. also alleges he was prejudiced by the lack of recordation because he was unable to verify hearsay testimony admitted as corroborative testimony.

At the 26 April 2006 hearing, a week after B.P. testified in chambers, petitioner called DSS investigator Dee Etheridge ("Etheridge") to testify. During direct-examination, the following occurred:

> [Attorney for DSS]: What did [B.P.] tell you as to the events?

> [Attorney for respondent father]: Objection, Your Honor.
>
> [Attorney for DSS]: Corroboration.
>
> The Court: What is your reason for objecting?
>
> [Attorney for respondent father]: It's in follow-up to my objection to taking the - - I objected to testimony that was not made a part of the record, being made part of the record by means of corroboration.

The trial court overruled the objection and allowed the DSS investigator to testify about what B.P. had told her had occurred between B.P. and respondent father. When Etheridge completed her testimony, the following colloquy occurred:

> [Attorney for Jerry P.]: Your Honor, I renew my objection to strike in that (inaudible) does not corroborate her testimony. In particular, she did not say that there had ever been any previous intercourse when she testified back there so that testimony is not - -
>
> [Attorney for DSS]: I believe she did, Your Honor.
>
> [Attorney for respondent mother]: Your Honor, I have to (inaudible) as counsel here. It's clear from her testimony back there that she mentions more than one time that there was no sexual intercourse at all.
>
> The Court: Do you want to respond to that?
>
> [Attorney Advocate]: She did.
>
> [Attorney for DSS]: I believe [the Attorney Advocate's] notes indicate that she had indicated there was one prior incident of intercourse but even [if there was] not, Ms. Etheridge is just relaying the information. Particularly, it is consistent with regards to [an] eleven or twelve year[] old and five or six times. If the Court wants to strike that one instance from the record, that's fine but at least she did testify it was five or six

> times that there was inappropriate sexual contact between herself and her father. That is corroborating her statements.
>
> The Court: Let me see - -
>
> [Attorney for DSS]: I believe there was - -
>
> The Court: Let me see you up here at the bench.

The trial court conducted a bench conference and then stated: "I think we have agreed here at the bench that any testimony concerning him using his penis and having intercourse with her prior to the time that she was fifteen should be stricken; is that correct?" "All right, let it be stricken. Go ahead."

Although the testimony was stricken, it does not cure the prejudice of counsel having to rely on their memories a week after B.P. testified regarding a critical issue as to whether sexual intercourse ever occurred. We conclude the trial court failed to protect the interests of Jerry P. because B.P.'s testimony was not recorded pursuant to N.C. Gen. Stat. § 7B-806 (2005), and Jerry P. suffered prejudice from the lack of recordation.

Vacated and remanded.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).