NO. COA07-1169

NORTH CAROLINA COURT OF APPEALS

Filed: 17 June 2008

IN THE MATTER OF:
K.L.K.

Mecklenburg County
No. 06 J 1180

Appeal by juvenile from orders entered 11 June 2007 by Judge Hugh B. Lewis in Mecklenburg County District Court. Heard in the Court of Appeals 6 March 2008.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin, for the State.

Charlotte Gail Blake for juvenile-appellant.

STEELMAN, Judge.

The trial court acted within its discretion in ruling that a five-year-old was competent to testify after observing the witness and finding that inconsistencies in her testimony were a matter of credibility rather than disqualification under Rule 804. The trial court properly admitted the hearsay statements of the nurse under the Medical Diagnosis exception to the Hearsay Rule. Because the trial court failed to complete the adjudication order prior to its filing, the matter must be remanded for correction of clerical errors.

I. Procedural Background

This matter originated with a delinquency petition filed 10 October 2006, alleging K.L.K. to be delinquent for committing a first-degree sexual offense and indecent liberties between children. Hearings were held before Judge Lewis on 10 April 2007 and 11 June 2007. The trial court adjudicated K.L.K. a delinquent juvenile on 11 June 2007 and entered adjudication and dispositional orders on that date. Juvenile (hereinafter "appellant") appeals.

II. Competency of the Child Witness

In his first argument, appellant contends that the trial court abused its discretion in allowing a five-year-old to testify as a competent witness because the child did not meet the test of competency articulated in *State v. McNeely*, 314 N.C. 451, 333 S.E.2d 738 (1985). We disagree.

At the adjudication hearing, the State sought to introduce evidence from M.L., the alleged victim of the offenses. After a first effort to administer the oath to the five-year-old victim, the trial court heard arguments from counsel for the State and the juvenile regarding competency and the admissibility of evidence if the witness were to be declared unavailable under Rule 804. After considering the matter, the trial court stated:

> As to the first prong we're dealing with the definition as defined under [Rule] 804(a) first. Then I'm also going to address the [Rule] 601 question and make sure that they are separate, with a bright line here. [Rule] 601 deals with competency to testify. And I'm going to rely on *In [re Clapp,* 137 N.C. App. 14, w]herein a juvenile court did not commit plan [sic] error in admitting the testimony of a four-year-old victim despite the defendant's argument that the victim was incompetent to testify. Who has [sic] she did not clearly

> communicate her understanding of the obligations to tell the truth or illustrate that she had the capacity to understand and relate facts[,] that she proved [sic] inaudible responses to those questions. . . . [Addressing] that first[,] I'm going [to] deem that this witness is -- is competent and I'm going to bring her back in and place her under oath and I want to let you attempt your questions and then if I need to revisit the issues of 804, I shall.

Appellant made a continuing objection for the record. The court administered the oath as follows:

> THE COURT: If you'll please place your left hand on the Bible. That's this hand. Raise your right hand. "Do you swear to tell the truth, the whole truth and nothing but the truth so help you God?" Can you say yes or no? Will you say it for me? Say yes?
>
> THE WITNESS: Yes.

Appellant contends that the trial court's competency finding could not be the result of a "reasoned decision" because there was no indication that M.L. understood the nature of the oath or her duty to tell the truth.

The ruling on the competency of a witness is reviewed for an abuse of discretion. *State v. McNeely*, 314 N.C. 451, 453, 333 S.E.2d 738, 740 (1985) ("The ruling on the competency of a witness is within the trial court's discretion. A ruling committed to a trial court's discretion may be upset only when it is shown that it could not have been the result of a reasoned decision.")(internal citations omitted). Our Supreme Court addressed the issue of the competency of a five-year-old witness in *State v. Reeves*, 337 N.C. 700, 448 S.E.2d 802 (1994), stating:

> We have said that "[t]here is no age below which one is incompetent as a matter of law to testify." *State v. Eason*, 328 N.C. 409, 426, 402 S.E.2d 809, 818 (1991). The court was able to see the witness and determine whether she could express herself. The transcript indicates that she could do so. We know that a five-year-old child can tell what she has observed. We disagree with the defendant's contention that if the child was incompetent to be a witness when she was two-and-a-half years of age, she would be incompetent at five years of age. She could remember what she had observed and be better able to articulate it when she was older.
>
> We also believe the evidence at the hearing supports the court's finding that the child understood the duty of a witness to tell the truth. She testified in effect that a person could be punished for not telling the truth. She did not answer on some occasions when asked about the difference between telling the truth and not telling the truth, but the court could have found, which it did, from all the testimony that the child understood the duty of a witness to tell the truth. We cannot hold that it was error to find that Lisa was competent to testify.

Id. at 726-27, 448 S.E.2d at 813-14 (alterations in original). We hold that *Reeves* is controlling in this matter. Like the trial court in *Reeves*, "[t]he court was able to see [M.L.] and determine whether she could express herself. The transcript indicates that she could do so." *Id.* The record before us reflects a reasoned decision by the trial court. Although M.L. did not articulate the difference between the truth and a lie, she acknowledged that playtime involved "pretending" and demonstrated cognitive ability in answering questions about her daily activities and things she did at school. On this record, we cannot say that the trial

court's determination that M.L. could express herself and understood the duty to tell the truth was an abuse of discretion.

This argument is without merit.

III. Nurse Wallace's Testimony

In his second argument, appellant contends that the trial court erred in allowing hearsay testimony from the emergency room nurse because M.L. denied speaking to a nurse or telling her anything about the alleged offenses. We disagree.

Kristina Wallace, a registered nurse in the emergency department of Carolinas Medical Center (University), testified that she participated in M.L.'s treatment on the day following the alleged offenses. Appellant argues that the nurse's hearsay testimony was erroneously admitted because it was not corroborative of the child's testimony in light of her subsequent denial that she told the nurse and doctor what happened to her.

When Ms. Wallace testified, the State established that: (1) the nurse and doctor examined M.L. in an examination room in the hospital emergency department; (2) Ms. Wallace was wearing hospital scrubs and a nametag; (3) during the course of the medical examination, the nurse and the physician asked open-ended questions about why M.L. was at the hospital. Following Ms. Wallace's testimony that she explained to M.L. that "I was here to help take care of" her and that M.L. would be examined by a doctor, the trial court allowed the following testimony:

> DISTRICT ATTORNEY: Did [M.L.] say anything to you about what had happened?
>
> NURSE: She told me that she --

DEFENSE COUNSEL: OBJECTION hearsay.

THE COURT: OVERRULED. Reserved for appeal. You may answer the question.

NURSE: She told me that she was there because her pee-pee hurt.

D.A.: And did she tell you -- did you ask her what happened?

NURSE: I did.

D.A.: And what was her response?

NURSE: She stated that [appellant] stuck his finger in her pee-pee.

D.A.: Did you clarify what her pee-pee was?

NURSE: I did, I asked her where that was located and she pointed down to her bottom.

D.A.: To her bottom or --

NURSE: Down to her private area.

D.A.: To her gen -- or front of back, I guess is my question?

NURSE: To her front.

The decision to exclude or admit evidence is within the discretion of the trial court. *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753, *cert. denied*, 360 N.C. 575, 635 S.E.2d 429 (2006). "An abuse of discretion will be found only when the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (internal quotations and citations omitted).

Among the firmly-rooted hearsay exceptions is the exception for statements made for the purpose of medical diagnosis or treatment. N.C. Gen. Stat. § 8C-1, Rule 803(4)(2007).

> [H]earsay evidence is admissible under Rule 803(4) only when two inquiries are satisfied. First, the trial court must determine that the declarant intended to make the statements at issue in order to obtain medical diagnosis or treatment. The trial court may consider all objective circumstances of record in determining whether the declarant possessed the requisite intent. Second, the trial court must determine that the declarant's statements were reasonably pertinent to medical diagnosis or treatment.

State v. Hinnant, 351 N.C. 277, 289, 523 S.E.2d 663, 670-71 (2000).

Regarding the first prong, "the trial court should consider all objective circumstances of record surrounding declarant's statements in determining whether he or she possessed the requisite intent under Rule 803(4)." *Hinnant*, 351 N.C. at 288, 523 S.E.2d at 670.

> The first part of the inquiry seeks to determine the child's purpose in making the statement, not the interviewer's purpose in conducting the interview. In *Hinnant*, the alleged victim of sexual abuse was a four-year-old child. She was interviewed by a clinical psychologist after a doctor had already conducted an initial medical exam. The record did not "disclose that [the psychologist] or anyone else explained to [the child] the medical purpose of the interview." In that case our Supreme Court could not conclude that the child understood the interviews were conducted in order to provide medical diagnosis or treatment. Because "there [was] no affirmative record evidence indicating that [the child's] statements were medically motivated and, therefore, inherently reliable," the Court found that the first part of the inquiry was not met.

State v. Lewis, 172 N.C. App. 97, 103, 616 S.E.2d 1, 5 (2005) (alteration in original)(citations omitted).

The facts here are distinguishable from the facts in *Hinnant* and similar to those in *Lewis*. The questions to which M.L. responded were asked by the examining physician and nurse in preparation for a physical examination, not by a psychologist in a separate interview room following a medical examination. The record demonstrates that the nurse explained the medical purpose for the visit and that the child appeared to understand that medical purpose. As in *Lewis*, "the circumstances surrounding the interviews created an atmosphere of medical significance[.]" *Id.* at 104, 616 S.E.2d at 5 ("the interviews took place at a medical center, with a registered nurse, immediately prior to a physical examination."). The trial court reasonably concluded that the child's disclosure was medically motivated. *Hinnant*, 351 N.C. at 288, 523 S.E.2d at 670.

With respect to the second prong, "[i]n the context of child sexual abuse . . . , a victim's statements . . . as to an assailant's identity are pertinent to diagnosis and treatment." *State v. Bullock*, 320 N.C. 780, 782-83, 360 S.E.2d 689, 690 (1987)(citation omitted). Moreover, in spite of appellant's contention that the nurse's testimony was non-corroborative because the child did not testify that she had divulged details to hospital personnel, the content of M.L.'s statements to the nurse were in fact corroborative of her testimony at trial. We cannot say that the trial court abused its discretion in allowing this testimony.

This argument is without merit.

IV. The Adjudication Order

In his final argument, appellant contends that the trial court erred in adjudicating him delinquent and entering disposition because there was insufficient competent evidence to support the trial court's findings of fact and conclusions of law. Because the court failed to make any conclusions of law or to sign the adjudication order, we remand the matter to the trial court.

The trial court made detailed oral findings of fact in open court. The 11 June 2007 order states only that the trial court found beyond a reasonable doubt that the juvenile committed the offenses of first-degree sexual offense and indecent liberties between children. Appellant argues that, even if the challenged testimony, *supra*, is admissible, its weight renders it insufficient to support the trial court's findings, conclusions, and adjudication of delinquency. The weight of the evidence is a matter for the factfinder. *See In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397-98 (1996)("When the trial court is the trier of fact, the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate.") "If there is competent evidence to support the trial court's findings of fact and conclusions of law, the same are binding on appeal even in the presence of evidence to the contrary." *Id*. Upon thorough review of the record, we hold that the court's findings are supported by competent evidence and are binding on appeal.

However, the trial court made no conclusions of law and failed to complete the decretal portion of the order or to sign the adjudication order. We remand the matter to the trial court to

complete the second page of the adjudication order. The 11 June 2007 adjudication order is otherwise affirmed.

AFFIRMED IN PART, VACATED IN PART, REMANDED IN PART.

Judges McCULLOUGH and ARROWOOD concur.

Report per Rule 30(e).