NO. COA07-1229

NORTH CAROLINA COURT OF APPEALS

Filed: 7 October 2008

IN THE MATTER OF:

A.J.W.
K.S.W.

Iredell County
Nos. 06 JB 196
06 JB 197

Alexander County
Nos. 05 J 82
05 J 146

Appeal by respondents from adjudication order entered 14 December 2006 by Judge Theodore Royster, Jr. in Iredell County District Court and disposition order entered 2 March 2007 by Judge Theodore Royster, Jr. in Alexander County District Court. Heard in the Court of Appeals 17 March 2008.

Attorney General Roy Cooper, by Assistant Attorneys General M. Lynne Weaver and Creecy Johnson, for the State.

Carol Ann Bauer for respondent-appellant A.J.W.

Michael E. Casterline for respondent-appellant K.S.W.

GEER, Judge.

Respondents A.J.W. and K.S.W. were adjudicated delinquent based on their commission of felonious breaking and entering and felonious larceny. Because K.S.W.'s notice of appeal states that he is appealing the adjudication order — and not the disposition order — we are required under *In re A.L.*, 166 N.C. App. 276, 601 S.E.2d 538 (2004), to dismiss his appeal. With respect to A.J.W.'s

appeal, we agree that the trial court admitted evidence in violation of A.J.W.'s rights under the Sixth Amendment Confrontation Clause and, therefore, hold that A.J.W. is entitled to a new delinquency hearing.

Facts

The State's evidence tended to show the following facts. On 25 April 2006, at approximately 11:45 p.m., a deputy sheriff with the Iredell County Sheriff's Department responded to an alarm call at the Market Basket convenience store. Detective Sergeant Andy Poteat, also of the Sheriff's Department, heard the deputy over the radio report that a door had been kicked in. When Detective Poteat arrived at the store to assist the deputy, he saw that a sliding glass door was broken and a light over the door had been shattered.

After the store manager arrived at the scene, he and Detective Poteat watched a security videotape that recorded the burglary. On the videotape, there were two white males wearing black clothes and gloves taking various alcohol products and carrying them out of the store through the broken glass door. The males' faces were covered and both wore black tight-fitting toboggans or skull caps. One of the suspects wore long black pants with a blue or black pair of shoes, while the second suspect had on three-quarter-length black pants with tennis shoes. After viewing the videotape, the store manager mentioned that "the clothing description reminded him of the young boy who lived in the trailer park next door, June Bug Drive."

Detective Poteat attempted to serve an arrest warrant at a trailer on June Bug Drive, but no one answered the door. Detective Poteat then returned to the store and, behind the store, found a shoe, some clothing, an open case of beer, and some loose beer cans. The clothing looked similar to the clothing worn by the suspects in the video. Based on this discovery, Detective Poteat believed that the suspects had been on foot near the store, and he called a K-9 unit to the scene to try to locate any tracks leading away from the store.

The K-9 dog led the officers toward June Bug Drive and ultimately stopped in front of a trailer at 153 June Bug Drive, which was the address where Detective Poteat had previously attempted to serve the arrest warrant. Detective Poteat and other deputies knocked on the front and side doors of the trailer for about 15 minutes, but no one answered even though the deputies could see someone lying on a couch inside. After receiving no answer, the deputies opened the front door and entered the house. The person on the couch sat up and identified herself as Ms. Shaver.

The deputies explained why they had entered, and Ms. Shaver told them that her grandsons A.J.W. and K.S.W. and their friends were also in the trailer. Detective Poteat followed Ms. Shaver to the back of the trailer where the juveniles were located. As they went, Detective Poteat noticed a pair of three-quarter-length black pants, a second pair of black pants, a long-sleeve black shirt, and a "black silk-like head cover" lying on top of a clothes hamper.

These items matched the clothing worn by the suspects in the security video. He touched the three-quarter-length black pants, and they were damp. There was a piece of brick in the pocket of the second pair of black pants that Detective Poteat thought was consistent with what caused the damage to the sliding glass door at the store.

Five people — Justin Shaver, Dustin Nackley, Angel Seeds, A.J.W., and K.S.W. — were in the back room. On the floor, there were beer bottles similar to the ones stolen from the Market Basket, along with more black clothing, toboggans, and damp muddy shoes left in a corner of the room. Detective Poteat asked who went into the store, but the group was uncooperative.

Detective Poteat then interviewed Angel Seeds and Dustin Nackley individually. Seeds admitted that A.J.W. and K.S.W. had broken into the store, while Nackley indicated that only A.J.W. and K.S.W. had left the house that night. Detective Poteat interviewed A.J.W. and K.S.W. with their grandmother present, but both of them denied knowing who broke into the store and said they were asleep.

On 26 September 2006, the State filed juvenile petitions in Iredell County, alleging that A.J.W. and K.S.W. had committed felonious breaking and entering and felonious larceny. On 14 December 2006, the juveniles were adjudicated delinquent for the offenses alleged in the petition. The juveniles filed notices of appeal from the adjudication on 9 February 2007. Disposition was transferred to Alexander County, and the disposition hearings were held on 31 January 2007. On 2 March 2007, the trial court entered

Level 2 disposition orders as to both A.J.W. and K.S.W. On 12 March 2007, A.J.W. filed an amended notice of appeal "regarding the Adjudication and Disposition issues by the [trial court] on the 31st day of January 2007 and filed March 2, 2007." On the same date, K.S.W. also filed an amended notice of appeal "of the Adjudication Hearing on December 14, 2006 in Iredell County, North Carolina."

Discussion

We must first address whether we have jurisdiction over K.S.W.'s appeal. In *In re A.L.*, 166 N.C. App. 276, 277, 601 S.E.2d 538, 538 (2004), this Court pointed out that this Court has only limited jurisdiction to review final orders in juvenile matters. Specifically, "[a]ppealable final orders include '[a]ny order of disposition after an adjudication that a juvenile is delinquent or undisciplined.'" *Id.* (quoting N.C. Gen. Stat. § 7B-2602 (2003)). The Court explained further: "'The statute does not authorize an appeal following the *adjudicatory* portion of the case.'" *Id.* (quoting *In re Pegram*, 137 N.C. App. 382, 383, 527 S.E.2d 737, 738 (2000)). The Court then noted in *A.L.* that the juvenile's notice of appeal "refers only to the order entered 29 October 2002, with its 'findings adjudication of delinquency,' and mentions neither the disposition nor the order dated 8 December 2002." *Id.* The Court ruled: "Since nothing in the record indicates that the [disposition] order was appealed, we must conclude that we have no jurisdiction to review this matter." *Id.* at 278, 601 S.E.2d at 538-39. As a consequence, the Court dismissed the appeal.

This appeal is indistinguishable from *A.L.* K.S.W.'s notice of appeal did not mention the disposition order, but rather only referred to the order adjudicating K.S.W. delinquent. Under *A.L.*, the notice of appeal was insufficient to vest jurisdiction in this Court. Our Supreme Court has recently held that when a party fails to complete all the steps necessary to vest jurisdiction in the appellate court, it "precludes the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008). Accordingly, we are bound by *A.L.* and must dismiss K.S.W.'s appeal for lack of jurisdiction.

Although A.J.W.'s notice of appeal is not a model of precision, it does sufficiently appeal from the disposition order and, therefore, we have jurisdiction over his appeal. On appeal, A.J.W. challenges the admission of the testimony of Detective Poteat regarding the statements implicating A.J.W. and K.S.W. made by Angel Seeds and Dustin Nackley when interviewed by the deputies during their investigation. Although both Seeds and Nackley had been subpoenaed, they did not come to court. The prosecutor indicated that he believed that their absence was because they both had warrants for arrest pending against them and did not want to be arrested.

A.J.W. contends that admission of these out-of-court statements violated the Sixth Amendment's Confrontation Clause and the hearsay rules. At trial, defense counsel objected on the grounds of hearsay and argued that the statements did not

constitute statements against interest under Rule 804(b)(3), as the State had contended. Although defense counsel did not, at trial, assert any violation of A.J.W.'s right to confrontation under the Sixth Amendment, the trial court, on its own, mentioned *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004), which specifically addressed the Confrontation Clause. The trial court stated:

> THE COURT: All right. What we have here is a situation where, I think, [the prosecutor] is correct under North Carolina Rules of Evidence interpreted by Appellate Courts that if they consider there is corroborating evidence to substantiate that, it would be admissible as exception to hearsay rule. The *Crawford* case put out a couple years ago by the U.S. Supreme Court seems to espouse a different rule, where basically if you don't have that witness here, pretty much [it] is hearsay and it's not admissible, but Federal Courts have been chipping away a little bit and the North Carolina Courts have also upheld certain ones by exception to the hearsay rule in spite of *Crawford*. So at this point since I'm a State Judge and not a Federal Judge, I'm going to go along with the North Carolina interpretation as long as you can -- I'll allow it subject to your being able to show corroborating evidence that it's trustworthy and it is sufficient. So at this point I'll overrule the objection subject to a motion -- renewal of objection, motion to strike if the State's not able to show corroborating evidence that would show the trustworthiness.

Thus, the trial court acknowledged *Crawford*, but chose to admit the statements so long as the State presented corroborating evidence.

Rule 10(b)(1) of the Rules of Appellate Procedure provides: "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or

motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." Our Supreme Court has held that "a party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." *Dogwood*, 362 N.C. at 195-96, 657 S.E.2d at 364.

Despite the failure to preserve this error at trial, A.J.W. could have ensured appellate review by asserting in his assignment of error that the trial court had committed plain error. N.C.R. App. P. 10(c)(4). A.J.W.'s counsel, however, failed to do so. *See In re Pope*, 151 N.C. App. 117, 119, 564 S.E.2d 610, 612 (2002) ("[J]uvenile has also waived plain error review by 'failing to allege in his assignment of error that the trial court committed plain error.'" (quoting *State v. Flippen*, 349 N.C. 264, 276, 506 S.E.2d 702, 709 (1998), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015, 119 S. Ct. 1813 (1999))).

Nevertheless, we believe that this appeal presents an appropriate situation for application of Rule 2 of the Rules of Appellate Procedure. *See* N.C.R. P. App. 2 ("To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions."). In *Dogwood*, 362 N.C. at 196, 657 S.E.2d at 364, the Supreme Court

confirmed that there are some instances when the "imperative to correct fundamental error . . . may necessitate appellate review of the merits despite the occurrence of default."

This case does not present the customary Rule 10 situation in which the trial court did not have an opportunity to address the issue raised on appeal. Here, the trial court raised the dispositive case, *Crawford*, on its own initiative and declined to follow it even though United States Supreme Court decisions interpreting the federal constitution are, of course, controlling in state court. This appeal presents precisely the type of fundamental error that warrants review under *Dogwood*.

Our Supreme Court has specifically addressed *Crawford*: "*Crawford* holds the Confrontation Clause forbids 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *State v. Lewis*, 361 N.C. 541, 545, 648 S.E.2d 824, 827 (2007) (quoting *Crawford*, 541 U.S. at 53-54, 158 L. Ed. 2d at 194, 124 S. Ct. at 1365). Although the United States Supreme Court did not define what statements are "testimonial," it held that "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." *Crawford*, 541 U.S. at 52, 158 L. Ed. 2d at 193, 124 S. Ct. at 1364. *See also id.* at 53, 158 L. Ed. 2d at 194, 124 S. Ct. at 1365 (holding that "interrogations by law enforcement officers fall squarely within" any definition of testimonial statements).

The statements by Seeds and Nackley unquestionably constituted "testimonial statements" since they were in response to interrogation by law enforcement officers in the course of their investigation of the breaking and entering and larceny at the convenience store. Because Seeds and Nackley did not appear at trial, and A.J.W. had no prior opportunity for cross-examination, admission of those statements violated the Sixth Amendment's Confrontation Clause. A.J.W. is, therefore, entitled to a new delinquency hearing.

Dismissed as to K.S.W.; new trial as to A.J.W.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).