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NO. COA12-234  
NORTH CAROLINA COURT OF APPEALS

Filed: 18 September 2012

IN THE MATTER OF:  
C.J.L.

Alexander County  
No. 11 JB 37

Appeal by juvenile from order entered 31 August 2011 by Judge H. Thomas Church, and from orders entered 30 September 2011 and 6 October 2011 by Judge Christine Underwood in Alexander County District Court. Heard in the Court of Appeals 27 August 2012.

*Roy Cooper, Attorney General, by Tawanda N. Foster-Williams, Assistant Attorney General, for the State.*

*Heather L. Rattelade, for juvenile-appellant.*

MARTIN, Chief Judge.

Juvenile C.J.L. ("Charlie"<sup>1</sup>) appeals from orders adjudicating him delinquent for the misdemeanor offenses of simple assault, communicating threats, and sexual battery, and

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<sup>1</sup> We use the pseudonym "Charlie" to refer to juvenile C.J.L.

sentencing him to supervised probation, community service, and intensive counseling. We affirm.

On 13 December 2010, Jane<sup>2</sup> was sitting in her assigned seat on the school bus on her way home from East Alexander Middle School in Alexander County, North Carolina, when Charlie, a fellow seventh-grader who was sitting next to her, asked Jane for her cell phone number. After Jane refused to give Charlie her phone number, Charlie "told [Jane] that he would rape [her] if [she] didn't give him [her] phone number," and then laughed and "gave [Jane] a creepy smile." A few minutes later, Charlie reached out his hand and, with a smile on his face, "proceeded to run his hand all up [Jane's] body," starting at her mid-thigh, then to her groin, up her stomach, and continuing across her breasts. In response, Jane slapped Charlie's hand away from her body, asked him to leave her alone, and moved to the other side of the bus, after which Charlie "just giggled." Moments later, as Jane was talking with her friend, Charlie furtively took a picture of Jane's chest with his cell phone, and set the picture as the "wallpaper" or background image on the screen of his phone. Then, a few days later, although Jane had refused to give Charlie her cell phone number, Jane received a text message from Charlie that read, "I will rape you."

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<sup>2</sup> We use the pseudonym "Jane" to refer to the State's witness J.D.H.

Because Charlie continued to "constantly" send text messages to her, Jane changed her cell phone number shortly thereafter.

Jane did not report the December 2010 incident to anyone until April 2011, when she and Charlie were both in in-school suspension and the teacher monitoring the classroom quietly instructed Jane to move her seat because the teacher observed that Charlie was staring at her. Jane then confided in the teacher that Charlie had previously threatened to rape her. Upon hearing this information, the teacher reported Jane's allegations to school officials and Jane gave the school's resource officer a written statement of her account of the 13 December 2010 bus incident and of the text messages she received from Charlie threatening to rape her.

In May 2011, juvenile petitions were filed against Charlie alleging that he committed three incidents of the offense of sexual battery and one incident of the offense of communicating threats against Jane, and further alleging that he committed one incident of the offense of simple assault against another female classmate, who accused Charlie of coming up behind her and "rubbing down [the full length of] her arm with his hand." The prosecutor later consolidated the petitions alleging sexual battery, and the entire matter was noticed for an adjudication hearing calendared for 6 July 2011.

At the July 2011 hearing, the State began its case by presenting Jane's testimony describing her account of the bus incident on 13 December 2010. When asked whether she believed that Charlie "might carry out the threat of raping [her]," Jane testified that she believed his threat because one of her friends told her that Charlie "had sex with his [own] sister at a church camp." Upon further questioning by the prosecutor, Jane testified that, "a couple days after" the incident on the bus, she confronted Charlie to ask him whether the story about him having a sexual encounter with his sister was true, and Charlie admitted to Jane that it was true. After this testimony was elicited from Jane, but before she could answer the prosecutor's next question as to whether there were "any other reason[s] that [she] believed that [Charlie] would carry out the threat" to rape her, the court interrupted the proceeding and stated the following:

Approach. Step down, please. The time periods that the witness has testified to, I think that that statement is inadmissible; and at this point I think it's prejudicial to the point that I will have to declare a mistrial, but by declaring a mistrial, it doesn't mean the case is over. It just means that I can't hear it. Certainly got [sic] another judge that is scheduled in here soon that can hear the case. I feel that's necessary under the circumstances. All right. What date might we reschedule that for hearing?

After the court's pronouncement declaring a mistrial, and without objection from either the prosecutor or defense counsel, the court calendared the matter for hearing by another judge on 17 August 2011. On the same day of the July hearing, the court also signed and filed a Juvenile Order with the following handwritten findings:

This matter came on for trial before the undersigned judge. During the hearing certain testimony was illicit [sic] from the prosecuting witness. Later, this court determined that some of that testimony was inadmissible and highly prejudicial.

Based on the findings of the court[,] the Court, on its own motion, declared and does declare a mistrial. A new court date was set.

At the August 2011 hearing, the court heard testimony from four witnesses for the State, including Jane. Defense counsel moved to dismiss the charges at the close of the State's evidence and at the close of all of the evidence, which the trial court denied. After finding that the juvenile committed each of the charged offenses, the court adjudicated the juvenile as delinquent and, on 30 September 2011, the court entered a Juvenile Level 1 Disposition Order sentencing the juvenile to twelve months of supervised probation, forty hours of community service, and ordering him to "cooperate with intensive counseling to address his obsession with sexualized behavior."

The juvenile appeals.

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The juvenile first contends his counsel was ineffective because she failed to object to the trial court's order declaring a mistrial. The juvenile asserts that the court improperly declared a mistrial shortly after the July 2011 adjudication hearing began, and suggests that his counsel's failure to object to the mistrial failed to protect his right to be free from the double jeopardy to which he was purportedly subjected by his subsequent conviction. We disagree.

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984)). "In order to meet this burden defendant must satisfy a two part test." *Id.* at 562, 324 S.E.2d at 248. "First, the defendant must show that counsel's performance was deficient," which "requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Id.* (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693). "Second,

the defendant must show that the deficient performance prejudiced the defense," which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Id.* (emphasis omitted) (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693). "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Id.* at 563, 324 S.E.2d at 249.

In the present case, at the July 2011 hearing, the State's witness Jane recounted the 13 December 2010 incident when Charlie told her that he would rape her, stroked her body from her thigh to her breasts, and surreptitiously photographed her chest with his cell phone. Then, after hearing Jane's further testimony that Charlie had "had sex with his [own] sister at a church camp," and that Jane had confronted Charlie to ascertain the veracity of the story, the court abruptly stopped the proceeding and declared that Jane's testimony was inadmissible and prejudicial to the point that the court felt that it "*ha[d]* to declare a mistrial." (Emphasis added.) Thus, even though "[i]t is well-settled in this jurisdiction that when the court

withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured," *State v. Smith*, 301 N.C. 695, 697, 272 S.E.2d 852, 855 (1981), it appears that the trial court, sitting as the fact-finder in the case below, determined that Jane's testimony had irreparably prejudiced the juvenile and that such prejudice could not be cured by a pronouncement that the court would disregard the incompetent evidence. In other words, the trial court determined that the "highly prejudicial" testimony from Jane "render[ed] impossible a fair and impartial trial [for the juvenile] under the law," see *State v. Crocker*, 239 N.C. 446, 450, 80 S.E.2d 243, 246 (1954), and, in its discretion and with the parties' consent, the court decided that the matter should be heard anew by another judge in order for the juvenile to receive a fair trial.

Since it is "well within the trial judge's discretion [to declare a mistrial] when faced with the occurrence of some incident of a nature that would render impossible a fair and impartial trial under the law," *State v. Shuler*, 293 N.C. 34, 45, 235 S.E.2d 226, 233 (1977) (internal quotation marks omitted), and because "the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation [of whether a mistrial is necessary]," *State v. Malone*, 65 N.C. App. 782, 785-



86, 310 S.E.2d 385, 387 (alteration in original) (internal quotation marks omitted), *disc. review denied and appeal dismissed*, 311 N.C. 405, 319 S.E.2d 277 (1984), we conclude that the trial court did not abuse its discretion when it declared a mistrial during the July 2011 adjudication hearing. Moreover, since "an order of mistrial which is declared . . . to serve the 'ends of public justice' will not ordinarily cause a subsequent conviction after retrial to be susceptible to a double jeopardy challenge," *State v. Simpson*, 303 N.C. 439, 447, 279 S.E.2d 542, 547 (1981); *see also Crocker*, 239 N.C. at 450, 80 S.E.2d at 246 ("[T]he necessity of doing justice . . . [relates to] the occurrence of some incident of a nature that would render impossible a fair and impartial trial under the law." (internal quotation marks omitted)), we further conclude that the juvenile was not subjected to double jeopardy by his subsequent conviction at the August 2011 adjudication hearing. Accordingly, because the only basis brought forward on appeal for the juvenile's claim of ineffective assistance of counsel is his assertion that his counsel subjected him to double jeopardy by failing to object to the court's purportedly improper *ex mero motu* order declaring a mistrial, we overrule this issue on appeal.

The juvenile next contends the State violated his

constitutional right to due process by knowingly soliciting or failing to correct false testimony from Jane during the August 2011 hearing, and by relying upon this testimony to find him guilty of communicating threats in violation of N.C.G.S. § 14-277.1.<sup>3</sup> The juvenile suggests that Jane's testimony at the August 2011 hearing had "[c]onveniently . . . changed" from her testimony at the July 2011 hearing, and that the alleged differences in her testimony demonstrate that the prosecutor "abdicat[ed]" his duties in contravention of the "constitutional obligations imposed upon the State." However, our review of the record indicates that the juvenile did not raise any such constitutional challenge on appeal and, thus, this issue is not properly before us. See *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) ("[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal.").

Additionally, we note that the juvenile has failed to

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<sup>3</sup> Although the juvenile suggests in his brief that Jane's purportedly false testimony affected the court's adjudication of guilt on *all* of the charged offenses against him, the juvenile argues only that the challenged testimony affected whether the court could properly determine that Jane "believe[d] that [Charlie's] threat [to rape her] will be carried out." See N.C. Gen. Stat. § 14-277.1(a)(4) (2011). Thus, to the extent that this issue on appeal is properly before us, we consider only whether the State knowingly solicited or failed to correct false testimony from Jane to secure the juvenile's conviction on the offense of communicating threats in violation of N.C.G.S. § 14-277.1.

provide support for his serious accusation that the prosecutor acted in dereliction of his responsibilities by knowingly soliciting or failing to correct false testimony from the State's witness. The testimony excerpted by the juvenile from the July 2011 hearing shows that Jane testified that she heard a story from a friend about Charlie, and that "a couple days after" Charlie threatened her on the bus, Jane confronted him about the story. The testimony excerpted by the juvenile from the August 2011 hearing shows that Jane testified that she heard "things" about Charlie that "gave [her] some concern" during the "weeks or months before the [bus] incident." In other words, contrary to the juvenile's supposition that her later testimony "changed," a close review of Jane's testimony from the July 2011 hearing reveals that Jane only testified to *confronting* Charlie "a couple days after" the bus incident to confirm the veracity of the story she heard about him, but did not specifically testify as to when she first *heard* the story about Charlie. This is also consistent with Jane's testimony on cross-examination at the August 2011 hearing, during which Jane unequivocally stated that she consistently maintained that she had heard the story about Charlie before 13 December 2010, i.e., before Charlie first threatened Jane that he would rape her. Because the juvenile has not brought forward any evidence to

support his serious accusation that the prosecutor solicited or failed to correct any false testimony from Jane with respect to the timing of when she heard stories about Charlie, we decline to address this issue on appeal further.

All remaining assertions in support of which the juvenile has failed to present any relevant legal authority are deemed abandoned. See N.C.R. App. P. 28(a), (b)(6).

Affirmed.

Judges GEER and STROUD concur.

Report per Rule 30(e).