NO. COA13-136

NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

In the matter of J.K.C.

Mecklenburg County
No. 12 JB 201

Appeal by juvenile from adjudication order and disposition order entered 6 August 2012 by Judge Donald R. Cureton in Mecklenburg County District Court. Heard in the Court of Appeals 14 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Kimberly N. Hoppin for defendant-appellant.

BRYANT, Judge.

Where a lay witness testifies as to his recollection of events, such testimony is within Rule 701 as it is based on the perception and personal knowledge of that witness. A child witness who can demonstrate an understanding of the requirement

of veracity for testimony is deemed competent to testify. A typographical error in citing a statute is not a fatal defect where the appropriate statutory language is given in the juvenile petitions. Where sufficient evidence existed, viewed in the light most favorable to the State, to prove each and every element of a claim, the trial court did not err in denying defendant's motion to dismiss.

On 11 February 2012, J.K.C. ("juvenile") was asked to babysit Annie[1] and her older sister, Gina, for the evening. Juvenile, who was fifteen years old at the time, had babysat for the family several times over the past several years. Annie was three years old and Gina was seven years old at the time of the incident.

During the evening, juvenile took Annie upstairs to the bathroom. Annie testified that "[juvenile] licked my private while in the bathroom." Annie also stated that juvenile sometimes helped clean her after she used the bathroom. Upon further questioning by the State, Annie stated that juvenile had "[p]ut her finger in me and she tasted my private." Annie also stated that juvenile had "licked my private." Annie also indicated that she had spoken "lots of times" about this

[1] Annie and Gina are pseudonyms used to protect the identities of the juveniles pursuant to N.C.R. App. P. 3.1(b).

incident with her parents and with the Assistant District Attorney.

Gina, Annie's sister, testified that juvenile used to be her babysitter until "she did inappropriate things to [Annie]." Gina said that she remembered juvenile saying, "Come on, let's go to the bathroom" to Annie. Gina testified that juvenile and Annie went to the bathroom, and that the door was locked when Gina went to see why they were taking so much time to use the bathroom. After juvenile and Annie returned from the bathroom, Gina joined them to play with blocks and to play princess in a tent.

At 7:00 that evening, juvenile called Annie's father and told him that she had a migraine and wished to go home. Annie's parents then returned to the home from dinner. Upon returning home, Annie told her father that "[juvenile] licked [her] private." Annie's parents testified that they were surprised and confused by Annie's comments. Annie's father took Annie upstairs to question her about her comments, while juvenile waited downstairs for her mother to come and pick her up. After continuing to question Annie, Annie's parents became concerned because Annie's statements remained consistent. Annie's parents

called the parents of juvenile to discuss what happened and then called 911.

Detective Wendell Moynihan of the Special Victims Division, Youth Crime Unit, arrived at Annie's house, spoke with the family, and requested the crime scene unit. Detective Moynihan referred Annie's family to Pat's Place Child Advocacy Center for a forensic interview and arrested juvenile.

Annie was transported to the emergency room at CMC Levine Children's Hospital that night. A rape kit was conducted on Annie, and Detective Moynihan applied for a non-testimonial identification order to obtain a DNA swab from juvenile. DNA was collected and analyzed, but those results were not entered into evidence by either party.

Clinical social worker Alyssa Layne conducted a forensic interview with Annie the day after the incident, on 12 February 2012. A video of the interview was admitted into evidence by the State. Layne drafted a forensic interview report which was also admitted into evidence by the State.

On 2 August 2012 juvenile was brought before the trial court on petitions filed 3 April 2012, alleging first-degree sexual offense and crime against nature, and on petitions filed 27 April 2012, alleging first-degree sexual offense, crime

against nature, and indecent liberties between children. At trial, juvenile did not offer any evidence. Juvenile was found responsible for two counts of first-degree sexual offense and one count of crime against nature. Allegations in the 27 April 2012 petition for crime against nature and indecent liberties between children were dismissed.

The trial court entered disposition on 3 August 2012, ordering a Level 2 disposition. Juvenile was placed on supervised probation for twelve months, and was ordered not to have contact with Annie or any unsupervised contact with anyone younger than herself. The trial court also ordered juvenile to undergo a Juvenile Sex Offender evaluation and complete the Teen Healthy Sexuality program through Teen Health Connection. Juvenile now appeals.

On appeal, juvenile raises the following arguments: (I) the trial court committed reversible error by allowing Annie's father to testify he believed Annie was telling the truth; (II) the trial court committed reversible error in ruling Annie was competent to testify; (III) the trial court lacked jurisdiction to adjudicate juvenile delinquent and enter disposition on the charges of first-degree sexual offense with a child pursuant to

N.C. Gen. Stat. § 14-27.4A, where this offense was not alleged in the petitions; and (IV) the trial court committed reversible error by denying juvenile's motion to dismiss the charges where the State failed to present sufficient evidence of each and every element of the offenses.

I.

Juvenile first argues that the trial court committed reversible error by allowing Annie's father to testify that he believed Annie was telling the truth. We disagree.

"In order to preserve an issue 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." N.C.R. App. P. 10(a)(1) (2009). Here, juvenile did not object to the admission of Annie's father's testimony at trial. Accordingly, this Court reviews the admission for plain error. N.C.R. App. P. 10(a)(4) (2009). To show plain error, a defendant must demonstrate that "a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty."

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and internal quotation omitted). "[P]lain error review should be used sparingly, only in exceptional circumstances, to reverse criminal convictions on the basis of unpreserved error[.]" *Id.* at 517, 723 S.E.2d at 333.

Juvenile argues that the admission of Annie's father's testimony was improperly admitted because it was barred under Rule 701 of the Rules of Evidence. Rule 701 limits testimony by a lay witness to testimony "in the form of opinions or inferences . . . which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2011).

Here, Annie's father testified as to the sequence of events that occurred the night of the incident in question. The context of the testimony indicates that Annie's father was speaking as to his perception of Annie's comments concerning juvenile's alleged actions, as well as his own responses to Annie's statements which lead him to eventually call both juvenile's parents and 911. As such, the testimony of Annie's father was proper lay witness testimony because it was meant not to establish the credibility of Annie's statements, but to

reveal Annie's father's perception of and response to the events of that night.

Further, to establish plain error juvenile is required to show that the evidence admitted impacted the jury's verdict. *See, e.g.*, *State v. Dew*, ___ N.C. App. ___, ___, 738 S.E.2d 215, 219 (2013) ("Assuming, without in any way deciding, that the admission of this portion of [the] testimony was improper, Defendant has failed to show that, absent the error, the jury would have probably reached a different result."). Here, the trial court sat as judge and jury. Where a bench trial is conducted,

> the rules of evidence as to the admission and exclusion of evidence are not so strictly enforced as in a jury trial. If there was incompetent evidence admitted, it will be presumed it was disregarded by the judge in making his decision, unless it affirmatively appears that the action of the judge was influenced thereby.

Mayberry v. Home Insurance Co., 264 N.C. 658, 661, 142 S.E.2d 626, 629 (1965) (citation omitted).

Here, juvenile has failed to show that the trial court committed plain error by admitting the challenged portion of Annie's father's testimony. This argument is overruled.

II.

Juvenile next argues that the trial court committed reversible error in ruling that Annie was competent to testify. We disagree.

The issue of whether a child is competent to testify at trial "is a matter which rests in the sound discretion of the trial judge in the light of his examination and observation of the particular witness." *State v. Jones*, 310 N.C. 716, 722, 314 S.E.2d 529, 533 (1984) (citation omitted).

> There is no age below which one is incompetent as a matter of law to testify. Determining whether a child is competent to testify is a matter within the discretion of the trial court. The trial court's decision will not be reversed on appeal unless it is shown that it could not have been the result of a reasoned decision. In exercising his discretion, the trial court must rely on his personal observations of the child's demeanor and responses to inquiry on *voir dire* examination.

State v. Ward, 118 N.C. App. 389, 394, 455 S.E.2d 666, 668-69 (1995) (citations and internal quotations omitted).

Juvenile argues that the testimony of Annie was inadmissible because Annie was incompetent to testify. Specifically, juvenile states that her *voir dire* of Annie demonstrated Annie's incompetence because Annie showed an inability to distinguish between fact and fiction. The trial court, after completion of the *voir dire* of Annie, made detailed

findings of fact in open court and determined that Annie was competent to testify, despite Annie giving contradictory testimony in response to questioning. The trial court also remarked that "[t]he veracity [sic] of her [Annie's] statements will go to her credibility as we proceed forward." Our Supreme Court has held that any "[c]onflicts in the statements by a witness affect the credibility of the witness, but not the competency of the testimony." *State v. Cooke*, 278 N.C. 288, 291, 179 S.E.2d 365, 368 (1971) (citations omitted). As the decision of the trial court to admit Annie's testimony was based upon the trial court's personal observations of Annie during *voir dire*, and finding her sufficiently competent to testify, the trial court did not err in admitting Annie's testimony.

III.

The third argument raised by juvenile is that the trial court lacked jurisdiction to adjudicate juvenile delinquent and enter disposition on the charges of first-degree sexual offense with a child pursuant to N.C. Gen. Stat. § 14-27.4A where this offense was not alleged in the petitions. We disagree.

Jurisdictional matters are reviewed *de novo*. *In re J.A.P.*, 189 N.C. App. 683, 659 S.E.2d 14 (2008). Where a criminal pleading "is alleged to be invalid on its face, thereby

depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000).

In the instant case, juvenile argues the trial court lacked jurisdiction because the juvenile petitions charging her referenced subsection N.C.G.S. § 14-27.4A(a)(2), while the allegations in the petitions tracked the language of N.C.G.S. § 14-27.4A(a)(1). However, under N.C. Gen. Stat. § 15A-924(a)(6) (2011), regarding content of criminal pleadings, "[e]rror in the citation or its omission is not ground for dismissal of the charges or for reversal of a conviction." Moreover, our Court has held in *State v. Mueller*, 184 N.C. App. 553, 647 S.E.2d 440 (2007), that "although an indictment may cite to the wrong statute, when the body of the indictment is sufficient to properly charge defendant with an offense, the indictment remains valid and the incorrect statutory reference does not constitute a fatal defect." *Id.* at 574, 674 S.E.2d at 455.

Here, the juvenile petition filed on 3 April 2012 alleged the following statutory offense:

> [t]he juvenile is a delinquent juvenile as defined by G.S. 7B-1501(7) in that on or about the date of the offense shown above and in the court named above, the juvenile,

> did unlawfully, willfully, and feloniously engage in a sexual act, namely licked the victim's private area with [Annie], the victim, who at the time of the offense, was a child under the age of 13, specifically age 3, and the delinquent juvenile was at least [illegible] years old and at least four years older than the victim.

The juvenile petition filed on 27 April 2012 alleged the following statutory offense:

> [t]he juvenile is a delinquent juvenile as defined by G.S. 7B-1501(7) in that on or about the date of offense shown above and in the court named above, the juvenile, did unlawfully, willfully, and feloniously engage in a sexual act, namely putting her finger inside the victim's vagina with [Annie], the victim, who at the time of the offense, was a child under the age of 13, specifically age 3, and the delinquent juvenile was at least 12 years old and at least four years older than the victim.

It is clear from these petitions that although a typographical error was made, citing to N.C.G.S. § 14-27.4A(a)(2), which pertains to an offender 18 years old or older, rather than to the correct statute, N.C.G.S. § 14-27.4A(a)(1), the language used in the petitions clearly follows that of the appropriate statute, N.C.G.S. § 14-27.4A(a)(1). Therefore, the petitions, as alleged, were valid and sufficient to properly charge juvenile with two counts of first-degree sexual offense. Juvenile's argument is overruled.

IV.

Juvenile's final argument is that the trial court committed reversible error by denying juvenile's motion to dismiss the charges where the State failed to present sufficient evidence of each and every element of the offenses. We disagree.

In ruling on a motion to dismiss, "the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted). Evidence must be viewed "in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the [trier of fact] to resolve." *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000) (citations omitted).

A total of five petitions were filed against juvenile alleging two counts of first-degree sexual offense, two counts of crime against nature, and one count of indecent liberties between children. The trial court dismissed one count of crime against nature and dismissed the count alleging indecent

liberties between children. The remaining petitions alleging first-degree sexual offense were based on sexual acts involving cunnilingus and digital penetration; however, in the petition alleging crime against nature, no sexual act was designated.

Juvenile argues that the State presented insufficient evidence that juvenile committed a first-degree sexual offense. N.C. Gen. Stat. § 14-27.4A(a)(1) provides that

> [a] person is guilty of a sexual offense in the first degree if the person engages in a sexual act . . . [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]

A sexual act is defined as "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body . . . ." N.C. Gen. Stat. § 14-27.1(4) (2011).

Juvenile contends that because Annie's testimony was contradictory regarding the sexual acts, the State has failed to meet its burden. We note that as Annie testified about the incident, at times she contradicted herself as to whether or not she was clothed during the sexual acts. However, as to the sex offense involving cunnilingus, Annie testified repeatedly and consistently that "[juvenile] licked [her] private." "Our

courts have consistently held an alleged victim's testimony is sufficient to establish that the accused committed a completed act of cunnilingus by placing his tongue on her pubic area." *State v. Stancil*, 146 N.C. App. 234, 245, 552 S.E.2d 212, 218 (2001). Also, Annie's statements to others, as well as her trial testimony, was consistent regarding the juvenile's sexual act of digital penetration. When interviewed by the clinical social worker, in addition to stating that juvenile licked her vagina, Annie stated that juvenile had digitally penetrated her vagina. Furthermore, at trial, Annie testified that juvenile "[p]ut her finger in me and she tasted my private." This testimony is sufficient to establish first-degree sexual offense based on digital penetration. *See State v. Watkins*, 318 N.C. 498, 349 S.E.2d 564 (1986) (holding that a seven-year-old child's testimony that defendant had touched her vaginal area, causing it to hurt, was sufficient to support a conviction for first degree sexual offense). Viewing the evidence in the light most favorable to the State, the evidence was sufficient to prove each element of each count of first-degree sexual offense pursuant to N.C.G.S. § 14-27.4A(a)(1). The trial court properly denied juvenile's motion to dismiss the first-degree sexual offense charges.

Juvenile also argues that the State failed to prove the elements of crime against nature. General Statutes, section 14-177 states that "[i]f any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon." N.C.G.S. § 14-177 (2011). This statute is "broad enough to include all forms of oral and anal sex . . . ." *State v. Stiller*, 162 N.C. App. 138, 140, 590 S.E.2d 305, 307 (2004). As juvenile was found not responsible for the allegations in one of the petitions (27 April 2012) alleging crime against nature, the inquiry here is whether there was sufficient evidence to support such a charge as alleged in the other petition (3 April 2012). That petition alleged:

> [t]he juvenile is a delinquent juvenile as defined by G.S. 7B-1501(7) in that on or about the date of offense shown above and in the court named above, the juvenile, did unlawfully, willfully, and feloniously Crime Against Nature [sic] commit the abominable and detestable crime against nature with [Annie]. This offense is in violation of G.S. 14-177. Maximum commitment 24 Months or 18th Birthday.

Although the 3 April juvenile petition does not specify the sexual act committed in violation of the statute[2] prohibiting crime against nature, it is not required to do so. *See State v.*

[2] The 27 April 2012 petition specified digital penetration as the act constituting crime against nature.

Stokes, 274 N.C. 409, 413, 163 S.E.2d 770, 773 (1968) ("An indictment which charges that defendant did unlawfully, willfully and feloniously commit the infamous crime against nature with a particular man, woman or beast is sufficient."). As previously discussed, when viewed in the light most favorable to the State, sufficient evidence was presented to show each element of each charge presented.

Juvenile further argues that because no specific act constituting crime against nature was alleged in the petition, the trial court adjudicated juvenile's charges on alternate theories. Juvenile expresses reasonable concern that the offenses are not distinct, but stops short of raising a double jeopardy issue, perhaps because it is clear that "[i]f . . . a single act constitutes an offense against two statutes and each statute requires proof of an additional fact which the other does not, the offenses are not the same in law and in fact and a defendant may be convicted and punished for both." *State v. Hunt*, ___ N.C. App. ___, ___, 728 S.E.2d 409, 413 (2012) (citation omitted). Here, first-degree sexual offense under N.C.G.S. § 14-27A(a)(1) requires that the sexual act — whether cunnilingus or digital penetration — be committed upon a child under the age of twelve years old. Crime against nature does

not have an age limitation. Notwithstanding that the same act could constitute the basis for the trial court's adjudication of each offense, the issue is whether sufficient evidence was presented to support the offense of crime against nature. The answer is yes. The evidence supports separate sexual acts, either of which can support a charge of crime against nature. Therefore, in the light most favorable to the State, sufficient evidence was presented to permit the trial court to find juvenile responsible as to each of the charges of first-degree sexual offense and crime against nature. Accordingly, the trial court did not err in denying juvenile's motion to dismiss these charges.

Affirmed.

Judges STEPHENS and DILLON concur.

Report per Rule 30(e).