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NO. COA13-641

NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2013

IN THE MATTER OF:

A.B.D.¹

Mecklenburg County
No. 12 JB 439

Appeal by Juvenile from order entered 27 November 2012² by Judge Regan A. Miller in Mecklenburg County District Court. Heard in the Court of Appeals 24 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General Vanessa N. Totten, for the State.

¹ Initials and pseudonyms are used in this opinion to protect the identity of the juvenile and other minors discussed herein. All names initially shown in quotation marks are pseudonyms.

² An amended disposition order was filed by the juvenile court on 10 December 2012. The original order listed the offenses for which A.B.D. was adjudicated delinquent as "Ind. Liberties Between Child." and "Crime Against Nature." However, as discussed herein, the charge of indecent liberties between children was ultimately dismissed and the juvenile was actually found to have committed the offenses of crime against nature and first-degree sexual offense. The amended disposition order corrects this clerical error, but is otherwise identical to the order entered 27 November 2012.

Anna S. Lucas for Juvenile.

STEPHENS, Judge.

Procedural History and Factual Background

On 3 July 2012, the Mecklenburg County District Attorney's Office filed three petitions alleging that Juvenile A.B.D. ("Adam") was delinquent for having committed the offenses of indecent liberties between children, first-degree sexual offense, and crime against nature. On the same date, the juvenile court entered an order for secure custody whereby Adam was placed in a detention facility. On 16 July 2012, the court released Adam from detention and placed him on house arrest. The matter came on for hearing in the juvenile court in Mecklenburg County on 27 November 2012. The evidence at the hearing tended to show the following:

In May 2012, Adam, a thirteen-year-old eighth grader, lived with his grandmother and older brother in Charlotte, North Carolina. Adam had a school record which included three in-school suspensions and four out-of-school suspensions dating back to January 2007. He also had a history of aggressive and disruptive behavior.

On the evening of 18 May 2012, the mother of five-year-old "Tracey" went into labor and was admitted to a local hospital. As a result, Tracey went home with her godmother, who was also Adam's aunt. There were six children, including Tracey and Adam, and several adults at the aunt's apartment that evening. During the evening, one of the adults, "Sara," went to look for Tracey and Adam after noticing that they were not in the living room with the other children. Sara entered a bedroom where the lights were off and saw Adam in a closet lying on his stomach with his pants pulled down. Sara asked where Tracey was, and Adam lifted his body up to reveal Tracey lying face down beneath him with her pants down. When Adam lifted up, Sara was able to see Adam's penis and Tracey's bare bottom.

At the adjudication hearing, Tracey testified that Adam "took me in the closet and he pulled his pants down and my pants down and then he took his thing and put - I poop at." Tracey testified that it "hurt." The following exchange then took place:

[The State:] And [Tracey], you say he stuck his thing in your thing? By your thing, what do you mean?

[Tracey:] He was doing nasty things.

[Adam's counsel:] I can't hear.

THE COURT: You have to – you have to turn around and tell me the answer that you were – say that again.

[Tracey:] He was doing something – he was doing nasty.

[The State:] And what – what things on your body did he – did it touch?

[Tracey:] The part that had poop in it.

Rebecca Horner, a forensic interviewer with Pat's Place Child Advocacy Center, testified about her interview with Tracey in June 2012. Horner brought a video recording of the interview to the hearing. Adam objected to admission of the recording on chain of custody grounds:

[The State:] Did you bring a copy of the interview that you conducted with [Tracey] to court with you today?

[Horner:] Yes.

[The State:] And do you have that in your possession?

[Horner:]. Yes.

[The State:] May I approach the bench, Your Honor?

THE COURT: Yes, sir.

[Adam's counsel:] Your Honor, before Mr. Maslow puts that in, I'm going to make an objection to chain of custody. I'm making an objection based on chain of custody before (inaudible) puts it in.

THE COURT: Right. Well, he hasn't actually offered it yet, so -

[Adam's counsel:] Okay, I'll wait.

THE COURT: You can *voir dire* on it if you want to at the appropriate time. Go ahead.

[The State:] At this time, I'd like to introduce State's Exhibit 1 of the interview of [Tracey] be sworn [sic] at Pat's Place.

THE COURT: All righty. Ms. -

[Adam's counsel:] Your Honor, I renew my objection chain of custody [sic]. It's the State's burden. I - I have no idea what that is, who's had it. He noted that she did review it before today. But he's also noted that she no longer works at Pat's Place, and I don't see on the witness list anyone else from Pat's Place to talk about that video if it's been changed or altered any way [sic], how it was handled, and who may have handled it before court.

At the conclusion of the *voir dire*, Adam's counsel "renew[ed] my chain of custody objection[,]" which the court overruled. The State moved to introduce the recording, and the court asked Horner several questions about the recording, including, "How do I know that that video, that disk that you're looking at there is the video that you copied?" Horner assured the court that she had reviewed the disk prior to the hearing. Adam's counsel again renewed her objection, which the court noted before admitting and playing the recording.

At the close of the hearing, the juvenile court dismissed the charge of indecent liberties between children, but found that Adam committed the offenses of crime against nature and first-degree sexual offense. The court ordered a Level 2 disposition and placed Adam on probation for twelve months. Adam appeals. We affirm.

Discussion

Adam's sole argument on appeal is that the trial court erred in admitting the video recording of the interview between Horner and Tracey at Pat's Place. Specifically, Adam contends the recording was inadmissible hearsay. We conclude that Adam has failed to preserve his right to appellate review of this issue.

As discussed *supra*, at the hearing Adam did not object to the recording on hearsay grounds.³

To the extent [an appellant] fail[s] to object to introduction . . . of the evidence he now contends was inadmissible, or objected on grounds other than those now argued on appeal, he has waived his right to appellate review other than for plain error. We reverse for plain error only in the most exceptional cases, and only when we are convinced that the error was either a

³ Adam did object to the social worker's *testimony* about what Tracey told her during the interview on the basis of hearsay, but he did not object to admission of the *recording* of the interview on that ground.

fundamental one resulting in a miscarriage of justice or one that would have altered the [outcome of the case].

State v. Locklear, 363 N.C. 438, 449, 681 S.E.2d 293, 303 (2009) (citations and internal quotation marks omitted). Plain error review applies in juvenile delinquency adjudications, just as it does in criminal cases. See *In re W.R.*, 363 N.C. 244, 247, 675 S.E.2d 342, 344 (2009). However, where an appellant does not "specifically and distinctly allege . . . plain error, [he] has waived any appellate review." *State v. Hamilton*, 338 N.C. 193, 208, 449 S.E.2d 402, 411 (1994) (citing N.C.R. App. P. 10(c)(4)).

Adam does not "specifically and distinctly" argue plain error in the admission of the recording. Although Adam has thus waived his right to appellate review of this issue, we elect in our discretion to review for plain error pursuant to Rule 2 of our Rules of Appellate Procedure. See N.C.R. App. P. 2 (permitting appellate courts to excuse a party's default and reach the merits of an appeal when necessary to "prevent manifest injustice to a party").

Adam argues that the recording contained inadmissible hearsay without which there was no evidence of penetration, an essential element of first-degree sexual offense. See *State v.*

Huntley, 104 N.C. App. 732, 411 S.E.2d 155 (1991), *cert. denied*, 331 N.C. 288, 417 S.E.2d 258 (1992). As Adam notes, the juvenile court did not specify the basis for admitting the recording. On appeal, he presents arguments that the recording did not fall into the hearsay exception specified in Rule of Evidence 803(4) as a statement made for purposes of medical diagnosis or treatment. See N.C. Gen. Stat. § 8C-1, Rule 803(4) (2011). We need not address Adam's contention on this point, however, because the recording falls squarely into another hearsay exception as a prior consistent statement.

Rule 801 of the North Carolina Rules of Evidence defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Although hearsay is inadmissible except [as] provided by statute or the Rules of Evidence, an exception to this general rule allows admission of a prior consistent statement. Under this exception, a witness'[s] prior consistent statements may be admitted to corroborate the witness'[s] sworn trial testimony. . . .

. . . .

In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony. . . . However, the witness's prior statements as

to facts not referred to in his trial testimony *and not tending to add weight or credibility* to it are not admissible as corroborative evidence. . . .

In other words, where testimony which is offered to corroborate . . . does so substantially, it is not rendered incompetent by the fact that there is some variation. Such variations affect only the weight of the evidence which is for the jury to determine. Accordingly, prior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness'[s] in-court testimony. A trial court has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, non[-]hearsay purposes.

State v. Lloyd, 354 N.C. 76, 103-04, 552 S.E.2d 596, 616-17 (2001) (citations, internal quotation marks, and some brackets omitted).

We are satisfied from our review of the recording that Tracey's account of what happened in the closet with Adam is more than substantially similar to her in-court testimony; it is virtually identical. The recording does not add "facts not referred to in h[er] trial testimony[," but rather, simply clarifies her testimony in more explicit language than Tracey used while on the stand, so as to "add weight or credibility to [her] testimony." *Id.* In the recording, Tracey gives the same account of what occurred in the closet except that she states

that Adam "put his thing *in* the private part where I poop at - in the hole" and later stated that Adam "was hiding his thing inside of the thing that makes the poop come out." The recording was thus admissible for corroborative non-hearsay purposes.

Further, we note Tracey's own testimony at trial provided evidence of penetration, rendering any error in the admission of the recording harmless. At the hearing, Tracey testified that Adam "took his thing and put - I poop at" and that it "hurt." Later, when asked "you say he stuck his thing *in* your thing? By your thing, what do you mean," Tracey did not correct or contradict the State's understanding of her earlier testimony, but rather responded that Adam had done "nasty things" with her "part that had poop in it." This testimony was competent evidence upon which the juvenile court could find beyond a reasonable doubt that Adam penetrated Tracey with his penis.

Adam's argument is overruled, and accordingly, the juvenile court's order adjudicating him delinquent is

AFFIRMED.

Judges GEER and ERVIN concur.

Report per Rule 30(e).