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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-455

Filed: 7 January 2020

Person County, No. 17 JB 63

IN THE MATTER OF: K.A.

Appeal by juvenile from orders entered 22 August 2018 and 18 September 2018 by Judge Mark Galloway in Person County District Court. Heard in the Court of Appeals 12 November 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Erika N. Jones, for the State.*

*Leslie C. Rawls for the juvenile-appellant.*

BERGER, Judge.

K.A. (“Kenneth”)<sup>1</sup> appeals from an adjudication order entered August 22, 2018 and a disposition order entered September 18, 2018. He contends the trial court failed to protect his right to confront and cross-examine a witness during the adjudicatory hearing in violation of his right to due process. We disagree.

Factual and Procedural Background

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<sup>1</sup> A pseudonym is used to protect the anonymity of the juvenile discussed in this case.

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On November 17, 2017, juvenile delinquency petitions were filed, which alleged Kenneth committed the following felonies: (1) secret peeping by using a device to create a photographic image pursuant to N.C. Gen. Stat. § 14-202(e); (2) possession of an unlawful image pursuant to N.C. Gen. Stat. § 14-202(g); and (3) dissemination of an unlawful image pursuant to N.C. Gen. Stat. § 14-202(h).

During a probable cause hearing, Mr. Justice, the Assistant Principal at Person High School, testified that on October 20, 2017, a female teacher approached him and informed him that a student had taken an inappropriate picture of her during class and posted it on Snapchat. Mr. Justice asked the teacher where she was sitting in the classroom and who was sitting in front of her. The teacher gave Mr. Justice three to four names, including Kenneth's.

Mr. Justice then went to Kenneth and asked him to open Snapchat on his phone. Mr. Justice observed that Kenneth had a picture of the teacher, which revealed her legs and undergarments while she was sitting at her desk. After confirming Kenneth's name matched the name of the Snapchat account, Mr. Justice used his cellphone to take a picture of the inappropriate photo on Kenneth's screen.

The teacher also testified during the probable cause hearing. She stated Mr. Justice showed her the photo he had taken of the inappropriate photo. She testified that was in fact her in the photo and whomever took the photo did so without her consent.

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The trial court found probable cause on all three felonies. That same day, the trial court conducted an adjudicatory hearing. Neither the State nor Kenneth presented additional evidence or witness testimony during the adjudicatory hearing.

The trial court adjudicated Kenneth as a delinquent for violations of Sections 14-202(g) and (h). The trial court did not find him delinquent under Section 14-202(e). On September 10, 2018, the trial court conducted a disposition hearing and placed Kenneth on Level 2 probation for twelve months with conditions. Kenneth appeals.

Kenneth contends the trial court failed to protect his right to confront and cross-examine Mr. Justice during the adjudicatory hearing. The State contends this issue is not properly before this Court because, after Kenneth invoked his right to cross-examine Mr. Justice, the trial court failed to provide a ruling in accordance with our Rules of Appellate Procedure. We first address this threshold issue below.

Analysis

Pursuant to Rule 10 of the North Carolina Rules of Appellate Procedure, “[i]n 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). “It is also necessary for the complaining party to obtain a ruling upon the party’s request, objection, or motion.” N.C.R. App. P. 10(a)(1).

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In the instant case, Kenneth concedes he did not obtain a ruling from the trial court upon his request to cross-examine Mr. Justice.<sup>2</sup> However, he contends this issue is properly preserved for appellate review as a result of the trial court's failure to protect his right to cross-examine the witness against him during the adjudicatory hearing as required by N.C. Gen. Stat. § 7B-2405. We agree.

“[W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial.” *In re J.D.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 832 S.E.2d 484, 497 (2019) (citation and quotation marks omitted).

“Section 7B-2405 of our General Statutes provides that our courts are to protect the rights of a juvenile defendant during a delinquency hearing and has been considered a ‘statutory mandate.’” *Id.* at \_\_\_, 832 S.E.2d at 497. Section 7B-2405(3) states that during an adjudicatory hearing, “the court shall protect” a juvenile's “right to confront and cross-examine witnesses.” N.C. Gen. Stat. § 7B-2405(3) (2017). “The plain language of N.C. Gen. Stat. § 7B-2405 places an affirmative duty on the trial court to protect the rights delineated therein during a juvenile delinquency adjudication.” *In re J.R.V.*, 212 N.C. App. 205, 210, 710 S.E.2d 411, 414 (2011) (“The

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<sup>2</sup> After the State concluded its direct-examination of Mr. Justice during the probable cause hearing, the State informed the trial court and Kenneth's counsel that it had one more witness. Kenneth's counsel then stated, “Did I have cross-examination of the witness? (UNINTELLIGIBLE).” It is unclear from the record whether this statement was an objection, request, or thought. However, we will treat it as a request.

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use of the word ‘shall’ by our Legislature has been held by this Court to be a mandate, and the failure to comply with this mandate constitutes reversible error.” (citation and quotation marks omitted)). Therefore, the plain language of Section 7B-2405 requires the trial court to protect a juvenile’s right to confront and cross-examine witnesses during the adjudicatory hearing.

Accordingly, Kenneth’s argument that the trial court failed to protect his right to cross-examine Mr. Justice is preserved despite the trial court’s failure to provide a ruling upon Kenneth’s request. We address the merits below.

“[F]ailure to follow the statutory mandate when conducting an adjudication hearing constitutes reversible error unless proven to be harmless beyond a reasonable doubt.” *In re J.B.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 820 S.E.2d 369, 371 (2018), *review denied, stay dissolved*, \_\_\_ N.C. \_\_\_, 824 S.E.2d 406 (2019). “The adjudicatory hearing shall be a judicial process designed to determine whether the juvenile is undisciplined or delinquent. The allegations of a petition alleging that a juvenile is delinquent must be proved beyond a reasonable doubt at adjudication.” *In re J.J., Jr.*, 216 N.C. App. 366, 370, 717 S.E.2d 59, 62 (2011) (internal citation and quotation marks omitted).

“Our courts have consistently recognized that the State has a greater duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution.” *In re J.R.V.*, 212 N.C. App. at 207, 710 S.E.2d at 412 (citation and quotation marks omitted). “The General Assembly has also taken affirmative steps

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to ensure that a juvenile's rights are protected during a delinquency adjudication.”

*Id.* at 207, 710 S.E.2d at 412. Section 7B-2405 states, in pertinent part:

In the adjudicatory hearing, the court shall protect the following rights of the juvenile . . . to assure due process of law:

- (1) The right to written notice of the facts alleged in the petition;
- (2) The right to counsel;
- (3) The right to confront and cross-examine witnesses;
- (4) The privilege against self-incrimination;
- (5) The right of discovery; and
- (6) All rights afforded adult offenders except the right to bail, the right of self-representation, and the right of trial by jury.

N.C. Gen. Stat. § 7B-2405 (2017).

In the present case, Kenneth's purported request to cross-examine Mr. Justice took place during the probable cause hearing, not the adjudicatory hearing. During the adjudicatory hearing, Kenneth did not request cross-examination of Mr. Justice nor did he request an opportunity to question Mr. Justice directly.

Nonetheless, on appeal, Kenneth appears to argue that the trial court should have *sua sponte* called Mr. Justice back to the stand and allowed Kenneth the opportunity to question Mr. Justice because the State has a greater duty to protect his rights during the adjudicatory hearing. We agree that the State has a greater duty to protect a juvenile's rights during the adjudicatory hearing but disagree with

Kenneth's assertion that the trial court was required to call Mr. Justice back to the stand.

When no witnesses are called during an adjudicatory hearing, there is no witness to confront or cross-examine, and thus, no statutory right to protect. While the trial court may be obligated to protect a juvenile's rights during an adjudicatory hearing, the court is not required to exercise a juvenile's confrontation rights on behalf of the juvenile. See *In re J.B.*, \_\_\_ N.C. App. at \_\_\_, 820 S.E.2d at 371 (explaining that a trial court's affirmative duty to protect a juvenile's right against self-incrimination during the adjudicatory hearing was only implicated when the juvenile elected to testify).

At some point, as here, it is incumbent upon counsel to protect his or her client's rights. A trial court should not be expected "to relinquish [its] role as impartial arbiter in exchange for the dual capacity of judge and guardian angel." *State v. Lashley*, 21 N.C. App. 83, 85, 203 S.E.2d 71, 72 (1974). Accordingly, we uphold the juvenile's adjudication and affirm the trial court's disposition.

Even if, on appeal, Kenneth contended his right to examine Mr. Justice had been violated during the probable cause hearing, our conclusion would remain the same.

N.C. Gen. Stat. § 7B-2202 states that "[t]he court shall conduct a hearing to determine probable cause in all felony cases in which a juvenile was 13 years of age

or older when the offense was allegedly committed.” N.C. Gen. Stat. § 7B-2202(a) (2017). “A probable cause hearing is not conducted for the purposes of discovery; its purpose is to determine whether there is probable cause to believe that a crime has been committed and that [the juvenile] committed it.” *In re J.J., Jr.*, 216 N.C. App. at 369, 717 S.E.2d at 62 (citation and quotation marks omitted). Section § 7B-2202 explains:

At the probable cause hearing:

- (1) A prosecutor shall represent the State;
- (2) The juvenile shall be represented by counsel;
- (3) The juvenile may testify, call, and examine witnesses, and present evidence; and
- (4) Each witness shall testify under oath or affirmation and be subject to cross-examination.

N.C. Gen. Stat. § 7B-2202(b).

“If the trial court finds that probable cause exists and the alleged felony is not a Class A felony, ‘upon motion of the prosecutor . . . , the court shall either proceed to a transfer hearing or set a date for that hearing.’” *In re J.J., Jr.*, 216 N.C. App. at 369, 717 S.E.2d at 62 (quoting N.C. Gen. Stat. § 7B-2202(e)). “If the court does not transfer the case to superior court, the court shall either proceed to an adjudicatory hearing or set a date for that hearing. The adjudicatory hearing shall be a separate hearing.” N.C. Gen. Stat. § 7B-2203(d) (2017). “[T]he trial court may conduct all three hearings [the probable cause, transfer, and adjudicatory hearings] in one

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proceeding, so long as the juvenile's requisite statutory and constitutional rights are safeguarded." *In re J.J., Jr.*, 216 N.C. App. at 370, 717 S.E.2d at 62.

Our courts do not blend the separate stages of the juvenile delinquency process. Even though all three hearings may all be held in one proceeding, the requirements of each hearing are set by statute. Unlike Section 7B-2405, which states that during an adjudicatory hearing, "the court shall protect" a juvenile's "right to confront and cross-examine witnesses," N.C. Gen. Stat. § 7B-2405(3), the plain language of Section 7B-2202 does not place an affirmative duty on the trial court to protect a juvenile's confrontation rights during a probable cause hearing. Section 7B-2202 only provides that "[t]he juvenile may testify, call, and examine witnesses." N.C. Gen. Stat. § 7B-2202.

Here, once the probable cause hearing concluded, the case was not transferred and continued to the adjudicatory hearing. Kenneth's counsel could have cross-examined Mr. Justice during the probable cause hearing when counsel purportedly requested to do so, but for unknown reasons, counsel did not. The trial court was not required to ensure that Mr. Justice be cross-examined by Kenneth during the probable cause hearing.

Even though the State and Kenneth did not offer additional evidence or witness testimony during the adjudicatory hearing, the requirements of the adjudicatory hearing under Section 7B-2405 should not also be applied to the

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probable cause hearing under Section 7B-2202—to hold otherwise would rewrite the statute and impose a higher standard during the probable cause hearing than is required by the plain language of the statute.

Conclusion

We uphold the juvenile’s adjudication and affirm the trial court’s disposition.

AFFIRMED.

Chief Judge McGEE concurs.

Judge BRYANT concurs in result only by separate opinion.

Report per Rule 30(e).

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BRYANT, Judge, concurring in the result only.

I concur in the result reached by the majority. I fully concur in the portion of the opinion holding that Kenneth’s argument that the lower court failed to protect his right to cross-examine a witness is preserved for our review despite the trial court’s failure to provide a ruling upon his request.

Reviewing this matter, the trial court, in essence, conducted the probable cause hearing and the adjudicatory hearing simultaneously. Per the record, the Notice of First Appearance indicated a probable cause and adjudicatory hearing would be scheduled the same day. As our statutes and our case law acknowledge, a probable cause hearing is separate from an adjudicatory hearing and separate from a disposition hearing. *See* N.C. Gen. Stat. §§ 7B-2202 (“Probable cause hearing”), -2405 (“Conduct of the adjudicatory hearing”), -2409 (“Quantum of proof in adjudicatory hearing”), -2500 (“Purpose” of dispositions); *see also In re J.J.*, 216 N.C. App. 366, 717 S.E.2d 59 (2011) (addressing a probable cause hearing, adjudicatory hearing, and a disposition hearing conducted *seriatim*).

The majority opinion acknowledges that statutory protections which must be afforded to a juvenile during a delinquency adjudication hearing are not required during a probable cause hearing. Here, no witnesses were called during the adjudication hearing, and per the majority, “there [was] no witness to confront or

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*BRYANT, J., concurring in the result only*

cross-examine, and thus, no statutory right to protect.” It is this situation that causes me to write separately.

Ultimately, if a juvenile suffers no prejudice, the trial court’s actions should not be reversed. The record shows that during the probable cause hearing, Kenneth moved to suppress the testimony and evidence of the primary witness—Principal Justice. The record shows Kenneth was given ample opportunity to voir dire the testimony of Principal Justice and based on the testimony of Principal Justice, challenged the admissibility of the contents of Kenneth’s telephone. Kenneth was also able to cross-examine the teacher—the victim—whose picture was taken and disseminated. Moreover, while new evidence was not presented during the adjudicatory hearing, the State asserted at the end of the probable cause hearing that the evidence for the adjudicatory hearing would be the same. In an ideal setting, these hearings would be more distinctly bifurcated. Nevertheless, in rendering its rulings and entering its written orders, the trial court acknowledged the standard of proof applicable to findings of fact made in support of conclusions in an adjudication of delinquency—proof beyond a reasonable doubt. I see no prejudice to Kenneth for his failure to further cross-examine or challenge Principal Justice at the adjudication stage of the juvenile’s hearing. Thus, I concur in the result only.