IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-464

No. COA20-600

Filed 7 September 2021

Iredell County, No. 19 JB 53

IN THE MATTER OF: J.A.H.

Appeal by juvenile from orders entered 22 August 2019 and 10 October 2019 by Judge Carole Hicks in Iredell County District Court. Heard in the Court of Appeals 26 May 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Vanessa N. Totten, for the State-appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for juvenile-appellant.

GORE, Judge.

¶ 1 On 29 March 2019, a delinquency petition was filed alleging that John[1] had committed a second-degree forcible sex offense against Leah. John and Leah were 11 years old when the offense was alleged to have occurred. On 22 August 2019, the trial court adjudicated John responsible, and on 10 October 2019, entered a Level 2 disposition with special conditions. John entered oral notice of appeal in open court.

[1] Pseudonyms are used to protect the identity of the juveniles.

On appeal, John argues that the trial court erred by 1) limiting his cross-examination of the complaining witness Leah, and by excluding therapy notes he sought to admit into evidence; 2) allowing a detective to impermissibly comment on his constitutional right to silence during a police interview; and 3) allowing the State to comment on his decision to proceed to adjudication rather than admit responsibility for the offense charged. Additionally, John contends that he should receive a new adjudication hearing because the effects of cumulative error rendered the adjudication proceeding fundamentally unfair. We affirm the judgment of the trial court.

I. Factual and Procedural Background

¶ 2 In January 2019, the complaining witness, Leah, wrote an essay for English class at Mooresville Middle School. In that essay, Leah described how she had been sexually assaulted on a school bus. Leah's teacher forwarded the essay to school Principal Ayana Robinson ("Principal Robinson"). Principal Robinson interviewed Leah and referred the allegation to the school resource officer in accordance with school policy. The case was assigned to Detective Ashley Bronkie-Kight ("Det. Bronkie-Kight"), of the Mooresville Police Department. Det. Bronkie-Kight referred Leah to the Dove House—a center specializing in interviewing minors who are victims of sexual abuse—to be interviewed about her account of the assault.

¶ 3 Leah recounted that on 14 October 2016, the day of the "Wacky Tacky" school dance, she was sexually assaulted on a school bus by another student, John. At the

time, Leah and John were both eleven years old and sixth grade students at Mooresville Intermediate School.

¶ 4 Leah testified that she sat alone in the back of the nearly empty bus, while John and his friend James were seated across the aisle from her. Leah stated that she was listening to music with her headphones on when John "fell" into her seat. Leah requested that he leave her seat, but John refused. John then placed his knee over her knee, uncrossed her legs, and pinned her to the seat. John placed one hand over her mouth and grabbed her breasts. John then moved his hand underneath Leah's pants and digitally penetrated her vagina against her will. Leah further stated that she "didn't make any noise" because she was "scared" and "in shock." She tried to push him off, but he was bigger and stronger than her.

¶ 5 Once the bus reached James' stop, John got off Leah and returned to his seat. Leah exited the bus shortly thereafter but did not tell anyone about the assault that day. She claimed that she did tell her school's principal five days later—a claim that the principal would later dispute—but that when the principal did not believe her, she did not tell her parents or press the issue any further.

¶ 6 During the Dove House interview, Leah mentioned other incidents involving John, which occurred prior to the sexual assault. On one occasion, John found a lighter in his backpack, and two of his friends lit it near her face and talked about lighting her hair and bookbag on fire. In another incident, John suggested that Leah

give out $20 blow jobs to raise money for a project. A third incident later came to light wherein John had a "panda puppet" in the back of the school bus, and he joked with his friends about "fingering" the panda puppet.

¶ 7 After the Dove House interview, Det. Bronkie-Kight was able to determine that Mooresville Intermediate had hosted only one dance in Fall 2016—the "Wacky Tacky" dance—and that Leah, John, and James all attended school that day. Officer Kratz, a school resource officer, verified that all three children did not attend the dance that day.

¶ 8 Det. Bronkie-Kight interviewed several witnesses, including school officials, students, and John himself. Det. Bronkie-Kight testified that John waived *Miranda* rights and agreed to speak with her in a recorded interview. John confirmed that he did ride the school bus at that time, and that he usually sat in the back with James. When asked on cross-examination about her decision to charge John, Det. Bronkie-Kight testified:

> Q. Okay. And you based your probable cause -- well, what did you base your probable cause on?
>
> A. I'll answer that again, because I'm pretty sure I had answered it for [the State]. The school attendance records; school dance records; the interview by [Leah]; the statements made by [James], which we did not refer to; the interviews with different students referring to [James], which I cannot refer to; and the interview with [John].
>
> Q. Okay. Anywherfe (sic) in that interview, did [John]

admit to a sexual assault?

A. No, sir. His mother stopped the interview.

¶ 9 Following Det. Bronkie-Kight's investigation, on 29 March 2019 a juvenile court counselor approved the filing of a delinquency petition alleging that John had committed a second-degree forcible sex offence against Leah. The adjudication hearing began on 18 July 2019 in the District Court in Iredell County before the Honorable Judge Carole Hicks and continued through 8 August 2019, 21 August 2019 and 22 August 2019.

¶ 10 During discovery, defense counsel received therapy notes from a facility called "Turning Point" that Leah had visited. On cross-examination, defense counsel asked Leah about prior inconsistent statements she may have made to a therapist at Turning Point.

> Q: And do you remember telling someone at Turning Point about this incident?
>
> A: Yes, sir.
>
> Q: And do you remember what you said about this incident to somebody at Turning Point?
>
> A: No, sir.
>
> Q: Do you remember saying that two people sexually –
>
> [The State]: Objection, Your Honor. If I may be heard?

The State objected on grounds that the therapist was not present to testify, and there was no indication as to whether the notes were a summation of the conversation, paraphrasing Leah's statements, or Leah's own words written verbatim. The defense contended that Leah could testify based on her own recollection of her own statements. The trial court ruled that it would:

> allow a little latitude to ask [Leah] . . . if she recalls making certain statements in those notes. She has already stated that she can't tell [defense counsel] specifically what she had told [her therapists] back then, and with no other person here that can say whether that's paraphrasing or not, but be careful.

Defense counsel proceeded to inquire:

> Q: Did you tell the therapist that [John and James] sexually assaulted you?
>
> A: Not to my knowledge. No, sir.
>
> Q: Okay. And if it's written in your psychiatry notes, you believe that not to be true?
>
> [The State]: Objection, Your Honor.
>
> THE COURT: Sustained.

¶ 11 Before closing arguments, defense counsel again tried to introduce the therapy notes. After hearing arguments from both sides, the trial court conducted an *in camera* review of the documents. After its review, the court ruled:

> Both parties . . . [have] already been provided these records. There was an opportunity to have some questions asked regarding these records, limited -- albeit limited. But

> the records that are produced here, especially if they are being offered as a substantive -- it does deprive the State of having an opportunity to cross examine on those records. So, just to take them in, that's the dilemma we have here. . . . [I]n order to allow records to come in, you have to show that there was no other way to get that same information in. And that is not the situation we have here. . . . I do not believe it would be appropriate to just admit those records at this point.

¶ 12 Finally, after the trial court ruled on the admissibility of the therapist notes, the court allowed closing arguments. John took exception without objection at the hearing to a portion of the State's closing arguments. The State argued:

> [Y]ou heard . . . Detective Bronkie-Kight, interview [John]. You heard him admit to all the incidents, and [defense counsel] wants you to make believe, "Well, he admits when he's in trouble." Those are minor offenses. If he would admit to assaulting [Leah], we wouldn't be here right now. He's not going to admit to a sexual assault; that's for sure.

¶ 13 On 22 August 2019, Judge Hicks adjudicated John responsible for a second-degree forcible sex offense and concluded he was a delinquent juvenile. On 10 October 2019, Judge Hicks entered a Level 2 disposition, and John was placed on 12 months' probation, assigned a court-appointed counselor, and ordered to adhere to a curfew. John entered oral notice of appeal in open court.

II. Discussion

A. Limitation on Cross-Examination and Exclusion of Evidence

¶ 14 In his first issue on appeal, John argues that the trial court impermissibly limited his ability to cross-examine Leah, depriving him of the opportunity to confront

the witnesses against him. Further, he contends that the trial court erred by excluding therapy notes that he sought to introduce into evidence. John argues that the therapy notes were admissible for substantive purposes as "[s]tatements made for purposes of medical diagnosis or treatment" as allowed by N.C. Gen. Stat. § 8C-1, Rule 803(4), and at the very least should have been admissible for the purpose of impeachment by prior inconsistent statement. John asks this Court to review the therapy notes, *in camera*, to determine 1) whether any portions were admissible for impeachment or for other purposes; and 2) whether the exclusion of any admissible portions was harmless beyond a reasonable doubt. We conclude that the trial court did not abuse its discretion by limiting cross-examination of the complaining witness or by excluding the therapy notes.

¶ 15 "'Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *State v. McNeil*, 350 N.C. 657, 677, 518 S.E.2d 486, 498 (1999) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 88 L. Ed. 2d 15, 19 (1985)).

> It is well settled that in a criminal case an accused is assured his right to cross-examine adverse witnesses by the constitutional guarantee of the right of confrontation. However, it is also a well-established principle that the scope of cross-examination rests largely within the discretion of the trial court and its ruling thereon will not be disturbed absent a clear showing of abuse of discretion.

State v. Wrenn, 316 N.C. 141, 144, 340 S.E.2d 443, 446 (1986) (internal quotation marks and citations omitted).

¶ 16 In the case *sub judice*, defense counsel had an extensive opportunity to cross-examine the complaining witness. He was permitted to question Leah about her core allegations against John, statements made to her therapist about the sexual assault, and inquire into the nature of her treatment at Turning Point. The trial court allowed defense counsel, over the State's hearsay objections, to question Leah as to whether she recalled making certain statements in the therapy notes, specifically whether she remembered telling her therapist that John and another boy sexually assaulted her. Leah responded, "Not to my knowledge. No sir[,]" and the trial court prevented John from refuting Leah's denial with statements in the therapy notes.

¶ 17 John argues that the trial court abused its discretion when it prevented him from impeaching Leah with extrinsic evidence.

> [E]xtrinsic evidence of prior inconsistent statements may not be used to impeach a witness where the questions concern matters collateral to the issues. Such collateral matters have been held to include testimony contradicting a witness's denial that he made a prior statement when that testimony purports to reiterate the substance of the statement.

State v. Hunt, 324 N.C. 343, 348, 378 S.E.2d 754, 757 (1989) (internal citations omitted). "Therefore, once a witness *denies* having made a prior inconsistent statement, the State may not introduce the prior statement in an attempt to discredit

the witness; the prior statement concerns only a *collateral matter*, *i.e.*, whether the statement was ever made." *State v. Mitchell*, 169 N.C. App. 417, 421, 610 S.E.2d 260, 263 (2005) (quotation marks and citations omitted). Here, defense counsel's question relates to Leah's recollection of making the prior statement to her therapist, and her denial is conclusive for the purposes of impeachment.

¶ 18 John also argues that the therapy notes were admissible for substantive purposes as an exception to hearsay under N.C. Gen. Stat. § 8C-1, Rule 803(4). "Rule 803(4) requires a two-part inquiry: (1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000) (citations omitted). However, as the State argued and the trial court noted, Leah's therapist was never called to testify. Without the therapist's testimony, it is unclear whether the notes are a verbatim reproduction of Leah's statements, or paraphrased summations of a conversation in treatment. Further, without the therapist's testimony, it is entirely unclear as to whether Leah's statements were for the purposes of diagnosis and treatment relating to the sexual assault itself.

¶ 19 John asks this Court to conduct an *in camera* review of the therapy notes placed under seal by the trial court.

On appeal, the appellate court is required to examine the

> sealed records to determine whether they contain information that is favorable and material to an accused's guilt or punishment. Favorable evidence includes evidence which tends to exculpate the accused, as well as any evidence adversely affecting the credibility of the government's witnesses. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Thaggard, 168 N.C. App. 263, 280, 608 S.E.2d 774, 785 (2005) (quotation marks and citations omitted).

¶ 20 Having conducted an *in camera* review, this Courts determines that while portions of the therapy notes are favorable to the defense, the contents are not material. This is not a case where a trial court restricted access to documents, and evidence was never disclosed to the defense. Instead, the therapy records were turned over in discovery, and John had access to them. Defense counsel had an opportunity to review the records and call the therapist to testify, but he declined to do so. Accordingly, the trial court did not abuse its discretion by excluding the therapy records and limiting defense counsel's cross-examination of Leah.

B. Fifth Amendment Right to Silence During Interview

¶ 21 In his second issue on appeal, John argues that his Fifth Amendment right to remain silent was violated when Det. Bronkie-Kight was impermissibly allowed to imply on cross-examination that he would have confessed to the sexual assault had

his mother not stopped the police interview. While defense counsel did not object to Det. Bronkie-Kight's testimony or raise a constitutional objection at trial, John argues that this issue is automatically preserved for appeal by statutory mandate. Pursuant to N.C. Gen. Stat. § 7B-2405,

> [t]he adjudicatory hearing shall be a judicial process designed to determine whether the juvenile is undisciplined or delinquent. In the adjudicatory hearing, the court shall protect the following rights of the juvenile and the juvenile's parent, guardian, or custodian to assure due process of law:
>
> . . .
>
> (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 (2020). John argues that because his claim is not among the three types specified in subsection (6), this issue is automatically preserved for appellate review.

¶ 22 However, we are not persuaded that this constitutional claim is automatically preserved by statutory mandate, regardless of objection. "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). Defense counsel did not object and raise a constitutional argument at the time Det. Bronkie-Kight commented on John's mother's decision to

stop the police interview. Accordingly, this issue is not preserved on appeal, and we decline to address it.

C. Improper Closing Argument

¶ 23 In his third issue on appeal, John contends that during closing arguments, the State improperly commented on his decision to proceed to adjudication rather than admit responsibility. He argues this was in violation of his due process right to plead not responsible to the offense charged. Defense counsel did not object to the State's closing argument at the adjudication hearing.

¶ 24 "The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted). "To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998) (citation omitted). "In order to determine whether the prosecutor's remarks are grossly improper, the remarks must be viewed in context and in light of the overall factual circumstances to which they refer." *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995) (citation omitted).

¶ 25 During closing arguments, the prosecutor twice commented on John's refusal to admit responsibility for an offense he maintained he did not commit. The prosecutor stated, "[i]f [John] would admit to assaulting [Leah], we wouldn't be here right now[,]" and "[John] confirms everything, and what he does deny—of, course, he's going to deny the sexual assault, because we wouldn't be here if that was the case." John argues that the State improperly distorted his assertion of innocence into consciousness of guilt.

¶ 26 Assuming, *arguendo*, that these comments were improper, we do not conclude that they were so egregious as to warrant a new trial. A juvenile adjudication does not involve a jury, and a judge sits as the finder of fact. "In a nonjury trial, if incompetent evidence is admitted and there is no showing that the judge acted on it, the trial court is presumed to have disregarded it." *In re Hartsock*, 158 N.C. App. 287, 290, 580 S.E.2d 395, 397-98 (2003) (quotation marks and citation omitted). "[T]he burden rests on the juvenile to rebut the presumption that any incompetent evidence was disregarded and demonstrate prejudice." *Id.* at 290, 580 S.E.2d at 398 (citation omitted). Here, the trial court was presumed to have disregarded improper evidence. Absent an affirmative indication on the record that the prosecutor's statements caused the trial court to adjudicate John responsible for the offense charged, the juvenile has not demonstrated prejudice. We conclude that the trial court did not commit reversible error by failing to intervene *ex mero motu* in this case.

D. Cumulative Error

¶ 27 In his final argument, John asserts that he is entitled to a new adjudication hearing because the effects of cumulative error rendered the adjudication proceeding fundamentally unfair. Cumulative error can be grounds for a new trial when "none of the trial court's errors, when considered in isolation, were necessarily sufficiently prejudicial to require a new trial, the cumulative effect of the errors created sufficient prejudice to deny defendant a fair trial." *State v. Canady*, 355 N.C. 242, 246, 559 S.E.2d 762, 764 (2002). This Court concludes that John is not entitled to a reversal based upon cumulative error, and this issue on appeal is overruled.

III. Conclusion

¶ 28 We hold that the trial court did not abuse its discretion by excluding the therapy notes or by limiting cross-examination of the complaining witness. John's unpreserved constitutional claim is waived on appellate review. Additionally, in assessing the prosecutor's alleged improper closing remarks, the trial court did not commit reversible error by failing to intervene *ex mero motu*. Furthermore, this Court finds no cumulative error in this case.

AFFIRMED.

Judges DILLON and CARPENTER concur.

Report per Rule 30(e).