IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-458

Filed 2 January 2024

Surry County, No. 22 JB 136

IN THE MATTER OF: G.J.W.L.

Appeal by juvenile from adjudication and disposition orders entered 20 December 2022 by Judge Gretchen Hollar Kirkman in Surry County District Court. Heard in the Court of Appeals 17 October 2023.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for the Juvenile.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Stephanie A. Brennan, for the State.

CARPENTER, Judge.

The juvenile ("Gregory")[1] appeals from orders adjudicating him responsible for second-degree trespass and disorderly conduct at a school. On appeal, Gregory argues the trial court erred by: (1) denying his motion to dismiss the disorderly conduct petition; (2) allowing Gregory to testify without first advising him of his right against self-incrimination; and (3) failing to make written dispositional findings

[1] Pseudonyms used throughout to preserve confidentiality and for ease of reading. *See* N.C. R. App. P. 42(b).

evidencing its consideration of the factors under N.C. Gen. Stat. § 7B-2501(c). After careful review, we conclude Gregory's motion to dismiss argument is waived as unpreserved, we further conclude the trial court erred in failing to safeguard Gregory's right against self-incrimination, and we therefore do not reach the dispositional-findings issue. Accordingly, we reverse and remand for a new adjudication hearing.

I. Factual & Procedural Background

Record evidence tends to show the following. In September 2022, Gregory was a thirteen-year-old student at Mount Airy Middle School, who was temporarily assigned to an alternative school program called RISE. Relevant here, RISE students were not allowed to attend any athletic functions or other extracurricular activities.

On 2 September 2022, Gregory attended the Mt. Airy High School football home game with his friends "Alex" and "Austin." A school resource officer, Officer Chamberlain, encountered Gregory at the football game and asked him to leave. Gregory exited the stadium without incident but remained in the parking lot with Alex and Austin, who were also RISE students and subject to the same restriction. Shortly thereafter, the principal encountered Gregory, Alex, and Austin interacting with students at the game through the fence and asked them to leave the premises. Because the boys did not comply, the principal requested Officer Chamberlain's assistance. Officer Chamberlain again instructed Gregory to leave campus and encouraged Gregory and his friend, Alex, to leave with Alex's siblings in their nearby

car. Officer Chamberlain testified "there was some cursing going on," that Gregory kept saying "you can't do anything to me," and the boys refused to leave. Eventually the boys ran off, had an encounter with a patrol officer, and left in a vehicle.

On 1 November 2022, Officer Chamberlain filed verified petitions against Gregory for second-degree trespass and disorderly conduct at a school. On 20 December 2022, the trial court held a hearing where Officer Chamberlain testified for the State, and Gregory testified for the defense. After the State closed its case, Gregory moved to dismiss the charge of engaging in disorderly conduct at a school, and the trial court denied the motion. The trial court did not advise Gregory of his right against self-incrimination prior to his testimony. After the close of all evidence, Gregory did not renew his motion to dismiss. The trial court adjudicated Gregory responsible for both charges and imposed a level 1 disposition order requiring twelve months of probation and community service. Gregory entered oral notice of appeal in open court.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7B-2602 (2021).

III. Issues

The issues before this Court are whether the trial court erred in: (1) denying Gregory's motion to dismiss the charge of engaging in disorderly conduct at a school; (2) allowing Gregory to testify without advising him of his right to remain silent or that his testimony could be used against him; and (3) failing to make the dispositional

findings required under N.C. Gen. Stat. § 7B-2501(c).

IV. Analysis

A. Motion to Dismiss

Gregory first argues the trial court erred by failing to dismiss the charge of engaging in disorderly conduct at a school where the evidence did not show a "substantial" disruption of school activities.

"[A] motion to dismiss made at the close of the State's evidence is waived if the defendant presents evidence. The rule requires that a defendant must again move to dismiss the charge at the close of all the evidence in order to challenge the sufficiency of the evidence on appeal." *In re Davis*, 126 N.C. App. 64, 66, 483 S.E.2d 440, 442 (1997) (concluding juvenile's argument was waived after juvenile's failure to renew motion to dismiss after presenting evidence); N.C. R. App. P. 10(a)(3).

Here, Gregory concedes he presented evidence and failed to renew his motion at the close of all evidence. Therefore, Gregory did not preserve this argument and has waived appellate review on this issue. *See In re Davis*, N.C. App. at 66, 483 S.E.2d at 442.

Acknowledging his failure to properly preserve the issue, Gregory requests this Court invoke Rule 2 of the North Carolina Rules of Appellate Procedure to reach his argument. Rule 2 concerns this Court's power "to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *State v.*

Campbell, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (quoting *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299–300 (1999)). "Whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis." *Id.* at 603, 799 S.E.2d at 603 (citations omitted).

> Before exercising Rule 2 to prevent a manifest injustice, both this Court and the Court of Appeals must be cognizant of the appropriate circumstances in which the extraordinary step of suspending the operation of the appellate rules is a viable option. Fundamental fairness and the predictable operation of the courts for which our Rules of Appellate Procedure were designed depend upon the consistent exercise of this authority.

State v. Hart, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007).

Here, Gregory has failed to persuade us this is the "rare case" warranting the suspension of our appellate rules. *See Campbell,* 369 N.C. at 603, 799 S.E.2d at 602–03; *see also Hart*, 361 N.C. at 316–17, 644 S.E.2d at 205–06. In the exercise of our discretionary authority, we decline to invoke Rule 2, and Gregory's argument is precluded.

B. Self-Incrimination

Gregory next argues the trial court reversibly erred by allowing him to testify without first advising him he had the right to remain silent and that his testimony could be used against him. We agree.

This issue implicates both statutory and constitutional considerations. "When a juvenile argues to this Court that the trial court failed to follow a statutory mandate, the error is preserved and is a question of law reviewed *de novo*." *In re E.M.*, 263 N.C. App. 476, 479, 823 S.E.2d 674, 676 (2019) (quoting *In re G.C.*, 230 N.C. App. 511, 515–16, 750 S.E.2d 548, 551 (2013)). Constitutional issues, including claims implicating the Fifth Amendment, are also reviewed de novo. *See State v. Shuler*, 378 N.C. 337, 339, 861 S.E.2d 512, 515 (2021). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *In re G.C.*, 230 N.C. App. at 516, 750 S.E.2d at 551 (quoting *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008)).

Where there is a violation of a defendant's federal constitutional rights, the error is prejudicial "unless the appellate court finds that it was harmless beyond a reasonable doubt." N.C. Gen. Stat. § 15A-1443(b) (2021). It is the State's burden to demonstrate the error was harmless. *Id.*

A trial court overseeing a juvenile-delinquency proceeding has a heightened obligation to protect the constitutional and statutory rights of any minors who appear before it. *See In re T.E.F.*, 359 N.C. 570, 575, 614 S.E.2d 296, 299 (2005) ("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.") (citation omitted); *In re Meyers*, 25 N.C. App. 555, 558, 214 S.E.2d 268, 270 (1975) ("The fact that the present proceeding is not an ordinary criminal prosecution but is a juvenile

proceeding . . . does not lessen but should actually increase the burden upon the State to see that the child's rights were protected.").

Our General Assembly enshrined this concept in section 7B-2405:

> The 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:
>
> (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 (2021) (emphasis added).

"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.B.*, 261 N.C. App. 371, 373, 820 S.E.2d 369, 371 (2018) (quoting *In re J.R.V.*, 212 N.C. App. 205, 210, 710 S.E.2d 411, 414 (2011)). "The 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." *In re J.R.V.*, 212 N.C. App. at 208, 710 S.E.2d at 413 (quoting *In re Z.T.B.*, 170 N.C. App. 564, 569, 613 S.E.2d 298, 300 (2005)). "While N.C. Gen. Stat. § 7B-2405 . . . does not provide the

explicit steps a trial court must follow when advising a juvenile of his rights, the statute requires, at the very least, *some* colloquy between the trial court and the juvenile to ensure that the juvenile understands his right against self-incrimination before choosing to testify at his adjudication hearing." *Id.* at 208–09, 710 S.E.2d at 413.

Here, when Gregory was called to testify, the trial court stated: "[Gregory], come take the stand. I'm going to ask you to raise your right hand and listen to the Clerk. She's going to have you affirm your answers." The trial court did not, at any time, engage in any sort of colloquy with Gregory as to whether he understood the implications of testifying, which constitutes error. *See id.* at 208–09, 710 S.E.2d at 413. Accordingly, the burden shifts to the State to demonstrate the error was harmless. *See* N.C. Gen. Stat. § 15A-1443(b).

Our de novo review of the record reveals the State did not meet its burden to demonstrate this violation of Gregory's right was harmless beyond a reasonable doubt. Gregory testified regarding his version of events: He was invited to the game by a RISE teacher and coach; he paid for a ticket; and while he did not deny his delayed departure from the parking lot, the delay was because he was waiting for a different ride than the one Officer Chamberlain encouraged him to take. While any additional detail Gregory added "was consistent with the prior evidence presented by the State," Gregory's testimony was not otherwise favorable. *See In re J.R.V.*, 212 N.C. App. at 210, 710 S.E.2d at 414 (concluding the trial court's failure to conduct

N.C. Gen. Stat. § 7B-2405(4) colloquy was harmless beyond a reasonable doubt where juvenile's testimony was consistent with prior evidence or favorable to the defense); *see also In re J.B.*, 261 N.C. App. at 374, 820 S.E.2d at 372 (trial court's N.C. Gen. Stat. § 7B-2405(4) colloquy conducted after the juvenile testified was erroneous and was not harmless beyond a reasonable doubt where juvenile's testimony "and the manner in which the State attempted to use the testimony was prejudicial.").

Here, the State not only benefited from Gregory's testimony because it supported the elements of both charges, but also because it advanced their position regarding any "disrespect" Gregory had shown towards Officer Chamberlain.

> **Q**. Did you ever tell him that you were simply waiting on a ride?
>
> **A**. I told him the first time and he said, no, you're not. You're getting – you're supposed to be in this car. And I told him no, I'm not.
>
> **Q**. Okay. Did you tell him who you were waiting for?
>
> **A**. No.
>
> **Q**. Did you ask to borrow his phone, be able to contact a parent or your ride?
>
> **A**. No, because the person they tried to drag me away from that I was talking to, that's the – that's the dad's ride I was waiting for. His dad was on the way to get me and him.

In closing, the State used Gregory's testimony to confirm his disrespectful attitude and that he refused to leave when instructed:

> [Gregory] did not tell the officer he was waiting for a ride,

> did not ask to use the officer's phone to secure a ride, and if he had done that, and that were the case, Your Honor, I don't doubt for a second the officer would have accommodated him with that. That's not what happened here.

During its oral ruling, the trial court revisited Gregory's disrespectful attitude towards authority: "It's the way he responded to it, right? So, when he was told to leave, he didn't leave and he was hanging out in the parking lot. And then, the officer came up and he was being very disrespectful, which then gave way to the disorderly conduct."

The trial judge presiding over Gregory's juvenile delinquency proceeding was subject to a heightened obligation to protect his constitutional and statutory rights. *See In re T.E.F.*, 359 N.C. at 575, 614 S.E.2d at 299. The trial court's failure to engage with Gregory before he testified fell short of its affirmative duty to safeguard Gregory's constitutional rights against compelled self-incrimination. Under these circumstances, we cannot conclude this error was harmless beyond a reasonable doubt. *See In re J.B.*, 261 N.C. App. at 374, 820 S.E.2d at 372; N.C. Gen. Stat. §§ 7B-2405(4), 15A-1443(b). Therefore, we reverse the adjudication order and remand for a new hearing.

C. Dispositional Findings Per N.C. Gen. Stat. § 7B-2501(c)

Lastly, Gregory argues the trial court committed reversible error by failing to make sufficient findings in its disposition order to demonstrate that it considered the factors listed under N.C. Gen. Stat. § 7B-2501(c). Because Gregory's second issue is

dispositive, we do not reach his third argument. In the event a subsequent dispositional hearing is conducted on remand, we note only that "the trial court is required to make findings demonstrating that it considered the [N.C. Gen. Stat. § 7B-2501(c)] factors in a dispositional order entered in a juvenile delinquency matter." *In re J.J., Jr.*, 216 N.C. App. 366, 375, 717 S.E.2d 59, 65 (2011) (citation omitted).

V. Conclusion

We conclude Gregory's challenge to his motion to dismiss was unpreserved and therefore waived. We further conclude the trial court erred by failing to take adequate precautions to protect Gregory's constitutional rights against self-incrimination, and such error was not harmless beyond a reasonable doubt. Accordingly, we reverse the adjudication order and remand for a new adjudication hearing. Due to our reversal of the adjudication order, we need not reach Gregory's dispositional argument.

REVERSED AND REMANDED.

Judges HAMPSON and THOMPSON concur.

Report per Rule 30(e).