

NO. COA14-101
NO. COA14-562

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

IN THE MATTER OF:

Mecklenburg County
No. 11 JB 522

J.F.

Appeal by juvenile from adjudication order entered 14 May 2013 by Judge Regan A. Miller and from disposition order entered 23 January 2014 by Judge Kimberly Best-Staton in Mecklenburg County District Court. Heard in the Court of Appeals 11 September 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Gerald K. Robbins and Assistant Attorney General Kimberly N. Callahan, for the State.

Michelle FormyDuval Lynch, for juvenile-appellant.

DIETZ, Judge.

This juvenile case involves acts of oral sex between two boys, ages fourteen and seven. Fourteen-year-old J.F. convinced the seven-year-old victim to perform fellatio on him, and also performed fellatio on the victim. The trial court adjudicated

J.F. delinquent on two counts of first-degree sexual offense and two counts of crime against nature.

On appeal, J.F. argues that the petitions charging him with these juvenile offenses were defective. J.F. also contends that there was insufficient evidence of sexual purpose and of penetration, which J.F. argues are essential elements of the charged offenses. Finally, in a separate appeal, J.F. challenges the terms of his disposition. On the State's motion, we consolidated the two appeals for purposes of decision.

We hold that the petitions in this case are sufficient, that sexual purpose is not an element of either charged offense, and that penetration is not an element of first-degree sexual offense. Accordingly, we affirm the adjudication on the two first-degree sexual offense charges.

However, we must reverse the two adjudications for crime against nature. Our case law requires penetration as an element of the crime against nature offense. Here, the victim testified that there was no penetration and that the two merely "licked" each other's genitalia. As a result, we are constrained to reverse the two crime against nature adjudications.

Accordingly, we affirm the trial court's adjudication order on the two counts of first-degree sexual offense; we reverse the

trial court's adjudication order on the two counts of crime against nature; and we vacate the trial court's disposition order and remand for a new disposition.

Facts and Procedural History

On 20 or 21 July 2012, M.H. and J.F. were playing together at the home of M.H.'s grandmother, Mrs. Johnson. Mrs. Johnson was J.F.'s foster mother. At the time, M.H. was seven years old and J.F. was fourteen years old. The two boys were alone in the open loft area of the Johnson home when J.F. asked M.H. to "suck" his penis. M.H. stated that he refused to suck J.F.'s penis, but after J.F. kept asking, M.H. did "lick" it. J.F. then licked M.H.'s penis. After this incident occurred, M.H. returned home, but he did not tell his mother or grandmother what had happened.

The following Sunday, M.H. approached his mother and asked, "why don't I have hair on my guts like [J.F.]?" "Guts" is a word that M.H. used to describe his genitalia. When his mother asked him how he knew this about J.F., M.H. told her that J.F. "asked me to suck his guts." M.H. said that he didn't do it because he knew it was wrong, but that J.F. kept asking him to "suck it like you're sucking a straw." M.H.'s mother immediately went to Mrs. Johnson's house to tell her what had

happened. On the way, M.H.'s mother contacted the police and had them meet her there.

The State filed petitions against J.F. on 14 November 2012 for two counts of first-degree sexual offense, two counts of crime against nature, and one count of indecent liberties between children. The trial court held a delinquency hearing on 14 May 2013. At the close of the evidence, J.F.'s counsel moved to dismiss all of the charges, arguing that the petitions were defective and that the State had failed to produce evidence of all required elements for each offense.

The trial court granted the motion to dismiss the indecent liberties between children charge on the ground that there was insufficient evidence of sexual purpose, a required element of that offense. But the court denied the motion to dismiss on the two counts of first-degree sexual offense and the two counts of crime against nature, concluding that the petitions were not defective and that there was sufficient evidence to support those four charges.

The trial court adjudicated J.F. delinquent on 14 May 2013. On 15 July 2013, before the disposition hearing occurred, J.F. filed an interlocutory appeal from the adjudication order under N.C. Gen. Stat. § 7B-2602 (2013). The trial court proceeded

with the case and entered a disposition order on 23 January 2014. J.F. then filed notice of appeal from the disposition order on 30 January 2014. On the State's motion, this Court consolidated the two appeals for hearing.

Analysis

I. Sufficiency of the Juvenile Petitions

J.F. first argues that the trial court erred in denying his motion to dismiss on the ground that the petitions were defective. Specifically, J.F. contends that "the petitions do not give him enough actual notice for the crimes he is alleged to have committed, and whether it was during one setting or one period of time or more, or one or two or more acts of fellatio." For the reasons that follow, we reject this argument and hold that the petitions are sufficient.

The sufficiency of a juvenile petition is a jurisdictional issue that this Court reviews *de novo*. *In re K.W.*, 191 N.C. App. 812, 813, 664 S.E.2d 66, 67 (2008). The petition in a juvenile action serves the same purpose as an indictment or other charging instrument in a criminal case. The petition "must contain a plain and concise statement asserting facts supporting every *element* of a criminal offense and the juvenile's commission thereof with sufficient precision clearly

to apprise the juvenile of the *conduct which is the subject of the allegation.*" *In re Griffin*, 162 N.C. App. 487, 493, 592 S.E.2d 12, 16 (2004) (quotation marks and ellipses omitted).

The sufficiency of a juvenile petition is evaluated by the same standards applied to indictments in adult criminal proceedings. See *In re Burrus*, 275 N.C. 517, 530, 169 S.E.2d 879, 887 (1969), *aff'd sub nom. McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). The general rule is that an indictment charging a statutory sexual offense will be sufficient if it is "couched in the language of the statute." *State v. Palmer*, 293 N.C. 633, 638, 239 S.E.2d 406, 410 (1977).

A petition charging first-degree sexual offense is sufficient if it alleges "that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child under the age of 13 years, naming the child, and concluding as aforesaid." N.C. Gen. Stat. § 15-144.2(b) (2013). It is not necessary to specify in the petition which particular sexual act was committed. *State v. Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 362 (1982).

Similarly, a petition charging a crime against nature involving a juvenile victim is sufficient if it states that "defendant did unlawfully, willfully and feloniously commit the

infamous crime against nature with a particular man, woman or beast" and further alleges the age of the victim or otherwise indicates that the victim was a minor. *State v. O'Keefe*, 263 N.C. 53, 54, 138 S.E.2d 767, 768 (1964); accord *In re R.L.C.*, 361 N.C. 287, 296, 643 S.E.2d 920, 925 (2007).¹ Although it is necessary to "allege the person with or against whom the offense was committed," it is not necessary to identify "the manner in which [the offense] was committed." *O'Keefe*, 263 N.C. at 54, 138 S.E.2d at 768.

Applying this precedent, we hold that the four petitions in this case are sufficient to satisfy the applicable statutory and constitutional requirements. The petitions charging J.F. with first-degree sexual offense follow the statutory language of N.C. Gen. Stat. § 14-27.4(a)(1) by stating that J.F. "did unlawfully, willfully and feloniously . . . [e]ngage in a sexual act with [M.H.], a child under the age of thirteen (13) years," identifying M.H. by his full name. The petitions also state that the "victim was 7," and one petition states that "juvenile performed fellatio on victim," while the other states that

¹ The U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) narrowed the scope of our State's crime against nature statute. However, our Supreme Court has held that the crime against nature statute still applies to fellatio involving a juvenile. *In re R.L.C.*, 361 N.C. at 296, 643 S.E.2d at 925.

"victim performed fellatio on juvenile." Under *Edwards*, these petitions provide sufficient details of the sex acts charged. 305 N.C. at 380, 289 S.E.2d at 362.

Likewise, the petitions charging J.F. with crimes against nature allege that J.F. "did unlawfully, willfully and feloniously . . . commit the abominable and detestable crime against nature with [M.H.]," again identifying M.H. by his full name. Like the first-degree sex offense petitions, these petitions also state that "victim was 7 years old," and one petition states that "victim performed fellatio on juvenile," while the other states that "juvenile performed fellatio on victim." Under *O'Keefe*, these petitions provide sufficient details of the sex acts charged. 263 N.C. at 54, 138 S.E.2d at 768.

J.F. also argues that, even if each petition is sufficient standing alone, they are defective when viewed together because "there is no specification if one or two acts of fellatio are alleged," and therefore the petitions "did not give [J.F.] enough actual notice for the crimes he is alleged to have committed." In other words, J.F. contends that he cannot know if the charges of first-degree sexual offense and crimes against

nature refer to the same acts of fellatio or to multiple, separate acts.

We reject this argument because it is precluded by our case law. As explained above, when pleading these sex offenses, the State need not identify the particular sex acts involved or describe the manner in which they were performed. See *Edwards*, 305 N.C. at 380, 289 S.E.2d at 362; *O'Keefe*, 263 N.C. at 54, 138 S.E.2d at 768. If J.F. required more specific details about the factual circumstances underlying each charge in order to prepare his defense, he should have moved for a bill of particulars. See *In re K.R.B.*, 134 N.C. App. 328, 332, 517 S.E.2d 200, 202 (1999). Accordingly, we reject J.F.'s argument that the petitions were defective because they failed to provide sufficient details concerning the sex acts underlying the offenses.

J.F. next argues that the two petitions alleging that M.H. performed fellatio on J.F. are defective because the victim "was the actor" and therefore the petitions do not allege a crime by J.F. As explained below, we reject this argument as well.

The statute defining first-degree sexual offense does not require that the accused perform the sexual act on the victim, but rather that he "engage[] in a sexual act *with*" the victim.

N.C. Gen. Stat. § 14-27.4(a) (2013) (emphasis added). Moreover, the statute under which J.F. was charged, N.C. Gen. Stat. § 14-27.4(a)(1), does not require that the sex acts involve force or be against the will of the victim; instead, the statute requires only that the victim is under 13 years of age and there is a sufficient age differential between the accused and the victim. Compare N.C. Gen. Stat. § 14-27.4(a)(1), with *id.* § 14-27.4(a)(2) (requiring first-degree sexual offense involving adult victims to be "by force and against the will" of the victim). This conclusion is confirmed by *State v. Sweat*, in which our Supreme Court affirmed a defendant's conviction on two counts of first-degree sexual offense based on allegations that the juvenile victim performed fellatio on the defendant. 366 N.C. 79, 727 S.E.2d 691 (2012).

Likewise, nothing in the crime against nature statute requires that the accused be the one performing the sexual act. Our appellate courts repeatedly have upheld crime against nature adjudications in which the alleged victim performed fellatio on the accused. See, e.g., *In re R.L.C.*, 361 N.C. at 296, 643 S.E.2d at 925; *In re Heil*, 145 N.C. App. 24, 550 S.E.2d 815 (2001). Accordingly, we reject J.F.'s arguments and hold that the petitions at issue in this appeal are not defective.

II. Evidence of Sexual Purpose

J.F. next argues that the State failed to present evidence of "sexual purpose" with respect to the first-degree sexual offense and crime against nature charges. This "sexual purpose" language comes from the indecent liberties between children statute, which requires that the sex act be "for the purpose of arousing or gratifying sexual desire." N.C. Gen. Stat. § 14-202.2(a)(2) (2013).

The trial court dismissed the indecent liberties charge in this case because there was insufficient evidence that J.F. acted for the purpose of arousing or gratifying sexual desire. J.F. argues that we should judicially impose the same sexual purpose element on the remaining charges as well. We disagree.

This Court reviews *de novo* the question of what elements are required to prove a particular offense. See *In re R.L.C.*, 361 N.C. at 294, 643 S.E.2d at 924. When interpreting an unambiguous statute, courts "are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978). Relying on this precedent, our Supreme Court previously refused to read an age differential requirement into the crime against nature statute, although similar age

differential provisions are included in other juvenile sex offense statutes. See *In re R.L.C.*, 361 N.C. at 294, 643 S.E.2d at 924.

The reasoning of *R.L.C.* controls here. Neither the first-degree sexual offense statute nor the crime against nature statute contains a sexual purpose requirement. See N.C. Gen. Stat. §§ 14-27.4(a)(1), 14-177. Because the General Assembly included this requirement in the indecent liberties statute, but omitted it from these other sex offense statutes, we must conclude that the omission was intentional. See *In re R.L.C.*, 361 N.C. at 294, 643 S.E.2d at 924. Simply put, this Court must give effect to each of the statutes as written; we do not have the power to add a sexual purpose element to an unambiguous criminal statute that does not contain one. Accordingly, we reject J.F.'s argument.

III. Evidence of Penetration

J.F. next argues that the State failed to prove that penetration occurred. J.F. contends that penetration is an essential element of both first-degree sexual offense and crime against nature.

"We review a trial court's denial of a [juvenile's] motion to dismiss *de novo*." *In re S.M.S.*, 196 N.C. App. 170, 171, 675

S.E.2d 44, 45 (2009). "Where the juvenile moves to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of [juvenile's] being the perpetrator of such offense." *In re Heil*, 145 N.C. App. at 28, 550 S.E.2d at 819 (quotation marks omitted). "The evidence must be such that, when it is viewed in the light most favorable to the State, it is sufficient to raise more than a suspicion or possibility of the respondent's guilt." *In re Walker*, 83 N.C. App. 46, 48, 348 S.E.2d 823, 824 (1986).

As an initial matter, we must address whether penetration is an essential element of these two offenses. As explained below, we hold that penetration is a required element of the offense of crime against nature, but that it is not a required element of first-degree sexual offense.

First-degree sexual offense requires a "sexual act." N.C. Gen. Stat. § 14-27.4(a). The term "sexual act" is defined by statute and includes "cunnilingus, fellatio, analingus, or anal intercourse." *Id.* § 14-27.1(4). It also includes "penetration, however slight, by any object into the genital or anal opening of another person's body." *Id.* This Court has explained that this definition encompasses two different types of sexual acts: "one which requires penetration by 'any object' into two

specifically named bodily orifices, and one which the North Carolina courts have interpreted to require a touching." *State v. Johnson*, 105 N.C. App. 390, 392, 413 S.E.2d 562, 563 (1992). Fellatio falls into this latter, "touching" category. See *id.* Fellatio is "any touching of the male sexual organ by the lips, tongue, or mouth of another person." *State v. Smith*, 362 N.C. 583, 593, 669 S.E.2d 299, 306 (2008) (quotation marks omitted). Thus, in first-degree sexual offense cases involving fellatio, proof of penetration is *not* required. See *id.*; see also *State v. Hoover*, 89 N.C. App. 199, 208, 365 S.E.2d 920, 926 (1988).

By contrast, penetration *is* a required element of the offense of crime against nature. As our Supreme Court has held, an essential element of crime against nature is "some penetration, however slight, of a natural orifice of the body." *State v. Whittemore*, 255 N.C. 583, 585, 122 S.E.2d 396, 398 (1961). "Proof of penetration of or by the sexual organ is essential to conviction." *Id.*; see also *In re R.N.*, 206 N.C. App. 537, 540, 696 S.E.2d 898, 901 (2010). As a result, we must determine whether the State presented sufficient evidence of penetration to support J.F.'s adjudication for the two crime against nature offenses.

There is no direct testimony of penetration in this proceeding. M.H. testified that the two boys were alone in the open loft area of the Johnson home when J.F. asked him to "suck" J.F.'s penis. In describing the incident, M.H. differentiated between J.F. asking him to "suck" his penis, which he refused to do, and to "lick" it, which he did. When asked to elaborate, M.H. explained that "lick" meant to touch it with his tongue. When asked directly whether J.F.'s penis went into his mouth, M.H. replied "just a tongue." Likewise, when asked about how J.F. touched M.H.'s penis, M.H. stated that J.F. only used his tongue and "lick[ed] it."

Our Court has held that nearly identical direct testimony was insufficient to establish penetration. See *In re R.N.*, 206 N.C. App. at 542, 696 S.E.2d at 902 (vacating crime against nature adjudication for insufficient evidence of penetration where the evidence merely showed that the juvenile "licked" the victim's "private area").

Although there is no direct evidence of penetration, the State argues that this Court should infer penetration based on surrounding circumstances, as we did in the 2001 case *In re Heil*, 145 N.C. App. 24, 550 S.E.2d 815. In *Heil*, a four-year-old victim performed an act of fellatio on an eleven-year-old

juvenile. See *id.* at 26-27, 550 S.E.2d at 817-18. The four-year-old did not testify at the adjudication hearing. Instead, the State introduced the testimony of the victim's father, who described how the victim demonstrated what he had done by licking his mother's thumb. See *id.* The juvenile appealed his adjudication for crime against nature, arguing that there was insufficient evidence of penetration.

On appeal, this Court held that, based on the size difference between the juvenile and the victim and "the fact that the incident occurred in the presumably close quarters of a closet, it was reasonable for the trial court to find . . . that there was some penetration, albeit slight, of juvenile's penis into [the four-year-old victim's] mouth." *Id.* at 29-30, 550 S.E.2d at 820.

In re Heil is distinguishable in several ways. First, *Heil* relied on the close quarters in which the incident occurred in determining that an inference of penetration was reasonable. Here, both M.H.'s mother and grandmother testified that the loft where the incident occurred was an open area with no door. More importantly, unlike the four-year-old in *Heil*, who was unable to testify, seven-year-old M.H. testified to the details of the incident at the delinquency hearing. That testimony

differentiated between acts involving penetration, which M.H. testified did not occur, and acts that merely involved licking or touching with the tongue.

In short, we do not believe the inference of penetration drawn in *Heil* appropriately can be drawn here. That inference conflicts with the victim's own direct testimony. Moreover, a key circumstantial factor relied upon in *Heil* to draw this inference—the small closet space where the incident occurred—is not present here. Because there was no direct evidence of penetration and insufficient evidence to infer penetration, the State failed to meet its evidentiary burden. As a result, we must reverse the crime against nature adjudications.

IV. Jurisdiction to Conduct Disposition Hearing

Our decision to reverse the two crime against nature adjudications compels us to vacate and remand the disposition order. But we would have been required to vacate and remand that order in any event, because the trial court lacked jurisdiction over the disposition proceeding. We briefly address this jurisdictional issue to provide guidance to trial courts faced with similar situations in the future.

As a general matter, an appeal from a trial court order “stays all further proceedings in the court below upon the

judgment appealed from, or upon the matter embraced therein." N.C. Gen. Stat. § 1-294 (2013). Thus, unless another statute provides otherwise, "[a]n appeal removes a cause from the trial court which is thereafter without power to proceed further until the cause is returned by mandate of the appellate court." *Upton v. Upton*, 14 N.C. App. 107, 109, 187 S.E.2d 387, 388 (1972). The statutes governing appeals in juvenile delinquency proceedings confirm this general rule. See N.C. Gen. Stat. § 7B-2606 (2013) (providing that in the event of an appeal, the trial court shall have the authority to modify or alter an adjudication order only after "affirmation of the order" by the appellate courts).

But there is an additional wrinkle in juvenile cases. The General Assembly permits a juvenile to appeal his adjudication *before* the disposition hearing (the juvenile equivalent of criminal sentencing) if that hearing does not take place within 60 days after adjudication. See N.C. Gen. Stat. § 7B-2602. Because an appeal divests the trial court of jurisdiction over the matter, when a juvenile takes a statutory interlocutory appeal of the adjudication under section 7B-2602, the trial court is divested of jurisdiction "to modify the order or

proceed to disposition during the pendency of the appeal.” *In re Rikard*, 161 N.C. App. 150, 153, 587 S.E.2d 467, 469 (2003).

That is precisely what happened here. The trial court entered its adjudication order on 14 May 2013. No disposition was made within 60 days, and J.F. filed notice of appeal from the adjudication order under section 7B-2602 on 15 July 2013. The court later held a disposition hearing on 23 January 2014. As a result of the pending appeal, the trial court had no jurisdiction to conduct that disposition hearing.

In future juvenile delinquency cases where the disposition hearing occurs long after the adjudication, it may be prudent for trial courts first to determine whether the juvenile appealed the adjudication order. This will prevent a trial court from using its already limited time and judicial resources on a proceeding over which the court lacks jurisdiction.

Conclusion

For the reasons stated above, we affirm the trial court’s adjudication order on the two counts of first-degree sexual offense; we reverse the trial court’s adjudication order on the two counts of crime against nature; and we vacate the trial court’s disposition order and remand for a new disposition consistent with this opinion.

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AFFIRMED IN PART; REVERSED IN PART; VACATED AND REMANDED IN PART.

Judges STEELMAN and GEER concur.