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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-924

Filed: 19 May 2020

Rowan County, No. 18 JB 169

IN THE MATTER OF B.W.B.

Appeal by juvenile from adjudication order entered 5 February 2019 by Judge James F. Randolph in Rowan County Juvenile Court. Heard in the Court of Appeals 29 April 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Janelle E. Varley, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for juvenile-appellant.*

BERGER, Judge.

Petitions were filed on November 7, 2018, alleging that B.W.B. (the “juvenile”) committed two counts of distribution of food with foreign object and one count of communicating threats. The case was heard in juvenile court on February 1, 2019. The trial court dismissed the charge of communicating threats but adjudicated the juvenile delinquent on both counts of distribution of food with foreign object. On March 8, 2019, the trial court entered a Level 2 disposition which included 12 months of probation. The juvenile appeals.

Factual and Procedural Background

On October 31, 2018, Henry Patterson (“Patterson”)<sup>1</sup> took his son, Thomas, trick-or-treating in the Grace Ridge neighborhood. Upon returning home, Thomas bit into a candy bar he had received. Unbeknownst to Thomas, there was a pin in the candy bar which stuck Thomas in the mouth behind his front teeth. After discovering another pin in a separate candy bar, Patterson called the Rowan County Sheriff’s Office. Deputies responded and took the pins with them. Patterson took Thomas to the hospital. That night, Patterson posted on Facebook that he discovered pins in his son’s Halloween candy.

Heather Baker (“Baker”) also took her children trick-or-treating in the Grace Ridge neighborhood. Baker saw a Facebook post stating that an individual who went trick-or-treating in the same neighborhood found pins in the candy. Baker went home, located her children’s candy, opened a candy bar, and found two metal objects within the candy.

Detective Patrick Schmeltzer (“Det. Schmeltzer”) was assigned to investigate the case. Det. Schmeltzer testified that Patterson identified the juvenile’s grandparents’ home as the “only place where they went that gave out [that particular brand of candy] bars.”

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<sup>1</sup> The following pseudonyms will be used pursuant to N.C. R. App. P. 42(b): “Thomas” is used for a minor prosecuting witness; “Henry Patterson” is used for Thomas’ father; and, “Heather Baker” is used for a prosecuting witness.

Detective Cody Trexler (“Det. Trexler”) and Det. Schmeltzer went to the juvenile’s grandparents’ home on November 3, 2018. Det. Trexler asked if he could speak with the juvenile and consent was given. Det. Trexler asked the juvenile if he knew where his grandmother kept her sewing needles, and the juvenile responded that he did. The juvenile asked Det. Trexler not to tell his grandmother because she was not aware that he knew where they were. The juvenile showed Det. Trexler into the kitchen and opened a sewing kit that was in a basket on the counter. Det. Trexler noticed that there were no sewing needles in the sewing kit.

The trial court adjudicated the juvenile delinquent and entered a Level 2 disposition which included 12 months of probation. The juvenile appeals, alleging the trial court (1) erred when it denied his motion to dismiss; (2) committed plain error when it admitted hearsay statements into evidence; and (3) erred when it failed to make independent findings of fact as required by N.C. Gen. Stat. Sections 7B-2409 and 7B-2411. We disagree.

### Analysis

#### I. Motion to Dismiss

The juvenile first argues that the trial court erred when it denied his motion to dismiss the petitions for distribution of food with foreign object. Specifically, the juvenile contends that the State failed to present sufficient evidence that he put the

pins in the candy bars. Further, the juvenile argues that the trial court improperly relied upon hearsay statements in ruling on the motions to dismiss. We disagree.

We review a . . . court's denial of a [juvenile's] motion to dismiss *de novo*. Where the juvenile moves to dismiss, the . . . court must determine whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of [the juvenile's] being the perpetrator of such offense. 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 [juvenile's] guilt.

*In re K.C.*, 226 N.C. App. 452, 456, 742 S.E.2d 239, 242 (2013) (*purgandum*).

“The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.” *State v. Frisch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (citations and quotation marks omitted).

To survive a motion to dismiss the petitions for distribution of food with foreign object, the State was required to present substantial evidence that the juvenile

knowingly distribute[d], [sold], [gave] away or otherwise cause[d] to be placed in a position of human accessibility or ingestion, any food, beverage, or other eatable or drinkable substance which that person knows to contain . . . [a]ny poisonous chemical or compound or any foreign substance such as, but not limited to, razor blades, pins, and ground glass, which might cause death, serious physical injury or serious physical pain and discomfort.

N.C. Gen. Stat. § 14-401.11(a)(3) (2019) (*purgandum*).

At the adjudication hearing, the State presented evidence that the juvenile's grandmother purchased the particular brand of candy bar to give out to children for Halloween. Also, a neighbor and another person testified that the juvenile was the individual handing out candy from the home identified as the source of the tainted candy bars. In addition, another witness testified that she observed the juvenile place a bowl of candy at the end of the driveway for trick-or-treating children. This evidence supports the element that the juvenile knowingly gave away or placed the food in a position of human accessibility.

The State also presented evidence that the candy given away by the juvenile was tainted. Candy bars are food items within the meaning of the statute. The State introduced into evidence the candy bar from Baker that had pins inside it. N.C. Gen. Stat. Section 14-401.11(a)(3) lists pins as a foreign substance "which might cause death, serious physical injury, or serious physical pain and discomfort." N.C. Gen. Stat. §14-401.11(a)(3). Accordingly, the State's evidence established that the item contained a "foreign substance . . . which might cause death, serious physical injury or serious physical pain and discomfort." N.C. Gen. Stat. § 14.401.11(a)(3).

Thus, there was evidence that the tainted candy bars came from the home where the juvenile was located, and that the juvenile was the individual distributing the candy bars to children on Halloween. In addition, the juvenile had knowledge about the location of, and access to, his grandmother's sewing kit. When he showed

Det. Trexler the sewing kit, the juvenile did not want anyone to find out that he knew where it was located. Upon observing the contents of the sewing kit, Det. Trexler noticed that there were no needles.

This circumstantial evidence that the juvenile placed the pins in the candy bars was sufficient to withstand a motion to dismiss as it established that the juvenile knew the candy bars contained foreign substances. *Frisch*, 351 N.C. at 379, 526 S.E.2d at 455. Thus, the evidence presented by the State was sufficient to support a reasonable inference that the juvenile was the perpetrator of the offenses.

In addition, although the juvenile contends that the above testimony considered by the court may have been inadmissible, when ruling on a motion to dismiss, the trial court must consider “all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State[.]” *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

Because the State presented substantial evidence of each element of the offense, and that the juvenile was the perpetrator of the offense, the trial court did not err when it denied the juvenile’s motion to dismiss.

## II. Hearsay Statements

The juvenile next argues that the trial court committed plain error by admitting hearsay statements into evidence. We disagree.

“In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C.R. App. P. 10(a)(4). Our Supreme Court “has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge’s instructions to the jury, or (2) rulings on the admissibility of evidence.” *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). Under plain error review, a defendant “must demonstrate that a fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). “Plain error arises when the error is so basic, so prejudicial, so lacking in its elements that justice cannot have been done.” *State v. Bice*, 261 N.C. App. 664, 821 S.E.2d 259, 264 (2018), *review denied*, \_\_\_ N.C. \_\_\_, 831 S.E.2d 70 (2019) (citation and quotation marks omitted).

Hearsay is “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.” N.C. Gen. Stat. § 8C-1, Rule 801(c) (2019). Hearsay is generally inadmissible in criminal cases unless a witness’ out of court statement corroborates the witness’ in-court testimony. *See State v. McGraw*, 137 N.C. App. 726, 730, 529 S.E.2d 493, 497 (2000) (citations omitted) (“It is well-settled that a witness’ prior consistent statements are admissible to corroborate the witness’ sworn trial testimony.”). “[I]f

the testimony offered in corroboration is generally consistent with the witness's testimony, *slight variations will not render it inadmissible*. Such variations affect only the credibility of the evidence which is always for the jury." *State v. Warren*, 289 N.C. 551, 557, 223 S.E.2d 317, 321 (1976) (emphasis added).

Even if we assume that the statements challenged by the juvenile were inadmissible hearsay, under plain error review, a defendant "must demonstrate that a fundamental error occurred at trial." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact" on his adjudication as a delinquent. *Id.* at 518, 723 S.E.2d at 334 (citations and quotation marks omitted). Importantly, when a "judge is sitting both as judge and as the finder of the facts, it is presumed that he disregarded incompetent evidence in making his findings of fact." *Matter of Ashby*, 37 N.C. App. 436, 438-39, 246 S.E.2d 31, 33 (1978).

Here, the juvenile cannot establish that a fundamental error occurred at his adjudication hearing. While the juvenile's counsel failed to object to the challenged testimony, the trial court is presumed to have only considered the competent evidence in reaching its decision. Accordingly, the trial court did not commit plain error.

### III. Adjudication Order



Finally, the juvenile argues that the trial court erred when it failed to make independent findings of fact as required by N.C. Gen. Stat. Sections 7B-2409 and 7B-2411. We disagree.

The “[juvenile] alleges a violation of a statutory mandate, and alleged statutory errors are questions of law. A question of law is reviewed *de novo*. Under the *de novo* standard, [this] Court considers the matter anew and freely substitutes its own judgment for that of the lower court.” *In re A.M.*, 220 N.C. App 136, 137, 724 S.E.2d 651, 653 (2012).

N.C. Gen. Stat. Section 7B-2409 requires that “[t]he allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt.” N.C. Gen. Stat. § 7B-2409 (2019). N.C. Gen. Stat. Section 7B-2411 instructs that

[i]f the court finds that the allegations in the petition have been proved as provided in G.S. 7B-2409, the court shall so state in a written order of adjudication, which shall include, but not be limited to, the date of the offense, the misdemeanor or felony classification of the offense, and the date of adjudication.

N.C. Gen. Stat. § 7B-2411 (2019). “The statutory use of ‘shall’ is a mandate to trial judges requiring them to affirmatively state that the allegations of the juvenile petition are proved beyond a reasonable doubt.” *In the Matter of Wade*, 67 N.C. App. 708, 711, 313 S.E.2d 862, 864 (1984).

The trial court's adjudication order stated: "The following facts have been proven beyond a reasonable doubt: SEE ATTACHED INSERT TO ADJUDICATION ORDER." The Insert to Adjudication Order stated:

The court adjudicates the juvenile delinquent pursuant to his admission for the following charges beyond a reasonable doubt (only as to the offenses as identified by a check mark):

  X   On October 31, 2018, the juvenile unlawfully, willfully and knowingly did distribute, sell, give away or otherwise cause to be placed in a position of human accessibility any food, or eatable substance which that person knows to contain any poisonous chemical, or compound or any foreign substance such as, but not limited to, razor blades, pins, and ground glass, which might cause death, serious physical injury or serious physical discomfort. The juvenile is alleged to have handed out Snickers bars containing straight pins on Halloween night. This offense is in violation of G.S. 14-401.11(a)(3), a class C felony.

  X   On October 31, 2018, the juvenile unlawfully, willfully and knowingly did distribute, sell, give away or otherwise cause to be placed in a position of human accessibility any food, or eatable substance which that person knows to contain any poisonous chemical, or compound or any foreign substance such as, but not limited to, razor blades, pins, and ground glass, which might cause death, serious physical injury or serious physical discomfort. The juvenile is alleged to have handed out Snickers bars containing straight pins on Halloween night. This offense is in violation of G.S. 14-401.11(a)(3), a class C felony.

       On September 24, 2018, the juvenile did unlawfully and willfully threaten to physically injure the person or damage the property of Shelby Dwiggin. The threat was communicated to the person in the following manner: by pointing his finger gun at her and pretending to shoot her

several times, and made a motion simulating the recoil of a fired gun. Ms. Dwiggins stated that she told him to stop and he looked her in the eye, made the gun with his hand again, cocked it and pretended to shoot her again. This offense was in violation of G.S. 14-277.1, a class 1 misdemeanor.

The juvenile relies on *In the Matter of S.C.R.* to argue that the trial court's use of the word "allege" in the Insert to Adjudication Order violates the statutory mandate. *In the Matter of S.C.R.*, 217 N.C. App. 166, 718 S.E.2d 708 (2011). Specifically, the juvenile contends that the trial court may not "incorporate wholesale the allegations in the petition as a substitute for making its own findings of fact." *Id.* at 169, 718 S.E.2d 712.

However, this is a delinquency petition, not an abuse, neglect, and dependency matter. *In re S.C.R.* concerned a dependent and neglected juvenile and was controlled by Section 7B-807. *Id.* at 169, 718 S.E.2d 712. Section 7B-2411 is at issue here. "Section 7B-2411 does not specifically require that an adjudication order contain appropriate findings of fact[,] as does Section 7B-807, the statute governing orders of adjudication in the abuse, neglect, or dependency context." *In re J.V.J.*, 209 N.C. App. 737, 740, 707 S.E.2d 636, 638 (2011) (*purgandum*). Instead, "at a minimum, section 7B-2411 requires a court to state in a written order that 'the allegations in the petition have been proved [beyond a reasonable doubt].'" *Id.* at 740, 707 S.E.2d at 638.

Here, the trial court complied with the requirements of Section 7B-2411. The trial court specified that the findings were made “beyond a reasonable doubt,” and then set forth the allegations against the juvenile which it found to be proven beyond a reasonable doubt. The adjudication order also contained the date of the offenses, the felony classification of the offenses, and the date of adjudication as required by N.C. Gen. Stat. Section 7B-2411. The trial court complied with the requirements of Sections 7B-2409 and 7B-2411, and the juvenile’s argument is wholly without merit.

Conclusion

For the foregoing reasons we affirm the trial court.

AFFIRMED.

Judges DILLON and HAMPSON concur.

Report per Rule 30(e).