IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-68

No. COA21-312

Filed 1 February 2022

Wilson County, No. 2020 JB 49

IN RE: D.A.

Appeal by Respondent from Orders entered 27 October 2020 by Judge Pell C. Cooper in Wilson County District Court. Heard in the Court of Appeals 30 November 2021.

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

Law Office of Kellie Mannette, PLLC, by Kellie Mannette, for Respondent-Appellant.

WOOD, Judge.

¶ 1 Dawson[1] appeals from an October 27, 2020, Juvenile Adjudication Order (the "Adjudication Order") entered adjudicating him as delinquent for the misdemeanor offense of assault inflicting serious injury. Dawson also appeals from an October 27,

[1] Pseudonyms are used for all minors in this case. The presence of a full name indicates the individual is not a minor.

2020 Disposition Order (the "Disposition Order") placing Dawson on nine months of probation and ordering Dawson to pay $500.00 to Chloe McCroskey ("McCroskey"). Dawson failed to give proper notice of appeal and now comes before this Court by a petition for writ of certiorari. In our discretion, we grant Dawson's petition for a writ of certiorari. After careful review of the record and applicable law, we find no prejudicial error at trial but remand for additional finding of facts on the issue of restitution.

I. Background

¶ 2 On April 22, 2020, Tiffany was hosting a birthday party for herself in the apartment owned by her father. Tiffany's father, Sarah, and McCroskey all resided together in the apartment. Both marijuana and alcohol were consumed at Tiffany's birthday party. Prior to the party, McCroskey had a falling out with Sarah and decided to move out of the apartment. At approximately 7:00 p.m. the evening of the party, McCroskey returned to the apartment to pack up her belongings.

¶ 3 When McCroskey entered the room where Sarah was, they began to quarrel. During their quarrel, McCroskey pulled Sarah's hair and also hit Sarah, causing a fight to ensue. McCroskey and Sarah's fight ultimately moved into the common area of the apartment. During the fight, McCroskey became so angry she "blacked out" such that she could not precisely recall all the details of her fight with Sarah. When McCroskey regained awareness of what was occurring, she was still fighting with

Sarah. While Sarah and McCroskey were fighting in the common area of the apartment, Tiffany, along with other guests at the party, pulled Sarah and McCroskey apart from each other.

¶ 4 As McCroskey attempted to leave the apartment, a female in a green jacket punched McCroskey and then someone else also proceeded to attack McCroskey. At this time, Dawson rushed into the room and grabbed McCroskey to separate her from the other girls. Dawson testified McCroskey slapped him and thus elicited his comment in front of the party guests, "I'm not afraid to hit girls, I'm not afraid to hit girls, I hit girls." Dawson then shoved McCroskey to the floor. While she was on the floor, McCroskey was kicked in the face and felt her jaw pop, followed by a large amount of bleeding from her mouth. Because McCroskey was lying face down on the floor, she did not see who kicked her. She was, however, able to see that whoever kicked her was wearing white Nike Air Force 1 shoes. Only Dawson and the female in the green jacket were reported to be wearing white Nike Air Force 1 shoes at the party. Tiffany called an ambulance for McCroskey. Thereafter, the majority of the attendees, along with Dawson, left the apartment before police and Emergency Services arrived.

¶ 5 Officer Glen Langley ("Officer Langley") arrived on scene at approximately 8:15 p.m. McCroskey approached Officer Langley while holding a blood soaked white towel to her mouth. Officer Langley observed that McCroskey obviously was injured

because one of her eyes and the entire left side of her face were swollen. McCroskey suffered a broken jaw on one side of her face and a fractured jaw on the other. McCroskey had to undergo surgery costing thousands of dollars and had to have her jaw wired shut for two months.

¶ 6 McCroskey gave differing accounts to investigating officers as to who had kicked her. McCroskey told Officer Langley "Shababy" kicked her in the face. She told another officer that Dawson was the individual who had kicked her. Officer Langley later discovered "Shababy" was Dawson's street name. Yet, McCroskey told a third officer at some point she believed it was a female who had kicked her.

¶ 7 After the attack, Tiffany began sending messages through social media to McCroskey telling McCroskey that she was the one who had kicked her in the face. As a result of these messages, Officer Langley charged Tiffany with assaulting McCroskey. Tiffany then recanted her statement and gave a written statement to police naming Dawson as the individual who had kicked McCroskey in the face. Tiffany explained she lied to McCroskey in the snapchat message in an attempt to "protect" Dawson, a friend and an individual whom she previously had dated. The charge against Tiffany was later dropped. At trial, Officer Langley testified that throughout the course of the investigation, the minors were intimidated to speak with the police due to social media threats and potential gang involvement.

¶ 8 On August 6, 2020, Dawson was charged with assault inflicting serious bodily

injury. The case was heard before the trial court on October 14, 2020. At trial, Tiffany testified Dawson was the individual who had kicked McCroskey. Dawson testified on his own behalf. Dawson denied kicking McCroskey and stated he did not own a pair of white Nike Air Force 1 shoes. However, Dawson testified to his willingness to retaliate if a girl were to hit him. Dawson testified he did not kick McCroskey because others at the party pulled him back after he pushed McCroskey to the ground.

¶ 9 At the end of the trial, the trial court orally adjudicated Dawson as delinquent for the offense of assault inflicting serious injury and imposed a level 1 disposition. Dawson's attorney gave notice of appeal in open court on October 14, 2020 and filed a written notice of appeal on October 15, 2020. On October 27, 2020, the trial court entered the written Adjudication Order adjudicating Dawson as delinquent for committing the offense of misdemeanor assault inflicting serious injury. On the same day, the trial court entered the written Disposition Order placing Dawson on nine months of probation and ordering him to pay $500.00 in restitution to McCroskey.

¶ 10 Because the written notice of appeal did not specifically state to which court the appeal was taken and was given prior to the issuance of the Adjudication Order and the Disposition Order, Dawson now petitions this Court for writ of certiorari. On appeal, Dawson requests us to grant his petition for writ of certiorari and contends the trial court erred by failing to advise him of his Fifth Amendment right against self-incrimination and by ordering restitution without making any findings that

paying restitution was in his best interest or findings regarding his ability to pay. In our discretion, we grant Defendant's petition for writ of certiorari.

II. Discussion

A. Fifth Amendment Right Against Self-Incrimination

¶ 11 Dawson first contends the trial court erred by failing to advise him of his Fifth Amendment right against self-incrimination before he testified in violation of N.C. Gen. Stat. § 7B-2405. We agree, but hold this error was not prejudicial.

¶ 12 At the outset, we note Dawson's counsel did not object to this issue at the trial court. The general rule is a defendant's failure to object at the trial court to any alleged error precludes the defendant from later raising the issue on appeal. N.C. R. App. P. Rule 10(a)(1) (2021); *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). An exception lies "when 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." *Ashe*, 314 N.C. at 39, 331 S.E.2d at 659. *See In re E.M.*, 263 N.C. App. 476, 479, 823 S.E.2d 674, 676 (2019). Since Dawson alleges a statutory mandate was violated, we conduct a *de novo* review despite Dawson's failure to object at trial. *In re E.M.*, 263 N.C. App. at 479, 823 S.E.2d at 676.

¶ 13 This State "has a greater duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution." *In re T.E.F.*, 359 N.C. 570, 575, 614

S.E.2d 296, 299 (2005) (emphasis omitted) (citing *State v. Fincher*, 309 N.C. 1, 24, 30 S.E.2d 685, 699 (1983) (Martin, J., concurring)). N.C. Gen. Stat. § 7B-2405 provides the judicial process to be used in a juvenile proceeding to ensure the juvenile's rights are protected, *In re J.B.*, 261 N.C. App. 371, 373, 820 S.E.2d 369, 371 (2018), stating in relevant part,

> [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 . . . [t]he privilege against self-incrimination.

N.C. Gen. Stat. § 7B-2504(4) (2021). The use of the word "shall" in Section 7B-2504(4) "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. 205, 208, 710 S.E.2d 411, 413 (2011) (citation omitted).

¶ 14 Section 7B-2405 places "an affirmative duty on the trial court to protect . . . a juvenile's right against self-incrimination." *Id.* A juvenile proceeding "to determine delinquency, as a result of which the juvenile may be committed to a state institution, must be regarded as 'criminal' for Fifth Amendment purposes of privilege against self-incrimination." *In re Burrus*, 275 N.C. 517, 530, 169 S.E.2d 879, 887 (1969), aff'd, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971). As such, a juvenile's privilege against self-incrimination "applies in juvenile proceedings the same as in adult

criminal cases." *Id.* (citation omitted). When informing a juvenile of his rights, Section 7B-2405 requires at 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." *In re J.R.V.*, 212 N.C. App. at 209, 710 S.E.2d at 413 (emphasis omitted).

¶ 15 Dawson asserts the trial court erred by giving "no response at all" and not "engag[ing] in any colloquy" when Dawson was called to testify at trial. This Court faced a similar issue in *In re J.R.V.* In that case, there was no colloquy between the trial court and the juvenile regarding the juvenile's privilege against self-incrimination *Id.* at 209, 710 S.E.2d at 413. As a result, we held that by "saying nothing to the juvenile to protect the juvenile's privilege against self-incrimination, the trial court failed to follow its statutory mandate . . . ." *Id. See also In re J.B.*, 261 N.C. App. at 374, 820 S.E.2d at 371 (holding that instructing a juvenile of his right against self-incrimination after the juvenile had already testified was clearly error).

¶ 16 The trial court in this instant case similarly had no colloquy with Dawson concerning his Fifth Amendment privilege against self-incrimination. Dawson's attorney simply stated "I'd call my client, . . . [Dawson]. He was sworn earlier," and then Dawson took the stand and began to testify. The record is devoid of any exchange between the trial court and Dawson where the trial court informed Dawson of his Fifth Amendment right against self-incrimination. Therefore, the trial court

committed error by not following the statutory mandate to engage in colloquy with Dawson to protect the juvenile's constitutional right against self-incrimination.

¶ 17 Although the trial court erred by failing to instruct Dawson on his Fifth Amendment right against self-incrimination prior to testifying, it is necessary to analyze whether Dawson was prejudiced by this error. *See In re J.R.V.*, 212 N.C. App. at 209, 710 S.E.2d at 413 ("Since the trial court's failure to follow its statutory mandate implicates the juvenile's constitutional right against self-incrimination, the error is prejudicial unless it was harmless beyond a reasonable doubt."). Here, Dawson contends the addition of his testimony was prejudicial. Upon careful review, we overrule Dawson's argument and hold Dawson's testimony was not prejudicial. We once more find our decision in *In re J.R.V.* to be analogous to the case before us. Although the trial court in *In re J.R.V.* committed error by not exchanging any colloquy with the juvenile about his privilege against self-incrimination, we held this error was not prejudicial. *Id.* at 209, 710 S.E.2d at 413-14. Since "the juvenile's testimony was either consistent with the prior evidence presented by the State or was otherwise favorable to the juvenile[,]" we held the trial court's error was harmless beyond a reasonable doubt. *Id.* at 210, 710 S.E.2d at 414.

¶ 18 Like the juvenile in *In re J.R.V.*, Dawson's testimony either was favorable to himself or consistent with the prior evidence presented by the State. Dawson alleges the prejudicial statements he made were that he "admitted to being in a place where

'everyone' was smoking marijuana and drinking liquor [and] . . . would have 'retaliated' against . . . [McCroskey] if he could have." However, the record illustrates these statements were consistent with evidence presented by the State. McCroskey testified at trial Dawson grabbed her by the shoulders and shook her while saying "I'm not afraid to hit girls; I'm not afraid to hit girls, I hit girls" and then she was shoved onto the floor. While on the floor, she then was kicked in the face. Tiffany confirmed McCroskey's testimony Dawson had grabbed her and pushed her to the floor. Tiffany further testified she saw Dawson kick McCroskey in the face. Officer Langley, the first officer to arrive to the apartment, testified McCroskey told him Dawson was the person who kicked her in the face.

¶ 19 Regarding Dawson's testimony that marijuana and alcohol were consumed at the party, both Officer Langley and McCroskey testified these substances were consumed at the party. Moreover, Dawson also testified he did not kick McCroskey, did not own white Nike Air Force 1 shoes, and Tiffany's friends were responsible for McCroskey's injuries.

¶ 20 In short, Dawson's testimony was either consistent with the State's evidence or favorable to himself. Because the trial court's error in failing to advise Dawson of his Fifth Amendment privilege against self-incrimination was harmless beyond a reasonable doubt, the error was not prejudicial.

B. Restitution

¶ 21 Dawson next contends the trial court erred by ordering him to pay restitution without making any findings that paying restitution was in his best interest or that he had the ability to pay restitution. As such, Dawson argues the trial court did not comply with the mandates in N.C. Gen. Stat. § 7B-2501 and N.C. Gen. Stat. § 7B-2506(4). We analyze a trial court's compliance with statutory mandates *de novo*. *In re E.M.*, 263 N.C. App. at 479, 823 S.E.2d at 676. Section 7B-2501(c) provides, in relevant part,

> the court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile, based upon:
>
> (1) The seriousness of the offense;
>
> (2) The need to hold the juvenile accountable;
>
> (3) The importance of protecting the public safety;
>
> (4) The degree of culpability indicated by the circumstances of the particular case; and
>
> (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c) (2021). Section 7B-2506(4) states

> The court exercising jurisdiction over a juvenile who has been adjudicated delinquent may use the following alternatives in accordance with the dispositional structure set forth in G.S. 7B-2508:
> . . .
>
> (4) Require restitution, full or partial, up to five hundred dollars ($ 500.00), payable within a 12-month period to any

> person who has suffered loss or damage as a result of the offense committed by the juvenile. The court may determine the amount, terms, and conditions of the restitution. If the juvenile participated with another person or persons, all participants should be jointly and severally responsible for the payment of restitution; however, the court shall not require the juvenile to make restitution if the juvenile satisfies the court that the juvenile does not have, and could not reasonably acquire, the means to make restitution.

N.C. Gen. Stat. § 7B-2506(4) (2021). A "requirement that a juvenile make restitution as a condition of probation must be supported by the record and appropriate findings of fact which demonstrate that the best interest of the juvenile will be promoted by the enforcement of the condition." *In re D.A.Q.*, 214 N.C. App. 535, 537-38, 715 S.E.2d 509, 511 (2011) (cleaned up). *See In re Schrimpsher*, 143 N.C. App. 461, 464, 546 S.E.2d 407, 410 (2001); *In re D.M.B.*, 196 N.C. App. 775, 778, 676 S.E.2d 66, 68 (2009).

¶ 22 The Disposition Order requires Dawson to pay McCroskey $500.00 in restitution. At the end of the restitution section on the Disposition Order's form, a sentence on the form specifically says "NOTE: The Court shall make specific findings that the juvenile has and can reasonably acquire the means to make restitution." However, the trial court made no findings Dawson has and can reasonably acquire the means to make restitution on the Disposition Order. At trial, the parties only briefly discussed restitution:

> [Appellee trial lawyer]: If I may, Judge, this may not be the appropriate time but we would ask for $[500.00] in

> restitution to go towards those medical bills.
>
> . . .
>
> THE COURT: Now I do want him to pay an appropriate amount of restitution. I believe that State has asked for $[500.00]. I believe that's what we can do.

The trial court did not make any findings that it was fair and reasonable for Dawson, that Dawson's best interest would be served by paying restitution, or that he had the ability to pay.

¶ 23 A trial court's order to pay restitution as a condition of probation must be supported by at least *some* findings of fact restitution is in a juvenile's best interest and that the juvenile can pay the restitution. *See In re Berry*, 33 N.C. App. 356, 360, 235 S.E.2d 278, 280 (1977) (holding the record was insufficient to support restitution as a condition for probation because "[t]he record does not reveal, and the court made no finding of fact from which it can be determined that such a condition is fair and reasonable, relates to the needs of the children, tends to promote the best interest of the children, or is in conformity with the avowed policy of the State in its relation to juveniles."). While it may be assumed that it would be in a juvenile's best interest to make restitution to his victim, there is an inquiry that must be made to ensure it is actually in the juvenile's best interest based on the circumstances surrounding the juvenile and that the juvenile has the ability to comply. Because the trial court failed to make such findings, we remand to the trial court for further findings on restitution.

III. Conclusion

¶ 24 For the foregoing reasons, we hold that although the trial court erred by not advising Dawson on his Fifth Amendment right against self-incrimination, this error was not prejudicial. Thus, we find no error in the Adjudication. Because the trial court did not make findings that the order of restitution was in the juvenile's best interest or that the juvenile had the ability to pay, we remand the Disposition Order to the trial court for further findings.

NO PREJUDICIAL ERROR IN PART; REMANDED IN PART.

Judges DIETZ and MUPRHY concur.

Report per Rule 30(e).