

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5097-14T3

STATE IN THE INTEREST
OF N.C.,
a juvenile.

Argued January 24, 2017 – Decided March 20, 2017

Before Judges Messano and Guadagno.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Camden County, Docket No. FJ-04-0430-15.

Jack L. Weinberg, Designated Counsel, argued the cause for appellant N.C. (Joseph E. Krakora, Public Defender, attorney; Mr. Weinberg, on the brief).

Maura M. Sullivan, Assistant Prosecutor, argued the cause for respondent State of New Jersey (Mary Eva Colalillo, Camden County Prosecutor, attorney; Ms. Sullivan, of counsel and on the brief).

PER CURIAM

N.C. appeals from the Family Part's March 5, 2015 order of disposition, adjudicating him delinquent for conduct that, if committed by an adult, would constitute first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1), and third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a). He also

appeals from the June 25, 2015 order that imposed a three-year probationary term, conditioned on N.C.'s residential placement in a sex-specific treatment facility. On appeal, N.C. raises the following points:

POINT I: THE FAMILY PART COURT ABUSED ITS DISCRETION IN QUALIFYING BOTH THE SEVEN-YEAR-OLD VICTIM AND HIS THIRTEEN-YEAR-OLD BROTHER AS COMPETENT TO BE WITNESSES AT THE HEARING. THE CHILDREN DID NOT EXPRESS AN UNDERSTANDING OF THEIR DUTY TO TELL THE TRUTH, THE ESSENCE OF MORAL RESPONSIBILITY. [Partially raised below.]

POINT II: THE COURT ABUSED ITS DISCRETION IN ADMITTING THE OUT-OF-COURT STATEMENT OF THE SEVEN-YEAR-OLD CHILD [J.D.]. THE STATEMENT DOES NOT MEET THE TRUSTWORTHINESS REQUIREMENT OF N.J.R.E. 803(c)(27).

POINT III: THE COURT ERRED WHEN IT DENIED THE JUVENILE'S MOTION TO DISMISS AT THE END OF THE STATE'S CASE PURSUANT TO R. 3:18-1. IN THE ALTERNATIVE, THE COURT ERRED WHEN IT DENIED THE JUVENILE'S MOTION FOR TO SET ASIDE THE VERDICT AS AGAINST THE WEIGHT OF THE EVIDENCE PURSUANT TO R. 3:20-1. THE STATE FAILED ITS BURDEN OF PROOF IN THIS MATTER. THIS IS A CASE OF REASONABLE DOUBT.

A. R. 3:18-1 Motion

B. R. 3:20-1 Motion to Set Aside the Verdict

POINT IV: THE FAMILY PART ABUSED ITS DISCRETION IN FAILING TO IMPOSE A DEFERRED DISPOSITION IN THIS MATTER. THE COURT FURTHER ABUSED ITS DISCRETION WHEN IT IMPOSED RESIDENTIAL PLACEMENT AS A CONDITION OF PROBATION.

We have considered these arguments in light of the record and applicable legal standards. We affirm.

I.

On the relevant dates alleged in the complaint, N.C. was thirteen years old, and the victim, J.D. (Jimmy), was seven years old.¹ Jimmy and his thirteen-year-old brother, S.D. (Sam), lived two doors away from N.C. During trial before Judge Morris G. Smith, Jimmy testified that N.C. sexually assaulted him on several occasions, beginning when Jimmy was five years old.² Jimmy described several incidents that occurred in his home and N.C.'s home during which N.C. anally penetrated Jimmy with his penis.

Sam testified about an incident during which he, Jimmy and N.C. were playing in Sam's room. At one point, Sam noticed the other two boys "weren't there." Sam opened the closed door of Jimmy's bedroom and saw his brother laying on the bed. N.C. was laying on the bed behind Jimmy, and his pants were "loose." Although he originally testified Jimmy's pants were off, Sam admitted, "that's a bit foggy." N.C. "jumped" upon seeing Sam, and Sam walked out of the bedroom. Although Jimmy testified that

¹ We have fictionalized the names of the juvenile victim and his juvenile brother, a witness at the trial.

² The judge found N.C. not guilty of charges in two complaints alleging similar offenses when Jimmy was five and six years old.

he told Sam what had happened, Sam denied ever having such a conversation. Sam admitted that he told no one about the incident he witnessed.

Jimmy first confided to an adult, his grandmother, M.S. (Martha), when he stayed overnight at her home in July 2014, shortly after the last assault. Martha testified that N.C.'s name came up in conversation, and Jimmy said he had not seen N.C. recently. Jimmy said he "want[ed] to tell [his grandmother] what [N.C.] does to [him]." Jimmy then pointed to his penis and told Martha that N.C. put "this" in Jimmy's "behind." Martha contacted Jimmy's mother, who in turn contacted law enforcement authorities.

Detective Timothy Houck, of the Camden County Prosecutor's Office Special Victims' Unit, testified that he began his investigation on July 23, 2014, by interviewing Jimmy and recording a video statement, during which the detective used an anatomical drawing for Jimmy to indicate what had occurred. The DVD of the interview was played for Judge Smith. Houck also took a statement from Sam, and later that day arrested N.C.

The State rested after Houck's testimony and sought to introduce Jimmy's video statement and the anatomical drawing into evidence. Defense counsel objected, arguing the statement did not meet the standards for admissibility under N.J.R.E. 803(c)(27), the so-called tender years exception to the hearsay rule, because

it was not "trustworthy." Judge Smith reserved decision, after which defense counsel moved for a judgment of acquittal, which the judge denied.

On the next trial day, Judge Smith ruled Jimmy's video statement to Houck was admissible. N.C. presented his grandfather, grandmother, aunt and neighbor as character witnesses. His mother, T.C. (Terry), testified that a week before Jimmy's disclosure to Martha, she had an intense argument with Martha about Sam's behavior and some undisclosed trouble Sam faced. N.C.'s sister testified that she or another adult was "always . . . in the house," and, as per her parents' order, the family never shut the door to any room except the bathroom.

N.C. also testified. He stated that Jimmy and Sam were his friends, but that he and Sam often argued. N.C. denied ever sexually assaulting Jimmy. He also claimed to have contracted Lyme's Disease during the relevant time and suffered headaches, dizziness and fatigue as a result. The defense rested after N.C. testified, and the judge heard summations from both attorneys.

Judge Smith rendered his comprehensive oral decision the next day. The judge made specific credibility findings, concluding the defense character witnesses and Terry were credible, but their testimony was not particularly significant. The judge rejected any suggestion that Jimmy's accusations or Martha's testimony were

the products of bad blood between the families. The judge also found Martha's testimony was credible, at least with respect to Jimmy's disclosure, and Detective Houck was "credible in the limited role . . . he played in th[e] trial."

Judge Smith then focused on Jimmy's testimony, which he recounted in detail. Noting Jimmy's demeanor at trial and during the video statement, and recognizing some inconsistencies, the judge nevertheless found "[Jimmy's] testimony to be credible in all of the areas where it's important."

Judge Smith also found Sam to be a credible witness. He noted Sam admitted being unable to state with certainty that his brother's pants were down, however, the judge concluded this uncertainty supported Sam's credibility. As the judge explained, "[Sam] could have said that he had seen more than he did; he did not." Judge Smith concluded the State had proven the charges regarding events in spring 2014 beyond a reasonable doubt.

N.C. subsequently moved for a new trial. Judge Smith denied that motion. After several delays, on June 25, 2015, Judge Smith entered the order of disposition we discuss more fully below.

II.

N.C. argues Judge Smith mistakenly exercised his discretion by finding Jimmy and Sam were "competent to be witnesses." The contention requires only brief comment.

N.C. never raised an argument regarding Sam's competency at trial, nor did he assert the claim before Jimmy testified.³ We therefore review the judge's decision to accept both as competent witnesses using plain-error analysis. State v. Bueso, 225 N.J. 193, 211 (2016) (citing R. 2:10-2).

In Bueso, a child sexual assault case decided after the briefs were filed in this case, the Court made clear that "[w]ith substantial discretion regarding the form of questioning, the trial court's task is to determine whether the child witness appreciates the distinction between truth and lies, and comprehends his or her duty to tell the truth." Id. at 207. The inquiry is not improper simply because the prosecutor, not the judge, poses questions to the child witness. Id. at 212. Our review of the transcript convinces us that Judge Smith did not mistakenly exercise his discretion by permitting Jimmy and Sam to testify.

³ Contrary to N.C.'s assertion in his brief, defense counsel only objected during the argument regarding admissibility of Jimmy's statement to Houck, never as to the child's competency as a witness pursuant to N.J.R.E. 601.

In Point II, N.C. argues the judge abused his discretion by admitting Jimmy's video statement because it failed to meet the requirement of trustworthiness under N.J.R.E. 803(c)(27). We again disagree.

N.J.R.E. 803(c)(27) creates an exception to the hearsay rule and provides:

A statement by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil proceeding if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601.

[(Emphasis added).⁴]

⁴ We recently held that admission of a testimonial hearsay statement made by a juvenile witness later determined to be incompetent under N.J.R.E. 601 violates a defendant's Sixth Amendment confrontation rights. State ex rel. A.R., 447 N.J. Super. 485, 514-21 (App. Div. 2016).

A statement is admissible under the Rule when (1) the proponent gives "prior notice of its intention to introduce the child's statement"; (2) there is "a pre-trial judicial finding of trustworthiness"; and (3) "[an] opportunity to cross-examine the child at trial[.]" State v. P.S., 202 N.J. 232, 249 (2010) (internal citations omitted).

N.C. objected to the admission of Jimmy's video statement, arguing Jimmy did not understand "it was morally wrong to lie." Judge Smith appropriately considered the factors set forth by the United States Supreme Court in Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990). These include: spontaneity, consistent repetition, mental state of the declarant, use of terminology unexpected of a child of similar age, and lack of motive to fabricate. Id. at 821-22, 110 S. Ct. at 3150, 111 L. Ed. 2d at 656. He also considered the factors set forth by our Supreme Court in State v. Michaels, 136 N.J. 299, 309 (1994), as they relate to the conduct of law enforcement officials taking the statement. He determined Jimmy's video statement was trustworthy, and we see no mistaken exercise of the judge's discretion in this regard.

N.C. argues it was error to deny his motion for acquittal at the end of the State's case, see Rule 3:18-1, and his motion for a new trial, Rule 3:20-1. He contends Judge Smith should have

entered a judgment of acquittal after the State rested because "Jimmy was not credible," there was no corroborative forensic evidence and Sam did not corroborate his brother's testimony. For similar reasons, N.C. argues Judge Smith should have granted his post-trial motion to set aside the verdict as "against the weight of the evidence." We are unpersuaded.

When deciding a motion for acquittal based upon the insufficiency of the State's evidence, the trial court must apply the time-honored standard set forth in State v. Reyes, 50 N.J. 454 (1967):

[W]hether[] viewing the . . . evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt.

[Id. at 459 (citation omitted).]

We review the decision of the trial judge de novo applying the same standard. State v. Bunch, 180 N.J. 534, 548-49 (2004). Here, the combined testimony of Jimmy, Sam, Martha, the video statement Jimmy provided Houck, and the rational inferences to be drawn therefrom, supplied sufficient evidence to adjudicate N.C. delinquent beyond a reasonable doubt. We need not comment further.

Rule 3:20-1 provides:

The trial judge on defendant's motion may grant the defendant a new trial if required in the interest of justice. If trial was by the judge without a jury, the judge may, on defendant's motion for a new trial, vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. The trial judge shall not, however, set aside the verdict of the jury as against the weight of the evidence unless, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a manifest denial of justice under the law.

"[A] motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown." State v. Armour, 446 N.J. Super. 295, 306 (App. Div. 2016) (quoting State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000)).

"We note initially that the argument that the verdict was against the weight of the evidence is not the proper standard in a non-jury case. The standard is whether there is sufficient credible evidence in the record to support the judge's determination." State in Interest of R.V., 280 N.J. Super. 118, 120-121 (App. Div. 1995). We accord deference to Judge Smith's credibility determinations, which, in turn, supply sufficient evidence to find N.C. delinquent. We find no mistaken exercise of Judge Smith's discretion in denying N.C.'s motion for a new trial.

Lastly, N.C. argues Judge Smith mistakenly exercised his discretion by not deferring disposition and imposing a residential placement as a condition of probation. N.C. contends the judge found several mitigating factors, and the strong support from N.C.'s family and others in the community justified a deferred disposition.

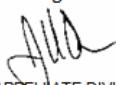
"Once the court adjudicates a juvenile to be delinquent, the [Juvenile Justice] Code permits the court to order incarceration or, in lieu of incarceration, any of twenty enumerated dispositions under N.J.S.A. 2A:4A-43(b). The statute sets forth the factors that the court must weigh when determining the appropriate disposition." State ex rel. C.V., 201 N.J. 281, 295 (2010) (citing N.J.S.A. 2A:4A-43(a)). In reviewing the disposition, we defer to the judge's "feel for the case, and . . . only intervene if we are satisfied that the sentence imposed represents an abuse of discretion." State ex rel. S.B., 333 N.J. Super. 236, 246 (App. Div. 2000) (internal citations omitted).

Here, Judge Smith rejected the State's argument that N.C. should receive a custodial sentence. He found several mitigating factors, N.J.S.A. 2A:4A-44(a)(2), and that those outweighed any aggravating factors. The judge noted the serious nature of the charges against N.C. and carefully considered the psychosexual evaluation performed by Dr. Meryl E. Udell, Psy.D. Judge Smith

concluded N.C. was in need of significant counseling services, but that he need not be incarcerated while receiving treatment. We find no mistaken exercise of Judge Smith's broad discretion in imposing a probationary term conditioned upon specific residential counseling.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.


CLERK OF THE APPELLATE DIVISION