NO. COA03-36

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2003

IN THE MATTER OF:

K.M.	Caldwell County
C.H.	Nos. 02 J 17 & 18

Appeal by respondent from adjudication and disposition orders filed 12 July 2002 by Judge Robert M. Brady in Caldwell County District Court. Heard in the Court of Appeals 15 October 2003.

Lauren Vaughan for petitioner-appellee Caldwell County Department of Social Services.

Janet K. Ledbetter for respondent-appellant.

BRYANT, Judge.

Mark Morgan (respondent) appeals adjudication and disposition orders filed 12 July 2002 finding his stepdaughter C.H. to be an abused juvenile and his daughter K.M. to be neglected.

The Caldwell County Department of Social Services (DSS) filed petitions dated 25 January 2002 alleging C.H. to be an abused, neglected, and dependent juvenile and K.M. to be a neglected and dependent juvenile. At the hearing before the trial court, C.H., who was ten years old at the time, testified that her stepfather, respondent, had lived with her and her mother since C.H. was twenty-two months old. Between fourth and fifth grade, respondent began touching C.H. in inappropriate places "[m]aybe twice a

month." C.H. stated respondent "would touch [her] butt[,] he would touch [her] cooter[1] and sometimes put his finger in [her] cooter[,] touch [her] breasts and lick . . . [her] neck and suck on it." She further added that respondent had previously tried to put his tongue in her mouth, shown her his penis, and tried to get her to touch him "on the outside of his clothes between his legs." During the touching, respondent would ask C.H. "if it felt good," and when she replied that it did not, he would try to correct her.

According to C.H., respondent initiated the touching by starting to tickle and playfully wrestle with her. While she was fully clothed, respondent would touch her between her legs on the outside of her clothes. Sometimes, however, respondent also reached between her legs by "put[ting] his hands down [her] pants." At times C.H.'s seven-year-old sister K.M. was in the room when the touching took place. When asked if her mother had ever seen respondent touch her, C.H. responded: "I don't know. She looked, but I don't [sic] guess she thought anything was going on with that either." C.H. remembered one occasion in the living room during which respondent had just "touched [her] on [her] cooter . . . when [her] mama came [and] he stopped." C.H. told a friend and a cousin about the touching. The cousin subsequently told C.H.'s mother, but, as C.H. testified, her mother never asked her about this.

Laura Dunlap, the DSS child protective services investigator who investigated the allegations in this case, testified that upon speaking with C.H., C.H. told her that respondent "touches [her] in

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[1]C.H. identified her "cooter" as "the part between my legs."

[her] private spots" and "pointed to her breasts, her vaginal area, and her bottom." C.H. also revealed that respondent "licks her on the neck" and "kisses her on the mouth," sometimes trying "to put his tongue in her mouth." Respondent objected to Dunlap's testimony about C.H.'s statements unless it was being offered for corroborative purposes and also stated that the testimony should be excluded under North Carolina Rule of Evidence 403. The trial court overruled the objection.

Dr. Jill Marie DeVries testified as an expert in pediatrics in the area of medical evaluation and diagnosis of child sexual abuse. DeVries had examined C.H. on 5 February 2002. Prior to the examination, DeVries had conducted a short interview during which C.H. told her respondent had licked her neck, touched her breasts, squeezed her butt, and put his fingers in her vagina. Defendant objected to this testimony on the ground that the interview was not part of the medical exam. The trial court overruled the objection. Thereafter, DeVries testified that the physical examination yielded some findings that were consistent with C.H.'s description of "[f]ondling" but could also have been caused by something other than abuse. DeVries concluded that "[f]ondling rarely leaves any physical evidence."

In its 12 July 2002 adjudication order, the trial court, "by clear, cogent and convincing evidence," made the following findings:

> The minor child, [C.H.], was competent to testify. [C.H.] was a credible witness. [C.H.] had no credible motive to fabricate the alleged actions of her stepfather as set forth

in the petition. Throughout the course of the proceedings, [C.H.] was consistent in her testimony and in her relation to what had occurred. While [C.H.] could not accurately recall the specific dates or times of day that her stepfather touched her in inappropriate ways, she was consistent in her relation of the nature and manner of the offensive touching, i.e., touching her breasts and her private parts which she referred to as her cooter and her bottom. The [trial] [c]ourt finds the testimony of Ms. Dunlap . . . corroborates [C.H.'s] testimony, specifically as it relates to the incident in the living room when . . . respondent stepfather touched [C.H.'s] breast and also put his hand in her pants and touched her vaginal area. There was a great deal of colloquy back and forth between the parties regarding corroborating evidence and hearsay evidence, etc., and the [trial] [c]ourt wants to make sure it is clear that the [c]ourt is specifically finding that the corroboration of [C.H.'s] testimony relates to that specific incident[,] but it is not saying it does not as to any other particular incident. That does not mean that the [trial] [c]ourt does not believe and does not find that the other incidents did occur as testified to by [C.H.,] but as far as corroboration that is the incident it is talking about. The [trial] [c]ourt finds the specific incident was not mere wrestling or playing or tickling with [C.H.] but constituted indecent liberties by [respondent] with [C.H.] The [trial] [c]ourt finds the testimony of the examining pediatrician inconclusive regarding any physical evidence of sexual abuse[,] and the [c]ourt has not based its decision in this matter on said testimony. The [trial] [c]ourt does find, however, that the doctor's testimony corroborates the child's testimony of inappropriate touching of the vaginal area by her stepfather. The [trial] [c]ourt also finds that instances of inappropriate touching occurred for at least over a period of twelve (12) months preceding the filing of the petition as testified to by [C.H.] The [trial] [c]ourt, however, cannot find by clear, cogent and convincing evidence that the mother knew of this inappropriate touching . . . and therefore . . . cannot find . . .

> that she failed to protect the child or children.

Based on these findings, the trial court concluded that C.H. was an abused juvenile. The trial court also concluded that C.H.'s half sister, K.M., was a neglected juvenile because she "live[d] in a home where another juvenile ha[d] been subjected to abuse by an adult who regularly lives in the home and that juvenile ha[d] been adjudicated to have been abused."

In its subsequent disposition order, the trial court found it to be in the best interests of the children for custody to remain with DSS until the mother took such steps as "necessary to put herself in a position to properly parent the children and to keep them safe." The trial court then ordered that reasonable efforts be made to reunite the family and approved a visitation plan. The trial court further ordered respondent to complete SAIS, a sexual abuse specific evaluation, and to follow all recommendations. In addition, the mother, who was a homemaker, was to "obtain her own residence away from [respondent] and obtain full[-]time employment."

The issues are whether: (I) the trial court abused its discretion in admitting the testimony of Dunlap and DeVries over respondent's objection; (II) there was sufficient evidence to support the trial court's findings leading to its determination of abuse; (III) the trial court erred in adjudicating K.M. neglected based solely on its adjudication of C.H. as an abused juvenile; (IV) the trial court had authority to order the mother to obtain

full-time employment and her own residence away from respondent; and (V) the trial court erred in ordering reasonable efforts toward reunification when the order did not include visitation and reunification for respondent and his daughter K.M.

I

Respondent argues the trial court abused its discretion in admitting the testimony of Dunlap and DeVries regarding C.H.'s statements to them. Specifically, respondent contends that the prejudicial aspect of this evidence far outweighed its probative value.

We first note that the adjudication order explicitly states the trial court did not consider this testimony as substantive evidence but merely as corroboration of C.H.'s testimony. *See State v. Gilbert*, 96 N.C. App. 363, 365, 385 S.E.2d 815, 816 (1989) ("out-of-court statements offered to corroborate prior testimony are not hearsay"). Thus, these statements were properly admitted, unless, as respondent asserts, their probative value was substantially outweighed by the danger of unfair prejudice. *See* N.C.G.S. § 8C-1, Rule 403 (2001). In this case, however, there was no such danger as the hearing was held before a judge and not a jury. *See In re Paul*, 84 N.C. App. 491, 497, 353 S.E.2d 254, 258 (1987) ("[i]n a trial before a judge without a jury, it is presumed that the judge disregarded any incompetent evidence and did not draw inferences from testimony otherwise competent which would render such testimony incompetent"). The trial court's adjudication order clearly shows that the trial court was aware of

the limited role to be given Dunlap's and DeVries' testimony so as to avoid both hearsay problems and any prejudicial impact on respondent. Accordingly, there was no abuse of discretion in considering the evidence to the extent as was done by the trial court.[2]

II

Respondent further contends there was insufficient evidence to support the trial court's findings leading to its determination of abuse based on indecent liberties. According to respondent, there was no evidence from which to conclude that the touching which occurred during playful wrestling between respondent and C.H. was not accidental but for the purpose of arousing or gratifying sexual desire.

On appeal, the standard of review is whether the trial court's findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000). An abused juvenile is defined, in pertinent part, as a juvenile whose parent "[c]ommits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: . . . taking indecent liberties with the juvenile, as provided in G.S. 14-202.1, regardless of the age of the parties." N.C.G.S. § 7B-101(1)d. (2001). N.C. Gen. Stat. § 14-202.1 in turn provides:

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[2]In his brief to this Court, respondent also discusses DeVries' testimony regarding her physical findings and the possibility of sexual abuse. As the trial court did not consider this evidence in reaching its conclusion, we do not address this part of respondent's argument.

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he . . . :
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]

N.C.G.S. § 14-202.1(a)(1) (2001). "Whether a person acts 'for the purpose of arousing or gratifying sexual desire[] may be inferred from the evidence of [his] actions.'" *In re Cogdill*, 137 N.C. App. 504, 511, 528 S.E.2d 600, 604 (2000) (quoting *State v. Rhodes*, 321 N.C. 102, 105, 361 S.E.2d 578, 580 (1987)).

In this case, the trial court determined, and we agree, that C.H.'s testimony was sufficient to establish the touching occurred for the purpose of arousing or gratifying sexual desire. While the touching would begin by respondent tickling and playing with C.H., C.H. stated that it progressed from respondent placing his hand on her vaginal area on the outside of her clothes to him inserting his fingers into her vagina beneath her clothing. Respondent would also kiss C.H. and try to put his tongue in her mouth. Finally, respondent would ask C.H. if the touching felt good. As these acts go far beyond accidental touching that could occur during rough play and instead indicate a "purpose of arousing or gratifying sexual desire," there was no error. N.C.G.S. § 14-202.1(a)(1); *see State v. Quarg*, 334 N.C. 92, 100, 431 S.E.2d 1, 5 (1993) ("[t]he uncorroborated testimony of the victim is sufficient to convict under N.C.G.S. 14-202.1 if the testimony establishes all of the

elements of the offense").[3]

III

Respondent also assigns error to the trial court's adjudication of K.M. as a neglected juvenile based solely on the adjudication of abuse with respect to C.H.

A neglected juvenile is defined in part as "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2001). "In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." *Id.* Moreover, "'there [must] be some physical, mental, or emotional impairment of a juvenile or a substantial risk of such impairment as a consequence of the failure to provide "proper care, supervision, or discipline"'" in order to support a neglect adjudication. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (quoting *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993)).

In this case, the evidence established that K.M. was living in the same household in which C.H. was being abused, N.C.G.S. § 7B-101(15), and was further present in the same room and therefore

[3]Respondent further contends the trial court used the improper standard of "preponderance of the evidence" as opposed to "clear, cogent and convincing evidence" to evaluate the evidence before it. As the trial court's order explicitly states that the trial court found the facts "by clear, cogent and convincing evidence," there is no basis for respondent's assignment of error and it is therefore overruled.

exposed to the acts testified to by C.H. This is sufficient evidence from which to conclude that K.M. was not only presently at substantial risk of mental or emotional impairment but was also at physical risk of being a potential subject of the same abuse. *See Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676. Because K.M. was living "in an environment injurious to [her] welfare," N.C.G.S. § 7B-101(15), the trial court did not err in concluding that she was neglected within the meaning of the statute.

IV

We now turn to respondent's contention that the trial court lacked the statutory authority to order the mother to obtain full-time employment and her own residence away from respondent before custody would be reinstated to her. Respondent lacks standing to raise this issue. *See Culton v. Culton*, 327 N.C. 624, 625, 398 S.E.2d 323, 324 (1990) (only an aggrieved party has standing to appeal from an order or judgment of the trial division). Since the disputed portion of the order was not directed at respondent and he is only indirectly affected by it, respondent does not qualify as an aggrieved party for purposes of standing. *See id.* ("[a]n aggrieved party is one whose rights have been directly and injuriously affected by the action of the court"); *Insurance Co. v. Ingram, Comr. of Ins.*, 288 N.C. 381, 385, 218 S.E.2d 364, 368 (1975) (where "the aggrieved real party in interest is content, an appealing party has at most only an incidental interest in the subject matter of the litigation and will be affected only indirectly by the judgment complained of"). Accordingly, we do not

address this issue.

V

With respect to respondent's remaining assignments of error discussed in his brief to this Court, we note that respondent has failed to present any reason as to why, in light of the adjudication of abuse and the adjudication of neglect based on the abuse, remand to the trial court for the development of a "workable Family Services Case Plan" should be granted. Thus, we do not address this argument. *See* N.C.R. App. P. 28(b)(6).

Affirmed.

Judges McCULLOUGH and TYSON concur.

Report per Rule 30(e).