FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-581

DIEGO DE HOYOS,

Appellant,

v.

JULIA BAUERFEIND as Natural Guardian of Jan De Hoyos Bauerfeind, a Minor,

Appellee.

On appeal from the Circuit Court for Alachua County.
Robert K. Groeb, Judge.

December 16, 2019

ROWE, J.

Dr. Diego De Hoyos appeals a final judgment of injunction against domestic violence entered against him after the mother of his nine-year-old son alleged that De Hoyos hit the child in the face. De Hoyos argues that the trial court erred by relying on child hearsay statements without determining whether the statements were reliable. He argues that without the inadmissible hearsay, no competent, substantial evidence supports the trial court's finding that an act of domestic violence occurred. We agree and reverse.

I. Background

Dr. Julia Bauerfeind petitioned for an injunction against domestic violence on behalf of her son against De Hoyos, the child's

father. Bauerfeind alleged that De Hoyos injured the child by striking him in the face when De Hoyos was taking the child to school. Bauerfeind claimed that De Hoyos hit the child's head against the window of the car after the child asked to return home to grab his jacket. When the petition was filed, Bauerfeind and De Hoyos were in a legal dispute over paternity and time-sharing. During that same time, the child was in treatment with a therapist, Dr. Mary McCue.

The trial court held a hearing on Bauerfeind's petition. The child did not testify. De Hoyos expected the child's therapist and Bauerfeind to testify about statements the child made to them about the alleged abuse. De Hoyos' counsel objected to the hearsay testimony. Counsel argued that the court needed to determine whether the statements were admissible under the child hearsay exception provided in section 90.803(23), Florida Statutes.

Bauerfeind's counsel disagreed and argued that the statements were admissible without reference to the hearsay exception, citing the decisions in *Berthiaume v. B.S. ex rel. A.K.*, 85 So. 3d 1117 (Fla. 1st DCA 2012), and *Hughes v. Schatzberg*, 872 So. 2d 996 (Fla. 4th DCA 2004). The trial court agreed with Bauerfeind. The court noted De Hoyos' standing objection to the admission of the hearsay statements and the hearing continued.

De Hoyos testified that he chastised his son for taking too much time to do his hair before they left for school, when the son knew they were in a rush. De Hoyos admitted that he put his hand either on his son's head or on his shoulder after his son told him that he "wished that during the day today a large black man would come and break [De Hoyos'] face." But De Hoyos denied that his son's head hit the window of the car.

Dr. Mary McCue, the child's therapist, testified next. She agreed to waive the therapist-patient privilege on behalf of the child. Dr. McCue testified about her conversations with the child:

> So [the child] explained that in the morning they were running behind and that they got into the car, and [the child] realized that he forgot his coat. So he went back in to retrieve his coat. When he got back into the car,

> his father was highly irritated that it took [the child] three minutes to retrieve his coat. [The child] described Diego questioning him about what he was doing in the house, why it was taking him so long.
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> And that appeared to escalate to the point where Diego started calling him–this is where I need my notes—a "sneaky bag of shit," a "bag of shit," a "motherfucker," and a "fucker."
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> He went on. Then Diego said—went on to say that his father told him that he hoped a big black man comes to school and breaks his face.
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> And then [the child] replied, "me too."
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> And he said at that point, that's when Diego swung his hand and hit him in the face, hitting his nose, his teeth, and his head then hit the window.
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> He told me that his nose and his teeth were still sore and that his head was uncomfortable. He explained that he said "me too" because he was trying to bring Diego down, saying, okay, me too; I hope somebody comes and beats me up too.

Bauerfeind testified next. She claimed that she picked up her son from school on the day of the incident to take him to his counseling session with Dr. McCue. Her son told her that his father hit him, but he did not want to talk about it. Later that evening, her son told Bauerfeind that De Hoyos got mad at him for going back inside the house to get his coat and slapped him in the face. Bauerfeind did not feel or see a bruise at that time. But the next day, the school called her about a bruise on the child's face. Bauerfeind then filed the petition.

The trial court granted a permanent injunction for protection against domestic violence, finding that the child was in imminent danger of future harm from De Hoyos. This appeal follows.

II. Analysis

We review a trial court's admission of evidence for an abuse of discretion, but that discretion is limited by the rules of evidence. *J.B. v. State*, 166 So. 3d 813, 815 (Fla. 4th DCA 2014). Whether a statement is hearsay is a legal question subject to de novo review. *Id.*

De Hoyos argues that the trial court erred in considering the child's statements to his therapist and Bauerfeind without determining whether the statements were admissible under the child hearsay exception provided in section 90.803(23), Florida Statutes. De Hoyos argues that without the child hearsay statements, no competent, substantial evidence supports the trial court's finding that an act of domestic violence occurred.

An out-of-court statement is not generally admissible, but an out-of-court statement made by a child victim describing an act of child abuse against the child is admissible as long as the source of information is trustworthy and:

> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and
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> 2. The child either:
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> a. Testifies; or
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> b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or

> mental harm, in addition to findings pursuant to s. 90.804(1).

§ 90.803(23), Fla. Stat. (2014)

Under the exception provided in section 90.803(23), child hearsay statements are admissible as substantive evidence when the statements satisfy a strict standard of reliability and corroboration.* *State v. Townsend,* 635 So. 2d 949, 954 (Fla.1994). This strict standard for admissibility is necessary to "balance the need for reliable out-of-court statements of child abuse victims against the confrontation and due process rights of those accused of child abuse." *Id.* at 953. Before admitting a child hearsay statement, a trial court must determine:

> whether the hearsay statement is reliable and from a trustworthy source without regard to corroborating evidence. If the answer is yes, then the trial judge must determine whether other corroborating evidence is present. If the answer to either question is no, then the hearsay statements are inadmissible.

Id. at 957.

Here, the trial court did not determine whether the child's statements to his mother and his therapist satisfied the strict standard of reliability and corroboration required by the statute and *Townsend*. Instead, the court found that the holdings in *Hughes v. Schatzberg*, 872 So. 2d 996 (Fla. 4th DCA 2004), and *Berthiaume v. B.S. ex rel. A.K.*, 85 So. 3d 1117 (Fla. 1st DCA 2012), supported the admission of the statements as substantive evidence and obviated the need for the court to consider their reliability.

The trial court found that it need not determine whether the child's statements to his therapist were admissible under section 90.803(23), Florida Statutes, because *Schatzberg* holds that a child's therapist can assert or waive the therapist-patient privilege

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* The corroboration determination applies only when the child is unavailable as a witness, as is the case here.

for communications relating to abuse of the child. *Schatzberg*, 872 So. 2d at 997. But *Schatzberg* was not a case involving hearsay. And De Hoyos did not contest Dr. McCue's ability to waive the therapist-patient privilege and communicate about her own statements or mental impressions based on her treatment of the child. Rather, De Hoyos argued that the waiver of the therapist-patient privilege did not obviate the need for the trial court to determine whether the child's statements to the therapist were admissible under section 90.803(23). We agree.

The trial court similarly concluded, citing *Berthiaume*, that it need not determine whether the child's statements to his mother, conveyed through her sworn petition for an injunction against domestic violence, were admissible under section 90.803(23). The court's reliance on *Berthiaume* was misplaced. There, the court held that a parent seeking a sexual violence injunction on behalf of a child can testify to the child's statements describing acts of violence by a nonparent, and those statements can support a sexual violence injunction. *Berthiaume*, 85 So. 3d at 1119. The court determined that it need not consider whether the child's statements were admissible under section 90.803(23) because "section 784.046 is a clear expression by the legislature that, under the circumstances here, the parent's sworn petition is sufficient to support an injunction." *Id*. at 1119.

This case involves the domestic violence injunction statute, section 741.30, Florida Statutes, not the sexual violence injunction statute, 784.046, Florida Statutes. Unlike the sexual violence injunction statute, the domestic violence injunction statute contains no language suggesting that child hearsay statements in a sworn petition filed by a parent (against either another parent or a nonparent) can support an injunction. And unlike *Berthiaume*, the sworn petition here was filed by a parent seeking an injunction against another parent.

In sum, *Schatzberg* and *Berthiaume* involved different questions than the ones posed here. Here, the trial court needed to determine whether the child's statements to his therapist and to his mother were admissible under section 90.803(23). The court's failure to do so was error. *See Leaphart v. James*, 185 So. 3d 683, 685 (Fla. 2d DCA 2016) (holding that hearsay statements by

petitioner's friends and neighbors were not competent evidence to show acts of domestic violence); *Brilhart v. Brilhart ex rel. S.L.B.*, 116 So. 3d 617 (Fla. 2d DCA 2013) (holding that father's testimony consisting of hearsay statements by the child about abuse by the mother could not support issuance of an injunction).

And the error was not harmless. The only evidence of abuse of the child by De Hoyos came from the child hearsay statements to the therapist and Bauerfeind. *See In re A.B.*, 186 So. 3d 544, 549 (Fla. 2d DCA 2015) (reversing an injunction sought by child's mother against the child's father where the petition was based on hearsay statements of the child and the mother was not a witness to the alleged acts and failed to provide physical evidence of the alleged acts). No witnesses to the alleged abuse testified. Neither Bauerfeind nor the child's therapist saw a mark on the child's face in the hours after the incident. And Bauerfeind never provided the photograph she claimed that she took of the child's bruise the next day. Because Bauerfeind did not provide competent, substantial evidence to support the injunction, the final judgment granting the injunction is REVERSED.

WOLF and ROBERTS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

John J. Kelly of Glassman & Zissimopulos, Gainesville, for Appellant.

S. Scott Walker and A. Derek Folds of Folds, Walker & Maltby, LLC, Gainesville, for Appellee.