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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000136-ME

J.T.T. APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE JENNIFER UPCHURCH EDWARDS, JUDGE
ACTION NO. 11-J-00038

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES, L.B.T. AND D.M.J. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MAZE AND NICKELL, JUDGES.

MAZE, JUDGE: Appellant, J.T.T., appeals from the finding of the Russell Circuit Court that he had neglected or abused his step-daughter and placed his own child at risk of abuse. He also appeals from the court's custodial placement of his daughter with another relative. After thoroughly examining the record in this case, we find no clear error in the findings of the trial court. Accordingly, we affirm.

Background

J.T.T. and L.T. had one child of their marriage, A.T., born February 2, 2010. In addition to A.T., L.T. had a daughter, B.D., from a prior relationship. In early 2010, J.T.T. moved out of the marital home and took up residence with his parents in Ohio. In the summer of 2010, while they were estranged, L.T. began sending J.T.T. sexually explicit pictures and videos of B.D., via text messaging. B.D. was thirteen years of age at the time the images were taken. At least three of the videos were taken at B.D.'s maternal grandmother's home and in at least two of the videos, L.T.'s voice can be heard talking to B.D. In February of 2011, J.T.T.'s parents turned the videos over to local authorities in Ohio, and the Kentucky State Police ("KSP") initiated an investigation of which both J.T.T. and L.T were subjects. As a result of KSP's investigation, L.T., but not J.T.T., was charged criminally.

On March 9, 2011, the Russell County Attorney filed a juvenile petition on behalf of A.T. alleging risk of abuse against J.T.T. and L.T due to their alleged roles as perpetrators of the videos. The Russell Circuit Court issued an Emergency Custody Order ("ECO") granting temporary custody of A.T. to her maternal grandmother, D.J. At a subsequent hearing, J.T.T. was ordered to have no contact with his daughter until further order of the court.

After several continuations, the adjudicative hearing in the civil abuse case was held on November 17, 2011. On L.T.'s motion, and at J.T.T.'s insistence that his case be adjudicated that day, the trial court bifurcated the cases against

J.T.T. and L.T., agreeing to hear only testimony against J.T.T. that day. L.T. asserted her right against self-incrimination and refused to testify in the adjudication of the neglect and abuse case until the criminal charges against her were resolved. Upon L.T.'s request to be excused, the court stated that L.T. had the right to stay for the hearing but that the court could not require her to do so. Both L.T. and her attorney left the courtroom and were not present for the subsequent hearing against J.T.T.

The Commonwealth called Detective Burton of KSP as the Commonwealth's first witness. In response to a question regarding L.T.'s reason for creating the videos in question, Detective Burton stated that he had concluded from his investigation that "[L.T.] made [the videos] in an attempt to entice [J.T.T.] to come back to live with her. In other words . . . it appears she's in some way offering her daughter in a sexual manner in exchange for [J.T.T.] to come back down here and live with her." J.T.T.'s attorney did not object to this statement. The County Attorney then asked Detective Burton if L.T. made any statements regarding her role and J.T.T.'s role in the production of the videos. J.T.T.'s attorney immediately objected, stating,

> my client's due process rights are important as well . . . and if [the Commonwealth is] bringing evidence, they can bring it, but they have to do it within the confines of the Rules of Evidence. And if [L.T.] decides not to testify, that's her constitutional right as well, but . . . whatever she does cannot violate [J.T.T.'s] rights.

After initially sustaining the objection, the trial court overruled the objection and allowed testimony regarding L.T.'s statements to continue. The trial court reasoned, "[L.T.] has chosen to not be present and I tend to agree [with the Commonwealth]. I think that I probably ruled erroneously on that last one. She's the parent of the child, she's a party and I'm going to reverse that ruling and overrule that objection." Continuing his testimony regarding L.T.'s statements, Detective Burton then stated, "she admitted to making the videos . . . she said the reason she did it was [J.T.T.] had requested or asked for the videos." J.T.T.'s attorney objected again, stating, "my client cannot cross-examine mother with regard to those statements . . . this is violating my client's due process." The court noted J.T.T.'s continuing objection, but stated, "[i]t is [J.T.T.]'s choice to have [the hearing] now. If you're wanting to have it now, there's a problem because you understand she's not going to be here. You knew that."

Later in the hearing, the Commonwealth called Vanessa Garr, the Cabinet for Health and Family Services ("CHFS") worker who investigated the case, and B.D., the alleged victim. On cross-examination from J.T.T.'s attorney, Ms. Garr testified that there was no indication that D.J. knew the videos were being filmed in her home and that, the past notwithstanding, D.J. met the requirements, and was the "most logical choice," for A.T.'s placement.

B.D. testified at the hearing that, prior to the creation of the videos, J.T.T. had touched her and spoken to her in inappropriate ways, though she stated that "nothing sexual" had ever happened. She testified that she was afraid of J.T.T.

and that she believed he played a role in the production of the videos, because L.T. "wouldn't have done it on her own."

Following the hearing, the trial court found A.T. to be at risk of abuse due to her mother's incarceration and her father's inappropriate and suggestive behavior toward B.D. The trial court found that no less restrictive placements were available and granted continued temporary custody of A.T. to D.J. The court concluded that it was in the best interest of A.T. to be placed with her grandmother, as she would be at risk of abuse if placed with J.T.T. The trial court granted J.T.T. supervised weekly visitation with A.T. J.T.T. appeals the trial court's findings following the adjudication and disposition of his case.

Analysis

Specifically, J.T.T. challenges 1) the trial court's admission of L.T.'s statements through Detective Burton's testimony, 2) the trial court's finding of risk of abuse regarding A.T. against J.T.T., 3) the trial court's grant of physical custody of A.T. to D.J. and 4) the trial court's finding that D.J. was a "qualified" placement under KRS 620.090. We will visit all of these issues in turn.

I. L.T.'s Statements Against J.T.T.

J.T.T. appeals the trial court's decision to allow Detective Burton to testify to statements made by L.T. regarding J.T.T.'s involvement in the production of the videos of B.D. J.T.T. argues that, although L.T. was a party to the case, that her availability for examination was required. Because L.T. was not present, J.T.T.

contends, Detective Burton's testimony regarding her statements constituted impermissible hearsay and should not have been allowed. We review this issue for an abuse of discretion. The test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). No evidentiary error shall be grounds for reversal unless it affects the substantial rights of the parties. Kentucky Rules of Civil Procedure ("CR") 61.01.

Hearsay is defined as a statement offered in evidence to prove the truth of the matter asserted. Kentucky Rule of Evidence ("KRE") 801. As a general rule, hearsay statements are not admissible as evidence. KRE 802. However, several exceptions to this general rule exist. In addition to those exceptions are statements which are deemed not to be hearsay. One such statement is found in KRE 801A. "A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is: (1) The party's own statement, in either an individual or representative capacity . . ." KRE 801A(b)(1). The requirements of the rule are (1) that the statement be made by a party to the litigation and (2) that it be offered against that party. *See* Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 8.15(3)(4th ed. 2003). The Supreme Court has held that an admission by a party "is not truly an exception to the hearsay rule, and is more accurately classified as non-hearsay." *Fisher v. Duckworth*, 738 S.W.2d 810, 814 (Ky. 1987).

It is essential for our purposes to point out that J.T.T. does not now, nor did he during the hearing, object to the statement on the basis that it failed to meet the above requirements of KRE 801A(b)(1). J.T.T. even concedes in his brief that L.T. was a "party" to the action for purposes of the hearsay rule. Rather, the basis of J.T.T.'s objection during the hearing was that L.T.'s absence during testimony regarding her statements about J.T.T. violated J.T.T.'s right to confront and cross-examine L.T. regarding the truth of her statements.

The Supreme Courts of Kentucky and the United States have clearly stated that confrontation and cross-examination are not rights universally applicable to civil proceedings such as the case before us now. *Vitek v. Jones*, 445 U.S. 480, 494-96 (1980); *A.A.G., supra*.

Rather, "[a] civil litigant's right of confrontation and cross-examination is grounded in the Due Process Clause of the Fifth and Fourteenth Amendments." *Cabinet for Health and Family Serv. v. A.A.G.*, 190 S.W.3d 338, 345 (Ky. 2006)(citing to *Willner v. Comm. on Character and Fitness*, 373 U.S. 96, 103 (1963)). In the context of hearsay testimony, due process requires only that the evidence presented be "reliable," and "reliability can be inferred without more in a case where evidence falls within a firmly rooted exception to the hearsay rule." *A.A.G.* at 346 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *overruled as applied to criminal cases by Crawford v. Washington*, *541 U.S. 36 (2004)*). In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66

(1980), *overruled as applied to criminal cases by Crawford v. Washington*, *541 U.S. 36 (2004)*.).

J.T.T. relies on *G.E.Y. v. Cabinet for Human Resources* in arguing that the trial court's admission of L.T.'s statements was "in contravention of the spirit of the party exception" which he claims ensures the declarant's ability to cross-examine the witness. In *G.E.Y.*, the Court of Appeals reversed the trial court's admission under the "shop work" or "business records" exception of the CHFS case file without requiring a CHFS representative to testify. In reversing, the Court of Appeals found the trial court had been unable to distinguish competent evidence from incompetent evidence.

While we find *G.E.Y* to be factually distinguishable, it does stand for an important and long-accepted principle upon which we rely in affirming the trial court's ruling. When a judge acts as a fact-finder, as opposed to a jury, it is presumed that she will be able to disregard hearsay statements. *G.E.Y.*, *supra*, at 715. In essence, a judge, trained in the law, is capable of discerning "the grain from the chaff, and to decide the case alone upon the law . . ." *Id*. (quoting *Andrews v. Hayden's Adm'rs*, 11 S.W. 428 (Ky. App. 1889). Where it is apparent that the trial court relied on the hearsay in makings its decision, however, the error in the admission of the unreliable evidence cannot be deemed harmless or non-prejudicial. *Id*.

The key, and ultimately dispositive, difference between our case and *G.E.Y.* is that the trial court in *G.E.Y.* clearly relied upon the admitted case reports

in coming to its findings. This contrasts with the present trial court's finding, which was based not on the statements to which J.T.T. objects, but expressly and exclusively on B.D.'s testimony that J.T.T. had spoken to and touched B.D. inappropriately in the past.[1] Accordingly, there is no indication whatsoever that the L.T.'s statement regarding J.T.T.'s involvement with the videos factored at all into the trial court's ultimate conclusion. In fact, there is nothing to indicate that the trial court did not properly disregard the statement in coming to that conclusion. Therefore, we find that any error which may have resulted from L.T.'s statements being admitted was harmless, as it is not apparent from the court's ruling that it relied on those statements.

In addition, it could well be argued that L.T.'s statements against J.T.T. do not meet the specific requirements of an "admission by a party" or that the admission of the statements in L.T.'s absence violated J.T.T.'s due process rights. However, neither argument is adequately before this Court on appeal. Indeed, J.T.T. argues in his brief that L.T.'s statement "does not fit under this exception," but his given legal reasoning is incorrect. Rather than point to the specific manner in which L.T.'s statements do not fit within 801A(b)(1) or cite to the controlling cases we mention above, J.T.T. repeatedly points out that J.T.T. was unable to confront and cross-examine L.T. – a right which is not absolute in the civil context. Further, J.T.T. objected on due process grounds at the hearing,

[1] The trial court's handwritten Findings of Fact and Conclusions of Law, as written on the case calendar read, in their entirety, as follows: "Mother is in jail on child porn charges. Father has not been charged but step-daughter alleged under oath he inappropriately touched her and spoke to her inappropriate, sexually suggestive ways while he lived in the home with her."

however, he does not expressly make this argument in his brief, nor does he apply a due process analysis to the facts of the case. We are unwilling to take the extreme measure of overturning a trial court by filling in the jurisprudential blanks for J.T.T. Without more, we are unable to conclude that the trial court's ruling was an abuse of its discretion. Hence, we affirm the trial court's ruling during Detective Burton's testimony and find that J.T.T.'s substantial rights were ultimately unaffected by that decision.

II. The Trial Court's Finding of J.T.T.'s Risk to A.T.

J.T.T. also contests the trial court's finding that, as a result of the evidence heard at the adjudicative hearing, he posed a risk of abuse to his own daughter. We review the trial court's findings regarding the weight and credibility of the evidence for clear error and will not set aside those findings unless they are clearly erroneous. CR 52.01. Whether or not the findings of the trial court are clearly erroneous depends on whether there is substantial evidence in the record to support them. On the other hand, the trial court's application of the law to the facts of the case is subject to *de novo* review. *K.H. v. Cabinet for Health and Family Serv.*, 358 S.W.3d 29, 30-31 (Ky. App. 2011)(citing to *A & A Mech., Inc. v. Thermal Equip. Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999).).

This matter turns solely on the sufficiency of the evidence as applied to the statutory definition of neglect. Per KRS 600.020(1), an abused or neglected child is "a child whose health or welfare is harmed or threatened with harm when

his parent, guardian or other person exercising custodial control or supervision of the child . . . (f) [c]reates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child[.]" CHFS has the burden of showing that a parent poses a risk of harm to the actual child in question. *K.H., supra*, at 32. As the fact-finder, the trial court is entitled to draw reasonable inferences from the evidence. *Id*. However, CHFS cannot sustain its burden of proof by the compounding of inferences upon inferences. *Id*. (citing to *American Inc. Co. v. Horton*, 401 S.W.2d 758, 760 (Ky. 1966).) The risk of harm must be more than a mere theoretical possibility, but an actual and reasonable potential for harm. *Id*.

In *K.H.*, upon which J.T.T. relies heavily in his brief, this Court held that CHFS had based its finding of risk of harm upon compounded inferences. In *K.H.*, like our case, a father and mother were both found to be a risk to their children after an allegation of sexual abuse by the father upon a teenage relative of the mother. Also similar to our case, the trial court in *K.H.* conducted an evidentiary hearing at which the social worker and a KSP representative testified. However, the child who was the alleged victim in *K.H.* did not testify and the substantiation of risk, along with the custody recommendation, was based upon the mother's mere failure to comply with a CHFS recommendation.

The factual differences between *K.H.* and the present case permit a different result. In starkest contrast to the facts in *K.H.*, the present trial court not only heard evidence from a KSP detective and a CHFS social worker, but it also

heard extensive testimony from B.D. regarding J.T.T.'s inappropriate comments and actions towards her and her resulting fear of him. The trial court heard, through uncontroverted testimony, that J.T.T. possessed the exploitative videos in question for nearly a year before his parents turned them over to police. The conclusion that J.T.T. posed an actual risk to his own child was reasonably inferred from these facts.

In sum, the risk of harm in this case results from far more significant and potentially harmful conduct than a parent simply refusing to comply with a CHFS recommendation, as in *K.H.* Rather, the trial court made a finding that J.T.T. had previously made sexually suggestive comments to B.D. and touched her inappropriately. The trial court found that J.T.T.'s inappropriate conduct constituted abuse against B.D. and placed J.T.T.'s own daughter at risk of abuse. Given the facts of this case, as they were presented at the adjudicative hearing, we find there was sufficient evidence for the trial court to form these conclusions and to find that J.T.T., through his prior conduct toward B.D., created an "actual and reasonable risk" that an act of sexual abuse or exploitation would be committed upon A.T. Accordingly, we affirm the trial court's finding regarding J.T.T.'s risk to A.T.

III. The Trial Court's Grant of Custody to D.J.

J.T.T. contests the trial court's grant of temporary custody of A.T. to D.J. on two grounds: 1) Finding that placement of A.T. with D.J. was in the best interest of A.T. went against the substantial weight of the evidence presented; and

2) the trial court erred in finding D.J. to be a "qualified" placement pursuant to KRS 620.090. In cases which are tried without the intervention of a jury, the trial court's findings of fact should not be reversed unless they are determined to be clearly erroneous. In making such a consideration, the appellate court must keep in mind that the trial court had the opportunity to hear the evidence and observe the witnesses, so as to judge their credibility, and therefore, is in the best position to make findings of fact. CR 52.01; *See also Bealert v. Mitchell*, 585 S.W.2d 417, 418 (Ky. App. 1979). However, the trial court's conclusions of law are subject to independent appellate determination. *A & A Mech., Inc. v. Thermal Equip. Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999).

KRS 403.270 requires that a "court shall determine custody in accordance with the best interests of the child." Additionally, KRS 620.090 requires,

> [i]n placing a child under an order of temporary custody, [CHFS] or its designee shall use the least restrictive appropriate placement available. Preference shall be given to available and *qualified* relatives of the child considering the wishes of the parent or other person exercising custodial control or supervision, if known.

KRS 620.090(2)(emphasis added). In challenging both D.J.'s suitability as custodian and her status as a "qualified" relative, J.T.T. points to three facts: 1) That three of the videos in question were taped inside D.J.'s home; 2) that more than a decade ago, D.J. allowed L.T. to have a child at the age of twelve by a man later convicted of statutory rape; and 3) that the CHFS's worker's

recommendations were based on interviews with L.T. and B.D., both of whom lacked credibility. These arguments fail to establish any error by the trial court in finding that the requirements of KRS 403.270 and 620.090 were properly met.

J.T.T.'s argument that D.J. is unqualified because her home was the setting for three of the videos in question is too tenuous. However, there is no evidence in the record that D.J. knew that the videos in question were being taped in her home. Nothing in the caseworker's investigation or that of KSP revealed any such knowledge of the ongoing abuse by L.T. upon B.D. To argue for reversal of the court's custody order by merely inferring otherwise falls well short of the threshold necessary to show clear error.

J.T.T. also fails to demonstrate that D.J.'s alleged bad judgment more than a decade ago presently makes her an unsuitable or unqualified caretaker for A.T. On the contrary, Ms. Garr, after visiting D.J.'s home and reviewing D.J.'s history, found D.J. to be "the most logical choice" for A.T.'s placement due to the appropriateness of D.J.'s home, L.T.'s incarceration and J.T.T.'s conduct toward B.D.[2] Ms. Garr's report specifically states, "Social Service Worker does not have any concerns with [B.D.] [and A.T.] being placed at [D.J.'s] home . . . The home . . . is a suitable placement . . . There was [*sic*] not any safety concerns found in their home." This evidence of the *present* state and suitability of D.J.'s home better

[2] J.T.T. points out that Ms. Garr's home study and evaluation of J.T.T. as a possible custodian for A.T. recommended him as a suitable placement. However, J.T.T. fails to mention that said recommendation was expressly conditioned upon CHFS not substantiating the allegations of abuse and risk of abuse made against J.T.T. Those allegations were substantiated. As Ms. Garr's recommendation states, "[o]bviously this would disqualify him as being a suitable placement for [A.T.]."

informed the trial court's decision regarding placement of A.T. in that home. More importantly, we hold that the court properly relied on this evidence in making its decision.

Finally, the credibility of B.D. and L.T. factors little into our review. Ms. Garr's custody recommendation was indeed based on interviews with L.T. and B.D. J.T.T. contends both had reasons to lie about his role in the videos and therefore, their testimony was unreliably skewed. However, Ms. Garr's recommendation was also based on her conversations with Detective Burton and J.T.T. himself. Additionally, Ms. Garr testified at the hearing that she found B.D. to be credible due to several factors, including the fact that her answers to questions regarding L.T. and J.T.T. were consistent throughout the balance of the interview. Most importantly, however, as an appellate court, we must entrust the task of judging the credibility of B.D. and L.T. to the trial court, as it was in a far better position to judge such matters. In doing so, we will not disturb the trial court's finding based solely on a witness's credibility, or alleged lack thereof.

In sum, it is evident from Ms. Garr's Dispositional Report that only L.T., J.T.T. and D.J. had expressed a willingness to care for A.T. Of these three choices, two were problematic. L.T. was incarcerated for abusing B.D. and J.T.T. was facing substantiated allegations of sexual abuse against B.D. D.J.'s home was found to be suitable and able to take in not only A.T., but her siblings as well. Considering these and all of the above facts, we affirm the trial court's findings. The trial court properly applied the requirements of KRS 620.090 in placing A.T.

in the "least restrictive appropriate placement" available and in finding D.J. to be an "available and qualified relative of the child" based on the testimony at the hearing and the report and recommendations of CHFS.

Conclusion

We find no clear error on the part of the trial court in this case. Accordingly, the orders of the Russell Circuit Court are affirmed.

ALL CONCUR.

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