

RENDERED: NOVEMBER 30, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000109-ME

B.S.

APPELLANT

APPEAL FROM HARDIN CIRCUIT COURT
FAMILY COURT DIVISION
v. HON. PAMELA ADDINGTON, JUDGE
ACTION NOS. 16-J-00454 AND 16-J-00454-001

CABINET FOR HEALTH AND FAMILY
SERVICES; D.P.M., A MINOR CHILD;
AND M.S., NATURAL FATHER

APPELLEES

AND

NO. 2017-CA-000110-ME

B.S.

APPELLANT

APPEAL FROM HARDIN CIRCUIT COURT
FAMILY COURT DIVISION
v. HON. PAMELA ADDINGTON, JUDGE
ACTION NOS. 16-J-00456 AND 16-J-00456-001

CABINET FOR HEALTH AND FAMILY
SERVICES; H.S.N., A MINOR CHILD;
M.S., NATURAL FATHER; AND
R.O.N., NATURAL MOTHER

APPELLEES

AND

NO. 2017-CA-000111-ME

B.S.

APPELLANT

APPEAL FROM HARDIN CIRCUIT COURT
FAMILY COURT DIVISION
v. HON. PAMELA ADDINGTON, JUDGE
ACTION NOS. 16-J-00458 AND 16-J-00458-001

CABINET FOR HEALTH AND FAMILY
SERVICES; L.S.N., A MINOR CHILD;
M.S., NATURAL FATHER; AND
R.O.N., NATURAL MOTHER

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON,¹ TAYLOR, AND THOMPSON.

¹ Judge Robert G. Johnson concurred in this opinion prior to the expiration of his term of office on November 20, 2018. Release of the opinion was delayed by administrative handling.

TAYLOR, JUDGE: B.S. brings these consolidated appeals from three separate orders entered on November 29, 2016, by the Hardin Circuit Court, Family Court Division, adjudicating that the three children, D.P.M., H.S.N., and L.S.N., were neglected and abused and that B.S. specifically failed to provide medical care and protect the children from their abusive father.² For the reasons stated, we affirm.

BACKGROUND

On September 28, 2016, the Cabinet for Health and Family Services (Cabinet) filed three separate petitions in the Hardin Family Court alleging 1) that H.S.N. and L.S.N. had been neglected and abused by M.S. and B.S., and 2) that D.P.M. was at risk of neglect or abuse by M.S. and B.S. The petitions were filed pursuant to Kentucky Revised Statutes (KRS) Chapter 620. D.P.M. is the natural-born son of B.S. and step-son of M.S. H.S.N. and L.S.N. are the natural born children of M.S. and step-children of B.S.³

As pertains to the allegations against B.S., an adjudication hearing was conducted by the family court on November 16, 2016. B.S. declined to testify or offer any evidence at the hearing, other than to request the court to interview

² The three cases on appeal are related and were consolidated for all purposes on appeal by order of the Court entered April 17, 2017.

³ As concerns H.S.N. and L.S.N., the petition alleged that M.S. inflicted the abuse and B.S. was present and aware of the abuse and failed to protect the children.

D.P.M. in chambers.⁴ M.S. stipulated to the allegations in all three petitions and did not testify at the hearing. By separate orders entered on November 29, 2016, the family court concluded that B.S. had failed to protect all three children and further failed to provide proper medical care for the children. These consolidated appeals follow.

The underlying relevant facts in this case are not in dispute. H.S.N. and L.S.N. were severely spanked by M.S. in the bedroom of the family home causing substantial bruising and injury to the children. Testimony from a representative of the Cabinet and Radcliff Police Officer Charles Foushee placed B.S. in the bedroom with M.S. when the punishment was administered. B.S. admitted to Cabinet worker Jeannetta Childress that she knew about the spankings by M.S. As noted, M.S. stipulated to the allegations of abuse in all three petitions. B.S. does not take issue with the findings of fact by the family court below, but rather raises two evidentiary issues in the conduct of the adjudication hearing, specifically as concerns rulings that precluded the children from being called as witnesses or otherwise being interviewed by the family court in reaching its decision in these cases. Thus, we limit our review of the adjudication orders on

⁴ B.S.'s decision to not testify presumably was based on her right against self-incrimination under the Fifth Amendment of the United States Constitution. See Kentucky Revised Statutes 620.100(2).

appeal to these evidentiary rulings below and will set forth any additional facts as needed in our analysis.

STANDARD OF REVIEW

Our standard of review of a trial court's ruling as to admitting or excluding evidence is limited to determining whether the trial court abused its discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000).

The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Id. at 581 (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

Given that the only issues raised in this appeal look to evidentiary issues, our scope of review shall be limited accordingly.

ANALYSIS

B.S.'s first argument on appeal is that the family court erred by not allowing the three children to be called as witnesses at the hearing, or at least be interviewed by the court in camera. However, in our review of the hearing transcript, counsel for B.S. did not call the children as witnesses, but rather suggested to the court that the children testify or be interviewed. Counsel then appeared to retreat from calling H.S.N. and L.S.N. as witnesses and then focused on the court interviewing D.P.M., who was seventeen years old at the time of the hearing. Unrefuted in the record is the statement by D.P.M.'s guardian ad litem at

the hearing that D.P.M. was not present in the bedroom when the spankings occurred and thus was not a witness to the abuse of H.S.N. and L.S.N. by M.S. In fact, at the hearing and in B.S.'s brief, B.S.'s counsel stated he did not know what testimony D.P.M. would have given if called as a witness.

B.S. argues that pursuant to Kentucky Rules of Evidence (KRE) 103(a)(1), her substantial rights have been violated by excluding the testimony of D.P.M., to which we have serious reservation. KRE 103(a)(2) clearly requires a party to make an offer of proof where evidence has been excluded:

(2) Offer of proof. If the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Thus, for B.S. to have properly preserved on appeal the family court's exclusion of D.P.M.'s testimony at the hearing, B.S. must establish that a substantial right was affected by the ruling and the substance of the excluded testimony must have been provided to the court by an offer of proof. *Henderson v. Commonwealth*, 438 S.W.3d 335 (Ky. 2014). Based on our review of the record, including the hearing transcript, this did not occur. A proper offer of proof is both mandatory and critical for proper appellate review. *Id.* at 342-43. In this case, B.S. failed to make a proper offer of proof and now vaguely argues on appeal, what hypothetically D.P.M.'s testimony might have been. This is simply not sufficient for this Court to meaningfully review on appeal, especially given that the

record reflects that D.P.M. was not present when the spankings occurred. Thus, we find no abuse of discretion or error by the family court in excluding the testimony of D.P.M.

B.S.'s second and final argument on appeal again looks to the failure of the children to be allowed to testify at the hearing, this being a violation of KRE 806 and the Sixth Amendment to the United States Constitution. The primary focus of B.S.'s exceedingly terse KRE 806-based argument seems to be that her Sixth Amendment right to confront witnesses was violated, relying upon the holding in *Crawford v. Washington*, 541 U.S. 36 (2004). However, dependency, neglect and abuse actions are civil actions, not criminal. *Z.T. v. M.T.*, 258 S.W.3d 31, 36 (Ky. App. 2008). Thus, neither *Crawford* nor the Sixth Amendment are applicable to this case. See, e.g., *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338, 345-47 (Ky. 2006) ("Nothing in *Crawford* suggests that its reasoning was intended to apply where the Sixth Amendment does not apply; and the Sixth Amendment does not apply to civil cases."). Clearly, the plain language of the relevant portion of KRE 806 governs only the procedural method of examination of a declarant who is called as a witness (as if on cross-examination). See Thomas L. Osborne, *Trial Handbook for Kentucky Lawyers* § 29:10 (2017-2018 ed.) Having concluded that the family court did not abuse its

discretion in not allowing D.P.M. or the other children to testify, we again find no error by the court as concerns B.S.'s arguments under KRE 806.

Based on our review of the entire record on appeal, the testimony of the children would have added nothing for the family court to make its decision in these cases. As the family court noted at the end of the hearing, there was substantial evidence presented by the Cabinet to support the allegations of the petitions and a finding of neglect by B.S. This included M.S.'s stipulation of the allegations in the petitions, Radcliff Police Officer Foushee's testimony and Cabinet worker Childress's testimony. Whether or not to interview the children was within the sound discretion of the family court, which is granted wide latitude in exercising that discretion. *Addison v. Addison*, 463 S.W.3d 755 (Ky. 2015). There is nothing in the record on appeal that looks to an abuse of discretion by the family court in not interviewing or allowing the children to testify in this case.

For the foregoing reasons, the three orders of the Hardin Family Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Joshua M.P. Cooper
Elizabethtown, Kentucky

**BRIEF FOR APPELLEE CABINET
FOR HEALTH AND FAMILY
SERVICES:**

Dawn Lonneman Blair
Elizabethtown, Kentucky