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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001469-ME

M.C. APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE NORA J. SHEPHERD, JUDGE
ACTION NO. 16-J-00225-001

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY AND
K.C., A MINOR CHILD APPELLEES

AND

NO. 2017-CA-001470-ME

M.C. APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE NORA J. SHEPHERD, JUDGE
ACTION NO. 16-J-00226-001

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY AND
B.C., A MINOR CHILD APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND JONES, JUDGES.

JONES, JUDGE: This consolidated appeal arises out of orders of the Clark Circuit Court finding that M.C. ("Father") subjected his two children, K.C. ("Daughter") and B.C. ("Son"), to a risk of sexual abuse and adopting the recommendations of the Cabinet for Health and Family Services (the "Cabinet"). Following review of the record and applicable law, we reverse the orders of the Clark Circuit Court.

I. BACKGROUND

Father is the natural father of Son and Daughter. On March 8, 2016, the Cabinet received reports that Daughter, an eleven-year-old child, had told her friends and her school counselor that she had performed oral sex on Father. Based on these allegations, Roberta Mardis, a social worker with the Cabinet, accompanied a police officer to the home to investigate. Father was made to leave the home that evening. On May 6, 2016, Father was asked to come into the Winchester Police Department where he was interviewed by Detective Beall. Following the interview, Father was arrested for first-degree sodomy, victim under

twelve years of age. On July 18, 2016, the Cabinet filed dependency, neglect, or abuse ("DNA") petitions for both Daughter and Son.[1] Approximately one year after Daughter had made the allegation against Father, she informed the Cabinet and the County Attorney's office that she had made the allegation up in hopes of receiving more attention. The criminal charges against Father were dropped in light of Daughter's recantation. On April 12, 2017, the Cabinet filed amended DNA petitions for both children. The amended petitions noted Daughter's prior allegation against Father, and additionally stated that the Cabinet believed Son and Daughter were at a risk of harm based on statements Father had made during his interview with Detective Beall.

An adjudication hearing was held on July 27, 2018, at which Ms. Mardis was the sole testifying witness. Ms. Mardis testified that she had filed the original DNA petitions for Son and Daughter; however, she had not filed or seen the amended petitions. She testified that she had been present when Father was interviewed by Detective Beall and had watched the entire interview via closed-circuit television. The parties stipulated to the authenticity of the recorded interview; however, Father's counsel objected to introduction of the portion that the Cabinet sought to play, as it had been conducted prior to Detective Beall

[1] The grounds stated in the petition for Daughter were that Father had made her perform oral sex on him. The grounds stated in Son's petition stated that he was at risk of harm because Father made Daughter perform oral sex on him.

reading Father his *Miranda*[2] rights. The trial court overruled Father's objection, and the Cabinet proceeded to play a ten-minute portion of the interview.

At the start of the portion of the interview played, Detective Beall asks Father if he has a lot of sex toys laying around the house. Father acknowledged that he and his wife, D.C. ("Mother"), do keep sex toys in their home.[3] Father explained that, over the past few months, he and Mother had noticed that their sex toys were disappearing from their bedroom. Father stated that he and Mother kept the toys locked in a cabinet, with little handcuffs around them; however, they had noticed that the lock had been moved on several occasions. Eventually, Father and Mother discovered that Daughter had been taking the toys and playing with them in the bathtub. Upon this revelation, Mother had a private discussion with Daughter and they thought that the problem was resolved.

Following that conversation, however, Father came home from work early and found another sex toy hidden under the bathroom sink while he was cleaning. Father laid the toy on Daughter's bed and waited for her to come home from school so that they could have a talk. When Daughter came home from school, Father explained "a little about the birds and the bees" to her. During this

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[3] Mother was not named in the DNA petitions.

conversation, Daughter asked Father how a woman was supposed to fulfill a man's needs if something else is not working right. Father was not sure where this question was coming from and told Daughter she was too young for that. He told Daughter that there are certain things a woman can do to a man to please him, but that that was all she needed to know. Other than that statement, Father denied that he had talked to Daughter about oral sex.

When questioned about the sex toy that he had laid on Daughter's bed, Father told Detective Beall that it was a plastic replica of his penis, which he had made using a kit. Father referred to the toy as a "clone." Father stated that Daughter asked him about it and he told her that it was an imitation of him that Mother keeps to feel safe on nights when he is away from home. Father admitted that Daughter had seen the "clone," but stated that he had never shown Daughter his actual penis. Father explained that at the end of his and Daughter's conversation, he had taken Daughter's hands and put them on the top of her body and the lower part of her body. Father told Daughter that if anyone were to touch her there, she needed to tell either him or Mother. Father agreed with Detective Beall that he had placed Daughter's hands on her breasts and between her legs. Father stated that at the end of their conversation, he had kissed Daughter on the forehead and then they had gone into the kitchen to make dinner.

On cross-examination, Ms. Mardis acknowledged that she no longer worked for the Clark County Cabinet and had never read or seen the amended petition. She testified that she had watched Father's entire interview with Detective Beall, and that, during that interview, Father had never disclosed doing anything sexual towards Daughter and never admitted to harming Daughter. Ms. Mardis stated that, while Daughter was not at a risk of physical harm when talking to Father about the sex toy, she believed that it could not have been comfortable for Daughter to have that type of conversation with Father. Ms. Mardis acknowledged that she is not a qualified mental health professional and could not speak to any mental or emotional harm that may have been caused to Daughter. The portion of Father's interview with Detective Beall was the extent of the Cabinet's proof. Father elected not to call any witnesses.

During its closing argument, the Cabinet argued that Father's conversation with Daughter constituted "grooming." It contended that leaving sex toys in a place where Daughter was able to access them, Father's using Daughter's hands to demonstrate where she should not let people touch her, and Father kissing Daughter on the forehead at the end of their conversation all constituted inappropriate behavior. The Cabinet clarified that it was not trying to prove emotional abuse; it believed that sexual abuse had occurred or, at the least, a risk of sexual harm.

The guardian ad litem ("GAL") informed the trial court of her concerns that Father and Mother were still married, and the children were still residing with Mother. The GAL argued that there was no other reason for Father to show Daughter the "clone" sex toy and explain to her what it was other than for his own sexual gratification. Additionally, the GAL argued that there was no reason for Father to explain to Daughter that there were other ways a woman can please a man besides through sexual intercourse. The GAL expressed her opinion that, instead of responding to Daughter's inquiries, Father should have told Daughter that she did not need to know that information. The GAL argued that Father's conversation with Daughter clearly represented grooming.

Following closing arguments, the trial court stated its findings from the bench. The trial court expressed its concern that Father had taken Daughter into her bedroom to talk to her about the "clone" sex toy, as it found that this action was unnecessary to have an appropriate talk with Daughter about boundaries and privacy. The trial court found that Father's conversation with Daughter, coupled with the fact that Father had placed Daughter's hands around her "private areas," represented "classic textbook grooming behavior." Accordingly, the trial court found that there was a risk of harm that sexual abuse had occurred, and that Daughter was placed at a risk of harm by Father.

The trial court entered adjudication orders finding that Father had created a risk of harm that an act of sexual abuse, sexual exploitation, or prostitution would be committed upon Son or Daughter. The trial court's findings of fact were written on the docket sheet:

> [Father] told 11 yr old [sic] daughter that dildo she had allegedly found was an exact replica of [Father], that there are ways for a woman to satisfy a man other than intercourse, used daughter's hands to touch herself around her breasts and her vagina—all show classic grooming behavior and indicate child at risk of harm for sexual abuse by [Father].

R. 25.

On August 24, 2017, a disposition was held, and the trial court adopted the recommendations of the Cabinet.[4] The Cabinet's recommendations included that Father: continue having no contact with Son and Daughter; cooperate with the Cabinet; complete a parenting assessment and follow all recommendations; complete a mental health assessment and follow all recommendations; participate in family therapy; and complete a sexual offender assessment and follow all recommendations.

This appeal by Father followed.

[4] The disposition hearing was not made part of the record on appeal.

II. STANDARD OF REVIEW

"The trial court's findings regarding the weight and credibility of the evidence shall not be set aside unless clearly erroneous." *K.H. v. Cabinet for Health & Family Servs.*, 358 S.W.3d 29, 30 (Ky. App. 2011) (citing CR[5] 52.01). "On the other hand, the trial court's application of the law to those facts is subject to *de novo* review." *Id.* (citing *A & A Mech., Inc. v. Thermal Equip. Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999)).

III. ANALYSIS

On appeal, Father argues that the Cabinet presented insufficient evidence to prove that he placed Son and Daughter at risk of sexual abuse. He additionally argues that the trial court erred when it took judicial notice of "grooming."

The Cabinet pursued this case under KRS[6] 600.020(1)(a)(6), which provides that a child is abused or neglected when his or her parent "[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[.]" Sexual abuse is defined to include "any contacts or interactions in which the parent . . . uses or allows, permits, or encourages the use of the child for the purposes of the sexual

[5] Kentucky Rules of Civil Procedure.

[6] Kentucky Revised Statutes.

stimulation of the perpetrator or another person[.]" KRS 600.020(61). Sexual exploitation includes situations in which a parent "allows, permits, or encourages the child to engage in an act which constitutes prostitution[,]" or where a parent "allows, permits, or encourages the child to engage in an act of obscene or pornographic photographing, filming, or depicting of a child as provided for under Kentucky law[.]" KRS 600.020(62).

Under KRS 620.100(3), the Cabinet bears the burden of proving dependency, neglect, or abuse by a preponderance of the evidence. Thus, in this case, the Cabinet was required to prove that Daughter and Son were more likely than not to be at risk of sexual abuse from Father. *Ashley v. Ashley*, 520 S.W.3d 400, 404 (Ky. App. 2017). To meet its burden, the Cabinet offered testimony from one witness and played a ten-minute portion of Father's interview with Detective Beall. Ms. Mardis—the Cabinet's sole witness—testified that, while she had filed the original DNA petitions, she had never seen the amended petition before the date of the hearing. Ms. Mardis testified that she had watched Father's interview with Detective Beall in its entirety; however, when questioned about the conversation Father relays during that interview, the strongest observation she had was that Daughter could not have been comfortable discussing these matters with Father.

The conversation Father had with Daughter certainly does not represent the best parenting, or the most appropriate way to handle the situation in which Father found himself. And we acknowledge that, "[a]s the fact-finder, the trial court was entitled to draw reasonable inferences from the evidence." *K.H.*, 358 S.W.3d at 32. However, we cannot find that the statements Father made in his interview with Detective Beall—without more—constitute sufficient evidence for the Commonwealth to meet its burden of proof. "[T]he risk of harm must be more than a mere theoretical possibility, but an actual and reasonable potential for harm." *Id.* The Cabinet's evidence simply falls short of this standard.

Further, the Cabinet had the burden to show that not only was Daughter at risk of harm, but that Son was as well. The Cabinet offered absolutely no evidence to suggest that Father's conversation with Daughter placed Son at risk of sexual abuse. The only time that Son was even mentioned during the hearing was when the GAL informed the trial court that he was still residing with Mother. The trial court made no findings concerning Son's risk of abuse. Even if we agreed with the trial court's finding that Father created a risk of sexual abuse of Daughter, the neglect or abuse of Daughter does not equate to the neglect or abuse of Son. The finding as it relates to Son was clearly erroneous.

We do not doubt that the Cabinet, in filing the DNA petitions, was motivated by a good faith desire to protect Son and Daughter. Nonetheless, the

Cabinet failed to meet its burden of proving that Father subjected his children to a risk of sexual abuse. We do not disagree with the Cabinet, or the trial court, that Father's conversation with Daughter was not the best way to handle the situation, especially considering Daughter's young age. However, "[w]e must also be mindful that an adjudication of neglect carries long-reaching consequences." *K.H.*, 358 S.W.3d at 31. While the Cabinet and the trial court may believe—and, perhaps, rightfully so—that Father's conversation with Daughter represented poor judgment and likely made Daughter uncomfortable, those beliefs do not equate to substantial evidence on which to base a finding that Daughter and Son were at risk of sexual abuse by Father. Because we conclude that there was insufficient evidence to support a finding of abuse and/or neglect, we do not address Father's argument that the trial court erred in taking judicial notice of "grooming."

IV. CONCLUSION

In light of the foregoing, the orders of the Clark Circuit Court adjudging Daughter and Son to be neglected by Father are reversed.

ALL CONCUR.

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