

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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000454-ME

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM FRANKLIN FAMILY COURT
HONORABLE SQUIRE WILLIAMS III, JUDGE
ACTION NO. 17-J-00190-001

B.S., FATHER; AND
B.S., A MINOR CHILD

APPELLEES

AND

NO. 2018-CA-000455-ME

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM FRANKLIN FAMILY COURT
HONORABLE SQUIRE WILLIAMS III, JUDGE
ACTION NO. 17-J-00190-002

B.S., FATHER; AND
B.S., A MINOR CHILD

APPELLEES

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NO. 2018-CA-000456-ME

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM FRANKLIN FAMILY COURT
HONORABLE SQUIRE WILLIAMS III, JUDGE
ACTION NO. 17-J-00191-001

B.S., FATHER; AND
A.S., A MINOR CHILD

APPELLEES

AND

NO. 2018-CA-000458-ME

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM FRANKLIN FAMILY COURT
HONORABLE SQUIRE WILLIAMS III, JUDGE
ACTION NO. 17-J-00191-002

B.S., FATHER; AND
A.S., A MINOR CHILD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; JOHNSON¹ AND D. LAMBERT, JUDGES.

CLAYTON, CHIEF JUDGE: The Commonwealth of Kentucky brings these consolidated appeals from a Franklin Family Court order finding that a minor child, B.S. (“Child”) was abused but finding insufficient evidence that the abuse was inflicted while Child was in the care of his father, B.E.S. (“Father”) and Father’s girlfriend A.W. (“Girlfriend”), as alleged in the petition filed by the Commonwealth. Having reviewed the record and applicable law, we affirm.

Child was four years of age at the time the abuse occurred. He and his older sister A.S. (“Sister”) are the biological children of Father and E.S. (“Mother”). Father and Mother were never married and separated shortly after Child was born. Father lives with Girlfriend and her minor daughter. Father and Mother have a timesharing arrangement for the care of their children.

In accordance with this arrangement, Mother dropped Child off at his daycare on the morning of Friday, August 4, 2017. Girlfriend picked him up that afternoon. It is undisputed that Child showed no signs of injury at that time. Girlfriend and Father kept Child and Sister through the weekend until Father dropped Child back at the daycare at about 7:45 a.m. on Monday, August 7, 2017.

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

The daycare director and teacher both noticed that Child had bruising on his face that morning, but they did not contact the authorities.

When Mother picked Child up from the daycare on Monday afternoon at approximately 5:00 p.m., she noticed multiple bruises on his face and in his ears. She contacted the sheriff's department and Child was treated at the emergency room. A forensic pediatrician examined photographs of Child taken at the emergency room on Monday and subsequently examined him in person on Wednesday. In her report on his condition, the pediatrician listed fifteen injuries, including multiple bruises to his ears and both sides of his face and multiple petechiae, which are red marks indicative of broken blood vessels. The report ruled out any underlying medical condition that would result in such excessive bruising and attributed the injuries to direct blunt force trauma. The doctor reported that Sister suggested the impacts were punishment for Child having kicked the cat. The doctor determined that Child's injuries were "diagnostic of inflicted injury and child physical abuse." The doctor also expressed concern that none of the caretakers who were looking after Child at the time the injuries occurred sought medical care.

The Department for Community Based Services ("DCBS") made the determination that the abuse occurred while Child was in Father's care. According to the social worker's testimony, the daycare was ruled out as a viable perpetrator

based on interviews with Child, Sister and the parents. DCBS filed a petition on behalf of Child and Sister alleging abuse by Father and neglect by Girlfriend. Following a hearing, the children were temporarily removed from Father's custody and placed in the custody of Mother. An adjudication hearing was held on February 23, 2018. At the close of the Commonwealth's evidence, Father moved to dismiss the petition. The trial court granted the motion, finding that Child was abused but the Commonwealth had failed to show by a preponderance of the evidence that Father was responsible. This appeal by the Commonwealth followed.

Under Kentucky Revised Statutes (KRS) 620.100(3), "a determination of dependency, neglect, and abuse shall be made by a preponderance of the evidence" and the Commonwealth, as the complainant, bears the burden of proof. A trial court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rules of Civil Procedure (CR) 52.01. On review, "the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion." *Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008) (internal citation omitted). "Under this standard, an appellate court is obligated to give a great deal of deference to the trial

court's findings and should not interfere with those findings unless the record is devoid of substantial evidence to support them." *D.G.R. v. Commonwealth, Cabinet for Health & Family Servs*, 364 S.W.3d 106, 113 (Ky. 2012) (internal citation omitted). Substantial evidence has been defined as evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chem. Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

The trial court found that Child sustained injuries about his face, neck and ears, and that the injuries, especially to his ears, could not have been self-inflicted, and were indicative of abuse. It also noted, based on the testimony of the forensic pediatrician, that the injuries could have been inflicted as recently as Monday. The trial court gave little weight to the testimony of the daycare workers who noticed Child's bruises on Monday morning, observing that neither of the daycare workers notified Child's parents, or any other authority, of the marks. The court described their testimony as unreliable, due, in part, to inconsistencies, and vague recollections, and weighed this evidence accordingly.

The court concluded that the intervening time Child spent at daycare on Monday meant that it could not conclusively find that the injuries occurred while in Father's care.

The Commonwealth argues that the court's findings ignore important evidence in the record that points directly to the abuse having occurred while Child was exclusively in the care of Father and Girlfriend. The Commonwealth points to Sister's statement that Child's injuries were inflicted as punishment for kicking the cat and the social worker's testimony that Father initially admitted to her that he would smack Child's hands for being rough with the cat, but he later denied doing this.

The key issue is the family court's assessment of the testimony of the director of the daycare and the teacher who was directly responsible for Child. The director testified that the daycare has four workers who look after thirty-two children divided amongst three rooms. She testified that she did not notice anything different about Child's condition when he first came in at around 7:40 or 7:45 a.m. on Monday because there were many children arriving around that time who were all shepherded initially into the back room before proceeding to their assigned rooms. She noticed a bruise on his face at around 8:00 a.m. but explained she was not concerned because he often came in with bruising due to the fact he liked to wear flip flops all the time and tripped frequently.

The Child's teacher testified that when she first saw Child at around 8:15 a.m. his face was bruised up with blue dark marks toward one side. She did not look at his ears. She testified that he had never come in before with these types

of large facial bruises. She told the director who she said had not noticed the bruising because she was very busy. Child told them he fell and hit a table at his mother's. She felt this explanation made sense so she did not call the police. The director admitted it was a mistake not to report the injuries and testified that the daycare had been investigated by the Office of the Inspector General for their failure to do so and that they had received training regarding the reporting requirement.

It is unclear whether the director independently noticed the facial bruising or only observed it after Child's teacher drew her attention to it. It is undisputed that neither the director or teacher reported the injuries. The forensic pediatrician testified that it was possible the injuries were inflicted on Monday but was unable to say how likely that was. "[W]e must bear in mind that in reviewing the decision of a trial court the test is not whether we would have decided it differently[.]" *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). We are also mindful that

A family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. A family court is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses, and a reviewing court is not permitted to substitute its judgment for that of the family court, unless its findings are clearly erroneous.

Bailey v. Bailey, 231 S.W.3d 793, 796 (Ky. App. 2007).

Under the circumstances, the trial court's decision that it could not conclusively find that the abuse was inflicted while Child was in Father's care because of the time Child spent afterwards at the daycare, was not clearly erroneous.

The orders of the Franklin Family Court are therefore affirmed.

ALL CONCUR.

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