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Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-001791-ME

B.B.

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SQUIRE WILLIAMS, III, JUDGE
ACTION NO. 19-J-00065-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
M.B.; AND S.B., MOTHER

APPELLEES

AND

NO. 2019-CA-001792-ME

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COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
S.B.; AND S.B., MOTHER

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v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SQUIRE WILLIAMS, III, JUDGE
ACTION NO. 19-J-00067-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
J.B.; AND S.B., MOTHER

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

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

CLAYTON, CHIEF JUDGE: B.B. (“Father”) appeals from an order of the
Franklin Circuit Court determining that his child J.B. (“Child”) was an abused

child and that his other two children were at risk of abuse. For the reasons stated below, we affirm.

BACKGROUND

B.B. is the biological father of three minor children, M.B., S.B., and Child. At the time of the incidents in question, M.B. was ten years of age, S.B. was seven years of age, and Child was approximately four and a half years of age. Father and the children's biological mother ("Mother") married in 2007 and divorced in 2017. The parties shared joint custody of the children and approximately equal timesharing, and by all accounts had an amicable co-parenting relationship.

On May 4, 2018, Mother reported to the Franklin County Sheriff's Office ("FCSO") allegations made by Child that Father had touched Child's vagina on several occasions. The FCSO referred the allegations to the Franklin County Department for Community Based Services (the "Cabinet"). At that time, the children were removed from B.B. pursuant to a prevention plan initiated by the Cabinet.

Mother was instructed by the Cabinet to have Child examined by her pediatrician. Dr. Suresh Saxena completed an examination of Child on May 11, 2018, and diagnosed Child with vaginitis and/or vulva vaginitis.

On May 14, 2018, Child completed an interview with the Child Advocacy Center of the Bluegrass (“CAC”). During this interview, Child alleged that Father “rubbed her vagina on her skin while she was in bed” and “tickled” her vagina while she sat on his lap. On June 7, 2018, additional CAC interviews were conducted with Child’s brothers, M.B. and S.B. Neither boy made any disclosures of abuse of any kind, nor did the children reveal witnessing the alleged abuse of Child. A forensic examination of Child was also completed on that date by Dr. Jacqueline M. Sugarman, who serves as medical director of the CAC and practices pediatric forensic medicine. Dr. Sugarman indicated that she could neither confirm nor deny the occurrence of the alleged sexual abuse.

Meanwhile, the Commonwealth of Kentucky (the “Commonwealth”) presented the allegations of sexual abuse against Father to the Franklin County grand jury (the “Grand Jury”) on October 30, 2018. The Grand Jury returned a no true bill for the charge of rape, first degree. The Commonwealth presented additional allegations of sexual abuse against Father to the Grand Jury on January 22, 2019, which also resulted in a no true bill for the offense of criminal abuse, first degree.

On March 5, 2019, Mother reported new allegations to the Cabinet. Specifically, Mother reported that one of Child’s brothers, S.B., disclosed that he had in fact witnessed an instance of Father’s alleged sexual abuse against Child. A

second CAC interview was conducted with S.B. on March 11, 2019, during which S.B. disclosed that he had witnessed Father with his hand in Child's underwear and saw him touching his sister "in a bad way." S.B. disclosed that Child received a popsicle in exchange for not telling anyone that "[Father] touched her privates."

Thereafter, the Cabinet filed the petitions initiating these dependency, neglect, and abuse actions on March 22, 2019 (the "Petitions"). The Commonwealth again presented the allegations to the Grand Jury on April 23, 2019, who returned another no true bill on the offense of sexual abuse, first degree, victim under 12 years of age.

The Franklin Circuit Court held an adjudication hearing for the allegations contained in the Petitions on September 20, 2019. The Commonwealth offered the testimony of Cabinet investigative worker Valerie Nally. While Nally testified to indicators of sexual abuse displayed by Child, Nally confirmed that the presence of such indicators was never witnessed by her but rather were reported to her by Mother. While investigating the allegations, Nally did not speak with anyone at Child's daycare to discuss Child's behavior there, nor did she speak with any additional family members.

The court next heard testimony from Dr. Saxena, the pediatrician who examined Child after her initial allegations. Dr. Saxena indicated that he had diagnosed Child with vaginitis and described such condition as redness around the

vagina. Dr. Saxena further testified, however, that the condition does not necessarily indicate sexual abuse and that it was common amongst individuals in Child's age group, as they often displayed poor hygiene and bathroom habits.

The trial court also heard testimony from Child's licensed therapist, Kelly Dykus. Dykus acted as Child's treating therapist after the allegations were made against Father. Dykus was licensed in trauma and had been licensed since 2012. Additionally, she had a master's degree and 4,000 hours of required supervision. Dykus testified that she diagnosed Child with post-traumatic stress disorder for an individual under six years of age and based this diagnosis in part on physical acting out reported by Mother and Child herself. Over Father's counsel's objection, Dykus further testified that Child had disclosed to Dykus that Father had touched Child's vagina and had inserted a "slimy stick" in her rectum. Dykus also witnessed one episode of sexual acting out, in which Child inserted a pen into a doll's rectum.

Father testified at the hearing as well and maintained his innocence regarding Child's accusations. Father posited that the allegation of inserting an object into Child's rectum could be related to suppositories that were administered to the children at a younger age for medical reasons. Additionally, Father testified to various public Facebook posts that Mother had made, which included his name, address, and detailed the allegations made against him.

Mother testified last and confirmed that Child had disclosed the alleged abuse on the evening of May 4, 2018, and had identified Father as having touched her vagina. Mother confirmed that she herself had been a victim of sexual abuse as a child, and that Child's allegations had revived Mother's issues with trauma due to her own history of abuse.

On September 25, 2019, the trial court entered orders finding that Child was an abused child and that her siblings were at risk of abuse under Father's care. Father filed these timely appeals after entry of the trial court's disposition orders.

ANALYSIS

a. Standard of Review

A trial court has broad discretion in its determination of whether a child is dependent, neglected, or abused. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998) (citing *Department for Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky. App. 1977)). A trial court's findings of fact "shall not be set aside unless clearly erroneous[.]" Kentucky Rule of Civil Procedure ("CR") 52.01. Under such 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 Services*, 364

S.W.3d 106, 113 (Ky. 2012) (citation omitted). “Substantial evidence” constitutes “evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people.” *Cabinet for Health and Family Services on behalf of C.R. v. C.B.*, 556 S.W.3d 568, 574 (Ky. 2018) (citation omitted).

Further, “the trial court, as the finder of fact, has the responsibility to judge the credibility of all testimony, and may choose to believe or disbelieve any part of the evidence presented to it.” *K.R.L. v. P.A.C.*, 210 S.W.3d 183, 187 (Ky. App. 2006) (citation omitted). If we conclude that the factual findings and conclusions of law by the family court are correct, the only remaining issue on appeal is whether the family court abused its discretion in applying the law to the facts. *L.D. v. J.H.*, 350 S.W.3d 828, 830 (Ky. App. 2011).

The appellate standard for reviewing a trial court’s evidentiary rulings is abuse of discretion. *Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles.” *Id.* (citation omitted).

b. Discussion

Father first argues that the trial court erred in admitting certain testimony of Child’s treating therapist at the adjudication hearing. Specifically,

Father argues that Child's out-of-court statements to her therapist concerning the identification of Father as the perpetrator of the alleged sexual abuse against Child constituted inadmissible hearsay and did not fall under any of the hearsay exceptions contained in the Kentucky Rules of Evidence.

Before we venture into an analysis of the hearsay rule and its exceptions, we will discuss the rationale and requirements for an adjudication hearing as described in Kentucky Revised Statutes ("KRS") 620.100(2).

A full adjudicatory hearing is necessary *to determine whether abuse or neglect has in fact occurred*. The adjudicatory hearing precedes any dispositional hearing and has an entirely different purpose from that later hearing. At the adjudicatory stage the state must prove the factual basis for its claim to intervene in the parent-child relationship. *The focus of that hearing is proof of the state's accusations against the parent rather than the child's best interest*. At the full adjudicatory hearing both the child and the parents must be represented by counsel. *A full adjudicatory hearing is a trial, at which the parents may confront and cross-examine all witnesses against them, and at which they have a right to avoid self-incrimination*. In the adjudicatory stage, lawyers for the parents and the child should assure that the state proves its case. The judge must serve as a neutral fact-finder.

Although the statute does not specifically so state, one may infer that there are at least two important differences in the adjudicatory hearing and the temporary removal hearing. *First, hearsay may not be admissible at the adjudicatory hearing*. While hearsay is specifically permitted by KRS 620.080, KRS 620.100(2) not only omits any mention of hearsay's admissibility but also provides specific confrontation rights for the parties.

Second, at a full adjudicatory hearing the state must prove the truth of its allegations made in the complaint. Thus, the state’s burden at the adjudicatory hearing is somewhat higher than at the temporary hearing. The difference in the difficulty of proof may not always be very significant because the definitions of neglect and abuse include threats of serious harm as well as actual harm.

Louise Everett Graham and James E. Keller, *Protective Services – Full Adjudicatory Hearings*, 15 KY. PRAC. DOMESTIC RELATIONS L. § 6:19 (2019) (emphasis added) (footnotes omitted). Additionally, the Commonwealth must prove that the child has been abused or neglected by a preponderance of the evidence in an adjudication hearing. KRS 620.100(3).

An “[a]bused or neglected child” is defined, in relevant part, as:
a child whose health or welfare is harmed or threatened with harm when:

[h]is or her parent . . . :
...

5. Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;
[or]

6. Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child[.]

KRS 600.020(1)(a).

Returning to the issue of hearsay, as a result of the foregoing statutory framework, the Kentucky Rules of Evidence are applicable at an adjudication hearing. Under Kentucky Rule of Evidence (“KRE”) 801(c), “[h]earsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” As a general rule, under KRE 802, hearsay is not admissible. One exception to the foregoing, KRE 803(4), provides that “[s]tatements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis” are not excluded by the hearsay rule even though the declarant is available as a witness.

Over the years, Kentucky’s courts have debated whether the identity of a perpetrator of sexual abuse is “pertinent to diagnosis or treatment.” For example, in *Edwards v. Commonwealth*, the Kentucky Supreme Court held that the identity of a child sex abuse offender was pertinent to diagnosis or treatment when the perpetrator was a family or household member. 833 S.W.2d 842, 844-45 (Ky. 1992), *overruled by Colvard v. Commonwealth*, 309 S.W.3d 239 (Ky. 2010), *as corrected* (Apr. 9, 2010). Under this interpretation of KRE 803(4), a doctor or other medical personnel could testify about the child victim’s statement that a family member was the perpetrator. *Id.*

Thereafter, in *Colvard*, 309 S.W.3d 239, the Kentucky Supreme Court examined earlier cases concerning the use of KRE 803(4) to admit out-of-court statements identifying a familial or household perpetrator in child sexual abuse cases, including *Edwards*. *Id.* at 243-47. In so doing, the Court held that child sex abuse cases were subject to the same version of KRE 803(4) as other types of cases. *Id.* at 247. However, the Court made clear that it was “not hold[ing] that statements of a child victim to medical personnel identifying an abuser are always inadmissible. There may be circumstances in which such statements will be found to comport with the requirements of KRE 803(4)[.]” *Id.*

We find this case to involve such circumstances. We note that in *Colvard* the medical personnel involved were an EMT, a triage nurse, and a pediatrician providing treatment for the child victim’s physical injuries. *Id.* at 243. Alternatively, in this case, Mother sought treatment for Child from a therapist to specifically diagnose and treat Child’s psychological, rather than physical, trauma. Moreover, to effectively treat Child, the “inception . . . of the cause or external source” of Child’s injury was “pertinent to [Dykus’] treatment or diagnosis” thereof. The exact nature, extent, and treatment of Child’s psychological problems depended on the identity of the abuser. Moreover, information concerning the perpetrator was also “reasonably pertinent” to a course of treatment which included removing Child from the home, if needed. Under the plain language of KRE

803(4), the “medical treatment” exception to the hearsay rule is applicable to the current situation.

Additionally, even if the trial court’s admission of Child’s hearsay identification statements through Dykus’ testimony was in error, we believe that, even without the admission of such identification testimony, other sufficient evidence existed to support the trial court’s decision that Child was an abused child and her siblings were at risk of abuse. The Kentucky Supreme Court has held that the “[a]dmission of incompetent evidence in a bench trial can be viewed as harmless error, but only . . . *if there was other competent evidence to prove the matter in issue[.]*” *Prater v. Cabinet for Human Resources, Commonwealth of Ky.*, 954 S.W.2d 954, 959 (Ky. 1997) (emphasis in original) (citation omitted).

Here, we believe that Dykus’ other testimony regarding Child’s statements as to what was done to her and how she was injured falls under the “medical treatment” exception to the hearsay rule. Moreover, the “matter in issue” was whether Father “[c]ommit[ted] or *allow[ed] to be committed* an act of sexual abuse” on Child and whether Father “[c]reate[d] or *allow[ed] to be created* a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed” upon Child’s siblings. KRS 600.020(1)(a)5. and 6. Kentucky courts have stated that “[t]he identity of the perpetrator of the abuse is not material” to such findings. *Commonwealth, Cabinet for Health & Family Services ex rel. M.H. v. R.H.*, 199

S.W.3d 201, 204 (Ky. App. 2006), *as modified* (Aug. 18, 2006). Therefore, even though we have held that Dykus' testimony identifying Father as the perpetrator was inadmissible, the remainder of Dykus' testimony constituted substantial evidence that acts of sexual abuse were committed upon Child while under Father's care and supervision.

Father's remaining challenges to the trial court's decision go to the weight and credibility of the testimony and evidence. The determination of weight and credibility of evidence, however, is clearly within the trial court's discretion as fact-finder. CR 52.01; *see also Cabinet for Health and Family Services v. P.W.*, 582 S.W.3d 887, 896 (Ky. 2019). Additionally, Father's assertion that the Grand Jury's finding of no true bill rendered the trial court's findings clearly erroneous is unavailing, as the trial court was not and could not be made aware of what happened in the Grand Jury proceedings. *See* Kentucky Rule of Criminal Procedure ("RCr") 5.24(1) ("all persons present during any part of the proceedings of a grand jury shall keep its proceedings and the testimony given before it secret"). Accordingly, we conclude that the trial court's finding of abuse was supported by substantial evidence and did not constitute an abuse of discretion.

CONCLUSION

For the foregoing reasons, we affirm the Franklin Circuit Court's orders.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Whitney True Lawson
Frankfort, Kentucky

BRIEF FOR APPELLEE
COMMONWEALTH OF
KENTUCKY, CABINET FOR
HEALTH AND FAMILY
SERVICES:

Moira M. Wingate
Rick Sparks
Frankfort, Kentucky