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NO. COA01-1441

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

IN RE:  
SHANA SIMONE

Moore County  
No. 98 J 138

Appeal by respondent from an order entered 3 January 2001 by Judge Lee Gavin in Moore County District Court. Heard in the Court of Appeals 9 September 2002.

*Assistant County Attorney Brannon Burroughs, for petitioner-appellee.*

*Law Firm of Richard J. Costanza, by Hal Morris, for respondent-appellant mother.*

*Michael Rowland for respondent father.*

*Jerry D. Rhoades, Jr. for Guardian Ad Litem.*

HUNTER, Judge.

Judith Simone ("respondent") appeals from an order entered 3 January 2001 in which the trial court adjudicated Shana Simone ("Shana"), respondent's daughter, as a neglected and abused juvenile. The trial court further concluded that it was in Shana's best interests that she remain in the legal custody of the Moore County Department of Social Services ("DSS"). For the reasons stated herein, we affirm the trial court's adjudication and disposition.

On 11 September 2000, Karen D'Emo ("Ms. D'Emo"), the on-call social worker for Moore County Social Services, received a report regarding Shana. Shana was at the Pinehurst Police Department and did not wish to go home because she had problems dealing with her mother. Ms. D'Emo talked to respondent and Shana and a child protection plan was developed. Subsequently, Shana left the police station with her mother. About an hour and a half later, Shana returned to the police station and was extremely upset. Shana told Ms. D'Emo that when she and her mother had gotten home, her mother had slapped her face, causing her to fall to the floor, and kicked her in the side. Although Ms. D'Emo did not notice any red marks on Shana's face, she did notice that Shana's stomach was red.

On or about 14 September 2000, the DSS filed a petition alleging that Shana had been neglected by her mother. A hearing was held on 4 December 2000 during which Shana testified that her mother had slapped her across the face and kicked her in the stomach. Shana further testified that approximately two weeks prior to 11 September 2000, her mother had cut her arm with a knife.

According to Shana, her mother used marijuana in their home almost every day. Shana indicated that when her mother smokes marijuana and drinks alcohol at the same time, she is more likely to become violent. Shana also testified that her mother does not take her medication prescribed for depression.

Dr. Jeanie Hu ("Dr. Hu"), an expert in child psychiatry, testified that Shana was diagnosed with "major depressive episode,

severe." Shana was admitted to Dorothea Dix Hospital and treated with antidepressants and individual therapy. Dr. Hu testified that on 23 October 2000, Shana told a doctor that her mother cut her arm with a knife and had punched her in the face. However, Shana later recanted these allegations. Dr. Hu further testified that recantation is consistent with the behavior of abuse victims and that she found it significant that Shana's recantation occurred during a family session when Shana's mother made her first appearance at Dorothea Dix.

The trial court concluded that Shana was a neglected juvenile in that she does not receive proper care, supervision, or discipline from respondent. The trial court further concluded that Shana was an abused child because respondent used grossly inappropriate procedures to modify Shana's behavior. The trial court ordered Shana's custody to remain with DSS. Respondent appeals.

I.

Respondent assigns error to the trial court's second finding of fact because respondent claims this finding was not supported by competent evidence. The trial court's second finding of fact provides the following: "When Shana returned home with her mother after signing the protection plan, the mother hit Shana in the face with her hand. Shana fell to the ground, and the mother kicked Shana in the stomach. The mother was angry that Shana had involved DSS in their disputes."

Allegations of abuse and neglect must be proven by clear and convincing evidence. N.C. Gen. Stat. § 7B-805 (2001). "In a non-jury [abuse and] neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Our review of a trial court's conclusions of law is limited to whether the conclusions are supported by the findings of fact. *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984). "If the trial court's conclusions of law are supported by findings of fact based on clear, cogent and convincing evidence, and the conclusions of law support the order or judgment of the trial court, then the decision from which appeal was taken should be affirmed." *In re Everette*, 133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999).

In the case *sub judice*, respondent specifically contends the trial court relied on Shana's unsworn testimony in making its second finding of fact and therefore, this finding was not based on competent evidence. After reviewing the transcript, we note it is silent as to whether Shana's testimony was sworn. Assuming for the purpose of argument that the testimony was not sworn, respondent failed to object to Shana's testimony at trial on the grounds that Shana was not under oath. "Despite the constitutional nature of the oath requirement, our appellate courts have consistently held that where the trial court fails to administer the oath to a witness, the defendant's failure to object waives appellate review

of the court's error." *State v. Beane*, 146 N.C. App. 220, 225, 552 S.E.2d 193, 196 (2001), *appeal dismissed*, 355 N.C. 350, 563 S.E.2d 562 (2002). The rationale supporting this holding is that "[i]f an objection had been made, the trial court could have corrected the oversight by putting the witness under oath and allowing him to redeliver his testimony, if necessary." *State v. Robinson*, 310 N.C. 530, 540, 313 S.E.2d 571, 578 (1984). This Court has previously concluded in a termination of parental rights case that respondent-parent could not show reversible error in the trial court's allowing children to testify without being sworn where respondent-parent failed to lodge an objection with the trial court. *In re Nolen*, 117 N.C. App. 693, 696, 453 S.E.2d 220, 222-23 (1995). For the foregoing reasons, we conclude that since respondent failed to object to Shana's testimony at trial on the grounds that Shana was not under oath, she has waived appellate review of the court's error in admitting and relying on unsworn testimony in making its findings. We therefore hold that the trial court's second finding of fact is supported by clear and convincing competent evidence (Shana's testimony and Ms. D'Emo's corroborating testimony), which in turn, supports the trial court's conclusion that Shana was a neglected juvenile.

## II.

Respondent additionally assigns error to the trial court's third conclusion of law in which the court concluded that Shana was "an abused child as defined by N.C.G.S. § 7B-101(1)(c) in that her mother has used grossly inappropriate procedures to modify Shana's

behavior.” We conclude this conclusion of law is supported by the court’s finding that Shana’s mother hit Shana in the face with her hand and kicked Shana in the stomach. The court further found that Shana’s mother was angry that Shana had involved DSS in their disputes. Respondent specifically contends the trial court erred in failing to make a finding that respondent’s conduct constituted grossly inappropriate discipline. This argument lacks merit since the determination of whether respondent’s conduct constitutes grossly inappropriate discipline requires the exercise of judgment and is therefore a conclusion of law rather than a finding of fact. See *Helms*, 127 N.C. App. 505, 491 S.E.2d 672. This assignment of error is overruled.

### III.

Respondent next assigns error to the trial court’s second conclusion of law by claiming that there are insufficient findings to support a conclusion that “Shana is a neglected juvenile in that she does not receive proper care, supervision, or discipline from her mother.” Respondent specifically claims the trial court failed to find that there was some impairment or risk of serious impairment to the juvenile which respondent asserts is necessary in order for a court to conclude that a juvenile is neglected.

A neglected juvenile is defined in pertinent part as “[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile’s parent, guardian, custodian, or caretaker . . . .” N.C. Gen. Stat. § 7B-101(15) (2001). In order for a trial court to adjudicate a juvenile neglected, this Court

has "required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide 'proper care, supervision, or discipline.'" *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (citations omitted). The determination of whether a child is neglected is a conclusion of law and therefore, must be supported by adequate findings of fact. *In re McLean*, 135 N.C. App. 387, 390, 521 S.E.2d 121, 123 (1999).

Respondent relies on *Everette*, 133 N.C. App. 84, 514 S.E.2d 523, to support her argument. In *Everette*, this Court held that the findings of fact were insufficient to support a conclusion that the juvenile had been neglected since there were no findings that the juvenile was impaired or at substantial risk of impairment due to the respondent's actions. However, the case *sub judice* can be distinguished from *Everette* since in *Everette*, there was more than one inference that could be drawn from the evidence as to whether the juvenile was at a substantial risk of impairment or had suffered impairment. In the instant case, the court found that respondent slapped Shana on the face, which knocked her to the floor, and kicked her in the stomach. The only inference that may be drawn from this evidence is that the child suffered from physical, mental, or emotional impairment as a consequence of respondent's failure to provide proper care, supervision, or discipline. Therefore, we conclude it was unnecessary for the trial court to make a specific finding of impairment or substantial risk of impairment. See *Safriet*, 112 N.C. App. at 753, 436 S.E.2d

at 902 (affirming the trial court's adjudication and disposition even though the court failed to make any findings regarding the detrimental effect of the mother's conduct on the child's physical, mental, or emotional well-being because that was the only inference that could be drawn from the facts).

IV.

Respondent asserts that her attorney at the time of the hearing rendered ineffective assistance of counsel. Our General Assembly has provided the parent with a statutory right to counsel "[i]n cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent . . . ." N.C. Gen. Stat. § 7B-602(a) (2001). In order to prevent the statutory right to counsel from becoming an empty formality, the right to counsel provided in N.C. Gen. Stat. § 7B-602(a) includes the right to effective assistance of counsel. See *In re Bishop*, 92 N.C. App. 662, 665, 375 S.E.2d 676, 678 (1989). "To prevail on a claim of ineffective assistance of counsel, respondent must show that counsel's performance was deficient and the deficiency was so serious as to deprive her of a fair hearing." *Id.* at 665, 375 S.E.2d at 679. Respondent claims her lawyer should have objected after the trial court announced its conclusion that the child was abused since in the petition, it was only alleged that the child had been neglected. Respondent further contends that her attorney was deficient in failing to object to Shana's purported unsworn testimony.



As to the first alleged deficiency, according to Rule 54(c) of the North Carolina Rules of Civil Procedure, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in his pleadings.*" N.C. Gen. Stat. § 1A-1, Rule 54(c) (2001) (emphasis added). In the instant case, an adjudication of abuse was suggested by the pleadings and justified by evidence adduced at trial and therefore, this relief was properly granted by the trial court even though an adjudication of abuse was not requested in the petition. See *NCNB v. Carter*, 71 N.C. App. 118, 322 S.E.2d 180 (1984). Accordingly, respondent's attorney was not deficient in failing to object after the trial court announced its conclusion that the child was abused.

As to the second alleged deficiency, respondent has not shown that her counsel's failure to object to Shana's purported unsworn testimony deprived her of a fair hearing. We conclude that respondent has not met her burden necessary to prevail on an ineffective assistance of counsel claim. Therefore, this assignment of error is overruled.

V.

Respondent next contends that the trial court erred in admitting Shana's answer to one of the court's questions because Shana's answer contained hearsay not within an exception to the hearsay rule. When the court questioned Shana about whether she had received medical treatment for the cut that she alleged her mother had inflicted, she responded: "The policeman told me I

could go to the hospital and they would make a record of it, and my baby-sitter was -- was -- when they found me -- when the police found me, and they told me -- my baby-sitter just told me -- she was just, like, 'forget it.'" Respondent argues that this statement was inadmissible hearsay. We disagree.

Hearsay is defined as "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." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2001). "If a statement is offered for any other purpose, it is not hearsay and is admissible." *State v. Dickens*, 346 N.C. 26, 46, 484 S.E.2d 553, 564 (1997).

In the instant case, the statements at issue were not admitted for the truth of the matters asserted but were used to establish that Shana did not receive medical treatment for the cut on her arm, which she alleged her mother had inflicted, and her reasons for not seeking treatment. Since these statements were not being admitted for the truth of the matters asserted therein, these statements do not constitute hearsay.

VI.

Respondent finally argues that the trial court erred by asking Shana about a phone conversation that she had with respondent the night prior to the hearing since the conversation occurred after the date alleged in the petition. Shana testified that during the phone conversation with respondent, respondent yelled and cussed at her and told her that her legal father was not her biological father.

Respondent specifically asserts that this evidence was not relevant and therefore should not have been admitted. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2001).

If the admission of this evidence was error, it was not prejudicial error. There is no indication in the court's order that the court relied on the phone conversation in making its decision. Additionally, excluding the phone conversation, there was adequate evidence supporting the court's conclusion that Shana was a neglected and abused juvenile.

For the foregoing reasons, we affirm the trial court's adjudication and disposition.

Affirmed.

Chief Judge EAGLES concurs.

Judge MARTIN concurs in the result in a separate opinion.

Report per Rule 30(e).

NO. COA01-1441

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

IN THE MATTER OF:  
SHANA SIMONE

Moore County  
No. 98-J-138

MARTIN, J., concurring in the result.

I concur in the result reached by the majority, but for an additional, and more fundamental reason. The majority notes that the record is silent as to whether Shana's testimony was sworn, and assumes, for the purpose of its discussion, that her testimony was not sworn. Such an assumption is unnecessary and is contrary to the fundamental rule that where the record is silent, there is a presumption that the trial proceedings were regular and free of error. "The longstanding rule is that there is a presumption in favor of regularity and correctness in proceedings in the trial court, with the burden on the appellant to show error." *McLean v. Mechanic*, 116 N.C. App. 271, 276, 447 S.E.2d 459, 462 (1994) (citation omitted), *disc. review denied*, 339 N.C. 738, 454 S.E.2d 654 (1995). As our Supreme Court has noted, appellate courts are not to "engage in speculation and assume error . . . when no aberration can be fairly and affirmatively ascertained from the record." *State v. Fox*, 305 N.C. 280, 283, 287 S.E.2d 887, 889 (1982). A silent record supports the presumption that the trial proceedings were free of error, and it is "the duty of the

[appellant] to see that the record was properly made up and transmitted, and when the matter complained of does not appear of record, [appellant] has failed to show prejudicial error.'" *Id.* (citation omitted).