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NO. COA05-1417

NORTH CAROLINA COURT OF APPEALS

Filed: 18 July 2006

IN THE MATTER OF:

K.A.,

Minor Child.

Vance County

No. 04-J-158

Appeal by respondent from orders entered 18 April 2005 and 27 April 2005 by Judge J. Henry Banks in District Court, Vance County. Heard in the Court of Appeals 17 May 2006.

No brief filed by petitioner-appellee, Vance County Department of Social Services.

Alexandra S. Gruber for guardian ad litem.

Janet K. Ledbetter for respondent-appellant.

McGEE, Judge.

The Vance County Department of Social Services (DSS) filed a juvenile petition on 1 September 2004, alleging K.A. to be abused and neglected. K.A. is the biological daughter of D.A. (respondent), and was five years old at the time of the 18 February 2005 adjudication hearing. DSS alleged K.A. to be abused in that her "parent, guardian, custodian or caretaker: . . . committed, permitted, or encouraged the commission of a sex or pornography offense with or upon [K.A.] in violation of the criminal law." DSS alleged K.A. to be neglected in that she "[did] not receive proper care, supervision, or discipline from . . . [her] parent, guardian,

custodian, or caretaker." DSS alleged that on or about 31 August 2004, it received a report alleging that K.A. "suffered injury from sexual abuse administered by [respondent]." DSS also alleged that on or about 31 August 2004, it obtained information that "[respondent] allegedly sexually assaulted [K.A.] by inappropriately touching [K.A.'s] vagina area with his hand, and [by] forcing [K.A.] to perform oral sex, the most recent incident occur[ing] on or about [30 August 2004]." The trial court filed an order on 7 September 2004 awarding custody of K.A. to DSS.

At the adjudication hearing, K.A.'s aunt, Angela N., testified that on 30 August 2004, she went to the home of her sister, Ramona N. Ramona N. told Angela N. that "[K.A.] had been touched by [respondent]." Angela N. further testified that K.A. told her respondent had rubbed his penis against K.A.'s body as they were lying in bed. K.A. demonstrated to Angela N. how K.A. and respondent were positioned during the alleged sexual activity by using male and female dolls. Angela N. testified she filed an incident report with police on 30 August 2004.

Ramona N. testified that on 30 August 2004, K.A. said "[respondent] put his pee-pee in [K.A.'s] mouth and did like this, huh uh[.]" K.A. also told Ramona N. that "if [K.A.] didn't do it, the monsters [were] going to come and get [K.A.], and the cops [were] going to take [K.A.] from them." Ramona N. further testified that K.A. used dolls to demonstrate these sexual acts to her several times after 30 August 2004.

Tamika Tripel (Ms. Tripel), an investigator with DSS,

testified she interviewed K.A. on 31 August 2004 regarding the allegations of sexual abuse. Ms. Tripel used anatomical drawings during the interview. Ms. Tripel stated that K.A. told her respondent had placed his penis in K.A.'s mouth, had put his body on K.A.'s body, and had touched K.A.'s vagina with his hands.

Rhonda Hopkins (Ms. Hopkins), a forensic nurse examiner, testified she interviewed and examined K.A. on 1 September 2004 at the Maria Parham Medical Center. Ms. Hopkins stated that before discussing any of the alleged sexual acts, she discussed with K.A. the importance of telling the truth and obtained a "truth agreement" from K.A. Ms. Hopkins then interviewed K.A., who used anatomically-correct drawings to demonstrate how respondent committed the alleged sexual acts. Ms. Hopkins testified K.A. "said the boy picture was [respondent], the girl picture was [K.A.]. And [K.A.] said, '[respondent] put that on this.' And [K.A.] pointed to [respondent's] penis and her vagina by using the photographs."

Ms. Hopkins testified that the "interview is done first so that you may gather information . . . that would be helpful in the medical evaluation." Ms. Hopkins further testified that, immediately after the interview on 1 September 2004, she conducted a physical examination of K.A., including a vaginal examination. The examination revealed no abnormalities in K.A.'s hymen nor any physical injuries. Ms. Hopkins testified that in eighty-five to ninety percent of sexual abuse cases involving children, the children show no physical signs of sexual abuse. In her assessment

of K.A., Ms. Hopkins stated it was "unknown but suspicious that [K.A.] has been the victim of sexual abuse by [respondent]." Ms. Hopkins further testified that "an absence of physical findings does not rule out the possibility of sexual abuse."

Respondent made continuing objections to statements made by Angela N., Ramona N., Ms. Tripel, and Ms. Hopkins on the ground of inadmissible hearsay. The trial court overruled respondent's objections. At the conclusion of the adjudication hearing, respondent moved to strike all testimony by any witness concerning statements made by K.A. Respondent based his motion to strike on three grounds: (1) the testimony of the witnesses was inadmissible hearsay since K.A. did not testify in court, (2) K.A. lacked competency because "[a] five-year-old child isn't presumed competent[,]" and (3) statements made by K.A. which were testified to at trial by other witnesses violated the confrontation clause of the United States Constitution. The trial court denied respondent's motion to strike. Respondent then moved to dismiss the petition on the basis that the hearsay evidence was not sufficient evidence to prove the allegations in the petition, and the trial court denied the motion.

At the conclusion of the adjudication hearing, the trial court stated as follows: "[T]he allegations in the petition alleging abuse and neglect as to . . . [respondent] ha[ve] been proven by clear and convincing evidence[.]" In the adjudication order filed 18 April 2005, the trial court concluded that "[K.A.] [was] an [a]bused juvenile under N.C.G.S. [§] 7B-101(1) in that

. . . [r]espondent . . . sexually assaulted . . . [K.A.] by means of oral sex and inappropriate touching." The trial court also concluded that "[K.A.] [was] a [n]eglected juvenile under N.C.G.S. [§] 7B-101(15) in that . . . [r]espondent . . . allowed . . . [K.A.] to reside in an environment injurious to her welfare and failed to provide proper care or supervision." The trial court adjudicated K.A. an abused and neglected juvenile. However, the written adjudication order did not contain any reference to the clear and convincing evidentiary standard.

The trial court filed a disposition order on 27 April 2005, ordering that: (1) legal and physical custody of K.A. be awarded to K.A.'s maternal grandparents, (2) there be no contact between respondent and K.A., and (3) DSS be released from its obligation to continue reunification efforts with respondent. Respondent appeals.

I.

Respondent first assigns as error "[t]he trial court's failure to state in the written Adjudication Order the standard of proof used in making its determination of abuse and neglect that the allegations of the Petition were proven by clear and convincing evidence pursuant to N.C.G.S. § 7B-807." N.C. Gen. Stat. § 7B-807 (2005) provides: "If the court finds that the allegations in the petition have been proven by clear and convincing evidence, the court shall so state." Respondent's argument relies on this statutory language and on our Court's ruling in *In re Church*, 136 N.C. App. 654, 525 S.E.2d 478 (2000). In *Church*, an adjudication

order failed to recite the standard of proof relied upon in terminating the respondent's parental rights. *Id.* at 657-58, 525 S.E.2d at 480. In *Church*, the "[r]espondents assign[ed] as error the trial court's failure to recite the standard of proof relied upon in terminating parental rights. Specifically, the trial court's failure to state that the findings of fact adduced from the . . . adjudicatory hearing were based upon clear, cogent, and convincing evidence is reversible error." *Id.* at 655, 525 S.E.2d at 479. Our Court held that

[a]lthough the termination statute does not specifically require the trial court to affirmatively state in its order terminating parental rights that the allegations of the petition were proved by clear and convincing evidence, without such an affirmative statement the appellate court is unable to determine if the proper standard of proof was utilized.

Id. at 657, 525 S.E.2d at 480. Our Court interpreted N.C. Gen. Stat. § 7B-1109(f) to require a "trial court to affirmatively state in its order the standard of proof utilized in the termination proceeding." *Id.* Our Court held that "[t]he trial court failed to recite the standard of proof applied in its adjudication order and its failure to do so [was] error." *Id.* at 658, 525 S.E.2d at 480. Moreover, our Court held that "since the trial court is required to state that the proper standard of proof has been applied, we cannot conclude the error here was harmless." *Id.*

In the present case, as respondent argues, the trial court did not specifically state in the written adjudication order the standard of proof used in making its determination of abuse and

neglect. However, unlike in *Church*, the trial court in the present case orally stated at trial the evidentiary standard it applied:

[T]he Court makes the determination that the allegations in the petition alleging abuse and neglect as to . . . respondent . . . ha[ve] been proven by clear and convincing evidence, specifically that [K.A.] was abused by [her] parent, committed or encouraged commission of a sexual act upon [K.A.] in violation of the criminal laws of this state. Also, specifically as to . . . respondent, . . . the Court also makes the same determination by clear and convincing evidence, that [K.A.] is a neglected juvenile in that [K.A.] did not and does not receive proper care, supervision or discipline from [her] parent, in this case . . . respondent[.]

While the better practice is to state in the written adjudication order the clear and convincing standard of proof, the fact that the trial court orally stated at trial the appropriate standard enables this Court "to determine if the proper standard of proof was utilized." See *In re Church*, 136 N.C. App. at 657, 525 S.E.2d at 480. We also conclude the trial court satisfied the requirements of N.C.G.S. § 7B-807 by orally stating that the allegations of abuse and neglect in the petition had been proven by clear and convincing evidence. Therefore, we overrule respondent's assignment of error.

II.

Respondent next argues the trial court erred by allowing inadmissible hearsay testimony regarding statements made by K.A. Respondent has limited his argument to the testimony of Ms. Hopkins, thereby abandoning any challenge to the admissibility of the testimony of any other witness. See N.C.R. App. P. 28(b)(6).

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) (2005). Hearsay evidence is inadmissible at trial unless an exception to the hearsay rule applies. N.C. Gen. Stat. § 8C-1, Rule 802 (2005).

N.C. Gen. Stat. § 8C-1, Rule 803(4) (2005) provides that

[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (4) . . . Statements made for purposes of medical diagnosis or treatment 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 diagnosis or treatment.

Our Supreme Court uses a two-part inquiry to determine if testimony is admissible under the Rule 803(4) hearsay exception: "(1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000).

Regarding the first prong of the *Hinnant* analysis, "the proponent of Rule 803(4) testimony must affirmatively establish that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment." *Id.* at 287, 523 S.E.2d at 669. A trial court must consider "all objective circumstances of record surrounding [a] declarant's statements in determining whether he or she possessed the requisite intent under Rule

803(4)." *Id.* at 288, 523 S.E.2d at 670.

Some factors to consider in determining whether a child had the requisite intent are whether an adult explained to the child the need for treatment and the importance of truthfulness; with whom and under what circumstances the declarant was speaking; the setting of the interview; and the nature of the questions.

State v. Bates, 140 N.C. App. 743, 745, 538 S.E.2d 597, 599 (2000), *disc. review denied*, 353 N.C. 383, 547 S.E.2d 19 (2001).

In *Hinnant*, the defendant was convicted of first-degree rape, first-degree sexual offense, and taking indecent liberties with a minor. *Hinnant*, 351 N.C. at 279, 523 S.E.2d at 664. The juvenile was unavailable as a witness at the defendant's trial. *Id.* at 280, 523 S.E.2d at 665. The State presented testimony of a clinical psychologist specializing in child sexual abuse, who testified that she interviewed the juvenile to obtain information for the examining physician. *Id.* at 281, 523 S.E.2d at 666. Over objection, the psychologist testified as to what the juvenile told her regarding the defendant's sexual offenses against the juvenile. *Id.*

In *Hinnant*, there was no evidence that anyone explained to the juvenile the medical purpose of the interview or the importance of truthfulness. *Id.* at 289-90, 523 S.E.2d at 671. The interview was not conducted in a medical environment, and it occurred two weeks after the juvenile's initial medical examination. *Id.* at 290, 523 S.E.2d at 671. Additionally, the psychologist posed a series of leading questions in which she "systematically pointed to the anatomically correct dolls and asked whether anyone had or had not

performed various acts with [the juvenile]." *Id.* Thus, the *Hinnant* court held that the objective circumstances surrounding the interview did not reinforce the need for truthful answers and did not indicate that the juvenile's statements were made for purposes of medical diagnosis or treatment. *Id.*

In the present case, K.A.'s interview with Ms. Hopkins is distinguishable from the interview in *Hinnant*. Before discussing any sexual abuse, Ms. Hopkins talked about the importance of truthful answers and obtained a "truth agreement" from K.A. Unlike *Hinnant*, Ms. Hopkins conducted the interview at a medical facility and did not ask K.A. leading questions about the alleged sexual abuse. Rather, a review of the record shows that K.A. initiated discussion regarding the sexual activity.

To meet the second prong of the *Hinnant* test, we must decide "whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *Hinnant*, 351 N.C. at 284, 523 S.E.2d at 667. In *Hinnant*, the psychologist did not conduct the interview with the juvenile until two weeks after the juvenile received initial medical diagnosis. *Id.* at 290, 523 S.E.2d at 671. Thus, the *Hinnant* court held that the testimony of the psychologist failed the second prong of the inquiry because the juvenile's statements were not reasonably pertinent to diagnosis or treatment. *Id.* The official commentary following the statutory medical diagnosis or treatment hearsay exception states that "[u]nder the exception the statement need not have been made to a physician." N.C.G.S. § 8C-1, Rule 803(4) (official commentary). However,

Hinnant states this prong of the inquiry "does not include statements to nonphysicians made after the declarant has already received initial medical treatment and diagnosis." *Hinnant*, 351 N.C. at 289, 523 S.E.2d at 670. "[I]nformation that a child sexual abuser is a member of the patient's household is reasonably pertinent to a course of treatment that includes removing the child from the home." *State v. Aguallo*, 318 N.C. 590, 597, 350 S.E.2d 76, 80.

The present case differs from *Hinnant*. Because respondent lived in the same household as K.A., the identification of respondent as a child sexual abuser was "reasonably pertinent to a course of treatment that include[d] removing [K.A.] from the home." See *Id.* Furthermore, Ms. Hopkins, a forensic nurse examiner, interviewed K.A. on 1 September 2004, just two days after K.A.'s aunt reported the matter to police and before any medical professional conducted a medical examination of K.A. In fact, Ms. Hopkins conducted the interview immediately before administering the medical examination in order to gather information that would be helpful in the medical examination. Accordingly, we hold that K.A.'s statements to Ms. Hopkins in the interview were "reasonably pertinent to diagnosis or treatment." See *Hinnant*, 351 N.C. at 284, 523 S.E.2d at 667. Ms. Hopkins' testimony satisfies both prongs of the *Hinnant* test and was admissible under the medical diagnosis or treatment exception to the hearsay rule. Respondent's assignment of error is overruled.

Respondent argues the trial court abused its discretion by "fail[ing] to hold the Review Hearing pursuant to N.C.G.S. § 7B-906, and make the requisite findings of fact before the terms of the Disposition Order could be legally effective." Respondent appears to argue that the trial court failed to hold a review hearing pursuant to N.C. Gen. Stat. § 7B-906 and failed to comply with the requirements of that statute.

However, respondent's argument is premature. N.C. Gen. Stat. § 7B-906(a) (2005) provides: "In any case where custody is removed from a parent, guardian, custodian, or caretaker the court shall conduct a review hearing within 90 days from the date of the dispositional hearing and shall conduct a review hearing within six months thereafter." N.C. Gen. Stat. § 7B-906(c) (2005) sets forth the criteria which a trial court must consider at a review hearing and provides that a trial court must "make written findings regarding those [criteria] that are relevant[.]"

In the present case, the trial court, in its disposition order, ordered that the trial court "shall review custody of [K.A.] on August 3, 2005." Because the review hearing had not yet taken place at the time of the filing of this appeal, respondent's argument that the trial court did not comply with the provisions of N.C.G.S. § 7B-906 is premature. We overrule this assignment of error.

Affirmed.

Judges HUNTER and STEELMAN concur.

Report per Rule 30(e).