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NO. COA06-1024

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2007

IN THE MATTER OF:

M.E.P.V., A.V.V., S.V.P.,
V.G.P. and J.D.G.P.

Johnston County
Nos. 06 JA 54-58

Appeal by respondent from juvenile adjudication and disposition orders entered 1 June 2006 by Judge Resson O. Faircloth in Johnston County District Court. Heard in the Court of Appeals 8 January 2007.

Jennifer S. O'Connor for petitioner-appellee Johnston County Department of Social Services.

Elizabeth Myrick Boone for petitioner-appellee Guardian ad Litem.

Annick Lenoir-Peek for respondent-appellant.

MARTIN, Chief Judge.

Respondent-father ("respondent") appeals from an order adjudicating minor child M.E.P.V. a neglected and abused juvenile and A.V.V., S.V.P., V.G.P., and J.D.G.P. neglected juveniles. Respondent also appeals a disposition order requiring the Johnson County Department of Social Services ("DSS") to cease reunification efforts and visitation between respondent and his sons, A.V.V. and S.V.P. For the reasons set forth below, we affirm.

On 31 August 2005, DSS received a report alleging neglect of all of the children and sexual abuse of M.E.P.V. DSS substantiated the claims and began case management services. Respondent was allowed supervised visitation of his two natural children. DSS developed an Out of Home Service Agreement. In that agreement, respondent was asked to attend domestic violence counseling, complete parenting classes and obtain a sex offender evaluation. Respondent did not complete any of the activities outlined in the Agreement.

As a result of respondent's failure to comply, DSS filed five separate juvenile petitions. An adjudication hearing was held 3 May 2006. The trial court found evidence that on and before 31 August 2005, respondent was living with his wife and the five children. M.E.P.V. testified that respondent physically abused his wife in the presence of the children. In addition, respondent hit J.D.G.P. with a rope and slapped M.E.P.V. while she worked on her homework. M.E.P.V. also testified that respondent sexually abused her. Respondent would ask M.E.P.V. if she were having her period, if her breasts were developing and if she would have a baby with him. On 3 July 2005, respondent was driving M.E.P.V. to a friend's house. He pulled the car over in a secluded area, raped M.E.P.V. and threatened the rest of the family if she told anyone. M.E.P.V. did not tell her mother until August 2005. Tina Williams, a social worker with DSS, testified as to respondent's failure to complete his assigned case plan and corroborated the testimony of M.E.P.V.

The trial court adjudicated M.E.P.V. to be an abused child and

adjudicated all five children to be neglected due to improper care and supervision as well as residing in an environment injurious to their health and welfare. The disposition hearing was also held on 3 May 2006. The children remained in the custody of the mother. DSS was relieved of further reunification efforts between respondent and his children, A.V.V. and S.V.P. The court also ordered an end to all visits between respondent and A.V.V. and S.V.P.

Respondent first argues that the trial court erred in allowing M.E.P.V. to testify in chambers. "[T]he right to confront witnesses in civil cases is subject to 'due limitations.'" *In re Barkley*, 61 N.C. App. 267, 270, 300 S.E.2d 713, 715 (1983) (citation omitted). This Court has recognized "the troubling aspects of children testifying in court, particularly where a child is called upon to testify against a parent or the perpetrator of sexual abuse." *In re Faircloth*, 137 N.C. App. 311, 318, 527 S.E.2d 679, 683 (2000). A court's decision that a child's best interests are served by allowing the child to testify in closed chambers will be upheld provided the decision is reasonable and each party's interests are represented through the presence of counsel. *In re Williams*, 149 N.C. App. 951, 960, 563 S.E.2d 202, 207 (2002). Further, a "lawyers' presence in-chambers eliminates any prejudice to defendant that might have occurred had defendant's attorneys not been present in the trial judge's chambers." *Cox v. Cox*, 133 N.C. App. 221, 227, 515 S.E.2d 61, 66 (1999) (upholding closed chambers testimony with all attorneys present despite defense counsel's objection).

M.E.P.V. testified in chambers at the request of her Guardian ad Litem attorney advocate. Counsel for all parties were present for the testimony and respondent's counsel was permitted to cross-examine her. The court's decision to allow M.E.P.V. to testify in closed chambers was reasonable in that the child was called to testify against both a stepparent and an alleged perpetrator of sexual abuse.

Respondent also argues that prejudicial and reversible error arose out of the failure to record M.E.P.V.'s closed chambers testimony. All juvenile "adjudicatory and dispositional hearings shall be recorded by stenographic notes or by electronic or mechanical means." N.C. Gen. Stat. § 7B-806 (2005). The unavailability of a verbatim transcript does not automatically constitute error. *In re Clark*, 159 N.C. App. 75, 80, 582 S.E.2d 657, 660 (2003). To prevail on such grounds, a party must demonstrate that the missing recorded evidence resulted in prejudice. *Id.* General allegations of prejudice are insufficient to show reversible error. *Id.* As to unavailable verbatim transcripts, a narration of the evidence may be compiled through a reconstruction of the testimony given. *Id.* (citing *Miller v. Miller*, 92 N.C. App. 351, 354, 374 S.E.2d 467, 469 (1988)); see also N.C. R. App. P. 9(c)(1).

In the present case, a narration of M.E.P.V.'s testimony was prepared by respondent's attorney in accordance with N.C. R. App. P. 9(c)(1). Respondent does not allege that the narrative of M.E.P.V.'s testimony failed to reflect the true sense of the

evidence received. Further, respondent does not argue any specific prejudice resulting from the missing verbatim transcript that may not have been cured by the preparation of the narrative. Ultimately, the record contains the evidence "necessary for an understanding of all errors assigned." N.C. R. App. P. 9(a)(1)(e).

Respondent argues that there was insufficient evidence during the adjudication stage to support the trial court's findings of fact and its conclusions of law that M.E.P.V. was abused and all the juveniles were neglected. We disagree. A trial court must make sufficient findings of fact to support its conclusions of law as to whether a child is neglected or abused. *In re Ellis*, 135 N.C. App. 338, 340, 520 S.E.2d 118, 120 (1999) (citation omitted). Findings of fact must be supported by clear and convincing evidence. *Id.* at 340-41, 520 S.E.2d at 120. Findings supported by clear and convincing 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). Further, "it is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). Only those findings of fact specifically assigned as error are subject to review. *In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404 (2005). All remaining findings are presumed to be correct and supported by competent evidence. *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982). "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 M.J.G.*, 168 N.C. App. 638, 643, 608 S.E.2d 813, 816 (2005).

First, respondent challenges the trial court's conclusion that M.E.P.V. was abused and certain related findings of fact. The findings in dispute include the trial court's fifth finding of fact, that respondent touched M.E.P.V.'s legs, asked questions related to her development and asked her to have his child. In the sixth finding of fact, the trial court found respondent to have raped M.E.P.V. on 3 July 2005. The incident occurred in respondent's car as he drove M.E.P.V. to her friend's home in Benson. Following the incident, respondent threatened to hurt M.E.P.V. and her mother, brothers and sisters if she revealed what had occurred. The seventh finding of fact indicates that M.E.P.V. finally told her mother of the rape on or about 31 August 2005.

The trial court's findings were based on the testimony of M.E.P.V. In addition, M.E.P.V.'s testimony was corroborated through the testimony of her social worker, Tina Williams. Respondent contends that M.E.P.V.'s testimony was full of "suspicious aspects" and not supported by an evaluation of the sexual abuse allegations. However, it is for the trial court, not this Court, to assess the credibility of the witnesses and the weight to be given their testimony. *In re Gleisner, supra*. The trial court's findings were supported by clear and convincing competent evidence and are, therefore, binding on appeal.

Turning to the trial court's conclusion, an abused juvenile is defined as one whose caretaker "[c]ommits, permits, or encourages

the commission of a violation of the following laws by, with, or upon the juvenile" including both "first-degree rape" and "taking indecent liberties with the juvenile." N.C. Gen. Stat. 7B-101(1) (d) (2005). The trial court's conclusion that M.E.P.V. was an abused child was supported by the findings of fact.

Respondent next challenges the trial court's conclusion that the juveniles were neglected and certain related findings of fact. Respondent assigned error to the fourth finding of fact, that respondent struck J.D.G.P. with a rope, struck V.G.P. with a belt and slapped M.E.P.V. while she worked on her homework. The court also found that respondent was physically aggressive toward the children's mother in the presence of the children. In the eighth finding of fact, the trial court found that on one occasion, the children accompanied the respondent as he purchased "a bag containing a white powder like substance." Respondent challenges the thirteenth and fourteenth findings of fact, that he has not cooperated with DSS, refusing to complete a sex offender evaluation or attend parenting classes. In addition, the court found respondent to have violated DSS safety assessments by having "unsupervised contact with his children."

M.E.P.V. testified as to respondent's physical abuse of certain children as well as a physical altercation between respondent and her mother in the presence of the children. M.E.P.V. also indicated that when she was roughly fourteen, she was with respondent when "a man gave [respondent] some money and he gave the man a package with white powder." The findings related to respondent's actions

following DSS involvement are supported through the testimony of Tina Williams. In her testimony, Ms. Williams indicated that respondent "had not been meeting with [her] at all for an extended period of time, more than six weeks" and "had done nothing to address and identify risk issues." She testified that respondent has not completed any of the activities outlined for him by DSS. The findings of fact related to neglect were supported by clear and convincing competent evidence and are also binding on appeal.

A neglected juvenile is defined as follows:

A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2005). The trial court must also consider whether the juvenile "lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." *Id.* In the present case, the trial court concluded that each child was neglected for failure to "receive proper care and supervision," for "residing in an environment injurious to their health and welfare," and for "living in a home in which the juvenile [M.E.P.V.] was sexually abused."

The findings of fact provide ample support for the trial court's challenged conclusion of law. The court made specific findings of physical abuse within the home demonstrating a lack of proper care and an environment injurious to the children's welfare.

Clear and convincing evidence existed that M.E.P.V. was abused while residing with the remaining children. Further, the "probability of a repetition of neglect" was evidenced by the respondent's lack of effort to cooperate with the DSS case plan. *In re Ballard*, 311 N.C. 708, 714, 319 S.E.2d 227, 232 (1984).

Respondent next argues that the trial court erred in its determination to suspend reunification efforts and future visitation with A.V.V. and S.V.P. A trial court's dispositional order must be based on the best interests of the child. See *In re Pittman*, 149 N.C. App. 756, 766, 561 S.E.2d 560, 567 (2002). Any dispositional alternatives are within the discretion of the trial court and are reviewed under an abuse of discretion standard. See N.C. Gen. Stat. § 7B-903 (2005). A court may order the cessation of reunification efforts where the court makes written findings of fact that "such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]" *In re Everett*, 161 N.C. App. 475, 479, 588 S.E.2d 579, 582 (2003) (quoting N.C. Gen. Stat. § 7B-507(b)(1)).

During the dispositional stage, the trial court made findings of fact that respondent remained unwilling to develop an In Home Service plan with DSS. Further, respondent "has chosen not to attend a sex offender evaluation, parenting classes or attend HALT to address domestic violence issues which would eliminate the risk issues in the home and assist with possible reunification efforts with his children." The trial court found it contrary to the best

interest of respondent's children, A.V.V. and S.V.P., to be placed in respondent's custody. Continuing reunification efforts were found "futile and inconsistent with the juvenile's need for a safe home within a reasonable period of time[.]" The trial court's findings of fact support its order to cease reunification efforts and visitation.

Respondent argues that his refusal to cooperate with the DSS was due to the advice of his attorney in a related criminal proceeding. In support of this contention, respondent cites *In re T.C.B.*, 166 N.C. App. 482, 487, 602 S.E.2d 17, 20 (2004), in which an adjudicatory conclusion of willful or intentional abandonment was reversed in part due to an attorney's orders to avoid contact with the minor child. *Id.* Here, we review a dispositional order in which the trial court is principally concerned with finding the course of action necessary to promote the children's best interest. N.C. Gen. Stat. § 7B-903(a) (2005). We hold that the court did not abuse its discretion in finding it to be in the best interests of the children to cease reunification efforts and visitation.

Affirmed.

Judges MCCULLOUGH and LEVINSON concur.

Report per Rule 30(e).