NO. COA06-1291

NORTH CAROLINA COURT OF APPEALS

Filed: 03 July 2007

IN THE MATTER OF:
M.B., Minor Child.

Buncombe County
No. 05 J 487

Appeal by defendant from judgment entered 4 April 2006 by Judge Marvin P. Pope, Jr., in Buncombe County District Court. Heard in the Court of Appeals 12 April 2007.

Matthew Middleton for Buncombe County Department of Social Services, petitioner-appellee.

Michael N. Tousey for Guardian ad Litem, appellee.

Michael E. Casterline for respondent-appellant father.

STEELMAN, Judge.

When an expert doctor neither testifies that sexual abuse of a child *in fact* occurred, nor impermissibly states that a child was being truthful, but instead testifies that there is concern that a child may have been abused, the testimony is properly admitted into evidence. When the trial court's findings of fact are supported by clear and convincing evidence, and the findings support the conclusion that a child is abused, the order must be affirmed.

M.B. was born on 14 September 2001 to Tiffany B. ("mother") and Joshua B. ("respondent") in Buncombe County. When mother was

three months pregnant with M.B., she overdosed on an antidepressant medication, Zoloft.

M.B. resided with mother and respondent from September 2001 until March 2002, when mother and M.B. began living with Bridgette C., M.B.'s maternal grandmother ("grandmother"), and Ira C., M.B.'s maternal step-grandfather ("grandfather") (together, "grandparents"). Respondent also moved in with grandparents, even though mother and respondent were separated and living in different parts of the home. During the period of time that mother and respondent lived in grandparents' home, they smoked marijuana. Within a few months, mother and respondent moved out of the home, and M.B. remained with grandparents.

In November 2001, mother and respondent argued in front of M.B. over respondent's excessive alcohol consumption. Respondent "threw a baby bathtub out of the window into the yard, smashing the window to pieces[,]" and "tore a metal bar off a tile rack in the bathroom and repeatedly struck [mother] with it causing her to bleed[.]" Grandfather heard the fight and found mother "bleeding and crying hysterically." On a different occasion, respondent pushed a bathroom door open and threatened to kill mother, and once, grandmother overheard a phone conversation between mother and respondent during which respondent threatened to kill mother.

In January 2002, M.B. began staying with grandparents during the day, and in March 2002, M.B. began to permanently reside with grandparents.

In February 2005, respondent called grandmother and "sounded as though he had been drinking heavily." Respondent stated that "[M.B.] had seen his penis while he was urinating[,] . . . and he was concerned that [M.B.] might say that he hit her in the head with his penis." This concerned grandmother, and in March 2005, grandmother took M.B. for a Child Medical Examination ("CME") with Dr. Cynthia Brown, the Medical Director of the Child Maltreatment Evaluation Program at Mission Children's Clinic in Asheville, North Carolina. At the CME, M.B. stated that "'Daddy shook his wee-wee[,]'" and M.B. stood up and began to "shake her hips in a side-to-side motion, with her hands down near her private area as though she was holding a penis and shaking it." Dr. Brown recommended psychological counseling. M.B. began to see Katherine Barnhill, a Licensed Clinical Social Worker ("LCSW"). Barnhill "had over a dozen sessions with the minor child from April until May 17, 2005." Grandmother, however, decided to discontinue therapy because "she believed the sessions were becoming too upsetting for [M.B.][.]"

In December 2005, Buncombe County Department of Social Services ("DSS") received a report alleging that M.B. had been molested by respondent. The report stated that M.B. talked about seeing respondent's "wee wee" and that "he used to put chicken noodle soup on his penis and then eat it off." The report also alleged that M.B. "was observed playing with some puppies, and one of the puppies was licking [M.B.] between her legs." Grandmother told M.B. not to allow "the puppy to lick her between the legs."

M.B. responded that "it was alright, it didn't hurt, it was what Joshua (her father) did to her."

On 10 January 2006, M.B. entered into therapy with LCSW Melinda Kent ("Ms. Kent") and met with Ms. Kent for seven sessions. During one therapy session, M.B. said that "father put chicken noodle soup on his 'wee wee' and that his 'wee wee' stood straight up."

On 4 April 2006, the trial court concluded that M.B. was an abused child pursuant to N.C. Gen. Stat. § 7B-101(1) in that "[M.B.] has been the victim of a sexual offense, and that the minor child's parent and caretaker ha[ve] created or allowed to be created a substantial risk of serious physical injury to the minor child by other than accidental means." The trial court also concluded that M.B. was a neglected child pursuant to N.C. Gen. Stat. § 7B-101(15), because M.B. does not "receive proper care or supervision from her parents," and that M.B. "[l]ives in an environment injurious to her welfare[.]" The court further concluded that it was in the best interest of M.B. that custody be granted to DSS.

From this order, respondent appeals. Mother did not appeal.

I: Expert Testimony

In his first argument, respondent contends that the trial court erred by allowing Dr. Cynthia Brown to testify about her "concern" of sexual abuse, when there was no physical evidence that M.B. was sexually abused. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2005) provides that "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." *Id.* The rules of evidence apply to proceedings in which a juvenile is alleged to be abused, neglected or dependent. N.C. Gen. Stat. § 7B-804.

With respect to expert testimony in child sexual abuse prosecutions, our Supreme Court has approved the admission of expert testimony if based upon a proper foundation. *See State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002). The foundation may be the testifying physician's medical examination and review of the victim's medical history. *See State v. Shepherd*, 156 N.C. App. 69, 73, 575 S.E.2d 776, 779 (2003) (citations omitted).

The trial court must not "admit expert opinion that sexual abuse has *in fact* occurred . . . absent physical evidence supporting a diagnosis of sexual abuse[.]" However, an expert witness may testify, "as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *Stancil* at 267, 559 S.E.2d at 789.

In the instant case, respondent argues that the trial court erred in admitting the following testimony of Dr. Brown, because there was no physical evidence of sexual abuse:

> DSS Attorney: Is that behavior consistent with a child that's seen inappropriate sexual behavior?
>
> Dr. Brown: Object. Based on that, there's not enough for her to make that leap yet, Your Honor.
>
> The court: Rephrase your question. Sustained.
>
> DSS Attorney: What was the conclusion of your medical evaluation?
>
> Dr. Brown: I was concerned that this was a child who had been sexual abused. . . .
>
> Dr. Brown: [M.B.'s caretakers] described statements and behavior in [M.B.] that raised concern for sexual abuse. . . .
>
> DSS Attorney: Were you concerned that she had been sexually abused?
>
> Dr Brown: I was concerned that it was possible that she had been sexually abused, yes.

We find it pertinent that Dr. Brown did not testify that sexual abuse had *in fact* occurred. Rather, Dr. Brown testified that she had *concern* that the child may have been sexually abused. Dr. Brown's testimony is also consistent with her assessment of M.B. after performing a CME, which stated:

> *Possible sexual abuse.* This is based on the statements M. has made to her family. The interview today was limited by her age, developmental level and attention span. A normal anogenital examination does not preclude the possibility of sexual abuse. There also have been some behaviors noted that raise *concern for possible sexual abuse.* (emphasis added)

Based on Dr. Brown's testimony and the CME assessment, the trial court made the following finding of fact:

> Dr. Brown *expressed concern* that the minor child *may have been sexually abused* and she

> recommended psychological counseling. Dr. Brown found no physical evidence of sexual abuse, but the minor child would not have had physical evidence with this type of abuse. (emphasis added)

We find the cases of *In re Mashburn*, 162 N.C. App. 386, 591 S.E.2d 584 (2004), and *In re Morales*, 159 N.C. App. 429, 583 S.E.2d 692 (2003), instructive. In *Mashburn*, this court held that the trial court's admission of testimony of a qualified expert in pediatric medicine was permissible when the expert testified that "'[i]t's my *opinion* that she [the female child] is *highly likely* to have been a victim of child sexual abuse.'" *Id.* at 397, 591 S.E.2d at 592 (emphasis added). The doctor neither testified that sexual abuse *in fact* occurred, nor impermissibly stated that the female child was being truthful. Moreover, in *Morales,* this Court reasoned that "[i]n a jury trial, the distinction between an expert witness' testifying (a) that sexual abuse in fact occurred or (b) that a victim has symptoms consistent with sexual abuse is critical." *Id.* at 433, 583 S.E.2d at 695. This is because a "jury could well be improperly swayed by the expert's endorsement of the victim's credibility." *Id.* However, in a bench trial, this Court "can presume, unless an appellant shows otherwise, that the trial court understood the distinction and did not improperly rely upon an expert witness'" testimony. *Id.* at 433-34, 583 S.E.2d at 695.

Based on *Mashburn* and *Morales,* we conclude that Dr. Brown's statements regarding her "concern" that M.B. had been sexually abused were not impermissibly admitted. This assignment of error is overruled.

II: Findings of Fact

In his second argument, respondent contends that a portion of finding of fact number twenty-eight is not supported by clear and convincing evidence. We hold that there were plenary findings of fact supported by clear and convincing evidence of record, which were sufficient to support the trial court's conclusion of abuse, regardless of whether we consider the challenged portion of this finding of fact. We therefore do not reach this argument.

III: Abuse

In his final argument, respondent contends that the trial court erred in concluding that M.B. was the victim of a sexual offense in that the conclusion was not supported by the findings of fact and evidence presented at the hearing. We disagree.

When reviewing an adjudication of abuse and neglect, our review is limited to whether the trial court's findings of fact are supported by clear and convincing evidence and whether the trial court's conclusions of law are supported by those findings of fact. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). Even if there is some evidence to support contrary findings, the trial court's findings of fact are considered conclusive if they are supported by clear and convincing evidence. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

An "abused juvenile" is defined by N.C. Gen. Stat. § 7B-101(1)(d), as:

> Any juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker . . . [c]ommits, permits, or encourages the commission of a violation of the following

> laws by, with, or upon the juvenile: . . . first-degree sexual offense, as provided in G.S. 14-27.4 . . . and taking indecent liberties with the juvenile, as provided in G.S. 14-202.1[.]

N.C. Gen. Stat. § 14-27.4 provides that "[a] person is guilty of a sexual offense in the first degree if the person engages in a sexual act . . . [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]" *Id.* A "sexual act" is defined as "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse." N.C. Gen. Stat. § 14-27.1(4).

N.C. Gen. Stat. § 14-202.1 provides:

> A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either . . . (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

Respondent specifically argues that since findings of fact numbers eight, twenty, twenty-six, and twenty-eight are not supported by clear and convincing evidence, the findings cannot support the trial court's conclusion that M.B. was an abused juvenile.

> 8. The Buncombe County Department of Social Services received a report in December 2005 alleging that the minor child had been molested by the respondent father. The report alleged that the minor child had seen the ocean on a television commercial and became

> nervous and frightened because the respondent father had molested her in a bathroom while the minor child was on a trip to Charleston. The report alleged that the minor child talked about seeing the respondent father's "wee wee" and that he used to put chicken noodle soup on his penis and then eat it off. The report also alleged that recently the minor child was playing with puppies and they began to lick her between her legs. The maternal grandmother observed this incident and told the minor child that this was inappropriate behavior. The minor child responded that it was okay because it tickles just like when the respondent father did that to her. Based on the allegations contained in the report the Department opened an investigation.
>
> 20. The maternal grandmother took the minor child for a CME the first week of March 2005. . . . When the minor child was explaining what the respondent father had done to her, she stated that "Daddy shook his wee-wee", and she stood up and began to shake her hips in a side-to-side motion, with her hands down near her private area as though she was holding a penis and shaking it. . . .
>
> 26. In December 2005 the minor child was observed playing with some puppies, and one of the puppies was licking the minor child between her legs. The maternal grandmother saw this and told the minor child not to allow the puppy to lick her between the legs. The minor child told the maternal grandmother that it was alright, it didn't hurt, it was what Joshua (her father) did to her. This statement is consistent with the earlier statements the child made to the medical professionals.

Based upon our holding in the previous section, we do not discuss that portion of finding of fact number twenty eight.

We note that respondent abandoned his argument as to several findings of fact, *see* N.C. R. App. P. 28(b)(6), including the remaining portion of finding of fact number twenty eight, which states that "[M.B.] disclosed that [father] put chicken noodle soup

on his 'wee wee' and that his 'wee wee' stood straight up." This portion of finding of fact number twenty-eight, and the following findings of fact, are binding on appeal:

> 19. The minor child began to make statements to the maternal grandmother in November 2004 about possible inappropriate conduct by the respondent father. The maternal grandmother felt that the statements were concerning but she didn't initially act as she didn't understand exactly what the minor child was trying to tell her, and she couldn't believe the respondent father would abuse the minor child. The respondent father visited with the minor child at the maternal grandmother's home, and the maternal grandmother would leave the minor child with the respondent father and run errands for three to four hours at a time while the respondent father kept the minor child. Toward the end of February 2005 the respondent father called the maternal grandmother and sounded as though he had been drinking heavily. The respondent father stated that the minor child had seen his penis while he was urinating. He expressed that he wanted to disclose this to the maternal grandmother because he was concerned that the minor child might say that he hit her in the head with his penis. This caused great alarm to the maternal grandmother and she called her pediatrician[.] . . .
>
> 27. The maternal grandmother observed significant domestic violence by the respondent father towards the respondent mother when the respondent parents were living in the home of the maternal grandparents.

These findings are deemed conclusive on appeal, *see* N.C. R. App. P. 28(b)(6), and support the trial court's conclusion that M.B. was an abused juvenile.

A: Challenged Findings of Fact

With regard to finding of fact numbers eight and twenty-six, respondent specifically argues that the findings refer to

"statements made by a very young child, subject to varying interpretations and not consistently repeated by the child[,]" and therefore, the statements were not supported by clear and convincing evidence. We disagree.

The evidence shows the contrary, that M.B.'s statements to grandmother, Dr. Brown, Ms. Kent and Ms. Barnhill were consistent, and that respondent's exposures of his penis to M.B. were repeated. Grandmother stated that M.B. began "making [concerning] statements when she was . . . two and a half or three years old[.]" Grandmother's testimony reveals that M.B. referred to respondent's penis as a "hairy monster"; that M.B. observed respondent "peeing on the walls"; that when she told M.B. that it was okay to see her younger "brother's wee-wee" in the bath, but she should not see "big people's wee-wee[,]" M.B. said, "I can daddy's." Grandmother testified that:

> [Father] called me one day and he said, I just wanted to let - I could tell he was drinking, and he said, "I just wanted to let you know that [M.B.] seen my weenie last night when I was giving her a bath." And I said, "Why?" He said, "She peeked around the curtain when I was peeing." I said, "Well, I got two bathrooms," and I just left it at that. And he said, "I didn't want her to go to the doctor and say daddy slapped me up side the face with his weenie."

With regard to the puppy incident, grandmother stated:

> My husband came in and said . . . [M.B.]'s sitting in the driveway and the puppies were licking her between the legs. So I went out there and I said, "[M.B.], you can't let the puppies lick you between the legs, it's not nice." And she said, "Nana, it don't hurt, it tickles like [father] did."

M.B. disclosed to Dr. Brown "that her daddy shook his wee-wee all over[,] . . . physically demonstrat[ing] by standing and moving her body backwards or side to side."

M.B. also disclosed to Ms. Barnhill that "[w]ith his wee-wee [father] got chicken soup in my face." M.B. described the incident in greater detail, stating that respondent "put chicken soup on his wee-wee and flung it around the room[,] [a]nd that when he had put the chicken soup on his wee-wee it stood straight up." Ms. Barnhill further testified:

> While painting, she was talking about her father. And she mentioned her hoochie-tu and her father's wee-wee, and she asked me "does your daddy bite your hoochie-tu?" And I said, "No, he hasn't done that." I asked her in response, using her words, "Did your daddy bite your hoochie-tu," and she said yes. Then she continued painting.

Ms. Kent testified that she "would have some concerns [as to M.B.'s visitation with respondent] because . . .[M.B.] stated that when they were up at the old trailer and she was with her father, that he had put chicken soup on his wee-wee and flung it around the room." M.B. said, "when he had put the chicken soup on his wee-wee it stood straight up." This statement from M.B. "arose in response to a question in [a therapeutic] game[,] [a]nd the question was what is something you don't like about someone you love." In response to the question, M.B. stated that she "didn't like it when Joshua's wee-wee flung chicken noodle soup all around."

M.B.'s disclosures to the foregoing people were not inconsistent. In fact, M.B. repeated essentially the same incidents to her grandmother, Dr. Brown, Ms. Kent and Ms. Barnhill.

M.B.'s disclosure regarding her father licking or biting her private area was repeated to her grandmother and to Ms. Barnhill. M.B.'s disclosure regarding her father shaking or flinging his penis was repeated to Ms. Barnhill, Ms. Kent and Dr. Brown. The reference to chicken noodle soup was made to both Ms. Barnhill and Ms. Kent. After thorough review of the record, we find clear and convincing evidence to support the trial court's findings of fact numbers eight and twenty six.

With regard to finding of fact number twenty, respondent repeats his argument that the evidence of Dr. Brown's "concern" of sexual abuse was not properly admitted, and therefore the finding is not supported by clear and convincing evidence. We concluded in a previous section that Dr. Brown's statements regarding her "concern" that M.B. had been sexually abused were properly admitted. Therefore, evidence of record supports finding of fact twenty.

B: Conclusion of Law

Respondent next argues that the findings of fact do not support the trial court's conclusion that M.B. was an abused juvenile. We disagree.

The evidence tends to show, and the findings of fact reflect, that respondent's actions constituted taking indecent liberties with a minor in violation of N.C. Gen. Stat. § 14-202.1, which is one requisite for abuse pursuant to N.C. Gen. Stat. § 7B-101(1)(d). *See, e.g., State v. Strickland*, 77 N.C. App. 454, 335 S.E.2d 74 (1985) (holding that evidence was sufficient to warrant a

conviction of taking indecent liberties with a minor when defendant masturbated in front of two seven year old boys and invited the boys to join). The findings are more then sufficient to support the trial court's conclusion that M.B. was abused. This assignment of error is overruled.

Respondent failed to argue the remaining assignments of error in his brief, and they are deemed abandoned. N.C. R. App. P. 28(b)(6).

AFFIRMED

Judges BRYANT and LEVINSON concur.

Report per Rule 30(e).