NO. COA08-1103

NORTH CAROLINA COURT OF APPEALS

Filed: 3 March 2009

IN THE MATTER OF:
B.R.M., R.W.M.

Harnett County
Nos. 08 J 23, 24

Appeal by Respondent-Father from order entered 27 June 2008 by Judge Resson O. Faircloth in District Court, Harnett County. Heard in the Court of Appeals 2 February 2009.

E. Marshall Woodall and Duncan B. McCormick for Petitioner-Appellee Harnett County Department of Social Services.

Joyce L. Terres for Respondent-Appellant Father.

Womble Carlyle Sandridge & Rice, PLLC, by Philip J. Mohr, for Guardian ad Litem.

McGEE, Judge.

Respondent-Father appeals from a juvenile adjudication and disposition order which concluded that his daughter, B.R.M., was abused and neglected; that his son, R.W.M., was neglected; and which denied Respondent-Father visitation with his children. We affirm.

B.R.M. and R.W.M. (the Juveniles) lived with Respondent-Father and his wife (Stepmother) in Harnett County at the time of the filing of these proceedings. The Juveniles had previously lived at various times with their biological mother and with their paternal

grandparents. The Harnett County Department of Social Services (DSS) received a report in December 2007 that four-year-old B.R.M. and three-year-old R.W.M. were being subjected to inappropriate discipline by Respondent-Father's live-in girlfriend at the time. The report also indicated that R.W.M. had medical problems related to his uncircumcised penis. Kristen Tyndall (Ms. Tyndall), a DSS social worker, was assigned to the case and conducted a home visit of Respondent-Father's home. She discussed R.W.M.'s medical needs, and Respondent-Father indicated that the family did not have health insurance, but he would take the steps necessary to get Medicaid reinstated for R.W.M. Ms. Tyndall scheduled a doctor's appointment for R.W.M., and Respondent-Father and his girlfriend agreed to take R.W.M. to the appointment. Ms. Tyndall also educated them on appropriate discipline, and then closed the case with services recommended. However, R.W.M. was never taken to the doctor's appointment.

DSS received a second report on 19 February 2008 alleging sexual abuse of B.R.M. by Respondent-Father. Ms. Tyndall was again assigned to the case and made a home visit on 20 February 2008. Ms. Tyndall attempted to speak with Respondent-Father, but he was working out-of-state at the time.

Ms. Tyndall conducted an interview with B.R.M. regarding the allegations. According to Ms. Tyndall, B.R.M. was "a very bright little girl" who understood the difference between truth and lies. As Ms. Tyndall was asking B.R.M. about female genitalia on a drawing, B.R.M. became embarrassed, "cowered down," and would not

look up. As Ms. Tyndall was placing the drawing to the side, B.R.M. pointed to the vaginal area and said, "daddy touches me here." Ms. Tyndall also testified that B.R.M. said that her father "makes her take her clothes off and lay on the bed, takes his clothes off and lays on top of her and they play a bouncing game." Ms. Tyndall further testified that B.R.M. also told her that "it didn't hurt," that her Stepmother "was at work . . . when it happen[ed]," and that it happened four times. When Ms. Tyndall asked B.R.M. if she told her Stepmother, B.R.M. said that her Stepmother "showed her a picture of daddy's pee-pee on the computer." At that point, Ms. Tyndall felt that B.R.M. became embarrassed again, did not want to answer any more questions, and the interview ended.

Ms. Tyndall interviewed Respondent-Father on 25 February 2008. She first asked why R.W.M. was never taken to the medical appointment, and Respondent-Father explained that he "can't do everything," that he was probably working and that it was his current wife's (the Stepmother's) responsibility. Respondent-Father also expressed concern about the biological mother of the Juveniles. He claimed that, among other things, she abused illegal drugs, could not take care of herself, had neglected the Juveniles, and was a "terrible person altogether." Finally, when Ms. Tyndall asked Respondent-Father whether he had concerns about sexual abuse of his daughter, he told Ms. Tyndall that B.R.M. may have been abused once by an old boyfriend of the Juveniles' biological mother. Respondent-Father said B.R.M. told him in November 2006

that her biological mother's boyfriend "did some things to her," but Respondent-Father was not sure whether she was telling the truth because she "will do anything for attention" and will lie for food. Finally, Respondent-Father denied the allegation made against him.

Ms. Tyndall also interviewed the Juveniles' biological mother. Although she had not seen the Juveniles since November 2007, she expressed concerns about sexual abuse of the Juveniles by Respondent-Father and about R.W.M.'s medical needs.

DSS filed juvenile petitions on 21 February 2008 alleging that B.R.M. was an abused and neglected juvenile and that R.W.M. was a neglected juvenile, based on the alleged sexual abuse of B.R.M. and R.W.M.'s medical issues. An order for nonsecure custody was entered on 22 February 2008, and the Juveniles were placed in DSS custody. The trial court subsequently continued custody with DSS in nonsecure custody orders entered 29 February 2008, 14 March 2008, and 11 April 2008.

The trial court conducted an adjudicatory and dispositional hearing on 9 May 2008. Ms. Tyndall testified, recalling her investigation and interviews with the Juveniles and various family members. Dr. Howard Loughlin, a pediatrician, who evaluated both Juveniles following the abuse and neglect petition, testified as an expert witness for DSS.

Dr. Loughlin interviewed and examined B.R.M. on 4 March 2008 regarding the allegations of abuse, and B.R.M. recounted the incidents with Respondent-Father. When Dr. Loughlin asked B.R.M.

if she knew anything about the term "sexing," B.R.M. responded, "my daddy is the only one that has sexed me." Dr. Loughlin further testified regarding the details of his interview with B.R.M.:

> [I]t had been in his room and [her Stepmother's] room. He had not had any clothes on, he had asked her to take her clothes off and then he had laid her on the bed in the room on a pillow. He had then gotten on top of her and moved when he was on top of her. He said that he was concerned that he not hurt her and asked -- he asked if it was hurting when he did that. I asked [B.R.M.] if she had ever seen her daddy's pee-pee when he was doing that and she said that some white stuff had come out of his pee-pee and that he would go wash that off when the white stuff came out.

According to Dr. Loughlin, when he asked B.R.M. how many times this had happened, she hesitated, but thought it happened two times. Her Stepmother was at work when it happened, and R.W.M. was in another room. B.R.M. also told Dr. Loughlin that her Stepmother showed her a picture of her daddy's "pee-pee" on a computer.

Dr. Loughlin performed a physical examination on B.R.M., which was normal. However, he testified that this result "neither supported nor . . . refute[d] the diagnosis of sexual abuse." Dr. Loughlin was concerned about the possibility of sexual abuse based on B.R.M.'s specific descriptions and knowledge of sexual activity that would not be expected from a child of her age. Dr. Loughlin testified as follows: "My conclusions at the end of my evaluation were that all of those findings that I outlined were very consistent with those found in children who had been sexual abuse victims."

Dr. Loughlin also evaluated R.W.M., who had fluid in his left

ear and had foreskin adhesions on his penis. Dr. Loughlin noted that R.W.M.'s speech was difficult to understand, but otherwise had a normal physical examination. Based on Dr. Loughlin's examination and interview with R.W.M, he found no evidence that R.W.M. had been physically or sexually abused.

The trial court entered a written adjudicatory order on 27 June 2008, finding that B.R.M. was an abused and neglected juvenile and that R.W.M. was a neglected juvenile. The trial court thereafter entered a dispositional order, in which it awarded custody to DSS and denied Respondent-Father visitation until further order of the trial court. The trial court set a review hearing for 8 August 2008. The Juveniles' biological mother participated in the trial court proceedings but she did not appeal. Respondent-Father appeals.

I.

We first address Respondent-Father's challenges to several findings of fact. He contends that findings of fact numbers 10, 13, and 19-21 are not supported by competent evidence in the record. "Allegations of neglect must be proven by clear and convincing evidence. In a non-jury 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) (citations omitted). If competent evidence supports the findings, they are "binding on appeal." *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003)

(citations omitted). Furthermore, "'[t]he trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, he alone determines which inferences to draw and which to reject.'" *Id.* (citation omitted).

We note that Respondent-Father does not object to the remaining findings of fact. Accordingly, findings of fact numbers 1-9, 11, 12, 14-18, and 22-23 are presumed to be supported by clear and convincing evidence and are therefore binding on appeal. *See In re J.D.S.*, 170 N.C. App. 244, 252, 612 S.E.2d 350, 355 (2005).

Respondent-Father first challenges finding of fact number 10, which details B.R.M.'s description of the incidents in question:

> On or about February 19, 2008, juvenile [B.R.M.] made disclosure of inappropriate sexual encounters with her father . . . on more than one occasion. The inappropriate sexual encounters which the juvenile called "sexing" included the removal of the clothes of the father and the juvenile and the positioning of the father on top of the juvenile with movements by the father, called by the juvenile as playing the "bouncing games" and resulting in white stuff coming from the father's "pee-pee".

Respondent-Father contends that this finding of fact is a combination of the testimony of both Dr. Loughlin and Ms. Tyndall regarding their interviews with B.R.M. Because B.R.M. did not testify at the hearing, Respondent-Father argues that finding of fact number 10 is based on impermissible 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) (2007). Hearsay evidence is inadmissible unless an exception to the hearsay rule applies. *Id.*; N.C. Gen. Stat. § 8C-1, Rule 802 (2007).

Prior to trial, DSS gave specific notice of its intention to offer Dr. Loughlin's testimony and Child Medical Evaluation into evidence pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(4). Rule 803(4) provides in relevant part that:

> The 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.

N.C. Gen. Stat. § 8C-1, Rule 803(4) (2007). In order to be admissible under this hearsay exception, the statement must meet a two-part inquiry. 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).

Concerning the first prong, "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. Our Supreme Court has recognized the difficulty in establishing this prong, especially in child abuse cases, but has held that 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. These circumstances include the following: (1) the setting of the interview and the nature of the questioning; (2) to whom the declarant was speaking; and (3) whether anyone told the child the purpose of the examination or explained the need for the child to tell the truth. *Id.*

In this case, Dr. Loughlin testified that the exam took place in his office, and he introduced himself to B.R.M. as a children's doctor. He asked B.R.M. if she knew she was coming to the doctor that day and she answered in the affirmative. Dr. Loughlin then explained "our process of our talking and then my doing an exam to make sure that she was okay." Dr. Loughlin also asked B.R.M. if there were any problems that she wanted to have checked and told her that "children sometimes come to our clinic if there's concern that older children or adults have done things to them that they shouldn't have done." Accordingly, the circumstances surrounding Dr. Loughlin's examination support the first prong of the medical exception analysis.

The statements were also sufficient to meet the second prong of the inquiry, as they were "reasonably pertinent to diagnosis or

treatment." *Id.* at 284, 523 S.E.2d at 667. "[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 (1986). At the hearing, Dr. Loughlin explained that in cases involving allegations of abuse, like B.R.M.'s case, he conducts a medical evaluation for the purpose of making a diagnosis and recommendation for treatment. He also explained that such an evaluation is composed of an interview with the child, a physical examination, and lab and/or x-ray studies if necessary. In his evaluation of B.R.M., Dr. Loughlin followed this protocol. During her interview with Dr. Loughlin, B.R.M. told him about the "sexing" incidents involving Respondent-Father. Dr. Loughlin then conducted a physical exam and ordered pertinent lab tests. The physical exam and lab tests were normal, but Dr. Loughlin explained that "the large majority of children who have been sexually abused are found to have normal exams." Thus, Dr. Loughlin was of the opinion that his findings were consistent with sexual abuse. The statements of B.R.M. were reasonably pertinent to Dr. Loughlin's diagnosis and treatment. Accordingly, we conclude that Dr. Loughlin's testimony, admissible pursuant to the medical exception under Rule 803(4), was competent to support finding of fact number 10. This assignment of error is overruled.

To the extent that the trial court relied on Ms. Tyndall's testimony in formulating finding of fact number 10, such reliance does not constitute prejudicial error. At the hearing, DSS offered

Ms. Tyndall's testimony regarding B.R.M.'s statements specifically for the purpose of corroboration. We have previously held that out-of-court statements offered for the purpose of corroboration are not hearsay. *See In re Mashburn*, 162 N.C. App. 386, 393, 591 S.E.2d 584, 589 (2004) (holding that testimony by DSS investigator regarding allegations of child abuse did not constitute hearsay because it was offered for purposes of corroboration); *State v. Gilbert*, 96 N.C. App. 363, 365, 385 S.E.2d 815, 816 (1989) ("[O]ut-of-court statements offered to corroborate prior testimony are not hearsay."). To the extent, if any, that the trial court included testimony from Ms. Tyndall that did not sufficiently corroborate Dr. Loughlin's testimony in this finding of fact, we hold the relevant portions of this finding of fact are supported by competent evidence.

We also reject Respondent-Father's argument that Ms. Tyndall's testimony is not corroborative based on a discrepancy in the number of incidents reported by B.R.M. (two versus four). We find this discrepancy to be nothing more than a slight variance in B.R.M.'s account of the incidents, and it is well-settled that "slight variances in . . . corroborative testimony do not render it inadmissible." *State v. Covington*, 290 N.C. 313, 337, 226 S.E.2d 629, 646 (1976). This assignment of error is overruled.

We next review Respondent-Father's challenge to findings of fact numbers 13, 19, 20 and 21 which detail the Juveniles' exposure to sexually explicit material.

> 13. The [R]espondent[-][F]ather has allowed sexual[ly] explicit material to be

> located in his home in such fashion that the same might become available to the [J]uveniles herein for their observation by sight or hearing.
>
> . . . .
>
> 19. The [R]espondent[-][F]ather has allowed the [J]uveniles herein to be cared for by others who allowed sexual[ly] explicit materials to be available for viewing by the [J]uveniles. The [Respondent-Father] did not re-direct the [J]uveniles and/or stop them from watching the materials.
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> 20. During interviews, [the Juveniles' biological mother] acknowledged that [The J]uveniles were being exposed to pornographic material in [Respondent-Father's] home and the home of the paternal grandparents. There is no record or evidence that the mother took any steps to protect the juveniles.
>
> 21. Various [evidence] submitted to the court supports that these [J]uveniles were exposed to premature and inappropriate sexual behavior at the hands of one or both of the parents.

Respondent-Father contends that there is no evidentiary support for these findings.

We agree that DSS did not present any competent adjudicatory evidence to support finding of fact number 20. The only possible basis for this finding was contained in a clinical evaluation which was not admitted into evidence. Thus, the evaluation is not competent to support finding of fact number 20. Nonetheless, because this finding is unnecessary to the trial court's ultimate determination that the juveniles were abused and/or neglected, it is unnecessary for us to address this argument.

Findings of fact numbers 13, 19, and 21, however, are

supported by competent evidence. At the hearing, Dr. Loughlin testified that B.R.M. told him that her Stepmother showed her a picture of a "pee-pee" on the computer. According to Ms. Tyndall, Respondent-Father told Ms. Tyndall that his parents, with whom the Juveniles had previously lived, watched porn all day. On one occasion, Respondent-Father also saw the Juveniles looking at porn on television at his parents' house. This testimony is sufficient to support the findings that Respondent-Father allowed sexually explicit material to be available in his home and in the home of others who have cared for the Juveniles. Accordingly, we conclude that findings of fact numbers 13, 19 and 21 are supported by clear and convincing evidence.

II.

Respondent-Father next challenges the trial court's adjudicatory conclusions of law. Respondent-Father argues that if the findings which he challenged (numbers 10, 13, 19-21) are removed, any basis for the trial court's conclusions of law is also removed. However, we have already determined that findings of fact numbers 10, 13, 19, and 21 are supported by competent evidence, and that number 20 is not necessary to the trial court's conclusions.

The trial court concluded that B.R.M. was an abused juvenile as defined by N.C. Gen. Stat. § 7B-101(1)(d), which provides that a child is abused if the child's parent, guardian, custodian, or caretaker commits, permits, or encourages the commission of a sexual offense. After reviewing the record, we affirm the trial court's conclusions that B.R.M. was abused.

Based on the testimony of Dr. Loughlin and Ms. Tyndall, the trial court found that Respondent-Father engaged in inappropriate sexual encounters with B.R.M., that the conduct performed by Respondent-Father was made by him for the purposes of his sexual gratification, and that the Juveniles exhibited sexual knowledge and activities more advanced than Juveniles of their respective ages. We have previously held that a "child's allegations, along with a physician's exam and testimony provide sufficient evidence for the trial court to make a finding of abuse." *In re K.W.*, ___ N.C. App. ___, ___, 666 S.E.2d 490, 496 (2008) (citation omitted). Accordingly, we conclude that the trial court's findings, which were based on the testimony of Dr. Loughlin and Ms. Tyndall, are sufficient to support its conclusion that Respondent-Father abused B.R.M.

The trial court also concluded that and B.R.M. and R.W.M. were neglected juveniles. The findings outlined above regarding Respondent-Father's inappropriate sexual encounters with B.R.M. support the conclusion that B.R.M. was living in an environment injurious to the juveniles' welfare. *See K.W.*, ___ N.C. App. at ___, 666 S.E.2d at 497 (finding that evidence of sexual abuse by the juvenile's father constituted sufficient evidence to find that the child was living in an environment injurious to her welfare).

Additionally, the finding that B.R.M. was abused also supports the finding that R.W.M. was neglected. The statutory definition of neglect provides: "In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home

where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." N.C. Gen. Stat. § 7B-101(15) (2007). "In cases of this sort, the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999). In the case before us, the trial court found that both Juveniles had been exposed to sexually explicit material and premature and inappropriate sexual behavior. We find the evidence of abuse of B.R.M. to be sufficiently predictive and therefore relevant to determining whether R.W.M. was neglected. Therefore, we conclude that the trial court's findings were sufficient to establish that R.W.M. was also living in an environment injurious to his welfare. These assignments of error are overruled.

III.

Finally, Respondent-Father contends that the trial court erred by denying Respondent-Father visitation rights for B.R.M. and R.W.M. We review a trial court's dispositional order of visitation for abuse of discretion. *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007) (citation omitted). "Abuse of discretion exists when 'the challenged actions are manifestly unsupported by reason.'" *Barnes v. Wells*, 165 N.C. App. 575, 580, 599 S.E.2d 585, 589 (2004) (citation omitted).

At disposition, the guardian *ad litem* (GAL) requested that the court cease reunification efforts with Respondent-Father. [T. p.

107] At the time of the hearing, Respondent-Father had not complied with any of the requirements of his Out of Home Family Services Agreement, and had not followed through with the recommendations of the Child and Family Evaluation, which DSS requested. Respondent-Father had not called DSS to check on the status of the Juveniles. For these reasons, DSS recommended denial of visitation privileges. Although the trial court denied Respondent-Father visitation, it declined to take the GAL's recommendation, and explained that Respondent-Father would have to comply with DSS's family services agreement in order to obtain visitation:

> [A]t this time if he will comply with the recommendations I'm not going to cease reunification efforts. But he will have no visitation until he's done the specific things called for in this list of recommendations. The Court adopts the recommendations and sets for review August 1.

We find that this ruling is the result of a reasoned decision and is supported by the evidence and the findings. Moreover, we note that because the trial court found that visitation with Respondent-Father was not in the Juveniles' best interest, it was not required to establish the time, place, and conditions for visitation. *See In re E.C.*, 174 N.C. App. 517, 522, 621 S.E.2d 647, 652 (2005). Nonetheless, the trial court did outline the requirements necessary for Respondent-Father to procure visitation rights. We conclude that the trial court's dispositional determination was not an abuse of discretion. This assignment of error is overruled.

Affirmed.

Chief Judge MARTIN and Judge WYNN concur.

Report per Rule 30(e).