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NO. COA08-1218

NORTH CAROLINA COURT OF APPEALS

Filed: 3 March 2009

IN THE MATTER OF:

Jackson County
Nos. 06 J 89, 07 J 37

A.J. and J.G.

Appeal by respondents from an adjudication order entered 2 April 2008 by Judge Richlyn D. Holt and an order on disposition entered 2 June 2008 by Judge Richard K. Walker in Jackson County District Court. Heard in the Court of Appeals 16 February 2009.

Mary G. Holliday, for appellee Jackson County Department of Social Services.

Robert C. Kerner, Jr., for guardian ad litem.

Carol Ann Bauer, for appellant respondent-mother.

Matthew Ryan McKaig, for appellant respondent-father.

CALABRIA, Judge.

Respondents appeal from the trial court's order adjudicating the minor child A.J. neglected and abused and the minor child J.G. neglected, and from the subsequent disposition order. Both respondents assign error to the admission of numerous hearsay statements under the residual hearsay exception pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(24) (2007), and argue that without the erroneously admitted hearsay, the findings and conclusions

regarding abuse and neglect have no support. After careful review, we affirm the orders of the trial court.

I. Background

Respondent-mother M.J. ("respondent-mother") is the mother of A.J., born in 2003, and J.G., born in 2007. Respondent-father ("M.G.") is the father of J.G. and dates respondent-mother. A.J.'s father, T.D., is not a party to this appeal. Jackson County Department of Social Services ("DSS") first became involved with the family in 2006. On 29 December 2006, DSS filed a juvenile petition with regard to A.J., alleging abuse and neglect. DSS was granted nonsecure custody on that day, and placed A.J. in foster care with the Parton family. On 17 May 2007, DSS filed a juvenile petition alleging neglect of J.G. based on A.G.'s allegations of sexual abuse by M.G. ("first petition"). DSS was granted nonsecure custody of J.G. and she was placed in foster care. On 27 November 2007, DSS filed a "second" petition alleging abuse and neglect of A.J., also based on the allegations of sexual abuse she made against M.G. The first petition involving A.J. dating from 2006 is not part of this appeal.

Prior to the adjudication hearing, DSS filed a motion to introduce hearsay statements made by A.J. regarding sexual acts committed by M.G. against A.J., pursuant to the residual hearsay exception. The adjudication hearing was held on 17 and 18 March 2008. At the hearing, the trial court determined and the parties acknowledged, that DSS had provided respondents with proper notice, that the statements were not covered by any of the enumerated

exceptions to the hearsay rule, and that the statements were material to an issue for adjudication. With regard to A.J.'s availability for trial, the trial judge stated, "the Declarant is not going to be testifying." No objection or argument was made in response to this statement.

The first witness, foster mother Keitha Parton ("Ms. Parton"), testified about a statement A.J. made to her in March 2007. Ms. Parton and A.J. were riding in a vehicle when Ms. Parton told A.J. she wanted to kiss her, and A.J. asked if she was going to kiss her on her "booty." When Ms. Parton asked A.J. if anyone had ever kissed her on her "booty," A.J. said M.G. had, and A.J. illustrated by making a licking motion. Upon objection, the trial court allowed further argument from the parties regarding the residual hearsay exception, and then stated that "[t]here's not anything that's more probative on this issue, and the evidence will best serve the interests of justice." With regard to the trustworthiness of the statements, the court stated that trustworthiness "relates to the child's age, and to the unusual, uh, content of the statement." The court allowed A.J.'s statement into evidence, and testimony continued.

Over objection, Ms. Parton testified that on 21 April 2007, A.J. asked her a question. A.J. was getting ready for bed and she held the tail of a Barney the dinosaur doll between her legs. A.J. asked Ms. Parton if the dinosaur's tail was a "weenie," and stated that was what M.G. had done to her. The trial court heard arguments from the parties, and reasoned that the statement was

trustworthy. Specifically, A.J. made the statement to her foster mother in the comfort of the foster home as A.J. was getting ready for bed, and the content of the statement was significant in that it was outside what would normally be expected from a three-year-old child. The court also determined that the statement was material, more probative than other evidence, and since the interests of justice would be served by its admission, allowed the statement into evidence.

In another instance on 30 April 2007, A.J. told Ms. Parton about a "game" played with her mother, in which respondent-mother would squeeze her bottom. The trial court allowed the statement.

In September 2007, when Ms. Parton found a hair in the pasta she was eating and asked A.J. to throw the hair away for her, A.J. referenced having a hair in her mouth that made her sick, and the hair was from M.G.'s "weenie." The trial court allowed the statement.

Psychologist Jean Cummings ("Dr. Cummings") testified regarding her evaluation of A.J. over the course of five meetings. Dr. Cummings directed Ms. Parton to complete a child sexual behavior inventory on A.J. A.J. scored at the top of the range for demonstrating sexualized behaviors. At the end of the interviews, Dr. Cummings concluded that A.J. had been sexually abused, but it was not clear who the perpetrator was since A.J. never repeated the statements she had made about M.G. to anyone other than Ms. Parton. When A.J. saw a figure drawing and was identifying body parts on it, she stated that M.G. had touched her genital area, but provided

no other details. Dr. Cummings also met with each respondent and interviewed them. M.G. took a child abuse potential inventory test, and his results were not clinically significant. Dr. Cummings stated she could not say with any degree of certainty that M.G. had sexually abused A.J. When asked about the propensity of a child A.J.'s age to make statements of abuse to a caretaker but not to a doctor, Dr. Cummings stated that children in A.J.'s age group are more likely to talk about things that concern them when they feel safe or comfortable, such as when they are at home or driving in a car. Dr. Cummings was not aware of any physical evidence showing that A.J. had been abused.

Ms. Parton's niece M.P. also testified over objection regarding statements made by A.J. about sexual acts committed by M.G. On 1 April 2007, M.P. was reading a bedtime story to A.J. when A.J. made a comment about M.G.'s "black stick." Ms. Parton then asked A.J. some questions about her statement. In response, A.J. said M.G. used his black stick on her bottom, that it happened in the car or in the house, and that M.G. kissed her on the head and lips and on her bottom. The trial court stated that the evidence was more probative than other evidence that might be readily procurable, that the interests of justice outweigh any prejudicial value, and that the subject was first broached by A.J. The trial court allowed the statement.

M.P. testified about an incident on 5 April 2007 when A.J. made another statement about M.G.'s "black stick" and that he used it on A.J.'s mother, making her scream and cry. A.J. stated that

M.G. used it on her bottom, and that she liked it, but M.G. told her to keep it a secret and not tell anybody. The trial court allowed the statement as being made under similar circumstances as the 1 April 2007 statement since A.J. brought up the topic without prompting.

Over objection, the trial court allowed testimony from A.J.'s foster father, Scott Parton, about an April 2007 incident in which A.J. stated that her stuffed Barney toy's tail was a "weenie," she stuck the toy between her legs and stated that was what M.G. had done to her. The trial court reasoned that the statement was trustworthy since it was made when A.J. was getting ready for bed, she brought up the subject unsolicited, and she made the statement without being prompted by anyone.

The trial court allowed testimony by Jason Warren, fiancé to one of the Partons' daughters, regarding statements made by A.J. about M.G.'s "black stick" and a game called "One-Two-Three Hush-Mouth." A.J. started talking on her own to family members that were in the living room watching television one night when she made the statements. Upon questioning by Ms. Parton about where M.G. put his "black stick," A.J. pointed to her mouth and to her bottom.

The trial court decided that the statement was trustworthy in that A.J. brought up the subject herself, and that it was an unusual topic for a child to be discussing.

Over objection, the trial court also allowed statements which T.P., minor daughter of the Partons, said A.J. made on 1 April 2007 regarding a game called "One-Two-Three Hush-Mouth" and on 21 April

2007 regarding A.J. putting her Barney toy's tail between her legs, calling it a "weenie," and indicating that was what M.G. had done to her. With regard to the game, A.J. stated that she wanted to teach the game to the others, and said that M.G. kissed her on her head, her lips, and her bottom. The trial court stated that since it had already analyzed the statements under two other recipients, it would admit the testimony from T.P.

At the close of the agency's evidence, both respondents moved to dismiss the petition, arguing that DSS had not met its burden of proving the allegations by clear and convincing evidence. The trial court denied the motion. Respondents then introduced into evidence portions of Dr. Cummings' deposition, including Dr. Cummings' concerns regarding what kind of attention A.J. may have received from her foster parents after making some of her statements. Dr. Cummings stated "if the child is getting some unusual attention from making statements of any kind, they are more likely to make these statements in the future and to elaborate on them."

The trial court entered an adjudication order on 2 April 2008 finding A.J. to be an abused and neglected juvenile. The trial court specifically found that M.G. "touched and kissed [A.J.] in a sexually inappropriate manner and he has allowed the child to touch him in a sexually inappropriate manner." The trial court adjudicated J.G. as a neglected juvenile, finding that "she lived in a home where another juvenile was abused." The court held a separate disposition hearing on 7 May 2008, awarding DSS legal and

physical custody of the minor children in an order entered 2 June 2008. From the orders, respondents appeal.

II. Analysis

Respondents contend the trial court erred by admitting the juvenile's hearsay statements pursuant to the residual hearsay provision because (1) the statements were not trustworthy; (2) the statements were not more probative than other evidence which could have been easily procured; and (3) admission of the statements did not serve the ends of justice. Since respondents contend the statements should not have been admitted, they also argue the findings of fact and conclusions of law based on the statements were made in error. Further, respondent-mother assigns error to the trial court's denial of her motion to dismiss.

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). Although hearsay is generally not admissible, if hearsay falls within one of the exceptions enumerated in Rule 803, it may be admitted. N.C. Gen. Stat. § 8C-1, Rule 802 (2007). Here, the statements at issue were admitted pursuant to the residual hearsay exception:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the

interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

N.C. Gen. Stat. § 8C-1, Rule 803(24) (2007). Thus, a trial court must make a six-part inquiry to determine the admissibility of a hearsay statement under the residual hearsay exception: (1) whether the agency gave proper notice of its intention to introduce the statements; (2) whether the statements were covered by any other exception to the hearsay rule; (3) whether the statements were trustworthy; (4) whether the statements were material; (5) whether the statements were "more probative on the issue than any other evidence which the proponent can procure through reasonable efforts[;]" and (6) whether the interests of justice would be served by admitting the statements. *State v. Smith*, 315 N.C. 76, 92-97, 337 S.E.2d 833, 844-47 (1985). We review the trial court's decision to admit hearsay evidence under Rule 803(24) for abuse of discretion. *Id.* at 97, 337 S.E.2d at 847.

In the instant case, the trial court found, and the parties do not contest, that DSS properly gave notice of its intention to offer the statements at the hearing, no other hearsay exception applies beyond the residual hearsay exception, and that the statements are material. Therefore, we do not address three of the six elements enumerated above in this appeal.

Respondents first challenge the admissibility of the hearsay statements as lacking any indicia of trustworthiness. Respondent-mother indicates that A.J. may have been getting attention from her foster parents for making the statements, and argues that a three-year-old's statements are not inherently credible. M.G. contends the trial court did not adequately explain why it found the statements to be trustworthy other than to recite the circumstances in which each statement was made. M.G. points out that Ms. Parton attempted to elicit allegations from A.J. by asking her leading questions, and that Dr. Cummings expressed some doubts about A.J.'s credibility. We disagree.

Our state Supreme Court noted in *State v. Deanes*, 323 N.C. 508, 374 S.E.2d 249 (1988), *cert. denied*, 490 U.S. 1101, 104 L. Ed. 2d 1009 (1989), that four factors appeared in *Smith* which impact trustworthiness: (1) assurance of the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth; (3) whether the declarant ever recanted the testimony; and (4) the practical availability of the declarant at trial for meaningful cross-examination. *Deanes*, 323 N.C. at 516, 374 S.E.2d at 255. However, even absent particularized findings by the trial court on each factor, we will not disturb a decision to admit hearsay under the residual hearsay exception where the record reflects the requisite indicia of reliability. *State v. Valentine*, 357 N.C. 512, 518-19, 591 S.E.2d 846, 853 (2003) (citing *State v. Daughtry*, 340 N.C. 488, 459 S.E.2d 747 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996)). Finally, "the peculiar

factual context within which the statement was made will determine its trustworthiness." *Smith*, 315 N.C. at 94, 337 S.E.2d at 845.

We conclude the trial court did not abuse its discretion by determining the statements made by A.J. to her foster family were trustworthy. The court noted the juvenile's young age and the mature subject matter of her statements, as well as the circumstances in which she made the statements. The court also noted that the statements were made spontaneously, in surroundings familiar and comfortable to the juvenile. With regard to the factors impacting trustworthiness noted in *Deanes*, all of the statements at issue involve actions by respondent-father toward A.J. Therefore, A.J.'s statements were made with her personal knowledge of the events she described. As to A.J.'s motivation to speak the truth, she made each statement spontaneously without any prompting. When asked to elaborate, A.J. appears to have simply responded to the questions; however, she was the one who initially broached the subject on each occasion described by the witnesses. There is no indication that A.J. was offered anything to make these statements or that she was rewarded upon making them. Further, no evidence was presented that A.J. ever recanted the statements. With regard to A.J.'s availability, we note that A.J. was four years old at the time of the adjudication hearing. Respondents did not request A.J. be examined. The trial court did not abuse its discretion by determining a four year old was unavailable to testify in a courtroom regarding the alleged sexual abuse. A.J.

made her statements to members of her foster family in familiar and comfortable settings. She did not repeat the statements or otherwise open up to Dr. Cummings over the course of their five meetings. It is unlikely that meaningful cross-examination could have been conducted in the courtroom with people who were strangers to A.J. Therefore, the trial court did not err in finding the statements to be trustworthy.

Respondents also challenge the hearsay statements as not being more probative than other evidence that could be reasonably procured through other means. Respondent-father in particular contends the trial court failed to adequately explore whether the juvenile was available to testify, and that the child's age alone is not determinative of the question. We have already reasoned above, however, that it is unlikely that the minor child would have been able to testify regarding the statements she made to her foster family. Therefore, the statements were more probative than any other evidence and the trial court did not err in so concluding.

Both respondents also claim that admission of the statements would not serve the interests of justice. Neither provides any elaboration on this argument, however, and our review of the record persuades us that admission of the statements serves the interests of justice in protecting these minor children from abuse. See *State v. Hinnant*, 351 N.C. 277, 292, 523 S.E.2d 663, 672 (2000) (Lake, J., concurring) (noting "significant interest of society in protecting our children from any type of abuse" in discussion of

residual hearsay exception). Therefore, the trial court did not abuse its discretion in admitting the statements pursuant to the residual hearsay exception.

Next, respondents argue the trial court erred in making the findings of fact and conclusions of law based on erroneously admitted hearsay evidence. In adjudication proceedings, the petitioner must prove the allegations by clear and convincing evidence. N.C. Gen. Stat. § 7B-805 (2007). In reviewing an adjudication order, we must determine whether the findings of fact are supported by clear and convincing evidence, and whether the findings of fact support the conclusions of law. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006). Since we find that the trial court did not abuse its discretion in allowing the statements into evidence, the evidence was properly used to support the findings of fact made by the trial court. The findings, in turn, support the conclusion that A.J. is a neglected and abused juvenile, and that her sibling, J.G., is a neglected juvenile. These assignments of error are overruled.

Finally, respondent-mother argues the trial court erred in denying the motion to dismiss where DSS failed to prove the allegations in the juvenile petition by clear, cogent, and convincing evidence. The basis of this argument rests on respondent-mother's contention that the trial court erred in admitting the hearsay statements of the juvenile. We have already found the admissions to be proper, and we further note that no evidence was presented contradicting either the statements made by

A.J. or Dr. Cummings' testimony. Therefore, sufficient evidence was presented by petitioner to survive a motion to dismiss, and this argument has no merit.

In conclusion, the trial court did not abuse its discretion in admitting the hearsay statements pursuant to the residual hearsay exception, the findings of fact are supported by competent evidence, and the findings support the conclusions of law, and the orders of the trial court are hereby affirmed.

Affirmed.

Judges HUNTER, Robert C. and BRYANT concur.

Report per Rule 30(e).