NO. COA08-436

NORTH CAROLINA COURT OF APPEALS

Filed: 19 August 2008

IN THE MATTERS OF:

Harnett County
Nos. 07 J 13-19
07 J 139

T.S., J.M., Z.S., T.S.,
S.S., T.M., D.M, and R.M.

Appeal by Respondent from order entered 18 January 2008 by Judge Albert A. Corbett, Jr. in District Court, Harnett County. Heard in the Court of Appeals 5 August 2008.

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

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for Respondent-Appellant.

Pamela Newell Williams for Guardian ad Litem.

McGEE, Judge.

Respondent is the biological mother of the above eight juveniles who, at the time of the filing of the juvenile petitions herein, ranged in age from infancy to fourteen years. The Harnett County Department of Social Services (DSS) filed juvenile petitions on 25 January 2007 alleging that T.S. (hereinafter referred to by the pseudonym of Tammy), a four-year-old female child, was abused and neglected, and that her six siblings at the time were

neglected. DSS obtained non-secure custody of the seven children. Respondent subsequently gave birth to an eighth child, R.M., while incarcerated. DSS filed a petition alleging R.M. was neglected and dependent and assumed non-secure custody of R.M. on 17 July 2007.

The trial court joined the cases for hearing and conducted hearings on the petitions on 17 August 2007 and 12 October 2007. The trial court filed an order on 18 January 2008 adjudicating Tammy as an abused and neglected juvenile, R.M. as a dependent juvenile, and the remaining six children as neglected juveniles. The trial court awarded custody of all eight children to DSS.

The trial court found as facts that Tammy was admitted to the emergency room of Betsy Johnson Hospital in a comatose condition on 23 January 2007. Tammy exhibited a spiral displaced fracture of her right upper arm, a profoundly high level of salt ingestion, fifty or more markings consisting of burns, welts, and scars on her body, low blood count, low protein level, weeping ulcers, skin peeling from her lips, matted and knotted hair, swollen-shut eyes, and a bite mark on the top of one hand. Tammy also had an odor of Clorox bleach about her. A police officer was called to the hospital to investigate, and Respondent was later criminally charged and incarcerated.

The trial court also found that Respondent told the police officer in the emergency room on the night of 23 January 2007 that Tammy had lived with another family until about thirty days earlier, when she returned to Respondent's household. Respondent disciplined Tammy for "talking ugly" and for having "bathroom

accidents." Respondent admitted that she had hit Tammy in the mouth and that Tammy had sustained black eyes. Respondent also related that the other children hurt Tammy.

The trial court further found that the police officer obtained two search warrants to search Respondent's residence. The officer found the home in an unsanitary and filthy condition. The officer found clothes piled high on the floor, and also found bottles of hot sauce, peppers, cleaning supplies, and a bottle of Clorox sitting out in the open. The officer found "[o]ld food on the stove and bugs . . . in the kitchen. Sour clothes were found in the washer and dryer. Holes were observed in the walls and floors."

The trial court also found that Respondent told a social worker at Betsy Johnson Hospital on 23 January 2007 that she took Tammy to the hospital after Tammy passed out while taking a bath. Respondent told the social worker that the marks on Tammy's body resulted from whippings she administered to Tammy when Tammy exhibited sexualized behavior. Respondent said she used a "braided belt and a black belt" to discipline Tammy. Respondent stated that the burns to Tammy's body resulted from Respondent accidentally spilling hot water on Tammy. Respondent also stated that Tammy had injured her arm two days earlier when she slipped on some water near the bathroom. Respondent acknowledged that she did not seek medical attention for Tammy when Tammy was burned by the hot water or when Tammy's arm was injured. Respondent also complained to a neighbor that Tammy would not cry when Respondent disciplined her.

Respondent served as the primary caretaker of the juveniles with the exception of R.M., who was born after Respondent was incarcerated. As one of its concluding findings, the trial court found that Respondent's actions, her statement of a willingness to kill Tammy in an effort to make Tammy cry, and Respondent's lack of remorse expressed for the injuries to Tammy "created a home environment of serious risk of injury to any child in [Respondent's] care."

Respondent filed a notice of appeal from the adjudication and disposition order on 14 February 2008. On appeal, Respondent argues that the trial court erred by allowing DSS to present inadmissible evidence during the adjudication proceeding. Respondent first takes exception to the admission of testimony by Dr. Adam Zolotor (Dr. Zolotor), a physician who testified as an expert, and who stated that the marks found on Tammy's back "could be switch marks from old injuries" or "could be like being struck with an object like a switch[.]" Respondent argues this testimony should have been excluded because it was based merely upon speculation and conjecture.

An expert may testify that a particular cause "'could have'" or "'possibly'" produced a particular result. *Brooks v. Hayes*, 113 N.C. App. 168, 170, 438 S.E.2d 420, 421 (1993) (citation omitted), *disc. review denied*, 335 N.C. 766, 442 S.E.2d 508, *disc. review denied*, 335 N.C. 766, 442 S.E.2d 509 (1994). The probative value of the testimony goes to its weight and sufficiency, not its admissibility. *State v. Ward*, 300 N.C. 150, 153-54, 266 S.E.2d

581, 583-84 (1980). Moreover, a party waives the right to contest the admission of evidence when the same or similar evidence is previously or later admitted without objection. *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995).

We first recognize that although the challenged testimony may have had little probative value, it was nonetheless admissible. *See Brooks*, 113 N.C. App. at 170, 438 S.E.2d at 421; *Ward*, 300 N.C. at 153-54, 266 S.E.2d at 583-84. Moreover, Dr. Zolotor previously testified, without objection, that the marks on Tammy's body "could've been scars from being struck by an object, like we would see if a kid was hit hard with a switch repeatedly over time." Furthermore, Respondent confessed to whipping Tammy with a belt and inflicting the marks upon Tammy. The police officer also testified, without objection, that Respondent told her she beat Tammy with a belt. The police officer further testified that during a search of Respondent's residence, she found "switches all over the house, probably two-to-four-foot switches hidden under the couch, in the drawers in the kitchen, in the children's bedroom." Because evidence similar to the challenged evidence was admitted without objection, Respondent lost the benefit of her objection. *See Alford*, 339 N.C. at 570, 453 S.E.2d at 516.

Respondent next argues the trial court erred in admitting testimony by Respondent's neighbor that she assumed Respondent had been beating Tammy. Respondent argues this testimony should have been excluded pursuant to N.C. Gen. Stat. § 8C-1, Rule 602 because Respondent's neighbor, not having seen Respondent whip Tammy,

lacked personal knowledge as to the matter.

Again, we note that the same or similar evidence was previously and subsequently admitted without objection. Respondent's neighbor earlier testified, without objection, that she assumed Respondent "would whoop [sic] [Tammy] or something to make her cry." Respondent's neighbor later testified, without objection, that although she had not actually seen Respondent beat Tammy, "The Lord know, and I know" Respondent had been beating Tammy. Therefore, Respondent also lost the benefit of her objection to this testimony. *See Alford*, 339 N.C. at 570, 453 S.E.2d at 516.

Respondent next challenges the admission of testimony by a clinical social worker relating what she had been told by Tammy and the other children regarding the nature and causes of the injuries to Tammy, and about Respondent's treatment of the children. Respondent argues this testimony should have been excluded as hearsay.

"'Hearsay' is 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 is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802 (2007). For example, by statute, hearsay evidence may be considered if it is offered at a dispositional hearing in an abuse, neglect, or dependency proceeding. N.C. Gen. Stat. § 7B-901 (2007). Respondent argues the trial court improperly admitted this

testimony during adjudication and based findings of fact upon this testimony.

In a bench trial, "it will be presumed that the judge disregarded any incompetent evidence that may have been admitted unless it affirmatively appears that [the judge] was influenced thereby." *Stanback v. Stanback*, 31 N.C. App. 174, 179-80, 229 S.E.2d 693, 696 (1976), *disc. review denied*, 291 N.C. 712, 232 S.E.2d 205 (1977). An appellant challenging the admission of evidence must show that "the trial court relied on the incompetent evidence in making its findings." *In re H.L.A.D.*, 184 N.C. App. 381, 395, 646 S.E.2d 425, 435 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008). "[E]ven when the trial court commits error in allowing the admission of hearsay statements, one must show that such error was prejudicial in order to warrant reversal." *In re M.G.T.-B.*, 177 N.C. App. 771, 775, 629 S.E.2d 916, 919 (2006). "Where there is competent evidence to support the court's findings, the admission of incompetent evidence is not prejudicial." *In re McMillon*, 143 N.C. App. 402, 411, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001).

Respondent cites findings of fact numbers 13, 22 and 23 as being based upon the challenged testimony. We disagree. The bulk of finding of fact number 13 catalogues Tammy's injuries and is supported by the unchallenged testimony of the police officer, who saw Tammy in the emergency room and who made a report of her findings. Respondent argues the portion of finding of fact number 13 that states Tammy's injuries were caused by "other than

accidental means" is based solely upon the allegedly inadmissible hearsay statements the children made to the clinical social worker. We disagree.

The unchallenged findings demonstrate that Tammy was in Respondent's care for thirty days prior to 23 January 2007 and that Respondent was the primary caretaker of all of the juveniles, except R.M., at the time of the filing of the juvenile petitions. The findings also demonstrate that Respondent admitted hitting Tammy and that Respondent allowed the other children to hurt Tammy: "[Respondent] admitted that she had hit [Tammy] in the mouth and [Tammy] had received black eyes and that the other children would hurt [Tammy]." The trial court also found that "[i]n answer to [Tammy's] black eyes, [Respondent] stated that [Tammy] tried to hump her sisters [sexual act] and that [Z.S.] kicked [Tammy] off the bed and [Respondent] had whipped [Tammy] with a belt. [Respondent] further stated that the marks on [Tammy's] body came from whippings for humping." The trial court also found that "[Respondent] used a braided belt and a black belt to discipline [Tammy]. [Respondent] whipped [Tammy] for making sexually suggestive acts [humping with and without clothes]." The trial court further found that "[Respondent] complained to her neighbor . . . about [Tammy] in that [Tammy] would not cry when disciplined and that [Respondent] called [Tammy] a bitch." Respondent's neighbor also testified that Respondent stated "[Respondent] would want to kill [Tammy.]" As to Tammy's broken arm, Dr. Zolotor testified that the bones "were pretty markedly

displaced and [it] should've been obvious to anybody that something was not right with [Tammy's] arm." However, the police officer testified that Respondent admitted she did not seek any medical attention for Tammy. As to the burns, Respondent told a social worker that she had accidentally spilled hot water on Tammy. However, again, the police officer testified that Respondent stated she did not seek any medical attention for Tammy. Regarding Tammy's comatose state, Dr. Zolotor testified that the cause of the excess levels of salt in Tammy's system was "likely from salt administration[.]" All of this evidence and the unchallenged findings of fact demonstrate that Tammy's injuries were inflicted by other than accidental means. Therefore, even excluding the clinical social worker's testimony, there was ample evidence to support the challenged portion of finding of fact number 13.

Finding of fact number 22 states that Respondent, as a form of discipline, caused Tammy's injuries to be inflicted by striking and beating Tammy with a braided belt and/or a large belt. This finding is also supported by the testimony of the police officer who testified that Respondent confessed to beating Tammy. Moreover, the unchallenged findings of fact, recited above, also demonstrate that Respondent admitted to whipping Tammy with a "braided belt and a black belt[.]" Finding of fact number 23 states that Respondent's treatment of Tammy amounted to "cruel and unusual punishment[,]" "sadistic behavior[,]" and "severe child endangerment[.]" This finding is supported by the totality of the evidence, including Respondent's confession to the police officer

and the testimony of Dr. Zolotor and social workers regarding what they observed. As the trial court's findings are supported by other clear and convincing evidence, we hold that error, if any, in admitting hearsay testimony was not prejudicial.

Respondent next contends the trial court's adjudicatory conclusions of law are not supported by findings of fact based upon competent evidence. "The allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2007). Review of an adjudication order involves a determination of: (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the conclusions of law are supported by the findings of fact. *In re Pittman*, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566, *disc. review denied*, 356 N.C. 163, 568 S.E.2d 608 (2002). The trial court's adjudicatory findings are binding on appeal if they are supported by clear, cogent, and convincing evidence. *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73, (2003). Review of a conclusion of law is *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

Respondent argues the trial court's adjudication of Tammy as abused and neglected is based in part upon the inadmissible testimony of Dr. Zolotor and a clinical social worker. We disagree. An abused juvenile is defined as a juvenile whose parent, guardian, custodian, or caretaker "[i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means[.]" N.C. Gen. Stat. § 7B-101(1)(a) (2007).

"[S]erious physical injury" is defined as an injury that causes "great pain and suffering." *State v. Phillips*, 328 N.C. 1, 20, 399 S.E.2d 293, 303, *cert. denied*, 501 U.S. 1208, 115 L. Ed. 2d 977 (1991). The trial court's findings of fact list numerous injuries inflicted upon Tammy. The trial court's findings are supported by the testimony of the police officer, who personally observed Tammy's injuries. The police officer also heard Respondent's confession that she and the other children inflicted some of these injuries upon Tammy. Moreover, as to Tammy's broken arm and her burns, Respondent's failure to seek medical attention demonstrates that the injuries were inflicted by other than accidental means. Regarding Tammy's comatose state, Dr. Zolotor testified that the high level of salt in Tammy's system was "likely from salt administration[.]" We further hold that the trial court's findings of fact support the trial court's conclusion of law that Tammy is an abused juvenile.

Respondent next argues the trial court's findings of fact do not support its conclusion of law that Tammy and her siblings are neglected juveniles. We cannot agree.

A neglected juvenile is defined as 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) (2007). Neglect may be established by

a showing of some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the parent's failure to provide proper care, supervision, or discipline. *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993). As to Tammy's siblings who also lived in the home, N.C.G.S. § 7B-101(15) also provides:

> In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

In the present case, we conclude the findings support the trial court's conclusion that Tammy and her siblings who lived in the home were neglected. The findings reflect that in disciplining Tammy, Respondent inflicted serious injuries upon Tammy's body. All of the other children, with the exception of R.M., who was yet to be born, resided in the home where the abuse occurred. The home itself was in an unsanitary and filthy condition, and hazardous materials and chemicals were accessible to the children. The police officer also testified that on the evening Respondent brought Tammy to the hospital, Respondent left the other children at home alone. We thus hold that the trial court's findings of fact support its conclusion of law that Tammy and her siblings who resided in the home were neglected juveniles.

Respondent also argues the trial court's findings of fact do not support its conclusion of law that R.M. is a dependent juvenile. A dependent juvenile is defined as a juvenile "in need

of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2007). In determining whether a juvenile is dependent, the trial court is required to "address both[:] (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005).

The trial court's findings disclose that R.M.'s paternity has not been established and that the alleged father did not attend the hearings. At the time R.M. was born, Respondent was incarcerated. Respondent continues to be incarcerated and unable to care for R.M. or to make satisfactory child care arrangements. Although Respondent did arrange for two caretakers to care for R.M., and DSS initially approved of the arrangement, DSS subsequently learned that the caretakers had drug charges pending against them. At DSS's request, the caretakers brought R.M. to DSS's office. However, before giving custody of R.M. to DSS, the female caretaker removed all of R.M.'s clothing and took R.M.'s pacifier. The female caretaker also refused to give the social worker information about R.M.'s infant formula or feeding schedule. Furthermore, the caretakers had not obtained medical treatment for R.M., including the removal of extra digits on R.M.'s hands and one foot and treatment for a reflux condition. Therefore, we conclude that the

trial court's findings of fact support the trial court's conclusion of law that R.M. is a dependent juvenile.

By her final assignments of error, Respondent contends the trial court erred by failing to enter the adjudication and disposition order within thirty days of the hearing as required by N.C. Gen. Stat. § 7B-807(b) and N.C. Gen. Stat. § 7B-905(a), and by failing to hold the subsequent hearing required by N.C. Gen. Stat. § 7B-807(b).

N.C. Gen. Stat. § 7B-807(b) (2007) requires a juvenile court to enter a written adjudication order within thirty days after completion of the adjudication hearing. If the order is not entered within that time frame, the clerk of court is required to schedule a hearing to determine the reason for the delay. *Id.* Within ten days after that hearing, the trial court is required to enter the order. *Id.* Similarly, a disposition order must be entered within thirty days of the conclusion of the disposition hearing. N.C. Gen. Stat. § 7B-905(a) (2007).

In the present case, the trial court concluded the hearing on 12 October 2007 but did not enter the order until 18 January 2008, some ninety-eight days after the conclusion of the hearing and sixty-eight days beyond the deadline. The trial court also did not hold the hearing mandated by N.C.G.S. § 7B-807(b).

A trial court's failure to comply with the thirty-day deadlines imposed by N.C.G.S. § 7B-807 and N.C.G.S. § 7B-905 is not reversible error unless the complaining party can show prejudice. *In re E.N.S.*, 164 N.C. App. 146, 153-54, 595 S.E.2d 167, 171-72,

disc. review denied, 359 N.C. 189, 606 S.E.2d 903 (2004). Similarly, the failure to hold a hearing within ten days as required by N.C.G.S. § 7B-807(b) to investigate the reason for the delay will not invalidate an order unless prejudice is shown. *In re T.H.T.*, ___ N.C. App. ___, ___, 648 S.E.2d 519, 527-28 (2007).

In the case before us, Respondent has failed to show that she was prejudiced. Respondent remained incarcerated during the period of the delay. Respondent did not object to continuances of permanency planning hearings during this time period. Moreover, within a little more than six months after the conclusion of the last hearing, Respondent filed a record on appeal in this Court. Thus, her ability to prepare an appeal was not unreasonably compromised by the delayed entry of a written order.

The adjudication and disposition order is affirmed.

Affirmed.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).