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NO. COA09-345

NORTH CAROLINA COURT OF APPEALS

Filed: 18 August 2009

IN THE MATTER OF:

J.M., R.H., Jr.,	Rockingham County
C.S., A.S., R.M.	Nos. 04 JA 39
and B.M.,	07 JA 31-35
Minor Children.	

Appeal by Respondent from orders entered 20 October 2008 and 5 December 2008 by Judge Stanley L. Allen in District Court, Rockingham County. Heard in the Court of Appeals 3 August 2009.

No brief filed for Rockingham County Department of Social Services, Petitioner-Appellee.

Pamela Newell Williams for Guardian ad Litem.

Richard E. Jester for Respondent-Appellant.

McGEE, Judge.

Kimberly H. (Respondent) appeals from the trial court's 20 October 2008 order adjudicating R.M. an abused and neglected juvenile, and adjudicating J.M., R.H., Jr., C.S., A.S., and B.M. neglected juveniles. Respondent further appeals from the trial court's 5 December 2008 dispositional order.

Rockingham County Department of Social Services (DSS) filed a juvenile petition on 21 February 2007 alleging that R.M. was an abused juvenile. Specifically, DSS alleged that it received a

report on 4 December 2006 that Mr. H, Respondent's husband, "had sexually abused his then ten-year-old stepdaughter[.]" Additionally, DSS alleged all six children were neglected juveniles in that they lived in an injurious environment because R.M.'s abuse occurred in the home and the perpetrator continued to be present in the home. DSS alleged that R.M.'s younger sisters continued to have unsupervised contact with Mr. H, placing "these girls at risk of future sexual abuse and constituting improper and neglectful care on the part of [Respondent]." Furthermore, DSS alleged that some of R.M.'s siblings had been exposed to R.M.'s sexual abuse "in that [the] younger sisters slept on the bottom bunk bed while R.M. was being abused in her top bunk bed." DSS noted that A.S. had been awakened at night when Mr. H stood on her bed in order to climb into R.M.'s bed and A.S. heard R.M. saying "no" and pushing Mr. H off the bed. A nonsecure custody hearing was held on 27 February 2007 and the trial court entered an order granting nonsecure custody to DSS.

The trial court held a hearing on the petition on 22 May 2007. The trial court entered an adjudication and disposition order on 19 June 2007, finding that R.M. was abused and neglected and that the other children were neglected. Respondent filed notice of appeal. Our Court vacated the trial court's adjudication and disposition order on 6 May 2008 and remanded the case to the trial court. *In re J.M., R.H. Jr., C.S., A.S., R.M. & B.M.* 190 N.C. App. 379, ___ S.E.2d ___ (2008).

DSS obtained an *ex parte* order to retake custody of C.S. and

A.S. on 2 September 2008. Respondent filed a motion to set aside the *ex parte* order on 9 September 2008. The trial court granted Respondent's motion on 26 September 2008.

The adjudication and dispositional hearings on remand from our Court were held on 23 July, 11 September, 30 September, and 20 October 2008. The trial court entered an order on 20 October 2008, adjudicating R.M. an abused and neglected juvenile, and the other children as neglected juveniles. The disposition order entered 5 December 2008 returned custody of C.S., A.S., and R.H., Jr. to Respondent. The custody order as to R.M., J.M, and B.M. was continued in effect. Respondent appeals.

Respondent presents two arguments on appeal: (1) the trial court erred in its findings of fact and conclusions of law where the evidence presented did not support the conclusion that Respondent abused or neglected her children; and (2) the trial court erred in allowing hearsay testimony over Respondent's objection.

I.

We first address Respondent's argument that the trial court erred in allowing hearsay testimony over Respondent's objection, and by denying Respondent's motion to strike the testimony of Jordan Houchins (Houchins), an investigative social worker with DSS, and the testimony of Detective Steve Perkins (Perkins).

At the adjudication hearing, DSS did not call R.M. to testify, presenting instead the testimony of Houchins and Perkins. Respondent did not object to the testimony of Houchins and Perkins

while they were testifying. After DSS indicated there would be no further evidence presented by DSS on adjudication, Respondent moved to strike the testimony of Houchins and Perkins in its entirety. The trial court denied Respondent's motion.

"'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[.]" N.C. Gen. Stat. § 8C-1, Rule 802 (2007). Our Court has held that where "testimony is first admitted without objection, a subsequent motion to strike the testimony is addressed to the sound discretion of the court and its ruling will not be disturbed unless an abuse of discretion has been shown." *Financial Services v. Elks*, 29 N.C. App. 512, 513, 224 S.E.2d 660, 661 (1976). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

In the case before us, Respondent contends that the trial court's actions on remand are clearly in error given this Court's prior ruling prohibiting R.M.'s statements from being admitted through hearsay testimony. While we are mindful of the history of this case, we find the situation on remand differs from that at the original hearing. At the original adjudication hearing, the trial court precluded Respondent from presenting testimony, relying "solely on testimony from the prior hearings, one of which was not

even recorded, and the reports of DSS and law enforcement[.]” *In re J.M., R.H. Jr., C.S., A.S., R.M. & B.M.* 190 N.C. App. at 384, ___ S.E.2d at ___. On remand, testimony was presented but Respondent failed to object to that testimony. Respondent argues she did not object to the testimony because she assumed DSS would call R.M. to testify, and that she should not be penalized since she was “sandbagged” by DSS when DSS did not call R.M. to testify. Respondent does not contend, and we do not find, that the trial court abused its discretion. Respondent should have objected at the time Houchins and Perkins testified, even if she assumed DSS would call R.M. to testify. Accordingly, this argument is overruled.

II.

We next consider Respondent's contention that the trial court erred in finding and concluding that Respondent abused or permitted the abuse of R.M., and that she neglected any of the children.

“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). “A proper review of a trial court's finding of [abuse and] neglect entails a determination of (1) whether the findings of fact are supported by ‘clear and convincing evidence,’ and (2) whether the legal conclusions are supported by the findings of fact[.]” *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations omitted). “In a non-jury neglect [and abuse] 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). 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).

An abused juvenile is defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker . . . [c]ommits, permits, or encourages the commission of a violation of the . . . laws by . . . taking indecent liberties with the juvenile, as provided in G.S. 14-202.1[.]" N.C. Gen. Stat. § 7B-101(1)(d) (2007). 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. 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.

N.C. Gen. Stat. § 101(15) (2007). In order to adjudicate a juvenile neglected, "this Court has consistently required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the 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) (citations omitted).

In this case, the trial court made the following relevant findings:

2. On December 4, 2006, [DSS] social worker Jordan Houchins received the report alleging sexual abuse of [R.M.] by her stepfather. Social worker Houchins first interviewed [R.M.] on December 4, 2006, at Morehead Hospital, where she had been taken by [Respondent] due to allegations of inappropriate touching by the stepfather, [Mr. H]. Social worker Houchins, along with Rockingham County Sheriff[']s Department Detective Steve Perkins, interviewed [Respondent] at the hospital and she related to them the following: that [R.M.] told [Respondent] that [Mr. H] on three or more occasions had come into [R.M.'s] room in the late night or early morning hours, had kissed her, and had pulled down her underwear and his underwear and rubbed his genitals on her thigh. [Respondent] also stated that Reanna told her this usually happened on weekends, as [Mr. H] drinks heavily on the weekends. [Respondent] became aware of this on Sunday and she immediately had [Mr. H] leave the home. However, she allowed him to return to the home the very next day.

[3.] Det. Perkins and social worker Houchins also interviewed [R.M.] while at the hospital. [R.M.] indicated that [Mr. H] would come into her room late at night, climb into bed with her, kiss her or attempt to kiss her, and run his penis on her thigh. She stated that this usually occurred on weekends when [Mr. H] had been drinking. She indicated that [Mr. H] drinks only on weekends.

4. Upon leaving the hospital, social worker Houchins and Det. Perkins went to the home of [Respondent & Mr. H]. Upon arriving they found [Mr. H] and more than one of the children who lived in the household. [Mr. H] told the children, in English, to go to their rooms. [Mr. H] was informed in general terms of the nature of the allegations and of why the investigators were there. He voluntarily gave an extensive statement as to what happened, replying in a narrative form rather than giving short answers to questions. He

stated that he had [a] drinking problem, mostly on weekends. He further stated that he would go to [R.M.'s] room (in which [A.S. and C.S] also slept) and that he would kiss [R.M.] and rub his "thing" on her thigh on three or four occasions. His oral statement was entirely in English and he spoke in complete sentences. Det. Perkins reduced the statement to writing, in English, and let [Mr. H] review it. [Mr. H] indicated that it was correct and that he understood it. During the interview, [Respondent] returned to the home with [R.M.]; upon being told that [Mr. H's] statement matched what [R.M.] had said and that [Mr. H] would need to leave the home, [Respondent] agreed.

5. [DSS] substantiated sexual abuse of [R.M.] and injurious environment for the remainder of the children in the home. Criminal process against [Mr. H] was issued. [Respondent] ultimately gave information about [Mr. H's] whereabouts, but she requested that he not be arrested for several days because Christmas was near and she needed his check. Criminal process issued on or about December 7, 2006, but [Mr. H] was not arrested until on or about December 17, 2006. [Respondent] called Det. Perkins on at least one occasion and asked if he could arrange some sort of "help" for [Mr. H] and indicated that she did not want [Mr. H] to go to prison because the family could not afford it, as he paid all of the bills. When told how long an incarceration [Mr. H] might face, [Respondent] indicated she wanted the case dropped. She also contacted social worker Houchins and asked whether [Mr. H] could be home for Christmas.

6. Prior to the issuance of criminal process and prior to substantiation of the abuse report, [R.M.] told Det. Perkins and social worker Houchins that [Mr. H] did come into her room and into her bed at night and kiss and touch her, as set out above. Later, but before [R.M.] was removed from [Respondent's] home, [R.M.] recanted this story to social worker Houchins and expressed worry about Christmas, about the family's finances, and about the possibility of entering foster care if [Mr. H] [was] arrested. In her testimony during this hearing, [R.M.] again recanted and

indicated that when she talked to the investigators she was substituting [Mr. H's] name in acts that [Mr. S] supposedly committed against her when she was several years younger. However, her allegations against [Mr. S] were that he touched her inappropriately in the kitchen and in the living room, that he got into the bathtub with her, and that he took her to his bedroom and touched her inappropriately there; she never alleged against [Mr. S] that he got into her own bed and touched her. Therefore, the allegations against [Mr. S] are very different from the allegations against [Mr. H].

7. On at least once occasion, [A.S.] heard [Mr. H] in the bedroom and heard [R.M.] tell him "stop" and push him off the bunk. [A.S.] told [Respondent] this. [Respondent] initially believed [R.M.'s] allegations against [Mr. H] and she took [R.M.] to seek medical treatment. When aunt-by-marriage, Cindy was informed of these allegations, she physically assaulted [Mr. H] while [Respondent] stood by. Cindy also testified that [Mr. H] did not take allegations seriously and did not get upset although he was being accused of molesting his stepdaughter. However, at some point in 2007, [Respondent] no longer believed [Mr. H] had touched [R.M.].

8. After the investigation by Child Protective Services social worker Houchins, the [DSS] case was transferred to Treatment Services social worker Amber Garrett. Social worker Garrett attempted to develop a safety plan in order to keep the children in the home. However, on January 8, 2007, [Respondent] told social worker Garrett not to come to the children's schools or to the home to talk to [the] children. Thereafter, [Respondent] did agree to attend a Child and Family Team meeting on or about January 17, 2007, and agreed to allow social worker Garrett to have access to the children. During the same meeting, [Respondent] admitted that she was visiting [Mr. H] in jail and that he was calling home from the jail; with regard to whether [R.M.] ever spoke to [Mr. H] on the telephone, [Respondent] stated that she could not control who answers the telephone but the [sic] she agreed to work on [R.M.] not

answering. [Mr. H] was released in late January of 2007, but [Respondent] did not tell social worker Garrett this for several weeks. When social worker Garrett did discover [Mr. H] had been released, another Child and Family Team meeting was set for February 20, 2007, for [Mr. H] to attend. [Mr. H] did attend this meeting, accompanied by his criminal counsel, Ben Wrenn. An agreement was reached between [Mr. H] and [DSS] that he would have no contact with [R.M.] and would have supervised contact only with the other children. When [Respondent] [came to] the meeting, she became very angry when she realized that [Mr. H] had agreed to that and stated that she would need [Mr. H] to help with the other children once she gave birth to the child she was then carrying. Thereafter, both [Respondent] and [Mr. H] refused to sign a safety plan for the children, which prompted [DSS] to file the juvenile abuse and neglect petition and to request nonsecure custody.

9. Based on the above findings and conclusions, the Court finds that [R.M.] is an abused juvenile in that a parent or caretaker committed or permitted a sex offense with or upon the juvenile in violation of the criminal law and the Court finds that [R.M.] and the five siblings who are the subject of this action are neglected juveniles in that they did not receive proper care and supervision from a parent and lived in an environment injurious to their welfare.

Respondent challenges all of the above findings of fact. However, Respondent concedes that findings of fact numbers 5 and 8 contain true statements, and she does not argue that they are not supported by competent evidence. Therefore, those "findings are deemed to be supported by competent evidence and are binding on appeal." *In re M.A.I.B.K.*, 184 N.C. App. 218, 222, 645 S.E.2d 881, 884 (2007) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

Respondent argues that findings of fact numbers 2, 3, 6, and

7 are not supported by competent evidence. Specifically, Respondent contends that the findings are based on improper hearsay evidence.

As noted above, the statements were admitted without objection. Moreover, "even 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 concedes that she "cannot in good faith argue that there is no evidence that R.M. was abused in some way by Mr. H." As the trier of fact, the trial court was permitted to give more weight to the testimony of Houchins and Perkins than that of the other witnesses. *See In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996). Thus, we hold the trial court's findings were supported by other competent evidence, and any error in admitting hearsay testimony was not prejudicial.

Respondent challenges finding of fact number 4 by arguing that it does not show that she neglected R.M. Furthermore, Respondent contends that finding of fact number 9 is a conclusion of law and there is no evidence to support the conclusion that she neglected any of the children, or that she abused or permitted the abuse of R.M.

"The purpose of abuse, neglect and dependency proceedings is for the court to determine whether the juvenile should be adjudicated as having the status of abused, neglected or dependent." *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007).

The purpose of the adjudication and disposition proceedings should not be morphed on appeal into a question of culpability regarding the conduct of an individual parent. The question this Court must look at on review is whether the court made the proper determination in making findings and conclusions as to the status of the juvenile.

Id.

As noted, Respondent concedes there is evidence that R.M. was abused in some manner by Mr. H. In spite of this, Respondent, at some point, chose not to believe R.M. Respondent failed to acknowledge potential harm to the other children, insisting that Mr. H be allowed to have contact with the other children. In fact, Respondent allowed Mr. H to call the home and risk having contact with R.M. Based on the foregoing, we hold that the findings of fact are supported by clear and convincing evidence. We further hold that the findings support the conclusion that R.M. was an abused juvenile, and all six children were neglected juveniles. The trial court's orders are affirmed.

Affirmed.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).