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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-494

Filed: 20 December 2016

Wake County, Nos. 15 JA 195-99

IN THE MATTER OF: B.E., C.E., C.E., D.E., S.E.

Appeal by respondent from order entered 18 February 2016 by Judge Keith Gregory in Wake County District Court. Heard in the Court of Appeals 21 November 2016.

Wake County Attorney's Office, by Senior Deputy Wake Co. Attorney Roger A. Askew, for petitioner-appellee Wake County Human Services.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for respondent-appellant.

Keith Karlsson for guardian ad litem.

TYSON, Judge.

Respondent-father appeals from an order which adjudicated his daughter "Cathy" as an abused juvenile, and adjudicated "Cathy," "Beverly," "Charles," "Dominic," and "Samantha" as neglected juveniles. The parties have stipulated to pseudonyms for the minor children pursuant to N.C.R. App. P. 3.1(b). We affirm the district court's adjudication order.

I. Factual Background

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Respondent-father and mother are married and are the natural parents of five children, three daughters and two sons, born between 1998 and 2011. Both parents were employed; Respondent-father worked nights and mother worked days.

On 7 January 2015, law enforcement officers executed a search warrant at the family's home based upon allegations of child pornography being downloaded. When law enforcement officers arrived, Respondent-father answered the door and reported he had been occasionally sleeping on the floor in the same room as Beverly, who was sixteen years old. The officers contacted Wake County Human Services ("WCHS"). Beverly has not asserted any allegations of abuse by Respondent-father. No physical or other evidence of sexual or any other abuse of Beverly, or any of the other four children, except Cathy by either parent has been alleged or shown.

A WCHS social worker arrived at the home and interviewed the children. Cathy, who was seven years old, purportedly disclosed during her interview that Respondent-father had inappropriately touched her and penetrated her anus with his penis. Respondent-father was arrested and charged with sexual offense with a child, indecent liberties with a child, and twelve counts of second degree sexual exploitation of a minor based on the child pornography discovered on his computer. All the children remained in their home in the custody of their mother.

On 9 January 2015, Respondent-father called his wife from the Wake County jail and stated in response to the question of whether he was "guilty of everything:"

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“Yeah. I’m guilty, I’m very guilty.” At the adjudication hearing, Respondent-father testified his statements were directed to “having possibly downloaded things that I wasn’t supposed to download.”

On 30 January 2015, Beverly and Cathy underwent Child Medical Exams. No physical evidence of any sexual assaults or trauma was observed during the physical examinations of either daughter. Cathy again stated Respondent-father had sexually assaulted her. After Beverly’s exam, doctors concluded that she had depressive symptoms, was dysthymic and isolated. Intensive home services were recommended for the entire family.

Initially, the children’s mother cooperated with WCHS, with the exception of allowing the children to have phone contact with Respondent-father on one occasion. Over six months after Respondent-father’s arrest, WCHS asserted mother’s cooperation did not continue. WCHS filed a petition, which alleged Cathy and all of the children were abused and neglected. The petition alleged the children’s mother became resistant to WCHS intervention and services and had failed to follow through with recommended services. WCHS did not seek nonsecure custody of the children.

On 18 February 2016, the trial court entered an order, which concluded Cathy was abused and all five children were neglected. The order states the children’s mother had stipulated to facts, which may support the adjudication that Cathy was abused and that all five children were neglected. The children were permitted to

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remain in the sole legal custody of their mother, and the mother was ordered to comply with an “In Home Services Agreement.” The Agreement required the mother to, *inter alia*, obtain mental health assessments for all of the children and individual therapy for Beverly and Cathy.

At the adjudication hearing, Respondent-father denied sexually assaulting Cathy. He claims the download of the child pornographic videos was accidental. The court ordered him to comply with the In Home Services Agreement and prohibited him from any contact with his children. Respondent-father filed a timely notice of appeal.

II. Standard of Review

This Court reviews a trial court’s adjudication of a child to be a neglected juvenile to determine “(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). “The trial court’s conclusions of law are reviewable *de novo* on appeal.” *In re K.J.D.*, 203 N.C. App. 653, 657, 692 S.E.2d 437, 441 (2010) (citation and quotation marks omitted).

III. Issue

Respondent-father does not challenge the adjudication of Cathy as abused and neglected. His sole argument asserts the trial court erred by adjudicating his

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remaining four children as neglected juveniles. Respondent-father asserts the evidence presented at adjudication does not support such a finding, and the trial court failed to make specific findings that his four children were either harmed or at risk of harm when the petition was filed.

IV. Analysis

A neglected juvenile is defined in relevant part 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 lives in an environment injurious to the juvenile's welfare[.] . . . *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) (2015) (emphasis supplied).

Our Court has previously explained that this definition of neglect affords “the trial court some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside.” *In re McLean*, 135 N.C. App. 387, 395, 521 S.E.2d 121, 126 (1999) (citation and quotation marks omitted).

The trial court failed to make any specific finding that Respondent-father's other four children had been impaired or either one or all were at substantial risk of impairment. Respondent-father argues no evidence was presented at the adjudication hearing which would support such a finding. No testimony was

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presented that Respondent-father sexually assaulted or exposed any of his other children to pornography. WCHS presented no testimony that the other children were aware of Cathy's allegations.

“[T]his 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) (citation and quotation marks omitted).

The trial court found:

11. Child Medical exams were held January 30, 2015 for [Beverly] and [Cathy]. [Cathy] was consistent in her disclosures and provided significant detail that corroborated that [Respondent-father] sexually assaulted her

12. The father sexually abused [Cathy]. [Cathy, Beverly, Charles, Dominic and Samantha] were neglected in that they lived in a injurious environment and were not provided with proper care and supervision.

. . . .

14. [Beverly] has a history of increasing symptoms for depression and anxiety for the last two years which the family acknowledges but they have not gotten [Beverly] treatment.

Respondent-father fails to challenge the trial court's conclusion that Cathy was sexually abused, while his other children were living in the home. Respondent-father

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does not challenge the trial court's finding that videos of child pornography were found on his home computer. He acknowledged he downloaded child pornography, but testified the download was initially accidental. When questioned about how the accidental download of numerous videos occurred, Respondent-father did not explain the accident and asserted his Fifth Amendment rights. Testimony showed numerous, separate pornographic videos of young children were recovered from his computer.

The unchallenged finding that Cathy was sexually abused is relevant, but not the sole factor to the determination of whether the remaining children were also neglected. Our Court has held that while the statutory "language regarding abuse or neglect 'does not mandate' the trial court's conclusion of neglect the trial judge has 'discretion in determining the weight to be given such evidence.'" *In re C.M.*, 198 N.C. App. 53, 65-66, 678 S.E.2d 794, 801 (2009) (quoting *In re Nicholson*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994)).

In *In re C.M.*, the trial court found that one juvenile in the family, Alexander, had injuries which "were inflicted by non-accidental means," that the injury occurred close in time to three occasions in which respondents had presented the child to the emergency room, the respondent-father subsequently had slapped the child and the injuries "were significant and life threatening." This Court held these findings supported the trial court's conclusion that the juvenile was abused. *Id.* at 62, 678 S.E.2d at 799.

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Further, this Court held that the findings of fact provided clear and convincing evidence that both juveniles were at risk due to the abuse of Alexander, the instability and volatility of the living conditions, the deceptive nature of the respondents, and the environment in which they lived was injurious in that it involved violence. *Id.* at 66, 678 S.E.2d 802.

Since the statutory definition of a neglected child includes living with a person who has abused or neglected other children, and since this Court has held that the weight to be given that factor is a question for the trial court, the trial court, in this case, was permitted, although not required, to conclude that Tess [sibling] was neglected based on evidence that respondent-father had abused Alexander. *See, e.g., In re A.S.*, 190 N.C. App. 679, 691, 661 S.E.2d 313, 321 (2008) (affirming the trial court's adjudication of neglect of one child based on evidence that respondent had abused another child by intentionally burning her), *affirmed per curiam*, 363 N.C. 254, 675 S.E.2d 361 (2009); *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005) (affirming adjudication of neglect of one child based on prior adjudication of neglect with respect to other children and lack of accepting responsibility).

Id. at 66, 678 S.E.2d at 801.

With the trial court's unchallenged finding that Cathy was abused, the trial court's discretion to weigh that factor in determining whether the four other siblings were neglected is provided by the statute. *Id.*; N.C. Gen. Stat. § 7B-101(15).

In *In re F.C.D.*, ___ N.C. App. ___, ___, 780 S.E.2d 214, 222 (2015), the respondent parents physically abused one child. The trial court concluded the second child was neglected. The trial court failed to make an express finding that the second

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child was at risk of impairment based on her exposure to her half-brother's abuse. This Court relied on *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003), and held there would be no error, if all the evidence would support a finding of risk of impairment. *Id.* at __, 780 S.E.2d at 222. "Moreover, this Court has held that the exposure of a child to the infliction of injury by a parent to another child or parent, can be conduct causing or potentially causing injury to that child." *Id.* at __, 780 S.E.2d at 222 (citation and quotation marks omitted). The Court held the trial court's adjudication of the second child as a neglected juvenile did not constitute error. *Id.* at __, 780 S.E.2d at 222. We stress this is a statutorily allowed factor for the trial court to consider, and is not solely determinative in the adjudication of the other children. *In re C.M.*, 198 N.C. App at 65, 678 S.E.2d at 801.

The unchallenged evidence showed that Beverly had increasing symptoms of depression and that the family had removed her from school and not sought treatment for her. Until WCHS filed its petition, Respondent-mother had not cooperated with therapy recommended for the family.

Respondent-father also downloaded child pornography on his computer located in his home where his five children lived. This evidence, made part of the trial court's findings of fact "can be conduct causing or potentially causing injury" to the four remaining siblings. *In re F.C.D.*, __ N.C. App. at __, 780 S.E.2d at 222. WCHS's evidence considered in whole supports the trial court's finding that Beverly, Charles,

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Dominic and Samantha “were neglected in that they lived in an injurious environment and were not provided proper care and supervision.”

Stanley v. Illinois, 405 U.S. 645, 31 L. Ed. 2d 551 (1972) and *Santosky v. Kramer*, 455 U.S. 745, 71 L. Ed. 2d 599 (1982) stand for the “premise that the parents’ right to retain custody of their child and to determine the care and supervision suitable for their child, is a ‘fundamental liberty interest’ which warrants due process protection.” *In re Montgomery*, 311 NC 101, 106, 316 S.E.2d 246, 250 (1984). “In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent.” *Id.* at 109, 316 S.E.2d at 252.

The trial court’s omission of findings regarding risk of impairment is not reversible error where our review of all of the evidence submitted supports such a finding and the trial court’s finding of abuse of one child is not challenged. *See Padgett*, 156 N.C. App at 648, 577 S.E.2d at 340.

V. Conclusion

Clear, cogent and convincing record evidence supports the trial court’s conclusion that Cathy was abused and her siblings were neglected. The order appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judges BRYANT and McCULLOUGH concur.

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Report per Rule 30(e).