IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-57

Filed: 3 December 2019

Guilford County, Nos. 16 JT 71-72

IN THE MATTER OF: A.H. & T.H.

Appeal by respondent from order entered 22 August 2018 by Judge K. Michelle Fletcher in Guilford County District Court. Heard in the Court of Appeals 4 September 2019.

Spidell Family Law, PLLC, by Megan E. Spidell, and Kettles Law, PLLC, by Sarah L. Kettles, for petitioner-appellee.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky Brammer, for respondent-appellant.

BERGER, Judge.

Respondent-Mother's parental rights were terminated by the trial court pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) for willful abandonment. Respondent-Mother appeals, alleging that the trial court erred when it (1) concluded that she willfully abandoned the juveniles, and (2) admitted Petitioner-Father's cell phone records into evidence in the absence of a recognized hearsay exception. For the reasons stated herein, we vacate and remand.

Factual and Procedural Background

Petitioner-Father and Respondent-Mother were married in April 2007. The parties had two children together, Taylor and Alice.[1] After Taylor was born, Petitioner-Father became increasingly concerned over the behaviors Respondent-Mother was exhibiting, including "constantly following [him] from room to room around [their] house," "bugging [his] car . . . with recording equipment," etc. Petitioner-Father attempted to have Respondent-Mother involuntarily committed, and, when she returned home after being released without being committed, the two separated. When the two separated, Respondent-Mother was pregnant with Alice.

Petitioner-Father filed a complaint for custody of the two children in July 2010 in Lee County. The parties consented to a custody arrangement in which they shared joint legal and physical custody of the two minor children.

Respondent-Mother was committed to a mental health facility in September 2011. Petitioner-Father filed a *Motion for Modification of Child Custody and Motion for Emergency Custody* in Lee County. A temporary custody order was entered that awarded Petitioner-Father primary custody of both children. The parties later consented to an arrangement in which temporary custody of the minor children remained with Petitioner-Father and Respondent-Mother was entitled to supervised visitation every Saturday.

[1] Pseudonyms are used for both minor children to protect their identities and for ease of reading.

On December 25, 2011, Respondent-Mother went to Petitioner-Father's grandmother's house unannounced. The minor children and Petitioner-Father were celebrating Christmas with Petitioner-Father's family. After this incident, Respondent-Mother informed Petitioner-Father via text message that she was taking her son from another relationship to be with his father in Mexico.

On January 26, 2012, Petitioner-Father filed a *Motion for Modification of Order to Suspend and/or Terminate Defendant's Visitation*. Respondent-Mother was not present for hearing on the motion, and the trial court entered an order allowing Petitioner-Father's motion. The order also suspended Respondent-Mother's visitation privileges. In July 2012, Respondent-Mother filed *pro se* a *Motion for Modification of Custody and/or Visitation Order*. Respondent-Mother appeared in court on October 31, 2012 for hearing on her motion, but the matter was continued. Respondent-Mother's motion was later dismissed without prejudice for her failure to prosecute.

In 2014, Respondent-Mother gave birth to triplets while living in a mental health facility in Missouri. After her release from the mental health facility, she returned to North Carolina in July 2014.

Respondent-Mother's father remained in contact with Petitioner-Father. In December 2015, her father gave the minor children a Christmas gift from

Respondent-Mother, although he did not tell them or Petitioner-Father that the gifts came from Respondent-Mother.

On May 11, 2016, Petitioner-Father filed a petition to terminate Respondent-Mother's parental rights to Taylor and Alice. Petitioner-Father alleged that grounds existed to terminate Respondent-Mother's parental rights for dependency and willful abandonment under Sections 7B-1111(a)(6) and (7) of the North Carolina General Statutes. Hearing on the petition was held in Guilford County District Court from July 9-10, 2018. At the hearing, the parties disputed how often Respondent-Mother had telephone contact with the minor children in the years since the trial court's order suspending her visitation privileges. Respondent-Mother claimed that she made numerous attempts to call Petitioner-Father so that she could talk to the children, but her calls always went to voicemail. Respondent-Mother testified that she eventually called less and less, and she never left voicemails. Petitioner-Father testified that Respondent-Mother's contact was sporadic and that Respondent-Mother last spoke with the minor children on August 5, 2013.

The trial court granted Respondent-Mother's motion to dismiss the allegation of dependency under Section 7B-1111(a)(6) for insufficiency of evidence. However, on August 22, 2018, the trial court entered an order concluding that grounds existed for termination for willful abandonment under Section 7B-1111(a)(7). It further concluded that termination was in the best interests of Taylor and Alice, and the trial

court terminated Respondent-Mother's parental rights to the minor children. On appeal, Respondent-Mother argues that the trial court erred when it (1) concluded that grounds existed to terminate her parental rights based on willful abandonment, and (2) admitted Petitioner-Father's cellphone records into evidence. We address each argument in turn.

Analysis

I. Willful Abandonment

> Our Juvenile Code sets forth a two-step process for the termination of parental rights. At the adjudication stage, the petitioner bears the burden of proving by clear . . . and convincing evidence that grounds exist for termination pursuant to section 7B-1111 of the General Statutes. If the trial court finds that grounds exist for termination, it then proceeds to the dispositional stage at which it must 'determine whether terminating the parent's rights is in the juvenile's best interest' based on [enumerated] factors . . . .

In re E.H.P. & K.L.P., ___ N.C. ___, ___, 831 S.E.2d 49, 52 (2019) (internal citation omitted). We review the trial court's findings of fact to determine whether they are supported by clear and convincing evidence and whether these findings support the conclusions of law. N.C. Gen. Stat. § 7B-805 (2017); *In re E.H.P.*, ___ N.C. at ___, 831 S.E.2d at 52.

Grounds exist to terminate parental rights where "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion . . . ." N.C. Gen. Stat. § 7B-1111(a)(7) (2017). This

section requires that the trial court make a determination of willful abandonment for the time period "*at least six consecutive months* immediately preceding the filing of the petition or motion." N.C. Gen. Stat. § 7B-1111(a)(7) (emphasis added).

Here, the petition to terminate Respondent-Mother's parental rights to the minor children was filed on May 11, 2016. The relevant six-month timeframe for consideration under Section 7B-1111(a)(7) would have been November 11, 2015 through May 11, 2016. However, the trial court found that "the relevant period for the [c]ourt to consider is December 11, 2015 through May 11, 2016."

The trial court miscalculated the relevant time period and, in doing so, only considered the *five* months preceding the petition to terminate parental rights rather than the statutorily required six months. By failing to consider the proper statutory timeframe for willful abandonment under Section 7B-1111(a)(7), the trial court erred in concluding that grounds existed to terminate Respondent-Mother's parental rights to Taylor and Alice.

Petitioner-Father does not dispute that the trial court erred in miscalculating the relevant time period for purposes of determining willful abandonment under Section 7B-1111(a)(7). Instead, he contends this was harmless error because "the trial court made sufficient findings based upon clear [ ] and convincing evidence, of the correct relevant period." The trial court's Findings of Fact regarding willful abandonment, however, repeatedly reference the erroneous time period:

> b. [Respondent-Mother] did not initiate any contact with the juveniles during the relevant period.
>
> c. [Respondent-Mother] did not send any cards, gifts, tokens of affection for the juveniles during the relevant period . . . .
>
> . . . .
>
> f. [Respondent-Mother] is not on social media (Facebook), however, [she] did not make any attempts to reach out to any of [Petitioner-Father]'s family members who are on social media during the relevant period to communicate with or see the juveniles.
>
> g. [Respondent-Mother] failed to engage in any parental role for the juveniles during the relevant period.
>
> h. [Respondent-Mother] did not provide any voluntary financial assistance for the juveniles during the relevant period . . .
>
> i. [Respondent-Mother] did not send any letters, birthday or Christmas cards to the juveniles during the relevant period . . . .

These findings demonstrate that the trial court was considering the evidence in the context of only a five-month period. To have us extend the trial court's findings for a sixth month would impermissibly place us in a fact-finding role that belongs to the trial court. *See In re F.G.J., M.G.J.*, 200 N.C. App. 681, 693, 684 S.E.2d 745, 754 (2009) ("It is the role of the trial court and not this Court to make findings of fact regarding the evidence."). Accordingly, we must vacate and remand.

II. Cell phone records

Petitioner-Father sought to admit copies of his cell phone records at trial to prove that Respondent-Mother did not contact the minor children by telephone. The cell phone records contained his "phone logs" from December 11, 2015 to May 11, 2016.[2] Respondent-Mother objected to the admission of the cell phone records, arguing they were inadmissible hearsay. Respondent-Mother contends the trial court erred when it admitted the cell phone records into evidence over her objection.

We review "a trial court's ruling on the admission of evidence over a party's hearsay objection *de novo*." *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

"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) (2017) (quotation marks omitted). "Hearsay is not admissible except as provided by statute . . . ." N.C. Gen. Stat. § 8C-1, Rule 802 (2017).

[2] "Relevant time period" as used herein refers to the five month period between December 11, 2015 and May 11, 2016.

Assuming without deciding that Petitioner-Father's cell phone records were inadmissible hearsay, Respondent-Mother has not demonstrated prejudice from the admission of these records.

> The mere admission by the trial court of incompetent evidence over proper objection does not require reversal on appeal. Rather, the appellant must also show that the incompetent evidence caused some prejudice. In the context of a bench trial, an appellant must show that the court relied on the incompetent evidence in making its findings. *Where there is competent evidence in the record supporting the court's findings, we presume that the court relied upon it and disregarded the incompetent evidence*.

In re Huff, 140 N.C. App. 288, 301, 536 S.E.2d 838, 846 (2000) (emphasis added) (*purgandum*).

The trial court found by clear and convincing evidence that "Respondent[-M]other did not initiate any contact with the juveniles during the relevant period." This finding of fact is supported by Petitioner-Father's testimony:

> Q. What, if any, contact did [Respondent-Mother] have with the children in the year of 2014?
>
> A. None.
>
> THE COURT: Did you say none?
>
> THE WITNESS: None. No, ma'am. I mean, yes, ma'am.
>
> Q. Were there any calls -- what, if any, calls were placed to the children or requests to see the visit -- to visit with the children during 2014?
>
> . . . .
>
> A. None. I don't remember any.

Q. Okay. So none that you recall?

A. No, ma'am.

Q. And what about with regard to 2015?

A. The one I do remember is I think it was around June. It was summertime 2015. It was a text from her saying that she had hired an attorney.

Q. And how do you know that it was from [Respondent-Mother]?

A. On the text it came up, her name[.]

. . . .

Q. And what, if any other, contact in the year 2015 did you have from [Respondent-Mother]?

A. None. None at all.

Q. No calls?

A. No, ma'am.

Q. No texts other than that one?

A. That was it.

. . . .

Q. And when was the next contact that you had with [Respondent-Mother]?

A. None.

Q. You had no contact? So for the remainder of 2015, what, if any, attempts did she make to contact you?

A. None.

. . . .

Q. And as far as through the period of the end of December, December 31st, 2015, did you receive any other contact from [Respondent-Mother] whatsoever?

A. No, ma'am.

> Q. And when was the next time that you received communication from [Respondent-Mother]?
>
> A. I think it was June 20th, 2016.
>
> Q. In the period of May -- of December 11th of 2015 to May 11th, 2016, what, if any, communication either via phone, via text message, via email did you receive from [Respondent-Mother]?
>
> A. None.
>
> . . . .
>
> Q. And were -- what, if any, attempts around that time -- were there any calls made to the children?
>
> A. None. No calls.

Respondent-Mother correctly notes that the trial court found that "[Petitioner-Father] introduced cellphone records for each month of the relevant period, which show no calls from Respondent[-Mother] during the period to the juveniles, and therefore the Court finds that no calls to the juveniles were made during the relevant period." This finding was not material. Because other competent evidence supports the trial court's finding that Respondent-Mother did not contact or call the minor children during the relevant time period, Respondent-Mother was not prejudiced by the admission of the phone records. *In re Huff*, 140 N.C. App. at 301, 536 S.E.2d at 846 ("Where there is competent evidence in the record supporting the court's findings, we presume that the court relied upon it and disregarded the incompetent evidence." (citation and quotation marks omitted)).

Conclusion

For the reasons stated herein, the order terminating Respondent-Mother's parental rights is vacated and the matter remanded to the trial court.

VACATED AND REMANDED.

Judge INMAN concurs.

Judge MURPHY concurs in part and dissents in part by separate opinion.

Report per Rule 30(e).

No. COA 19-57 – *In re A.H. & T.H.*

MURPHY, Judge, concurring in part and dissenting in part.

When the proponent of evidence fails to lay the proper foundation for the evidence to be admitted under the "Records of Regularly Conducted Activity" exception to the rule against hearsay, the trial court errs in admitting such evidence at the adjudication stage of a petition to terminate parental rights. Based on the findings of the trial court in this case, I do not join the Majority in finding a lack of prejudice to Respondent-Mother. However, I join the Majority in its analysis and holding that the trial court erred in concluding that grounds exist to terminate parental rights for willful abandonment under N.C.G.S. § 7B-1111(a)(7) when it failed to consider the correct statutory six-month time period. Although I too would vacate and remand the trial court's order, because my analysis requires the trial court to reconsider Respondent-Mother's credibility on remand without the erroneously admitted cell phone records, I respectfully dissent in part.

At trial, Petitioner-Father's counsel sought to admit copies of Petitioner-Father's cell phone records, specifically his billing statement containing "phone logs" from 11 December 2015 to 11 May 2016. Respondent-Mother's counsel objected to the admission of the cell phone records, arguing they were inadmissible hearsay.[3]

[3] Petitioner-Father argues that Respondent-Mother's hearsay argument "was not timely raised during trial and therefore not properly before the Court on appeal." Specifically, he argues that

The trial court overruled Respondent-Mother's objection, which she contends was in error.

We review "a trial court's ruling on the admission of evidence over a party's hearsay objection *de novo*." *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* at 639, 777 S.E.2d at 348 (quoting *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008)).

"'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.G.S. § 8C-1, Rule 801(c) (2017). "Hearsay is not admissible except as provided by statute or by these rules." N.C.G.S. § 8C-1, Rule 802 (2017). Petitioner-Father contends the cell phone records were admissible under the statutory exception for "Records of Regularly Conducted Activity." N.C.G.S. § 8C-1, Rule 803(6) (2017). That exception states:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if (i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all

---

Respondent-Mother's argument at trial centered on "authenticity" and not hearsay. I disagree. At trial, Respondent-Mother's counsel explicitly stated "I'm going to object at this point on hearsay grounds . . . ." Counsel's reference to authenticity was within her argument regarding Rule 803(6), which may incorporate questions of authenticity. *See State v. Miller*, 80 N.C. App. 425, 429, 342 S.E.2d 553, 556 (1986) (discussing "[a]uthentication" within the context of Rule 803(6)).

> as shown by the testimony of the custodian or other qualified witness, or by affidavit or by document under seal under Rule 902 of the Rules of Evidence made by the custodian or witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. Authentication of evidence by affidavit shall be confined to the records of nonparties, and the proponent of that evidence shall give advance notice to all other parties of intent to offer the evidence with authentication by affidavit. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Id. The question before us is whether the cell phone records were properly authenticated under Rule 803(6).

These cell phone records were not authenticated by affidavit or by document under seal under Rule 902. Petitioner-Father also does not contend that he was a custodian of the cell phone records. Rather, he argues that he is a "qualified witness" and that his testimony as a qualified witness properly authenticated the cell phone records.

We have held that it is not necessary for the individual who generated a record to authenticate it. *In re S.D.J.*, 192 N.C. App. 478, 482-83, 665 S.E.2d 818, 821 (2008). Yet "the foundation must be laid by a person familiar with the records and the system under which they are made[.]" *Id.* at 482, 665 S.E.2d at 821. Petitioner-Father testified to the following:

> [Counsel:] Can you identify this document for the Court?

> [Petitioner-Father:] That's my phone bill.
>
> [Counsel:] And how do you know that it's your phone bill?
>
> [Petitioner-Father:] It has my name on it.
>
> [Counsel:] Is . . . this your account number here at the top?
>
> [Petitioner-Father:] Yes, ma'am.

Petitioner-Father then testified as to his account number and the date range listed on the cell phone records. This testimony evinces Petitioner-Father's familiarity with the proffered evidence in that he had seen the statements before and recognized his identifying information on the records.

This testimony, however, fails to establish Petitioner-Father's familiarity with the system under which the cell phone records were made. Petitioner-Father's testimony did not address the methods under which the cell phone records were generated or the system under which they were stored and maintained. *See id.* (purgandum) ("A qualifying business record is admissible when a proper foundation is laid by testimony of a witness who is familiar with the records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy.").

To support his argument that the trial court properly admitted the cell phone records, Petitioner-Father points us to *State v. Miller*, 80 N.C. App. 425, 342 S.E.2d 553 (1986). There, we held that the trial court did not err in admitting into evidence,

over the defendant's hearsay objection, the results of the defendant's blood test through the testimony of an emergency room nurse. *Id.* at 427, 342 S.E.2d at 556. At trial, the nurse "testified that it is part of routine emergency room treatment of trauma victims to order a laboratory panel, which includes the blood test at issue." *Id.* at 428, 342 S.E.2d at 555. She further testified that "she saw the venipuncture technician draw the blood and leave to take the blood to the hospital 'stat' laboratory . . . ." *Id.* We concluded that the emergency room nurse who ordered the blood test was a "qualified witness" under Rule 803(6) whose testimony established that the "results of the blood test constitute[d] a record made in the usual course of business[.]" *Id.* at 429, 342 S.E.2d at 556. We further stated that "[a]uthentication [was] not undermined because the person who actually analyzed the blood in the stat laboratory was not present to testify as a witness." *Id.*

The case before us is distinguishable from *Miller*. While the nurse in *Miller* was not the one who analyzed the defendant's blood or generated the blood test results, she was familiar with the "system under which" the blood results were made and her testimony established that familiarity. *Id.* In contrast, here, Petitioner-Father's testimony failed to establish that he had a familiarity with the system under

which the cell phone records were generated, stored, or maintained. Defendant's reliance on *Miller* is misplaced.[4]

Accordingly, Petitioner-Father's testimony did not lay the appropriate foundation for the cell phone records to be admitted as a record of regularly conducted activity under Rule 803(6). Petitioner-Father's testimony failed to establish that the admitted cell phone records were records of regularly conducted activity under Rule 803(6) or fell within any other exception to the rule against hearsay, and the trial court erred in admitting the cell phone records and considering them as substantive evidence.

I agree with the Majority that, "Where there is competent evidence in the record supporting the court's findings, we presume the court relied upon it and disregarded the incompetent evidence." Majority at 9 (purgandum). However, this presumption does not hold in light of the trial court's statement that it specifically relied on the incompetent evidence in its analysis. In Finding of Fact 18(e), the trial court found

> by clear . . . and convincing evidence . . . : Petitioner introduced cell phone records for each month of the relevant period, which show no calls from Respondent during the period to the juveniles, *and therefore* the Court finds that no calls to the juveniles were made during the relevant period.

[4] I further note that in citing *Miller* after the United States Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 174 L. Ed. 2d 314 (2009), I deal solely with authentication arguments under Rule 803(6).

(Emphasis added). This finding unequivocally negates the presumption that the trial court disregarded the same and the Respondent-Mother was not prejudiced thereby. As the determination of whether Respondent-Mother made calls to her children is material to the determination of whether grounds existed to terminate her constitutional right to parent her children and it is clear that the trial court relied on this incompetent evidence, we must reverse for the trial court to make its findings of fact, including credibility determinations, without any reliance whatsoever on the inadmissible cell phone records.