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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA COA19-1020

Filed: 4 August 2020

Guilford County, No. 19 JA 312

IN THE MATTER OF L.N.H.

Appeal by Mother from order entered 23 August 2019 by Judge Marcus A. Shields in Guilford County District Court. Heard in the Court of Appeals 9 June 2020.

Mercedes O. Chut for Petitioner-Appellee Guilford County Department of Health and Human Services.

Alston & Bird LLP, by Sarah R. Cansler, for Appellee-Guardian ad Litem.

Miller & Audino, LLP, by Jeffrey L. Miller, for Respondent-Appellant-Mother.

COLLINS, Judge.

Mother appeals from the trial court's adjudication, disposition, and permanency planning order. Mother argues that the trial court erred by adjudicating

her minor child “Lea”¹ abused, neglected, and dependent, and ceasing reunification efforts with Mother. We reverse the adjudications of abuse and neglect and remand for a new hearing, reverse the adjudication of dependency, and vacate the disposition and permanency planning order.

I. Procedural History and Factual Background

The Guilford County Department of Health and Human Services (“Department”) received a report on 7 May 2019 alleging that Lea, a 10-week-old infant weighing 11 pounds, had been taken to the emergency room at Moses Cone Hospital earlier that day for treatment of injuries inflicted by Mother while on the exterior porch of their residence. According to the report, observers saw Mother punch Lea in the chest, spray a green liquid in her face, swipe the flame of a lighter across her face, burn her feet with the flame, and lay her down on the porch. The report further alleged that the observers picked Lea up off the porch, contacted law enforcement, and indicated that Mother did not return to the porch to check on Lea.

Lea was transferred to Brenner Children’s Hospital in Winston-Salem, North Carolina. The Department later obtained Lea’s medical records from the hospital, which indicated that Lea sustained “partial thickness burns over the soles of her feet extending to the lateral aspect of the dorsum feet bilaterally and erythema on abdomen.”

¹ To protect the identity of the child, pseudonyms have been used throughout the opinion to identify the child and parties related to the child. *See* N.C. R. App. P. 3.1(b).

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On the same day, one of the Department's extended service social workers visited the emergency department of Wesley Long Hospital to interview Mother, who explained that she had put Lea to bed, had drunk a double shot of vodka, and did not remember hurting Lea. Mother told the social worker that she suffered from depression, that her doctor had recently increased the dosage of her prescribed medication, and that she did not have a mental health history. Mother reported that Lea's father lived in Colorado. Some of Mother's family members came with her to the hospital and stated that she had a long history of depression and had been abused as a child.

The next day, 8 May 2019, Jarin Elliot, a social worker and the Department's child protective services ("CPS") investigator, interviewed Mother at the Guilford County jail.² Mother told Elliot that she had been prescribed Zoloft for anxiety and depression but had not taken it in the past three weeks, and that she remembered putting Lea to bed, fixing a drink, and later being woken up by her mother asking her why Lea was in the hospital. Mother suggested that Lea's godmother would be a good placement option for Lea, but the Department did not perform a home study. Mother told Elliot that Lea's father was Brian Richardson and that she did not have any contact information for him.

² Mother had been charged with felony child abuse and incarcerated.

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On that same day, Lea's maternal great aunt, Gene Goodson ("Mrs. Goodson"); Lea's maternal great grandmother; and Mother's cousin presented themselves at the Department, offering to care for Lea. They told Elliot that they were not aware that Mother had any mental health diagnosis and that they did not know the whereabouts of Lea's father.

On 9 May 2019, the Department filed a juvenile petition requesting nonsecure custody of Lea and alleging that Lea was an abused, neglected, and dependent juvenile. At the time the petition was filed, Mother was incarcerated, and the Department had not succeeded in its efforts to locate Lea's putative father, Richardson. The trial court entered an order that day granting the Department nonsecure custody of Lea.

Richardson visited the Department on 14 June 2019 to take a paternity test, which established his paternity. On 31 July 2019, the trial court held adjudication, disposition, and permanency planning hearings.³ Although Richardson expressed interest in having Lea live with him, the Department was unable to perform background checks on him and his live-in girlfriend or obtain results of a drug screening of Richardson before the hearings. At the time of the hearings, no case plan had been developed for Richardson because the Department had not received

³ Richardson attended the hearings by telephone and was represented by counsel in the courtroom.

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requested information from Richardson and had not received a response from Richardson's attorney.

Mother remained incarcerated through the date of the hearings. While in jail, Mother entered into a limited jail case plan with the Department, which required her to complete parenting classes, attend Alcoholics Anonymous ("AA") groups, comply with recommended psychiatric treatment, inform the Department of the status of her criminal charge, take all prescribed medications, refrain from incurring infractions in jail, and participate in life-skills programs. As of the date of the hearings, Mother had reported completing 75% of the parenting classes, had started attending AA meetings, had not received disciplinary infractions, had kept the Department informed of the status of her criminal charges, and had earned certificates in eleven life-skills programs including anger management. Mother was taking daily medications as prescribed, and although Mother had not yet seen a therapist, as there were none on staff at the jail, it was determined that it would be possible for a therapist to visit Mother at the jail for this purpose.

During the adjudication hearing, the trial court heard testimony from Elliot, who testified that Mother had admitted to the extended service social worker in an interview on 7 May 2019 that Mother had been using alcohol while Lea was in her care, that Mother could not remember what had happened to Lea, and that Mother suffered from depression. Elliot also testified about his interview with Mother at the

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jail on 8 May 2019, wherein Mother told him that she had been prescribed Zoloft for anxiety and depression but had not taken it in the past three weeks, and that she remembered putting Lea to bed, fixing a drink, and later being woken up by her mother asking her why Lea was in the hospital.

Elliot also testified about the neighbors' initial report that prompted the investigation, wherein they described the events related to Lea's injuries. Additionally, Elliot testified that Lea was hospitalized and under the care of doctors on 7 and 8 May 2019 at Brenner Children's Hospital, whose medical records indicated that Lea had burns on her feet and erythema, superficial reddening of the skin, on her abdomen. The trial court took judicial notice of the medical records without objection. Elliot explained that he had determined after seeing pictures in the medical records of the burns on Lea's feet that the Department should seek nonsecure custody to ensure Lea's safety and to enable the Department to consent to her ongoing medical care.

At the conclusion of the adjudication hearing, the trial court adjudicated Lea abused, neglected, and dependent. During the disposition hearing, the trial court heard testimony from the foster care social worker about the Department's disposition report and Mother's progress with her case plan. The social worker testified that she had completed a home study for Mrs. Goodson and her husband, which had been approved by the Department; the Goodsons were willing to provide

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long-term care for Lea and comply with any trial court order; there were no concerns about the suitability of the Goodsons' home; the Goodsons did not have CPS or criminal histories; and the Department recommended that Lea remain in the legal custody of the Department and be placed with the Goodsons. Mother's counsel agreed that placement with the Goodsons was in Lea's best interest.

At the conclusion of the disposition hearing, the trial court found that an appropriate placement for Lea was with the Goodsons; that it was in Lea's best interest to remain in legal custody of the Department, to be placed with the Goodsons, and to have no contact with Mother; that the Department could allow Richardson visitation if he were to sign and make progress in a case plan; that the Department had made reunification efforts with Richardson and that continuing these efforts was in Lea's best interest; that the Department had provided services to Mother while she was in jail; and that there was no biological parent to whom Lea could return safely, and who could provide adequate supervision and meet Lea's needs.

During the permanency planning hearing, the trial court heard testimony from the foster care social worker and the guardian ad litem volunteer. At the conclusion of the hearing, the trial court found that ceasing reunification efforts with Mother was in Lea's best interest due to the aggravating circumstances related to Lea's serious physical injury while in Mother's care, and in consideration of Mother's pending felony charge for which she would need to serve an active prison sentence if

convicted. The trial court concluded that the primary plan of reunification with Richardson with the secondary plan of adoption was in Lea's best interest.

The trial court entered an Order consistent with its oral findings and conclusions on 23 August 2019, which Mother timely appealed.

II. Discussion

A. Adjudications of abuse and neglect

Mother first argues that the trial court erred by adjudicating Lea abused and neglected, because the findings of fact supporting the adjudications are based solely on the neighbors' report and the medical records, which constituted inadmissible hearsay.

When reviewing adjudications of abuse and neglect, we determine whether the trial court's findings of fact are supported by clear and convincing competent evidence and whether the findings of fact support the trial court's legal conclusions. *In re S.G.*, 835 S.E.2d 479, 483 (N.C. Ct. App. 2019). Properly supported findings are deemed conclusive on appeal, even if some evidence supports contrary findings. *Id.* "Unchallenged findings of fact are binding on appeal." *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011) (citation omitted). We review de novo the trial court's conclusions of law. *In re S.G.*, 835 S.E.2d at 483. We review de novo whether an out-of-court statement constitutes inadmissible hearsay. *State v. Castaneda*, 215 N.C. App. 144, 147, 715 S.E.2d 290, 293 (2011).

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The Juvenile Code defines abuse and neglect as follows:

(1) Abused juveniles. — Any juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker:

a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;

b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;

. . . .

(15) Neglected juvenile. — Any juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare . . .

N.C. Gen. Stat. § 7B-101 (2019).

In juvenile adjudication hearings, the North Carolina Rules of Evidence apply. *See* N.C. Gen. Stat. § 7B-804 (2019). “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 (2019). Hearsay is inadmissible as substantive evidence unless it falls within an exception to the rule against hearsay or another statute. N.C. Gen. Stat. § 8C-1, Rule 802 (2019).

In this case, the trial court made the following challenged findings of fact:

9. The [Department] most recently became involved with this family on May 7, 2019. Paternity had not been established at this time. The juvenile required medical attention as a result of sustaining injuries allegedly related to the mother having been observed by other individuals punching the juvenile in the chest, allowing green liquid to be placed across the juvenile's face, and lighting a flame,

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swiping the juvenile's face, and allowing the juvenile to sustain serious burns to her feet, as the mother being under the influence of alcohol, based upon her own admission.

10. Information was presented to the Court that the juvenile was located on the steps after the mother inflicted the injuries to the juvenile.

11. The Court considers the above injuries to be serious physical injuries; laying on the steps of the porch and found by neighbors, who advised the proper authorities.

....

16. The juvenile had to be transported to Brenner's Children's Hospital in Winston Salem to be treated for injuries sustained as a result of burns inflicted upon the sole of the juvenile's feet extending to the lateral aspect of dorsum feet bilaterally and erythema on abdomen.

17. Accepted into record as part of today's evidence, a previous exhibit admitted on May 10, 2019, which is in the court file; the Court took judicial notice.

....

21. The Department met its burden and the juvenile should be adjudicated as abused, based on the serious injury which was inflicted upon the juvenile as well as, after those injuries being inflicted on the juvenile, the juvenile was left and exposed to a substantial risk of harm, as she was left on the steps of the porch.

22. The juvenile is adjudicated neglected as a result of being in an injurious environment from the dates of May 7, 2019, and May 8, 2019, when the mother allowed the juvenile to be inflicted with injuries that she sustained; as well as the mother's use of alcohol and not remembering what took place, resulting in the juvenile's injuries.

....

24. Based upon the above Findings of Fact, the juvenile is adjudicated abused, neglected and dependent.

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At the adjudication hearing Mother objected on the basis of hearsay when Elliot began to testify to the substance of the neighbors' report. The trial court overruled Mother's objection based on the Department's explanation that it was not offering the report for its truth, but to explain why the Department had become involved with the family and what events gave rise to the Department's investigation.

A statement that explains a person's subsequent conduct is admissible nonhearsay. *State v. Goblet*, 173 N.C. App. 112, 117, 618 S.E.2d 257, 261 (2005). *See In re F.G.J.*, 200 N.C. App. 681, 687 n.2, 684 S.E.2d 745, 750 n.2 (2009) (noting that trial court's findings of fact related to testimony being challenged on hearsay grounds "appear to be explaining why DSS took certain actions"). However, it is apparent that portions of findings of fact 9, 10, 11, and 22 are based on the report as substantive evidence, and that finding of fact 24 is based in part on these findings. As the trial court did not limit its use of the report to an admissible nonhearsay purpose, but instead considered the report as substantive evidence, the trial court erred.

Moreover, while the challenged findings of fact are supported by the medical records, of which the trial court took judicial notice without objection, Mother argues that she was denied effective assistance of counsel because her counsel did not object to the trial court taking judicial notice of the records and did not otherwise object to the admission of the records.

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“In cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right.” N.C. Gen. Stat. § 7B-602(a) (2019). “This right to counsel also includes the right to effective assistance of counsel.” *In re S.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 (2009) (citation omitted). “To successfully establish that counsel’s assistance was ineffective, a parent must show: (1) [her] counsel’s performance was deficient or fell below an objective standard of reasonableness; and (2) [her] attorney’s performance was so deficient [she] was denied a fair hearing.” *Id.* (citation omitted). “A parent must also establish [s]he suffered prejudice in order to show that [s]he was denied a fair hearing.” *Id.* (citation omitted).

The transcript of the hearing reflects the following discussion:

[DEPARTMENT COUNSEL]: And did the [Department] receive medical records as a result of the child being admitted to the hospital?

[ELLIOT:] Yes.

[DEPARTMENT COUNSEL]: Your Honor, I’m not going to introduce an extensive amount of medical records; however, previously admitted into evidence on May 10th, 2019, are a portion of the medical records. Since those have already been admitted into evidence, I would ask at this time that you take judicial notice of those.

THE COURT: Any objection?

UNIDENTIFIED SPEAKER: No objection, Your Honor.

[MOTHER’S COUNSEL]: No objection, already in evidence.

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THE COURT: All right. So admitted. The Court will take judicial notice. May 10th, you said?

[DEPARTMENT COUNSEL]: Yes, Your Honor.

THE COURT: All right.

The same inadmissible hearsay regarding what observers saw happen to the juvenile as discussed above was included in the medical records. Even if we assume this is a proper use of “judicial notice,” the Department had already noted that it was not offering the evidence of what the observers saw for its truth but only to explain why the Department had become involved with the family and what events gave rise to the Department’s investigation. N.C. Gen. Stat. § 8C-1, Rule 801. Even if some of the information in the medical records was admissible, we assume the trial court in a bench trial has not considered inadmissible hearsay; but as discussed above, the findings of fact indicate the trial court did consider this information for the truth of the matter asserted. *In re A.L.T.*, 241 N.C. App. 443, 463, 774 S.E.2d 316, 328 (2015). To the extent Mother’s counsel failed to note the hearsay objection to the same information within the medical records as in Elliot’s testimony, Mother’s counsel’s performance was deficient and, as a result, Mother was denied a fair hearing. *In re S.C.R.*, 198 N.C. App. at 531, 679 S.E.2d at 909.

As the trial court erred by considering Elliot’s testimony regarding the substance of the neighbors’ report as substantive evidence, and Mother was denied a fair hearing as a result of counsel’s failure to object to the admission of the medical

records, we reverse the adjudications of abuse and neglect and remand the case to the trial court for a new hearing.

B. Adjudication of dependency

Mother next argues that the trial court erred by adjudicating Lea dependent, because Mother had alternative child care providers, and the trial court failed to make specific findings that Richardson was unable to provide for Lea or lacked alternative child care providers.

When reviewing an adjudication of dependency, we determine whether the trial court's findings of fact are supported by clear and convincing competent evidence and whether the findings of fact support the trial court's legal conclusions. *In re S.G.*, 835 S.E.2d at 483. Properly supported findings are deemed conclusive on appeal, even if some evidence supports contrary findings. *Id.* "Unchallenged findings of fact are binding on appeal." *Peters*, 210 N.C. App. at 13, 707 S.E.2d at 733. We review the trial court's conclusions of law de novo. *In re S.G.*, 835 S.E.2d at 483.

The Juvenile Code defines dependency as follows:

Dependent juvenile. — A juvenile in need of assistance or placement because . . . the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-101(9) (2019). "In determining whether a juvenile is dependent, the trial court must 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 L.H.*, 210 N.C. App. 355, 363, 708 S.E.2d 191, 196 (2011) (internal quotation marks and citation omitted). “[A]lthough N.C. [Gen. Stat.] § 7B-101(9) uses the singular word ‘the [] parent’ when defining whether ‘the [] parent’ can provide or arrange for adequate care and supervision of a child, our caselaw has held that a child cannot be adjudicated dependent where she has at least ‘a parent’ capable of doing so.” *In re V.B.*, 239 N.C. App. 340, 342, 768 S.E.2d 867, 868 (2015) (citation omitted). “The trial court must look at the situation before the court at the time of the hearing when considering whether a juvenile is dependent.” *In re F.S.*, 835 S.E.2d 465, 473 (N.C. Ct. App. 2019).

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

18. The Department continued to contact with the mother’s family, and on May 8, 2019, the maternal great-aunt, [Mrs. Goodson], presented herself along with Ms. [Braves], a cousin, as well as a Ms. [Kane] who presented themselves and was willing to take care of the juvenile. However, the Department taking into consideration the safety of the juvenile, based on the circumstances in which the juvenile came to acquire the attention of the Department, and prioritized the safety of the juvenile, over completing any home studies at that point.

19. The mother did not provide any other alternative placements with family members who presented themselves to the Department, or the mother was unable to provide any information as it related to [Richardson], who at the time, his location was unknown and the means to communicate with him remained unknown.

20. The Department made efforts to contact the mother and visited her at the Guilford County Jail, which the mother

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presented a potential placement alternative, [Ms. Brown], her godmother. However, due to the safety of the juvenile being paramount as their priority, they were unable to complete a home study prior to the filing of the petition. There was a sufficient need to consent to medical care, and the Department made the efforts to ensure that the mother would be unable to have contact as there was an urgency to do so. Although the mother was charged criminally as a result to the incident and held under a bond, there was a potential release and the priority was the juvenile's safety.

. . . .

23. The juvenile is adjudicated as dependent due to the time of the filing of the petition, the safety of the juvenile was paramount, and there were no alternative placements; and as of the date of the petition there were no biological parent with whom the juvenile could be returned to that would provide the adequate amount of care the juvenile required.

24. Based on the above Findings of Fact, the juvenile is adjudicated . . . dependent.

The trial court erroneously based its adjudication of dependency on conditions existing at the time the petition was filed instead of the time of the adjudication. *See In re B.P.*, 257 N.C. App. 424, 434, 809 S.E.2d 914, 920 (2018). Moreover, the trial court failed to make specific findings with respect to Lea's father's ability to provide or arrange care for her. *See In re V.B.*, 239 N.C. App. at 344-45, 768 S.E.2d at 870 (reversing trial court's adjudication of juvenile dependency because trial court made no findings that juvenile's father was unable to provide or arrange care for child).

Finally, the trial court found that Mother's family members presented themselves to the Department, representing themselves as Mother's family members

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willing to care for Lea. Indeed, among them was Mother's grandmother, Mrs. Goodson, with whom the Department ultimately placed Lea. Thus, Mother did not lack an appropriate available alternative child care arrangement. *See* N.C. Gen. Stat. § 7B-101(9). Accordingly, we reverse the trial court's adjudication of dependency.

In light of our above conclusions, we vacate the trial court's disposition and permanency planning order, which were based upon the trial court's adjudication of Lea as abused, neglected, and dependent.

III. Conclusion

We reverse the adjudications of abuse, neglect, and dependency. We vacate the disposition and permanency planning order. We remand for a new hearing on the allegations of abuse and neglect.

REVERSED IN PART, VACATED IN PART, AND REMANDED.

Judges STROUD and TYSON concur.

Report per Rule 30(e).