IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-353

Filed: 7 April 2020

Mecklenburg County, Nos. 18 JA 262–64

IN THE MATTER OF: H.A.V., O.A.A., N.L.

Appeal by respondent from order entered 14 December 2018 by Judge Ty M. Hands in Mecklenburg County District Court. Heard in the Court of Appeals 19 February 2020.

Mecklenburg County DSS, by Keith T. Roberson, for petitioner-appellee.

Lisa Anne Wagner for respondent-appellant mother.

Paul W. Freeman, Jr. for guardian ad litem.

DIETZ, Judge.

Respondent appeals the trial court's order adjudicating her three minor children as neglected and dependent juveniles. Respondent argues that the trial court improperly admitted hearsay evidence, improperly instructed her about her Fifth Amendment right against self-incrimination, and improperly denied her the opportunity to consult with her counsel while she was testifying. Respondent also challenges the findings of facts and conclusions of law in the court's order.

We reject these arguments. The only evidentiary arguments that Respondent properly preserved for appellate review are meritless and the trial court's handling of her testimony complied with both the Fifth Amendment and Respondent's statutory right to counsel. Furthermore, the trial court's findings are supported by competent evidence and those findings, in turn, support the trial court's conclusions of law. We therefore affirm the trial court's order.

Facts and Procedural History

In May 2018, law enforcement arrested Respondent during a raid on her home. The State charged Respondent with kidnapping, rape, and indecent liberties with a child.

In June 2018, Mecklenburg County Youth and Family Services filed a juvenile petition alleging that Respondent's three minor children, Nicole, Oscar, and Howard[1], are neglected and dependent juveniles. YFS obtained nonsecure custody of the children the same day.

YFS interviewed Respondent the day after taking custody of her children. Respondent requested that the children be placed with her brother or, in the alternative, with Nicole's father who lives in New Orleans. However, Respondent was unable to provide contact information for Nicole's father. YFS did not approve

[1] We use pseudonyms to protect the identities of the juveniles.

placement with Respondent's brother because of allegations against him in the juvenile petition.

The following week, the trial court held a hearing on the need for continued YFS custody. Nicole's father appeared and requested placement of Nicole, but placement was denied due to lack of information about the father's home in Louisiana. Respondent's brother also appeared, but was ordered to be excluded from future hearings based on allegations he threatened juveniles involved in Respondent's criminal charges.

YFS later filed an amended juvenile petition identifying the fathers of Oscar and Nicole. The court continued custody with YFS, granted Nicole's father visitation and contact with Nicole, ordered expedited home studies for Nicole's and Oscar's fathers, and granted YFS authority to place Nicole with her father if the home study was positive. After further investigation, YFS filed a second amended petition identifying the father of Respondent's remaining child, Howard, as Respondent's adult son, who also was arrested in the May 2018 raid by law enforcement.

In August 2018, the trial court conducted a hearing on the petitions. Oscar's and Nicole's fathers appeared and requested custody of their respective children. A YFS social worker testified about the circumstances surrounding the children's removal from Respondent's home and the investigation into their home situation.

Respondent also was called to testify. During the testimony, Respondent repeatedly invoked her Fifth Amendment right against self-incrimination. While on the stand, Respondent's counsel requested an opportunity to further advise Respondent about her Fifth Amendment rights, but the trial court declined the request.

A forensic interviewer from a child advocacy center testified and YFS presented notes and recordings of interviews conducted at the center with two juveniles, B.C. and J.C., who lived in Respondent's home. This evidence indicated that at B.C. had sexual contact with adults in Respondent's home.

Following the hearing, the trial court entered an order adjudicating all three children neglected and dependent. Oscar and Nicole were placed in the legal custody of their respective fathers and Howard was maintained in YFS custody. Respondent was ordered not to have any contact with the children. Respondent appealed.

Analysis

I. Admission of hearsay evidence

Respondent first argues that the trial court erred in admitting evidence of J.C.'s and B.C.'s child advocacy interviews under the residual exception to the hearsay rule. Respondent contends that the trial court failed to determine whether the witnesses were unavailable or to adequately consider the six factors required for

admission under the residual exception. We reject Respondent's arguments because they are not preserved for appellate review.

Generally, "[t]he admission of evidence pursuant to the residual exception to hearsay is reviewed for an abuse of discretion, and may be disturbed on appeal only where an abuse of such discretion is clearly shown." *In re W.H.*, __ N.C. App. __, __, 819 S.E.2d 617, 620 (2018) (citations omitted).

But "in order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." *In re K.A.*, 233 N.C. App. 119, 122–23, 756 S.E.2d 837, 840 (2014). This principle applies to rulings based on the residual exception to the hearsay rule. *State v. Rhome*, 120 N.C. App. 278, 286, 462 S.E.2d 656, 663 (1995).

The requirement that a litigant object on a "specific ground" in order to preserve the ground for further appellate review is a critical piece of our error preservation rules. "Error may not be argued on appeal where the underlying objection fails to present the nature of the alleged error to the trial court." *State v. Catoe*, 78 N.C. App. 167, 168, 336 S.E.2d 691, 692 (1985). "This rule serves to facilitate proper rulings" and to ensure that both the trial court and the parties can "take proper corrective measures to avoid retrial." *Id.*

Equally important, this rule prevents gamesmanship that can frustrate the prompt administration of justice. Specifically, objecting on one specific legal ground and then "swapping horses" and asserting a different one on appeal permits a party hold back potentially meritorious arguments until appeal and, as a result, get a second bite at the appeal in a new trial or hearing. *Rolan v. N.C. Dep't of Agriculture and Consumer Servs.*, 233 N.C. App. 371, 381, 756 S.E.2d 788, 794–95 (2014). Thus, this Court will adhere to the requirements of Rule 10 of the Rules of Appellate Procedure and examine whether the "specific ground" asserted on appeal is one that the litigant raised in the trial court.

Here, when YFS proffered evidence of J.C.'s and B.C.'s child advocacy interviews, Respondent objected on "*Crawford*" grounds, meaning an objection to the use of hearsay testimony on the ground that it is prohibited by the Confrontation Clause in the United States Constitution. The trial court overruled that objection on the ground that *Crawford* applies only in criminal cases.

The court then asked YFS whether the challenged evidence was hearsay. YFS conceded that it was but asserted that it was admissible under the residual exception in Rule 804(b)(5), quoting directly from the language of the rule.

Respondent then objected on the ground that the notice she received of YFS's intent to offer this hearsay evidence was inadequate because it contained inaccurate information. The trial court overruled this objection after reviewing the notice,

finding that the notice was adequate because it "[c]learly says the name and address" of the declarants, B.C. and J.C.

The trial court then asked if there were any additional objections and admitted the evidence after there were "no other objections":

> THE COURT: So overruled on that basis. Clearly says name and address there. Objection overruled. Anything additional? Hearing no other objections, it's in evidence. Any further questions for this witness?

Importantly, Respondent never objected to the admission of the testimony on the ground that it does not satisfy the requirements of Rule 804(b)(5). Indeed, Respondent never objected *at all* on the ground that the challenged evidence was *inadmissible* hearsay. She instead objected to *lack of notice* concerning that hearsay testimony.

The transcript of this proceeding is of exceedingly poor quality, with many "[indiscernible]" notations throughout the testimony including, critically, during the discussion of the admissibility of the challenged evidence. The parties therefore provided a narrative of key portions of the testimony. In the narrative, the parties identify the two grounds on which Respondent objected, which are confirmed by the transcript itself:

> Page 139. line 8 through Page 141. Ms. Coan [Respondent's counsel] argues that the United States Supreme Court opinion in Crawford applies or should apply in juvenile cases where the witness testimony against a Respondent-Parent is about criminal matters.

> Page 142, line 8. Ms. Coan [Respondent's counsel] objects to admission of hearsay evidence (interviews with [B.C. and J.C.] at Pat's Place) on the basis that she did not receive sufficient notice that Petitioner intended to offer the hearsay evidence under Rule 804(b)(5).

Simply put, Respondent never informed the trial court that, in her view, the evidence was inadmissible hearsay.

Respondent cites cases from this Court and our Supreme Court holding that the trial court is required to make specific findings, or consider specific factors, before admitting this sort of hearsay testimony. *See, e.g., In re W.H.*, __ N.C. App. at __, 819 S.E.2d at 620. But none of those cases negates or overrules the requirement in the Rules of Appellate Procedure that litigants timely object to the admission of evidence and state the specific grounds that are the basis for the objection. N.C. R. App. P. 10(a). If it were otherwise, trial testimony that could only be admissible under a residual hearsay exception could be challenged on appeal even if it were admitted at trial with no objections at all. That is not how our error preservation system works. If a litigant wants to challenge the admission of hearsay testimony and obtain a ruling from the court concerning why that testimony falls within a hearsay exception, that litigant must timely object to the evidence on that ground. Respondent did not do so.

Our review of Respondent's challenge to this testimony is therefore limited to the objection she actually raised—that she did not receive proper notice. We review

this argument for abuse of discretion. *In re W.H.*, __ N.C. App. at __, 819 S.E.2d at 620. The trial court's determination that the notice YFS provided was adequate was a reasoned one and not so arbitrary that it fell outside the court's sound discretion. *Id.* Accordingly, the trial court did not err by admitting the challenged evidence.

II. Privilege against self-incrimination and right to counsel

Respondent next argues that the trial court violated her Fifth Amendment right against self-incrimination. We reject this argument as well.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). "The Fifth Amendment—which is applicable to the states through the Fourteenth Amendment—privileges an individual not to answer official questions put to him in any . . . proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *In re L.C.*, 253 N.C. App. 67, 72, 800 S.E.2d 82, 87 (2017). "When a witness is *compelled* to testify, . . . her right to assert the privilege is preserved until such time as an answer to a particular question would incriminate her. At that point, the witness must decide whether to invoke the privilege or waive it." *Id.* at 76, 800 S.E.2d at 89.

Here, the trial court properly explained to Respondent that she must decide whether to invoke or waive her Fifth Amendment privilege against self-incrimination

in response to each individual question asked, relying on the advice she had received from her counsel:

> THE COURT: So if [Counsel for Petitioner] has a question that possibly does not implicate the 5th Amendment right, he can ask it. [Respondent] decides whether or not she is going to take that right, based on the questions that he has asked. . . . [T]his is her right, the right she chooses to waive. You advised her of what you wanted to do. She may have a different [indiscernible]. It happens all the time. So I gave my instructions as the Court so that I was clear that you have to assert, correct? . . . if you take the 5th Amendment, you have to say it . . . Then she has to – I have to rely on whatever advice you get from counsel to supplement that, but I don't have to advise her about what else she can do because that's the job of her counsel, and that's her job to remember whatever counsel has told her.

This is an accurate statement of the applicable Fifth Amendment legal standard. *See In re L.C.*, 253 N.C. App. at 76, 800 S.E.2d at 89. Moreover, Respondent understood her rights, as explained to her by the trial court, because she responded to the questioning after this court colloquy with "I invoke the 5th Amendment" or "I plead the 5th Amendment" in response to sixteen questions from YFS counsel and an additional twenty-two questions from counsel for the guardian ad litem.

Respondent does not identify any questions where she attempted to invoke her privilege but was not permitted to do so, or any questions that she was forced to answer despite invoking her privilege. *Contra Id.* at 78, 800 S.E.2d at 90 (finding Fifth Amendment violation where the trial court forced respondent to answer a question after respondent attempted to invoke her privilege). Accordingly, the trial

court did not violate Respondent's right to invoke her Fifth Amendment privilege against self-incrimination.

Respondent also argues that the trial court violated her statutory right to the assistance of counsel. Again, this argument is meritless.

Parents in this type of juvenile proceeding have a statutory right to counsel. N.C. Gen. Stat. § 7B-602(a). "This statutory right includes the right to effective assistance of counsel." *In re Dj.L.*, 184 N.C. App. 76, 84, 646 S.E.2d 134, 140 (2007).

Respondent contends that the trial court violated this right by refusing to permit her counsel to confer with her at various points after she had been called to the stand to testify. This argument fails because Respondent has no right, constitutional or otherwise, to pause the questioning and speak with her counsel once she takes the stand.

As the U.S. Supreme Court has explained, when a litigant "becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying. He has an absolute right to such consultation before he begins to testify, but neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice." *Perry v. Leeke*, 488 U.S. 272, 281 (1989). The same principle applies to the statutory right to counsel provided to Respondent by North Carolina law. *See In re Bishop*, 92 N.C. App. 662, 664–65, 375 S.E.2d 676, 678 (1989).

To be sure, trial courts have broad discretion in managing trial proceedings and the court could choose, in its discretion, to recess the trial to permit counsel to communicate with her client. But whether to do so is "a matter of discretion in individual cases, or of practice for individual trial judges." *Perry,* 488 U.S. at 284.

Here, the trial court properly explained Respondent's right to invoke her privilege against self-incrimination but declined to pause the proceeding to permit Respondent to seek further advice from counsel. As the trial court explained, once Respondent takes the stand "that's her job to remember whatever counsel has told her." Accordingly, we reject Respondent's argument that her right to counsel was violated during her testimony.

III. Adjudication of neglect and dependency

Finally, Respondent argues that the trial court erred in adjudicating her children neglected and dependent. She argues both that the court's findings are not supported by competent evidence and that those findings are insufficient to support the court's conclusions of law.

"The role of this Court in reviewing a trial court's adjudication of neglect and [dependency] is 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 T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007).

"If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary." *Id.* "Unchallenged findings of fact are presumed correct and are binding on appeal." *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006). When a respondent in a juvenile case asserts the Fifth Amendment privilege against self-incrimination, the court "may use a witness' invocation of his fifth amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable to him." *In re L.C.*, 253 N.C. App. at 73, 800 S.E.2d at 87.

Respondent does not challenge any of the trial court's specific findings of fact as unsupported by the evidence, but rather argues that the trial court relied on incompetent evidence in the form of the challenged hearsay evidence discussed above. Because we rejected that argument, we can summarily dispose of Respondent's challenge to the trial court's findings.

We thus turn to whether those findings are sufficient to support the court's conclusions that the juveniles are neglected and dependent. A dependent juvenile is a juvenile whose "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). To support an adjudication of dependency, "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 P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the court." *In re T.H.*, 232 N.C. App. 16, 27, 753 S.E.2d 207, 215 (2014). A dependency adjudication is proper where "[a]t the time the juvenile petition was filed, there were no appropriate family members *immediately available* to care for the children." *Id.* (emphasis added).

Here, the trial court found that Respondent is "currently incarcerated" and that when a YFS social worker initially met with Respondent following her arrest, Respondent "failed to provide any alternative placements except her brother." Respondent also "provided names of the fathers of [Nicole] and [Oscar] but did not provide contact information for those two fathers." The trial court further found that Respondent "did not provide contact information for the fathers of the minor children but identified that [Nicole's] father resides in Louisiana" and that a YFS social worked testified about YFS's "efforts to locate and verify the safety of the father prior to the filing of the petition," including "speaking to the children themselves about how to contact their fathers, speaking with relatives and collaterals regarding the location of the biological fathers of the Juveniles and online database searches to locate the Fathers."

These findings are sufficient to support the trial court's adjudication of dependency because they address both required prongs. *See In re P.M.*, 169 N.C. App. at 427, 610 S.E.2d at 406. The findings indicate both that Respondent was unable to provide care for the children due to her incarceration on serious criminal charges and that there "were no appropriate family members immediately available to care for the children." *In re T.H.*, 232 N.C. App. at 27, 753 S.E.2d at 215. Although Respondent provided YFS with the name of Nicole's father and he ultimately was found to be a suitable placement for Nicole, the evidence presented at the hearing and the trial court's resulting findings show that he was not *immediately available* when the juveniles were taken into YFS custody. Respondent was unable to provide YFS with contact information for Nicole's father, who lived out of state, and YFS had to engage in its own lengthy efforts to locate him, contact him, and assess the suitability of his home before placing any of the juveniles with him. Accordingly, the trial court's findings support the adjudication of dependency.

The statutory definition of a neglected juvenile includes a juvenile "whose parent, guardian, or custodian 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(15). "[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 neglect. *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901–02 (1993).

But "the trial court need not wait for actual harm to occur to the child if there is a substantial risk of harm to the child in the home." *In re T.S., III*, 178 N.C. App. 110, 113, 631 S.E.2d 19, 22 (2006), *aff'd per curiam*, 361 N.C. 231, 641 S.E.2d 302 (2007). "[E]vidence of abuse of another child in the home is relevant in determining whether a child is a neglected juvenile." *In re Nicholson*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994).

Here, the trial court found that Respondent reported to a social worker that her adult son was "sexually involved" with B.C., a minor child residing in the home, and Respondent "was aware of this relationship"; that Respondent "testified that her incarceration was related to rape and kidnapping" of minor children who resided in her home; and that Respondent's adult son "indicated to the [social worker] that he and B.C. were in a relationship." The court found that Respondent told another minor in the home, J.C., "that he could be with her nine-year-old daughter, [Nicole]" and "[Nicole] would lie next to [J.C.] at [Respondent's] direction"; that Respondent transported 12-year-old J.C. to and from work; and that Respondent's "front door had a lock on it that prevented [J.C. and B.C.'s] family from leaving."

The court further found that Respondent invoked her Fifth Amendment privilege in response to "numerous questions" regarding whether she forced a child

in the home to have sex with her adult son; whether she forced J.C. and B.C.'s family to reside in her home, work with her, and give her all their money as payment for bringing them to North Carolina; how long she had been in a relationship with her adult son; whether she provided alcohol to J.C.; whether she was present when her adult son raped B.C.; and whether she provided proper care for her own children before the petition was filed.

The trial court's findings are sufficient to support the trial court's adjudication of neglect because they show that there is a "substantial risk of harm" to the juveniles as a result of living in an environment injurious to their welfare where they were not receiving proper care and other juveniles were being abused. N.C. Gen. Stat. § 7B-101(15); *In re T.S., III*, 178 N.C. App. at 113, 631 S.E.2d at 22. The findings indicate that a minor child was being sexually abused in Respondent's home with Respondent's knowledge and complicity, that Respondent provided alcohol to another minor child while his sister was being sexually abused, and that she forced minor children in the home to work with her. Moreover, the findings also show that Respondent told a minor in the home he could have sexual contact with Nicole and that Respondent invoked her privilege against self-incrimination when asked if she provided proper care for her children. The abuse of other children in the home is relevant to the determination of whether Respondent's children are neglected. *In re Nicholson*, 114 N.C. App. at 94, 440 S.E.2d at 854. And the trial court was permitted

to infer from Respondent's repeated invocation of her privilege against self-incrimination that truthful responses to those questions would have been unfavorable to her. *In re L.C.*, 253 N.C. App. at 73, 800 S.E.2d at 87.

Accordingly, we hold that the trial court's findings properly supported its conclusion that Respondent's children were neglected and dependent.

Conclusion

For the reasons discussed above, we affirm the trial court's adjudication and disposition order.

AFFIRMED.

Judge COLLINS concurs.

Judge MURPHY concurs in result only.

Report per Rule 30(e).