An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-230

Filed: 31 December 2020

Cumberland County, No. 18 JA 630

IN THE MATTER OF: C.S.

Appeal by Respondent-Father from an Order entered 28 October 2019 by Judge Caitlin Evans in Cumberland County District Court. Heard in the Court of Appeals 17 November 2020.

Michael A. Simmons for petitioner-appellee Cumberland County Department of Social Services.

Edward Eldred for respondent-appellant father.

Matthew D. Wunsche for guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Father (Father) appeals from the trial court's Adjudication and Disposition Order adjudicating C.S.[1] as abused, but not neglected, and returning C.S. to her mother (Mother) and Father. The Record before us reflects the following:

C.S. was born on 9 October 2018. Mother was a German citizen and Father served in the United States Army. In the months following her birth, no concerns arose with the parents' ability to care for C.S. She received appropriate medical care and the parents were attentive to her needs. On 7 December 2018, C.S. experienced seizure-like symptoms and difficulty breathing after Mother had fed her. C.S. was admitted to Cape Fear Valley Medical Center (Cape Fear) where medical personnel conducted a CT scan showing C.S. had bilateral subdural hemorrhages. C.S. was then transferred to UNC Medical Center (UNC) for more intensive care. An 8 December 2018 dilated eye exam showed C.S. had bilateral, multilayered retinal hemorrhages consistent with trauma. UNC referred the incident as a possible child abuse case and the Department of Social Services (DSS) was notified. C.S. was discharged to her neighbor's care on 11 December 2018.

On 17 December 2018, while in the neighbor's care, C.S. experienced another episode and was taken to Cape Fear where a second CT scan was performed. A comparison of the two scans revealed "evolving subdural hemorrhages" that were "minimally increased" from the previous scan. C.S. was transferred again to UNC

---

[1] The parties use initials to designate the juvenile. We do the same for consistency and to help protect the juvenile's identity.

where a second "formal child abuse consult" was performed. The second referral noted no "new concerns for maltreatment." C.S. was discharged from UNC on 21 December 2018, and DSS filed a petition alleging C.S. was abused, neglected, and dependent. DSS took nonsecure custody of C.S.

In January 2019, Dr. Molly Berkhoff evaluated C.S. for possible maltreatment and concluded C.S.'s "clinical history in conjunction with her medical findings are most consistent with a diagnosis of abusive head trauma." Dr. Berkhoff reviewed the opinions of various medical subspecialists in concluding C.S.'s injuries resulted from "repetitive shaking" or "shaking and impact resulting in repetitive rotational forces to the head."

C.S. remained in DSS custody through multiple intermediate hearings and orders continuing nonsecure custody. On 22 July 2019, the trial court scheduled a special juvenile session for 7 October 2019, in order to hear this case. On 5 September 2019, Father filed a written Motion to Continue Special Setting because his expert witness would not be available on the planned hearing date and was "a vital witness." Father argued not granting the continuance would "affect the fundamental fairness of the trial" as the expert would testify as to "what we believe happened to the minor child." At a 19 September 2019 nonsecure custody hearing, Father's counsel made an oral motion to voluntarily dismiss his Motion to Continue and the trial court

granted the voluntary dismissal of his Motion. The Record contains no explanation for Father's voluntary dismissal of his Motion.

At the 7 October 2019 hearing, the trial court heard testimony from C.S.'s pediatrician; Dr. Metzger, a Cape Fear radiologist; Dr. Berkhoff, with UNC; a DSS social worker; as well as Mother and Father, and their neighbor. The trial court also received into evidence C.S.'s medical records from Cape Fear, along with radiographic images of her brain, and a report filed by Dr. Berkhoff. C.S.'s pediatrician testified there were no concerns with C.S.'s early development, based on regular check-ups, through 30 November 2018. Dr. Metzger testified the hemorrhages found on the first CT scan of C.S.'s brain showed the injury occurred within a couple weeks of the scan. Dr. Berkhoff testified the retinal hemorrhaging and subdural hematomas seen in C.S were consistent with head trauma and not with other conditions. Dr. Berkhoff also testified C.S.'s clinical record indicated no clear genetic or hematological condition that would explain these findings. Moreover, Dr. Berkhoff testified, although these hemorrhages and hematomas can occur at birth, "they do not lead to a few months later or at nine weeks of age having a change in [C.S.'s] mental status." Dr. Berkhoff further testified C.S.'s pattern of retinal hemorrhaging was not associated with birth trauma and choking incidents could not cause a subdural hematoma.

First, Mother testified she never abused, injured, or accidentally dropped C.S. Then Mother testified to the circumstances surrounding C.S.'s prenatal diagnoses

and her birth. Mother explained, after C.S.'s birth, C.S. had vomiting issues and Mother raised those concerns with C.S.'s pediatrician. Mother also testified about the incident on 7 December 2018, where C.S. first had a seizure-like episode. Mother testified when C.S. became limp, Mother took C.S. to the neighbor's house for help. The neighbor told Mother to call 911, and Mother ran back home to retrieve her phone and call 911. Father testified he was at work at the time of the 7 December episode.

After Father testified, Father's counsel asked the trial court to hold the evidence open on the basis Father's second witness was "not present" because he was "testifying in another matter in another state[.]" DSS objected on the grounds it would be unfair to hold evidence open and let DSS's evidence "go stale[.]" The Guardian ad litem joined the objection because Father filed a previous Motion to Continue and voluntarily dismissed it and because DSS had other witnesses it would have wanted at the hearing but were unavailable. The trial court denied Father's oral motion stating:

> There was a motion to continue based on the witness not being able to be present. I also was notified from the Department there were several witnesses that they wanted that would not be able to be here on the dates that were set for this special session. We had a brief discussion last court hearing about if this case should be held open, and I ruled that we were going to hear all testimony on today's date . . . and that was for all parties. So I am not going to hold the case open.

The trial court made oral Findings and adjudicated C.S. as abused, but dismissed DSS's allegations C.S. was neglected and dependent.

The trial court entered its written Order on 28 October 2019. As part of its written Order, the trial court made the following relevant Adjudicatory Findings: C.S. had attended all of her regular pediatric appointments since birth with the only concern noted being her vomiting; C.S. had progressed normally from birth through the 7 December episode; CT scans and the testimony of physicians Dr. Metzger and Dr. Berkhoff showed C.S.'s injuries were caused by trauma, and that trauma was the result of abuse; Mother and Father were the only people responsible for C.S.'s care leading up to the 7 December episode; and that parents had not provided an explanation for C.S.'s injuries. Therefore, the trial court found the evidence supported a conclusion of abuse. However, the trial court found because the parents sought immediate medical care for C.S. during the 7 December episode, and from birth up until this episode, the evidence did not support neglect. Accordingly, the trial court adjudicated C.S. as abused but not neglected or dependent.

Father filed Notices of Appeal from the trial court's Order to this Court on 2 and 16 December 2019. DSS filed a Motion to Dismiss the appeal as Father's Notices of Appeal were untimely and the trial court granted the Motion. However, Father filed a Petition for Writ of Certiorari on 13 February 2020; we granted Father's Petition in a 2 March 2020 Order.

Issues

The dispositive issues on appeal are whether: (I) the trial court's Conclusions C.S. was abused but not neglected were legally inconsistent requiring reversal of the abuse adjudication; and (II) the trial court abused its discretion by not holding the evidence open to allow Respondents' expert witness to testify.

Analysis

I. Inconsistent Legal Conclusions

First, Father contends we cannot test the "correctness" of the trial court's Order because the trial court made "legally contradictory conclusions of law." "In non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Moreover, any findings of fact not specifically challenged are presumed sufficient and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Father does not specifically challenge any of the trial court's Findings; as such, we presume those Findings to be supported by clear and convincing competent evidence and binding on this appeal. *In re Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676.

However, the trial court's Findings must also support its Conclusions of Law. *Id.* On appeal, Father makes the nuanced argument the trial court's Conclusions C.S. was abused, but not neglected, were "legally inconsistent and contradictory" such

that they were legally impermissible. According to Father, "abused" but "not neglected" is illogical, ostensibly because there is some overlap in the definitions of "abused" and "neglected" in our General Statutes. We disagree.

N.C. Gen. Stat. § 7B-101(1)(a) defines—in part—an abused juvenile as one whose parent inflicts, or allows to be inflicted, a serious, non-accidental injury. N.C. Gen. Stat. § 7B-101(1)(a) (2019). Our General Statutes provide another, distinct definition of a neglected juvenile:

> Any juvenile less than 18 years of age (i) who is found to be a minor victim of human trafficking . . . or (ii) whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; or who is not provided necessary medical care; or who lives in an environment injurious to the juvenile's welfare . . . .

N.C. Gen. Stat. § 7B-101(15) (2019).

First, under Father's logic, any time a child is adjudicated as abused, the child should always also be adjudicated as neglected. We do not find support for such a conclusion in the statutes. If the General Assembly intended any child adjudicated as abused to also satisfy the definition of a neglected juvenile, the General Assembly would have enacted language expressly including "abused" in the definition of neglected juvenile. Moreover, the definition of neglected juvenile evinces the intent that neglect results from a pattern of conduct injurious to a child. Certainly, acts of abuse can support a conclusion a child "lives in an environment injurious" to the child's welfare, *In re L.Z.A.*, 249 N.C. App. 628, 638, 792 S.E.2d 160, 169 (2016);

however, one act of abuse does not necessitate that conclusion. In fact, Father points to no caselaw supporting this argument. Moreover, in order to establish neglect, "our appellate courts have consistently required that there be either evidence of physical, mental or emotional impairment, or a substantial risk of such impairment *as a consequence of the failure to provide proper care, supervision, or discipline*." *In re L.T.R.*, 181 N.C. App. 376, 384, 639 S.E.2d 122, 127 (2007) (emphasis added) (citation and quotation marks omitted).

In making ultimate Findings of Fact to support its Conclusions of Law, the trial court is required to not "simply recite allegations" but use "processes of logical reasoning from the evidentiary facts[.]" *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (citation and quotation marks omitted). Here, the trial court—in concluding C.S. was abused but not neglected—used just such a process of logical reasoning based on its Adjudicatory Findings. The trial court found the injuries discovered on 7 December 2018, along with C.S.'s clinical history and the testimony of medical experts who evaluated C.S for potential abuse, supported its Conclusion C.S. was abused.

The trial court also found, prior to the 7 December episode, C.S. had progressed normally, there were no concerns "related to the juvenile or with either Respondents' parenting," and the parents immediately sought care for C.S. after the 7 December incident. Accordingly, the trial court concluded "the evidence [did] not rise to the

level of neglect pursuant" to the definition of neglected juvenile. Thus, the trial court's Finding the parents provided adequate and immediate care for C.S.—despite any incident of abuse—supported its Conclusion C.S.'s injuries were not the result of the parents' failure to provide proper care, supervision, or discipline.

Therefore, the trial court made Findings based on the evidence, and used processes of logical reasoning to come to rational Conclusions based on those Findings. The trial court's Conclusions were not inconsistent, much less inconsistent such that they were not legally permissible. Accordingly, the trial court's Conclusion C.S. was abused but not neglected was properly supported by its Findings.

II. Motion to Hold the Evidence Open

Father further argues the trial court abused its discretion in not holding the evidence open on the hearing date, after DSS had presented its evidence, so that Father's expert witness—who was unavailable—could testify. N.C. Gen. Stat. § 7B-803 provides:

> The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile. Resolution of a pending criminal charge against a respondent arising out of the same transaction or occurrence as the juvenile petition shall not be the sole extraordinary circumstance for granting a continuance.

N.C. Gen. Stat. § 7B-803 (2019). "Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001) (citation omitted). "Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying the continuance will further substantial justice." *In re Humphrey*, 156 N.C. App. 533, 538, 577 S.E.2d 421, 425 (2003) (citation and quotation marks omitted). The moving party must show "extraordinary circumstances" supporting its motion to establish the trial court abused its discretion in denying the motion. *In re C.J.H.*, 240 N.C. App. 489, 495, 772 S.E.2d 82, 87 (2015).

Here, Father has not met his burden in showing extraordinary circumstances supporting his request to hold the evidence open. Father argues the trial court's denial of his request "deprived [Father] of a fair trial" because one could "safely assume the expert's testimony would have been favorable" to Father. However, nothing in the Record—such as an affidavit or proffer—indicates what that testimony would have been. As such, the circumstances surrounding the expert's unavailability were not extraordinary. *See In re Humphrey*, 156 N.C. App. at 538, 577 S.E.2d at 426 (the party did not show extraordinary circumstances where the party failed "to develop this argument or provide evidence to support this claim").

In fact, Father had known his expert would not be available for some time before the hearing. The hearing was first scheduled for 23 July 2019 and was continued to 7 October 2019. On 5 September 2019, Father filed a Motion to Continue the 7 October hearing because his expert witness would not be available. Then, on 19 September 2019, Father orally dismissed his Motion to Continue. The Record contains no explanation as to why Father voluntarily dismissed his Motion to Continue.

Then, at the 7 October hearing, after DSS put on its evidence and the parents put on their available testimony, Father's counsel asked the trial court to hold the evidence open so his expert witness could testify when the witness became available. DSS and the Guardian ad litem objected on the grounds Father had previously moved to continue based on the expert witness's unavailability and voluntarily dismissed it. The trial court reasoned:

> There was a motion to continue based on the witness not being able to be present. I also was notified from the Department there were several witnesses that they wanted that would not be able to be here on the dates that were set for this special session. We had a brief discussion last court hearing about if this case should be held open, and I ruled that we were going to hear all testimony on today's date . . . and that was for all parties. So I am not going to hold the case open.

Therefore, the trial court expressed reasons why it would be unfair to hold the evidence open—when DSS had already presented its evidence and also had witnesses unavailable for the hearing—to wait for Father's expert witness to become available

when Father knew of the witness's unavailability and had already voluntarily dismissed the previous Motion to Continue based on this same witness's unavailability. Accordingly, the trial court did not abuse its discretion in denying Father's request to hold the evidence open.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Order.

AFFIRMED.

Judges STROUD and TYSON concur.

Report per Rule 30(e).