

At the time, R.H. was fifteen years old and N.R. was three years old. (BHA's Findings of Fact, Nos. 1-3, 6-9, 12.)

In May 2008, CYS received a referral regarding suspected sexual abuse of N.R. by R.H. Following an investigation, on July 11, 2008, CYS filed an indicated report of child abuse² against R.H. based on allegations that R.H. touched N.R.'s genitals and forced N.R. to touch R.H.'s genitals. (BHA's Findings of Fact, No. 49.) On July 25, 2008, CYS amended the report to add allegations of deviate sexual intercourse. On August 29, 2008, R.H. filed a request to have the report expunged from the ChildLine Registry,³ which was denied. (BHA's Findings of Fact, Nos. 51-52.) On October 20, 2008, R.H. filed a timely appeal with the BHA.

The BHA held an evidentiary hearing on June 15, 2009. At the hearing, Patricia Hahn, an intake caseworker for CYS, described the course of the investigation. Hahn testified that she interviewed N.R. on two occasions with Detective Wickersham of the Pottstown Police Department. (BHA's Findings of Fact, Nos. 28, 30.) Hahn also was present during a third interview conducted by a member of the District Attorney's Office; however, Hahn could not recall what information N.R. disclosed during that interview. (BHA's Findings of Fact, Nos. 32-33.) Hahn testified that N.R. was interviewed a fourth time by an individual

² "Child abuse" is defined in the Law as "[a]n act or failure to act by a perpetrator which causes nonaccidental serious mental injury to or sexual abuse or sexual exploitation of a child under 18 years of age." 23 Pa. C.S. §6303(b)(1)(ii).

³ ChildLine is a statewide system for receiving and maintaining reports of suspected child abuse and referring such reports for investigation. In the case of an indicated report of child abuse, the information is placed in the statewide central register. *See F.V.C. v. Department of Public Welfare*, 987 A.2d 223, 224 n.1 (Pa. Cmwlth. 2010).

from the Assessment Treatment Alternative (ATA), but Hahn was not present during that interview. (BHA's Findings of Fact, No. 35.) Hahn attempted to rely on the ATA report during her testimony, but the BHA found that the information in the report was inadmissible. (BHA Adjudication at 14-15.)

N.R. testified that, on the evening of March 15, 2008, R.H. pulled down his pants and showed N.R. his "wee wee." N.R. testified that R.H.'s "wee wee" had hair on it. R.H. then told N.R. to pull down his pants and take his "wee wee" out, which N.R. did. (BHA's Findings of Fact, Nos. 15-17, 22.) N.R. further testified that there was no touching involved and that R.H. did not tell N.R. not to tell anyone about the incident. (BHA's Findings of Fact, Nos. 19-20.) N.R. testified that he asked R.H. if they could play a "game" on their "privates," but R.H. said no. (BHA's Findings of Fact, No. 21.) N.R. also saw R.H.'s genitals when N.R. and R3 walked in on R.H. as he was going to the bathroom that same night. (BHA's Findings of Fact, No. 23.)

M.R. testified that she first learned about the incident with R.H. on May 5, 2008, while she was bathing N.R. and R3. She testified that R3 pointed at N.R.'s genitals, at which point M.R. told the boys that "only mommy and daddy" and "a doctor" are allowed to touch their private parts. She testified that N.R. said, "[A]nd a babysitter," prompting M.R. to ask, "[W]hat babysitter?" (N.T., 6/15/09, at 52-54.) N.R. then told his mother about the March 15, 2008, incident with R.H.

R.H. testified that, on the night in question, N.R. accidentally wet his pants, so R.H. had to help N.R. change into clean clothes. (N.T., 6/15/09, at 158-59.) He also testified that N.R. and R3 walked into the bathroom three times while

he was attempting to urinate. (BHA's Findings of Fact, No. 24.) R.H. testified that when the boys walked in, he had just opened his zipper and his genitals were not fully exposed. (BHA Adjudication at 14.) According to R.H., later that night, while he and the boys were watching television, N.R. pointed to R.H.'s genital area and asked, "How big are you?" (N.T., 6/15/09, at 163.) R.H. testified that he never told M.R. about N.R.'s wetting accident, N.R.'s question about R.H.'s size, or the bathroom incident. (BHA's Findings of Fact, No. 25.) According to R.H., although he told his own parents, he did not feel comfortable telling M.R. because he did not have that type of relationship with her and did not want N.R. to get in trouble for asking him an inappropriate question. (N.T., 6/15/09, at 180, 183.)

As the designated factfinder, the BHA credited the testimony of N.R. and M.R. and specifically rejected R.H.'s testimony regarding the allegations as not credible. (BHA's Findings of Fact, Nos. 42, 44, 47.) Significantly, the BHA found that N.R.'s disclosure of the incident to his mother was "spontaneous and independent and not the result of any questions posed by her." (BHA's Findings of Fact, No. 13.) The BHA also found that N.R.'s courtroom testimony was inconsistent with his prior disclosures to the investigators with respect to whether any oral sex or touching had occurred. (BHA's Findings of Fact, No. 42.)

Based on these credibility determinations, the BHA concluded that there was insufficient evidence to support the allegations of deviate sexual intercourse and sexual assault in the indicated report because: (1) N.R. testified that no oral sex or touching occurred; (2) N.R. did not disclose oral sex or touching during his initial interview with police; (3) any information about oral sex contained in the ATA report was inadmissible and, in any event, was never made

part of the record; (4) Hahn could not recall what was disclosed during N.R.'s interview with the District Attorney's Office; (5) N.R. did not disclose oral sex to Hahn or Detective Wickersham in either of their interviews; and (6) although Hahn testified that N.R. disclosed touching during the second interview, that hearsay evidence was uncorroborated and directly contradicted N.R.'s courtroom testimony. (BHA Adjudication at 14-15.)

The BHA concluded, however, that, even absent evidence of oral sex or touching, CYS sufficiently proved that R.H. sexually abused N.R.⁴ The BHA explained:

There is sufficient credible and reliable evidence that R.H. committed sexual abuse by his "indecent exposure"^[5] toward

⁴ At the time the indicated report was filed in this case, "sexual abuse or exploitation" was defined, in relevant part, as follows:

The employment, use, persuasion, inducement, enticement or coercion of any child to engage in or assist any other person to engage in any sexually explicit conduct ... or the rape, sexual assault, involuntary deviate sexual intercourse, aggravated indecent assault, molestation, incest, indecent exposure, prostitution, statutory sexual assault or other form of sexual exploitation of children.

23 Pa. C.S. §6303(a). This provision was amended on July 3, 2008, with an effective date of December 30, 2008. However, because the alleged abuse and the indicated report pre-dated the amendment's effective date, the BHA properly relied on the above definition. (*See* BHA Adjudication at 8.)

⁵ The Department of Public Welfare's regulation explains that the offenses listed in the "sexual abuse" definition are those "defined by the crimes code." 55 Pa. Code §3490.4. Section 3127(a) of the Crimes Code defines "indecent exposure" as follows:

A person commits indecent exposure if that person exposes his or her genitals ... in any place where there are present other persons under circumstances in
(Footnote continued on next page...)

N.R. and his directing N.R. to expose himself which meets the separate definition of sexual abuse in that R.H. induced N.R. to engage in sexually explicit conduct, i.e. exposing himself.

(BHA Adjudication at 15.) Consequently, the BHA ordered that the indicated report be amended to “reflect the abuse to be indecent exposure and sexual abuse by inducing [N.R.] to engage in sexually explicit conduct, exposing himself.”

(BHA Adjudication at 16.)⁶

In his petition for review, R.H. argues that CYS failed to prove by substantial evidence that the allegations of sexual abuse in the report are accurate. We disagree.⁷

The critical issue to be determined in an expunction case is whether the indicated report of child abuse is accurate. *S.T. v. Department of Public Welfare*, 962 A.2d 679, 682 (Pa. Cmwlth. 2008). The county agency bears the burden of proving the accuracy of the report by substantial evidence. Substantial

(continued...)

which he or she knows or should know that this conduct is likely to offend, affront or alarm.

18 Pa. C.S. §3127(a).

⁶ See *G.M. v. Department of Public Welfare*, 954 A.2d 91, 93 (Pa. Cmwlth. 2008) (stating that Secretary of Department of Public Welfare and Secretary’s agents have discretion to amend a child abuse record at any time upon good cause shown); Section 6341(a) of the Law, 23 Pa. C.S. §6341(a)(1).

⁷ Our scope of review in an expunction case is limited to determining whether legal error has been committed, whether constitutional rights have been violated, or whether the findings of fact are supported by substantial evidence. *S.T. v. Department of Public Welfare*, 962 A.2d 679, 682 n.3 (Pa. Cmwlth. 2008).

evidence is “[e]vidence which outweighs inconsistent evidence and which a reasonable person would accept as adequate to support a conclusion.” 23 Pa. C.S. §6303(a); *see C.S. v. Department of Public Welfare*, 972 A.2d 1254, 1259 (Pa. Cmwlth.), *appeal denied*, ___ Pa. ___, 987 A.2d 162 (2009). If CYS fails to satisfy its burden of proof, the request for expunction will be granted. *Bucks County Children & Youth Social Services Agency v. Department of Public Welfare*, 977 A.2d 1254, 1256 (Pa. Cmwlth. 2009).

Accepting the BHA’s credibility determinations, as we must, we conclude that the credited evidence supports the BHA’s determination that R.H. sexually abused N.R.⁸ N.R. credibly testified that R.H. showed the child his genitals and then asked the child to show R.H. his genitals. (N.T., 6/15/09, at 26; *see* BHA Adjudication at 13.) This testimony alone provides sufficient evidence to prove that R.H. persuaded or induced N.R. to engage in sexually explicit conduct. Moreover, the evidence established that R.H.’s conduct satisfied the legal definition of indecent exposure. Though R.H. was himself a minor, as N.R.’s babysitter, R.H. knew or should have known that pulling down his pants and exposing his bare genitals would likely offend or alarm the three-year-old child. *See* 23 Pa. C.S. §6303(a); 18 Pa.C.S. §3127(a).⁹

⁸ The BHA is the ultimate factfinder in an expunction case, and its determinations regarding credibility and evidentiary weight will not be disturbed on appeal absent an abuse of discretion. *F.V.C.*, 987 A.2d at 228.

⁹ *See Commonwealth v. Tiffany*, 926 A.2d 503, 511 (Pa. Super. 2007) (holding that the offense of indecent exposure does not require the Commonwealth to prove that affront or alarm was actually caused, but only that the defendant knew or should have known that his conduct was likely to cause affront or alarm), *appeal denied*, 597 Pa. 706, 948 A.2d 804 (2008).

Next, R.H. argues that the BHA erred in admitting certain hearsay statements of N.R. that were offered to prove the allegations of deviate sexual intercourse and sexual assault in the indicated report. In an expunction proceeding, hearsay testimony of a child victim may be admissible, but it does not constitute substantial evidence unless it is corroborated. *A.Y. v. Department of Public Welfare*, 537 Pa. 116, 641 A.2d 1148 (1994).¹⁰ While the BHA admitted the hearsay statements under section 5986 of the Judicial Code, it found insufficient corroboration and ultimately ruled in R.H.'s favor on this issue. (See BHA Adjudication at 14-15.) Therefore, this claim is moot.

Because we conclude that the credible evidence supports the BHA's finding of sexual abuse, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

¹⁰ In *A.Y.*, our supreme court announced the following guidelines to be employed with regard to hearsay in expunction proceedings: (1) hearsay testimony of a child victim will be admitted in accordance with the standards set forth in section 5986 of the Judicial Code, 42 Pa. C.S. §5986, and this rule shall permit the testimony of the victim's parents and other family members as well as those professionals charged with investigating incidents of child abuse; (2) hearsay testimony in conjunction with admissible corroborative evidence of the acts in question can *in toto* constitute substantial evidence that will satisfy the agency's burden of proof; and (3) uncorroborated hearsay cannot satisfy the agency's burden, unless it comports with certain requirements not applicable here. *A.Y.*, 537 Pa. at 126, 641 A.2d at 1153.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

R.H.,	:	
	:	Petitioner
	:	
v.	:	No. 1836 C.D. 2009
	:	
Department of Public Welfare,	:	
Respondent	:	

ORDER

AND NOW, this 18th day of August, 2010, we hereby affirm the August 19, 2009, order of the Department of Public Welfare's Bureau of Hearings and Appeals.

ROCHELLE S. FRIEDMAN, Senior Judge