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NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

B.J.S. IN THE INTEREST OF: J.R., : IN THE SUPERIOR COURT OF
A MINOR, M.S., A MINOR, B.J.S., : PENNSYLVANIA
A MINOR :

APPEAL OF: J.S., MOTHER : No. 705 MDA 2013

Appeal from the Orders Entered March 20, 2013
In the Court of Common Pleas of Lancaster County
Criminal Division at No(s): CP-36-DP-196-2012
CP-36-DP-94-2012
CP-36-DP-95-2012

IN THE INTEREST OF: M.S., : IN THE SUPERIOR COURT OF
A MINOR, AND B.J.S., A MINOR : PENNSYLVANIA

APPEAL OF: R.S., FATHER : No. 704 MDA 2013

Appeal from the Orders Entered March 20, 2013
In the Court of Common Pleas of Lancaster County
Civil Division at No(s): CP-36-DP-0000095-2012
CP-36-DP-0000196-2012

BEFORE: BENDER, P.J., WECHT, J., AND FITZGERALD*, J.

MEMORANDUM BY BENDER, P.J.: **FILED DECEMBER 10, 2013**

J.S. (Mother) and R.S. (Father) (collectively "Appellants") appeal separately from three orders entered on March 20, 2013, adjudicating dependent three children: J.R., born in September of 2007; M.S., born in November of 2010; and B.J.S., born in November of 2012 (collectively the "Children"). Appellants also appeal from three orders entered on March 20, 2013, concluding that aggravated circumstances exist as to each of the

*Former Justice specially assigned to the Superior Court.

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Children.¹ J.R. is the daughter of Mother and S.R., who did not appeal. M.S. and B.J.S. are the daughters of Mother and Father. After review, we affirm in part, vacate in part, and remand for further proceedings.

The trial court related the following factual history:

At the time of [J.R.]’s birth, [Mother] was single. She subsequently married [Father]. When [J.R.] was nine months old, she was reported as abused to the Lancaster County Children and Youth Social Service Agency (Agency). Her injuries, as described in a Commonwealth Court opinion, included bruising and swelling of the left side of her head, bruising near the right temporal region, bruises on both sides of her neck, a large bruise on the rib cage, a buckle fracture of the left tibia and a fracture of the left 8th rib. A Protective Service Plan was put in place. [Father] was indicated as the perpetrator on August 1, 2008, and [J.R.] was placed by agreement and informally with her maternal grandparents. On June 18, 2010 the protective services case was closed. Mother has never believed that Father was a perpetrator. Father appealed his status as perpetrator to the Commonwealth Court, which affirmed the decision.

Mother gave birth to [M.S.] [in November of 2010]. Although the child went home with Mother and Father, a safety plan was established by the Agency providing that Father was to have no unsupervised contact with [M.S.]. The Family Service Plan also provided that both parents be evaluated for parental competence. After [J.R.]’s first abuse, Mother had seen a therapist, John Weigel, as part of her plan.^[2] He found Mother

¹ Mother appeals orders with respect to each of the three children, while Father appeals only those orders with respect to his two children, M.S. and B.J.S. Although Father and Mother filed separate notices of appeal, their issues are substantially intertwined. Accordingly, we now consolidate their appeals.

² While not critical to our disposition, the trial court’s use of the terms “first abuse” and “second abuse” are unnecessarily vague. It appears that “first abuse” refers to the June 2008 episode. Less clear, however, is whether “second abuse” refers to the March 2012 episode, discussed *infra*.

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functioning at a borderline intelligence range and had serious concerns about her ability to function as a parent. He recommended individual counseling to address the relevant issues, but Mother did not follow that recommendation. He was also concerned about her failure to accept Father as the perpetrator. His test results show that Mother had a high score on the scale indicating false answers. After the second abuse, Mother started seeing a therapist at Pennsylvania Counseling Services, but when the therapist went elsewhere, Mother did not follow up with the recommended replacement. She saw a Dr. Gransee, an Agency consultant, in May of 2011; his evaluative report recommended parent training, and on August 20, 2011, a Personal Parent Trainer (PPT) was assigned to the [family]. After some time, the parents seemed to be making progress, and [J.R.] returned to live with her parents and sister in January of 2012. The PPT, who was to stay to support the reunification, was discontinued early when [J.R.] was again abused in March of 2012 as described below. Mother also testified that she ... went on her own to see another therapist, Bruce Eyer. He recommended no further necessary action, but he only knew what Mother chose to self-report. For instance, he did not even know about the first instance of abuse.

On March 16, 2012, Mother took [J.R.] to see a physician and told him that bruises on the child happened during a nightmare when [J.R.] threw herself against a wall. Then there was a second incident on March 20. On March 23, 2012, the Agency received a call from Mother to tell them that [J.R.] had banged into the wall during a nightmare and had been injured. When the caseworker went out to the house to investigate, she found that the child had black eyes, bruising and lacerations to her face. She took photographs. Mother reported that she had gone into [J.R.]'s room alone after hearing [J.R.] scream. Mother's explanation is that [J.R.], in the throes of a nightmare, either slapped or punched herself in the face, or banged her head, face first, against the wall. Mother did not see these things happen; it was a supposition or fabrication on her part. Father told his mother-in-law that Mother was hitting [J.R.]. Mother told the police that the medication she was on could have caused the incident. She later denied that. Mother insisted that [J.R.] had frequent nightmares or "night terrors." She told an Agency caseworker that "[J.R.]'s nightmares were getting worse . . . And they were going to be taking [J.R.] to the doctor because Bob was concerned that [J.R.] may be having some kind

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of seizures because she shakes so violently during the nightmares." The resource mother told the court that [J.R.] had had no nightmares or other nighttime disturbances while with her. In addition, when [Mi.S. (Paternal Aunt)] brought [J.R.] to see Dr. Hoshauer for an investigation of abuse, she said nothing about [J.R.] having sleep problems, although she was specifically asked. Mother also went out of her way to hide the injured child from others. During the week following the injury, she did not take [J.R.] to the doctor for treatment for the injuries, canceled her meetings with the PPT, and kept [J.R.] home from school. She did not keep an appointment for an investigative meeting with the police. She told the [c]ourt that the doctor had been unavailable when she called, but she admitted she did not seek alternative care such as an Emergency Room visit. [J.R.]'s Shelter Care Order triggered by the March 23, 2012 abuse was issued by the Lancaster County Court on May 1, 2012. On May 10, 2012, temporary custody of [M.S.] was also given to the Agency, Mother was named as a perpetrator of abuse against [J.R.] and both children were placed by the Agency. Father was named as a perpetrator by omission because he appeared to know that Mother had been hitting [J.R.]. On May 14, 2012, a scheduled hearing was continued because Father's attorney was unavailable. On May 18, 2012, [M.S.] was placed in a[n] Agency approved resource home with [J.R.]. A safety plan provided that [J.R.] and [M.S.] would live with their paternal aunt [Mi.S.] and have only supervised contact with their parents. A CASA was appointed for the case on May 22, 2012. Unfortunately, [Paternal Aunt's] significant other did not want to be a permanent resource for the child, so on June 18, 2012, after a hearing, the order was modified and the children were placed in foster care. On July 30, 2012, and September 17, 2012, hearings were continued because of a lack of time to complete testimony. On September 20, 2012, the girls' placement was modified after hearing, and they were moved to live with their maternal grandparents. Mother had no visitation outside of her parents' house. Hearings were held on October 1 and 14, December 6, 2012, and January 7, 2013 in order to complete testimony[.]

Mother informed the Agency on October 11, 2012 that she was again pregnant[,] and her third child was born [in] November [of] 2012. The Agency took custody of [B.J.S.] and placed her in an agency approved resource home. These foster

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parents were willing to be a permanent resource for the little girl.

The Court received expert testimony from Cathy Hoshauer, M.D., a pediatrician and an expert in the evaluation of abuse victims. Dr. Hoshauer had seen [J.R.] and reviewed an interview of her by a forensic interviewer concerning the injuries. She subsequently prepared a report, in which she concluded that the injuries sustained by [J.R.] were inconsistent with her hitting her head on a wall. She explained further that "if you bump your head against a wall, you're not going to get injuries in multiple different places. So her injuries were her mouth, below her eye, above her eye and hemorrhage within the eye, and that's not something that will--that a child can create enough force on their own." She also responded negatively when asked if she had ever seen a child of four or so who was able to self-injure themselves with their own hands or other body parts to cause purple bruising on the face.

On March 20, 2013, aggravated circumstances were found as to Mother and Father, an adjudication order was issued and all three children were found to be dependent. [J.R.] was going into the physical custody of her father, [S.R.], [M.S.] to her maternal grandparents and [B.J.S.] to her foster parents.

Father appealed the March 20, 2013 orders concerning [M.S.] and [B.J.S.] to the Pennsylvania Superior Court ... on April 17, 2013. Mother appealed the Orders concerning all three girls to the Superior Court on the same day.

Trial Court Opinion (T.C.O.), 5/14/13 at 1-6 (citations to record omitted).

On appeal, Mother enumerates six issues for our review. Her first three issues challenge the sufficiency of the evidence to establish that J.R., M.S., and B.J.S. were dependent children. In her fourth and fifth issues, Mother asserts that the trial court abused its discretion in concluding that aggravated circumstances exist with respect to each of the children. Finally,

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Mother argues that the testimony of Dr. Cathy Hoshauer lacked sufficient foundation to permit the trial court to rely upon it.³

Father presents two issues for our review. First, he challenges the sufficiency of the evidence to establish that M.S. and B.J.S. were dependent children. Second, he argues that the trial court abused its discretion in refusing to grant a permanency plan for reunification of M.S. and B.J.S. with Father, based on its finding of aggravated circumstances.

In reviewing an adjudication of dependency, our standard of review is as follows:

[T]he standard of review in dependency cases requires an appellate court to accept the findings of fact and credibility determinations of the trial court if they are supported by the record, but does not require the appellate court to accept the lower court's inferences or conclusions of law.

* * *

[A]ppellate courts must employ an abuse of discretion standard of review, as we are not in a position to make the close calls based on fact-specific determinations. Not only are our trial judges observing the parties during the hearing, but usually . . . they have presided over several other hearings with the same parties and have a longitudinal understanding of the case and the best interests of the individual child involved. Thus, we must defer to the trial judges who see and hear the parties and can determine the credibility to be placed on each witness and, premised thereon, gauge the likelihood of the success of the current permanency plan. Even if an appellate court would have made a different conclusion based on the cold record, we are not

³ Although Mother's statement of questions enumerates six issues, her brief fails to comply with Pa.R.A.P. 2119(a), directing that the argument shall be divided into as many parts as there are questions involved. The argument section of Mother's brief consists of only one part.

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in a position to reweigh the evidence and the credibility determinations of the trial court.

In re R.J.T., 9 A.3d 1179, 1190 (Pa. 2010). A dependent child is one who, among other definitions,

is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals. A determination that there is a lack of proper parental care or control may be based upon evidence of conduct by the parent, guardian or other custodian that places the health, safety or welfare of the child at risk

42 Pa.C.S. § 6302.

Additionally, we have held:

A finding of abuse may support an adjudication of dependency. When the court's adjudication of dependency is premised upon physical abuse, its finding of abuse must be supported by clear and convincing evidence. However, "its findings as to the identity of the abusers need only be established by prima facie evidence that the abuse normally would not have occurred except by reason of acts or omissions of the caretakers (parents)."

Matter of C.R.S., 696 A.2d 840, 843 (Pa. Super. 1997) (citations omitted).

The arguments of both Mother and Father turn on their assertions that J.R.'s injuries were self-inflicted and occurred during a night terror episode. Mother emphasizes the opinions of Dr. Joseph Walden and Dr. Chris Duplass, who believed J.R.'s injuries were accidental and could have occurred as a result of sleeping disorders. The trial court, however, emphasizing the opinion of Dr. Cathy Hoshauer, concluded that J.R.'s injuries were not the result of sleeping disorders but, instead, were caused by Mother.

In accord with our standard of review, we must accept the trial court's findings of fact where they are supported by the record. In this case, however, our review of the record is somewhat hindered by the unavailability of the transcripts for the hearings held on June 18, 2012, and July 30, 2012. Here, Mother's brief, Father's brief, and the trial court's opinion make citations to transcriptions of those hearings, and so it appears that transcripts exist. Yet our scouring of the record reveals that they were omitted from the submission to this Court. It is well-settled that appellants bear the burden of ensuring a complete record on appeal. *In re R.N.F.*, 52 A.3d 361, 363 (Pa. Super. 2012). Nevertheless, in situations like this, Rule 1926 of our Rules of Appellate Procedure permits this Court, upon its own initiative, to endeavor to obtain a correction or modification of the record from the trial court. *See* Pa.R.A.P. 1926; *Commonwealth v. Preston*, 904 A.2d 1, 7-8 (Pa. Super. 2006). To that end, this Court's Prothonotary's Office made an informal inquiry of the trial court in an effort to obtain the transcripts that Appellants neglected to file. The trial court, however, was unable to provide the missing transcripts.

In general, where the absence of evidence is attributable to an appellant's failure to comply with the relevant procedural rules, the claims will be deemed to have been waived. *Preston*, 904 A.2d at 8 (citing *Commonwealth v. Barge*, 743 A.2d 429, 429-30 (1999)). On this basis, we conclude that Mother waived her sixth issue, wherein she argued that Dr.

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Hoshauer's testimony at the July 2012 hearing lacked a foundation and that Dr. Hoshauer's opinions were based on an incomplete review of the record. Nevertheless, we decline to hold that Appellants waived their primary issues on appeal; instead, we turn to the trial court's description of the testimony adduced at the June 2012 and July 2012 hearings in place of a review of the transcripts themselves.

Returning to the issues before this Court, even accepting Mother's assertion that some of the testimony weighed against the trial court's conclusion as to the source of J.R.'s injuries, the trial court was free to disbelieve that evidence. Based on the testimony of Dr. Hoshauer, the trial court found that J.R.'s injuries were inconsistent with her hitting her head against a wall, and that a child of J.R.'s age is incapable of harming herself to the extent that she was injured. Additionally, the court found Mother's version of the events lacking in credibility, emphasizing that Mother failed to take J.R. to an emergency room for treatment, kept J.R. home from school in order to hide J.R.'s injuries, and refused to permit the PPT to come as she normally would so that he/she would not see J.R.

The evidence that the court found credible provided a sufficient basis for the court to conclude that J.R. was the victim of abuse, that Mother committed the abuse, and that Father's omission allowed the abuse to occur. Consequently, the trial court did not abuse its discretion in concluding that J.R. was a dependent child.

With respect to M.S. and B.J.S., there were no allegations of abuse. The trial court concluded that, in light of the abuse against J.R., M.S. and B.J.S. were also dependent children. We have held that, where one sibling is abused and found to be dependent, a court may properly determine that other siblings are dependent, even if they were not abused, based upon a parent's failure to protect the children from harm and placing their health, safety, and welfare at risk. ***In re R.P.***, 957 A.2d 1205, 1213 (Pa. Super. 2008). On this basis, we conclude that the trial court did not err as a matter of law in adjudicating M.S. and B.J.S. dependent, based upon the abuse of J.R.

In their remaining issues, Mother and Father challenge the trial court's conclusion that aggravated circumstances exist. Father specifically challenges the trial court's refusal to grant him a child permanency plan with respect to M.S. and B.J.S., his biological daughters, as a result of the court's finding of aggravated circumstances.

This Court has held that when a trial court finds that aggravated circumstances exist, it is well within its discretion to order the cessation of reunification services. ***In re R.P.***, 957 A.2d at 1220. The Juvenile Act provides, in pertinent part:

"Aggravated circumstances." Any of the following circumstances:

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(2) The child or another child of the parent has been the victim of physical abuse resulting in serious bodily injury, sexual violence or aggravated physical neglect by the parent.

42 Pa.C.S. § 6302.

While a showing of physical abuse may support an adjudication of dependency, physical abuse is insufficient, on its own, to establish aggravated circumstances. Instead, as the above-quoted section provides, our legislature requires a heightened showing before a child welfare organization may cease its efforts to reunify a family. ***See id.; In re R.P.***, 957 A.2d at 1220. Namely, clear and convincing evidence must establish that the abuse resulted in serious bodily injury, sexual violence, or aggravated physical neglect. ***See id.***; 42 Pa.C.S. § 6341(c.1) (requiring clear and convincing evidence).

Here, the trial court concluded that, because J.R. was physically abused in 2008 and 2012, aggravated circumstances exist in this case. The trial court did not specify whether its finding of aggravated circumstances was based on aggravated physical neglect or on serious bodily injury, but there is no suggestion that it was based on sexual violence. The briefs of Mother, Father, the Lancaster County Children and Youth Social Service Agency, and the guardian *ad litem*, all presume that the court's finding of aggravated circumstances was based on serious bodily injury rather than aggravated physical neglect. We address it as such.

The Juvenile Act defines serious bodily injury as follows:

“Serious bodily injury.” Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ.

42 Pa.C.S. § 6302.⁴

While the legislative meaning of the phrase “serious bodily injury” is addressed by our Court with some frequency in criminal law (where it is defined identically as in the Juvenile Act), the meaning of those words is rarely addressed in family law. Nevertheless, this Court’s past cases provide some guidance. For instance, this Court has concluded that the abuse of a child resulted in serious bodily injury where the evidence demonstrated that a fractured skull, subdural hematoma, and retinal hemorrhaging put the child in critical condition and created a substantial risk of death. ***In re R.P.***, 957 A.2d at 1218. In a second case, ***In re A.H.***, 763 A.2d 873 (Pa. Super. 2000), we agreed that abuse of a child resulted in serious bodily injury where multiple fractures of a child’s arms and legs resulted in developmental delays. ***Id.*** at 877. Our conclusion was ostensibly premised on the fact that

⁴ We note that the brief of the guardian *ad litem* confuses the definition of “serious physical injury” with that of serious *bodily* injury. Her brief (citing to the Juvenile Act but, in fact, quoting the Child Protective Services Law, 23 Pa.C.S. § 6301 *et. seq.*) incorrectly states: “Serious bodily injury is an injury that ‘causes severe pain or significantly impairs a child’s functioning, either temporarily or permanently.’” **See** GAL’s Brief at 7. Our research reveals that this language is taken from the definition of “serious physical injury.” 23 Pa.C.S. § 6303(a). Unlike serious *bodily* injury, serious *physical* injury is legally insufficient to establish aggravated circumstances.

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the victim suffered protracted impairment of the function of a bodily member. ***Id.***

Here, in the abuse that occurred in 2008, prior to the births of M.S. and B.J.S., J.R. was bruised and two of her bones were fractured. However, there was no evidence that the fractures resulted in protracted impairment of a bodily member. In the subsequent abuse, in 2012, after the births of M.S. and B.J.S., J.R. received black eyes, bruising, and skin lacerations. Despite the abhorrence of Mother and Father's abuse of J.R., the record does not suggest that J.R.'s injuries were life threatening. Additionally, there was no suggestion that her injuries were permanently disfiguring, or that they caused the protracted loss or impairment of a bodily member or organ.

Without a doubt, the injuries to J.R. establish child abuse. However, because there was no testimony or evidence that demonstrated that J.R.'s injuries were of the kind that the legislature saw fit to categorize as 'serious bodily injuries,' the trial court lacked a proper foundation upon which to conclude that aggravated circumstances exist. Accordingly, we must vacate the trial court's orders determining that this case involves aggravated circumstances.

With respect to Father's argument that the trial court erred in refusing to grant a reunification plan, we remand for further proceedings. The trial court's decision to deny a reunification plan was based on its conclusion that aggravated circumstances exist. That conclusion was unsupported by the

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record. In light of our vacatur of the trial court's aggravated circumstances orders, further proceedings are necessary to resolve whether reunification is necessary or appropriate.

Orders adjudicating Children dependent affirmed. Orders determining aggravated circumstances exist vacated. Case remanded for further proceedings consistent with this Memorandum. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/10/2013