

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs March 14, 2014

IN RE KAITLYNNE D.

**Appeal from the Circuit Court for Coffee County
No. 135J Vanessa Agee Jackson, Judge**

No. M2013-00546-COA-R3-JV - Filed May 21, 2014

The circuit court adjudicated the child dependent and neglected on the ground of severe child abuse by her father. The father appeals contending the evidence is insufficient to sustain a finding of severe child abuse. Finding the evidence clear and convincing, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, J.J., joined.

Garth R. Segroves, Tullahoma, Tennessee, for the appellant, Jonathan D.

Robert E. Cooper, Jr., Attorney General and Reporter, Mary Byrd Ferrara, and Jordan Scott, Assistant Attorney General, Nashville, Tennessee, for the appellee, Tennessee Department of Children's Services.

Peter Trenchi, III, Sewanee, Tennessee, for the appellee, Antonia M. R.

OPINION

After receiving a referral that Jonathan D. ("Father") had inserted his finger inside the vagina of his five-year old daughter Kaitlynne D.¹, the Department of Children's Services ("the Department") immediately filed a petition in the Coffee County Juvenile Court seeking an emergency restraining order against Father and to adjudicate the child dependent and neglected as a result of severe child abuse by her father. The petition was filed on April 15,

¹This court has a policy of protecting the identity of children in parental termination cases by initializing the last names of the parties.

2011, and on the same day the juvenile court entered an ex parte restraining order; three days later an attorney was appointed to represent Father.

The preliminary hearing was held on April 28, 2011, following which the juvenile court extended the no contact restraining order. On November 7, 2011 the juvenile court found the child dependent and neglected; however, the juvenile court found the evidence insufficient to prove severe child abuse. That ruling was appealed by the guardian ad litem and the child's mother to the Coffee County Circuit Court.

Following a one-day trial on August 22, 2012, the circuit court ruled that the Department had proven, by clear and convincing evidence, severe child abuse of the child by Father based upon Father penetrating the child's vagina with his finger when she was five years old.

Father appeals contending the evidence was insufficient to prove by clear and convincing evidence that the child was the victim of severe child abuse and that the finding of severe child abuse should be reversed.

ANALYSIS

A child who is suffering from abuse is a dependent and neglected child. *See* Tenn. Code Ann. § 37-1-102(12)(G). A determination that a child is dependent and neglected must be supported by clear and convincing evidence. *See* Tenn. Code Ann. § 37-1-129(a)(1) & (c). Severe child abuse in a dependency and neglect proceeding must also be established by clear and convincing evidence. *In re S.J.*, 387 S.W.3d 576, 591 (Tenn. Ct. App. 2012).

The "clear and convincing evidence standard" is more exacting than the "preponderance of the evidence" standard, although it does not demand the certainty required by the "beyond a reasonable doubt" standard. *In re C.W.W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000). The clear and convincing evidence standard defies precise definition. *Majors v. Smith*, 776 S.W.2d 538, 540 (Tenn. Ct. App. 1989). Evidence satisfying this high standard produces a firm belief or conviction regarding the truth of facts sought to be established. *In re C.W.W.*, 37 S.W.3d at 474. Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992).

Our review of the trial court's determinations on questions of fact is de novo with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). Whether a child has been proven dependent and neglected by clear and convincing evidence is a question of law which we review de novo without a presumption of correctness.

In re H.L. F., 297 S.W.3d 223, 233 (Tenn. Ct. App. 2009). To the extent the trial court's determinations rest upon an assessment of the credibility of witnesses, the determinations will not be overturned absent clear and convincing evidence to the contrary. *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999).

The circuit court heard testimony from Dr. Thomas C. Monroe, III, Psy.D., Detective Butch Steward, Kaitlynn's mother, Father, and Father's wife; the court also viewed the video recording of the forensic interview of the child conducted by the Coffee County Children's Advocacy Center.

In the forensic video Kaitlynn, who was then six years old, was asked why she was there, Kaitlynn responded: "My daddy Jon. He was touching my privates." She further stated she would lie on the couch with her father, both of them on their sides, and "When we are watching movies he just puts his hand in my pants and touches my privates." She also stated that he "put [his hand] down far and touched my private" on the skin and that "it felt cold." She further explained, "First he touches it. Then he puts his hand in my private." She said it happened "more than one time" and "it makes me cry because it hurts." With the aid of an illustration, Kaitlynn identified where her private was; she also stated that it was the private she used for "peeing." She stated it happened when she was four and five years old.

Dr. Monroe testified as an expert witness. He obtained his doctorate degree in psychology in 1997, immediately thereafter he did a post-doctoral residency in psychology at Vanderbilt Psychological and Counseling Center from January 1997 to June 1998, and he is a licensed child psychologist. He has 20 years of experience working with abused children, and he has been qualified as an expert witness in evaluation of children regarding issues of abuse and neglect by several trial courts in Tennessee.

He stated that he conducted four extended interviews of Kaitlynn over several months during which he repeatedly challenged her story. Dr. Monroe testified that the sessions gave him the opportunity to ask the same questions to the child repeatedly over a long period of time to detect inconsistencies and evidence concerning whether she had been coached. He testified that Kaitlynn's recount of the details remained consistent during the four sessions with him and were also consistent with her initial disclosure of abuse at the Children's Advocacy Center.

Dr. Monroe testified that when a child is "coached" by an adult and/or programmed to memorize a story that the child typically cannot answer questions outside of the scripted story. He explained that he questioned Kaitlynn specifically to determine if she had been coached and that Kaitlynn did not show evidence of memorization or coaching. He also stated that her credibility was bolstered by her description of details that one would not think

to coach a child and that she exhibited “spontaneous emotions” that coincided with her description of the abuse. He also stated that she exhibited “emotional defiance” when she was challenged concerning the details of her story. He said she became indignant to a degree that would not be expected in a coached situation when he challenged the truth of her story. He also said she became agitated when questioned about her father.

Dr. Monroe’s written report was introduced into evidence. Relevant portions of his report include the following about the “secret touch” and how this made Kaitlynn feel:

When asked if a Secret Touch had happened to her she said it had and said her father had touched her privates as they watched television or he played a video game. When asked to demonstrate what happened, Kaitlynn took a stuffed animal and rubbed her hand on the vaginal area of the teddy bear in an up and down motion When asked what the experience was like she replied “BAD! It didn’t feel good.” . . . The psychologist and Kaitlynn then reviewed the concepts of inside and outside, demonstrating and testing her knowledge of the topic. The child was able to correctly distinguish between inside and outside with several items including the psychologist’s coffee mug. Kaitlynn was then asked if Jonathan’s finger was on the inside or outside of her vagina and she reported that there was digital penetration of her vagina. When asked how many times it occurred, she answered “Only a few times.”

When asked if there were other feedings about being Secret Touched she responded “I was worried.” The psychologist asked her what she was worried about and she said “Cause he used to make me happy.” “Then what” the psychologist prompted. “He started touching my privates” she answered with a sad face and voice.

Dr. Monroe testified that it was his expert opinion that Kaitlynn was truthful, that she had not been coached, and that Kaitlynn was the victim of sexual abuse, including, specifically, vaginal penetration by her father.

As for Father’s testimony, he agreed with Kaitlynn’s statements that he would lie down with her on the couch to watch movies as Kaitlynn described it; however, he denied abusing his daughter but his denial of abuse was anything but compelling or consistent. For example, Father testified that he “did not recall” whether he had digitally penetrated Kaitlynn’s vagina. Later in his testimony, Father stated that he did not touch Kaitlynn

improperly and that he did not know why he stated earlier in his testimony that he did not recall whether touching his daughter inappropriately.

Detective Stewart of the City of Manchester Police Department testified that he had received certification as a forensic examiner of children several years earlier after taking a course at the children's advocacy center in Huntsville, Alabama; however, he could not recall the name of the agency that granted him the certificate. He also admitted that he did not attend regular training that was specifically devoted to forensic evaluation of children. Nevertheless, based upon his viewing of the Child Advocacy Center video Det. Stewart testified that he did not believe the abuse occurred because she was "too articulate" for her age and he also believed she had been coached because, in his opinion, her body language, which he observed by viewing the recorded interviews, was not consistent with abuse.

The circuit court also heard testimony from Kaitlynn's mother and her husband, both of whom testified that Kaitlynn was bright and articulate for her age. Father also testified that Kaitlynn was very smart for her age.

Based upon the foregoing and other evidence presented, the circuit court found the expert testimony of Dr. Monroe convincing; it additionally stated that it found Kaitlynn's disclosures in the Child Advocacy Center video "compelling." After making her findings from the bench, the circuit court judge found that Kaitlynn was the victim of severe child abuse based upon her father touching and penetrating her vagina with his finger and that she was dependent and neglected. The court's order to this effect was entered on October 1, 2012.

Tenn. Code Ann. § 37-1-102(23)(C) defines "severe child abuse" to include the commission of any act towards the child prohibited by Tenn. Code Ann. § 39-13-522 [rape of a child] and Tenn. Code Ann. § 39-15-302 [incest]. Rape of a child is "the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if the victim is more than three (3) years of age but less than thirteen (13) years of age." Tenn. Code Ann. § 39-13-522(a). A person commits incest who "engages in sexual penetration" with a person known to be his child. Tenn. Code Ann. § 39-15-302(a).

Having reviewed the record and the applicable legal standards, we affirm the circuit court's finding that the evidence clearly and convincingly established that Kaitlynn was the victim of severe child abuse that was inflicted upon her by her father, Jonathan D., when she was five years old.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the appellant, Jonathan D.

FRANK G. CLEMENT, JR., JUDGE