Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-373

MARCH TERM, 2019

In re S.D., Juvenile*	}	APPEALED FROM:
	}	
	}	Superior Court, Lamoille Unit,
	}	Family Division
	}	
	}	DOCKET NO. 17-4-18 Lejv
		Trial Judge: Michael S. Kupersmith, Superior Judge (Ret.), Specially Assigned

In the above-entitled cause, the Clerk will enter:

Juvenile S.D., born in November 2002, appeals the court's order concluding that she is a child in need of care or supervision (CHINS) because she was habitually and without justification truant from compulsory school attendance. On appeal, juvenile argues that (1) the court erroneously admitted the school's attendance records without an adequate foundation, (2) the court erred in questioning a witness to provide a foundation for the records, and (3) the evidence does not support the court's finding that the absences were without justification. We affirm.

At the time the CHINS petition was filed, S.D. was fifteen years old and was enrolled in high school. At the merits hearing, the school's guidance director testified that for the school year that began in August 2017, by April 2018, S.D. had missed forty-two full days and eleven half days of school. The school did not receive parent notification to excuse S.D. from school and marked the absences as unexcused. The court admitted S.D.'s attendance record based on the guidance director's testimony that the record was kept in the regular course of business and the school considered it a business record. S.D. testified that she was absent due to poor sleep, depression, and anxiety. Mother agreed that S.D. had been absent but claimed that for at least half of the recorded absences she had called the school. She confirmed that S.D. had emotional issues and had seen a counselor. The court found that S.D. had been habitually absent based on the school records and the guidance director's testimony. The court noted that, even if, as mother suggested, S.D. had only twenty-one unexcused absences, this would still amount to habitual absence. The court further concluded that S.D.'s absences were without justification. The court found that mother's and juvenile's explanations were not sufficient to justify the absences, noting that mother failed to provide any medical documentation. Juvenile appeals.

The State has the burden of establishing by a preponderance of the evidence that a child is CHINS. Id. § 5315(a). On appeal from a CHINS decision, this Court will "uphold the court's factual findings unless clearly erroneous and the court's legal conclusions when supported by those

findings." In re M.K., 2015 VT 8, ¶ 8, 198 Vt. 233. The State has the burden of proving CHINS "by a preponderance of the evidence." In re J.H., 2013 VT 31, ¶ 8, 193 Vt. 541.

Juvenile first argues that the court erred in admitting S.D.'s attendance record. The trial court has discretion in making evidentiary decisions and we review for an abuse of discretion. Gilman v. Towmotor Corp., 160 Vt. 116, 122 (1992). Vermont Rule of Evidence 803(6) excepts from the hearsay rule records or data "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make" the report. The record or data must be shown to comply with each of these requirements "by the testimony of the custodian or other qualified witness." Id.

At trial, the State sought to admit S.D.'s attendance record, which listed S.D.'s unexcused absences. The guidance director testified that an unexcused absence meant that the student was not at school and the school had not received a medical note or a note or telephone call from a parent or guardian. She stated that the record was maintained by the school in the regular course of its work and that the record was an accurate copy. Mother objected to admission. The court had the following interchange with the guidance director:

> THE COURT: . . . Does the school consider this a—one of its regular business records?
>
> [Guidance Director]: Yes.
>
> THE COURT: And I think you've already answered this. Let me ask you again, is it kept in the regular course of the school's business?
>
> [Guidance Director]: Yes.
>
> THE COURT: Any further objection?

There was no further objection and the record was admitted.

On appeal, juvenile contends that requirements of Rule 803(6) were not met because there was no evidence about who entered the data or when and that the one-word responses to the court's questions were insufficient to meet the rule requirements that the records were kept in the course of regularly conducted business activity as part of a regular practice. We conclude that this objection is not preserved for appeal. Although juvenile's attorney made an initial objection to admission of the attendance records, after questioning by the judge and additional testimony from the guidance director, the court specifically inquired whether there were further objections, and none were made. Under these circumstances, the objection is not preserved. See In re A.W., 2014 VT 32, ¶ 28, 196 Vt. 228 ("Objections that are waived or not raised at trial are not preserved for review on appeal."); Reed v. Zurn, 2010 VT 14, ¶ 10, 187 Vt. 613 (mem.) (explaining that challenge not preserved for appeal where objection not renewed after court's invitation).

Juvenile contends that even if the objection was not preserved the admission of her attendance record amounted to plain error. Assuming that plain error applies, we conclude that any error in admitting the record was not plain error. See In re G.S., 153 Vt. 651, 651 (1990) (mem.) (stating that plain error exists only in "rare and extraordinary case where the error is an obvious one and so grave and serious as to strike at the very heart of a defendant's constitutional rights" (quotation omitted)). Any error in admitting the attendance record was neither grave nor serious given that mother admitted to the number of days S.D. was absent and to not calling the school to excuse at least half the absences, and the court found that even twenty-one absences amounted to habitual truancy.

In a related argument, juvenile claims that the court erred in questioning the guidance director to elicit a foundation for the school records. Juvenile claims that the court's action amounted to advocacy. No objection to the court's questioning was made at trial. Therefore, for the reasons describe above, this error was not preserved for review and does not amount to plain error.* In any event, we conclude that the court's questions, which were limited and intended to clarify prior testimony, did not amount to abuse of discretion. See V.R.E. 614(b) (allowing court to "interrogate witnesses"); State v. Johnson, 158 Vt. 508, 523 (1992) (concluding that court did not abuse its discretion in questioning witness in attempt to "clarify testimony that had become confused during several redirect and recross examinations").

Juvenile's final argument is that the evidence does not support the court's finding that S.D.'s absences were unjustified. In a truancy case, the State must prove by a preponderance of the evidence that the child is truant "without justification." 33 V.S.A. § 5102(3)(D); see also In re J.H., 2013 VT 31, ¶ 13. The State can satisfy this burden "through properly admitted school records showing the child's unexcused absence." In re J.H., 2013 VT 31, ¶ 13. Here, S.D.'s school records were introduced, showing that S.D. had 42 unexcused full-day absences from school. In her testimony, mother admitted that S.D. was absent on those days and that on at least half of the days she had not called or otherwise notified the school to excuse the absence. Both mother and juvenile argued that the absences were caused by S.D.'s severe emotional disturbances. Juvenile contends that the court failed to explain why the explanations provided by her and her mother for her absences were insufficient to demonstrated that the absences were justified.

In its written order, the court recognized mother's and juvenile's testimony regarding S.D.'s emotional disturbances. Juvenile argues that the court did not explain why it credited other testimony over the juvenile and mother's testimony. Krupp v. Krupp, 126 Vt. 511, 513, 236 A.2d. 653 (1967) (holding that when court is making findings, it must not merely recite the testimony of the parties and must sift the evidence and state the facts). The court found, however, that without any medical records the testimony was not enough to show that the absences were justified for medical reasons. In a CHINS proceeding, "it is the exclusive role of the family court to weigh the evidence and assess the credibility of witnesses." In re M.L., 2010 VT 5, ¶ 29, 187 Vt. 291. The court acted within its discretion in this case in determining that the explanations provided by

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* Juvenile contends that the error was preserved because the court prevented the parties from objecting. There is no merit to this claim given that the court specifically asked the parties if there was a further objection.

mother and juvenile were not weighty enough on their own to find that S.D.'s absences were for medical reasons.

There is no merit to juvenile's argument that the court basically concluded that no excuse could justify the absence if it was not reported contemporaneously and therefore reported as unexcused on the attendance record. The court recognized that although an attendance record can satisfy the State's burden of showing absences are unjustified, "the child or the parent can effectively rebut the State's evidence by proving that there was, in fact, justification for the child's absences."

Affirmed.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice