

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. 2020-318

MARCH TERM, 2021

In re B.M., Juvenile
(H.M., Mother*)

} APPEALED FROM:
}
} Superior Court, Franklin Unit,
} Family Division
}
} DOCKET NO. 289-12-19 Frjv

Trial Judge: Howard E. Van Benthuisen

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

Mother appeals a family division order adjudicating her son B.M. a child in need of care or supervision (CHINS). On appeal, mother argues that the court’s findings do not support the adjudication. We reverse and remand.

Following a hearing, the court found the following by clear and convincing evidence as to the merits of the CHINS petition. B.M., born in December 2017, lived with mother in grandmother’s home. In November 2019, police responded to a call regarding a family fight at the residence. When police arrived, mother stated that she and father were arguing but nothing physical occurred. Mother initially refused to allow the officers to enter the residence to check on father, but ultimately let them in. Mother lied to officers about father’s whereabouts, saying that a child was in the locked bathroom.

Once father emerged from the bathroom, officers noticed that he had an injury to his back. Father had an approximately one-inch cut on his back and there was a lot of blood on his shirt. At first father stated that the cut was caused by falling and denied that the injury was a stab wound. On the way to the hospital, father said he had been stabbed, and later stated, “I wish she had just stabbed me in the heart.” Mother denied that father had been hurt and when a police officer returned to the house to ask for the jacket father had been wearing, she told police she could not find it.

The trial court further found that mother’s next-door neighbor saw father enter mother’s trailer after dinner that day, heard fighting, and then saw father run out of the house yelling for an ambulance, declaring that “she stabbed me again” and saying he could not breathe. After that, father ran back into the house, at which point neighbor heard arguing and yelling coming from inside. The neighbor went over to mother’s house and found mother and B.M. standing in the front doorway. Mother was blocking father, who was standing behind her, asking to go to the hospital. Mother handed B.M. to neighbor, and neighbor’s friend who had accompanied her took B.M. to neighbor’s house. Neighbor observed that B.M. had blood on his nose. Neighbor then observed father run out the back door and saw mother chasing and hitting him. Neighbor returned

B.M. to mother after the police had left. Mother asked neighbor to lie and say that B.M. was with neighbor during the fight.

The day after receiving a report of the incident, a DCF caseworker went to mother's house unannounced as part of its investigation. The caseworker found that mother's pupils were dilated, her speech mumbled, and she was slurring her words. As to father's stab wound, mother lied to the DCF caseworker, stating that nothing physical had happened between her and father, and that B.M. had been at neighbor's house the entire time. Mother also falsely stated that she had not seen father for over a month. Mother denied abusing substances but acknowledged using marijuana. Mother did not follow up on a safety plan and attend a substance-abuse evaluation that DCF recommended.

Mother testified at the merits hearing. She claimed that she did not injure father, did not see any blood that evening, and was unaware of his injury. She also denied blocking him inside the trailer or running after him. She stated that neighbor was lying during her account of the events.

The court concluded that B.M. was CHINS at the time the petition was filed. The court credited neighbor's testimony over mother's and found that mother lied during to police the night of the incident and during her testimony at the merits hearing. The court found that on the night of the fight B.M. was present when mother stabbed father in the back. Moreover, the court found that B.M. was close enough to the assault to get blood on his nose. The court concluded that B.M. was therefore without proper parental care. The court subsequently entered a disposition order continuing DCF custody for B.M. Mother filed this appeal.

“When reviewing a CHINS adjudication, we will uphold the court’s factual findings unless clearly erroneous and the court’s legal conclusions when supported by those findings.” In re J.C., 2016 VT 9, ¶ 6, 201 Vt. 192 (quotation omitted). A child may be adjudicated as CHINS when, among other things, the child is “without proper parental care or subsistence, education, medical, or other care necessary” for the child’s wellbeing. 33 V.S.A. § 5102(3)(B). The State has the burden of establishing that a child is CHINS by a preponderance of the evidence. Id. § 5315(a). The focus of a CHINS proceeding is the welfare of the child and it is a factual question as to whether the child is without proper parental care. In re J.C., 2016 VT 9, ¶ 7.

On appeal, mother first argues that the court’s finding that B.M. was close to the stabbing is based on speculation. Mother contends that there was no direct evidence as to where B.M. was and that the fact that B.M. had what looked like blood on his face was insufficient to establish that B.M. was close to the stabbing.

The trial court as factfinder may draw reasonable inference from the facts presented. See In re B.R., 2014 VT 37, ¶ 26, 196 Vt. 304 (affirming court’s reasonable inferences made from facts); In re L.M., 2014 VT 17, ¶ 30, 195 Vt. 637 (explaining that in assessing whether child is without proper parental care court can “properly draw upon its own common sense and experience” (quotation omitted)) However, “those inferences must add up to more than mere suspicion, and the factfinder cannot bridge evidentiary gaps with speculation.” State v. Wisowaty, 2015 VT 97, ¶ 16, 200 Vt. 24 (quotation and alteration omitted).

Here, there was ample evidence to support the court’s finding that B.M. was present in the trailer with mother and father when mother and father were yelling and fighting. The court credited neighbor’s account of the events and did not credit mother’s assertion that B.M. was not present. However, the court went on to find that the stabbing “was sufficiently close to [B.M.] that the child got some blood on his nose” and that “he was very close to some part of the aggravated assault on his father.” These findings are speculative and not supported by the evidence. Neighbor testified

that the blood on B.M.'s nose was "a little bit" and "[j]ust like a little smudge. It wasn't much of anything." This testimony does not support a finding that B.M. was in close proximity to the assault. There was no evidence of the layout of the home or where B.M. was in the home during the altercation. The fact that B.M. had a small dot of what appeared to be blood on his nose is insufficient to establish that he was close to the assault.

The trial court described its finding that B.M. was close to the stabbing as the "most critical" evidence supporting its overall determination that B.M. was without proper parental care. We are unable on appeal to determine if, without this finding that the court described as "critical," the court would have concluded that B.M. was CHINS. On appeal, the State argues that other evidence in the record could support a CHINS determination. The trial court did not, however, make findings on that evidence, and we will not evaluate it for the first time on appeal. Because the trial court characterized its unsupported finding as the "most critical" in the case, and because the remaining findings could be sufficient to support a CHINS determination, we remand for the trial court to consider the question. Cf. In re B.C., 2018 VT 126, 209 Vt. 48, ¶ 23 (reversing CHINS determination where court relied on inadmissible hearsay and remaining evidence could not support CHINS as a matter of law).

Because we reverse and remand for additional findings, we do not reach mother's argument that one incident does not establish that B.M. was at risk of harm when the CHINS petition was filed about a month afterwards.

Reversed and remanded.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice