SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1223-15T4

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

B.D.,

Defendant-Appellant.

IN THE MATTER OF M.D. and A.D.,

Minors.

Submitted March 15, 2017 – Decided September 29, 2017

Before Judges Carroll and Gooden Brown.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FN-07-0544-14.

Joseph E. Krakora, Public Defender, attorney for appellant (Laura M. Kalik, Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Mary L. Harpster, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor M.D. (Catherine Davila, Designated Counsel, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor A.D. (Cory H. Cassar, Designated Counsel, on the brief).

GOODEN BROWN, J.A.D.

Defendant B.D.[1] appeals from the November 7, 2014 Family Part order[2] finding that he abused or neglected his then twelve-year-old daughter, M.D., within the meaning of N.J.S.A. 9:6-8.21(c). Defendant argues that the evidence presented at the fact-finding hearing was insufficient to support the trial court's finding of abuse or neglect under Title 9. The Division of Child Protection and Permanency (Division) and M.D.'s Law Guardian join in opposing the appeal. Although there was no finding of abuse or neglect with respect to M.D.'s then nine-year-old sister, A.D., who is not a party to this appeal, A.D.'s Law Guardian filed a brief taking no position.[3] Having considered the parties' arguments in light of the record and applicable legal principles, we affirm.

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[1] Pursuant to Rule 1:38-3, we use initials for the parties to protect their identities.

[2] This order became appealable as of right after the trial court entered a final order terminating the litigation on September 30, 2015.

[3] Although there was no finding of abuse or neglect regarding A.D., A.D. was included in the fact-finding order and was under the care

We derive the following facts from the record developed at the fact-finding hearing, during which Newark Police Officer Derrick Clemons and Division Caseworker Martha Harris testified for the Division. Salima Gordon, a Community Engagement Specialist at the children's school, and A.D. testified for defendant. The Division's Screening and Investigation Reports, the police report, M.D.'s medical records, and photographs of M.D.'s injuries were admitted into evidence.

At approximately 9:00 a.m. on April 24, 2014, Officer Clemons responded to Sherman Street in Newark after a bystander reported finding M.D. crying, bleeding and limping. M.D. reported to Clemons that defendant struck her several times during a physical altercation, after he accused her of stealing $25 from him. According to M.D., after the altercation, defendant went back to work and M.D. was walking to school when she encountered the bystander on the street.

Clemons observed injuries to M.D.'s head and hands, specifically swelling, cuts and bruises. Clemons contacted Emergency Medical Services personnel, who transported M.D. to Beth Israel Hospital for treatment of her injuries. In addition, a child abuse referral was made to the Division. While M.D. was

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and supervision of the Division when the fact-finding hearing was conducted.

being treated, Clemons was notified that defendant was at police headquarters attempting to file a complaint against M.D. Clemons returned to headquarters and placed defendant under arrest for aggravated assault and child endangerment based on M.D.'s statement. At the time, defendant was unaware that M.D. had been transported to the hospital.

Upon receiving the child abuse referral, Harris interviewed M.D. at Beth Israel Hospital where M.D. repeated the account she gave Clemons. M.D. specified that defendant punched her with a closed fist. M.D. also told Harris that during a prior incident, defendant "beat her up" when she arrived home late from cheerleading practice, but indicated she did not have any marks or bruises from that incident. During the interview, Harris observed abrasions on M.D.'s left elbow, left hand, left index finger, and left thumb, which she later photographed. The attending medical personnel noted that the abrasions were consistent with M.D.'s statement of being assaulted. It was further noted that the degree of pain was "moderate[,]" and the degree of bleeding was "minimal." A follow-up with her primary care physician was recommended.

Harris then traveled to Peshine Avenue School in order to interview A.D. about the incident. A.D. denied seeing defendant hit M.D. and denied seeing M.D. get hurt. A.D. confirmed that

defendant and M.D. argued over the missing money that M.D. had, in fact, stolen from defendant but "pleaded with [A.D.] not to tell." A.D. stated that because M.D. was angry at defendant, M.D. punched a hole in the living room wall. In addition, when they headed out to the car to go to school, M.D. took a rock and threw it at defendant, and then proceeded to bang on the car window with the rock.

A.D. told Harris that defendant left M.D. and drove her to school, only after M.D. refused to get her book bag so that he could take her to school. When questioned about the prior incident involving M.D. arriving home late from cheerleading practice,[4] A.D. admitted that defendant and M.D. argued, but denied any corporal punishment. Instead, M.D.'s punishment "was no TV, no phone and [M.D.] had to stay home all day." A.D. told Harris that M.D. was "very disrespectful" to their father and "tries to break the rules."

[4] Gordon testified for defendant and reported that M.D. signs up for various after school programs but never attends, requiring staff to wait for M.D. to return to pick up A.D. Although Gordon did not know M.D.'s whereabouts when she absented herself from the after school programs, she confirmed that M.D. was not on the school premises.

Harris returned to Beth Israel Hospital and accompanied M.D. home in order to effectuate a DODD removal[5] of both M.D. and A.D., who was then home from school. While they were at the home, M.D. changed her account of how she was injured. She told Harris that her injuries were actually sustained during an altercation with defendant that occurred outside. According to M.D., while they were outside, defendant tried to get her into his car. However, based on prior beatings, she was afraid and tried to run away from him, at which point defendant pushed her and she fell to the ground. While she was on the ground, defendant tried to get her house keys from her book bag and a scuffle ensued.

A.D. became extremely angry and upset when she heard M.D.'s account of how she was injured and learned that they would be removed as a result. When Harris explained the removal process to them, A.D. argued with M.D. in Harris' presence and blamed M.D. for their removal and their father's arrest. A.D. indicated that "it was [M.D.'s] fault" because "[s]he was being disrespectful" and "threw a rock at her father, and that's why they got into the argument." M.D. explained that she threw the rock because she was

[5] A "Dodd" removal refers to the emergency removal of a child from the home without a court order, pursuant to the Dodd Act, N.J.S.A. 9:6-8.21 to -8.82, as amended.

angry at defendant for "dragg[ing] her back inside" and "[telling] her to walk to school" because "nobody cared about her."

Harris interviewed defendant on April 24[6] and again on May 1, 2014. Defendant admitted that he and M.D. argued over the missing money, but denied punching or pushing her. He stated that she ran away from him while he was trying to talk to her and she tripped and fell. He admitted attempting to take her house keys out of her book bag while she was on the ground because she had threatened to have her friends take everything in the house, a threat M.D. admitted making. After the scuffle on the ground, defendant tried to get M.D. into his car to take her to school, but she refused. As a result, he left her and took A.D. to school, and later went to the police station to report the stolen money. He acknowledged he did not return to the house to check on M.D. He explained that M.D. had been "acting out[]" and was "disrespectful."

Because there was no prior history involving the family, following the investigation, the Division determined that the allegations of abuse or neglect were established. While M.D.'s credibility was questioned based on the inconsistencies in her

[6] The main purpose of the April 24, 2014 interview was to ascertain the identity of any family members or friends who would be willing to care for the children. However, M.D.'s mother was reportedly in the Ivory Coast, and the individuals identified by defendant were not viable placement options.

accounts, it was determined that defendant was "an active participant" in the altercations that resulted in M.D.'s injuries.

A.D. testified in-camera at the fact-finding hearing pursuant to Rule 5:12-4(b). Although she acknowledged that there were two separate incidents, one inside the house and one outside, she again denied that defendant "hit[,]" "punched[,]" pushed or injured M.D. in any way, and claimed that on both occasions, "[M.D.] fell by herself. So she hurt her own self." A.D. admitted being upset about their removal and blaming M.D. She also explained that defendant normally disciplined M.D. by "talk[ing] to her" but "she [doesn't] want to listen."

Following the hearing, the court determined that the Division "met its burden" and proved "by a preponderance of the evidence" that M.D. was abused and neglected. The court found the testimony of the police officer and the caseworker credible, and that the injuries they observed and described were consistent with and "match[ed] up with what [M.D.] said." On the other hand, the court discredited A.D.'s testimony, noting

> we have [A.D.'s] testimony who said she fell twice, once in the house, once outside. . . . I didn't find it really credible. And, obviously, she's living with the father. She was somewhat upset that [M.D.'s] behavior led to her removal and this incident. And, clearly, I think she blamed [M.D.] But, regardless, I think . . . at her age[,] . . .

> her testimony could very well have been manipulative.
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> Or, alternatively, she originally said she didn't see anything to the caseworker. I don't know if she saw anything or not. But now she did see something and she fell twice. I mean the story just didn't match up. It doesn't make any sense what [A.D.] said.

Further, the court explained "we have no testimony by the defendant denying these allegations or explaining what happened or why he would take off and leave his daughter crying and bleeding." The court concluded that "there were injuries sustained by [M.D.] due to the actions of [defendant], [who] was apparently upset over some $25 that [M.D.] may have taken." According to the court, "whether she took the money or not is really irrelevant for purposes of this hearing. The question is, how the defendant . . . dealt with that issue[.]" The court determined that the precipitating event was "really not . . . a justification for hitting the child or injuring the child[.]" The court entered a memorializing order, and this appeal followed.

Our Supreme Court has set forth the standard that governs Title 9 cases as follows:

> [A]ppellate courts defer to the factual findings of the trial court because it has the opportunity to make first-hand credibility judgments about the witnesses who appear on the stand; it has a feel of the case that can never be realized by a review of the cold record . . . . [B]ecause of the family courts'

> special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding.
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> [N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342-43 (2010) (citations omitted).]

Thus, "if there is substantial credible evidence in the record to support the trial court's findings, we will not disturb those findings." N.J. Div. of Youth & Family Servs. v. L.L., 201 N.J. 210, 226 (2010). However, "if the trial court's conclusions are 'clearly mistaken or wide of the mark' [we] must intervene to ensure the fairness of the proceeding." Id. at 227 (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)). We owe no deference to the trial court's legal conclusions, which we review de novo. N.J. Div. of Youth & Family Servs. v. A.R., 419 N.J. Super. 538, 542-43 (App. Div. 2011).

"To prevail in a Title 9 proceeding, the Division must show by a preponderance of the competent and material evidence that the defendant abused or neglected the affected child." N.J. Div. of Child Prot. & Permanency v. B.O., 438 N.J. Super. 373, 380 (App. Div. 2014); see N.J.S.A. 9:6-8.46(b). The trial court in turn determines whether the child is abused or neglected by "the totality of the circumstances." Dep't of Children & Families v. G.R., 435 N.J. Super. 392, 401 (App. Div. 2014). An "abused or

neglected child" means, in pertinent part, a child under the age of eighteen years

> whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of [the] parent or guardian . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment; or by any other acts of a similarly serious nature requiring the aid of the court[.]
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> [N.J.S.A. 9:6-8.21(c)(4)(b).]

Interpreting N.J.S.A. 9:6-8.21(c)(4)(b), our Supreme Court has held that mere negligence does not trigger the statute. N.J. Div. of Youth & Family Servs. v. T.B., 207 N.J. 294, 306-07 (2011); G.S. v. Dep't of Human Servs., 157 N.J. 161, 172-73 (1999). Rather, the failure to exercise a minimum degree of care refers "to conduct that is grossly or wantonly negligent, but not necessarily intentional." T.B., supra, 207 N.J. at 305 (quoting G.S., supra, 157 N.J. at 178). Thus, the failure to exercise a minimum degree of care "at least requires grossly negligent or reckless conduct." T.B., supra, 207 N.J. at 306.

Although the distinction between gross negligence and ordinary negligence cannot be precisely defined, McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 305 (1970), the essence of gross

or wanton negligence is that it "implies that a person has acted with reckless disregard for the safety of others." G.S., supra, 157 N.J. at 179. Further, willful or wanton conduct is "done with the knowledge that injury is likely to, or probably will, result[,]" and "can apply to situations ranging from 'slight inadvertence to malicious purpose to inflict injury.'" Id. at 178 (quoting McLaughlin, supra, 56 N.J. at 305). If the act or omission is intentionally done, "whether the actor actually recognizes the highly dangerous character of [his or] her conduct is irrelevant," and "[k]nowledge will be imputed to the actor." Ibid. Such knowledge is imputed "[w]here an ordinary reasonable person would understand that a situation poses dangerous risks and acts without regard for the potentially serious consequences[.]" Id. at 179.

A determination of whether a parent's conduct "is to be classified as merely negligent, grossly negligent, or reckless can be a difficult one." T.B., supra, 207 N.J. at 309. The determination is fact sensitive and "[e]ach case requires careful, individual scrutiny" as many cases are "idiosyncratic." N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 33 (2011). However, because the primary purpose is the protection of children, our Supreme Court has explained that "a Title 9 inquiry must focus on the circumstances leading up to the injury and on the harm to

the child, and not on the [parent or] guardian's intent." G.S., supra, 157 N.J. at 176. Thus, "whether the [parent or] guardian intended to harm the child is irrelevant[,]" and when "a parent or guardian commits an intentional act that has unintended consequences, that action is considered other than accidental within the meaning of Title 9." Ibid.

In M.C. III, supra, 201 N.J. at 335, a two-hundred pound father chased his two teenage children, caught and grabbed them, and all three ended up on the floor. Both children were injured. One child had a soft tissue injury to his right hand, scratches on his neck, and abrasions and swelling over his ribs, while the other had rib tenderness and an abrasion behind her ear. Ibid. Our Supreme Court held that, although the father "may not have intended to harm his children, his actions were deliberate" and constituted abuse because he "intentionally grabbed the children and disregarded the substantial probability that injury would result from his conduct." Id. at 345.

Similarly, defendant's conduct in this case constituted abuse or neglect within the meaning of Title 9. Even focusing solely on the scuffle on the ground to which defendant admitted, while he may not have intended to harm M.D., his actions were deliberate and constituted abuse because he disregarded the substantial probability that injury would result from his conduct. We are

therefore satisfied that the court's findings are supported by substantial, competent, and credible evidence in the record.

Defendant also argues that the court "misapplied the law by relying upon M.D.'s out-of-court statements to find that [defendant] had committed abuse or neglect under Title 9." We disagree. Pursuant to N.J.S.A. 9:6-8.46(a)(4), "previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence; provided, however, that no such statement, if uncorroborated, shall be sufficient to make a fact finding of abuse or neglect." Thus, a child's uncorroborated hearsay statement, although admissible, "may not be the sole basis for a finding of abuse or neglect." P.W.R., supra, 205 N.J. at 33; see also N.J. Div. of Youth & Family Servs. v. L.A., 357 N.J. Super. 155, 167 (App. Div. 2003). In N.J. Div. of Child Prot. & Permanency v. J.A., 436 N.J. Super. 61, 67 (App. Div. 2014), we held that "corroborative evidence need not be direct so long as it provides some support for the out-of-court statements." Here, M.D.'s statements were sufficiently corroborated by the police officer's and the caseworker's observations and descriptions of M.D.'s injuries, the photographs of M.D.'s injuries, and M.D.'s medical records.

Affirmed.