

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2058-14T1

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

I.O.,

Defendant-Appellant.

IN THE MATTER OF M.L., J.V.
and K.L.,

Minors.

Argued January 11, 2017 — Decided February 17, 2017

Before Judges Accurso and Manahan.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Middlesex
County, Docket No. FN-12-200-12.

Adrienne Kalosieh, Designated Counsel,
argued the cause for appellant (Joseph E.
Krakora, Public Defender, attorney; Ms.
Kalosieh, on the brief).

Lea C. DeGuilo, Deputy Attorney General,
argued the cause for respondent (Christopher

S. Porrino, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Ms. DeGuilo, on the brief).

Noel C. Devlin, Assistant Deputy Public Defender, argued the cause for minor J.V. (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Mr. Devlin, on the brief).

PER CURIAM

Defendant I.O. appeals from an April 27, 2011 order of the Family Part finding that she abused and neglected her eleven-year old daughter J.V. (Johnetta)¹ in violation of N.J.S.A. 9:6-8.21c. Because we agree with the Division of Child Protection and Permanency and the Law Guardian that there is substantial credible evidence in the record to support the trial judge's finding of abuse and neglect, we affirm.

A police officer, two Division workers and defendant's mother testified at the fact-finding hearing. The officer testified he was dispatched to the split-level house in Franklin Township where defendant was living on the report of a woman assaulting her mother. When he arrived just before 10:00 p.m., another officer was already speaking to defendant in the kitchen. There were no walls between the kitchen and the living

¹ We refer to the child by a fictitious name in order to protect her privacy.

room, and the officer could see both defendant and her mother in the kitchen and Johnetta, awake and sitting on a bed, in the living room. The house was in disarray, with piles of boxes around and a twenty-seven-inch television was shattered on the floor.

The officer testified that defendant's mother reported that defendant had come home drunk, "began arguing with her, and at one point during the argument, began to choke her." Defendant then threw the television to the floor. While the officer was interviewing defendant's mother, defendant continued to yell and scream at her mother, although both officers tried to get her to stop. At one point, defendant picked up a cordless phone and dialed 911, requesting additional officers. When the officers directed her to hang up, defendant instead yelled at her mother in an angry tone and threw the phone at her.

At that point, the officers told defendant she was under arrest. The officer testified defendant was "wild flailing her body, moving her arms around, refusing to follow . . . commands to stop screaming" and speak to the officers. Defendant was charged with harassment and resisting arrest. The officer testified that after handcuffing defendant and removing her to a squad car, he returned to advise defendant's mother of her right to seek a restraining order. As he left, he went over to where

Johnetta was sitting and told her he "was sorry that she had to witness everything that had happened." When he was asked on cross-examination why he thought Johnetta had seen what happened, he said, "Because it's an open area. She wasn't in another room or down the hall."

The Division case worker who responded to defendant's home after defendant was arrested also testified. Defendant's mother provided the worker with the same account she had provided the police. The worker testified defendant's mother denied knowing if defendant had been drinking and could not say why defendant had tried to choke her. Johnetta told the worker she had been asleep in another room during the entire incident and had not seen or heard anything, including the police arresting her mother.

After leaving defendant's mother and Johnetta, the worker interviewed defendant at the county jail. Although the worker had heard a report that defendant had been drunk, defendant denied she had been drinking, and the officer at the front desk told her the nurse that examined defendant saw no signs of intoxication. Defendant admitted arguing with her mother but denied choking her. When the worker asked defendant why she had been arrested, defendant said, she "didn't know, except that she resisted arrest and would not shut up." Defendant told the

worker that while she and her mother had been arguing in the kitchen, Johnetta was in the living room. Another worker testified that defendant had been referred for drug treatment prior to the incident.

Defendant's mother testified on her daughter's behalf. She acknowledged having argued with defendant, but denied that defendant was yelling at her. When asked on cross-examination who defendant was yelling at if not at her, defendant's mother replied, "I guess she was just yelling, I don't know who she was yelling at. She wasn't yelling at me." Defendant's mother also denied defendant had thrown the phone at her. She testified that defendant threw the phone "down, but she wasn't throwing it at [her]."

Defendant's mother claimed that Johnetta had not seen the argument, as she had been asleep in the bedroom, awakening only to see the officer departing after everything was over. She denied telling the officer defendant had been drunk, testifying she had never seen her daughter drink alcohol and did not know if she drank. She could not recall telling the officer that defendant had choked her. When the judge asked whether defendant had choked her, defendant's mother answered that "she might have put her hands on me like that, but she wasn't choking." Defendant's mother denied being afraid of her

daughter, but admitted the two had traveled to court separately and that her daughter did not know where she lived.

After hearing the testimony, Judge Marino entered an order finding defendant had placed Johnetta at substantial risk of imminent harm by her violent outburst in violation of N.J.S.A. 9:6-8.21c(4)(b). In a comprehensive written opinion, Judge Marino reviewed the proofs, made credibility determinations, discussed the controlling case law and explained clearly why she concluded Johnetta had been present and seen the altercation between her mother and grandmother and the threat of physical injury it posed to the girl.

Specifically, Judge Marino wrote that she found the officer "a credible witness," whose testimony was consistent on direct and cross-examination. She likewise found the testimony of the Division caseworkers to be both credible and consistent. Defendant's mother, however, the judge deemed incredible, finding she "appeared confused about events," and that her testimony was at odds with her report to the police and the Division workers on the night of the incident. Acknowledging that defendant's mother claimed she was "not fearful of [defendant]," the judge noted that defendant, "does not know where [her mother] is living and [defendant's mother] wants it to stay like that at this time."

Based on the credible testimony, the judge concluded that Johnetta saw the argument between her mother and grandmother and witnessed her mother choking her grandmother, throwing a large television to the floor, throwing a phone at or in the direction of her grandmother and being handcuffed by the police and removed from their home as she "resist[ed] arrest by flailing her arms and legs." Although acknowledging the State did not attempt to establish that Johnetta had been emotionally harmed by what she saw, see N.J. Div. of Youth & Family Servs. v. S.S., 372 N.J. Super. 13, 25-26 (App. Div. 2004), certif. denied, 182 N.J. 426 (2005), Judge Marino concluded "the State did show by a preponderance of evidence that [Johnetta] was placed at substantial risk of injury as a result of [defendant's] out of control conduct."

Defendant appeals, arguing the court erred in holding the Division's evidence established Johnetta was at risk of physical injury and that the Division did not present competent evidence Johnetta was put at substantial risk of physical injury when defendant threw a television to the floor or yelled and threw "inanimate objects" in the next room.

Defendant's arguments are premised almost entirely on alleged errors in the judge's fact-finding. We, however, are not free to overturn the factual findings and legal conclusions

of a trial judge "unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974).

Title 9 defines an "abused or neglected child" as including

a child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian, as herein defined, to exercise a minimum degree of care (a) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care though financially able to do so or through offered financial or other reasonable means to do so, or (b) 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[.]

[N.J.S.A. 9:6-8.21c(4).]

In G.S. v. Department of Human Services, 157 N.J. 161, 178 (1999), the Court explained that a "minimum degree of care," denoted

a lesser burden on the actor than a duty of ordinary care. If a lesser measure of care is required of an actor, then something more than ordinary negligence is required to hold the actor liable. The most logical higher measure of neglect is found in conduct that is grossly negligent because it is willful or wanton.

Willful or wanton conduct includes those actions "done with the knowledge that injury is likely to, or probably will, result."

Ibid. "Essentially, the concept of willful and wanton misconduct implies that a person has acted with reckless disregard for the safety of others." Id. at 179. The Court likewise held that "[b]ecause risks that are recklessly incurred are not considered unforeseen perils or accidents in the eyes of the law, actions taken with reckless disregard for the consequences also may be wanton or willful." Id. at 178.

Although the Court noted that the difference between negligence and willful and wanton conduct cannot be clearly delineated in all cases,

[w]here an ordinary reasonable person would understand that a situation poses dangerous risks and acts without regard for the potentially serious consequences, the law holds him responsible for the injuries he causes. Thus, under a wanton and willful negligence standard, a person is liable for the foreseeable consequences of her actions, regardless of whether she actually intended to cause injury.

[Id. at 179 (internal citation omitted).]

Therefore, the court held that

a guardian fails to exercise a minimum degree of care when he or she is aware of the dangers inherent in a situation and fails adequately to supervise the child or

recklessly creates a risk of serious injury to that child.

[Id. at 181.]

Our review of the trial court's factual findings in this abuse and neglect proceeding is strictly limited to determining whether those findings are supported by adequate, substantial, and credible evidence in the record. N.J. Div. of Youth & Family Servs. v. V.M., 408 N.J. Super. 222, 235 (App. Div.), certif. denied, 201 N.J. 272 (2009), cert. denied, 561 U.S. 1028, 130 S. Ct. 3502, 177 L. Ed. 2d 1095 (2010). If the findings have such support in the record, we are bound by them in deciding the appeal. Rova Farms, supra, 65 N.J. at 484.


Although our scope of review is expanded in considering the legal implications to be drawn from established facts, N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007), we do not conclude the judge went wide of the mark in determining that defendant's violent outburst in which she choked her mother, threw a large television to the floor and could not be dissuaded by the efforts of two policemen from continuing to scream and throw things at her mother while her eleven-year-old daughter sat nearby, resulting in the officers arresting and subduing defendant and forcibly removing her from their home, recklessly created a risk of serious injury to

Johnetta. See G.S., supra, 157 N.J. at 181-82. As the officer noted, Johnetta was not in "another room or down the hall," she was in the immediate vicinity of defendant's violent and out of control behavior.

The Supreme Court has explained that whether a parent has failed to exercise a minimum degree of care for a child must be analyzed "in light of the dangers and risks associated with the situation." Ibid. Having reviewed the record with respect to the arguments raised on appeal, we are satisfied that Judge Marino carefully and conscientiously assessed all of the facts presented. We affirm the finding of abuse and neglect substantially for the reasons expressed in her written opinion of April 26, 2011.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION