SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2298-14T1

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

B.G.,

Defendant-Appellant.

IN THE MATTER OF Z.P. and M.R., minors.

Submitted March 28, 2017 – Decided May 1, 2017

Before Judges Gilson and Sapp-Peterson.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Cumberland County, Docket No. FN-06-90-14.

Joseph E. Krakora, Public Defender, attorney for appellant (Durrell Wachtler Ciccia, Designated Counsel, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Jennifer Krabill, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Noel C. Devlin, Assistant Deputy Public Defender, on the brief).

PER CURIAM

Defendant B.G. (Barbara) appeals from a September 30, 2014 order finding that she abused or neglected her two minor sons by driving with them in a car while she was intoxicated and while the children were not in safety seats. We affirm because the finding of abuse or neglect was supported by substantial, credible evidence and the Family Part correctly applied the relevant law.

I.

Barbara is the mother of two sons, Z.P. (Zachery) and M.R. (Mark)[1]. J.R. (James) is the father of Mark. A.P. is the father of Zachery, but he was not involved in the proceedings.

On January 2, 2014, Barbara and James were involved in a one-car automobile accident. Barbara was driving the car and James was a passenger. The two boys were also in the car at the time of the accident and, although they were not in car seats, they were not hurt. Following the accident, Barbara and James were taken to a hospital for treatment. Hospital records show that

[1] To protect privacy interests, and for ease of reading, we use fictitious names. See R. 1:38-3(d)(12).

Barbara and James had blood alcohol concentrations (BAC) of 0.16% and 0.14%, respectively.

A fact-finding hearing was conducted on September 30, 2015. Private counsel represented both Barbara and James. No testimony was offered at the hearing. Instead, the parties stipulated to the admission of three documents: a redacted Division investigation summary; Barbara's medical records from the day of the accident; and James' medical records from the day of the accident. Counsel for Barbara and James both agreed to the admission of those records and that no testimony would be presented. Accordingly, neither Barbara nor James testified and no documents were submitted on their behalf. Indeed, neither counsel for Barbara nor James made any arguments against the finding of abuse or neglect.

The Family Part found that Barbara's BAC was above the legal limit based on a toxicology report contained in the medical records. The court then found that Barbara had been intoxicated when she was driving the car. The court also found that Barbara had placed the children's safety seats in the trunk to accommodate another passenger and she admitted to falling asleep while driving the car with the children in the vehicle. Based on those factual findings, the court concluded that Barbara failed to exercise a minimum degree of care by permitting the children to ride in the

car while she was under the influence of alcohol. The court also held that it was abuse or neglect to leave the car safety seats in the trunk and to have the children ride unrestrained in the car.[2]

Thereafter, Barbara entered into a stipulation under which she consented to substance abuse treatment. Following a series of compliance hearings, the children were returned to Barbara's custody and the litigation was terminated. Barbara now appeals and new counsel, the Office of Parental Representation, represents her.

II.

On appeal, Barbara makes two arguments. First, she contends that the trial court erred in finding abuse or neglect because the evidence presented was insufficient. In that regard, she argues the evidence contained inadmissible hearsay, the evidence consisted solely of documentary evidence, and expert testimony was required to prove that Barbara was intoxicated or impaired. Second, Barbara asserts that she did not receive effective assistance of counsel at the hearing.

Our review of the family court's factual findings is limited. N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 278-79

[2] The court also found that James had abused or neglected the children. James has not appealed that finding.

(2007). We defer to the findings of the Family Part if those findings are "supported by adequate, substantial, and credible evidence" in the record. N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 552 (2014). A decision should be reversed or modified on appeal only if the findings were "so wholly unsupportable as to result in a denial of justice[.]" Colca v. Anson, 413 N.J. Super. 405, 413 (App. Div. 2010) (alteration in original) (quoting Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 475 (1988)). "[B]y virtue of its specific jurisdiction, the Family Part['s]" findings should be accorded special deference. R.G., supra, 217 N.J. at 553. We review de novo a trial court's legal conclusions. N.J. Div. of Youth & Family Servs. v. S.I., 437 N.J. Super. 142, 152 (App. Div. 2014).

The adjudication of abuse or neglect is governed by Title Nine, which is designed to protect children. G.S. v. Dep't of Human Servs., 157 N.J. 161, 171 (1999) (quoting N.J.S.A. 9:6-8.8); see also N.J.S.A. 9:6-8.21 to -8.73 (governing protection of abused and neglected children). Under Title Nine a child is abused or neglected if

> [a] parent or guardian . . . creates or allows to be created a substantial or ongoing risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted loss or impairment of the function of any bodily organ

> . . . or 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 . . . 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[.]
>
> [N.J.S.A. 9:6-8.21(c)(2) and (c)(4)(b).]

The statute does not require that the child experience actual harm. N.J.S.A. 9:6-8.21(c)(4)(b); see also N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 449 (2012). Instead, a child can be abused or neglected if his or her physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired. N.J.S.A. 9:6-8.21(c)(4)(b). In such cases, where there is an absence of actual harm, the focus is on whether the parent failed to exercise a minimum degree of care. G.S. v. Dep't. of Human Servs., 157 N.J. 161 (1999).

In G.S. the Supreme Court explained that 'minimum degree of care' refers to "conduct that is grossly or wantonly negligent, but not necessarily intentional." Id. at 178. "Conduct is considered willful or wanton if done with the knowledge that injury is likely to, or probably will, result." Ibid. "[A] parent fails to exercise a minimum degree of care when, despite being 'aware of the dangers inherent in a situation,' the parent 'fails adequately to supervise the child or recklessly creates a risk of

serious injury to that child.'" N.J. Div. of Child Prot. & Permanency v. J.A., 436 N.J. Super. 61, 68 (App. Div. 2014) (quoting G.S., supra, 157 N.J. at 181).

The Division has the burden to prove by a preponderance of competent, material, and relevant evidence that a child is an abused or neglected child. N.J.S.A. 9:6-8.46(b); See also N.J. Dept. of Children and Families, Div. of Youth & Family Servs. v. A.L., 213 N.J. 1, 28 (2013). This requires demonstrating "the probability of present or future harm." New Jersey Div. of Youth & Family Servs. v. S.S., 372 N.J. Super. 13, 24 (App. Div. 2004), certif. denied, 182 N.J. 426 (2005). Title Nine cases are fact-sensitive, and the court must base its findings on the totality of circumstances. N.J. Div. of Youth & Family Servs. v. V.T., 423 N.J. Super. 320, 329 (App. Div. 2011).

A. The Sufficiency of the Evidence

We have previously ruled that "a parent fails to exercise the minimum degree of care required by N.J.S.A. 9:6-8.21(c)(4) when permitting children to be passengers in a vehicle driven by a person who appears to be inebriated." J.A., supra, 436 N.J. Super. at 64. Here, there was sufficient, competent, and credible evidence that Barbara was inebriated when she allowed her sons to be passengers in a vehicle that she was driving. Barbara admitted that she then fell asleep at the wheel and was involved in an

automobile accident. Although the children were not injured, they were put at substantial risk of serious harm because of Barbara's recklessness. Thus, Barbara abused or neglected her children by failing to exercise a minimum degree of care.

Barbara argues that it was error for the trial court to rely exclusively on documentary evidence. We have cautioned trial judges about the dangers inherent in adjudicating contested trials on the papers. N.J. Div. of Child Prot. & Permanency v. J.D., 447 N.J. Super. 337, 353-54 (App. Div. 2016). Here, however, we discern no error in the trial court's decision to rely on documents that were stipulated into evidence. The facts were uncontested and there was no showing that testimonial evidence could have disputed the facts established by the documents.

Barbara also argues that the evidence presented by the Division was "not competent because it included inadmissible hearsay." The decision to admit evidence is in the trial court's sound discretion and will not be reversed unless that discretion is abused. See Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382 (2010). Here, Barbara did not object to the admission of the documentary evidence. Thus, we review the admissions for plain error; that is, whether the error was "clearly capable of producing an unjust result[.]" R. 2:10-2; see also State v. Robinson, 200 N.J. 1, 20 (2009).

Since the documents in evidence were admitted by stipulation, the trial court did not have to make any specific findings as to their admissibility. Even if their admission were contested, however, the documents would have been admissible. N.J.S.A. 9:6-8.46(a)(3) allows for the admission of documentary evidence at an abuse or neglect fact-finding hearing if

> the judge finds that it was made in the regular course of the business of any hospital or any other public or private institution or agency, and that it was in the regular course of such business to make it, at the time of the condition, act, transaction, occurrence or event, or within a reasonable time thereafter, shall be prima facie evidence of the facts contained in such certification.

The material and central evidence at the fact-finding hearing concerned Barbara's intoxication. That evidence was established by a toxicology report contained in Barbara's hospital records. Although the toxicology report was admitted by stipulation, the medical records, including the toxicology report, were admissible as business records. N.J.S.A. 9:6-8.46(a)(3); N.J.R.E. 801(d); N.J.R.E. 803(c)(6); see also N.J. Div. of Youth & Family Servs. v. B.M., 413 N.J. Super. 118, 129-30 (App. Div. 2010) (explaining the prerequisites for admission under the business records exception). The hospital made these records in the regular course of its business of treating patients.

Barbara additionally argues that the Division's investigative summary contained embedded hearsay not subject to any exception. Specifically, she now takes issue with the admission of a conversation between the Division caseworker and Barbara's mother and a conversation between the caseworker and the doctor who examined Barbara on the night of the accident. The court did not rely on either of those conversations in finding that Barbara was intoxicated.

The conversation between the caseworker and Barbara's mother related to the temporary placement of the children after their emergency removal. Thus, that conversation was not relevant to the determination of abuse or neglect.

The Family Part judge stated that she relied on the medical records as evidence of Barbara's BAC at the time of the accident. Thus, there is nothing in the record to indicate that the trial court relied on the conversation between the caseworker and the doctor. Moreover, that conversation only served to confirm Barbara's BAC that was established in the toxicology report. In short, any evidence that Barbara asserts was embedded hearsay was not relied on and the admission of this evidence was not plain error.

Barbara also argues that expert testimony was necessary to establish her impairment. Under N.J.S.A. 39:4-50, operating a

vehicle with a BAC above 0.08% is prima facie evidence of driving while intoxicated and creates a rebuttable presumption that the driver was impaired. State v. Ghegan, 213 N.J. Super. 383, 383 (App. Div. 1986).

Here, hospital records that were admitted without objection show that Barbara's BAC was 0.16%. This was prima facie evidence of Barbara's impairment and Barbara presented nothing to rebut that presumption. Thus, there was no requirement for expert testimony to establish impairment and the trial court's finding that Barbara was impaired was based on substantial, credible evidence in the record.

B. Effective Assistance of Counsel

Parents who are subject to Title Nine abuse or neglect proceedings "are entitled to the effective assistance of counsel." Div. of Youth & Family Servs. v. M.D., 417 N.J. Super. 583, 609 (App. Div. 2011) (citing N.J. Div. of Youth & Family Servs. v. B.R., 192 N.J. 301, 305-07 (2007)). A defendant alleging ineffective assistance of counsel must prove both prongs of the Strickland test:

> (1) counsel's performance must be objectively deficient – i.e., it must fall outside the broad range of professionally acceptable performance; and
> (2) counsel's deficient performance must prejudice the defense – i.e., there must be "a reasonable probability that, but for

> counsel's unprofessional errors, the result of the proceeding would have been different."
>
> [B.R., supra, 192 N.J. at 307 (quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 697 (1984); accord State v. Fritz, 105 N.J. 42, 58 (1987) (adopting Strickland standard in New Jersey)).]

Barbara argues her trial counsel was ineffective in failing to object to certain hearsay contained in the documentary evidence and for failing to present evidence of Barbara's cooperation with the Division and her treatment for her substance abuse. These alleged failures do not establish either a deficient performance by Barbara's counsel or prejudice.

The decision not to object to the documentary evidence was a reasonable tactical decision. As we have already discussed, the hospital records were admissible as business records under N.J.S.A. 9:6-8.46(a)(3). Consequently, it was reasonable for counsel not to object because the documents would have been admissible over any such objection. "Matters of trial strategy are 'entrusted to the sound discretion of competent trial counsel.'" N.J. Div. of Youth & Family Servs. v. V.K., 236 N.J. Super. 243, 258 (App. Div. 1989) (quoting State v. Coruzzi, 189 N.J. Super. 273, 321 (App. Div.), certif. denied, 94 N.J. 531 (1983)), certif. denied, 121 N.J. 614 (1990).

The decision not to present evidence of Barbara's subsequent cooperation and substance abuse treatment also does not reflect a deficient performance by counsel. Such evidence was not relevant as to whether Barbara had abused or neglected the children by driving intoxicated. Instead, such evidence was relevant to the Division's return of the children to Barbara's custody. Indeed, the children were eventually returned to Barbara's custody because of her cooperation with the Division and her participation in substance abuse treatment.

The alleged failures also do not establish any prejudice to Barbara. Again, as we have already explained, any inadmissible hearsay contained in the documentary evidence was not relied on by the trial court in finding that Barbara had abused or neglected the children. Moreover, evidence of Barbara's subsequent cooperation and substance abuse treatment would not have rebutted the undisputed fact that she drove a car while intoxicated and while the children were in the car. The subsequent cooperation and treatment also does not show prejudice to the finding that she abused or neglected the children by driving while they were not secured in safety seats.

Having reviewed the record, we conclude that the trial court properly found that Barbara abused or neglected her two minor sons

based on competent and credible evidence. We also hold that Barbara has not established ineffective assistance of counsel.

Affirmed.