

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4263-14T4
A-4476-14T4

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

C.M. and J.G.,

Defendants-Appellants,

and

J.M., SR., and L.N.,

Defendants.

IN THE MATTER OF M.D., B.M.,
J.M., J.M., and L.G.,

Minors.

Submitted December 14, 2016 – Decided March 13, 2017

Before Judges Alvarez and Manahan.

On appeal from the Superior Court of New
Jersey, Chancery Division, Family Part, Hudson
County, Docket No. FN-09-318-14.

Joseph E. Krakora, Public Defender, attorney for appellant C.M. (Kimmo Z. H. Abbasi, Designated Counsel, on the brief).

Joseph E. Krakora, Public Defender, attorney for appellant J.G. (Thomas G. Hand, Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Joyce Calefati Booth, Deputy Attorney General, on the brief).

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

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors B.M., J.M., J.M., and L.G. (Lisa M. Black, Designated Counsel, on the brief).

PER CURIAM

Defendants J.G. (Robert)¹ and C.M. (Kate) separately appeal from a July 24, 2014 Family Part order determining, after a fact-finding hearing in an abuse and neglect proceeding, that Robert sexually abused M.D. (Sally) from age nine until age twelve, and that Kate neglected Sally by failing to protect her child from that significant harm. The matters are consolidated for decision. We affirm.

¹ We use initials and fictitious names in order to protect the children's privacy.

At the fact-finding hearing, several Division of Child Protection and Permanency (Division) caseworkers testified, as did two experts. Contacts with the family began in 2004. On that occasion, the Division was granted care and supervision of Sally and her three younger brothers because of Kate's neglect of her children's educational and medical needs. The litigation was dismissed in 2010. Robert is the father of the youngest boy, and resided with the family during the years Sally claimed she was sexually abused.

The Division was again contacted about the family in 2012. Sally had attempted suicide, suffered a mental health crisis, and been placed in a residential facility. On a home visit on July 4, 2013, Sally told Kate that Robert had raped her years earlier, and that he would drug her by giving her pills.

Kate asked Robert if the allegations were true. He denied them. Kate did not report the claims or take any other steps to address them.

Thereafter, Zuliya Beltram, one of the Division caseworkers, spoke to Kate regarding the allegations. She told the worker, on the one hand, that she did not believe Sally, on the other that she, Kate, had been raped and dealt with it, and that Sally needed to do the same. Kate referred to Sally as a "whore" and a "slut,"

described her as promiscuous, and said she did not act like a rape victim.

Beltram described Kate and Sally's relationship as very erratic. Kate would not visit her daughter at the residential placement despite the Division's offer of transportation and childcare.

Kate also told Beltram that Sally fabricated the charges because she was not allowed to get piercings or tattoos. Kate said she did not like her daughter, describing her as a manipulative child. She did not believe that Robert had raped her daughter because she would "hug up on him." Robert also denied the allegations to Division workers, claiming that Sally was upset because her mother would not give her permission to go outside.

Sally told Beltram that she had told her mother about the sexual abuse years earlier, but that her mother had slapped her and called her a liar. Sally also told the worker that she had complained about the sexual abuse to a childhood friend.

When Sally was interviewed by the Hudson County Special Victim Unit (SVU) in August 2013, she described the abuse in detail. It began when she was approximately nine years old and the family lived in Hoboken. Robert would touch her, kiss her, remove her clothing, and place his penis "inside her."

The SVU contacted Sally's childhood friend, who confirmed that years before Sally had disclosed that she had been raped. Although Sally did not name her attacker, the friend suspected that it was Robert.

Katwana Davis, another Division worker, testified that Sally had initially disclosed the sexual abuse during a treatment team meeting at her residential facility on July 24, 2013. When she spoke to Kate about the allegation, Kate said Sally had accused others of raping her and that she was "a whore and a slut."

Davis repeated Sally's description of the sexual abuse and also testified about the childhood friend who confirmed that Sally had told her that she had been raped. When Robert was confronted, Davis recalled that he responded that Sally was "just upset because she was being punished[,] " had behavioral issues, and was "just being mean by making up the allegations against him."

One of the Division's experts was Daniel Bromberg, a board certified cognitive and behavioral psychologist specializing in the effects of physical and sexual abuse on children. He interviewed Sally, reviewed her extensive records, including from the residential facility, administered psychological tests, and interviewed Kate by phone.

Despite the evaluation being court-ordered, Dr. Bromberg attempted to obtain Kate's consent. She agreed, albeit

reluctantly, but asked that he "not allow [Sally] to use [Kate's] experience of rape as her own." Dr. Bromberg found this troubling, not only because it meant that Kate did not believe her child, but that she thought her daughter was "stealing" her own history.

Sally reported having some psychotic symptoms, including hallucinations, between ages nine and twelve. These psychotic symptoms ceased upon her entry into the residential program. Dr. Bromberg believed that the symptoms were a direct response to her home situation, specifically, Robert's sexual abuse.

Dr. Bromberg recounted the details Sally gave, including multiple incidents of exposure to pornography and exposure to Robert masturbating, in addition to the unwanted sexual contact. Sally was not sure of the age at which Robert began to abuse her. She described Robert's behavior as "totally disgusting," and said it would make her feel a need to shower. Robert assaulted her at night while other family members were asleep, and used his fingers and his penis to penetrate her. He would expose himself to her at times, and she described on one occasion seeing "stuff dripping from his penis" after he masturbated. Robert would move inside her, withdraw, and as she got older, she realized that he would then masturbate and ejaculate elsewhere. He began to use condoms when she approached puberty.

Robert would give Sally "diet pills," which she came to believe were actually her mother's prescription medication. These drugs made her feel "high." Once when she had taken these pills, she said that Robert "put his penis inside my butt but I couldn't feel it. It was horrible."

Sally's acceptance of Robert's presence in the household, in Dr. Bromberg's opinion, did not contradict the sexual abuse allegations. Her biological father had never been involved with her, and it is not unusual for children who are molested to have some positive, not just negative, interactions with the adult perpetrator. Dr. Bromberg considered it significant, although Sally was unclear about details such as whether she was seven, eight, or nine years old when the abuse began, that she reported the event to a peer. He also considered it significant that her descriptions were consistent.

Dr. Bromberg administered psychological tests which revealed Sally suffered from anxiety, and engaged in maladaptive behaviors to control anxiety, such as self-injury. She was preoccupied with, and distressed about, sex and struggled with depression and anger management problems. He did not believe she was falsifying testing results because it would have required a great deal more education about the subject for her to have known which experiences to report and which symptoms to describe.

Dr. Bromberg was concerned that Kate did not believe her daughter, which meant that the parent-child relationship really could not continue. Kate could not protect Sally so long as she did not believe her.

The Division also presented the testimony of Martin A. Finkel, M.D., a board certified pediatrician involved in the treatment of child sexual abuse since 1982. He opined that Sally's concern that she would not be believed, or be able to go home, kept her from reporting her situation earlier. Sally was very fearful of being unable to return home.

Sally told Dr. Finkel that after the encounters with Robert, she would have difficulty urinating, indicative of genital trauma. He described some of Sally's "idiosyncratic worries," including that people could tell that she was not a virgin and that she might not be able to have children. Sally had developed symptoms of post-traumatic stress disorder, including suicidal ideation and self-injury. Dr. Finkel conducted a head-to-toe examination, and in addition to Sally's cutting scars, found she had a complete transaction of the hymen, common in younger children who are sexually penetrated and whose hymens are not fully estrogenized.

When she testified, Kate said that her relationship with Sally was more like that of an older sister than mother and daughter. While on the stand, she also described her relationship

with a young man named Jason, whom she said was twenty-one although Sally had claimed he was nineteen. Once Sally was in residential placement, Kate allowed Jason to live in her home and sleep in her daughter's bed, and became sexually involved with him.

Kate attributed Sally's 2013 disclosure to Robert's discovery of a Facebook posting that Sally planned to go to Jason's apartment in New York City. Kate confronted Sally, who became upset, and Robert called the police.

Kate said the police came to the apartment and spoke to Robert in the living room while she and Sally were in a bedroom; Kate claimed that Sally then told her that Robert had raped her. When she told Sally that she was going to tell the police, Sally grabbed her by the shirt and pulled her down onto the ground in front of the door preventing her from leaving the bedroom. Kate could not explain the reason the police, called to the home because of concern about Sally meeting an adult male in his apartment, did not talk to her or Sally.

Kate did not recall speaking to Beltram. She did not recall being on the phone during a treatment team meeting, while Sally was in the first residential placement, during which Sally described being sexually abused by Robert. Although she admitted calling her daughter derogatory names, she denied having made those remarks in her child's presence.

Kate reiterated that Sally had made up these allegations because she would not allow her daughter to get piercings or tattoos. On cross-examination, Kate acknowledged that Sally was raped, but insisted that Robert was not the rapist.

Kate admitted that Sally first accused Robert of raping her when she was eight or nine. On that occasion, she took Sally to her grandparents' house, and her grandmother spanked Sally when told what the child was alleging. Kate's grandmother told Sally to "never, ever say that again." Everyone was afraid of Kate's grandmother, and the grandmother's husband was "thundering" at Sally, "yelling at her" about the allegation to the extent that Kate herself was "terrified." Sally then recanted.

Robert called a Division investigation supervisor, Jillian Tallarico, as his witness. In her report, she said Sally told the worker that she had "sex" for the first time with someone she met on Facebook.

Priscilla Carmona, a Division intake worker, was also called by Robert. Sally told Carmona during a May 2013 visit at her residential placement that she wanted to go home to help her mother care for the new baby, as Sally thought Kate was pregnant. Sally denied being fearful of Robert, despite numerous physical altercations between them in the past.

In her thorough and detailed July 24, 2014 oral opinion, the trial judge found the Division workers credible, and found Kate incredible. She concluded that, by a preponderance of the evidence, the Division proved Robert sexually abused Sally over a period of years. She also held that when confronted with that information, Kate simply denied that it was true and took no action to protect her daughter. Kate was not even cooperative with Sally's residential treatment, refusing to travel to visit her. The judge credited the expert testimony corroborating Sally's accusations.

On December 8, 2014, at a status hearing, the Division revealed that Sally had recanted her prior statements and that Kate had become involved in family therapy with her daughter. The Division did not want Sally returned home, however, because Robert still lived there.

On Sally's behalf, the Law Guardian expressed her unhappiness with her placement at a second residential center. Sally, while under oath, said she was happy to have seen her mother that day, that she was tired of residential programs, and wanted to go home to her family to help her mother with her brothers. She was grateful that Robert was helping her mother with the boys, and had apologized to him for making "false allegations." Sally reiterated that she missed her family because she had not seen them for so

long: "[i]t's like it's been decades that I've been away." The matter was carried to afford Dr. Bromberg time to issue another report.

Dr. Bromberg's report, discussed at an April 13, 2015 hearing, concluded that Sally's recantation was motivated by her wish to go home. Among the factors the Division identified as supporting the position that Sally should not be sent home was an incident that occurred in January 2015, when during an unsupervised visit between Kate and Sally at a shopping mall, Kate threatened someone with a knife.

Sally's Law Guardian reiterated that Sally wanted to go home, even if Robert lived there. Sally desperately wanted to be part of her family again, and believed that everything would be fine if she were allowed to return.

Sally testified that she had been writing letters to Robert which she did not think he had been receiving. She also defended her mother's behavior at the mall, stating that although there was a "little altercation with the people in line," her mother had no intention of actually using the knife. The judge terminated the litigation at that hearing.

Now on appeal, Robert raises the following points of error:

POINT I: THE TRIAL COURT ERRED WHEN IT FAILED
TO RE-OPEN THE FACT FINDING AFTER [SALLY]

RECANTED UNDER OATH HER SEXUAL ABUSE ALLEGATIONS.

POINT II: THE TRIAL COURT ERRED IN FINDING THAT [ROBERT] COMMITTED AN ACT OF ABUSE OR NEGLECT AGAINST [SALLY] BECAUSE NO CREDIBLE EVIDENCE WAS PROVIDED TO SUPPORT THE TRIAL COURT'S FINDINGS.

POINT III: TRIAL COUNSEL WAS INEFFECTIVE (1) IN FAILING TO REQUEST THAT [SALLY] TESTIFY AND (2) IN FAILING TO REQUEST THAT THE FACT FINDING BE RE-OPENED BASED ON [SALLY'S] RECANTATION IN OPEN COURT.

Kate raises this issue for our consideration:

THE TRIAL COURT'S DECISION MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE BEFORE THE COURT TO ESTABLISH THAT [KATE] ABUSED OR NEGLECTED [SALLY].

I.

On appeal, we accord substantial deference to the Family Part's fact-finding due to its "special jurisdiction and expertise in family matters." Cesare v. Cesare, 154 N.J. 394, 413 (1998). This deference is particularly appropriate where "the evidence is largely testimonial and involves questions of credibility." Id. at 412 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). Only the trial court has the opportunity, upon observing the demeanor of the witnesses, to make credibility judgments, impossible on a cold record. N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008).

Unless a judge's factual findings are "so wide of the mark that a mistake must have been made," they should not be disturbed, even if we would not have made the same decision if we had heard the case in the first instance. N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007). "It is not our place to second guess or substitute our judgment for that of the Family Court, provided that the record contains substantial and credible evidence to support" the judge's decision. N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 448-49 (2012).

The Division bears the burden of proof to establish by a preponderance of the credible evidence that a child is abused or neglected. N.J.S.A. 9:6-8.46(b). An abused or neglected child is defined as:

A child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result 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 . . . or by any other acts of a similarly serious nature requiring the aid of the court.

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

II.

Robert first contends that the trial court erred by failing to reopen the fact-finding after Sally's recantation under oath. The contention has no merit.

Sally's recantation was not credible. It was not the first time that Sally had recanted her statements regarding Robert's sexual abuse. She did so as a young child when faced with angry great-grandparents whose response included spanking her, and becoming so enraged that even Kate was frightened. When the December 2014 recantation occurred, Sally was very unhappy with her residential placement, and she clearly wanted to be with her family.

The judge had the benefit of Dr. Bromberg's reevaluation. He considered Sally's recantation "noncompelling" and motivated by her wish to go home. Because Dr. Bromberg believed that Kate had told Sally that if she recanted, she would take her home, he did not find it surprising that the child ultimately reversed course. Kate denied making any such statements.

Dr. Bromberg described Sally as tired of treatment. He noted that recantation is a well-documented phenomenon common among minors sexually abused by a parental figure, particularly when the child lacks support from the non-offending parent.

The trial judge gave no credence to the recantation, unsurprising and unremarkable given the information presented to him. Sally's statements were clearly motivated by her unhappiness with her living situation. Her prior disclosures were consistent, detailed, corroborated by physical findings, and importantly, corroborated by a childhood friend.

Furthermore, contrary to Robert's second point, the proofs on the record were ample regarding the sexual abuse claims. Consistent statements made by a victim over time are indicative of trustworthiness. State v. D.G., 157 N.J. 112, 126 (1999). Sally's disclosures began when the child was young enough to be spanked by her great-grandmother, and resurfaced when she was a teenager.

Moreover, Sally's descriptions included physical details, and physical and emotional reactions to the abuse, unlikely to originate from any source other than experience. Her behaviors fell within the range of conduct that the experts opined were common in adolescents who were sexually abused. Thus the Division met its burden of proof and established the necessary statutory elements that Robert abused Sally.

It is noteworthy that Robert's explanations for Sally's accusations were as illogical as those made by Kate, who went so far as to acknowledge that Sally had been raped while denying that

Robert had done it. Robert attributed Sally's accusations to disciplinary conflicts with Kate. Those responses taken alone, so dismissive of the gravity of the harm the child alleged had been inflicted upon her, themselves make Sally's claims appear more credible—and make her recantation appear more incredible.

The judge who presided over the fact-finding did not err. The second judge who terminated the litigation did not err by failing to sua sponte reopen the fact-finding. The Division's proofs were substantial and remained so even after Sally's recantation.

III.

Robert also contends that his attorney was ineffective by failing to call Sally as a witness or to request that the fact-finding be reopened once Sally recanted in open court. Neither point has merit.

It is well-established that in order to demonstrate ineffective assistance of counsel, we apply the Strickland v. Washington standard. Strickland v. Washington, 466 U.S. 668, 687-96, 104 S. Ct. 2052, 2064-89, 80 L. Ed. 2d 674, 693-99 (1984). Counsel's performance must be outside of the range of professional norms and the deficient performance must be so prejudicial that reasonable probability exists that but for counsel's unprofessional errors, the result would have been different. See

N.J. Div. of Youth & Family Servs. v. B.R., 192 N.J. 301, 307. A strong presumption exists that counsel's representation falls within a "wide range of reasonable professional assistance." Ibid.

The record establishes that counsel's performance fell well within the range of professional norms. To have called the child as a witness, even had the court permitted it, would have posed the risk of doing more harm to Robert's case than any conceivable benefit. As a matter of strategy, the decision not to call the accuser as a witness seems eminently reasonable. At the time of the initial fact-finding hearing, Sally's statements were consistent and detailed, and the experts' opinions buttressed her disclosures.

Pursuant to N.J.S.A. 9:6-8.46(a)(4), in order to establish that a child has been abused or neglected based on out-of-court statements, corroboration is necessary. The statute makes prior out-of-court statements admissible in evidence, "provided, however, that no such statement, if uncorroborated, shall be sufficient to make a fact finding of abuse or neglect." N.J.S.A. 9:6-8.46(a)(4). To have called Sally would have actually run the risk that she would have, by virtue of her in-court testimony, corroborated what she said out of court. Furthermore, matters of strategy cannot be raised as ineffective assistance of counsel. State v. Cooper, 410 N.J. Super. 43, 57 (App. Div. 2009)

("Decisions as to trial strategy or tactics are virtually unassailable on ineffective assistance of counsel grounds").

IV.

Kate contends that the evidence was insufficient to establish that she abused or neglected her child. This claim does not warrant extensive discussion in a written opinion. R. 2:11-3(e)(1)(E).

Kate exhibited complete indifference to, and disbelief of, her daughter. When Sally alleged that Robert was sexually abusing her at age eight, she took the child to her grandparents' house and allowed Sally to be verbally and physically attacked for making the disclosure. At no time did she show, based on our review of the record, any signs of empathy, support, or even much interest in her daughter's well-being. She refused to engage in Sally's treatment other than telephonically when she was at the residential placements, and told her she could come home if she recanted, despite being ordered not to talk to her daughter about recantation.

Kate's lack of interest in protecting her child, and marked indifference to her suffering, is clearly conduct that harmed her child directly and indirectly, and was of a "serious nature requiring the aid of the court." N.J.S.A. 9:6-8.21(c)(4).

Affirmed.

