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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4562-15T1

NEW JERSEY DIVISION OF
CHILD PROTECTION AND
PERMANENCY,

Plaintiff-Respondent,

v.

N.B.,

Defendant-Appellant.

IN THE MATTER OF D.B.,

Minor.

APPROVED FOR PUBLICATION

December 19, 2017

APPELLATE DIVISION

Argued November 6, 2017 – Decided December 19, 2017

Before Judges Sabatino, Ostrer[1] and Whipple.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FN-12-0185-15.

David A. Gies, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; David A. Gies, on the briefs).

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[1] Judge Ostrer did not participate in oral argument. He joins the opinion with counsel's consent. R. 2:13-2(b).

Tasha M. Bradt, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Tasha M. Bradt, on the brief).

Olivia Belfatto Crisp, Assistant Deputy Public Defender, argued the cause for minor (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Olivia Belfatto Crisp, on the brief).

The opinion of the court was delivered by

WHIPPLE, J.A.D.

Defendant N.B. (mother) appeals from a May 16, 2016 order terminating litigation after a fact-finding hearing wherein a Family Part judge determined she had abused or neglected her son, D.B.

At the fact-finding hearing, the trial judge impermissibly admitted and relied on insufficiently corroborated statements of the child, as well as facts and complex diagnoses within a hearsay report of a psychologist consultant of the Division of Child Protection and Permanency (Division). For these reasons, we reverse.

I.

We glean the following facts from the record. On January 10, 2015, the Woodbridge Township Police Department contacted the Division to investigate a complaint by the biological father of then twelve-year-old D.B. who had been living with mother. A

Woodbridge Township Police officer reported D.B. called an aunt because he was frightened after mother left him alone during the day in their hotel residence.

The officer reported the child's aunt picked him up from the hotel and took him back to her home. The father picked up D.B. from the aunt's home and took the child to police headquarters. D.B. reportedly told the officer that mother and her boyfriend had a verbal argument, and during this argument, mother said "she was going to harm herself one of these days." The Division workers responded to the Woodbridge police headquarters and met with the officer, who reported what the child had told him earlier about mother's suicidal statement.

Two other officers went to mother's hotel to conduct what is termed a "welfare check." According to the police, mother reported she did have an argument with her boyfriend, went to take a drive for a couple of hours, and left D.B. at the hotel because he did not want to go for a drive. The officers reported mother was in a good mood and stated "when she said she was going to hurt herself it was just a figure of speech in the heat of the moment."

Two Division Special Response Unit (SPRU) workers met with D.B., who reportedly told them mother, her boyfriend, and he were all in a car heading home from dinner the night before,

mother and her boyfriend argued, and mother told her boyfriend, "[s]ince we're all here why don't you drive off the bridge and kill us all." According to the Division's investigation summary, D.B. said mother and her boyfriend previously had physical fights, but it was not physical that particular day. D.B. reported he had attempted in the past to intervene during fights but was never hurt when trying to protect mother. D.B. also told the SPRU workers he called his aunt because he did not feel safe and expressed fear that mother was "going to go off on [him] when she gets [him] alone."

Later that evening, the SPRU workers interviewed mother who reportedly stated that she had an argument with her boyfriend but denied saying she wanted to drive off a cliff, or that she ever made any comments about wishing to hurt herself. According to the Division's investigation summary, mother also denied ever having any physical altercations with her boyfriend, stating they just argued verbally.

The next day, the Division removed D.B. from mother's custody pursuant to N.J.S.A. 9:6-8.29 and N.J.S.A. 9:6-8.30, and on January 14, 2015, the Division filed a verified complaint seeking the care and supervision of the child pursuant to N.J.S.A. 9:6-8.21 to -8.73 and N.J.S.A. 30:4C-12. The court then placed D.B. with his father, where he remains.

On January 12, 2015, the Division assigned an intake worker who spoke with mother. According to the intake worker's written report, mother told the intake worker she was not fearful of her boyfriend and if domestic violence did occur she would call 911. That same day, the intake worker spoke to the boyfriend, who said he would "do anything he [could] to ensure that [mother] gets [the child] back with her" and was "willing to comply with the Batterers Intervention Program and undergo a psychological evaluation if needed." The intake worker prepared her portion of the investigation summary based on information she received from the SPRU workers but did not interview the child, nor question mother, her boyfriend, or the father about the January 10, 2015 incident.

D.B. was evaluated at the direction of the Division by Melissa Rivera Marano, Psy.D., a licensed psychologist, who prepared a written report evaluation of the child on March 4, 2015. This report was presented to the court with Dr. Marano's certification, dated May 17, 2015, which stated: (1) she is a licensed, practicing psychologist in New Jersey; (2) the report was made in the regular course of business; and (3) the report

was made within a reasonable time after "the condition and/or occurrence."[2]

The report noted D.B.'s "appropriate hygiene and dress[,]" as well as the fact that his "[m]ood and affect were within normal range." The report also contained the D.B.'s statements about his exposure to domestic violence.

According to Dr. Marano's report, D.B. stated he felt nervous at times and witnessed physical fights between mother and her boyfriend. D.B. also reported that on one occasion he hurt his hand while trying to intervene. The child reported that, in January, mother and her boyfriend had a long, verbal fight, and shortly after this fight ended, mother yelled at D.B. and he heard her call her boyfriend and say "You make me want to curl up and die." A few days afterward, D.B. heard mother say "she wanted to go off a cliff."

Notably, D.B. reported having friends, denied bullying or being bullied, stated he feels happy and no longer nervous while living with his dad, and denied having problems with eating or sleeping. He also "denied [having] current problems with mood."

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[2] Dr. Marano reviewed the following in preparation of her report: (1) a January 29, 2015 letter to the judge; (2) a student assignment report; (3) the Division's verified complaint for care and supervision; (4) intake forms; (5) special approval requests; and (6) the December 5, 2014 and January 10, 2015 investigation summaries.

Dr. Marano's report concluded that D.B. "produced a significantly elevated score on the Posttraumatic Stress Symptoms scale[,]" and "[b]ased on [the] history provided, [the] record and additional information obtained from [the boyfriend's] psychological assessment, it is clear that [D.B.] experienced a high degree of stress in his family life when living with his mother within the last two years plus." Dr. Marano found the level of domestic violence and mother's inability to deal with this and financial stress in a healthy manner negatively impacted her parenting. Dr. Marano diagnosed D.B. as having post-traumatic stress disorder (PTSD) and recommended, as a first step, he only engage in phone contact with mother.

On October 20, 2015, the trial court conducted a fact-finding hearing to determine if mother's conduct constituted abuse and neglect pursuant to N.J.S.A. 9:6-8.21(c)(4). The Division called the intake worker, who testified she was assigned to follow-up the January 10, 2015 investigation. The intake worker began testifying on direct examination, but was unable to complete her testimony due to an illness and was never cross-examined. Therefore, the Family Part judge ruled, over mother's objection, he would discount the intake worker's testimony.

The Family Part judge then permitted the intake worker's supervisor to testify with respect to the intake worker's involvement, again over mother's objection. The supervisor had no direct involvement and did not conduct interviews. Moreover, the supervisor did not discuss the referral with either of the SPRU workers. The supervisor did not discuss the situation with any of the police officers involved, nor was she the supervisor when Dr. Marano performed the psychological evaluation on D.B.

The Division moved three documents into evidence: (1) the Division's investigation summary; (2) a written report from Dr. Marano; and (3) Woodbridge Police Department's records with respect to two incidents that involved mother, only one of which related to the January 10, 2015 incident.

Mother objected to the use of D.B.'s hearsay statements to the officers and the SPRU workers. The judge found the statements were corroborated by mother's admission that she and her boyfriend fought verbally, and D.B.'s statements to the psychologist were substantive proof of abuse or neglect.

Mother also objected to Dr. Marano's written report because she did not testify and mother had no opportunity to challenge the report. The judge overruled the objection and admitted the report into evidence, relying upon Rule 5:12-4(d).

The judge suggested mother's suicidal verbalizations alone were insufficient to find abuse and neglect. However, the judge found mother's conduct grossly negligent or reckless when considering the aggregation of the suicidal verbalizations made in D.B.'s presence, D.B.'s statements about exposure to domestic violence, and D.B. having been left alone after the January 10, 2015 incident. Moreover, the judge credited Dr. Marano's opinion that D.B. suffered from PTSD after exposure to domestic violence and found D.B. emotionally harmed by mother's conduct.

On January 20, 2016, the Family Part judge determined mother abused and neglected D.B. under N.J.S.A. 9:6-8.21(c)(4). On May 16, 2016, the litigation was terminated. This appeal followed.

II.

On appeal, mother argues the Family Part judge's findings are not supported by competent admissible evidence and the judge erred in relying upon Dr. Marano's conclusions. We agree.

To the extent the appellate issues concern a trial court's findings of fact or credibility determinations, we accord substantial deference and defer to the factual findings of the Family Part if they are sustained 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) (citation omitted).

As a general rule with respect to the exclusion or admission of evidence, we afford "[c]onsiderable latitude . . . [to a] trial court in determining whether to admit evidence, and that determination will be reversed only if it constitutes an abuse of discretion." N.J. Div. of Child Prot. & Permanency v. N.T., 445 N.J. Super. 478, 492 (App. Div. 2016) (quoting State v. Kuropchak, 221 N.J. 368, 385 (2015)).

We owe no special deference to the trial court's rulings here because they essentially involved the application of legal principles and did not turn upon contested issues of witness credibility. See Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

N.J.S.A. 9:6-8.46(a)(4) provides "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." Corroborative evidence "need only provide support for the out-of-court statements." N.J. Div. of Youth & Family Servs. v. L.A., 357 N.J. Super. 155, 166 (App. Div. 2003) (quoting N.J. Div. Youth & Family Servs. v. Z.P.R., 351 N.J. Super. 427, 436 (App. Div. 2002)).

We have said the "most effective types of corroborative evidence may be eyewitness testimony, a confession, an admission

or medical or scientific evidence." Ibid. Although not involving corroboration by admissions, in Z.P.R., we held evidence of a child's age-inappropriate sexual behavior may provide necessary corroboration of that child's statements with respect to improper sexual conduct directed at the child by a parent. Z.P.R., 351 N.J. Super. at 436. In contrast, in L.A., we found acknowledgement of a debt by a non-party "is too indirect to provide the necessary support to admit [a child's] out-of-court statement." L.A., 357 N.J. Super. at 167.

Some direct or circumstantial evidence beyond the child's statement itself is required. Here, the trial judge relied on mother's statements as evidence corroborating the child's statements. Mother conceded she had verbal disputes with her boyfriend in front of D.B. in the past, and admitted on the day of the incident she said "she was going to hurt herself[,]" but "it was just a figure of speech in the heat of the moment." Although an admission may constitute effective corroborative evidence, mother's statements herein did not sufficiently corroborate the child's statements about exposure to physical violence, because in fact, she denied the arguments constituted physical violence.

Moreover, the child's behavior did not sufficiently corroborate emotional harm. Dr. Marano's report observed D.B.

denied thoughts of self-harm; his mood was normal and appropriate; he was cooperative during his evaluation; he was able to easily establish a rapport with the psychologist; and he denied problems with appetite, sleep, or mood.

Yet, Dr. Marano's report noted D.B. "admits to having memories of events occurring when he lived with his [m]om that upset him[,]" and "stated that he tries not to think about [those] things." Further, according to Dr. Marano's report, D.B. was repeatedly "feeling nervous" around mother.

The trial judge posited the child's hearsay statements to Dr. Marano were admissible on their own, as examples of statements made by a declarant seeking treatment. See N.J.R.E. 803(c)(4). However, courts must protect against conflating a statement's reliability with corroboration. N.J.S.A. 9:6-8.46(a)(4) constitutes a statutorily created exception to the hearsay rule but independent evidence of corroboration is required in order to find abuse or neglect.

Even if the statements made to Dr. Marano are considered reliable as statements made for the purpose of treatment,[3]

[3] The exception under N.J.R.E. 803(c)(4) does not apply where the purpose of the examination is to gather evidence. See State in the Interest of C.A., 201 N.J. Super. 28, 33 (App. Div. 1985). Thus, as D.B. was referred to Dr. Marano for a court-ordered psychological evaluation by the Division during the (continued)

consistency alone does not constitute corroboration.[4] Our courts have rejected the concept that mental health professionals may opine about the trustworthiness of a child's hearsay statements. State of New Jersey v. J.Q., 130 N.J. 554, 582-83 (1992).

Moreover, even if mother's statements corroborate some exposure of D.B. to domestic violence, we have said exposure alone cannot serve as a basis for a finding of abuse and neglect. See N.J. Div. of Youth & Family Servs. v. S.S., 372 N.J. Super. 13, 26 (App. Div. 2004) (noting it cannot be assumed that a child is presently harmed when he or she witness domestic violence or that such exposure will have a potential negative effect on the child in the future sufficient to warrant a finding of abuse).

Here, the trial court distinguished S.S., finding there was sufficient evidence to support the assertion that exposure to physical domestic violence harmed D.B. However, that evidence was inadmissible hearsay: (1) D.B.'s own statements that he observed such violence, which as explained above; and (2) Dr.

(continued)
pendency of the Title 9 action, the judge's determination that the statements were admissible under this rule was improper.

[4] By contrast, in assessing the trustworthiness of a child's hearsay statement under N.J.R.E. 803(c)(27) — as distinct from corroboration of the statement — a court may consider, among other factors, "consistency of repetition." State v. D.G., 157 N.J. 112, 125 (1999).

Marano's finding that D.B. suffered from PTSD as a result of such exposure[5], were not sufficiently corroborated.

The court relied upon Dr. Marano's conclusion that D.B. suffered from PTSD as a result of exposure to domestic violence. Such reliance is at odds with our rules of evidence and the case law governing the admission of complex opinions of non-testifying experts.

Reports are admissible when they are prepared by a professional consultant of the Division, such as Dr. Marano, for the purpose of guiding the Division in determining the appropriate course of action, and when they are maintained in the regular course of the Division's business. See R. 5:12-4(d); see also N.J.R.E. 803(c)(6); N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 346-47 (2010); N.J. Div. of Youth & Family Servs. v. M.G., 427 N.J. Super. 154, 173-74 (App. Div. 2012); N.J. Div. of Youth & Family Servs. v. B.M., 413 N.J. Super. 118, 129-33 (App. Div. 2010); In re Guardianship of Cope, 106 N.J. Super. 336, 343-44 (App. Div. 1969).

[5] Furthermore, Dr. Marano's report is inconclusive as to whether she relied on D.B.'s witnessing of physical violence or his observation of his mother's suicidal threats to reach her diagnosis of PTSD. Under the diagnostic criteria for PTSD, the affected person must be exposed to a traumatic "event . . . that involved actual or threatened death or serious injury." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 424-29 (4th ed. 1994).

However, when an expert is not produced as a witness, Rule 808 requires exclusion of the expert's opinion, "even if [the opinion] is contained in a business record, unless the trial judge makes specific findings regarding trustworthiness." M.G., 427 N.J. Super. at 174 (citation omitted).

The trustworthiness determination includes assessing whether the opinion is "too complex for admission." N.T., 445 N.J. Super. at 502. Here, specifically with respect to Dr. Marano's evaluation, the trial judge stated:

> Dr. Marano is known as a consultant of the Division. We have a certification by her . . . that these records regarding the child were made in the regular course of business. That they were done [within] a reasonable time . . . if there's a consultant being used and that consultant does provide the certification the [c]ourt can consider it.

The trial judge further stated "[o]ften times the [c]ourt is faced with . . . a complex diagnosis that's made there and the Division isn't really necessarily offering a complex diagnosis. They're offering [the report] for observations that the consultants made." The trial court noted that "when there is a complex diagnosis the argument can be made that the witness should be here to be cross-examined." However, the trial court then opined that "I don't believe that's really what this is being offered for. It's being offered for what she did, who she

saw, [who] she talked . . . to, maybe what she recommended." The trial court relied on Dr. Marano's report and stated

> [a]s to the complex diagnosis, a quick look of it doesn't look like it's complex but I haven't — I don't know exactly what's being offered. It sounds like what's being offered is really just the statements that may have been made by [the child], which again could come in under the fact that the consultants record would be available to the court. Could come in under . . . statements made for treatment purposes[.]

More specifically, we found in N.T., 445 N.J. Super. at 502, that "psychological evaluations generally 'entail[] the exercise of subjective judgment rather than a straightforward, simple diagnosis based upon objective criteria or one upon which reasonable professionals could not differ.'" Ibid. (quoting M.G., 427 N.J. Super. at 174); see In re Commitment of G.G.N., 372 N.J. Super. 42, 56 (App. Div. 2004) (excluding an evaluation of mental state because it is among most "complex diagnoses"); Liptak v. Rite Aid, Inc., 289 N.J. Super. 199, 221-22 (App. Div. 1996) (excluding a complex diagnosis concerning psychological impact).

We said "subjective judgment and complexity were evident in [the doctor's] diagnosis that [the child] had PTSD, and her opinion that [the child's] symptoms and his problems with [Attention Deficit Hyperactivity Disorder] and [Oppositional Defiant Disorder] could have resulted from exposure to traumatic

experiences like domestic violence." N.T., 445 N.J. Super. at 501. Therefore, in N.T., we ruled that opinions and diagnoses, such as a diagnosis of PTSD and its connection to the child's exposure to domestic violence, were inadmissible hearsay under N.J.R.E. 808. Id. at 500.

While the factual observations within Dr. Marano's evaluation were not inadmissible hearsay and the certification showed the evaluation "was admissible as a business record under [N.J.R.E.] 803(c)(6)," N.J.R.E. 803(c)(6) provides a caveat that opinions or diagnoses contained within business records are subject to the admissibility limitations of N.J.R.E. 808. As previously stated, when an expert does not testify as a witness, the rule requires exclusion of that person's expert opinion, "unless the trial judge makes specific findings regarding trustworthiness." N.T., 445 N.J. Super. at 501 (quoting M.G., 427 N.J. Super. at 174).

Here, the trial court did not make the requisite findings with respect to Dr. Marano's report. The trial court only observed the diagnosis did not look complex and it seemed that the report was really being offered for the child's statements contained in the report. Despite whatever permissible purpose for which the psychological evaluation may have been offered,

the trial judge impermissibly relied on the hearsay diagnosis of PTSD to support finding abuse and neglect.

PTSD is a complex diagnosis given the disorder's definitions, which notably include a wide variety of symptoms, and is not a monolithic disease with a uniform structure that does not permit individual variation. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 424-29 (4th ed. 1994). A diagnosis of PTSD encompasses an array of symptoms, stressors, and details of onset and can occur in a variety of settings. Brunell v. Wildwood Crest Police Dep't, 176 N.J. 225, 246 (2003).

Finally, we note the fact-finding hearing was conducted almost entirely on the papers. The only Division witness who provided live testimony was the supervisor who lacked personal, first-hand knowledge of the incident and conducted none of the interviews that were the basis of the Division's reports.[6] In New Jersey Division of Child Protection and Permanency v. S.W., 448 N.J. Super. 180 (App. Div. 2017), we cautioned that even when a defendant knowingly "agrees to a determination on the papers, the judge is not required to accede to the parties'

[6] As noted above, the judge did not consider the incomplete testimony of the intake worker.

intention to proceed in that fashion." Id. at 193. Here, we again caution against such a practice.

In sum, the trial court's determination was not sufficiently supported by competent, admissible evidence.

Consequently, the order of January 20, 2016, finding mother abused or neglected D.B. is vacated, and the Division is directed to remove defendant's name from the Child Abuse Registry as to this incident within thirty days.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.