

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5785-14T1

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

I.D.,

Defendant-Appellant,

and

R.B., J.B., and K.H.,

Defendants.

IN THE MATTER OF
Ra.B., J.B., and R.H.,

Minors.

Submitted March 29, 2017- Decided May 5, 2017

Before Judges Accurso, Manahan and Lisa.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Hudson County,
Docket No. FN-09-548-14.

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

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

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Joseph H. Ruiz, Designated Counsel, on the brief).

PER CURIAM

Defendant I.D. (Ike) appeals from an order, now final, entered by the Family Part finding that he abused and neglected his daughter, Ra.B. (Ruby).¹ We affirm.

R.B. (Reba) is the biological mother of three children. As of the date the Division filed its amended complaint, J.B. (Jim) was thirteen, Ruby was seven, and R.H. (Roxy) was four days old. Ike is the biological father of Ruby. K.H. (Kevin) is the biological father of Roxy. Jim's biological father was originally unknown to the Division, but was later determined to be Reba's father, J.B. (Joe), after genetic testing was ordered during this case. Ruby is the only child at issue in this appeal.

On January 13, 2014, the Division received a referral alleging

¹ We refer to the parties and the children by initials and fictitious names to preserve their confidentiality.

environmental neglect for Jim and Ruby, who were living with Reba at that time.² Division worker Emilie Asjana visited Reba's home on January 15, 2014. Asjana interviewed Ruby who advised Asjana that she did not like visiting with her father. According to Asjana, any reference made to Ike during the interview produced a change in Ruby's demeanor.

Asjana conducted an interview with Ike at his residence on February 10, 2014. At that time, Asjana observed two beds in Ike's bedroom. When Asjana addressed Ruby's statement that she does not like visiting Ike, he responded that Reba was "poison[ing] [Ruby's] mind against him."

On April 9, 2014, a second referral was received by the Division regarding Ruby, indicating she was "scared, timid, she doesn't want to go to school, she won't talk to her mother, and she is not herself and is a shell." According to the referent, Ruby stated that Ike "put his finger on her pee-pee" and "put his pee-pee on her pee-pee."

That same day, the Division sent intake worker Denia Fernandez to interview Ruby at her elementary school. Ruby had learning disabilities relating to reading skills, problem solving and math.

² The record does not clearly indicate who filed this referral. The report prepared by the Division worker after her initial visit indicates Reba believes Ike contacted the Division.

Despite these issues, Fernandez and Ruby were able to converse freely. Ruby told Fernandez that her mother, grandmother, two uncles and her daddy lived in the home. Ruby told Fernandez that she had two fathers, Kevin, who lives at the home, and Ike, who lives far away. After engaging in conversation about her home life, Fernandez spoke to Ruby about good and bad touch. Fernandez used drawings of naked male and female bodies for Ruby to identify different body parts. Ruby identified all parts of both bodies, naming the female vagina as "pepe" and the penis as "balls." On the drawing of a female body, Ruby rubbed the vaginal area in a circular motion and indicated "that's how [Ike] touched me." Ruby also told Fernandez that Ike would "put his balls on her pepe." Ruby indicated these interactions occurred approximately ten times. Ruby further explained she would cry, but her father told her to "shut up."

At the conclusion of the interview, Fernandez contacted the Hudson County Prosecutor's Office (HCPO) to report Ruby's disclosures. Fernandez went to Reba's residence and advised her what transpired during the interview of Ruby. Fernandez requested that Reba accompany Ruby to the HCPO later that day. During their conversation, Reba disclosed that her daughter cried hysterically every time she had to go to Ike's house, but due to a court order, Reba insisted Ruby visit.

Ruby was interviewed by the HCPO and Morris County Prosecutor's Office (MCPO) Special Victim's Unit because the alleged abuse occurred in Morris County, where Ike resided. During the interview, which Fernandez observed, Ruby was asked to identify body parts and explain how Ike touched her. Ruby referred to the vaginal area as the "pep" and the penis as "huevos." She reported her father gives her "bad touches" and puts "his 'huevos' in her 'pep'."

Ruby was given anatomically correct dolls and asked to demonstrate what Ike did to her. Ruby laid the female doll face up on the table, removed the doll's underwear, pulled the male doll's underwear off, and put the male doll's penis inside the female doll's vagina. She then placed the female doll face down and inserted the male doll's penis into the female doll's "ass." She also moved the male doll up and down on top of the female doll to demonstrate how Ike moved his body. Additionally, Ruby stated that Ike touched her "boobs" and said, "it bothered her, and it tickled her."

That same day, at the conclusion of Ruby's interview, Fernandez interviewed Jim who denied knowing anything was going on with Ruby and Ike. However, Jim stated that Ruby "was always crying every time she had to go with her father because she didn't want to go."

In April 2014, Reba and Ruby underwent both medical and psychosocial evaluations at Audrey Hepburn Children's House (Audrey Hepburn) in Hackensack, New Jersey.³ Fernandez accompanied them on both occasions. During the first visit, Reba divulged to Fernandez and the medical examiner that her father, Joe, sexually abused her as a child. Although Reba denied her father currently lived in her home, the Division implemented a Safety Protection Plan to ensure Joe had no contact with any of Reba's children.

The second visit to Audrey Hepburn included a psychological evaluation for Reba and a follow-up interview with Ruby. During Reba's evaluation, she recanted her statement that she was molested by her father. Fernandez reiterated the Division's concerns about her stability and the terms of the Safety Protection Plan. As a result of Ruby's psychosocial evaluation by the Child Study Team, it was determined Ruby had limited cognitive abilities and expressive language delays, yet was able to distinguish between the truth and a lie. Ruby reported having "nightmares," a diminished appetite, bed-wetting issues, "tummy aches" and headaches while sleeping. Further, Ruby made statements

³ There is a discrepancy in the record as to when the first evaluation occurred. The Division's investigation summary report indicates Ruby and Reba were first evaluated at Audrey Hepburn on April 11, 2014. The Psychosocial Team Evaluation indicates Ruby and Reba were first interviewed on April 15, 2014.

consistent with those made to Fernandez, the HCPO and the MCPO, and used anatomically correct dolls to replicate Ike's actions by

[laying] the girl doll on her back on the table; she took the male doll reported that he walked in without any clothing on. Showed the doll climbing into her bed and then laying on top of her; [Ruby] took the doll's penis with her fingers, and put it inside of the female doll's vagina. [Ruby] used the "back-and-forth" motion while laying the male doll on the female doll. She also took the male doll's hand and put it inside of the female doll[']s vagina[.] [Ruby] then took the female doll and turned her face down; she took the male doll and put him on top of the female doll and again used the "back-and-forth" motion . . .[.] [Ruby] reported "I didn't do nothing" while the abuse was occurring [and] when asked what it felt like when [Ike] had put his woof in her kitty cat, [Ruby] repeated "It bothered me," and indicated that [Ike's] woof felt "squishy and hard."

Christina Keeney, B.A., MSW Intern, served as the evaluator, concluded that the allegation of sexual assault was "clinically supported" and recommended Ruby participate in individual and family therapy. The report was signed by Keeney, as well as Michelle Mroz, LCSW, Social Work Supervisor, and Anthony D'Urso, Psy.D, Supervising Psychologist. A separate report regarding Reba's evaluation recommends Joe "participate in a parenting evaluation in order to address the allegations of sexual abuse

made by [Reba] and to assess his current risk for his grandchildren."⁴

On May 1, 2014, Ike was re-interviewed by Fernandez and denied all allegations. Fernandez inquired where Ruby sleeps when she visits. Ike showed her the bedroom and explained that he did not sleep in the room when Ruby was there. As a result of the investigation, the Division substantiated the sexual abuse allegations against Ike.

The Division thereafter filed an order to show cause and to appoint a law guardian with temporary custody, as well as a verified complaint for custody, care, and supervision pursuant to a Dodd removal. A hearing was held before Judge Mark J. Nelson. The judge granted custody of the children to the Division. On May 29, 2014, the parties appeared before Judge Nelson for a return on the order to show cause. Reba and Ike appeared and were both represented by counsel. The Division reported to the judge that Joe and Reba were currently living together again, and amended the complaint to include Joe so that he could be ordered to undergo

⁴ The quoted language comes from the Division's original verified complaint. Though referenced in the Division's original verified complaint and attached as an exhibit thereto, this report is not part of the record on appeal. The report was not referenced in the Division's amended verified complaint.

genetic testing to resolve Jim's paternity.⁵

On July 10, 2014, the parties, including Joe, appeared before Judge Nelson. Joe was ordered to undergo a DNA test. The DNA test revealed Joe was the father of Jim. After this revelation, Ruby was re-interviewed by the HCPO on September 9, 2014. During this interview, Ruby again used anatomically correct dolls to replicate Ike's conduct. She also reported she knew it was Ike because he spoke to her during the incident and told her "never to tell anyone." Ruby denied ever being touched by Joe.

The Title 9 fact-finding hearing took place on April 15, 2015, before Judge Lois Lipton. The Division produced four witnesses at the hearing.

Asjana, the Division caseworker, testified that she investigated the allegations regarding the condition of Reba's home and met with Reba who informed her that Ruby did not like to visit with Ike and cried when she went with him. Asjana also stated that she met with Ike and learned from him that Ruby slept in his bedroom. Asjana said she recommended that the case be

⁵ The Division also learned Reba had given birth to Roxy, her child with Kevin, on June 17, 2014. An amended verified complaint was filed by the Division pursuant to a Dodd removal as to Roxy. The matter was heard before Judge Nelson, who denied the Division's application, placed custody of Roxy with Kevin, and precluded Reba from living with Kevin.

transferred for monitoring and supervision.

Fernandez, the Division intake worker, testified that she investigated the allegation by then seven-year-old Ruby that Ike sexually molested her. Fernandez elaborated on the ability of Ruby to related the acts of molestation. According to Fernandez, Ruby "took the picture [depicting the body parts of a male and a female] away from [Fernandez's] hand and pointed at the pee-pee like she calls the vagina and [said] this is what my father does to me." Fernandez stated that Ruby then began to rub the vagina area of the picture in a circular motion. Ruby also reported that Ike "put his balls," referring to the male groin area, on her pee-pee and used his penis and hands to touch her body parts while she cried and he told her to "shut up."

Fernandez further testified that she observed Ruby's interview with the MCPO where she made the same allegations against Ike. Fernandez also testified that Reba informed her that Ruby would wet her bed after visits with her father. Based upon these interviews, Fernandez testified she referred Ruby to Audrey Hepburn for a medical and psychosocial evaluation; a facility used by the Division as a professional consultant.

Kerry Farrell, a Division adoption worker, testified that she observed Ruby's interview with the MCPO during which she was "able to clearly depict various body parts on a male and female body."

After the video of the interview was played in court, Farrell testified that it was an accurate depiction of the interview.

After a stipulation as to his qualifications and his capacity as an expert, D'Urso testified regarding his involvement with Ruby. Prior to his testimony, the defense objected because "[D'Urso] did not conduct the evaluation and also for the reason that the evaluator in this case, Christina [Keeney], who is a social work intern, I believe master degree level, has not been qualified." In response to the objection, the judge conducted a N.J.R.E. 104(a) hearing.

At the hearing, D'Urso testified that he was the supervising psychologist and section chief at Audrey Hepburn, and that his team evaluated Ruby and family members. D'Urso further testified that the purpose of the evaluation was to "provide valuable and reliable information regarding a family's functioning." According to D'Urso, an evaluator was assigned to each family member and the team had a group meeting to prepare the questions for the evaluation. D'Urso stated the evaluators conducted their interview and the team discussed the results of the interviews and arrived at a clinical conclusion. D'Urso also stated that he chaired the discussion, reviewed each report with the clinician and signed Ruby's report as the "supervising psychologist who contributed to the conclusions contained therein." D'Urso also

testified that it was not unusual for an evaluator to be a master's level social work intern.

The Division then moved for a ruling on D'Urso's testimony relative to the report and that "the report itself is admissible." In response, the judge asked defense counsel if he wanted to add anything to the prior objection to D'Urso's testimony to which counsel responded in the negative. The judge held that both the report and D'Urso's testimony would be admitted in evidence and D'Urso would be permitted to testify with regard to the report

because of the process in this particular case, evaluating five different family members and the process as the doctor testified that they've been doing for thirty years, of having individual clinicians evaluate - separate clinicians evaluate each family member, and then working together to get appropriate information to have a cohesive approach towards the family, and come up with a plan for the family, and the doctor attending the rounds and ultimately being responsible for a decision if there are disagreements among the various practitioners, and signing off on the report, I believe that it's totally appropriate for him to testify with regard to the findings in the report and for the report to be admitted into evidence.

D'Urso continued his testimony and noted that during the evaluation Ruby exhibited behaviors consistent with distress or stress, including difficulty sleeping, bed-wetting, and some fear and worry. D'Urso also noted these symptoms subsided after Ruby made the abuse disclosure.

D'Urso further testified that they utilized anatomically detailed dolls because it was an easier form of expression for children rather than using words. D'Urso stated it was significant that although Ruby, only seven-years-old, was able to demonstrate acts of intercourse because that should "be beyond her age and stage of development." On cross-examination, D'Urso acknowledged that there were no abnormalities observed during the physical examination of Ruby. However, he opined that the results neither confirmed nor denied the possibility that Ruby was sexually abused.

The Division rested its case. Ike offered no witnesses or evidence in defense.

Judge Lipton rendered an oral decision wherein she adopted D'Urso's testimony as fact, and found each of the Division's four witnesses "credible [and] straight forward." The judge concluded it was "certainly more probable than not" that Ruby was sexually abused. An order memorializing this finding was entered the same day.

The parties returned before Judge Nelson on July 9, 2015, to file a verified complaint for guardianship of Ruby and Jim. The protective services litigation was terminated the same day. Ike filed a notice of appeal on August 18, 2015.

The following points are raised on appeal:

POINT I

THE TRIAL COURT ERRED IN ADMITTING KEENEY'S PSYCHO[]SOCIAL EVALUATION INTO EVIDENCE AND ALLOWING DR. ANTHONY D'URSO TO TESTIFY ABOUT THE PROFESSIONAL CONCLUSIONS AND UNDERLYING FACTUAL ALLEGATIONS CONTAINED IN KEENEY'S PSYCHO[]SOCIAL EVALUATION BECAUSE KEENEY DID NOT TESTIFY AND THE UNDERLYING REQUIREMENTS OF THE NEW JERSEY RULES OF EVIDENCE WERE NOT MET.

POINT II

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

In reviewing the decision of a family court, we "defer to the factual findings of the trial court," New Jersey Division of Youth & Family Services v. E.P., 196 N.J. 88, 104 (2008), in recognition of the "'family courts' special jurisdiction and expertise in family matters.'" N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 343 (2010) (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)). "Concomitantly, reviewing courts should defer to the trial court's credibility determinations" as well. N.J. Div. of Youth & Family Servs. R.G., 217 N.J. 527, 552 (2014). It is "[o]nly when the trial court's conclusions are so 'clearly mistaken' or 'wide of the mark'" that we will intervene and make our own findings "to ensure that there is not a denial of justice." E.P., supra, 196 N.J. at 104 (quoting N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007)). However, "[a] trial

court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

We first address the contention that the psychosocial evaluation (Audrey Hepburn report) and D'Urso's testimony in relation to that evaluation was erroneous. A trial court's evidentiary rulings are reviewed employing the abuse of discretion standard. Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008). Evidentiary rulings not objected to will be reversed only if deemed plain error. R. 2:10-2.

At the outset, it is unclear whether there was an objection to the report. It is clear the Division announced that it sought the report's admission in evidence pursuant to N.J.S.A. 9:6-8.46(b) and Rule 5:12-4(d). Although defense counsel objected specifically to D'Urso's testimony as it related to the report, when offered the opportunity to expound on the objection relative to the D'Urso testimony, no further specific objection was lodged.

Notwithstanding, we conclude, contrary to the objection now raised on appeal, that the admission of the report was not erroneous. In reaching this conclusion, we note that Fernandez testified the report was of the type and nature ordinarily sought and obtained by the Division. Further, in his Rule 104(a)

testimony, D'Urso explained the clinical process employed with regard to the findings in the report and particularly, his supervisory role including his signing the report.

The admissibility of evidence in Title 9 actions is governed by statute, court rule, and the rules of evidence. N.J.S.A. 9:6-8.46(b) provides that only "competent, material and relevant" evidence may be admitted in such actions and that a finding of abuse and neglect must be proved by "a preponderance of the evidence." Further, N.J.S.A. 9:6-8.46(a)(3) states, in pertinent part that

any writing, record or photograph, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any condition, act, transaction, occurrence or event relating to a child in an abuse or neglect proceeding of any hospital or any other public or private institution or agency shall be admissible in evidence in proof of that condition, act, transaction, occurrence or event, 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 [therein]. . . . All other circumstances of the making of the memorandum, record or photograph, including lack of personal knowledge of the making, may be proved to affect its weight, but they shall not affect its admissibility[.]

Rule 5:12-4(d) also permits the Division to submit into evidence, pursuant to N.J.R.E. 803(c)(6) and 801(d), "reports by staff personnel and professional consultants" and states, "[c]onclusions drawn from the facts stated therein shall be treated as prima facie evidence, subject to rebuttal." N.J.R.E. 801(d) defines the term "business" to include "government agencies" and N.J.R.E. 803(c)(6) allows into evidence a statement in a writing of acts, events, conditions, and, subject to N.J.R.E. 808, opinions or diagnoses made at or near the time of observation by a person with personal knowledge or from information supplied by such person, "if the writing . . . was made in the regular course of business and it was the regular practice of that business to make it" unless the source or circumstances of preparation indicate it is not "trustworthy."

The report was obtained by the Division in the ordinary course of business. The circumstances under which the report was made provide a sufficient indication of its trustworthiness. The clinical report, in the manner it was prepared, provided "a reasonably high degree of reliability as to the accuracy of the facts recorded contained therein." In re Guardianship of Cope, 106 N.J. Super. 336, 344 (App. Div. 1969). Thus, the reports were admissible under N.J.S.A. 9:6-8.46(a)(3) and Rule 5:12-4(d).

Since the report was admissible, the report could be relied upon as proof of any "condition, act, transaction, occurrence or event" reflected therein. N.J.S.A. 9:6-8.46(a)(3). Further, the conclusions drawn from the facts set forth in the reports "shall be treated as prima facie evidence, subject to rebuttal." R. 5:12-4(d). Here, the trial judge properly relied upon the report in finding that Ruby had been abused and neglected.

We reject as well the argument that D'Urso's opinion testimony should have been barred. The argument lacks merit as unsupported by both the factual record and N.J.R.E. 703. That rule of evidence states that an expert's opinion must be based upon "facts or data . . . perceived by or made known to the expert, at or before a hearing." Here, D'Urso's facts and data were derived from his active participation in the clinical process. The interviews of Ruby and the family members were conducted under D'Urso's supervision, which encompassed the content and scope of the questions utilized in the interviews as well as the information obtained therefrom. Further, it was without contradiction that the information relied upon by D'Urso in formulating his opinion was that ordinarily relied upon by experts in his profession. N.J.R.E. 703.

We next address the second argument relating to a lack of credible evidence to support the finding of abuse and neglect.

Title 9 defines an "abused or neglected child" as "a child less than [eighteen] years of age whose parent or guardian . . . commits or allows to be committed an act of sexual abuse against the child[.]" N.J.S.A. 9:6-8.21(c)(3). The burden is on the Division to prove abuse or neglect by a preponderance of the "competent, material and relevant evidence[.]" N.J.S.A. 9:6-8.46(b); N.J. Dep't of Children & Families, Div. of Youth & Family Servs. v. A.L., 213 N.J. 1, 22 (2013).

The Legislature has defined "sexual abuse" to mean "contacts or actions between a child and a parent or caretaker for the purpose of sexual stimulation of either that person or another person[,]" and includes

(a) the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or assist any other person to engage in, any sexually explicit conduct or simulation of such conduct; (b) sexual conduct including molestation, prostitution, other forms of sexual exploitation of children, or incest; or (c) sexual penetration and sexual contact as defined in N.J.S.[A.] 2C:14-1 and a prohibited sexual act as defined in N.J.S.[A.] 2C:24-4.

[N.J.S.A. 9:6-8.84.]

Pursuant to N.J.S.A. 9:6-8.21(a), a "[p]arent or guardian" means "any . . . paramour of a parent, or any person, who has assumed responsibility for the care, custody, or control of a child or upon whom there is a legal duty for such care."

Under N.J.S.A. 9:6-8.46(a)(4), an uncorroborated statement of sexual abuse by a child is admissible in an abuse or neglect proceeding. However, "an uncorroborated statement . . . is not alone 'sufficient to make a fact finding of abuse or neglect.'" N.J. Div. of Child Prot. & Permanency v. J.A., 436 N.J. Super. 61, 66-67 (App. Div. 2014) (quoting N.J.S.A. 9:6-8.46(a)(4)). "Stated another way, 'a child's hearsay statement may be admitted into evidence, but may not be the sole basis for a finding of abuse or neglect.'" Ibid. (quoting N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 33 (2011)). Corroborative evidence is therefore required. Ibid.


Generally, "[t]he most effective types of corroborative evidence may be eyewitness testimony, a confession, an admission or medical or scientific evidence." N.J. Div. of Youth & Family Servs. v. L.A., 357 N.J. Super. 155, 166 (App. Div. 2003). "It would be a rare case where evidence could be produced that would directly corroborate the specific allegation of abuse between the child and the perpetrator" N.J. Div. of Youth & Family Servs. v. Z.P.R., 351 N.J. Super. 427, 435-36 (App. Div. 2002). The court in Z.P.R. noted that in most child sex abuse cases, there is no physical evidence and the child victim is the only eyewitness. Id. at 436. Moreover, "[t]he corroborative evidence need not relate directly to the alleged abuser, it need only

provide support for the out-of-court statements." Ibid. Here, D'Urso's testimony provided the requisite corroboration.

Based upon the record, Judge Lipton appropriately evaluated the evidence presented, made findings of fact and applied controlling law. Given our own review of the record and the deferential standard with which we undertake that review, we find no basis to conclude that the judge's finding of abuse and neglect was erroneous.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION