SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0813-16T1

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

P.M.,

Defendant-Appellant,

and

A.C. and S.P.,

Defendants.

IN THE MATTER OF C.C. and S.P.,

Minors.

Argued January 9, 2018 – Decided February 23, 2018

Before Judges Yannotti, Carroll and Mawla.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FN-12-0276-15.

Richard Foster, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Richard Foster, of counsel and on the briefs).

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

Lisa M. Black, Designated Counsel, argued the cause for minors (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Lisa M. Black, on the brief).

PER CURIAM

P.M. appeals from an order entered by the Family Part on March 8, 2016, which found that her minor child S.P. was an abused or neglected child within the meaning of N.J.S.A. 9:6-8.21(c)(4), due to her inadequate supervision and medical neglect. On appeal, P.M. also claims she did not have the effective assistance of counsel at the fact-finding hearing. For the reasons that follow, we affirm the trial court's order finding that P.M. abused or neglected S.P. and reject P.M.'s claim of ineffective assistance of counsel.

I.

We briefly summarize the relevant facts and procedural history. P.M. is the mother of two daughters, C.C. (born in October 2005) and S.P. (born in November 2012). C.C. has always lived with her maternal grandmother. S.P. lived with P.M. until shortly before

this action was commenced, when she began to reside with her father, S.A.P.

On June 2, 2015, S.A.P. picked up S.P. for his routine visit and noticed that she had numerous marks and bruises on her body. S.A.P. brought the child to the Raritan Bay Hospital Center for evaluation. A staff member of the hospital notified the Division of Child Protection and Permanency (Division), which began an investigation that was handled by caseworker Angela Flores. S.A.P. informed Flores that he had been told another child had bitten S.P.

Thereafter, Flores interviewed P.M., who told Flores that on May 30, 2015, she had a gathering with relatives and friends at her home. P.M. drank beer during the day and at approximately 12:45 a.m. on May 31, 2015, she went to a bar. P.M. left S.P. in the care of her friend, E.P., who has a three-year-old son, A.J. P.M. said that when she left to go to the bar, S.P. did not have any marks on her body. At the bar, P.M. had "at least [two] shots of Hennessey and cranberry."

P.M. said that when she returned home from the bar, she did not notice any injuries or wounds on S.P. She laid down on the same bed with S.P. and A.J. When she woke in the morning, P.M. discovered that S.P. had numerous bites or bruises on her body. P.M. told Flores she did not hear S.P. cry or scream while she was

sleeping. She said she did not bring S.P. to the hospital because she feared the Division would investigate and remove the child.

P.M. told Flores she called E.P. and informed her that S.P. had marks on her body. E.P. said A.J. had bitten S.P. P.M. claimed she took the child to a physician, but she could not produce the doctor's name or address, and she denied the doctor had provided her with any paperwork.

Flores also interviewed E.P. and her son. E.P. said A.J. had a history of biting other children. A.J. admitted he bit S.P. while they were alone on the bed.

The Division asked S.A.P. to pick up S.P. and keep her in his care until a medical evaluation could be performed. S.P.'s pediatrician evaluated the child on June 4, 2015. She found marks on the child's body, which she believed could be bite marks. She said the child had broken skin in very sensitive areas, such as the shoulders and an eyelid. The injuries were extensive and the child was in pain when touched. The doctor noted she had treated S.P. since her birth and there was no indication of abuse in the past.

The Division also had Gladibel Medina, M.D. evaluate the child's injuries. According to Dr. Medina, S.P. had marks and bites all over her body. The child's skin had been broken and scabs had formed. Her right eye had a puncture with broken skin.

Dr. Medina stated that because the child's injuries were so extensive, she had to have been screaming while being bit. The doctor said a child could have inflicted the injuries.

On June 29, 2015, the Division filed a verified complaint for the care and supervision of S.P. and C.C., alleging that both children were abused or neglected within the meaning of N.J.S.A. 9:6-8.21(c)(4)(b). In addition to P.M., the Division named S.A.P. and C.C.'s father, A.C., as defendants.

The Family Part judge heard testimony on June 29, 2015, and granted the Division's application for care and supervision of the children. The judge did not change the children's legal or physical custody. The judge ordered P.M. to participate in substance abuse treatment and allowed her liberal visitation, supervised by the Division.

On August 11, 2016, the return date of the order to show cause, the court entered an order, which continued the children in the Division's care and supervision. The judge ordered that S.P. would remain in the physical custody of her father, and C.C. would remain with her maternal grandmother. The judge ordered P.M. to attend substance abuse treatment and individual counseling. The court again allowed P.M. to have liberal supervised visits with the children.

Beginning on December 15, 2015, the judge conducted a fact-finding hearing on the Division's allegations of abuse or neglect. At the first proceeding, Flores testified regarding the Division's involvement in the matter and her observations of the family. The Division submitted photographs of S.P.'s injuries, which were admitted into evidence.

At the next proceeding, which took place on January 20, 2016, the court admitted Dr. Medina's report into evidence and Dr. Medina testified. In her report, the doctor detailed the injuries that S.P. had sustained, which included bite marks on the left cheek, right cheek, the upper right extremity, back, and eyelid.

Dr. Medina found that the bite marks were consistent with bites by a child. She stated that the bites were forceful enough to leave teeth impressions and create puncture wounds. She opined that the injuries were indicative of a physical assault which lasted over a period of time, and were likely painful and distressing to the child.

In the report, Dr. Medina stated.

> Under normal circumstances, a caretaker just asleep would have likely awakened after the first bite, especially when on the face, thereby stopping the other injuries from being inflicted. However, in this case, it is possible that [S.P.'s] mother while under the influence of alcohol was not arousable to prevent the assault from continuing. Nevertheless, the following morning after the

> injuries were observed, [S.P.] should have been taken for medical attention because the injuries were extensive over her body and involved open wounds and abrasions that can be associated with increased risk of skin superinfection if not appropriately cleansed and cared for. Medical neglect and maternal substance [abuse] significant enough to hinder/impede [P.M.'s] ability to respond to [S.P.'s] needs at the time she was responsible for caring for [S.P.] is a major concern.
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> [S.P.'s] injuries are inflicted in nature even though not necessarily abusive since the alleged perpetrator is a toddler and biting is not uncommon behavior in this age group. [S.P.'s] injuries could have been preventable, [and] neglect due to the influence of alcohol appears contributory. Furthermore, failure to seek medical care or verbal medical consultation regarding [S.P.'s] extensive cutaneous injuries is indicative of neglect as well.

At the February 3, 2016 proceeding, P.M. presented an expert report and testimony from Zhongxue Hua, M.D., Ph.D., who was qualified as an expert in the fields of forensic pathology, neuropathology, and forensic toxicology. In his report, Dr. Hua opined that S.P.'s bite marks occurred when A.J. and S.P. were alone, which was between 11:00 p.m. on May 30 and 1:45 a.m. on May 31, 2015. Dr. Hua based this opinion on his review of A.J.'s statements and the statements of others involved.

Dr. Hua said he disagreed with Dr. Medina's conclusion that P.M. could have been unconscious when S.P. was attacked. The doctor stated there was no forensic evidence to support that conclusion.

Dr. Hua also stated that E.P. probably left the children alone for a time, even though she was supposed to be babysitting the children.

The Division then moved to strike Dr. Hua's report and testimony, arguing he had provided a net opinion, which was unsupported by facts. The judge granted the motion. The judge noted that the doctor had based his opinion on an assessment of the timing of the injuries based on the differing statements, but gave more weight to A.J.'s statement.

On March 8, 2016, the judge rendered her oral decision, finding by a preponderance of the evidence that P.M. was S.P.'s primary caregiver when the child suffered numerous bite marks. The judge found that P.M. failed "to exercise a minimum degree of care" because she failed to provide adequate supervision and proper medical attention for the child. The judge memorialized her decision in an order dated March 8, 2016.

The judge conducted a compliance review hearing on May 24, 2016, and found that P.M. had not completed the court-ordered substance abuse treatment. Therefore, S.P. remained in her father's physical custody, and C.C. remained with her maternal grandmother. The court's order of May 24, 2016 again required P.M. to attend substance abuse treatment and provided that P.M. could continue to have liberal supervised visitation.

On September 14, 2016, the judge entered an order terminating the abuse or neglect proceedings. The court's order continued the children's existing custody arrangements, and again permitted P.M. to have liberal supervised visitation. The order also stated that any modifications to the existing visitation or custody arrangements must be made under the court's FD docket[1] and P.M. would be required to provide proof that she had completed substance abuse treatment.

P.M. thereafter filed a notice of appeal. She then filed a motion in this court to supplement the record with documents, which she contended were essential to the resolution of her claim that she had been denied the effective assistance of counsel in the fact-finding proceedings. We granted the motion.

II.

On appeal, P.M. argues that the judge erred by finding that S.P. was an abused or neglected child under N.J.S.A. 9:6-8.21(c)(4). She contends the Division failed to present sufficient credible evidence to support the judge's finding of inadequate supervision and medical neglect.

Initially, we note that the trial court's findings of fact

[1] The FD docket in the Family Part "consists of child custody, visitation, child support, paternity, medical support, and spousal support in non-divorce matters." B.C. v. N.J. Div. of Child Prot. & Permanency, 450 N.J. Super. 197, 205 (App. Div. 2017).

in an abuse and neglect proceeding are entitled to deference and will be upheld if supported by adequate, substantial, and credible evidence in the record. N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 38 (2011) (citing N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007)). We will defer to the trial court's findings unless the findings "went so wide of the mark that a mistake must have been made." Ibid. (quoting M.M., 189 N.J. at 279).

N.J.S.A. 9:6-8.21(c) defines the term "abused or neglected child" in relevant part as a child less than eighteen years of age

> 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 (a) in supplying the child with adequate . . . medical or surgical care though financially able to do so . . . or (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof . . . .

A finding of abuse and neglect under N.J.S.A. 9:6-21(c)(4) "can be based on proof of imminent danger and a substantial risk of harm." Dep't of Children & Families v. E.D.-O., 223 N.J. 166, 178 (2015) (quoting N.J. Dep't of Children & Families v. A.L., 213 N.J. 1, 22 (2013)). Moreover, the failure "to exercise a minimum degree of care" refers to conduct that is "grossly or wantonly negligent, but not necessarily intentional." Id. at 179 (quoting

G.S. v Dep't of Human Servs., 157 N.J. 161, 178 (1999)).

"Conduct is considered willful or wanton if done with the knowledge that injury is likely to, or probably will, result." Ibid. (quoting G.S., 157 N.J. at 178–79). "[T]he concept of willful and wanton misconduct implies that a person has acted with reckless disregard for the safety of others." Ibid. (quoting G.S., 157 N.J. at 178–79).

A parent or guardian "fails to exercise a minimum degree of care when he or she is aware of the dangers inherent in a situation and fails adequately to supervise the child or recklessly creates a risk of serious injury to that child." Ibid. (quoting G.S., 157 N.J. at 181). "Where an ordinary reasonable person would understand that a situation poses dangerous risks and acts without regard for the potentially serious consequences, the law holds [that person] responsible for the injuries [he or she] causes." Ibid. (quoting G.S., 157 N.J. at 179).

In addition, when "a parent or guardian acts in a grossly negligent or reckless manner, that deviation from the standard of care may support an inference that the child is subject to future danger." Dep't of Children & Families v. T.B., 207 N.J. 294, 307 (2011). On the other hand, if the parent or guardian has only been negligent, "there is no warrant to infer that the child will be at future risk." Ibid.

A. Inadequate Supervision

P.M. argues that the evidence does not support the judge's finding that she failed to provide adequate supervision for S.P. and thereby exposed the child to a risk of substantial injury. We disagree.

Inadequate supervision may constitute abuse or neglect under N.J.S.A. 9:6-8.21(c)(4)(b) if the parent or guardian's supervision is grossly negligent or recklessly exposes the child to substantial risk of harm and the child is in imminent danger of impairment. E.D.-O., 223 N.J. at 178-79. The Division may establish gross negligence based on inadequate supervision with evidence the parent or guardian left a child unattended, thereby exposing the child to potential harm. Id. at 181–85.

Here, the judge found that P.M. was S.P.'s sole caretaker when the child was injured. The judge noted that S.P. had received seventeen different bites, and the injuries were significant. The judge found that P.M. either left the children unattended or was so inebriated she could not hear the child's cries as she was attacked. The judge noted that P.M. had stated she did not hear S.P. cry, and Dr. Medina had testified it was highly unlikely the child would not have screamed or cried during the attack.

The judge stated that P.M. may have been "out cold from drinking" or "just outside somewhere." Nevertheless, the judge

found that P.M. was the child's caregiver at the relevant time, and whether intentional or not, she did nothing to prevent the biting from continuing. The judge concluded that P.M. did not exercise the minimum degree of care required by failing to adequately supervise the child.

We are convinced there is sufficient credible evidence in the record to support the judge's findings and conclusion that S.P. was an abused or neglected child under N.J.S.A. 9:6-8.21(c)(4)(b) due to P.M.'s inadequate supervision. The record supports the judge's determination that P.M. was grossly negligent and her failure to supervise S.P. adequately exposed the child to the risk of significant injuries, which she actually sustained.

In support of her argument that the evidence does not support the judge's finding of inadequate supervision, P.M. relies upon New Jersey Division of Child Protection & Permanency v. J.C., 440 N.J. Super. 568 (App. Div. 2015). In that case, we reversed the trial court's abuse or neglect finding where on a single occasion the parent drank alcohol to excess and slept late with her bedroom door closed, leaving the child wearing a dirty diaper with the apartment door ajar. Id. at 579. We noted there was no evidence that the parent had left the door ajar while intoxicated, or that she had even known it was ajar. Ibid.

In J.C., we also noted that "there was no proof of harm to

[the child], or that [the mother's] conduct met the statutory standard of abuse or neglect." Ibid. In this case, however, S.P. was seriously injured. She suffered numerous painful bites while in her mother's care, and P.M.'s conduct met the statutory standard for abuse or neglect. Thus, P.M.'s reliance upon J.C. is misplaced.

P.M. also argues that our decision in New Jersey Division of Child Protection & Permanency v. B.O., 438 N.J. Super. 373 (App. Div. 2014), does not support the trial judge's finding of abuse or neglect. In B.O., we upheld an abuse or neglect finding after a mother accidentally suffocated her child while sleeping and under the influence of drugs, based on the mother's "reckless disregard for the consequences." Id. at 381-82 (quoting G.S., 157 N.J. at 178).

P.M. contends that this case is substantially different from B.O. She argues that the evidence shows she did not act in reckless disregard of any potential harm because she was unaware that A.J. had a propensity to bite other children. However, in this case there is substantial evidence that P.M. did, in fact, act in reckless disregard for the safety of S.P. As the judge found, P.M. either left the child unattended or was so inebriated she could not act to protect the child from further injury.

B. Medical Neglect

Next, P.M. argues that the judge erred by finding that S.P.

was an abused or neglected child under N.J.S.A. 9:6-8.21(c)(4) due to medical neglect. She contends the Division failed to show that her failure to bring the child for a medical evaluation and treatment placed the child in imminent danger or a substantial risk of harm. Again, we disagree.

As noted previously, the term "abused or neglected child" is defined in N.J.S.A. 9:6-8.21(c)(4) to include a child "whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure" of that child's parent or guardian "to exercise a minimum degree of care (a) in supplying the child with adequate . . . medical or surgical care though financially able to do so . . . or (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof . . . ."

Here, the judge found that the Division had established medical neglect based on P.M.'s "failure to exercise a minimum degree of care" because P.M. did not take the child to a doctor or consult with a medical professional by phone after she observed the child's injuries. The judge stated that "[t]here is absolutely no proof in this case that [P.M.] took the child anywhere for medical attention" even though S.P. was "obviously" in pain as a result of "seventeen different injuries," including open wounds,

bite marks, and "[a] bite mark on top of a bite mark."

Indeed, Dr. Medina had opined that the child's injuries posed an increased risk of new skin infection if the injuries were not cleaned and cared for appropriately. The judge also found it was "quite compelling" that P.M. had claimed that she had taken S.P. to a doctor, when there was no proof that she had done so.

We are convinced that the evidence established that S.P.'s injuries posed a substantial risk of further harm and should have been treated promptly after they were inflicted. Indeed, Dr. Medina emphasized that S.P. "should have received care right away, as soon as the injuries were noted" in order to prevent the risk of further injury. See T.B., 207 N.J. at 307 (noting that gross negligence can be found based on evidence that the child was exposed to a risk of future harm).

We reject P.M.'s contention that a finding of medical neglect was not warranted because the child's bites and bruises did not become infected. As the evidence shows, the child suffered actual harm, and Dr. Medina's testimony established that the child was placed at risk of further harm by P.M.'s failure to seek prompt medical attention for the child's injuries.

Therefore, we affirm the trial court's finding that S.P. was an abused or neglected child within the meaning of N.J.S.A. 9:6-8.21(c)(4)(a) and (b), due to inadequate supervision and medical

neglect.

III.

P.M. also argues that she was denied the effective assistance of counsel during the fact-finding proceedings. She contends her attorney was deficient in handling the Division's medical neglect allegations.

A defendant in a Title 9 abuse or neglect proceeding has the right to counsel, and indigent parents have the right to have an attorney appointed to represent them. N.J.S.A. 9:6-8.43(a). Moreover, the right to counsel in Title 9 proceedings is the right to the effective assistance of counsel. N.J. Div. of Youth & Family Servs. v. B.H., 391 N.J. Super. 322, 345 (App. Div. 2007) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

To establish ineffective assistance of counsel, the parent or guardian must meet the two-part test established in Strickland v. Washington, 466 U.S. 558, 594 (1984). B.H., 391 N.J. Super. at 346-48; see also N.J. Div. of Youth & Family Servs. v. B.R., 192 N.J. 301, 308-09 (2007) (applying Strickland test in cases involving the termination of parental rights).

Thus, the parent or guardian must first show that counsel's performance was deficient, meaning that counsel's performance was outside the wide range of reasonable professional assistance. B.R., 192 N.J. at 307 (citing Strickland, 466 U.S. at 694). The

parent or guardian also must show that counsel's deficiency prejudiced the defense, which requires the parent or guardian to show that there is a reasonable probability that but for counsel's errors, the result would have been different. Ibid. (citing Strickland, 466 U.S. at 694). P.M. has not satisfied the two prongs of the Strickland test.

The record shows that after the judge struck Dr. Hua's testimony, the judge offered P.M.'s attorney the opportunity to present other witnesses, which counsel declined. P.M. asserts that her attorney should have sought additional time in which to locate and identify an expert to provide a report and rebut Dr. Medina's testimony. Alternatively, P.M. asserts counsel should have presented documents already in her possession, which allegedly showed that S.P.'s injuries were not as severe as Dr. Medina indicated.

P.M. has not, however, presented a report from a qualified expert, which would have countered Dr. Medina's assessment of S.P.'s injuries. In B.R., the Court noted that if a party claims ineffective assistance of counsel due to a failure to produce an expert or lay witness, the party must supply a certification from any such witness detailing "the substance of the omitted evidence along with arguments regarding its relevance." B.R., 192 N.J. at 311; see also N.J. Div. of Youth & Family Servs. v. N.S., 412 N.J.

Super. 593, 643 (App. Div. 2010) (rejecting ineffective assistance claim based on failure to present witnesses because certifications not provided to support the claim).

On appeal, P.M. cites certain medical records, which she claims show that S.P.'s injuries were not as severe as Dr. Medina indicated. She has not, however, provided this court with a certification from a qualified expert, with an opinion to a reasonable degree of medical certainty, that S.P.'s injuries were not serious, did not pose a substantial risk of further harm, and did not require immediate medical attention.

P.M. further argues that her attorney should have objected to the judge's consideration of the Division's alleged "amended allegations" of medical neglect and sought time in which to address those allegations. However, the Division's complaint and investigatory summaries included allegations of medical neglect.

Furthermore, Flores raised the issue of medical neglect in her testimony on the first hearing date on December 15, 2015, and the judge questioned her on this issue. In addition, Dr. Medina's June 2015 report and testimony at the proceeding on January 20, 2016, also addressed the issue of medical neglect. The judge held an additional hearing on February 3, 2016, wherein Dr. Hua testified and the court granted the Division's motion to strike.

In light of this procedural history, there is little

likelihood the court would have granted P.M. additional time to address the issue of medical neglect even if counsel had made such a request. In any event, P.M. cannot show that the outcome of the proceeding would have been different even if the court had granted P.M.'s attorney additional time and counsel had presented evidence disputing Dr. Medina's testimony on medical neglect.

P.M. has not shown that it is reasonably probable the court would have reached a different conclusion on the issue of medical neglect. Even if that were the case, the result of this proceeding here would have been the same. The court found that S.P. was an abused or neglected child based on inadequate supervision. That finding would not have changed if the court had reached a different conclusion regarding medical neglect.

We therefore conclude P.M. was not denied the effective assistance of counsel in the abuse or neglect fact-finding proceedings. P.M. failed to show that her attorney's handling of the case fell below the wide range of professional assistance or that the result of the proceeding probably would have been different if counsel had handled the issue of medical neglect along the lines suggested by P.M.

Affirmed.