

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5296-15T2

NEW JERSEY DIVISION OF
CHILD PROTECTION AND
PERMANENCY,

Plaintiff-Respondent,

v.

O.M.,

Defendant-Appellant,

and

M.G.,

Defendant.

IN THE MATTER OF M.G.,

a Minor.

Argued December 20, 2017 — Decided January 30, 2018

Before Judges Fuentes, Koblitz and Manahan.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Hudson County,
Docket No. FN-09-0528-14.

Ifeoma A. Odunlami, Designated Counsel, argued
the cause for appellant (Joseph E. Krakora,

Public Defender, attorney; Ifeoma A. Odunlami, on the brief).

Stephanie Asous, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Stephanie Asous, on the brief).

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

PER CURIAM

Defendant O.M. appeals from a July 31, 2014 Family Part order finding that she abused or neglected her then fourteen-year-old son, M.G. (Matt),¹ in violation of N.J.S.A. 9:6-8.21(c). The court concluded that given defendant's level of intoxication and her conduct directed toward Matt, she posed a substantial risk of harm to her son. Defendant argues that the Division of Child Protection and Permanency (Division) failed to meet its burden of proof, and the decision of the court was not supported by credible and relevant evidence, nor comported with controlling law. We disagree and affirm.

I.

The witnesses at the fact-finding hearing were Union City Police Officer Paul Goodwin and Division supervisor/Special

¹ We use pseudonyms for the convenience of the reader and to protect the child's privacy. See R. 1:38-3(d)(12)

Response Unit Investigator Magda Font. We discern the following facts derived from the record of the hearing.

At approximately 2:30 a.m. on April 15, 2014, Goodwin and two accompanying Union City police officers responded to defendant's residence regarding a report of a dispute between a mother and son. The residence consisted of one bedroom, a common room, and a bathroom.

Upon their arrival, the officers observed defendant who appeared to be "heavily intoxicated" and was slurring her speech. The officers further observed that defendant was unable either to maintain her balance or to articulate events, and that an odor of alcohol was "emanating from her person."

As Goodwin attempted to question Matt, defendant continually interrupted by screaming at her son in Spanish. Another officer interpreted defendant's statements as telling Matt "to leave the house and go sleep in the street." Goodwin observed Matt appeared to be distraught and nervous, and was hesitant to relate the events that occurred while in the presence of defendant. Due to defendant's violent behavior and their concern for Matt's safety, the officers stood between defendant and Matt.

Eventually, defendant was arrested and charged with endangering the welfare of a child based upon the totality of the circumstances. The circumstances included Matt's statement to

Goodwin, defendant's state of intoxication and her violent behavior. The police made a referral to the Division, which resulted in Matt's emergent removal.

Font interviewed Matt at the Union City Police Department that morning. Matt advised that he was awoken by defendant when she arrived home around 2 a.m., and she insisted he throw her male friend out of the apartment. Matt further advised that defendant became upset when he went into the bathroom. Defendant retrieved a knife from the kitchen and began to hit and stab the bathroom door. Fearful for his safety, Matt remained in the bathroom. Shortly thereafter, Matt heard defendant call the police, whereupon, he left the bathroom and hid in a closet waiting for the police to arrive.

Matt had seen defendant intoxicated before, but that night she appeared "violent" and "out of control," which was not normal behavior. Matt was afraid of defendant and thought she might kill him.

Later that day, Yudi Gonzalez, a Division caseworker, interviewed Matt. Matt expanded on his relationship with his father, who lived in El Salvador, and described his father's extreme abuse towards him. Matt alluded to the abuse as the reason he and defendant moved to the United States from El Salvador.

That same day, Font interviewed defendant, who was in jail. Font believed defendant was under the influence of alcohol as she smelled strongly of alcohol and had difficulty keeping focused on one topic. Although defendant denied using a knife or threatening Matt, defendant admitted that after drinking ten Corona beers, she arrived home around 1 a.m. and found her son was upset. Defendant stated that she believed Matt had left the house, which prompted her call to the police. As the interview continued, defendant disclosed that she did not want custody of Matt because she felt it was his fault she got arrested. Defendant further elaborated that during a prior incident, Matt failed to protect her from a male who tried to choke her.

Defendant confirmed that Matt's father was abusive, but indicated she felt that Matt deserved it. Defendant also confirmed that it was due to that abuse that she and Matt relocated to the United States.

On April 22, 2014, defendant was released from jail and interviewed, at home, by a Division caseworker. Defendant stated that she was not intoxicated on April 15, and in fact, consumed only five beers that evening. Defendant again denied threatening Matt. She also stated that her male friend did not accompany her into her residence. When the caseworker asked about her plans

regarding Matt, defendant replied that she "should have left him over there [El Salvador]."

Defendant did not testify on her own behalf. Additional supporting documents were entered into evidence on behalf of the Division. At the conclusion of the hearing, the judge found both witnesses' testimony extremely credible. In reaching the determination of abuse or neglect, the judge held:

The [] statute talks about a parent placing a child in imminent danger. Certainly, [Matt] was in imminent danger of being seriously hurt. This child was afraid for his life. . . .

She was so intoxicated at the time that she couldn't control herself in front of three police officers. And they were concerned for the safety of the child. That to me is creating a substantial risk of serious harm. . . . [S]he was the danger to him, and the intoxication and the violence, and the lack of any indication she was willing or able to be any sort of caretaker to that child . . . certainly rises to the level of creating a substantial risk of serious harm to this young man.

And she had placed that child in imminent danger both from the man she brought home at 2 a.m. while intoxicated and from her own behaviors. So the [c]ourt finds that by a preponderance of the evidence that she did abuse and neglect [fourteen]-year-old [Matt].

II.

On appeal, defendant raises the following points:

POINT [I]

THE TRIAL COURT ERRED IN FINDING THAT [MATT] WAS ABUSED OR NEGLECTED WHERE NO ACTUAL HARM WAS DEMONSTRATED AND WHERE THERE WAS A LACK OF COMPETENT, MATERIAL AND RELEVANT EVIDENCE OF IMMINENT HARM OR SUBSTANTIAL RISK OF HARM SUBMITTED TO THE COURT.

- A. [MATT] DID NOT SUFFER ANY ACTUAL PHYSICAL OR EMOTIONAL HARM.
- B. O.M.'S CONDUCT DID NOT PUT [MATT] AT IMMINENT OR SUBSTANTIAL RISK OF HARM.

POINT [II]

THE COURT IMPROPERLY CONSIDERED PREVIOUSLY EXCLUDED HEARSAY BY THIRD PARTIES CONTRARY TO THE NEW JERSEY RULES OF EVIDENCE.

POINT [III]

THE APPELLATE DIVISION SHOULD REVERSE THE FACT-FINDING ORDER AS THE TRIAL COURT VIOLATED O.M.'S DUE PROCESS RIGHTS BY FAILING TO ENSURE THAT SHE WAS ABLE TO CONFRONT THE WITNESSES AGAINST HER (NOT RAISED BELOW).

Our standard of review is well-settled. We are bound by the trial court's factual findings if supported by sufficient credible evidence. N.J. Div. of Youth & Family Servs. v. I.H.C., 415 N.J. Super. 551, 577-78 (App. Div. 2010) (citations omitted). We accord particular deference to the Family Court's fact-finding because of the court's "special expertise" in family matters, its "feel of the case," and its opportunity to assess credibility based on witnesses' demeanor. N.J. Div. of Youth & Family Servs. v. E.P.,

196 N.J. 88, 104 (2008); Cesare v. Cesare, 154 N.J. 394, 412-13 (1998). We also accord no deference to the "trial court's interpretation of the law and the legal consequences that flow from established facts" Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Defendant argues the evidence presented did not meet the "recklessness" or "gross negligence" standard required by Title 9 for findings of abuse or neglect as brought by the Division. We disagree.

Under N.J.S.A. 9:6-8.21(c)(4)(b), an abused or neglected child includes:

[A] child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent . . . to exercise a minimum degree of care . . . (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment; or by any other acts of a similarly serious nature requiring the aid of the court.

Title 9 sets forth the controlling standards for adjudicating cases of abuse or neglect. N.J.S.A. 9:6-8.21 to - 8.73; N.J. Div. of Youth & Family Servs. v. T.B., 207 N.J. 294, 303 (2011). "The main goal of Title 9 is to protect children 'from acts or conditions which threaten their welfare.'" G.S. v.

Dep't of Human Servs., 157 N.J. 161, 176 (1999) (quoting State v. Demarest, 252 N.J. Super. 323, 331 (App. Div. 1991)). 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. Div. of Youth & Family Servs. v. A.L., 213 N.J. 1, 22 (2013). A fact-finding hearing shall be held to determine whether the Division has shown by a preponderance of the evidence that the child was abused or neglected. N.J.S.A. 9:6-8.44, -8.46(b). Where there is no evidence of actual harm to the child, "a finding of abuse and neglect can be based on proof of imminent danger and substantial risk of harm." A.L., 213 N.J. at 23 (citing N.J.S.A. 9:6-8.21(c)(4)(b)).

As set forth in the statute, "[t]o find abuse or neglect, the parent must 'fail[] . . . to exercise a minimum degree of care.'" Div. of Child of Prot. & Permanency v. E.D.-O., 223 N.J. 166, 179 (2015) (alternations in original) (quoting N.J.S.A. 9:6-8.21(c)(4)(b)). To satisfy that standard, conduct must be willful or wanton, but not necessarily intentional. Ibid. "Willful or wanton" conduct is "done with the knowledge that injury is likely to, or probably will, result." Ibid. (quoting G.S., 157 N.J. at 178-79). In abuse or neglect hearings "it is of great importance that the evidence upon which judgment is based be as reliable as the circumstances permit and that the answering parent be given

the fullest possible opportunity to test the reliability of the [Division's] essential evidence by cross-examination." N.J. Div. of Youth & Family Servs. v. I.Y.A., 400 N.J. Super. 77, 94-95 (App. Div. 2008)(alterations in original)(citation omitted).

Whether a parent has failed to exercise a minimum degree of care "is fact-sensitive and must be resolved on a case-by-case basis." E.D.-O., 223 N.J. at 192. Courts undertaking this analysis "must avoid resort to categorical conclusions." Id. at 180 (citing T.B., 207 N.J. at 309). The court should base its determination on the totality of the circumstances. N.J. Div. of Youth & Family Servs. v. V.T., 423 N.J. Super. 320, 329 (App. Div. 2011). "[T]he elements of proof are synergistically related. Each proven act of neglect has some effect on the [child]. One act may be 'substantial' or the sum of many acts may be 'substantial.'" Id. at 329-30 (quoting N.J. Div. of Youth & Family Servs. v. C.H., 414 N.J. Super. 472, 481 (App. Div. 2010)).

A parent's substance abuse is not in itself grounds for a finding of abuse or neglect. See N.J. Div. of Child Prot. & Permanency v. Y.N., 220 N.J. 165, 184-86 (2014); A.L., 213 N.J. at 23. In addition, the parent must act unreasonably under the circumstances and there must be a corresponding harm or substantial risk of harm resulting in the child's impairment or imminent danger of impairment. Y.N., 220 N.J. at 184; A.L., 213 N.J. at 23.

We find no merit to defendant's argument that the trial court erred by concluding that Matt suffered actual emotional harm, and was put at substantial risk of harm. There is ample evidence within the record that supports Matt's reasonable fear of defendant.

Defendant was heavily intoxicated and was yelling at Matt to "sleep in the street." Defendant had, in the past and on the date in question, allowed a strange male to enter the residence in the early morning hours, and then sought her son's presumably physical assistance to remove the male. In doing so, she potentially exposed her son to physical harm. Further, defendant's violent and aggressive actions directed towards her son, notwithstanding the police presence, coupled with her severe intoxication, created an imminent risk of substantial harm. A court does not have to wait until actual harm occurs before making a finding. A.L., 213 N.J. at 23 (citation omitted). As such, we conclude that the finding of abuse or neglect premised upon imminent if not actual risk of harm was not erroneous.

Nor do we discern error in the evidentiary rulings. We review a trial court's evidentiary rulings under an abuse of discretion standard. State v. McGuire, 419 N.J. Super. 88, 135 (App. Div. 2011). A trial court's evidentiary rulings will not be disturbed on appeal absent a showing of clear abuse of discretion, meaning,

a clear error in judgment. State v. J.A.C., 210 N.J. 281, 295 (2012); see State v. Fulston, 325 N.J. Super. 184, 192-93 (App. Div. 1999). In applying this standard, we do not substitute our own judgment for that of the trial court, unless the trial court's ruling is so wide of the mark that a manifest denial of justice resulted. J.A.C., 210 N.J. at 295; State v. Swint, 328 N.J. Super. 236, 253 (App. Div. 2000).

Courts are granted broad discretion in determining the relevance of evidence and whether its probative value is substantially outweighed by its prejudicial nature. Verdicchio v. Ricca, 179 N.J. 1, 34 (2004); see State v. Nelson, 173 N.J. 417, 470 (2002). Differently stated, it has been pointed out that the trial court is in the "best position to engage in th[e] balancing process" required by this rule. State v. Ramseur, 106 N.J. 123, 266 (1987); see also Schaefer v. Cedar Fair, 348 N.J. Super. 223, 239 (App. Div. 2002) (noting that "[t]his is an exercise that trial judges perform every day in other contexts.").


All relevant evidence is admissible, unless otherwise excluded. N.J.R.E. 401; N.J.R.E. 402; State v. Burr, 195 N.J. 119, 126 (2008). Relevant evidence has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. To determine relevancy, a trial judge must "focus on the 'the logical connection between the proffered

evidence and a fact in issue.'" State v. Covell, 157 N.J. 554, 565 (1999) (quoting State v. Hutchins, 241 N.J. Super. 353, 358 (App. Div. 1990)). "Once a logical relevancy can be found to bridge the evidence offered and a consequential issue in the case, the evidence is admissible, unless exclusion is warranted under a specific evidence rule." Burr, 195 N.J. at 127. In consideration of our standard of review and the record before us, we discern no error that would result in reversal.

Finally, as to those issues raised on appeal that were not addressed before the Family Part, we decline to address them as they do not present policy issues that would compel our review. "Only in respect of important matters of public concern will an appellate court consider issues not raised below." Alan J. Cornblatt, PA v. Barow, 153 N.J. 218, 247 (1998) (citing State v. Churchdale Leasing, 115 N.J. 83, 100 (1989)).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION