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NO. COA04-1695

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

IN THE MATTER OF:

N.F.

Wake County
No. 01 J 509

Appeal by respondent from order entered 10 January 2002 by Judge Philip W. Allen in Wake County District Court. Heard in the Court of Appeals 24 August 2005.

Appellant Defender Staples Hughes, by Assistant Appellant Defender Daniel R. Pollitt, for respondent-appellant.

Wake County Guardian ad Litem, by Attorney Advocate Richard Croutharmel, for juvenile-appellee.

JACKSON, Judge.

Respondent-mother appeals from an adjudication order entered 10 January 2002 placing N.F. with his maternal grandparents following hearings on 28 and 29 November and 12 and 13 December 2001. Evidence presented at the hearings tended to show that N.F. was born 1 June 2001 to respondent and A.F. N.F. suffered fetal distress during birth and remained at the hospital for five days before returning to respondent's home. A.F. maintained his own residence but often stayed at the home of respondent during June and July of 2001. Although she received psychotherapy and took

anti-depressant medication for her depression, respondent's condition prevented her from maintaining her career as an attorney. Although A.F. held himself out as N.F.'s father, paternity of N.F. was never established legally.

N.F. was taken by respondent to the Duke Pediatric Clinic (the "Clinic") on 15 August 2001 for a routine check-up and vaccinations. Before the vaccines were administered, respondent was advised of several potential adverse reactions that N.F. might experience as a result of the vaccines including irritability, uncontrollable crying, seizures, fever, rashes and red patches. Immediately upon receiving the vaccinations, N.F. began to cry and wail. Respondent was instructed to administer Tylenol to N.F. After returning home, N.F. acted sedated and generally seemed out of sorts and respondent continued to administer Tylenol as instructed. A.F. spent the night of 15 August at respondent's apartment.

On the morning of 16 August N.F. woke around 6:00 a.m. and continued to be fussy and irritable. Respondent fed and cared for N.F. before finally getting him to sleep around noon. After N.F. was asleep, respondent left him in A.F.'s care while she went out to run errands. Respondent returned approximately one hour later to find A.F. coming out of N.F.'s room. A.F. said that N.F. had woken up but that he had rocked N.F. back to sleep. Approximately ten minutes later, N.F. began to cry in a way that respondent had never heard before except immediately after he had received the vaccinations on the previous day. When respondent picked N.F. up

he was limp, would not open his eyes, and continued to cry. Respondent called 911 thinking that N.F. was having a severe reaction to the vaccinations.

A paramedic arrived at the apartment at 2:35 p.m. and found N.F. crying persistently, irritable and moving around as if trying to bounce out of respondent's arms. The paramedic did not observe anything unusual about N.F.'s crying. N.F. was never removed from respondent's arms for assessment by the paramedic but, from the assessment that he was able to complete, the paramedic observed nothing unusual about N.F. Based on his observations and the information that N.F. had received vaccinations the previous day, the paramedic did not feel that transporting N.F. to the hospital was necessary and advised respondent to watch for any further changes and call 911 or her pediatrician if any were noticed.

N.F. continued to cry throughout the remainder of the afternoon and that night, slept for only short periods at a time and refused to eat. About midnight N.F. began to kick and jerk his leg and seemed to become more lethargic. At 7:30 a.m. on 17 August, respondent called the Clinic and made an appointment for N.F. that day. N.F. was seen at 9:45 a.m., was initially diagnosed with a bacterial infection, and immediately transferred to the Duke University Hospital Emergency Room. N.F. began to have seizures after reaching the emergency room. N.F. was admitted to the intensive care unit and hospital officials notified DSS that N.F. was suspected to have suffered blunt head trauma. N.F. remained in the hospital for approximately three weeks during which time

respondent spent a great deal of time at the hospital with N.F. and no inappropriate behavior toward N.F. by respondent was noted.

DSS offered, without objection, Dr. Karen St. Claire ("Dr. St. Claire"), a pediatrician at Duke University Medical Center, as an expert in pediatric medicine and child abuse and neglect. Dr. St. Claire testified that N.F. had a subdural hemorrhage, retinal hemorrhages and petechia (a particularly concerning type of rash) on his neck when he was admitted to the hospital. Dr. St. Claire testified that, after examining N.F. and reviewing all of his medical records, she determined N.F.'s symptoms were consistent with non-accidental trauma, specifically shaken baby syndrome. In making that determination, Dr. St. Claire had considered and ruled out infectious disease, metabolic disease, respiratory disease, and cardiac disease as possible causes of the symptoms. Dr. St. Claire also testified that, in her opinion, the vaccinations received by N.F. had nothing to do with his head injuries.

Respondent testified that she had not shaken N.F. nor caused injury to him in any way.

N.F. was adjudicated abused and neglected and relative placement was ordered by the trial court. Respondent timely appealed the adjudication order.

On appeal, respondent makes nineteen assignments of error but presents argument and authority for only four of these assignments in her brief. The assignments of error for which no argument is presented are deemed abandoned. N.C. R. App. P. Rule 28(b)(6) (2005). In one of her remaining assignments of error, respondent

assigns error to nineteen findings of fact but only presents argument in support of this assignment regarding five of those findings of fact. Pursuant to North Carolina Rules of Appellate Procedure Rule 28(b)(6), we consider only the findings of fact to which error is assigned and argument is presented. In yet another assignment of error, respondent assigns error to the trial court's conclusions of law numbers 2 through 5, yet only presents argument and authority regarding the alleged error of conclusions of law numbers 2 and 3. Accordingly, the portion of respondent's assignment of error pertaining to conclusions of law numbers 4 and 5 is not considered. N.C. R. App. Rule 28(b)(6). Similarly, no argument or authority is presented in support of the portion of respondent's assignment of error regarding the trial court's order number 2 and it is not considered.

Respondent's remaining assignments of error are: (1) the trial court committed prejudicial error in conducting an independent, *ex parte* investigation of material issues of fact; (2) the trial court's findings of fact numbers 10, 12, 31, and 34 are not supported by competent evidence; (3) the trial court's conclusions of law numbers 2 and 3 are not supported by the evidence or the court's findings of fact; (4) paragraph 1 of the trial court's order is erroneous as it is not supported by the evidence, findings of fact, or conclusions of law; and (5) the trial court's Order on Adjudication was erroneous as a matter of law.

Findings of fact that are supported by competent evidence are binding on appeal even if there is some evidence to the contrary.

In re A.D.L., __ N.C. App. __, __, 612 S.E.2d 639, 645, *disc. review denied*, __ N.C. __, 619 S.E.2d 402 (2005) (citing *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988)). Respondent first argues that the portion of the trial court's finding of fact number 12 "[t]hat from Wednesday, August 17, 2001, [N.F.] was in the exclusive care of [respondent] . . ." is not supported by clear and convincing evidence. This assignment of error is conceded by petitioner as respondent's uncontradicted testimony was that she had left N.F. in A.F.'s care for approximately one hour during that period of time.

Respondent next argues that finding of fact number 34 regarding respondent's failure to express concern in court over N.F.'s condition or prognosis, or anger or outrage that a violent injury had been inflicted on N.F. by someone is not supported by the evidence. The majority of the evidence cited by respondent in support of this argument comes from transcripts of proceedings prior to the adjudication hearing. Although the trial court does not indicate specifically that it considered the prior proceedings in making its determination, it is clear from several references in its findings of fact to those prior proceedings that they were considered by the trial court. At the custody hearing held 4 September 2001, respondent testified that she cried when she heard Dr. St. Claire testify that N.F. could have cerebral palsy or be mentally retarded as a result of his injuries. During the

adjudication hearing, respondent testified that she was angry that N.F. had to go through this situation. This finding of fact, therefore, is not supported by the evidence.

Respondent next takes exception to several portions of finding of fact number 31. Finding of fact number 31 contains several instances of conflict between respondent's testimony and other evidence introduced in the proceeding as well as statements made by respondent that go to the credibility of her testimony. Respondent first argues that the portion of finding of fact number 31 that she testified that she observed N.F.'s foot jerking prior to the morning she took him to the hospital only after hearing Dr. St. Claire testify that N.F.'s symptoms should have been exhibited prior to that morning. Respondent did testify at the adjudication hearing, prior to Dr. St. Claire's testimony at the hearing, that she felt N.F.'s foot jerking during the night of 16 August 2001 or early morning of 17 August 2001. Accordingly, this portion of the finding of fact is not supported by competent evidence.

The next contention regarding this finding of fact raised by respondent is that the portions of the trial court's findings of fact regarding her alcohol use were not supported by the evidence. The portion of finding of fact number 31 which states, "she testified that she had been drinking a considerable time, as much as 6-10 beers at a time[,] " actually is a misstatement of respondent's testimony relating to a report by her psychiatrist sent to DSS in September 2001. Respondent's actual testimony regarding the report about her alcohol use was, "He said at times

that I had consumed six beers or ten beers. I think, as I recall, that's what it says, because we've talked about that. It's not anything that I didn't know. But that had not been an occurrence for quite some time." Accordingly, this portion of the trial court's finding of fact is not supported by the evidence.

Respondent's final argument relating to finding of fact number 31 is that the portion stating, "[Respondent] testified that she would not talk with Child Protective Services about their investigation[,] but she would discuss a care plan[,] " is not supported by the evidence and violated her right to due process of law. During the custody hearing on 4 September 2001, respondent testified that she was willing to discuss N.F.'s care with the social worker, but not the investigation of the case, without her attorney present. This portion of the finding of fact, therefore, is supported by the evidence.

Although some portions of the trial court's findings of fact were not supported by the evidence as noted *supra*, those findings are not sufficient to constitute reversible error as the remaining findings of fact are sufficient to support the trial court's conclusions of law.

Respondent contends that the trial court's reference to her assertion of her rights to remain silent and to the presence of counsel denied her due process of law. "It is well-established that 'a defendant's exercise of his constitutionally protected rights to remain silent and to request counsel during interrogation may not be used against him at trial.'" *State v. Rashidi*, __ N.C.

App. __, __ 617 S.E.2d 68, 75 (2005) (quoting *State v. Elmore*, 337 N.C. 789, 792, 448 S.E.2d 501, 502 (1994) (citation omitted)). However, in a civil proceeding, the finder of fact may use a party's exercise of her Fifth Amendment privilege against self-incrimination to infer that her truthful statements would have been unfavorable to her case. *Davis v. Town of Stallings Bd. of Adjustment*, 141 N.C. App. 489, 494, 541 S.E.2d 183, 187 (2000) (citing *Fedoronko v. American Defender Life Ins. Co.*, 69 N.C. App. 655, 657-58, 318 S.E.2d 244, 246 (1984)).

The context of this finding of fact was the trial court's observations pertaining to the weight and credibility of respondent's testimony. Accordingly, the trial court's use of respondent's exercise of her Fifth Amendment privilege was proper. This assignment of error is overruled.

Respondent's final argument regarding the trial court's findings of fact is that its finding of fact that A.F. moved out of respondent's apartment on 8 August and did not return until the night of 15 August 2001 was not supported by the evidence. A.F.'s presence in respondent's apartment prior to 15 August is immaterial as it is conceded by all parties that he was present during the time relevant to N.F.'s injury. Accordingly, even if this finding of fact is not supported by the evidence, it cannot impact the validity of the trial court's order.

Respondent next assigns error to the trial court's *ex parte* factual investigation of the symptoms of shaken baby syndrome. A trial court's findings of fact cannot be based on information

obtained by the judge through an *ex parte* investigation. *State v. Crocker*, 239 N.C. 446, 453, 80 S.E.2d 243, 248 (1954). Respondent argues that the court's findings of fact regarding N.F.'s symptoms and their significance "were surely based on" the information which resulted from the *ex parte* investigation. However, respondent identifies no findings of fact that allegedly were based upon the results of the trial court's *ex parte* investigation. In fact, all of the court's findings of fact regarding N.F.'s symptoms and their significance were consistent with the testimony of Dr. St. Claire. Therefore, there is nothing to suggest that the trial court improperly relied upon the results of its *ex parte* investigation in making its findings of fact.

It also is significant to note that respondent did not object nor request a mistrial when the trial court disclosed that it had conducted such an investigation. This issue was, therefore, not properly preserved for appeal. N.C. R. App. P Rule 10(b)(1) (2005); *Scoggins v. Jacobs*, 169 N.C. App. 411, 416-17; 610 S.E.2d 428, 433 (2005). This assignment of error is overruled.

Respondent next contends that the trial court's conclusion of law number 2 is legally incorrect. Our review of a trial court's conclusion of law is limited to whether the conclusion is supported by the findings of fact. *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984). The definition of an abused juvenile upon which the trial court apparently relied is: any juvenile under eighteen years of age whose parent "[i]nflicts or allows to be

inflicted upon the juvenile a serious physical injury by other than accidental means." N.C. Gen. Stat. § 7B-101(a)(1) (2003).

We already have held that finding of fact number 12, that N.F. was in the exclusive care of respondent from 15 August 2001 until 17 August 2001 (which is the period during which N.F. suffered his injury) is not supported by the evidence. However, that holding is based upon evidence that A.F. had the juvenile in his exclusive care for approximately one hour during that period. This was the only evidence offered by respondent that challenges this finding of fact. Accordingly, it is undisputed that during the time in which the juvenile's injury occurred he was in the exclusive care of either respondent or A.F. The trial court's finding of fact, number 24 stated that N.F. suffered serious injuries by other than accidental means. These findings of fact, taken together, support the trial court's conclusion of law that N.F. was an abused juvenile as defined by North Carolina General Statutes, section 7B-101(a)(1). Accordingly, this assignment of error is overruled.

Respondent also argues that conclusion of law number 3, that N.F. was a neglected juvenile, is not supported by clear and convincing evidence. A neglected juvenile is defined by North Carolina General Statutes, section 7B-101(15) (2003), in relevant part, as one "who lives in an environment injurious to the juvenile's welfare" Respondent's basis for this argument is that the trial court made no finding or conclusion that respondent ever caused, or allowed to be caused, intentional injury to the child. This argument appears to be based on a

misapprehension of the law. The proper determinative factors in evaluating allegations of neglect "are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252.

Accordingly, our review is limited to whether the trial court's findings of fact support the conclusion that N.F. lived in an environment injurious to his welfare. Respondent argues that the only evidence in the record that tends to prove that N.F. was neglected was the testimony of Dr. St. Claire, which she now contends is not credible as Dr. St. Claire was a "classic interested witness" due to her employment at Duke where the vaccinations were administered. However, respondent offered no objection to the admission of Dr. St. Claire as an expert at trial, nor did she object to any of Dr. St. Claire's testimony on the basis of credibility or bias. Accordingly, these arguments have not been properly preserved for appeal and are not considered.

Further, respondent's only preserved assignment of error pertaining to Dr. St. Claire's testimony does not challenge the trial court's findings of fact regarding the doctor's testimony in any way. The only assignment of error related to Dr. St. Claire's testimony merely challenges the portion of a finding of fact that respondent's testimony regarding the timing of the onset of N.F.'s seizures changed after hearing Dr. St. Claire's testimony. Where no exception is taken to findings of fact, they are presumed to be supported by clear and convincing evidence and are, therefore,

binding upon appeal. *In re J.D.S.*, ___ N.C. App. ___, ___, 612 S.E.2d 350, 355 (2005).

The trial court's uncontroverted findings of fact pertinent to this assignment of error are: that the child suffered a serious physical injury; that the injury was suffered by other than accidental means; and that the child "lived in an environment where his caretakers were unable to provide for his basic health and safety and in an environment injurious to his welfare." These uncontested findings of fact, coupled with the trial court's findings of fact regarding N.F. being in the exclusive care and custody of either respondent or A.F. during the time period in which the injury was likely to have occurred, clearly support the conclusion that N.F. was a neglected juvenile. Therefore, this assignment of error is overruled.

Respondent's final assignment of error is that the trial court's Order on Adjudication was erroneous as a matter of law. Respondent argues that, because the trial court failed to state that the allegations in the petition had been proven by clear and convincing evidence, the Order on Adjudication was erroneous as a matter of law. "If the court finds that the allegations in the petition have been proven by clear and convincing evidence, the court shall so state." N.C. Gen. Stat. § 7B-807(a) (2003). "Failure by the trial court to state the standard of proof applied is reversible error." *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (citing *In re Wheeler*, 87 N.C. App. 189, 193, 360 S.E.2d 458, 461 (1987)). "However, there is no

requirement as to where or how such a recital of the standard should be included." *Id.* In *In re O.W.*, this Court held that the use of the words "concludes through clear, cogent convincing evidence," was sufficient to satisfy the requirements of North Carolina General Statutes, section 7B-807. *Id.*

In the case *sub judice*, the trial court stated in its order, before its findings of fact, that the court "makes the following findings of fact by clear, cogent and convincing evidence." After its findings of fact, the trial court stated, "[b]ased upon the foregoing findings of fact, this Court concludes as a matter of law" As the trial court stated the proper standard of proof prior to its findings of fact and the facts found by the trial court, upon which its conclusions of law were based, were determined pursuant to that standard of proof, we hold that the trial court's order satisfied the requirements of section 7B-807. Accordingly, this assignment of error is overruled.

Affirmed.

Judges McGEE and McCullough concur.

Report per Rule 30(e).