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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1140

Filed: 16 May 2017

Ashe County, Nos. 15 J 26–29

IN THE MATTERS OF: J.R.E., J.J.E., J.L.E., K.B.E.

Appeal by respondent-father from order entered 24 August 2016 by Judge Jeanie Houston in Ashe County District Court. Heard in the Court of Appeals 17 April 2017.

Grier J. Hurley for petitioner-appellee Ashe County Department of Social Services.

Assistant Appellate Defender Annick Lenoir-Peek for respondent-appellant father.

Womble Carlyle Sandridge & Rice, LLP, by Jessica L. Gorczynski, for guardian ad litem.

ELMORE, Judge.

Opinion of the Court

Respondent (“Father”) appeals from an adjudication and disposition order in which the trial court adjudicated his daughter, “Katie,” and his sons, “Jimmy,” “John,” and “Jack” abused and neglected.¹ We affirm in part and reverse in part.

I. Background

On 7 October 2015, the Ashe County Department of Social Services (“DSS”) obtained nonsecure custody of the children and filed juvenile petitions alleging they were abused and neglected. The petitions described two incidents occurring on 29 September and 7 October 2015. In the first incident, the children’s mother (“Mother”) was arrested and taken to jail after leaving two-year-old Katie alone in a stolen car with a loaded .38 caliber handgun while Mother and her girlfriend were “ ‘hunting ginseng’ ” in the woods. The second incident occurred a few days after the children had been placed with Father. Responding to a child protective services report,

Ashe County Sheriff Department [officers] found the father, holding [Katie] in his arms, walking down the road at 5:00 a.m. approximately 1 ½ miles from his home. [Katie] was without coat and shoes and was very cold. [Father] had a knife and lunged at the officers with the knife while holding the baby. [Father] told the officers that they would find dead bodies at his house; the two year old had been raped and he was putting a stop to it. He repeatedly fought the officers and begged them to shoot and kill him while he had the baby in his arms.

¹ We use pseudonyms to protect the minors’ identities. See N.C. R. App. P. 3.1(b).

Opinion of the Court

Officers later found five-, six-, and seven-year-olds Jimmy, John, and Jack at home without supervision and without food or electricity in the residence.

At the initial nonsecure custody hearing on 8 October 2015, DSS moved for the appointment of a guardian *ad litem* (“GAL”) for Father in light of his behavior and concern by “family members” that he “has an undiagnosed mental health disorder and needs help.” With the concurrence of Father’s counsel, the court found that Father “lack[ed] sufficient capacity to manage his own affairs and make and communicate important decisions concerning himself and his children” and appointed a GAL “to assist [him] in understanding the case, allowing him to participate to the extent he is able, exercising judgment as he is unable and protect the father’s interests.”

The court continued the pre-adjudication hearing scheduled for 20 November 2015 until 22 January 2016 by consent of the parties in order to obtain Father’s competency evaluation results. After inclement weather closed the juvenile court on 22 January, the matter was rescheduled for 22 April.

During the interim, on 23 February, Father filed a “Motion for Review” requesting telephone contact and visitation with his children. Father cited the results of a psychological evaluation ordered in a parallel criminal proceeding, which found him to be competent. After a hearing, the trial court allowed Father’s motion,

Opinion of the Court

granting him “reasonable phone access with his children” and “supervised visitation . . . at a minimum of twice monthly for two hours.”

At the 22 April pre-adjudication hearing, the trial court scheduled the matter for adjudication on 27 May. On 27 May, however, the court continued the hearing until 22 July by consent of the parties “due to the number of cases on the juvenile calendar.”

After the 22 July hearing, the trial court entered an order on 24 August 2016 adjudicating Katie, Jimmy, John, and Jack to be abused and neglected juveniles under N.C. Gen. Stat. § 7B-101(1) and (15) (2015) and decreeing a dispositional plan directing that the children remain in DSS custody, that DSS undertake reasonable efforts toward reunification, and that Mother and Father comply with mental health treatment as recommended by their respective assessments. Father appeals.

II. Analysis

A. Father’s Guardian *ad Litem*

Father first contends the trial court erred by failing to remove his GAL after Father was determined to be competent. Although Father concedes “it was likely the correct decision” for the court to appoint him a GAL on 8 October 2015, he asserts there was no evidence he lacked the ability to control his own affairs at the time of the adjudicatory hearing in July 2016.

However, Father has failed to preserve this issue for appellate review. N.C. R. App. P. 10(a)(1) (“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired It is also necessary for the complaining party to obtain a ruling”). The record contains no indication Father or his counsel ever sought to remove the GAL. *Cf. In re A.D.N.*, 231 N.C. App. 54, 65–66, 752 S.E.2d 201, 209 (2013) (reiterating that, “in order to preserve for appeal the argument that the trial court erred by failing to appoint the child a GAL, a respondent must object to the asserted error below”), *disc. rev. denied*, 367 N.C. 321, 755 S.E.2d 626 (2014). Accordingly, we decline to address this challenge. *Id.* at 66, 752 S.E.2d at 209.

Further, Father makes no showing that he was prejudiced by the GAL’s ongoing representation. *See generally In re H.T.*, 180 N.C. App. 611, 619, 637 S.E.2d 923, 928 (2006) (noting that, “to win a reversal of the trial court’s order on any of these grounds, Respondent-father must show he was prejudiced by the alleged error”). Because Father does not allege he was prevented from making any decision in these proceedings or that his will was otherwise overborne by his GAL, he fails to show grounds for relief on appeal.

B. Denial of Continuance

Opinion of the Court

Father next contends the trial court erred by denying his counsel's oral motion for a continuance at the start of the 22 July 2016 hearing.² The hearing transcript reveals the following exchange:

[FATHER'S COUNSEL]: Your Honor, for the record, for my client, he has informed me that he wants this case continued. He's making a formal motion to continue the matter. One of the reasons for that, he says he has talked to another attorney. He is considering hiring outside counsel to represent him in this matter. He also says that he has witnesses that he would like to subpoena to court. Various reasons of that nature.

We've been discussing at great detail other matters that he needs to do and take care of. He wants whoever his counsel is to review those documents before he signs anything and could also be advised. And for those reasons, he's making a motion to continue.

Based on those discussions that I've had with [Father] and the fact that he wants to hire another attorney, I would make a motion to withdraw as his attorney. . . .

THE COURT: Anybody want to . . . be heard on it?

[DSS COUNSEL]: I would object for [DSS]. These children have been in foster care now since October.

THE COURT: With no adjudication.

[DSS COUNSEL]: With no adjudication. We've had it on several times. It's not been able to proceed for various reasons, and [Father's] certainly now had, what, nine

² The section heading of Father's brief asserts the trial court erred "in denying the motion by trial counsel to withdraw" or, alternatively, in denying his motion for a continuance. Yet the body of Father's argument—including the stated standard of review—addresses only the denial of a continuance. Accordingly, we decline to address Father's motion-to-withdraw challenge. *See, e.g., State v. Davis*, 191 N.C. App. 535, 538, 664 S.E.2d 21, 24 (2008) ("Assignments of error not argued in a [party's] brief are deemed abandoned" citing N.C. R. App. P. 28(b)(6)).

Opinion of the Court

months to get another attorney if he wanted one.

THE COURT: I'm not going to continue it. I'm not about to. All right. Let's go.

The order on appeal reflects the court's denial of both the motion to continue and the motion to withdraw. The court found that "the petitions were filed back in October 2015 and [Father] has had ample time to seek other counsel and/or subpoena witnesses."

"Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001) (citation omitted), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 221 (2002). However, "[w]hen a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable upon appeal." *Id.* (citation omitted).

Father suggests, without discussion or citation to legal authority, that his "appeal raises a constitutional issue of due process when the continuance was required over disagreement on how to proceed at trial." Regardless of the applicable standard of review, we find no error.

Generally, continuances are disfavored in abuse, neglect, and dependency proceedings and "shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the

Opinion of the Court

juvenile.”³ N.C. Gen. Stat. § 7B-803 (2015). Father failed to show such “extraordinary circumstances” here. *See In re C.J.H.*, __ N.C. App. __, __, 772 S.E.2d 82, 87 (2015) (noting “respondent bore the burden of demonstrating sufficient grounds for continuance”). Father’s counsel’s bare assertions that Father “is *considering* hiring outside counsel” or “*says* that he has witnesses that he would like to subpoena” are insufficient to implicate Father’s constitutional right to due process. (Emphasis added.) Typically, the adjudicatory hearing on a juvenile petition is held “no later than 60 days from the filing of the petition[.]” N.C. Gen. Stat. § 7B-801(c) (2015). A respondent-parent must decide within this 60-day period whether to retain private counsel or subpoena witnesses. Here, as the trial court found, Father had more than nine months to make and act on these decisions.

Contrary to Father’s argument on appeal, the record does not show any disagreement or “impasse” between Father and his counsel as to the calling of witnesses or any other tactical issue. Further, Father made no proffer as to the specific witnesses he wished to subpoena or the testimony he expected to elicit. *See State v. Branch*, 306 N.C. 101, 105, 291 S.E.2d 653, 657 (1982). Accordingly, we overrule his argument.

³ The statute also authorizes continuances “for good cause . . . for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery.” N.C. Gen. Stat. § 7B-803 (2015). These circumstances do not apply.

C. Adjudications of Abuse and Neglect

Father next contends the trial court erred by adjudicating Jimmy, John, and Jack abused and neglected.⁴

We review an adjudication under N.C. Gen. Stat. § 7B-807 (2015) to determine whether the trial court's findings of fact are supported by "clear and convincing competent evidence" and whether those findings support the court's conclusions of law. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Uncontested findings are "presumed to be supported by competent evidence and [are] binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Conclusions of law are reviewed *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006). Whether a child is abused or neglected is a conclusion of law. *See In re Ellis*, 135 N.C. App. 338, 340, 520 S.E.2d 118, 120 (1999).

The trial court made the following findings in support of the abuse and neglect adjudications:

6. All four children were in the care of [Father] when on October 7, 2015 at approximately 5:15 a.m. [Father], holding the youngest child, [Katie], was walking down Beaver Creek School Road in West Jefferson, NC. He was approximately 1 ½ miles from his home. [Katie] had no coat, shoes or socks; she was clothed in shorts and a short sleeve shirt. The temperature was in the 30s.

7. [Father] had a knife of approximately nine inches in length which he at times pulled from a sheath. [He] asked

⁴ Father does not contest either of Katie's adjudications.

Opinion of the Court

Officer Michael Miller with the West Jefferson Police Department to “shoot him.” He had a blank stare on his face, was talking of dead bodies and demons. The bodies as stated by [Father] were at his house.

8. [Father] began walking down the road with [Katie] in his arms and would not stop when asked by Officer Miller. Law enforcement backup arrived at the scene. [Father] with the child in his arms entered the Episcopal Church. Deputy Aaron Reed got the knife from [him] and for a period of time they were in the church sitting in the pews. After a period of time, [Father] agreed to go to the hospital. It was then that . . . Sergeant Tony Blevins got [Katie] away from [Father]. [Katie’s] skin was cold to the touch and she was shivering.

. . . .

10. At the hospital, [Father] was sweating, he continued to talk but did not make sense. Sergeant Blevins opined that [he] was impaired. [Father] asked Sergeant Blevins for a cup of water. He did [sic] and upon going toward [Father] to retrieve the cup, [Father] punched Sergeant Blevins in the face. At that point, [Father] was arrested and taken into custody.

11. Because [Father] was speaking of dead bodies at his home and learning there were possibly three other children in the care of [Father], Officers Aaron Reed and Josh Howell went to [Father’s] home. The front door was standing wide open and they found the three children together in one bed, shaking and cold. There was no electricity . . . and no water in the home. There was no apparent source of heat and it was very cold. There was no adult present in the home with the children, ages 5, 6, and 7.

. . . .

13. On September 29, 2015 Deputy Josh Hopkins . . . found

Opinion of the Court

[Mother], . . . her girlfriend, . . . and [Katie]. [M]other and [girlfriend] had been hunting ginseng. Lieutenant Kelley Stephens observed [Katie] in her pajamas, soaking wet, cold and trembling. . . .

14. The car [Mother] and [girlfriend] . . . had been driving . . . was reported stolen from South Carolina. In the dashboard was found a loaded .38 Special revolver. . . . [Mother] and [girlfriend] admitted to using methamphetamine the previous weekend.

15. [M]other was arrested. [DSS] contacted [Father] and he came to get the children. On that day he appeared lucid, . . . and he indicated he had sufficient money and food to provide for the children. A social worker went to [Father's] home and checked on the children. Everything seemed to be in order, there was electricity in the home and [Father] indicated he was going to the grocery store. . . .

. . . .

17. [Mother] and [Father] each have a history of substance abuse.

18. The Court finds as a fact that the minor children are neglected children in that the children do not receive proper care, supervision or discipline from their parent, guardian custodian or caretaker and the minor children live in an environment injurious to the children's welfare pursuant to NCGS 7B-101(15).

19. The Court finds as a fact that the minor children are abused children in that the children's mother and father have created or allowed to be created a substantial risk of serious physical injury to the juvenile[s] by other than accidental means pursuant to NCGS 7B-101(1)(b).

To the extent Father does not contest the court's evidentiary findings, they are binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

Opinion of the Court

1. Findings of Fact

Father challenges portions of Finding 11 as unsupported by the evidence. He appears to dispute that the boys were “shaking and cold” when found by the officers, although he concedes in his brief that “[i]t was undoubtedly chilly” in the home. Father also challenges that his home lacked electricity, inasmuch as “officers attempted to turn on light switches with no success but no one went to see if there was indeed power to the home.” As to the finding there was “no water in the home,” Father contends: “There was no showing that anyone tried a water faucet.”

Although Father asserts in his brief that the “[t]he body cam video provides the best evidence of what officers found at the home[,]” he failed to provide this Court with a copy of the video. “It is the duty of the appellant to ensure that all documents and exhibits necessary for an appellate court to consider his assignments of error are part of the record or exhibits.” *State v. Davis*, 191 N.C. App. 535, 539, 664 S.E.2d 21, 24 (2008) (citing *State v. Berryman*, 360 N.C. 209, 216, 624 S.E.2d 350, 356 (2006)). Accordingly, to the extent the challenged portions of this finding could be supported by video evidence omitted from the appellate record, we deem Father’s argument to be abandoned. *Id.*

The hearing testimony fully supports Finding 11. Officer Aaron Reed testified that officers entered Father’s house through the open front door and “found the three young children . . . together in one bed covered up with a blanket. They were all

Opinion of the Court

shaking cold. The temperature was in the forties inside the house.” Officer Reed added “there was no power to the house and, therefore, no water for the children to drink.” When asked on cross-examination whether he had observed more than inoperable light switches, Officer Reed replied: “[N]othing inside the house had power to it.”

Father also challenges Finding 17, that he and Mother “each have a history of substance abuse.” At the hearing, DSS supervisor Janella Lee testified that when she spoke with Father after DSS placed the children with him in September 2015, Father “admit[ted] that in the past he has taken pills that he does not have a prescription for due to anxiety[.]” DSS social worker Ashley Sheets offered similar testimony:

[Father] has admitted to using pills that he was not prescribed in the past. Part of the information that c[a]me from his [comprehensive clinical] assessment⁵ is that when [Father] uses substances, whether it be alcohol, pills, drugs, whatever, he goes into a psychosis, and they’re afraid that if he continues using substances that that could remain permanently.

When asked whether Father “has a history of substance abuse,” Sheets replied: “Correct.” In her own testimony, Mother acknowledged her history of methamphetamine use. Accordingly, we overrule Father’s challenge.

2. Abuse Adjudications

⁵ Ms. Sheets averred that Daymark had performed Father’s competency evaluation and a comprehensive clinical assessment.

Opinion of the Court

We agree with Father that the trial court’s findings were insufficient to support adjudications that Jimmy, John, and Jack were abused. The Juvenile Code defines an “[a]bused” juvenile as one, *inter alia*, “whose parent, guardian, custodian, or caretaker . . . [i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means[,] . . . [c]reates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means[,]” or “[c]reates or allows to be created serious emotional damage to the juvenile[.]” N.C. Gen. Stat. § 7B-101(1) (2015).

Here, there was no evidence or finding that any of the boys sustained serious physical injury or emotional damage. Moreover, although Father left the boys unattended for an indeterminate period of time on 7 October 2015, no evidence indicates his actions created a substantial risk of serious harm *by non-accidental means*. In reaching this conclusion, we do not intend to suggest that a parent’s denial of adequate shelter or supervision may never amount to abuse. *See, e.g., State v. Watkins*, __ N.C. App. __, 785 S.E.2d 175, *disc. rev. denied*, __ N.C. __, 792 S.E.2d 508 (2016). But the facts of this case do not meet the standard in N.C. Gen. Stat. § 7B-101(1). Accordingly, we reverse the adjudications of abuse as to the three boys.

3. Neglect Adjudications

Father next contends the trial court’s findings do not support adjudications that Jimmy, John, and Jack were neglected. A “[n]eglected juvenile” is one “who does

Opinion of the Court

not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; . . . or who lives in an environment injurious to the juvenile's welfare[.]” N.C. Gen. Stat. § 7B-101(15) (2015). The juvenile must experience “some type of physical, mental, or emotional impairment *or a substantial risk of such impairment*” in order to be deemed neglected. *In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007) (emphasis added) (citation omitted). Although “not every act of negligence on the part of parents or other care givers constitutes ‘neglect’ under the law[.]” *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003), “[i]t is well-established that the trial court need not wait for actual harm to occur to the child if there is a substantial risk of harm to the child in the home.” *In re T.S.*, 178 N.C. App. 110, 113, 631 S.E.2d 19, 22 (2006), *aff’d per curiam*, 361 N.C. 231, 641 S.E.2d 302 (2007).

Here, the trial court's findings sufficiently support its conclusion that Jimmy, John, and Jack were neglected. The findings demonstrate these young boys were left unattended in a cold house without utilities and the door to enter the house was left wide open. Father's distance from the home and his delusional behavior when apprehended by law enforcement indicate the boys would have remained without supervision for a significant additional period of time. These circumstances reflect a substantial risk of impairment to the children at the time DSS took them into nonsecure custody. *Cf. In re D.C.*, 183 N.C. App. 344, 353, 644 S.E.2d 640, 645 (2007)

IN RE J.R.E., J.J.E., J.L.E., K.B.E.

Opinion of the Court

(upholding adjudication of neglect where the “respondent left her sixteen month old daughter alone in a Super 8 motel room for more than thirty minutes at four o’clock in the morning”). Therefore, we affirm these adjudications.

AFFIRMED IN PART; REVERSED IN PART.

Judges HUNTER, JR. and ZACHARY concur.

Report per Rule 30(e).