IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-428

No. COA 21-686

Filed 21 June 2022

Burke County, No. 21 JA 26-28

IN THE MATTERS OF:

G.M.A., E.R.S., K.R.S.

Appeal by Respondent Mother from consolidated adjudication and disposition order entered 29 July 2021 by Judge Mark L. Killian in Burke County District Court. Heard in the Court of Appeals 26 April 2022.

Amanda C. Perez for Petitioner-Appellee Burke County Department of Social Services.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Daniel F. E. Smith, for Guardian ad Litem.

Mary McCullers Reece for Respondent-Appellant Mother.

INMAN, Judge.

¶ 1 Respondent Mother ("Mother") appeals from a consolidated adjudication and disposition order adjudicating her three daughters neglected and one of her daughters abused and placing them in the custody of Burke County Department of Social Services ("DSS"). Mother argues that the trial court erred in allowing DSS to introduce the children's out-of-court statements as evidence during the adjudication

hearing. Because the statements were admissible under the residual hearsay exception, we hold that the trial court did not abuse its discretion in considering the statements, and we affirm its order.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 This case concerns adjudications of abuse and neglect as to three children, Gina, Etta, and Kate.[1] Gina was born in June 2015, Etta in July 2016, and Kate in June 2017. Mother is the natural parent of all three children, and Father is the natural parent of Etta and Kate. Mother and Father separated in November 2019 and shared time with the children, alternating each week.

¶ 3 On 16 September 2020, five-year-old Gina and four-year-old Etta were in the shower together when Father heard Gina say, "it's okay; it won't hurt." He opened the shower curtain and saw Gina had pinned Etta against the shower wall with her hand on her vagina. Father asked where she had learned that, and Gina told him that "Jimbo," Mother's boyfriend, had touched her there. Father filed a report with the Burke County Sheriff's Office and notified the girls' school.

¶ 4 The next day, during a forensic interview at the Child Advocacy Center in Burke County, Gina reported that Jimbo had touched her vagina while sitting on the couch, that Mother was present in the room when it happened, and that Mother did

[1] We identify the minor children by pseudonyms to protect their privacy.

not stop it. DSS implemented a safety plan, under which the three girls would stay with Father. On 25 September 2020, Jimbo was arrested and charged with taking indecent liberties with a minor.

¶ 5 On 12 October 2020, all three children underwent Child Medical Exams consisting of forensic interviews followed by physical exams. During the exam, Gina disclosed that Jimbo had touched her vagina "[m]ore than one time, about three times." Etta told the examiner that "Jimbo kissed me on the cooch and touched my cooch" and said that he had touched her at Mother's home twice. Kate also said that "Jimbo touched my cooch" but was not able to provide further information. None of the girls' physical examinations was remarkable.

¶ 6 On 1 March 2021, DSS filed a petition alleging that the juveniles were abused and neglected. On 9 April 2021, DSS filed and served its notice of intent to offer hearsay evidence pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(24) (2021). The combined adjudication and disposition hearing was conducted over three days, on 9 April, 18 June, and 2 July 2021.

¶ 7 DSS presented as witnesses the nurse practitioner and forensic interviewer who had spoken to the children and introduced the tape of Gina's forensic interview. Mother objected to testimony relaying the children's out-of-court statements, and the trial court overruled her objection, admitting testimony about the interview under the residual hearsay exception.

¶ 8 Mother testified that Jimbo never gave the girls baths at her home or helped dress them, and she had never seen him touch any of them inappropriately. She said she had noticed some sexualized behavior in the girls: that Etta had put food down her throat until she gagged because "she had watched [her father's girlfriend] do that to her daddy" and that Etta had asked Mother's stepfather if he "had a big cooch like her daddy."

¶ 9 The trial court concluded that Gina was abused and neglected, and that Kate and Etta were neglected. It found that remaining in Mother's home was contrary to their best interests and awarded custody and placement authority to DSS. It also ordered Mother to undergo a parenting capacity assessment and complete therapeutic services.

¶ 10 Mother appeals.

II. ANALYSIS

¶ 11 Mother's sole argument on appeal is that the trial court erred in allowing DSS to introduce the children's prior out-of-court statements. The statements meet the requirements for admissibility under the residual exception to the rule against hearsay, and we hold that the trial court did not abuse its discretion.

A. Standard of Review

¶ 12 We review an adjudication of abuse, neglect, or dependency to determine whether the trial court's findings of fact are based on clear and convincing competent

evidence and whether the findings support the conclusions of law. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Conclusions of law, including the ultimate conclusion that a child is neglected, abused, or dependent, are reviewed *de novo*. *In re V.B.*, 239 N.C. App. 340, 341, 768 S.E.2d 867, 868 (2015).

¶ 13 When determining the best interest of a child, "any evidence which is competent and relevant . . . must be heard and considered by the trial court . . . ." *In re Pittman*, 149 N.C. App. 756, 761, 561 S.E.2d 560, 564 (2002) (citation omitted). We review the admission of evidence pursuant to the residual hearsay exception for abuse of discretion and will overturn the ruling of the trial court only where such an abuse of discretion and prejudice are clearly shown. *In re B.W.*, 274 N.C. App. 280, 285, 852 S.E.2d 428, 432 (2020).

B. Admissibility of Out-of-Court Statements

¶ 14 Prior to the hearing, DSS filed notice of its intent to offer into evidence statements made by the children to Father and to persons at the Child Advocacy Center in September 2020. Mother objected to the introduction of these statements as inadmissible hearsay. The trial court admitted the evidence under the residual exception to the hearsay rule.

¶ 15 Out-of-court statements offered for the truth of the matter asserted are generally inadmissible as evidence. N.C. Gen. Stat. § 8C-1, Rule 802 (2021). Our Rules of Evidence recognize a number of exceptions to this rule, including the residual

or "catch-all" exception of Rule 803(24). Under this rule, a hearsay statement not specifically covered by another exception may still be admissible

> if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Id., Rule 803(24).

¶ 16 To decide whether to admit hearsay evidence under Rule 803(24), the trial court must determine: (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) if the statement is trustworthy, (4) if the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) if the interests of justice will be best served by admission of the statements. *State v. Smith*, 315 N.C. 76, 92-97, 337 S.E.2d 833, 844-47 (1985); *In re M.A.E.*, 242 N.C. App. 312, 317-18, 849 S.E.2d 50, 55 (2015) (applying the *Smith* factors in the juvenile adjudication and disposition context).

¶ 17 Mother challenges the admission of the children's statements under the third and fifth prongs of this analysis, that the statements were trustworthy and more probative than other available evidence. This analysis originated in the criminal context, where we recognized the constitutional right to confrontation requires the

trial court make findings of fact and conclusions of law resolving issues of trustworthiness and probativeness. *State v. Deanes,* 323 N.C. 508, 515, 374 S.E.2d 249, 255 (1988). Despite its origin as a criminal constitutional right, we have also recognized this requirement in juvenile adjudications. *B.W.*, 274 N.C. App. at 286, 852 S.E.2d at 433. However, even in criminal cases a trial court's failure to make explicit findings about these factors does not necessitate reversal: "[i]f the trial court either fails to make findings or makes erroneous findings, we review the record in its entirety to determine whether that record supports the trial court's conclusion concerning the admissibility of a statement under a residual hearsay exception." *State v. Sargeant*, 365 N.C. 58, 65, 707 S.E.2d 192, 196 (2011).

1. The out-of-court statements bore circumstantial guarantees of trustworthiness.

¶ 18 Mother argues the children's out-of-court statements do not have the circumstantial guarantees of trustworthiness required for admission under the residual exception. We disagree.

¶ 19 In determining trustworthiness, we examine the circumstances surrounding the making of the statement. *State v. Waddell*, 351 N.C. 413, 422, 527 S.E.2d 644, 650-51 (2000). The trial court must consider the following factors:

> (1) whether the declarant had personal knowledge of the underlying events, (2) whether the declarant is motivated to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) whether the

> declarant is available at trial for meaningful cross-examination.

State v. Valentine, 357 N.C. 512, 518, 591 S.E.2d 846, 852 (2003).

¶ 20 The trial court found the juveniles "were motivated to speak the truth" while making their out-of-court statements and held that the statements "possess[ed] circumstantial guarantees of trustworthiness." Mother argues that the trial court erred by not making specific evidentiary findings of fact to support these ultimate findings. The trial court is required to make findings of fact and conclusions of law when determining if a hearsay statement has the "equivalent circumstantial guarantees of trustworthiness" necessary for admission. *Id.* at 518, 591 S.E.2d at 852-53. However, when the trial court fails to make those findings of fact we "review the record and make our own determination." *Id.*, 591 S.E.2d at 853.

¶ 21 Applying the factors in *Valentine,* the children had personal knowledge of the underlying events and did not recant their statements. The nurse who performed the Child Medical Exams testified that there was no sign the children had been told what to say or encouraged to report sexual abuse and that they were not hesitant to answer her questions. The forensic interviewer followed a standard protocol, under which the children promised to tell the truth and were instructed to correct the interviewer if she got anything wrong and not to guess at answers. There is no indication in the record that the children had any reason to lie to Father or the examiner when

describing the abuse. *See id.* at 519, 591 S.E.2d at 853 (finding relevant that the declarant had "no reason to lie" to friends when making the out-of-court statement at issue). There is also no indication the children made contradictory statements or later recanted. Finally, the trial court determined the children were unavailable to testify.[2]

¶ 22 These facts are similar to other cases in which we have affirmed the trial court's finding that children's out-of-court statements bore the requisite guarantees of trustworthiness. *See In re W.H.*, 261 N.C. App. 24, 28, 819 S.E.2d 617, 620 (2018) (holding trial court did not abuse its discretion in determining juvenile's out-of-court statements were trustworthy despite recantation); *M.A.E.*, 242 N.C. App. at 323, 849 S.E.2d at 58. The trial court did not abuse its discretion in finding the children's statements had circumstantial guarantees of trustworthiness.

2. The children's statements were the most probative evidence on the issue that could be procured through reasonable efforts.

¶ 23 Mother also argues that the trial court erred in admitting the hearsay statements because it made no finding that they were the most probative evidence that could be reasonably procured. Instead, the trial court made only a finding that the children were unavailable to testify. As with trustworthiness, in the absence of a

[2] Mother argues that the trial court erred in concluding the girls were unavailable to testify because that finding was not supported by clear and convincing evidence. As we discuss *infra* ¶ 27, the trial court did not err in its determination.

finding by the trial court we review the record to determine whether it supports the trial court's conclusion that the hearsay statement is admissible under the residual exception. *Sargeant*, 365 N.C. at 65, 707 S.E.2d at 196.[3]

¶ 24 "Usually, *but not always*, the live testimony of the declarant will be the more (if not the most) probative evidence on the point for which it is offered." *Smith*, 315 N.C. at 95, 337 S.E.2d at 846 (emphasis in original). Although the residual exception, like other exceptions under Rule 803, does not require the declarant be unavailable for the hearsay statement to be admissible, "if the witness is available to testify at trial the necessity of admitting his or her statements through the testimony of a hearsay witness very often is greatly diminished if not obviated altogether." *State v. Fearing*, 315 N.C. 167, 171-72, 337 S.E.2d 551, 554 (1985) (citations and quotations marks omitted).

¶ 25 But when child witnesses are involved, we have recognized that "out-of-court statements are more probative than other evidence reasonably available" when in-court testimony could cause the child "confusion, anxiety, and trauma." *M.A.E.*, 242

[3] While our review of precedent reveals only examples of this record review when dealing with the trustworthiness prong, *Sargeant*, 365 N.C. at 65, 707 S.E.2d at 196; *M.A.E.*, 242 N.C. App. at 321, 849 S.E.2d at 57, the origin and reasoning for the requirement that the trial court make findings of fact and conclusions of law are identical for trustworthiness and probativeness. We do not hesitate to extend our review to address the question of whether the statements were the most probative evidence reasonably available.

N.C. App. at 319-20, 849 S.E.2d at 56. In *M.A.E.*, the juvenile's therapist "strongly recommended" that she not be required to testify because of the negative impact testifying could have on her and was concerned her testimony would not be truthful because she "doesn't want anyone to be in trouble." *Id.* The trial court found that compelling the eight-year-old juvenile to testify would be detrimental to her welfare and could hamper her progress in therapy. *Id.* Although the trial court did not expressly find the child unavailable to testify, we held that this evidence supported its determination that her out-of-court statements were more probative than other evidence reasonably available. *Id.* at 320, 849 S.E.2d at 56.

¶ 26 In this case, the children expressed fear and distress when asked about the circumstances of the sexual abuse. Gina and Etta were scared and "sobbing" when speaking to Father after he found them in the shower. During her forensic interview, Etta told the interviewer she did not want to talk about it because she was worried about Mother. DSS stated in its notice of intent to offer hearsay evidence that the children were unavailable to testify because the allegations involved their mother and her boyfriend and testifying would cause "unbearable distress" to them as they were only three, four, and five at the time. The trial court found they were unavailable to testify.

¶ 27 We affirmed a similar holding in *W.H.*, where the trial court determined that the children were unavailable because testifying would traumatize them, cause them

confusion, and there was a risk they would not be truthful out of guilt and fear. 261 N.C. App. at 28, 819 S.E.2d at 621. As the evidence in this case supports the trial court's holding that the girls were unavailable to testify, their out-of-court statements were the most probative evidence available.

¶ 28 Mother argues that our decision in *B.W.* requires us to hold that the evidence does not support a finding that the hearsay statements were the most probative evidence available. That case is distinguishable. In *B.W.*, the trial court held a preliminary hearing months before the adjudication at which it determined the children would be unavailable to testify but failed to reduce its order to writing. 274 N.C. App. at 282, 852 S.E.2d at 430. In its adjudication order, the trial court purported to adopt the findings of fact from the preliminary hearing, but the record on appeal contained neither the findings from that hearing nor the counselor's testimony upon which those findings were based. *Id.* at 288, 852 S.E.2d at 434. Without the testimony regarding the effect of testifying on the health and safety of the children, we were unable to determine whether the trial court's findings were supported by evidence. *Id.*

¶ 29 Here, the record evidence supports the trial court's findings. After reviewing the record, we cannot conclude that the trial court erred in finding that the children were unavailable to testify. Their out-of-court statements are therefore the most

probative evidence available.[4]

III. CONCLUSION

¶ 30 We hold that the trial court did not abuse its discretion in admitting the children's statements under the residual hearsay exception of Rule 803(24). The adjudication and disposition order is affirmed.

AFFIRMED.

Judges TYSON and WOOD concur.

Report per Rule 30(e).

[4] In her discussions of both the trustworthiness and probativeness prongs, Mother argues that there was not clear and convincing evidence to support the trial court's findings. However, we review the admission of testimony under the residual exception to determine "only if the findings are not supported by competent evidence, or if the law was erroneously applied." *Deanes*, 323 N.C. at 515, 374 S.E.2d at 255. The clear and convincing evidentiary standard applies to the trial court's adjudication of juveniles as abused, neglected, or dependent, but Mother has cited no authority holding this standard applies to evidentiary determinations in those proceedings.