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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-543

Filed 21 May 2024

Johnston County, No. 21 JA 146

IN THE MATTER OF: J.H.

Appeal by respondent-father from orders entered 22 December 2022 by Judges Joy A. Jones and Brad A. Salmon in Johnston County District Court. Heard in the Court of Appeals 3 April 2024.

Kimberly Connor Benton for respondent-appellant father.

Jennifer S. O'Connor for petitioner-appellee Johnston County Department of Social Services.

Mobley Law Office, P.A., by Marie H. Mobley, for respondent-appellee Guardian ad Litem.

DILLON, Chief Judge.

Respondent-appellant (“Father”) is the father of minor child J.H. (“Jada”).¹ He appeals the trial court’s adjudication and disposition orders. We affirm the orders.

I. Background

¹ Pseudonym used to protect juvenile’s identity and for ease of reading.

Johnston County Department of Social Services (“DSS”) has received multiple reports regarding Father over the years. After receiving a report in September 2021 of Father’s inappropriate discipline of Jada, DSS filed a petition alleging Jada to be a neglected juvenile. Following hearings on the matter, the trial court adjudicated Jada to be a neglected juvenile and placed Jada in her mother’s custody. Father appeals.

II. Analysis

Father presents multiple arguments on appeal, which we address in turn.

A. Incomplete Transcript & Meaningful Appellate Review

First, Father contends the transcripts from the adjudication hearing are insufficient to provide meaningful appellate review. Due to technological issues with recording the adjudication hearing, the transcript is marked “unintelligible” or “inaudible” in many places, thus leaving out some of Jada’s answers to questions asked at the hearing. DSS contends that the discernible portions of Jada’s testimony, along with the testimony of the social workers, are sufficient to allow for meaningful appellate review. We agree.

Our Court “conduct[s] a three-step inquiry to determine whether the right to a meaningful appeal has been lost due to the unavailability of a verbatim transcript.” *State v. Palacio*, 287 N.C. App. 667, 671, 884 S.E.2d 471, 476 (2023) (citation omitted).

First, we must determine whether defendant has made sufficient efforts to reconstruct the proceedings in the absence of a transcript. Second, we must determine

whether those reconstruction efforts produced an adequate alternative to a verbatim transcript—that is, one that would fulfill the same functions as a transcript. Third, we must determine whether the lack of an adequate alternative to a verbatim transcript of the proceedings served to deny defendant meaningful appellate review such that a new trial is required.

Id. (cleaned up).

Here, the parties were unable to complete an accurate reconstruction of the proceedings. Regardless, the lack of an adequate alternative to the verbatim transcript of the adjudication hearing does not deny Father meaningful appellate review. As discussed below, when viewing Jada’s testimony and the two social workers’ testimonies together, there was sufficient evidence in the transcript provided to our Court to allow for meaningful review. Accordingly, Father fails to prove the necessity of a new trial.

B. Finding of Fact 20

Next, Father contests Finding of Fact 20 regarding specific incidents of Father’s physical discipline of Jada, which states:

The Court finds on at least two separate occasions, after the closure of a CPS case addressing improper discipline, [Father] hit [Jada] with a belt, punched [Jada] and twisted her arm, all of which caused bruising and pain. [Jada] is fearful of [Father] as a result of the discipline and is fearful of retaliation by [Father].

Father argues there was insufficient evidence in the transcript to support this finding. However, even without a complete transcript of the hearing (due to

technological errors), there is still sufficient evidence to support this finding.

“An appellate court reviews a trial court’s adjudication to determine whether the findings are supported by clear, cogent, and convincing evidence and the findings support the conclusions of law.” *In re K.S.*, 380 N.C. 60, 64, 868 S.E.2d 1, 4 (2022) (cleaned up).

We conclude there was clear, cogent, and convincing evidence to support this challenged finding. For example, during her testimony, Jada testified, in pertinent part, that Father had previously used a belt and a dog leash to hit her; Father’s physical punishment left bruises; Father once twisted her arm so hard she thought her arm would break; and Father gave her “bruise cream.” Also, at the hearing, two DSS social workers testified concerning these injuries and introduced pictures of Jada’s bruises, all of which are part of the record on appeal.

C. Adjudication as Neglected Juvenile

Father argues the trial court erred in concluding that Jada was a neglected juvenile. We disagree.

Our General Statutes define “neglected juvenile” to include “any juvenile less than 18 years of age ... whose parent ... [c]reates or allows to be created a living environment that is injurious to the juvenile’s welfare.” N.C. Gen. Stat. § 7B-101(15)(e) (2023).

Here, based on its findings of fact, the trial court concluded Jada to be neglected by Father. We review a trial court’s adjudication of neglect *de novo*. *In re*

K.S., 380 N.C. at 64–65, 868 S.E.2d at 4–5.

Here, the trial court found that Father has a history of anger issues and inflicting improper discipline on Jada. For example, as found by the trial court, Father injured Jada on multiple occasions which caused marks, bruising, and pain. Father’s discipline included hitting Jada with a belt, punching her, and twisting her arm. The trial court further found that Jada “is fearful of [Father] as a result of [Father’s improper] discipline and is fearful of retaliation by [Father].”

Father points to a 2006 case where our Court held that “corporal punishment, i.e., spanking, standing alone, does not constitute abuse.” *In re C.B.*, 180 N.C. App. 221, 224, 653 S.E.2d 336, 338 (2006). However, the trial court properly essentially found that Father’s discipline in this case goes beyond mere spanking: Father also punched Jada and twisted her arm for “a couple of minutes” which caused her arm to hurt for two days.

We conclude that these and the other findings made by the trial court are supported by clear, cogent, and convincing evidence and support the court’s adjudicating Jada to be a neglected juvenile. *In re A.D.*, 278 N.C. App. 637, 642, 863 S.E.2d 317, 321 (2021) (“To support an adjudication of neglect, there must be evidence of some type of emotional, physical or mental harm, or a substantial risk of such harm, from the neglect[.]”).

D. Psychological Evaluation Requirement

Finally, Father argues the trial court erred in requiring him to obtain a

psychological evaluation as part of his case plan in the disposition order. We disagree.

The trial court's disposition order is reviewed only for abuse of discretion, which occurs "where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re J.M.*, 384 N.C. 584, 591, 887 S.E.2d 823, 828 (2023) (citations omitted).

"[T]he trial judge in an abuse, neglect, or dependency proceeding has the authority to order a parent to take any step reasonably required to alleviate any condition that directly or indirectly contributed to causing the juvenile's removal from the parental home." *In re B.O.A.*, 372 N.C. 372, 381, 831 S.E.2d 305, 312 (2019); N.C. Gen. Stat. § 7B-904(d1)(3) (2023).

DSS asserts that a psychological evaluation would assist in understanding and resolving Father's improper discipline issue. In particular, the evaluation may shed light on Father's background, his mental health status, and any cognitive delays that impact ability to parent. Additionally, in cases like the case at bar where a parent has been noncompliant with DSS and where there have been "observed difficulties in the parent's interactions with others," psychological evaluations highlight any "correlation between the behaviors observed and some diagnosis so that treatment recommendations can be put into place to continue to improve the family situation."

Here, Jada was adjudicated to be neglected because of Father's repeated physical discipline of Jada that left bruises. Based on DSS's allegations, evidence presented at the adjudication hearing, and the findings in the adjudication order, the

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trial court acted within its discretion by requiring Father to undergo a psychological evaluation.

AFFIRMED.

Judge STADING concurs.

Judge COLLINS concurs by separate opinion.

Report per Rule 30(e).

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COLLINS, Judge, concurs and writes separately.

I concur in the majority opinion. I write separately to note that, while I agree with the majority that the challenged findings of fact in this case have been proved by “clear, cogent, and convincing evidence,” I believe that, by statute, the allegations in this case need only to have been proved by “clear and convincing” evidence. I also note that our caselaw has not consistently cited the standard to be applied in this case.

An adjudicatory hearing on a petition alleging the abuse, neglect, and/or dependency of a minor child is governed by the procedures set forth in N.C. Gen. Stat. § 7B-800, *et seq.*, and is separate and distinct from a termination of parental rights proceeding which involves an adjudicatory hearing and is governed by the procedures set forth in N.C. Gen. Stat. § 7B-1100, *et seq.* Although adjudicatory hearings in both proceedings may involve a determination that a minor child has been abused, neglected, or dependent, by statute, the quantum of proof required is different in each proceeding.

N.C. Gen. Stat. § 7B-805 governs the adjudicatory hearing on a petition alleging that a juvenile is abused, neglected, or dependent and provides, “The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by *clear and convincing evidence*.” N.C. Gen. Stat. § 7B-805 (2024)

(emphasis added). N.C. Gen. Stat. § 7B-1109 governs the adjudicatory hearing on a petition seeking to terminate a parent’s parental rights to a juvenile and provides, “The burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on *clear, cogent, and convincing evidence*.” N.C. Gen. Stat. § 7B-1109(f) (2024) (emphasis added).

Our appellate courts have been inconsistent in citing these standards. For example, the “clear and convincing” standard has been recently cited in a case involving an adjudicatory hearing. *See In re J.M.*, 384 N.C. 584, 592, 887 S.E.2d 823, 829 (2023) (“During the adjudicatory phase [of an abuse, neglect, and dependency proceeding], the burden of proof is on DSS to show by clear and convincing evidence that a juvenile qualifies as abused, neglected, or dependent as the Juvenile Code defines those terms.” (citing N.C. Gen. Stat. § 7B-805 (2021))). However, this standard has also been recently cited in a case involving a termination of parental rights proceeding. *See In re M.B.*, 382 N.C. 82, 86, 876 S.E.2d 260, 264 (2022) (“In such cases, a trial court may terminate parental rights based upon prior neglect of the juvenile if the trial court *finds by clear and convincing evidence a probability of repetition of neglect* if the juvenile were returned to [his or] her parents.” (citation omitted)).

On the other hand, the “clear, cogent, and convincing” standard has recently been cited in a case involving a termination of parental rights proceeding. *See In re J.C.*, 380 N.C. 738, 741, 689 S.E.2d 682, 685 (2022) (“The Juvenile Code in North

Carolina mandates that a trial court’s adjudicatory findings of fact in a termination of parental rights order ‘shall be based on clear, cogent, and convincing evidence.’” (citing N.C. Gen. Stat. § 7B-1109(f) (2021); *In re B.L.H.*, 376 N.C. 118, 124, 852 S.E.2d 91 (2020)). This standard has also been recently cited in a case involving an adjudicatory hearing for neglect and dependency. *See In re K.S.*, 380 N.C. 60, 64, 868 S.E.2d 1, 4 (2022) (“An appellate court reviews a trial court’s adjudication ‘to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.’” (citing *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984))). In citing to *In re Montgomery*, the Supreme Court in *In re K.S.* explained in a footnote:

“We recognize that *In re Montgomery* and *In re C.B.C.* reviewed orders terminating parental rights pursuant to what is currently N.C.G.S. § 7B-1109. Although this case concerns an adjudication order entered pursuant to N.C.G.S. § 7B-800, *et seq.*, both determinations rely upon and relate to the definitions found in the current version of N.C.G.S. § 7B-101, and therefore, we employ the same standard of review.”

Id. at 64 n. 3, 868 S.E.2d at 1, n. 4.

In *In re Montgomery*, our Supreme Court opined that “‘clear and convincing’ and ‘clear, cogent, and convincing’ describe the same evidentiary standard.” *In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252. (citing 30 Am. Jur. 2d, Evidence § 1167). However, our Supreme Court has more recently described the “clear, cogent, and convincing” standard as a *heightened one*, explaining that N.C. Gen. Stat. §

7B-1109(f) “provides procedural protections for the interests of parents in their children” in termination of parental rights proceedings “by setting a heightened standard of proof by which a trial court must make findings of fact that show the grounds before determining whether parental rights should be terminated.” *In re B.L.H.*, 376 N.C. at 124, 852 S.E.2d at 96.

In sum, our legislature has chosen to require allegations in a petition alleging that a juvenile is abused, neglected, or dependent be proved by “*clear and convincing evidence*[.]” N.C. Gen. Stat. § 7B-805, while the burden of proof at the adjudicatory stage in a termination of parental rights proceedings “shall be upon the petitioner or movant and all findings of fact shall be based on *clear, cogent, and convincing evidence*[.]” N.C. Gen. Stat. § 7B-1109(f). I believe that the legislature chose its language purposefully and that we must apply the standards as the legislature has written them. In this case, that standard requires the allegations in the petition be proved only by “clear and convincing evidence.” N.C. Gen. Stat. § 7B-805.