

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-002547-ME

C.H.

APPELLANT

v. APPEAL FROM HARDIN FAMILY COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NOS. 03-J-00691-002; 04-J-00663-001;
AND 04-J-00665-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR FAMILIES AND
CHILDREN; J.R.H. (A MINOR);
K.I.H. (A MINOR); O.S.H. (A MINOR)

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND
REMANDING

** ** * * * * *

BEFORE: DYCHE AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

ROSENBLUM, SENIOR JUDGE: C.H. appeals from orders of the Hardin family court determining that he had abused his two biological children, K.H. and J.H., and his stepdaughter, O.H., and removing the children from his custody. For the reasons stated below, we affirm the trial court's finding of abuse and the removal order with regard to K.H., and vacate and remand with

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

regard to J.H. and O.H. for a determination of whether they are at risk of emotional injury or sexual abuse.

C.H. is the biological father of K.H. (born December 11, 1992) and J.H. (born November 8, 1995). Their biological mother, T.H. died in December 2003. T.H. is the biological mother, and C.H. is the stepfather, of O.H. (born April 10, 1997), who was in C.H. and T.H.'s custody at the time of T.H.'s death. Following T.H.'s death, C.H. retained custody of O.H., and, hence, following T.H.'s death the H. household consisted of C.H., K.H., J.H. and O.H.

A.G. (who was six at the time of the November 3, 2004 adjudication hearing) is a friend of O.H. and visited occasionally at the H. residence. In September 2004 the Cabinet received a referral containing allegations of sexual abuse perpetrated by C.H. involving K.H., O.H., and A.G. (but not J.H.). The allegations were investigated by Elizabethtown Police Department Detective Kelly Sloan and Cabinet for Families and Children (Cabinet) social worker Cynthia Little.

On September 23, 2004, the Cabinet filed Dependency, Neglect, and Abuse Petitions pursuant to Kentucky Revised Statutes (KRS) Chapter 620 in Hardin Family Court relating to K.H. (Case No. 04-J-00665-001), J.H. (Case No. 04-J-00663-001), and O.H. (Case No. 03-J-00691-002). The petitions alleged that C.H. "touches [K.H.'s] breast and vaginal area"; that C.H.

"touches [O.H.] in a 'touching game'"; and that "[J.H.] is at risk for sexual abuse due to the allegations of his siblings." On October 7, 2004, the family court entered orders placing the three children in the temporary custody of the maternal grandmother.

An adjudication hearing was conducted on November 3, 2004. At the conclusion of the hearing the family court entered adjudication hearing orders finding that it had been shown by a preponderance of the evidence that C.H. inappropriately touched K.H. and O.H., and that the matter was currently under investigation by the police.

On November 10, 2004, a disposition hearing was held. On November 24, 2004, the family court entered disposition hearing orders finding that the children had been abused; that the children should continue in the custody of their maternal grandmother; and that C.H. should not be permitted to have any contact with the children. This appeal followed.

First, C.H. contends that the family court erred by failing to determine the competency of the children and to administer an oath prior to its interviewing of them at the November 3, 2004, adjudication hearing. A.G., O.H., K.H., and J.H. were interviewed in camera by the family court at the November 3, 2004, adjudication hearing. Our review of the video tape of the interviews discloses that the family court did not

formally determine the competency of the children, and that none of the four children were administered a formal oath prior to being interviewed.

Before a young child is permitted to testify, the trial court should test the child to determine whether she (or he) is sufficiently intelligent to observe, recollect and narrate the facts and has a moral sense of obligation to speak the truth. Gaines v. Commonwealth, 728 S.W.2d 525, 526 (Ky. 1987); Moore v. Commonwealth, 384 S.W.2d 498, 500 (Ky. 1964); Capps v. Commonwealth, 560 S.W.2d 559, 560 (Ky. 1977); Pendleton v. Commonwealth, 83 S.W.3d 522, 525-526 (Ky. 2002).

Moreover, it is fundamental to our system of jurisprudence that a witness in a case not be permitted to testify unless the proffered witness shall first undertake a solemn obligation to tell the truth. This ordinarily will be by oath or affirmation Gaines at 526. However, in the case of very young children, after a determination by the trial court that the child is competent to testify, it is within the discretion of the court whether it is appropriate, in addition, to administer a formal oath. Id.

At the time of the November 3, 2004, adjudication hearing K.H. was almost 12, J.H. was almost nine, O.H. was seven-years and seven-months old, and A.G. was six. Thus, we believe that the family court should have preliminarily inquired

into the competency of the children, and, upon being satisfied of their competency, then exercised its discretion concerning whether to administer a formal oath. However, as further discussed below, we believe the family court's failure to engage in a competency determination or to administer a formal oath was harmless error.

First, A.G., O.H., and J.H. made no disclosures to the family court which implicated C.H. in improper conduct. As such, the testimony of these children was not prejudicial to C.H. It follows that the trial court's failure to qualify the children as competent to testify or to administer a formal oath was, if error, harmless error. See CR 61.01 (No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties).

K.H. did make one inculpatory statement implicating C.H. in misconduct. K.H. stated that C.H. touched her on her breasts and vaginal area, but attributed this to examinations

for medical purposes. While this statement implicated C.H. in misconduct, nevertheless, we are persuaded that any error by the family court in failing to qualify the competency of, or administer an oath to, K.H. was harmless error because the statement was cumulative to testimony provided by Detective Sloan. See, e.g. Hazelwood v. Woodward, 277 Ky. 447, 126 S.W.2d 857 (1939) (Error in admission of witness' testimony concerning value of an estate, though witness had not qualified himself to speak on matter, was not reversible error, where there was other competent evidence on the subject.) Thus, as further discussed below, even if the testimony of K.H. is disregarded, there is nevertheless substantial evidence, *i.e.*, Detective Sloan's testimony, to support the family court's finding that K.H. was abused by C.H. Thus, any error by the family court in failing to determine the competency of, or administer an oath to, K.H. was harmless error. CR 61.01.

C.H. also contends that the family court erred by determining that the children were abused children by a preponderance of the evidence.

KRS 620.100(3) provides that the Commonwealth bears the burden of proving dependency, neglect or abuse of a child by a preponderance of the evidence. KRS 600.020(1) defines an "abused or neglected child" as follows:

- (1) "Abused or neglected child" means a

child whose health or welfare is harmed or threatened with harm when his parent, guardian, or other person exercising custodial control or supervision of the child:

- (a) Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
- (b) Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;
- (c) Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005;
- (d) Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;
- (e) Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;
- (f) Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;
- (g) Abandons or exploits the child; or
- (h) Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. A parent or other person exercising custodial control or supervision of the child legitimately practicing the

person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child; or

- (i) Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months;

KRS 600.020(54) defines sexual abuse as follows:

- (54) "Sexual abuse" includes, but is not necessarily limited to, any contacts or interactions in which the parent, guardian, or other person having custodial control or supervision of the child or responsibility for his welfare, uses or allows, permits, or encourages the use of the child for the purposes of the sexual stimulation of the perpetrator or another person;

The adjudication orders entered on November 3, 2004, each contain the following findings and determinations:

FINDINGS OF FACT / CONCLUSIONS OF LAW

The Court, having considered the sworn testimony and evidence, and being otherwise sufficiently advised, hereby finds and concludes the rights provided in KRS 620.100 have been extended to the child and the adult(s) responsible for the child; and all due process rights have been observed, and further finds:

1. The allegations contained in the Petition . . . have . . . been proven by a preponderance of the evidence, and hereby makes the following specific findings of fact: Allegations made that Mr. Charles Hall was touching [K.H.] and [O.H.] inappropriately and he is currently under investigation by the police.

The family court also determined that the children were abused, that reasonable efforts had been made to prevent the children's removal from the home, and that the children's best interest required a change of custody.

Findings of fact shall not be set aside unless they are clearly erroneous, and due regard shall be given to the opportunity of the court to judge the credibility of witnesses. CR 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence. The test for substantiality of evidence is whether when taken alone, or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men. Janakakis-Kostun v. Janakakis, 6 S.W.3d 843 (Ky.App. 1999).

Detective Sloan testified regarding statements made by the children during interviews she had conducted with them during the course of her investigation. The statements made by the children, as recounted by Detective Sloan at the

adjudication hearing,² implicate Charles in the sexual abuse of K.H., but not J.H. and O.H.

Detective Sloan testified that there had been a previous referral to the Cabinet implicating C.H. in sexual abuse of K.H. in January 1994, but as the children made no disclosures implicating C.H. at that time, the allegations could not be substantiated.

The current phase of allegations began in September 2004 when A.G. disclosed improper conduct by C.H. involving her. A.G. disclosed to Detective Sloan that upon one of her visits to the H. residence, C.H. had taken her to his bedroom and caused her to strike her vaginal area against a bedpost. According to A.H., C.H. then took a stickhorse toy, put lotion on it, and rubbed it on her vaginal area. A.G. also stated to Detective Sloan that C.H. got under the bedcovers with her while he was nude, though she remained clothed; gave her a bath; and had her watch him take a bath. He then gave her \$10.00 and told her not to tell anyone.

In Detective Sloan's interview with O.H., O.H. corroborated that A.G. had gone to C.H.'s bedroom with the appellant. O.H. stated that on that occasion she observed C.H.

² C.H. did not object at the adjudication hearing to Detective Sloan's recounting of the children's out-of-court statements, nor does he challenge her testimony in this regard on appeal. Issues not raised on appeal are waived. Personnel Bd. v. Heck, 725 S.W.2d 13, 18 (Ky.App. 1986). We accordingly do not review whether the children's statements were admissible through Detective Sloan under the relevant hearsay rules.

and A.G. play what O.H. referred to as "the touching game."

O.H., however, did not identify where C.H. touched A.G. in the touching game.

O.H. also told Detective Sloan that C.H. played the touching game with her. O.H. described that the game was played by C.H. looking away and then touching her. Again, O.H. did not tell Detective Sloan where C.H. would touch her when they played the touching game, though Detective Sloan testified that she inferred that the game was abusive. O.H. also told Detective Sloan that C.H. takes K.H. upstairs to his bedroom.

In Detective Sloan's interview with J.H., J.H. corroborated that C.H. had taken A.G. upstairs. He also corroborated O.H.'s statement that C.H. takes K.H. upstairs. J.H. testified that on at least one occasion when C.H. had taken K.H. upstairs, he heard K.H. say, "your nasty."

During Sloan's interview with K.H., K.H. stated to the Detective that C.H. frequently touches her breasts and vaginal area. K.H. further stated, however, that C.H. told her that he was doing this to check her for breast cancer and other diseases; that he was educating her by teaching her about sex so she would not be raped; and on one occasion because she had shaved her vagina.

Detective Sloan's testimony substantiates the family court's finding of sexual abuse regarding K.H. While K.H. did

indicate that C.H. told her he was engaging in this conduct for the purpose of examining her for diseases and for "educational purposes," there is no indication that K.H. had ever experienced symptoms of, or required medical attention for, diseases in her breast and vaginal areas, and the excuse that C.H. engaged in the sexual touching of K.H. for "educational purposes" is patently implausible. Sloan's testimony with regard to K.H. is substantial evidence supporting the family court's finding of abuse concerning K.H.

Neither the Cabinet nor the Guardian ad Litem cite us to evidence presented at the adjudication hearing which directly implicates Charles in abusive conduct directed toward J.H. or O.H., and our review of the video proceedings fails to disclose such evidence. While O.H. testified that C.H. touches her in the "touching game," other than Detective Sloan's speculative inference, there was no evidence that the game involved inappropriate sexual touching. O.H. did not state to Detective Sloan that the touching was directed to her private areas. Moreover, there is no allegation whatsoever that C.H. ever sexually abused J.H.

Hence we conclude that there is not substantial evidence in the record to support the family court's finding that J.H. and O.H. were abused.

Nevertheless, KRS 600.020(1)(b) and KRS 600.020(1)(f) provide, respectively, that a child may be categorized as an abused or neglected child if the child is at risk of emotional injury or at risk of sexual abuse. Because the family court's finding of abuse in regards to K.H. is supported by substantial evidence, and such abuse of their sibling may subject J.H. and O.H. to a risk of emotional injury or sexual abuse, we remand for a determination of whether J.H. and O.H. are at risk of emotional injury and/or sexual abuse. Upon the entering of such findings, the family court should reconsider its adjudication and disposition concerning J.H. and O.H. in light of the additional findings.

For the foregoing reasons the judgment of the Hardin Circuit Court is affirmed in part, vacated in part, and remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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