

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001104-ME

D.J.A.¹

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 07-J-00036

DEPARTMENT OF JUVENILE JUSTICE and
CABINET FOR HEALTH AND FAMILY
SERVICES

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

NICKELL, JUDGE: D.J.A. has appealed from the Hardin Family Court's order entered on April 25, 2007, which granted temporary custody of his minor child, M.A., to the biological mother, B.A., and ordered D.J.A. to have no contact with the child. For the following reasons, we affirm.

¹ Pursuant to the policy of the Court of Appeals, in cases involving allegations pertaining to minor children, the parties shall be referenced by their initials in an effort to protect the interests of such minor children.

On January 13, 2007, M.A., then approximately seven months of age, presented to the emergency room at Hardin Memorial Hospital. Initial radiological results indicated M.A. had a fractured upper left arm. D.J.A. stated to medical personnel that the injury occurred following a fall while playing. The medical records alternately described the fracture as oblique or spiral. Doctors, concerned the injury may have been sustained as a result of abuse, contacted the Cabinet for Health and Family Services, Department for Community Based Services (“Cabinet”). Two social workers were dispatched to the hospital to investigate. The investigation substantiated abuse and, pursuant to KRS² 620.070, a juvenile dependency, neglect and abuse petition was filed on January 16, 2007, in the Hardin Family Court alleging D.J.A. was the perpetrator of the abuse.

On January 24, 2007, at a temporary removal hearing, the parties stipulated reasonable grounds existed to substantiate the abuse. The court entered an order comporting with the stipulation, found D.J.A. had previously been convicted of child abuse for causing a spiral fracture to another child, and granted temporary custody of M.A. to the child's maternal grandmother. An adjudication hearing was originally scheduled for February 28, 2007, but was continued by agreement until April 18, 2007. During the interim period, D.J.A. was charged criminally for the abuse.³

² Kentucky Revised Statutes.

³ The criminal charges appear to remain pending and are not before us on this appeal. Nothing in this opinion should be read as affecting those proceedings.

At the adjudication hearing, the trial court heard testimony from a forensic nurse in the Office of the Chief Medical Examiner, Kathy Recktenwald (“Recktenwald”). She testified about M.A.'s medical records and reports interpreting those records, interviews conducted with various parties following the incident, and her expert opinion that the fracture was consistent with an inflicted injury rather than the result of an accident. D.J.A. stipulated to the contents of the reports of his conversations with law enforcement and social workers, as well as his prior criminal history. At the conclusion of the hearing, the court believed the fracture was inconsistent with D.J.A.'s story. The court further found the child to be abused pursuant to KRS 620.020, ordered D.J.A. to have no contact with the child, and granted temporary custody to B.A. Following the court's ruling D.J.A. orally moved to alter, amend or vacate the order, which motion was denied. On April 25, 2007, D.J.A. filed a written motion to alter, amend or vacate the April 18, 2007, ruling, and for more specific findings of fact pursuant to CR⁴ 51.01. The court denied the request to alter, amend or vacate following the dispositional hearing on May 23, 2007. The court then adopted the Cabinet's recommendations that all prior orders remain in force, and that D.J.A. continue to have no contact with the child due to the pending criminal charges and prior history of abuse. Finally, the court granted permanent custody of the child to B.A. This appeal followed.

⁴ Kentucky Rules of Civil Procedure.

D.J.A. now contends: (1) the evidence presented was insufficient to support the trial court's ruling, (2) the trial court erroneously admitted evidence of his prior bad acts and gave such evidence improper weight, (3) the trial court erred in failing to hold the instant matter in abeyance pending disposition of the criminal case, and (4) the injury was not substantial enough to constitute abuse under the definition found in KRS 600.020. We reject each of D.J.A.'s contentions.

SUFFICIENCY OF THE EVIDENCE

D.J.A. first argues the evidence presented to the trial court was insufficient to support a finding of abuse pursuant to KRS 600.020.⁵ Findings of fact cannot be set aside unless they are clearly erroneous. CR 52.01; *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003), *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky.App. 2002). If substantial evidence supporting the findings of fact exist in the record, such findings are not clearly erroneous and will not be set aside. CR 52.01; *R.C.R. v. Commonwealth, Cabinet for Human*

⁵ KRS 600.020, in pertinent part, states:

(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.

....

(44) “Physical injury” means substantial physical pain or any impairment of physical condition.

Resources, 988 S.W.2d 36 (Ky.App. 1999); *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420 (Ky.App. 1986). “The trial court has broad discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination.” *R.C.R.*, 988 S.W.2d at 38 (citing *Department for Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky.App. 1977)). Under KRS 620.027(3) a trial court is required to determine the truth or falsity of the allegations presented in the initiating petition and “a determination of dependency, neglect, and abuse shall be made by a preponderance of the evidence.”

Here, the trial court had Recktenwald's uncontradicted expert testimony that the fracture was consistent with an inflicted injury rather than the result of a fall, and was inconsistent with D.J.A.'s account of the events preceding the injury. Further, Recktenwald indicated it would be nearly impossible for a child of such a tender age to have inflicted this injury upon himself from a fall. Although D.J.A. places much weight upon the contradictions within the medical testimony regarding whether the fracture was spiral or oblique, Recktenwald testified the mechanics involved in either type of fracture are the same or similar with each requiring a torsional force.⁶ Recktenwald discounted the importance of the label placed upon the fracture—oblique or spiral—but rather

⁶ D.J.A. attempts to direct this Court to “numerous medical documentation” for the proposition that the mechanisms of injury for spiral and oblique fractures are different. He has attached one such report to his brief, but gives no references to any other such documentation supporting his argument. Nevertheless, this medical evidence was neither presented to the trial court nor properly placed into the record. We refrain from considering such evidence for the first time on appeal.

emphasized the mechanics involved. She testified fractures resulting from twisting motions typically result from inflicted injuries rather than accidental injuries. Thus, our review of the record indicates the trial court had substantial evidence upon which to base its ruling, and therefore the ruling was not clearly erroneous and will not be disturbed on appeal.

PRIOR BAD ACTS

D.J.A. next contends the trial court erred in allowing introduction of evidence concerning his prior conviction for child abuse in contravention of the mandates contained in KRE⁷ 404(b) regarding the introduction of evidence of prior bad acts. Alternatively, he argues the trial court erroneously gave such evidence improper weight. As noted previously, D.J.A. stipulated to the admission of the records of his prior criminal conviction of criminal abuse. Having stipulated to the admission of this evidence, he cannot now be heard to complain regarding its admission. *Strong v. Commonwealth*, 507 S.W.2d 691 (Ky. 1974), *Hutson v. Commonwealth*, 215 S.W.3d 708 (Ky.App. 2006). A defendant “will not be permitted to feed one can of worms to the trial judge and another to the appellate court.” *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1975) (citations omitted).

We are further unpersuaded by D.J.A.'s alternate argument regarding the improper weight given to his prior conviction. Initially, we note that in determining the

⁷ Kentucky Rules of Evidence.

best interests of the child, the trial court is expressly required under KRS 620.023 to consider relevant evidence relating to any prior acts of abuse or neglect perpetrated against any child. Clearly such a requirement indicates the propriety of the trial court's consideration of D.J.A.'s prior criminal conviction for criminal abuse of a child when determining M.A.'s best interests. Further, in making its ruling, the trial court specifically noted that, even without taking the prior conviction into account, sufficient evidence had been produced to support a finding of abuse by a preponderance of the evidence. Although the written order included a brief notation regarding the conviction, we are unable to locate any support in the record for D.J.A.'s argument.

HOLDING ACTION IN ABEYANCE

Third, D.J.A. argues the trial court erred in failing to hold the instant proceedings in abeyance until the criminal charges against him had been resolved. A careful review of the record indicates this alleged error is not properly preserved for our review.

Counsel indicated at the adjudication hearing he intended to request a continuance of the matter at bar pending the conclusion of the criminal case, that he expected same to be denied, and that the adjudication hearing could then proceed. However, counsel did not make such a request, nor did the trial court rule on the issue. It is well-settled that a trial court must be given the opportunity to rule in order for an issue to be considered on appeal, and the failure of a litigant to bring an alleged error to the trial

court's attention is fatal to that argument on appeal. *Hines v. Carr*, 268 Ky. 78, 176 S.W.2d 99 (1943); *Kennedy, supra*. As was recently stated by the Supreme Court of Kentucky in *Olden v. Commonwealth*, 203 S.W.3d 672, 675 (Ky. 2006),

[s]imply voicing your intentions to object at some later time, but then failing to do so when the time draws nigh, does not serve the purpose of the rule, which is to give the trial court an opportunity to cure any errors in the proceedings, nor does it preserve the issue for review.

Thus, as the question was not presented to the trial court, we hold the issue to be unpreserved, and further discussion is unwarranted.

EXTENT OF INJURY

Finally, D.J.A. contends the injury M.A. sustained was not severe enough to constitute abuse under KRS 600.020(1)(a) as the injury failed to satisfy the requirements of KRS 600.020(44). He claims the child did not suffer substantial physical pain or impairment of physical condition. We disagree. The definition of physical injury set forth in KRS 600.020(44) specifically includes “*any* impairment of physical condition” (emphasis added).⁸ D.J.A. concedes M.A.'s condition was impaired at least during the relatively short duration⁹ of the healing process, yet he argues such impairment is insufficient to satisfy the low threshold required by KRS 600.020(44). We find such an

⁸ In contrast, the definition of “serious physical injury” found in KRS 600.020(53) sets a much higher threshold by requiring that the injury create a serious risk of death or “cause serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily member or organ.”

⁹ Recktenwald testified M.A. was almost fully healed within two weeks or less.

argument to be disingenuous at best. We hold the impairment of M.A.'s left arm during the healing process to be a sufficient basis upon which the trial court could find the child sustained a physical injury.

For the foregoing reasons, the order of the Hardin Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dwight Preston
LEWIS & PRESTON
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

Philip Moore
Assistant County Attorney
Elizabethtown, Kentucky

Julius Craig
Elizabethtown, Kentucky