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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2224-16T3

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

S.W. and F.W.,

Defendants,

and

T.W.,

Defendant-Appellant.

IN THE MATTER OF J.W.,

A Minor.

Submitted May 3, 2018 – Decided May 11, 2018

Before Judges Haas and Rothstadt.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Gloucester County, Docket No. FN-08-0188-15.

Joseph E. Krakora, Public Defender, attorney for appellant (Laura Orriols, Designated Counsel, on the briefs).

Gubir S. Grewal, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Angela Domen, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Linda Vele Alexander, Designated Counsel, on the brief).

PER CURIAM

Defendant T.W.[1] appeals from the Family Part's May 6, 2016 order, following a fact-finding hearing, determining that he sexually abused the twelve-year-old daughter of his paramour, with whom he lived.[2] We affirm.

Defendant and the victim's mother, S.W., had a three-year relationship. Defendant moved into S.W.'s home in February 2015. Defendant had previously been convicted of aggravated sexual assault and two counts of endangering the welfare of a child.[3] Upon his release from prison, defendant was classified as a Tier One Megan's Law[4] sex offender. As a condition of his parole,

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[1] Pursuant to Rule 1:38-3(d), we use initials and fictitious names to protect the confidentiality of the participants in these proceedings.

[2] The May 6, 2016 order became appealable as of right after the trial court entered a final order on December 21, 2016, dismissing the litigation.

[3] Defendant's victims in these offenses were nine-year-old girls.

[4] N.J.S.A. 2C:7-1 to -23.

defendant was not permitted to have unsupervised contact with children.

S.W.'s daughter, J.W. (Janet), was twelve years old when defendant joined S.W.'s household. Janet lived with her grandmother during the week. However, the child spent every other weekend with S.W. and defendant, and had her own bedroom in the home. S.W. was fully aware that defendant could not be left unsupervised with Janet.

On April 16, 2015, the Division received a referral from Janet's school, after she confided to a guidance counselor and her principal that defendant had sexually abused her on three occasions. Janet stated that in the first incident, she and defendant were in the backseat of a car on January 1, 2015. S.W. and an uncle were sitting in the front seat. Janet reported that defendant was intoxicated and began touching her between her legs. Janet told him to stop. About a week later, S.W. asked Janet what had happened, and Janet reported the inappropriate touching to her.

Several weeks later, Janet and a classmate, E.V., were at S.W. and defendant's home. While S.W. was in the kitchen, defendant came into the room and "began to play and wrestle with both girls." Janet stated defendant was intoxicated, and that he

grabbed each child "by [their] butt and then touched them between their legs."

Janet also reported a third incident that occurred a few weeks later. Janet stated she was in her room when defendant came in and leaned over directly into the child's face so that his mouth was nearly touching her nose. Janet pushed defendant away before he could kiss her and told him to get out of her room.

A Division investigator went to the school and spoke to the principal and then to S.W. After initially denying that she left defendant unsupervised with Janet, S.W. admitted she would leave Janet alone with him when she would take out the trash or walk her dog.[5] The investigator conducted an emergency removal, and drove Janet to the county prosecutor's office.

At the hearing, Detective Anthony Garbarino testified that he interviewed Janet after she arrived at the prosecutor's office. The child related the same three incidents to him as she had to the school staff. With regard to the incident in the backseat of the car, Janet told the detective that defendant "placed his hand on her thigh over [the] top of her clothing near her vagina."

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[5] In the Title 9 action that followed, the Division asserted that defendant sexually abused Janet. The Division also alleged that S.W. abused or neglected the child by leaving her unsupervised with defendant.

Janet stated that S.W. was asleep in another room, rather than in the kitchen cooking, when defendant touched her and her friend during the second incident. Janet also explained that defendant touched "her breast, buttocks, and vagina all over [the] top of her clothing with his hand" during this incident. In response to the detective's questions, Janet stated that S.W. was outside the home walking the dog during the third incident when defendant tried to kiss her.

Detective Garbarino asked Janet whether she had been left alone with defendant on any other occasions. Janet remembered one such incident, when her mother left the home to go to the store. Nothing untoward happened at that time.

The Division's investigator corroborated this account. The investigator testified that on the way to the prosecutor's office, Janet reported that S.W. "had left her home alone with [defendant] and it was for two hours when [S.W.] went food shopping." The child told the investigator that defendant "just stared at her and it made her feel really uncomfortable[,]" but he did not touch her.

After completing his investigation, Detective Garbarino obtained an arrest warrant, arrested defendant, transported him to the prosecutor's office for processing, and read him his

Miranda[6] rights. After waiving those rights, defendant admitted his relationship with S.W. and that he lived in her home. He denied ever being left alone with the child.

The detective told defendant that Janet had "made allegations that he had touched her inappropriately[,]" and asked him "if he recalled any interactions with [the child] that she would have thought were inappropriate." Defendant brought up both the incident in the backseat of the car, and the incident with Janet and her classmate. Addressing the first incident, defendant asserted "there was a bunch of people in the vehicle, that everybody had to sit in close proximity because of how many people were in the vehicle. He may have touched her leg, but if he did so it was unintentional." With regard to the second incident, defendant claimed he was wrestling with both girls "in a playful manner." However, he admitted "it [was] possible that he may have touched [Janet] in the places that she indicated again, but he stated that if he did so it was unintentional."

Janet testified in camera in the trial judge's chambers.[7] She again related the same three events she reported eleven months

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[6] Miranda v. Arizona, 384 U.S. 436 (1966).

[7] Prior to her testimony, the parties' attorneys prepared questions for the trial judge to ask the child. The attorneys were able to listen to the proceedings from the courtroom.

earlier to her school and the detective. In this iteration, however, Janet stated that the incident where defendant inappropriately touched her and her classmate occurred after the incident in her room where defendant tried to kiss her.

Defendant and S.W. did not testify at the hearing, and their attorneys did not call any witnesses.

At the conclusion of the hearing, the trial judge rendered a comprehensive oral decision, finding that the Division established by a preponderance of the evidence that defendant sexually abused Janet.[8] In so ruling, the judge made detailed findings of fact, and accepted Janet's accounts of the three incidents. The judge explained:

> Going on then, the [c]ourt having considered all of the evidence including the testimony which I find to be consistent between what I read [in the exhibits], what I heard in the courtroom from the various witnesses, what I also heard directly from the child[, Janet]. I find . . . [Janet] to be very credible.
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> [Janet] admitted to the police officer who repeated his testimony here in this courtroom that the incidences were very specific on very certain days. Once in a car, very close to the date in question[,] everyone has the time and date. One month later, in her room, and an incident that occurred in her

[8] The judge also found that S.W. abused or neglected Janet under N.J.S.A. 9:6-8.21(c)(3) for a "Megan's Law offender [defendant] to be alone with her child." S.W. did not appeal this determination and, therefore, she is not a party to this appeal.

> mother's house where there was some wrestling going on and all those involved.
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> I also find that when she was asked even more specific questions about other acts[,] she denied those acts. When she was asked about being shown inappropriate photographs, when she was asked about if she was ever asked to touch [defendant] in any way, shape or form[,] she denied all those things which I find to only add to her credibility. She was a forthright young lady who I found had been telling the truth.

This appeal followed.

On appeal, defendant challenges the judge's finding that his conduct constituted sexual abuse under N.J.S.A. 9:6-8.21(c)(3). He also argues for the first time that he was not a "guardian" of the child under N.J.S.A. 9:6-8.21. Finally, defendant asserts that his trial attorney provided him with ineffective assistance at the hearing.[9] We disagree.

Our review of the trial judge's factual finding of abuse or neglect is limited; we defer to the court's determinations "when supported by adequate, substantial, credible evidence." <u>N.J. Div. of Youth & Family Servs. v. I.Y.A.</u>, 400 N.J. Super. 77, 89 (App. Div. 2008) (quoting <u>Cesare v. Cesare</u>, 154 N.J. 394, 411-12 (1998)). The trial court is best suited to assess credibility, weigh

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[9] The Law Guardian supports the judge's finding that the Division met its burden of proving that defendant sexually abused Janet by a preponderance of the evidence, and urges that we affirm the judge's decision in all respects.

testimony and develop a feel for the case, and we extend special deference to the Family Part's expertise. N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342-43 (2010); Cesare, 154 N.J. at 413.

Unless the trial judge's factual findings are "so wide of the mark that a mistake must have been made" they should not be disturbed, even if we would not have made the same decision if we had heard the case in the first instance. N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007) (internal quotation marks and citation omitted). "It is not our place to second-guess or substitute our judgment for that of the family court, provided that the record contains substantial and credible evidence to support" the judge's decision. N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 448-49 (2012).

In pertinent part, N.J.S.A. 9:6-8.21(c)(3) defines an "abused or neglected child" as "a child less than 18 years of age whose parent or guardian, as herein defined,[10] . . . commits or allows to be committed an act of sexual abuse against the child[.]" In determining a case of abuse or neglect, the court should base its

[10] The term "parent or guardian" as used in N.J.S.A. 9:6-8.21(c)(3) includes the "paramour of a parent . . . who has assumed responsibility for the care, custody, or control of a child or upon whom there is a legal duty for such care." N.J.S.A. 9:6-8.21(a).

determination on the totality of the circumstances. N.J. Div. of Youth & Family Servs. v. V.T., 423 N.J. Super. 320, 329 (App. Div. 2011). A finding of abuse or neglect must be based on a preponderance of the evidence. N.J.S.A. 9:6-8.46(b).

Applying these standards to this matter, we are satisfied there was competent, credible evidence in the record to support the judge's finding that defendant sexually abused Janet during a period where he had been left alone with her in the home he shared with S.W. and the child. The judge found that Janet testified credibly about three incidents of sexual abuse. First, defendant placed his hand on Janet's thigh over her clothing near her vagina when he was sitting next to her in the backseat of a car. In the second incident, defendant touched Janet's breast, buttocks, and vagina over her clothing while "wrestling" with her and a classmate while S.W. was asleep. Finally, defendant tried to kiss Janet while he was alone with her in the home after S.W. went out to walk the dog.

Defendant argues that the judge erred by finding Janet credible and accepting her testimony. He asserts that when she testified in the judge's chambers, the child placed the three incidents in a different chronological order than she did when she made her initial reports of the abuse. However, we discern no basis for disturbing the judge's reasoned credibility

determination that was based on his opportunity to observe and hear the child's testimony firsthand. Cesare, 154 N.J. at 412-13.

As the judge expressly found, Janet was forthright throughout her testimony. The details concerning the three incidents were consistent with her prior accounts, and the fact that she placed one of the events "out of order" was certainly understandable given the eleven-month gap between her first report and her appearance at the fact-finding hearing.

The judge also noted that Janet, when given the opportunity to lodge other complaints about defendant's misconduct, declined to do so. Finally, Janet's credibility was further bolstered by the fact that defendant, when questioned by Detective Garbarino, specifically recalled the two incidents where Janet alleged he touched her inappropriately. Thus, we reject defendant's contention on this point.

Defendant also argues the Division failed to prove that he intentionally touched the twelve-year-old child in a sexual manner during the first two incidents. This contention also lacks merit. While defendant claimed during his interview with Detective Garbarino that if any touching occurred, it was "unintentional," the judge was certainly not obligated to accept this statement. In both of these incidents, defendant touched Janet between her

legs and near her vagina. Under the totality of those circumstances, the judge's conclusion that defendant intended to sexually abuse the child was unassailable.

Defendant next asserts that the Division failed to prove he was responsible under N.J.S.A. 9:6-8.21(a) for Janet's care, custody, or control and, therefore, he should not have been found to have sexually abused her under N.J.S.A. 9:6-8.21(c)(3). However, this argument was never presented to the trial judge, notwithstanding that the opportunity to do so was available to defendant. Instead, the only argument defendant raised in his closing statement was that Janet was not credible.

Although under the plain error rule we will consider allegations of error not brought to the trial court's attention that have a clear capacity to produce an unjust result, see Rule 2:10-2; we generally decline to consider issues that were not presented at trial, unless the jurisdiction of the court is implicated or the matter concerns an issue of great public importance.[11] Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (citing

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[11] Neither of these exceptions is applicable here. Defendant's contention that the fact question of whether a defendant is a responsible party under N.J.S.A. 9:6-8.21(a) is a "jurisdictional" issue lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Nieder v. Royal Indem. Ins. Co. 62 N.J. 229, 234 (1973)). As the Supreme Court has cogently explained:

> Appellate review is not limitless. The jurisdiction of appellate courts rightly is bounded by the proofs and objections critically explored on the record before the trial court by the parties themselves. Although "[o]ur rules do not perpetuate mere ritual[,]" we have insisted that, in opposing the admission of evidence, a litigant must "make known his position to the end that the trial court may consciously rule upon it." State v. Abbott, 36 N.J. 63, 76 (1961). This is so because "[t]he important fact is that the trial court was alerted to the basic problem[.]" Id. at 68. In short, the points of divergence developed in the proceedings before a trial court define the metes and bounds of appellate review.
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> [State v. Robinson, 200 N.J. 1, 19 (2009).]

Therefore, we need not review defendant's contention on this point.

In any event, we reject defendant's belated assertion on its merits because there was sufficient evidence in the record to support the conclusion, by a preponderance of the evidence, that defendant had "assumed responsibility for the care, custody, or control" of Janet within the intendment of N.J.S.A. 9:6-8.21(a). Defendant admitted he was S.W.'s paramour for three years. A "paramour of a parent" is expressly covered by the statute. Ibid.

As for having "care, custody, or control" of Janet, defendant's argument ignores the express language of N.J.S.A. 9:6-2. That statute defines "[t]he person having the care, custody

and control of any child" as "any person who has assumed the care of a child, or any person with whom a child is living at the time the offense is committed[.]" N.J. Div. of Child Prot. & Permanency v. J.L.G., 450 N.J. Super. 113, 120 (App. Div.) (quoting N.J.S.A. 9:6-2 and holding that a paramour who had only lived for a relatively short time with the child was nevertheless a person who had assumed care of the child under N.J.S.A. 9:6-8.21(a) and (c)), aff'd o.b., 229 N.J. 113 (2017).

Here, defendant admitted that he lived with S.W. full-time, and was present on the weekends when Janet was there. Contrary to defendant's assertion that he was never alone with the child, S.W. told the Division's investigator that she left Janet alone with defendant on several occasions. During those occurrences, defendant was the only adult in the home. Finally, Janet recalled one event where defendant was alone with her for approximately two hours while S.W. was out shopping. Based upon Janet's testimony, defendant also had access to Janet's room, further demonstrating he had "control" of her both when S.W. was in the home and when she was not. Therefore, even considering defendant's argument, we conclude it lacks merit.

Finally, defendant argues that his attorney provided him with ineffective assistance at the hearing. Again, we disagree.

During the Division's investigation, it arranged for a pediatrician to examine Janet. The doctor issued a written report, concluding that the child's "physical examination today shows no residual from any inappropriate contact, nor would any be anticipated given the history." Instead, the doctor stated that "[a] significant impact of [Janet's] experience is psychological. She should be seen by a mental health clinician for trauma-focused cognitive behavioral therapy for sexual abuse."

In the report, the doctor listed the three incidents in a different order than Janet originally reported them to her school. Thus, the report stated that Janet said the first incident occurred in the car, the second was defendant's attempt to kiss her, and the third was when defendant was "cupping her butt, grazing her vaginal area, and cupping her breasts during a wrestling game."

In her report, the doctor also mentioned a February 11, 2015 Child Welfare Services "assessment summary" the Division prepared when it first learned that S.W. and defendant were cohabiting. At that time, Janet did not report that defendant had been "inappropriate" with her. As noted above, the child would not disclose the three incidents of sexual abuse until April 16, 2015.

The doctor also stated that a Division representative told her before the examination that Janet had previously claimed that someone was sending her threatening e-mails, an assertion she also

made to Detective Garbarino. The Division representative told the doctor that it was later "discovered that [Janet] sent those [e-mails] to herself."

At the conclusion of its case-in-chief, the Division's Deputy Attorney General (DAG) advised the court that, although the doctor was available to testify, the Division was not going to call her as a witness because her testimony would be cumulative of that already presented. The DAG gave the doctor's report to defendant's and S.W.'s attorneys so they could determine whether to call the doctor as a witness. Both attorneys declined to call the doctor and both rested without presenting any witnesses.

On appeal, defendant questions this tactical decision by his attorney and asserts that the attorney should have called the doctor as a witness and introduced her report in evidence. According to defendant, the report could have been used to attack Janet's credibility because she related the three incidents of sexual abuse to the doctor in a different chronological order than she had done originally, and did not report the first incident to the Division when it did its safety assessment in February 2015. He also argues that the introduction of the unrelated complaint about the e-mails would have also demonstrated that the child's account of defendant's sexual abuse was not credible.

A defendant in a Title 9 abuse or neglect proceeding has the right to the effective assistance of counsel. N.J. Div. of Youth & Family Servs. v. B.H., 391 N.J. Super. 322, 345 (App. Div. 2007) (citing McMann v. Richardson, 397 U.S. 759, 771 (1970)). To establish ineffective assistance of counsel, the parent or guardian must meet the two-part test established in Strickland v. Washington, 466 U.S. 668, 694 (1984). Id. at 346-48; see also N.J. Div. of Youth & Family Servs. v. B.R., 192 N.J. 301, 308-09 (2007) (applying Strickland test in cases involving the termination of parental rights).

Thus, the parent or guardian must first show that counsel's performance was deficient, meaning that counsel's performance was outside the wide range of reasonable professional assistance. B.R., 192 N.J. at 307 (citing Strickland, 466 U.S. at 694). There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.

Further, because prejudice is not presumed, State v. Fritz, 105 N.J. 42, 52 (1987), the parent or guardian must next demonstrate "how specific errors of counsel undermined the reliability" of the proceeding. United States v. Cronic, 466 U.S. 648, 659 n.26, (1984). Moreover, such acts or omissions of counsel must amount to more than mere tactical strategy. Strickland, 466

U.S. at 689. Thus, the parent or guardian must show there is a reasonable probability that but for counsel's errors, the result would have been different. B.R., 192 N.J. at 307 (citing Strickland, 466 U.S. at 694).

Defendant has not satisfied either of the two prongs of the Strickland test. With regard to the first prong, the record shows that defendant's attorney made a reasonable tactical decision not to call the doctor who examined Janet as a witness. The doctor's report strongly corroborated Janet's account that defendant twice inappropriately touched her between her legs, and attempted to kiss her on another occasion. In addition, if the doctor testified consistently with her report, she would have provided clear evidence that Janet suffered psychological harm as a result of the assaults. Thus, the doctor's testimony obviously could have done more harm than good to the defense. Under these circumstances, we cannot conclude that defendant's attorney's decision to forego the introduction of this evidence was outside the scope of reasonable performance for a competent attorney.

Defendant has also not satisfied the second prong of the Strickland analysis. The judge was well aware that Janet's testimony at the hearing put the three incidents of sexual abuse in a different chronological order than she related in her earlier statements. However, the judge still found Janet to be a "very

credible" witness based upon the overall consistency of her accounts, and her demeanor in court. Thus, it is not reasonably probable that the minor discrepancies the defense could have raised based on the doctor's report would have led to a different result.

Moreover, while Janet apparently did not report the incident in the car to the Division when it made its first contact with the family, she had already reported defendant's actions to her mother, who took no action to help her. In addition, whatever occurred concerning the e-mails mentioned in the report was unrelated to the incidents of abuse involved in this case. Therefore, it is also not reasonably probable that either of these portions of the report would have changed the judge's decision if introduced in evidence.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION