SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2415-15T1

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

S.H.,

Defendant-Appellant,

and

B.H.,

Defendant.

IN THE MATTER OF D.H.,

A Minor.

Submitted September 28, 2017 – Decided February 20, 2018

Before Judges Haas and Gooden Brown.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FN-12-0236-13.

Joseph E. Krakora, Public Defender, attorney for appellant (Deric Wu, Assistant Deputy Public Defender, of counsel and on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Christie Pazdzierski, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Lisa M. Black, Designated Counsel, on the brief)

PER CURIAM

Defendant appeals from a December 19, 2013 Family Part order, finding that he abused or neglected his then three-year-old son, D.H.,[1] within the meaning of N.J.S.A. 9:6-8.21(c), by conducting an illegal drug transaction in his son's presence. The fact-finding order was perfected for appeal by a January 5, 2016 order terminating the litigation. We affirm.

The fact-finding hearing followed the Division of Child Protection and Permanency (Division) filing a verified complaint and application for an order to show cause for investigation, pursuant to N.J.S.A. 30:4C-12. The Division was investigating allegations of drug use predicated primarily on defendant's October 3, 2012 arrest for drug related and child endangerment offenses. Because defendant failed to attend two scheduled substance abuse evaluations, the Division sought and obtained a

[1] We use initials to protect the identity of those involved and to preserve the confidentiality of these proceedings. R. 1:38-3(d)(12).

court order directing defendant and his wife, D.H.'s mother, to cooperate in the investigation. Based on the investigation, the Division substantiated defendant for child neglect and filed a verified complaint against defendant seeking care and supervision of D.H., under N.J.S.A. 9:6-8.21 to -8.73, and N.J.S.A. 30:4C-12.[2]

The fact-finding hearing was conducted on December 9, 2013. The Division introduced four exhibits into evidence: the police report of defendant's October 3, 2012 arrest, the Division's investigation report, defendant's judgment of conviction, and the Division's November 5, 2012 substantiation letter. Division caseworker Nicole Galeano, identified as "the keeper of the case record," testified for the Division in order to authenticate all four exhibits. Defense counsel objected to the admission of the police report, arguing the certification did not meet the foundational requirements for the business records exception to the hearsay rules, and that the hearsay statements contained in the police report were inadmissible. Defense counsel also objected to the admission of the Division's investigation report. While defense counsel conceded that Galeano had laid a proper foundation for its admission as a business record, she objected to the inadmissible hearsay statements it contained.

[2] The Division did not seek any relief against defendant's wife, who was named in the complaint for dispositional purposes only.

As to the Division's investigation report, the judge agreed to consider only defendant's statements. Regarding the police report, the judge agreed that the certification was insufficient and granted the Division's request for a one-day adjournment to obtain the proper certification. However, after consulting with her client, defense counsel withdrew her objection and consented to the admission of the police report, subject to the exclusion of any inadmissible hearsay. The judge agreed to restrict her consideration of the police report to only "observations of the officer" and any statements made by defendant.

The police report disclosed that on October 3, 2012, State Police troopers were conducting a "plain clothes" surveillance detail at the Cheesequake Service Area on the Garden State Parkway to address "quality of life issues within the service area." While patrolling the parking lot "in unmarked vehicles," they observed an individual, later identified as defendant, seated in an automobile. Their attention was initially drawn to defendant because of his "nervous behavior." He was "manipulating [a] prescription bottle in his lap and looking right to left." Shortly thereafter, they observed defendant exit his vehicle with a child, who was later identified as his three-year-old son, D.H. Remaining in the vehicle was a woman, who was later identified as defendant's wife.

After exiting the vehicle, the troopers observed defendant proceed to the food court with D.H. Moments later, defendant and D.H. exited the food court and sat at an outdoor dining area. Defendant then retrieved a clear plastic bag from his groin area and placed it in a paper bag while continuing to display nervous behavior by continuously looking "from right to left." They then observed a man, later identified as W.N., approach defendant and "conduct[] a hand to hand transaction," wherein defendant handed W.N. the paper bag, and W.N. gave defendant money in exchange. After completing the transaction, all three walked back towards defendant's vehicle, at which point the troopers placed defendant and W.N. under arrest. Defendant's wife was permitted to leave with D.H.

A subsequent search of W.N. revealed thirty oxycodone pills inside the paper bag. A subsequent search of defendant revealed an orange colored prescription bottle containing sixty-one oxycodone pills. Defendant was administered his Miranda[3] rights and agreed to give a statement. During questioning, defendant admitted to police that he sold W.N. the "[oxycodone] pills in exchange for [$450]" because he had "been out of work for a long time and needed money to pay his rent." Defendant was charged

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

with second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a); third-degree distribution of a controlled dangerous substance, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(3); and loitering to commit a drug offense, N.J.S.A. 2C:33-2.1(b), a disorderly persons offense.

After the Division was notified of the arrest, caseworkers interviewed defendant at the Middlesex County Corrections Facility as part of their ensuing investigation. The Division's investigation report recounted that defendant admitted selling his prescription medication to W.N., but denied that the transaction occurred in the dining area. Instead, defendant stated the transaction occurred by the car, while D.H. and his wife were seated inside the car. Defendant also denied that his wife had any prior knowledge of the transaction. Defendant explained that he was prescribed oxycodone for bursitis in his knee, but always had a surplus of pills because he only took them on an as-needed basis. W.N. was an acquaintance who repeatedly asked to purchase his surplus pills. Defendant typically denied his requests but ultimately relented because his family was struggling financially. Defendant acknowledged he was "stupid" and "made a poor choice."

Subsequently, defendant was indicted and pled guilty to an amended charge of third-degree conspiracy to possess a controlled dangerous substance with intent to distribute, N.J.S.A. 2C:5-2 and

2C:35-5. He was sentenced on July 31, 2013, to a three-year probationary term. The memorializing judgment of conviction was entered on August 23, 2013.

Defendant did not testify or call any witnesses at the fact-finding hearing. After the hearing, on December 19, 2013, the judge issued an oral decision, finding the Division had "met its burden" of proving "by a preponderance of the evidence" that defendant abused or neglected D.H. First, the judge determined that Galeano, whom the judge found credible, provided the proper testimonial foundation for the admission of the exhibits. Next, the judge noted that it was undisputed that defendant was illegally selling his prescription medication because he admitted it to the police and to the Division caseworkers and pled guilty to "a criminal act." Acknowledging that it was a "fact sensitive" analysis, the judge indicated that she had to determine whether the Division proved "by a preponderance of the evidence, that [D.H.] was even in the presence of this encounter," and, if so, that "there was . . . harm to the child during the scenario, or if there was even a risk of harm [to D.H.], because the [c]ourt can't necessarily presume harm."

In discussing the discrepancy concerning where the drug transaction occurred, the judge found that "credibility . . . lie[d] with the trooper in this case, as well

as the other two troopers who signed [the report] because they sign[ed] after they read the report." The judge reasoned:

> [S]omething that the [c]ourt would say lends to the credibility of the trooper is that if a drug transaction happened in a car as suggested by [defendant] and [his wife] was in there, she would not have been released with the child. In fact [she] would have been charged at that point in time, brought to headquarters handcuffed and charged with the same exact crime.
>
> So I find it more believable that it more than likely happened where the officers, all three of them, had indicated pursuant to the report, which is . . . at . . . the dining area outside.

Next, the judge discussed the inherent dangers of bringing a young child to a drug transaction, stating:

> So at this point we have [D.H.] sitting with his father and we now know that this individual comes up to the father and we know that the father, [defendant], is going to sell this person drugs. He knows it's illegal. He's got to know it's dangerous. He has nervous behavior himself looking from side to side. He doesn't want to get caught by the police certainly.
>
> And he has to know at this point in time based on his own actions selling drugs is dangerous. He may be seen. Anything can happen. Selling drugs is illegal and it's an inherently dangerous activity. Yet the entire time [D.H.] is with him. He's indicated it was a stupid thing to do. It was a poor choice.
>
> And I would agree 100 percent.

The judge then assessed whether defendant's conduct placed D.H. at risk of harm and whether defendant failed to provide the requisite minimum degree of care. The judge reasoned:

> So what do we look to? What could have happened? A couple of things . . . . [Defendant] didn't have to sell drugs . . . . [H]e didn't have to bring his son with him . . . . So he could have left him at home. He could have left him [in] the car. Or he didn't have to do this at all.
>
> But instead he made that conscious decision to go to the rest area, to be with his son, to sell drugs to [W.N.] with his son right there while he was completing this drug transaction . . . .
>
> An illegal transaction, inherently dangerous drug transaction places the child at risk of harm . . . . [W]hether a parent has failed to exercise the required degree of care must be analyzed in light of the dangers and risks associated with the situation, which is an illegal activity.
>
> And is this conduct . . . grossly or wantonly negligent? Yes. Because he's acting with a reckless disregard for the safety of [D.H.]. And I believe that this is shown by more than mere ordinary negligence, but by gross[] and wanton[] negligence.
>
> There are many things that could have been done to get [D.H.] out of that situation if he decided to sell drugs. And he did none of them. In fact I believe he put him in harms way by bringing him with him and conducting this drug transaction while he was right there. He's a three[-]year[-]old child.

On the same date, the judge entered a memorializing order, and this appeal followed.

Defendant argues on appeal that "the police report should not have been admitted because the observations of the police officer were hearsay, just as any other statement in the report [was]." Defendant contends that the police report does not qualify for admission "under the business record exception," and the judge erred in relying heavily "on the police report to craft together a narrative of where D.H. was during the incident leading to [defendant's] arrest and his level of exposure to harm."

"[I]n reviewing a trial court's evidential ruling, an appellate court is limited to examining the decision for abuse of discretion." State v. Kuropchak, 221 N.J. 368, 385 (2015) (quoting Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008)). Trial courts are afforded "[c]onsiderable latitude . . . in determining whether to admit evidence." Ibid. (first alteration in original) (quoting State v. Feaster, 156 N.J. 1, 82 (1998)). Under the abuse of discretion standard, we should not reverse a trial court's evidentiary ruling, unless the decision "was so wide of the mark that a manifest denial of justice resulted." State v. Marrero, 148 N.J. 469, 484 (1997) (quoting State v. Kelly, 97 N.J. 178, 216 (1984)).

In evaluating a trial court's evidentiary ruling, one important consideration is the invited error doctrine. "The doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error." N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 340 (2010) (quoting Brett v. Great Am. Recreation, 144 N.J. 479, 503 (1996)). In other words,

> [A] defendant cannot beseech and request the trial court to take a certain course of action, and upon adoption by the court, take his chance on the outcome of the trial, and if unfavorable, then condemn the very procedure he sought . . . claiming it to be error and prejudicial.
>
> [Ibid. (second alteration in original) (quoting State v. Jenkins, 178 N.J. 347, 358 (2004)).]

The doctrine has particular applicability to situations where a party consents to the use of a document at trial, only to later appeal its admissibility. Id. at 341. Our Supreme Court has held that it would be "unfair" to reverse an evidentiary ruling that was consented to at trial, because it deprives the opposing party "of the opportunity to overcome any objection" or "satisfy any evidentiary requirements needed for the admission of the documents or present[] a witness or witnesses in place of the documents."

Id. at 341-42. It also "deprive[s] the trial court of the necessity to make a ruling based on the arguments presented by both sides." Id. at 341.

Here, defendant had the opportunity to preserve his objection to the police report at the fact-finding hearing, but instead consented to its admission and use in the very same way that it was considered by the trial judge. It would be fundamentally unfair for defendant to allow the judge to rely on the police observations in the report in rendering her decision, only to later challenge its admissibility on appeal. Under these circumstances, we hold the doctrine of invited error bars defendant from contesting on appeal the admission of the police report and the judge's consideration of the police observations documented in the report in reaching her conclusions.

"In spite of our invocation of the doctrine of invited error, we would not automatically apply the doctrine if it were to 'cause a fundamental miscarriage of justice.'" Id. at 342 (quoting Brett, 144 N.J. at 508). However, we are convinced that this case presents no fundamental injustice that would warrant relaxing the doctrine, particularly since defendant never disputed conducting the drug transaction in his son's presence.

Next, defendant contends the Division provided insufficient evidence for the judge to conclude that he "recklessly placed his

son in imminent danger or a substantial risk of harm on the night he was arrested." As a result, defendant continues, the Division "provided no evidence that D.H. was an abused or neglected child." We disagree.

Our standard of review on appeal is narrow. We defer to the Family Part's findings of fact and the conclusions of law that are based on those findings. N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007). "[F]indings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence." N.J. Div. of Youth & Family Servs. v. Z.P.R., 351 N.J. Super. 427, 433 (App. Div. 2002) (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974)). Even where there are alleged errors in the trial court's evaluation of underlying facts, a reviewing court "will accord deference unless the trial court's findings 'went so wide of the mark that a mistake must have been made.'" N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007) (quoting Snyder Realty, Inc. v. BMW of N. Am., Inc., 233 N.J. Super. 65, 69 (App. Div. 1989)).

Abuse and neglect cases are fact sensitive and require "careful, individual scrutiny," N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 33 (2011), and the assessment of the facts "must avoid resort to categorical conclusions." N.J. Div. of

Child Prot. & Permanency v. E.D.-O., 223 N.J. 166, 180 (2015). The burden of proof is on the Division to prove abuse or neglect by a preponderance of the "competent, material and relevant evidence." N.J.S.A. 9:6-8.46(b); see also N.J. Div. of Youth & Family Servs. v. A.L., 213 N.J. 1, 22 (2013).

N.J.S.A. 9:6-8.21(c)(4)(b) defines an "[a]bused or neglected child" as a child under the age of eighteen years

> [W]hose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof . . . .

When there is no evidence of actual harm to the child, like here, "a finding of abuse and neglect can be based on proof of imminent danger and substantial risk of harm." A.L., 213 N.J. at 23. Thus, "the court 'need not wait to act until a child is actually irreparably impaired by parental inattention or neglect.'" N.J. Div. of Youth & Family Servs. v. S.S., 372 N.J. Super. 13, 24 (App. Div. 2004) (quoting In re Guardianship of D.M.H., 161 N.J. 365, 383 (1999)).

Further, a parent "fails to exercise a minimum degree of care when he or she is aware of the dangers inherent in a situation and . . . recklessly creates a risk of serious injury to that

child." G.S. v. N.J. Div. of Youth & Family Servs., 157 N.J. 161, 181 (1999). While mere negligence does not trigger the statute, it is "grossly or wantonly negligent" behavior that falls below the "minimum degree of care." Id. at 178. A person fails to exercise the minimum degree of care when "an ordinary reasonable person would understand that a situation poses dangerous risks and acts without regard for the potentially serious consequences." Id. at 179. "When a cautionary act by the guardian would prevent a child from having his or her physical, mental or emotional condition impaired, that guardian has failed to exercise a minimum degree of care as a matter of law." Id. at 182.

Here, under the totality of the circumstances, we are satisfied that the trial judge's findings are supported by adequate, substantial, and credible evidence. Defendant knowingly allowed his three-year-old son to accompany him while he engaged in an inherently dangerous illegal drug transaction. His willingness to expose the child to this illegal activity, particularly when he had options that he disregarded, placed the child in "imminent danger and substantial risk of harm" and amounts to "grossly or wantonly negligent" behavior that falls below the requisite "minimum degree of care."

Affirmed.