SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3364-15T1

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

J.B.D., Jr.,

Defendant-Appellant,

and

J.N.M.,

Defendant.

IN THE MATTER OF M.R.D., a minor.

Argued January 18, 2018 – Decided April 24, 2018

Before Judges Simonelli, Rothstadt and Gooden Brown.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Morris County, Docket No. FN-14-0056-15.

Andrew J. Shaw, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Andrew J. Shaw, on the briefs).

Kenneth M. Cabot, Deputy Attorney General, argued the cause for respondent (Gurbir S. Grewal, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Kenneth M. Cabot, on the brief).

Rachel E. Seidman, Assistant Deputy Public Defender, argued the cause for minor (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Rachel E. Seidman, on the brief).

PER CURIAM

Defendant, J.B.D., Jr., appeals from the Family Part's order finding that he abused or neglected his daughter, M.R.D. (Miranda),[1] within the meaning of N.J.S.A. 9:6-8.21(c)(4). The court entered the order after it determined that defendant's earlier sexual abuse of his stepdaughter exposed Miranda to a substantial risk of harm. On appeal, defendant argues that (1) the trial judge erred by allowing another, but unrelated, alleged victim of his abuse to testify as to his prior bad acts; (2) the evidence presented at the fact finding hearing did not warrant a finding of abuse or neglect; and (3) his due process rights were violated when the trial court conducted an in camera interview of his stepdaughter. For the reasons that follow, we affirm.

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

The facts adduced at the fact finding hearing are summarized as follows. Miranda was born on February 2013, to her mother J.N.M. (Judy) and defendant.[2] Judy has another child, S.F. (Sally), who was born December 2004. Defendant is not Sally's father.[3] Sally was in the legal and physical custody of her maternal grandmother, who resides in New York, but she would visit her mother and defendant on alternating weekends.

On October 22, 2014, Sally disclosed to her therapist that she was afraid of defendant. She told her therapist that when defendant would lift up either her or Miranda, he would do so by placing his hands in their crotch and touching their vagina over their clothing. Sally, who was almost ten years old, also disclosed that defendant used explicit sexual words when talking to her such as "cock" and "pussy" and he talked to her about sex. On two or three occasions, Sally stated that defendant tried to lick her inner thigh and told her "I want to taste your whole body."

The therapist immediately notified the Division about Sally's disclosure and it launched an investigation. When she was interviewed, Judy reported that about a year ago, defendant

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[2] Judy is not participating in this appeal.

[3] Neither Sally nor her father are parties to this litigation.

disclosed to her that "he had feelings for a child he considered his daughter when she was [thirteen]." She expressed fear for Miranda's safety and stated that she was "already in transition to move out[,]" and that she wanted a restraining order.

The Morris County Prosecutor's Office (MCPO) also initiated an investigation. On October 23, 2014, the MCPO interviewed Sally and she described several instances in which defendant touched her inappropriately, talked to her about "sexual things[,]" and made her feel "uncomfortable." Specifically, she recalled one incident where she "was sitting [on defendant's] lap, and he turned [her] around and started humping [her] like a dog would." Sally also told a detective that she observed defendant pick Miranda up with two fingers between her legs in the same fashion he picked her up. She stated that she also observed him "lick [Miranda's] vagina." Sally explained that these incidents occurred while her mother was sleeping, in the shower, or out shopping.

The MCPO also interviewed defendant. He admitted that he had once licked Sally's hand. When the detective questioned whether he licked Sally or Miranda elsewhere, defendant stated, "[I]t really pisses me off when you fucking tell me that I licked my daughter's pussy." When asked if he had ever been accused of similar behavior in the past, defendant admitted that there was once a child, B.J.F. (Betty), "[t]hat lived in the neighborhood,

who [he] was like a father to. [Betty] was being raised by her grandmother. And she frequented [defendant's] house and was friends with [his] son. And [they] took her wherever [they] went."[4] Defendant stated that she was "always wanting to jump on [his] back, always wanting to have piggyback rides, stuff like that." He acknowledged that the Division investigated his relationship with Betty, but he "walked away from that unscathed."

On October 30, 2014, defendant was arrested and charged with first-degree aggravated assault and child endangerment. Additionally, a temporary restraining order (TRO) was issued, prohibiting defendant from contacting Judy, Miranda or Sally, but Judy later obtained the order's dismissal.

On January 5, 2015, the Division was contacted once again, this time due to concerns for Judy's sobriety. The local police department reported that it had been contacted by Judy and when police arrived, they found her intoxicated. Judy revealed to police that she had been consuming vodka for the past five days while caring for Miranda because she was distraught by the allegations against defendant. That same day, the Division conducted an emergency removal of Miranda after determining that Judy could not safely care for the child in her condition.

[4] Judy is not the boy's mother.

The Division completed its investigation of the allegations against defendant and concluded they were substantiated. According to its findings, both Miranda and Sally had been the victims of defendant's abuse. It filed a verified complaint for Miranda's custody, which the court granted. In a later proceeding, the court ordered that while custody of Miranda should continue with the Division, Judy, but not defendant, would be permitted supervised visitation.

Judy later stipulated to the allegations of abuse against her, specifically that she had been intoxicated after consuming vodka for five days straight, that she was in "an agitated mental state stemming from having recently learned that her husband had sexually abused both of her daughters[,]" and that such circumstances presented a substantial risk of harm to Miranda.

A fact finding hearing commenced as to the allegations against defendant before Judge Maritza Berdote Byrne. The Division presented five witnesses: Sally, MCPO Detective James Bruno, Betty, caseworker Roberta Murdock-Liuzzi, and the Division's expert, Dr. Anthony D'Urso. Defendant did not testify or call any witnesses.

Sally testified, over defendant's objection, in chambers. Before she testified, defendant argued that her testimony would be unduly prejudicial as the Division was not seeking findings

relative to Sally and because she was not his child, nor was she in his or Judy's legal or physical custody at the time of the alleged incidents involving Miranda. Judge Berdote Byrne overruled these objections, finding that evidence of abuse of one child can be relevant to the abuse of another child, and that there was no undue prejudice to defendant. After the judge determined that Sally's testimony was admissible, all parties consented to her testimony being conducted in chambers with counsel present and to the procedure to be followed in her questioning by the judge.

Sally testified that defendant talked to her about sex, and that he touched her crotch area over her clothing on several occasions, and otherwise acted inappropriately. With regard to Miranda, Sally testified that she observed defendant touching her on three occasions and that on one occasion, while Miranda was standing in the bathtub, he was "rubbing" her crotch with his palm "up and down" and "[b]ack and forth" for "[thirty] seconds."

Detective Bruno, who had conducted the separate interviews of Sally and defendant, testified about his investigation and, during the course of his testimony, the videotape of Sally's and defendant's interviews were played for the judge. Murdock-Liuzzi, the Division's intake caseworker testified about the Division's

records and its investigative findings that the allegations against defendant were substantiated.

Dr. D'Urso, section chief and supervising psychologist at the Audrey Hepburn Children's House, a regional child abuse facility at Hackensack University Medical Center, testified that after his review of various documents and interview of Sally, the Division's finding of her sexual abuse was clinically supported. He explained that his finding was based on:

> [Sally's] consistent disclosures. She had talked about detail in a variety of ways. One of the things in an evaluation you wouldn't want to see is the same rote presentation, especially with a child who's ten, who would have a larger vocabulary than a five, six, or seven year old. She was able to attach some of the sexual behavior to reactions she may have, or intent, or at least her perception of intent, and so —- on [defendant's] part I should say.
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> So she talked about the sexual behavior. She talked about witnessing her sister's behavior. She talked about the fact that she was reactive to it. . . . By her talking about the sexual abuse in different ways, that would suggest to us that she was talking about events that she experienced rather [than] events that she was told about, or suggested to tell about.

He also explained that when a perpetrator sexually abuses a child, one cannot say that the risk is limited to just that child or the "four corners" of that abuse.

Betty, who was nineteen years old at the time she appeared, testified that when she was about six or seven until the age of ten or eleven, defendant would babysit her. She testified that on one occasion, defendant got in bed with her wearing just boxers and a shirt, and that she could feel his penis from behind. She also described other incidents that occurred in defendant's car when he would pick her up from soccer practice and swim practice. Betty testified that defendant would ask her to touch his groin area, tell her that he loved her, and that he wanted to marry her when she was older. He also warned her that if she reported him, he would go to jail, and when he got out of jail, he would find her and hurt her or kill her.

On October 29, 2015, Judge Berdote Byrne placed her oral decision on the record, finding that the Division proved, by a preponderance of the evidence presented, that, although defendant had not actually molested Miranda, she was still an abused or neglected child, as defendant exposed Miranda to imminent danger and a substantial risk of harm based on his sexual abuse of Sally.

The judge made her determination after finding the Division's witnesses to be credible and placing her findings as to each of them on the record. As to Sally, the judge acknowledged that she

> did express some confusion with respect to recollection. She stated she had difficulty with memory. During her testimony before the

> [c]ourt and on the videotape of the [MCPO] interview she stated she tends to be forgetful. Nevertheless during the [c]ourt's interview, she was adamant she was being truthful and reiterated her statement to the [MCPO] saying, "Believe me I wouldn't lie about something as serious as this."

With respect to Betty, Judge Berdote Byrne found her to be "very clear in her testimony" and noted that "although she demonstrated outward calm, she did not look at [defendant] the entire time she testified, and the [c]ourt witnessed the rhythmic clenching of her jaw throughout her testimony." The judge found her testimony to be "credible and compelling."

Based on the credible evidence, Judge Berdote Byrne was not convinced that defendant had sexually abused Miranda as described by Sally. Although she found Sally "unmotivated to lie," the judge was not persuaded "that what [Sally] witnessed were not acts of caring for and bathing by [defendant]" and therefore, they were not for the purpose of sexual stimulation. However, the judge concluded that defendant "does present a current substantial risk [of] harm to [Miranda] because the Division . . . proved by a preponderance of the evidence that [defendant] sexually abused [Sally]." Relying on N.J.S.A. 9:6-8.46(a),[5] the judge concluded

[5] The statute provides in pertinent part:

that because it was proven that defendant sexually abused Sally while he was her caretaker, he also presented a substantial risk of harm to Miranda. She found corroboration in Sally's statements of sexual abuse and her "precocious sexual knowledge[,]" which were consistent with Dr. D'Urso's expert testimony that clinically found that Sally had been the victim of sexual abuse by defendant. Judge Berdote Byrne also found that defendant sexually abused Betty, but stated that this finding was not a basis for her decision.

The judge entered a fact finding order on October 29, 2015, stating that defendant abused or neglected Miranda. Miranda's physical custody was given back to her mother and the litigation was terminated by court order on February 4, 2016. This appeal followed.

On appeal, defendant argues the following:

> In any hearing under this act, . . . proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the responsibility of, the parent or guardian and . . . previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence; provided, however, that no such statement, if uncorroborated, shall be sufficient to make a fact finding of abuse or neglect.
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> [N.J.S.A. 9:6-8.46(a)(1) and (4).]

POINT I:

THE TRIAL COURT'S FACT FINDING DECISION MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED WHEN IT PERMITTED [BETTY] TO TESTIFY IN VIOLATION OF N.J.R.E. 403 AND N.J.R.E. 404(b).

A. THE LEGAL STANDARD.

B. THE VIOLATIONS OF N.J.R.E. 403 AND N.J.R.E. 404(b).

POINT II:

THE TRIAL COURT'S FACT FINDING DECISION MUST BE REVERSED BECAUSE THE EVIDENCE PRESENTED AT THE FACT FINDING HEARING DID NOT SUPPORT A FINDING OF ABUSE OF NEGLECT.

POINT III:

THE TRIAL COURT'S FACT FINDING DECISION MUST BE REVERSED BECAUSE [DEFENDANT'S] DUE PROCESS RIGHTS WERE VIOLATED WHEN THE TRIAL COURT CONDUCTED AN IN CAMERA INTERVIEW OF [SALLY] WITHOUT HIM PRESENT RATHER THAN REQUIRING HER TO TESTIFY IN COURT WITH HIM PRESENT (Not Raised Below).

POINT IV:

[DEFENDANT'S] NAME MUST BE REMOVED FROM THE CENTRAL REGISTRY OF ABUSE/NEGLECT PERPETRATORS (Not Raised Below).

We begin by acknowledging that the scope of our review is limited. N.J. Div. of Child Prot. & Permanency v. Y.A., 437 N.J.

Super. 541, 546 (App. Div. 2014). We will uphold the Family judge's factual findings and credibility determinations if they are supported by substantial, credible evidence. N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007). Accordingly, we will only overturn the judge's findings if he or she "went so wide of the mark that the judge was clearly mistaken." Ibid. (citing In re Guardianship of J.T., 269 N.J. Super. 172, 188-89 (App. Div. 1993)); N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 293 (2007). We do not, however, give any "special deference" to the Family Part's interpretation of the law. D.W. v. R.W., 212 N.J. 232, 245 (2012) (citing N.J. Div. of Youth & Family Servs. v. I.S., 202 N.J. 145, 183 (2010)). Consequently, we apply a de novo standard of review to legal issues. Id. at 245-46.

The adjudication of abuse or neglect is governed by Title 9, which is designed to protect children. N.J.S.A. 9:6-8.21 to -8.73; N.J.S.A. 9:6-8.8. Under Title 9, a child is abused or neglected if:

> [a] parent or guardian . . . creates or allows to be created a substantial or ongoing risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted loss or impairment of the function of any bodily organ; . . . commits or allows to be committed an act of sexual abuse against the

> child; . . . or a child whose 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 or guardian . . . 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, including the infliction of excessive corporal punishment[.]
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> [N.J.S.A. 9:6-8.21(c)(2), (3), and (4)(b).]

The statute does not require that the child experience actual harm. N.J.S.A. 9:6-8.21(c)(4)(b). Instead, a child is abused or neglected if his or her physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired. Ibid. "In the absence of actual harm, a finding of abuse and neglect can be based on proof of imminent danger and substantial risk of harm. A court 'need not wait to act until a child is actually irreparably impaired by parental inattention or neglect.'" N.J. Dep't of Children & Families, Div. of Youth & Family Servs. v. A.L., 213 N.J. 1, 23 (2013) (citations omitted).

A judge may consider a parent's past actions as indicative of his or her future ability to effectively parent. N.J. Dep't of Children & Families, Div. of Youth & Family Servs. v. C.H., 414 N.J. Super. 472, 482 (App. Div. 2010). Furthermore, "[p]redictions as to probable future conduct can only be based upon past performance. . . . Evidence of parents' fitness or unfitness can

be gleaned not only [from] their past treatment of the child in question but also from the quality of care to other children in their custody." Ibid. (third alteration in original) (quoting N.J. Div. of Youth & Family Servs. v. Robert M., 347 N.J. Super. 44, 68 (App. Div. 2002)). "[P]roof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of . . . the parent or guardian[.]" N.J.S.A. 9:6-8.46(a)(1).

Applying these guiding principles, we conclude defendant's arguments are without merit. We affirm substantially for the reasons expressed by Judge Berdote Byrne in her comprehensive and thoughtful oral decision, which was firmly supported by substantial, credible evidence and was legally correct. We add only the following comments.

Contrary to defendant's assertion that N.J.R.E. 404(b) barred Betty's testimony of defendant's prior bad acts, in Title 9 proceedings, evidence of a parent or guardian's abuse of another child in their care is admissible to establish a risk of harm to the child who is the subject of the action before the court. See N.J. Div. of Youth & Family Servs. v. I.H.C., 415 N.J. Super. 551, 573-74 (App. Div. 2010). The fact that Betty was not his child did not alter the admissibility of her testimony as, by his own statement to the MCPO, defendant was "like a father to [her]."

According to Betty, defendant served as a guardian while he babysat her and picked her up from her athletic practices. She spent overnights with him in his home where her grandmother placed her in defendant's "care, custody [and] control[,]" see N.J.S.A. 9:6-8.21(a), while her grandmother was at a work. There was no error in allowing Betty's testimony and, in any event, Judge Berdote Byrne specifically stated that in reaching her ultimate decision, she did not rely upon Betty's experience at all.

Finally, defendant argues his due process rights were violated when the judge conducted an in camera interview of Sally in violation of N.J.S.A. 2A:84A-32.4. Defendant did not raise this objection to Judge Berdote Byrne. Considering his challenge now, we apply the "plain error" standard, see R. 2:10-2, and conclude, again, his argument is meritless as there was no error.

In Title 9 matters, the level of confrontation of a child victim appearing as a witness may be circumscribed by Rule 5:12-4(b) or N.J.S.A. 2A:84A-32.4. The statute and rule limit confrontation when the witness is a child, particularly a child victim of sexual abuse. N.J. Div. of Youth & Family Servs. v. J.B., 120 N.J. 112, 126 (1990). "The protection of children from undue trauma associated with testifying is an important public policy goal." State v. Smith, 158 N.J. 376, 386 (1999) (citing Coy v. Iowa, 487 U.S. 1012, 1025 (1988)). Thus, "[t]rial judges

have broad discretion in abuse and neglect cases . . . to conduct a private examination of a child." N.J. Div. of Youth & Family Servs. v. L.A., 357 N.J. Super. 155, 168 (App. Div. 2003) (citing N.J. Div. of Youth & Family Servs. v. S.S., 185 N.J. Super. 3, 7 (App. Div. 1982)); see also R. 5:12-4(b). "The purpose of a private interview with the child is to afford the trier of fact the opportunity to assess" the child's credibility, his or her "powers of communication and observation, and [his or her] demeanor." L.A., 357 N.J. Super. at 168.

N.J.S.A. 2A:84A-32.4 sets forth an alternative means of securing a child-victim's testimony out of the normal courtroom setting. It states, in pertinent part:

> a. [I]n any action alleging an abused or neglected child . . ., the court may, on motion and after conducting a hearing in camera, order the taking of the testimony of a victim or witness on closed circuit television at the trial, out of the view of the . . . defendant, or spectators upon making findings as provided in subsection b. of this section.
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> b. An order under this section may be made only if the court determines by clear and convincing evidence that there is a substantial likelihood that the victim or witness would suffer severe emotional or mental distress if required to testify in the presence of spectators, the defendant, the jury, or all of them. . . .
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> . . . .

> d. The defendant's counsel shall be present in the same room as the victim or witness at the taking of testimony on closed circuit television. The defendant and the defendant's attorney shall be able to confer privately with each other during the testimony by a separate audio system.
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> [N.J.S.A. 2A:84A-32.4(a)(1), (b), and (d).]

For the first time on appeal, defendant argues that Sally's interview failed to comply with N.J.S.A. 2A:84A-32.4 because Judge Berdote Byrne failed to make specific findings that justified an in camera hearing, instead of one conducted in court subject to cross-examination directly, and not indirectly through the judge. However, while defendant objected to Sally testifying at all, once it was permitted, he did not object to the procedure[6] used by the judge, nor did defendant ever assert an objection to the nature or adequacy of the questions posed to the child. Rather, defendant consented to the in camera testimony and the specific procedure that was employed by the judge in asking Sally questions. Under these circumstances, there was no error in allowing Sally to testify in chambers.

[6] Prior to Sally's testimony, all parties submitted questions to Judge Berdote Byrne. Those questions were then asked by the judge to Sally in the presence of counsel, but outside the presence of the parties. Breaks in the interview were also taken to allow requests for additional questions to be communicated by counsel to the judge.

Even if conducting the in camera interview was erroneous, defendant's contention would be barred by the doctrine of invited error. "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)). "[C]onsistent with the doctrine of invited error, on appeal, the [defendant] may not protest the [procedure for the testimony's] admission . . . after he agreed to [the procedure] at trial." Id. at 332. Nevertheless, an appellate court should "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). Here, we discern no miscarriage of justice, "plain error[,]" see R. 2:10-2, or any error at all.

Affirmed.