RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3961-19

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

S.C., J.S., and L.M. (deceased),

Defendants,

and

B.L., JR.,

Defendant-Appellant.

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IN THE MATTER OF M.A.S.,[1]
A.M., and B.S.L., minors.

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Submitted February 14, 2022 – Decided April 19, 2022

Before Judges Messano and Accurso.

[1] The court received a non-participation letter from the Law Guardian for M.A.S. expressing no position on the appeal.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Hudson County, Docket No. FN-09-0254-19.

Joseph E. Krakora, Public Defender, attorney for appellant (Beth Anne Hahn, Designated Counsel, on the briefs).

Matthew J. Platkin, Acting Attorney General, attorney for respondent (Jane C. Schuster, Assistant Attorney General, of counsel; Mary L. Harpster, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors A.M. and B.S.L. (Meredith Alexis Pollock, Deputy Public Defender, of counsel; Dana Citron, Designated Counsel, on the brief).

PER CURIAM

This Title 9 litigation commenced when the Division of Child Protection and Permanency (the Division) filed a complaint seeking care and supervision of M.A.S. (Mia), the eleven-year-old daughter of defendant's girlfriend, S.C. (Susan), Mia's seven-year-old brother, A.M. (Albert), and her one-year-old brother, B.S.L. (Bobby), and restraining defendant, B.L., Jr., from any contact

with the children.[2] A February 13, 2019 incident precipitated the Division's action.

Susan came home from work unexpectedly early and found Mia and defendant under the covers in a bed Susan shared with defendant. Susan later told the Division that Mia hurriedly jumped out of the bed; defendant remained under the covers but turned away from Susan. Although Mia initially denied anything happened, after Susan falsely told the child there were cameras in the bedroom, Mia told her mother defendant sexually abused her. Susan disclosed that to a friend, who urged her to report the incident to law enforcement.

The Hudson County Prosecutor's Office (the HCPO) initiated an investigation and secured videotaped statements from Mia and defendant. He denied Mia's accusations. Defendant was arrested, indicted, and charged with sexual assault and endangering a child.

On May 8, 2019, during an in-home visit by the Division, Mia told the caseworker she was "sorry, [she] lied" about defendant touching her, saying defendant "never did anything to [her]." HCPO investigators videotaped a

[2] We use initials and pseudonyms pursuant to Rule 1:38-3(d)(12). Defendant and Susan were never married, but they lived together with the three children. Bobby was their biological son, and Mia and Albert were Susan's children from prior relationships.

second interview of Mia in which she recanted her initial allegations. In August, the State dismissed the criminal charges against defendant, and he was released from custody. The court granted defendant supervised visitation with Bobby but barred him from having any contact with Mia or Albert.

The fact-finding hearing, see N.J.S.A. 9:6-8.44, took place over three days in October and December 2019. The judge heard the testimony of Dr. Kirsten Byrnes, staff psychologist at the Audrey Hepburn Children's House (AHCH), who interviewed Mia after the original accusations and again after her recantation, and Madeline Liriano, the Division caseworker. The judge also viewed both of Mia's videorecorded statements to HCPO investigators.

The judge's December 10, 2019 order found defendant abused or neglected Mia pursuant to N.J.S.A. 9:6-8.21(c) "by sexually abusing [Mia] thereby placing her at risk of harm." It was supported by a written decision that we discuss below.

On May 12, 2020, the judge entered an order terminating the litigation. At the time, the three children were residing with Susan. Defendant was granted joint legal custody of Bobby and permitted unsupervised visitation with his son. The order continued to restrain defendant from having any contact with Mia and Albert.

Before us, defendant challenges the December 2019 fact-finding order, contending Mia's testimony was required because her allegations were "so inextricably dependent upon witness credibility." He also argues the Division failed to present evidence that sufficiently corroborated Mia's allegations of sexual abuse by defendant. See N.J.S.A. 9:6-8.46(a)(4) ("[P]revious 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."). Lastly, defendant contends the judge "implicitly relied" upon Child Sexual Abuse Accommodation Syndrome (CSAAS) testimony from Dr. Byrnes to bolster her conclusion defendant sexually abused Mia.

The Division and the Law Guardian for Albert and Bobby urge us to affirm the fact-finding order. They contend Mia's statements were properly admitted in evidence, and defendant had no "right to confrontation" or otherwise waived his right to have Mia testify at the hearing. Both also argue there was sufficient corroboration of Mia's allegations of sexual abuse, and Dr. Byrnes did not provide prohibited CSAAS testimony, or, if she did, the judge did not "even implicitly" rely on the testimony.

We have considered the arguments in light of the record and applicable legal standards. We reverse and remand for further proceedings consistent with this opinion.

I.

"[A]ppellate courts 'defer to the factual findings of the trial court because it has the opportunity to make first-hand credibility judgments about the witnesses who appear on the stand; it has a feel of the case that can never be realized by a review of the cold record.'" N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 342–43 (2010) (quoting N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008)). Moreover, "[b]ecause of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding." Cesare v. Cesare, 154 N.J. 394, 413 (1998).

However, "[t]here is an exception to that general rule of deference: Where the issue to be decided is an 'alleged error in the trial judge's evaluation of the underlying facts and the implications to be drawn therefrom,' we expand the scope of our review." N.J. Div. of Youth & Fam. Servs. v. G.L., 191 N.J. 596, 605 (2007) (quoting In re Guardianship of J.T., 269 N.J. Super. 172, 188–89 (App. Div. 1993)). When the issue presented turns on a legal conclusion derived

from the Family Part's factfinding, "we are not required to defer." N.J. Div. of Youth & Fam. Servs. v. A.R., 419 N.J. Super. 538, 542–43 (App. Div. 2011).

"In general, 'Title 9 controls the adjudication of abuse and neglect cases.'" Dep't of Child. & Fams., Div. of Child Prot. & Permanency v. E.D.-O., 223 N.J. 166, 177 (2015) (quoting M.C. III, 201 N.J. at 343). In pertinent part, Title 9 defines an "[a]bused or neglected child" as one under the age of eighteen "whose parent or guardian . . . commits or allows to be committed an act of sexual abuse against the child." N.J.S.A. 9:6-8.21(c)(3).

At a fact-finding hearing, "any determination that the child is abused or neglected . . . must be based on a preponderance of the evidence and . . . only competent, material and relevant evidence may be admitted." N.J.S.A. 9:6-8.46(b); see also N.J. Div. of Youth & Fam. Servs. v. J.Y., 352 N.J. Super. 245, 262–63 (App. Div. 2002). And, as already noted and critical to our consideration of this appeal, at any Title 9 hearing, prior statements "made by the child relating to any allegations of abuse . . . shall be admissible . . . provided . . . no such statement, if uncorroborated, shall be sufficient to make a fact finding of abuse . . . ." N.J.S.A. 9:6-8.46(a)(4).

II.

Because Mia's statements were the only direct proof of defendant's alleged sexual abuse, the judge correctly focused her attention upon corroboration of those statements. Citing our decision in New Jersey Division of Youth & Family Services v. Z.P.R., the judge noted that the corroborative evidence only needed to support the out-of-court statements; it "need not relate directly to the alleged abuser." 351 N.J. Super. 427, 436 (App. Div. 2002). The judge also properly observed that "age-inappropriate sexual behavior could provide the necessary corroboration required by N.J.S.A. 9:6-8.46a(4)." Ibid.

In her initial statement to HCPO investigators, Mia said she was sexually abused by defendant during the year prior to February 2019, but she recanted an earlier allegation made to her mother when confronted by defendant. Mia said defendant sexually abused her at least three times, the most recent being the day before, when she told her mother, which resulted in the HCPO's involvement.[3] Mia said defendant made her perform fellatio and licked her breasts and vagina, and she described the details of the February 13, 2019 incident for investigators.

[3] At other points in her statement, Mia said the sexual assaults happened on more than three occasions.

Three months later, Mia gave her second statement to HCPO investigators. She recanted her allegations, saying she fabricated them because she was jealous of defendant's close relationship with Albert and Bobby. Mia claimed she got ideas about what to say from a friend who was abused by her father. Mia even offered to take a lie detector test. But, when confronted by investigators with the possibility that defendant might return home because she recanted, Mia became very upset and emphatically stated, "[M]y mom is never going to let that man back . . . he's not moving back . . . mom swore on her life that he's not coming back . . . my mom would not do that to me." Mia explained that when her mother walked in and found her in bed with defendant, Susan "flipped out." Nonetheless, despite vigorous questioning by the investigators, Mia claimed she and defendant were only play wrestling.

Dr. Byrnes was permitted to describe in detail statements Mia made during her initial evaluation at the AHCH. Mia described "several sexual acts . . . occurring at regular frequency. . . . She[] discuss[ed] a lot of . . . the banter or the talking around it[,] which suggests that it's a little bit more nuanced th[a]n something that you're seeing or a conversation that you've overheard . . . ." The judge sustained defense counsel's objection to the doctor "interpreting what the child said as opposed to indicating what the child said."

At a later point, when the doctor said she had "clinically supported sexual abuse" of Mia, defense counsel again objected. He noted the doctor's evaluation was "to assess [Mia's] social and emotional functioning relative to the accusations, and it was not for the purposes of corroborating any out-of-court statements." The judge agreed, but said she would allow the doctor "to give her opinion . . . because that's how she made her recommendations." She was "not going to use . . . that she found there was sexual abuse. . . . [The judge was] only going to allow [Dr. Byrnes] to testify as to what her recommendations were and what the treatment plan would be."

Despite sustaining these objections and apparently agreeing the doctor's testimony should be circumscribed, the judge permitted Dr. Byrnes to explain again that Mia "had advanced sexual knowledge," a "very nuanced understanding of some of the sexual banter that goes along" with "the progression of . . . grooming." Mia "relay[ed] those conversations in a way that didn't seem like she had viewed it somewhere or . . . engaged in it somewhere or heard it secondhand from somewhere." This time, the judge overruled defense counsel's objection.

After Dr. Byrnes completed her testimony, the Division sought to move into evidence the reports the doctor authored after her initial evaluation of Mia

and the second evaluation that followed Mia's recantation.[4] Defense counsel objected, but the judge overruled the objection. She admitted both reports, limited only to "what [Mia] said . . . [and] what [the doctor's] observations" were, and "any symptomology" Mia evidenced.

The judge also said she would view both video recordings of Mia's statements to investigators but noted, "If [Mia] came in to testify, I may not have allowed the second evaluation[,] but she's not coming in, so." The following colloquy ensued:

> Defense counsel: I have a position with respect to whether [y]our [h]onor can make a credibility determination by simply watching videos but I'll leave that until —
>
> Judge: Well, I don't know if I'm going to.
>
> Defense counsel: Okay.
>
> Judge: But they're going to show it to us.
>
> Defense counsel: Because the first video there's no opportunity for cross examination with respect to the first video —
>
> Judge: I understand.

[4] The Division never arranged counseling recommended by Dr. Byrnes before Mia's recantation. In her written opinion, the judge did not find the doctor's "second interview to be relevant or persuasive."

> Defense counsel: — to assist [y]our [h]onor with respect to credibility.
>
> [(Emphasis added).]

The Deputy Attorney General representing the Division interrupted, asking if defense counsel was claiming "[Mia's] all of a sudden credible in the second [video]," the recantation. Defense counsel responded he was not "making that determination," but it was "a question . . . whether the Division can prove what version is credible[,] and what information the [c]ourt can rely upon." He reserved the right to raise the issue as "part of [his] summation," and he did.

In his closing statement, citing New Jersey Division of Youth & Family Services v. H.B., 375 N.J. Super. 148 (App. Div. 2005), defense counsel argued that given Mia's conflicting statements to investigators, "testimony of the child [was] necessary to resolve the issue of credibility." See id. at 184 (concluding judge erred in dismissing the Division's complaint by failing to conduct an in camera interview of the alleged child victim of sexual abuse and improperly relying on the mother's hearsay version of the child's recantation and reasons for fabricating her initial allegations).

Defense counsel also noted the lack of any opportunity to cross-examine Mia. He argued during the first interview the HCPO detective "was . . . only looking to establish facts to . . . support a finding of abuse," but in the second

interview the "objective was obvious," i.e., "to get [Mia] to recant her recantation." Counsel argued the decision "comes down to the credibility of this child and it can only be determined by hearing the child's testimony." He further argued statements the child made to Dr. Byrnes were for treatment purposes, and, citing New Jersey Division of Child Protection & Permanency v. N.B., 452 N.J. Super. 513 (App. Div. 2017), asserted the doctor was prohibited from opining about "the trustworthiness of a child's hearsay statement." See id. at 523 ("Our courts have rejected the concept that mental health professionals may opine about the trustworthiness of a child's hearsay statements." (citing State v. J.Q., 130 N.J. 554, 582–83 (1992))).

Defense counsel also challenged any claim that Mia evidenced precocious sexual knowledge that corroborated her initial claim of sexual abuse by defendant. Counsel observed that during her second interview with detectives, Mia sought to talk about sexual text messages and pictures she received on her cell phone, but the investigators were not interested. Counsel noted that Mia told investigators, Liriano, and Dr. Byrnes about her friend, who had been sexually assaulted by her father and spoke with Mia about the abuse on a daily basis.

In her written opinion, the judge recounted the evidence adduced at the hearing, including Liriano's testimony regarding Mia's original accusation and her subsequent recantation, the different versions of events in Mia's two videotaped statements, and Dr. Byrnes' testimony, including statements Mia made to the doctor during both interviews. The judge noted after the doctor's first interview, she diagnosed Mia with post-traumatic stress syndrome (PTSD).

The judge concluded Mia possessed precocious knowledge of sexual activity, "well[]beyond what an [eleven] year old would reasonably know," as demonstrated by the "idiosyncratic detail" contained in her original statement to investigators. The judge said Mia's "emotional response . . . avoidance, intrusive ideation, irritability and flashbacks" supported Dr. Byrnes's "diagnosis of PTSD." This evidence sufficiently corroborated Mia's initial claim of sexual abuse by defendant. See, e.g., Z.P.R., 351 N.J. Super. at 436 ("[E]vidence of age-inappropriate sexual behavior could provide the necessary corroboration required by N.J.S.A. 9:6-8.46(a)(4).").

> [Mia's] idiosyncratic detail relating to taste and pain, stating ejaculate is akin to slime; plus her advanced sexual knowledge and language, "let me hit it from the back" noting that [defendant's] penis was erect and knowledge of ejaculation without prior exposure to pornography or sexual behaviors, given her age, all provide corroboration for her out-of-court statement that she was sexually abused. [Mia's] level of detail

> was not as if she were merely repeating what her friend had disclosed to her. Rather, it was a detailed recitation of what she endured . . . . Most telling was her reaction to the second detective when she told her that now her stepfather may return to the home. She emphatically stated that her mom swore on her life that he is not coming back.

The judge entered the order under review.

III.

As noted, the judge found the Division proved by a preponderance of the evidence that defendant sexually abused Mia, a finding predominantly tethered to Mia's initial out-of-court statements to HCPO investigators and Dr. Byrnes. Pursuant to N.J.S.A. 9:6–8.46(a)(4), these statements were insufficient to make such a finding of abuse without other corroborating evidence. See N.J. Div. of Child Prot. & Permanency v. A.D., 455 N.J. Super. 144, 157 (App. Div. 2018) ("[T]he mere repetition and consistency of [a child's] statements are insufficient to support a finding of corroboration under N.J.S.A. 9:6-8.46(a)(4)."); N.B., 452 N.J. Super. at 522 ("Some direct or circumstantial evidence beyond the child's statement itself is required.").

Relying on our opinion in Z.P.R., the judge found Mia possessed a precocious knowledge of sex that internally corroborated the allegations of abuse by defendant. However, in her written opinion, the judge never discussed

Mia's statements to investigators about "the whole phone situation," i.e., when Susan discovered sexually explicit messages on Mia's cell phone. The Division's investigative summary, which was in evidence, revealed Susan told investigators of finding "the cell phone she had been looking for throughout the investigation." Susan also acknowledged Mia was active on different social media platforms, "sending inappropriate messages and pictures of herself . . . to different men." Susan said the messages dated "back to when [Mia] was [nine years] old," and included photos of penises. Further, during her testimony, Dr. Byrnes confirmed that as to "some of" the "information that [Mia] gave [her,] . . . she could possibly have observed simply by accessing information on a cell phone[.]" This demonstrates there was a legitimate dispute about the source of the corroborating evidence the judge primarily relied — Mia's precocious sexual knowledge.

In New Jersey Division of Youth & Family Services v. L.A., the trial judge relied upon hearsay statements the defendant's thirteen-year-old daughter made to the Division's caseworker to find the defendant invited the child's father, who had earlier sexually abused the child and was barred from visiting, into the family's apartment. 357 N.J. Super. 155, 159–63 (App. Div. 2003). The judge

denied the defendant's request to conduct an in camera interview of the child. Id. at 160.

We noted that the judge found the child's hearsay statements credible in determining the defendant directly violated prior orders entered in the litigation. Id. at 168. Recognizing the trial judge's broad discretion in conducting examinations of child abuse victims, we nevertheless concluded "the trial judge mistakenly exercised her discretion to rely solely on the reports of [the Division's] workers." Ibid. We found, in particular, "[t]he interview with [the child was] critical because, with her prior statement excluded, the finding of abuse and neglect is thinly supported." Id. at 169. We remanded for further proceedings so the child could "testify under such conditions as are in her best interest" about the events in question. Ibid.

Here, Mia recanted her allegations not once, but three times — to Liriano, the HCPO investigators and to Dr. Byrnes. As noted, the corroboration of her allegations of abuse rested primarily upon sexual precociousness, the source of which was essentially disputed in the evidence. Furthermore, although the judge said the doctor's testimony was limited to narrowly defined permitted uses, and specifically not that Mia was in fact the victim of sexual abuse, the judge's written opinion relied, in part, upon Dr. Byrnes' medical opinions that Mia

suffered from PTSD. The judge's opinion mirrored Dr. Byrnes' opinion that Mia's "nuance[d]" description of sexual banter and physical sensations demonstrated her precocious knowledge did not arise from other sources, such as a friend's recitation of abuse at the hands of her father, or the internet.

Moreover, while unlike in L.A., where the judge relied on hearsay in Division reports, here, the judge had the opportunity to view the video recorded statements. Yet, defense counsel correctly noted neither he, nor the judge, had the opportunity to ask questions of the child. The recorded statements confined the judge's ability to determine the credibility of Mia's initial allegations of sexual abuse.

We recognize defendant never specifically requested Mia be produced as a witness. However, he objected to the judge determining the credibility of Mia's allegations by only viewing the video statements. We are unsure what the judge meant when she responded, "Well, I don't know if I'm going to." However, the judge did find Mia's initial allegations credible and corroborated without the child's live testimony.

We conclude that pursuant to Rule 5:12-4(b), the judge should have produced Mia for live testimony under circumstances she deemed appropriate. We are cognizant of the need to scrupulously avoid possible re-victimization of

child sexual abuse victims by requiring their testimony. See, e.g., N.J. Div. of Child Prot. & Permanency v. C.W., 435 N.J. Super. 130, 142 (App. Div. 2014) ("[P]ublic policy requires the judiciary to prevent further victimization or traumatization of young children called to testify in court proceedings."). However, Mia is now fourteen years of age, one year older than was the child victim in L.A. We are certain the judge, experienced in Title 9 litigation, will "craft procedures acceptable to the parties," consistent with our holding in C.W., to avoid any further trauma and that satisfy defendant's due process rights. Id. at 144.

We reverse the order under review and remand the matter for further proceedings consistent with this opinion. We leave the conduct of the remand proceedings to the discretion of the judge. [5]

Reversed and remanded. We do not retain jurisdiction.

[5] We have already expressed our reservations about the scope of Dr. Byrnes' testimony, and, we urge the judge to consider our comments if she again relies on the doctor's testimony in deciding the relevant issues on remand. However, we agree with the Division and the Law Guardian's assertion that contrary to defendant's argument, the doctor's testimony did not encompass prohibited CSAAS opinions. The argument requires no further comment in a written opinion. R. 2:11-3(e)(1)(E).