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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF L.M. and H.C.:	)	
	)	
ELKHART OFFICE OF FAMILY AND CHILDREN,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 20A05-0812-JV-757
	)	
MAGEE MITCHELL, MATTHEW COPSEY And RACHELLE COPENHAVER,	)	
	)	
Appellees-Respondents.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0806-JC-157 & 20C01-0806-JC-158

April 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

The Elkhart County Department of Child Services ("DCS") appeals the juvenile court's dismissal of its petition alleging that L.M. and H.C. are children in need of services ("CHINS"). DCS raises three issues, which we consolidate and restate as whether the juvenile court's conclusion that the evidence was insufficient to prove that L.M. and H.C. were CHINS was clearly erroneous. We affirm.

The relevant facts follow. L.M., born on June 27, 2006, is the daughter of Magee Mitchell and James Lay. L.M. was living with Mitchell and Mitchell's boyfriend, Matthew Copsey. Copsey's daughter, H.C., born on November 27, 2000, would stay with Copsey and Mitchell on weekends, and with her mother, Rachelle Copenhaver, on weekdays. On June 5, 2008, L.M. was jumping on a bed at home, fell, and broke her clavicle. She also had bruising on her face. Mitchell took L.M. to the hospital for treatment.

On June 8, 2008, Copsey picked L.M. up from a high chair and set her on the ground when her leg buckled and she fell. Mitchell and Copsey iced L.M.'s leg for about an hour and then took her to the emergency room. It was later determined that L.M. had a "spiral type fracture" of the femur and that "there was some displacement to the fracture," which, according to the treating physician, means that "there wasn't just a crack in the bone, but the two bones were separated." Transcript at 11.

On June 9, 2008, L.M. was placed in protective custody with her maternal grandmother. On June 16, 2008, DCS filed a petition alleging that L.M. and H.C. were CHINS under Ind. Code §§ 31-34-1-1 & 31-34-1-2 with respect to Mitchell, Copsey, and Copenhaver (collectively, "the Parents"). At the hearing on the petition, Dr. David

Cutcliffe, the orthopedic surgeon who treated L.M. for her broken femur, testified that L.M.'s femur was "quite strong" and that it would take "quite a bit of force" to break it. Id. at 12. He testified that L.M.'s having been set on the ground from a high chair would not have generated enough force to cause the injury. He testified that the injury could have been sustained a week earlier but that there would have been "definite signs" that something was wrong with her leg, including foreshortening of the leg, swelling, pain, and crying. Id. On cross examination, Dr. Cutcliffe agreed that the injury could have been caused by an accident, particularly if L.M. had "landed hard jumping off the bed." Id. at 17. Mitchell testified that L.M. was "in a little bit of pain" and "walked with a little bit of a limp" a couple of days before her leg buckled. Id. at 73. Copsey testified that L.M. was in pain and crying "ever since she broke her bone on her shoulder." Id. at 61.

After the hearing, the juvenile court dismissed the petition, finding that "[w]ith the State's own expert [Dr. Cutcliffe] opining that the fracture at issue could have been caused by an accident, and could have been caused by jumping from a bed, the Court finds that the State has failed to meet its burden of proof" under Ind. Code § 31-34-12-4. Appellant's Appendix at 7.

The issue is whether the juvenile court's conclusion that the evidence was insufficient to prove that L.M. and H.C. were CHINS was clearly erroneous. DCS had the burden of proving by a preponderance of the evidence that L.M. and H.C. were CHINS. In re C.B., 865 N.E.2d 1068, 1072 (Ind. Ct. App. 2007), trans. denied. When reviewing the sufficiency of evidence, we consider only the evidence most favorable to the judgment and the reasonable inferences to be drawn therefrom. Slater v. Marion

County Dep't of Child Servs., 865 N.E.2d 1043, 1046 (Ind. Ct. App. 2007). We do not reweigh the evidence or judge the credibility of witnesses. Id.

When a juvenile court enters findings of fact and conclusions thereon we first determine whether the evidence supports the findings, and second, whether the findings support the judgment. C.B., 865 N.E.2d at 1073. We will reverse a judgment only if it is clearly erroneous, or in other words unsupported by the findings of fact and conclusions thereon. Id.

Indiana Code Section 31-34-1-1 provides:

> A child is a child in need of services if before the child becomes eighteen (18) years of age:
>
> (1) the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision; and
>
> (2) the child needs care, treatment, or rehabilitation that:
>
> (A) the child is not receiving; and
>
> (B) is unlikely to be provided or accepted without the coercive intervention of the court.

In addition, Ind. Code § 31-34-1-2(a) provides:

> A child is a child in need of services if before the child becomes eighteen (18) years of age:
>
> (1) the child's physical or mental health is seriously endangered due to injury by the act or omission of the child's parent, guardian, or custodian; and
>
> (2) the child needs care, treatment, or rehabilitation that:

(A) the child is not receiving; and

(B) is unlikely to be provided or accepted without the coercive intervention of the court.

Finally, Ind. Code § 31-34-12-4 provides:

> A rebuttable presumption is raised that the child is a child in need of services because of an act or omission of the child's parent, guardian, or custodian if the state introduces competent evidence of probative value that:
>
> (1) the child has been injured;
>
> (2) at the time the child was injured, the parent, guardian, or custodian:
>
> (A) had the care, custody, or control of the child; or
>
> (B) had legal responsibility for the care, custody, or control of the child; and
>
> (3) the injury would not ordinarily be sustained except for the act or omission of a parent, guardian, or custodian.

DCS argues that the Parents failed to rebut the presumption under Ind. Code § 31-34-12-4 that L.M. and H.C. are CHINS. The Parents argue that DCS failed to "prove when L.M. was injured or that the injury was due to any act or omission of [Mitchell] or [Copsey]." Appellee's Brief at 9. Thus, argue the Parents, DCS failed to meet its burden of production to raise the presumption. We agree with the Parents.

We find language from C.B. instructive. In that case, C.B. was admitted into an emergency room because of facial bruises, a broken arm, and numerous other bruises on his body. C.B.'s mother and her boyfriend claimed that C.B. fell off of a loveseat and hit a rocking chair. The Adams County Department of Child Services ("ACDCS") filed a petition alleging that C.B. was a CHINS, and, after a hearing, the juvenile court

concluded that C.B. was a CHINS. On appeal, C.B.'s mother challenged the sufficiency of the evidence in support of the juvenile court's conclusion. We noted:

> Our review of the record in the instant case reveals that on July 6, 2006, Dr. William Lewis (Dr. Lewis) examined C.B. and found multiple physical injuries, including a broken arm, a bruised eye and face, as well as bruises and swelling on his chest, neck, back of his head, groin, and buttocks. In testimony at the fact-finding hearing, Dr. Lewis explained that the bruise found on the back of C.B.'s head was "definitely abnormal" and signified that C.B. "was hit with some kind of object in the back of the head." (Transcript p. 64). Dr. Lewis also testified that it would be unusual for a two-year-old, like C.B., to suffer bruising in the middle of his chest or in his groin area. (Tr. p. 65). Furthermore, Dr. Lewis stated that C.B.'s buttock bruises indicated "[r]ather vigorous spanking." (Tr. p. 66). Finally, the record shows that as a result of these multiple injuries, Dr. Lewis opined that "either [C.B.] fell 100 times in [ ] a very short period of time from great heights or he was beaten," ultimately concluding that he was beaten, "probably on several occasions." (Tr. p. 67).

C.B., 865 N.E.2d at 1073. We held that, while it was "not certain whether Mother inflicted these injuries upon C.B.," the evidence presented raised the presumption under Ind. Code § 31-34-12-4 that C.B. was a CHINS. Id. In other words, the ACDCS had satisfied its burden of showing with competent evidence of a probative value that: (1) C.B. was injured; (2) C.B. was injured while under his mother's care or custody; and (3) C.B.'s injuries would not normally have been sustained except for the act or omission of his mother. See id. We noted further that "the record suggests that Mother was slow to seek medical treatment for [C.B.]" Id. Accordingly, we concluded that there was sufficient evidence that C.B.'s physical well-being was seriously endangered and that he needed care and treatment that he was not receiving from his mother. Id.

In the present case, Dr. Cutcliffe testified that L.M.'s having been set on the ground from a high chair would not have generated enough force to cause her injury.

Although he testified that the injury could have been sustained a week earlier, he stated that there would have been "definite signs" that something was wrong with L.M.'s leg, including foreshortening of the leg, swelling, pain, and crying. Transcript at 12. However, unlike in C.B., where there was evidence that C.B.'s injuries were unusual and that C.B. either "fell 100 times" or was beaten, Dr. Cutcliffe agreed on cross examination that the injury could have been caused by an accident, particularly if L.M. had "landed hard jumping off the bed" when she injured her clavicle three days earlier. Id. at 17. Further, L.M. was taken to the emergency room within an hour of the time her leg buckled, so unlike C.B., there is no suggestion in the record that Mitchell and Copsey were slow to seek medical treatment. Although DCS points out that Dr. Cutcliffe testified on recross that he believed C.B.'s injury occurred on June 8, 2008, the day that Mitchell and Copsey took L.M. to the emergency room, Dr. Cutcliffe also testified that, based on L.M.'s x-rays, the injury could have occurred up to ten days before that date. The juvenile court relied on the latter testimony in issuing its order, and we cannot reweigh the evidence.

Given our standard of review, we cannot say that the juvenile court was clearly erroneous when it found that DCS failed to introduce competent evidence of a probative value that L.M. sustained an injury that would not ordinarily be sustained except for the act or omission of the Parents. We therefore hold that DCS failed to raise the presumption under Ind. Code § 31-34-12-4 that L.M. and H.C. are CHINS and that the Parents were not required to present evidence rebutting the presumption. Accordingly,

the juvenile court's conclusion that the evidence was insufficient to prove that L.M. and H.C. were CHINS was not clearly erroneous.

For the foregoing reasons, we affirm the juvenile court's dismissal of DCS's petition alleging that L.M. and H.C. are CHINS.

Affirmed.

CRONE, J. and BRADFORD, J. concur