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FILED
Dec 30 2010, 9:40 am
CLERK
of the supreme court, court of appeals and tax court

IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF	)	
Z.T., Minor Child,	)	
and	)	
S.W., Mother,	)	
Appellant,	)	
	)	
vs.	)	No. 49A04-1004-JC-000252
	)	
MARION COUNTY DEPARTMENT	)	
OF CHILD SERVICES,	)	
Appellee,	)	
and	)	
CHILD ADVOCATES, INC.,	)	
Co-Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn Moores, Judge
The Honorable Danielle Gaughan, Magistrate
Cause No. 49D09-0909-JC-044084

December 30, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

The Marion Superior Court adjudicated Z.T. a Child in Need of Services ("CHINS"). S.W. ("Mother") appeals the adjudication and raises several arguments, which we consolidate and restate as:

> I. Whether the trial court abused its discretion when it determined that Z.T.'s out-of-court statements were reliable under Indiana Code section 31-34-13-3;
>
> II. Whether Mother was denied a fundamentally fair trial because the trial court held the child hearsay hearing and the fact-finding hearing on the same date;
>
> III. Whether Mother's counsel's allegedly deficient performance denied Mother a fair trial;
>
> IV. Whether the trial court abused its discretion when it excluded the testimony of a school psychologist; and
>
> V. Whether the trial court's CHINS adjudication is supported by sufficient evidence.
>
> We affirm.

Facts and Procedural History

Z.T., who was born on September 12, 2003, has a mild mental handicap and language impairment. He generally has difficulty speaking and is hard to understand. In September 2009, Z.T. was enrolled in Kristin Shaw's ("Shaw") early intervention kindergarten class at Indianapolis Public Schools.

On September 22, 2009, Shaw observed a bruise near Z.T.'s eye. When Shaw asked Z.T. how he got the bruise, Z.T. responded, "My mom hit me." Tr. p. 23. Shaw

was surprised that Z.T. spoke clearly and in a full sentence when he responded, because at that time he was not typically speaking in four-word sentences.

School personnel contacted the Indiana Department of Child Services of Marion County ("the DCS") to report the alleged abuse. Lauren McClellan ("McClellan"), a DCS family case manager, interviewed Z.T. at school the next day. McClellan asked Z.T. about the bruise near his eye, and Z.T. again stated, "My mom hit me." Tr. p. 17.

On September 24, 2009, the DCS filed a petition alleging that Z.T. was a CHINS. On December 18, 2009, the DCS filed a "Petition for Hearing to Introduce Out of Court Statements Pursuant to Indiana Code 31-34-13-2 and to Determine Competency of an Infant Witness." A hearing was held on the DCS's petition on February 22, 2010, and the CHINS fact-finding hearing was held immediately thereafter.

With regard to the child hearsay issue, the trial court found that Z.T.'s statements to Shaw and McClellan were admissible. Specifically, the court determined:

> 8. Kristen Shaw's inquiry about the bruise was non-leading and [Z.T.'s] response was clear and spontaneous. The time, content, and circumstances of [Z.T.'s] statement to Kristen Shaw provide sufficient indications of reliability and is therefore admissible.
>
> ***
>
> 12. Lauren McClellan's inquiry about the bruise was non-leading and [Z.T.'s] response was clear and spontaneous. Though Lauren McClellan was a stranger to [Z.T.], the questioning took place in a child friendly environment that [Z.T.] is familiar with. The time, content, and circumstances of [Z.T.'s] statement to Lauren McClellan provide sufficient indications of reliability and is therefore admissible.

Appellant's App. p. 80.

During the CHINS fact-finding hearing, Dr. Andrew Hicks, a pediatrician with the Indiana University School of Medicine, testified Z.T.'s injuries were consistent with his statement that his mother hit him. Dr. Hicks reached that conclusion after reviewing photographs taken of Z.T. on September 23, 2009. Dr. Hicks disagreed with Z.T.'s pediatrician's conclusion that the discoloration around Z.T.'s eye was due to allergies. Specifically, Dr. Hicks stated that the photographs "appeared to show more discoloration that I would expect for allergic shiners." Tr. p. 68. Further, Z.T.'s pediatrician's observation of the injury to the eye occurred six days after Z.T.'s teacher first observed the injury.

On March 16, 2010, the trial court adjudicated Z.T. a CHINS after entering the following findings:

> 3. A CHINS petition was filed on September 24, 2009 alleging that [Mother] failed to provide [Z.T.] with a safe and appropriate living environment. [Z.T.] presented at school with a black eye and reported that his mother hit him. [Mother] did not acknowledge that [Z.T.] had an injury and did not provide a plausible explanation for the bruising to [Z.T.'s] face.
> 4. Since the filing of the CHINS petition [Z.T.] has remained in the care of his mother in a temporary home trial visit.
> 5. [Z.T.] is a special needs child with a mild mental handicap and language impairment. [Z.T.] has difficulty speaking and making his wants and needs known. [Z.T.] has an IQ below 70 and a cognitive disorder.
> 6. Kristin Shaw is [Z.T.'s] early intervention kindergarten teacher at IPS 69. She sees [Z.T.] every day that he is at school.
> 7. On September 22, 2009, [Z.T.] came to school with a bruise on his face.
> 8. When asked how he got the bruise, [Z.T.] said, "My mom hit me." Kristin Shaw was surprised at how clearly he spoke and that he spoke in a full sentence because at that time he did not usually speak in 4 word sentences.

> 9. On September 22, 2009, Lauren McClellan, a DCS investigating case manager, went to the home of [Mother]. [Mother] would not let her in even after law enforcement was called.
> 10. On September 23, 2009, Lauren McClellan interviewed [Z.T.] at IPS School 69. When Lauren McClellan asked [Z.T.] about his eye, [Z.T.] said, "My mom hit me."
> 11. Petitioner's Exhibit 1 is a photograph of [Z.T.] taken on September 22, [2009] that shows bruising below and to the inside corner of [Z.T.'s] left eye. The bruising in the photograph is consistent with [Z.T.'s] statements.
> 12. [Mother's] use of excessive discipline resulted in bruising to [Z.T.'s] face.

Appellant's App. pp. 14-15. The trial court then concluded that Z.T. was a CHINS and "the coercive intervention of the Court is necessary to protect his health, safety, and welfare." Id. at 15. Mother now appeals. Additional facts will be provided as necessary.

I. The Admission of Z.T.'s Out-Of-Court Statements

Mother argues that the trial court abused its discretion when it admitted Z.T.'s statements to Kristin Shaw and Lauren McClellan into evidence pursuant to Indiana Code sections 31-34-13-2 and 3. Mother also argues that she was denied a fair trial because the trial court conducted both the child hearsay hearing and the CHINS fact-finding hearing on the same date. Finally, Mother argues that she was denied effective assistance of counsel because counsel agreed to incorporate the evidence from the child hearsay hearing into the CHINS fact-finding hearing.

A. *Reliability*

First, we address whether the trial court abused its discretion when it admitted Z.T.'s hearsay statements into evidence. Indiana Code section 31-34-13-2 provides that a statement made by a child who is less than fourteen years of age that

> concerns an act that is a material element in determining whether a child is a child in need of services; and [] is not otherwise admissible in evidence under statute or court rule; is admissible in evidence in an action described in section 1 of this chapter if the requirements of section 3 of this chapter are met.

Section 31-34-13-3 provides that the child's statement is admissible in an action to determine if the child is need of services if:

> (1) the court finds that the time, content, and circumstances of the statement or videotape and any other evidence provide sufficient indications of reliability; and
> (2) the child:
> > (A) testifies at the proceeding to determine whether the child . . . is a child in need of services;
> > (B) was available for face-to-face cross-examination when the statement or videotape was made; or
> > (C) is found by the court to be unavailable as a witness because:
> > > (i) a psychiatrist, physician, or psychologist has certified that the child's participation in the proceeding creates a substantial likelihood of emotional or mental harm to the child;
> > > (ii) a physician has certified that the child cannot participate in the proceeding for medical reasons; or
> > > (iii) the court has determined that the child is incapable of understanding the nature and obligation of an oath.

Ind. Code § 31-34-13-3.

The parties' stipulated to Z.T.'s unavailability as a witness, but Mother argues that Z.T.'s statements were unreliable, and therefore, inadmissible under section 31-34-13-3. Under Indiana Code section 31-34-13-3, "in order for child hearsay statements to be deemed admissible, the court must find that the time, content, and circumstances of the statements provide sufficient indications of reliability." Townsley v. Marion County Dep't of Child Servs., 848 N.E.2d 684, 689 (Ind. Ct. App. 2006).

The trial court concluded that Z.T.'s statement, "My mom hit me," was reliable because Z.T.'s statement was a clear and spontaneous response to questioning by his teacher about how he received the bruising around his eye. The next day, Z.T. was questioned by a DCS family case manager about his eye, and he again responded, "My mom hit me." Appellant's App. p. 80. The trial court concluded and we agree that the "time, content, and circumstances of" Z.T.'s statement to his teacher and the case manager provide sufficient indications of reliability. See id. Mother's argument that the discoloration around Z.T.'s eye was caused by "allergy shiners," and that Z.T. was not capable of making that statement because of language impairment and low IQ is simply an invitation to reweigh the evidence and the credibility of the witnesses, which our court will not do.

B. *Separation of Hearings*

Next, Mother argues that she was denied a fair trial because the child hearsay hearing and CHINS fact-finding hearing were held on the same day. In support of her argument she relies on Townsley and In re J.Q., 836 N.E.2d 961 (Ind. Ct. App. 2005).

In Townsley, our court held that "'a logical and fair reading of I.C. 31-34-13-3 requires some separation of the child hearsay determination and the CHINS determination in order to give effect to the statute's notice and hearing requirements.'" 848 N.E.2d at 688 (quoting J.Q., 836 N.E.2d at 965). In that case, the DCS petitioned the court for a hearing pursuant to Indiana Code section 31-34-13-2, but the trial court failed to hold a separate child hearsay hearing. When Father objected to the admission of the

child's statements during the CHINS fact-finding hearing, the court issued its rulings on Father's objections after the testimony had been heard.

On appeal, our court concluded that the trial court violated the requirements of section 31-34-13-3 when it failed to consider the admissibility of the child's out-of-court statements in a separate hearing. Specifically, we stated:

> Not only were the admissibility and CHINS determinations made in the same actual proceeding, which under *J.Q.* is impermissible, there was further no meaningful separation of these two distinct matters during that proceeding. The disputed testimony was introduced before the court had made a determination as to its reliability, and once the testimony was heard, the court appeared to lose focus on the question of its admissibility. Indeed, with respect to both Johnson's and Garcia's testimony, the attorneys had to stop the court from continuing forward with the CHINS proceeding in order to remind it to rule on the admissibility of the testimony.

Townsley, 848 N.E.2d at 688-89.

Similarly, in J.Q., the trial court considered the admission of the child's statements during the CHINS fact-finding hearing. Because Mother "was not given adequate notice or an adequate opportunity to be heard regarding the admission" of the child's statements, we concluded it "was error for the trial court to merge its decisions of whether [the child's] statements were admissible hearsay, and whether [the child] was a CHINS, into one fact-finding hearing." 836 N.E.2d at 965.

In this case, although the trial court held the hearings on the same date, the child hearsay hearing was an entirely separate hearing from the CHINS fact-finding hearing that followed. At the close of the child hearsay hearing, the court allowed argument from both parties, and then proceeded to find that two of Z.T.'s three statements were reliable

after considering the time, content and circumstances of the statements. Tr. pp. 49-51. By agreement of the parties, the testimony from the child hearsay hearing was incorporated into the CHINS fact-finding hearing held immediately thereafter.[1] The trial court then entered written findings approximately one month after the child hearsay hearing on the same day the court adjudicated Z.T. a CHINS. Because the trial court held two distinct, separate hearings and ruled on the reliability and admissibility of Z.T.'s statements before the CHINS fact-finding hearing commenced, we conclude the trial court did not err by holding both hearings on the same day. Section 31-34-13-3 requires separation of the two hearings, but does not necessarily require that the hearings be held on separate dates.

C. *Fair Trial*

Mother also claims that the "actions and omissions of Mother's counsel deprived her of a fair trial." Appellant's Br. at 23. In Baker v. Marion County Office of Family and Children, 810 N.E.2d 1035, 1038 (Ind. 2004), our supreme court observed,

> [w]here parents whose rights were terminated upon trial claim on appeal that their lawyer underperformed, we deem the focus of the inquiry to be whether it appears that the parents received a fundamentally fair trial whose facts demonstrate an accurate determination. The question is not whether the lawyer might have objected to this or that, but whether the lawyer's overall performance was so defective that the appellate court cannot say with confidence that the conditions leading to the removal of the children from parental care are unlikely to be remedied and that termination is in the child's best interest."

[1] Mother cannot succeed on her argument that the trial court erroneously incorporated the evidence from the child hearsay hearing into the fact finding hearing because the parties agreed to incorporation of the evidence. See L.H. v. State, 787 N.E.2d 425, 429 (Ind. Ct. App. 2007) ("[I]ncorporation of testimony from one proceeding into another may be appropriate when agreed to by the parties.").

Although Baker involved the involuntary termination of parental rights, given the interrelationship between CHINS and involuntary termination proceedings, we conclude that this standard must necessarily apply to CHINS proceeding as well.

Mother argues that she did not receive a fair trial because her counsel 1) failed to challenge the setting of the child hearsay hearing and the CHINS fact-finding hearing on the same date, 2) agreed to incorporate the evidence from the child hearsay hearing into the fact-finding hearing, and 3) failed to object to the admission of Z.T.'s statements at the fact-finding hearing. Specifically, Mother argues that DCS was only able to prove that Z.T. was a CHINS by admitting his statement, "My mom hit me," into evidence, and counsel's stipulation "to the admission of the most damaging evidence which DCS had to offer" denied her of a fair trial. Appellant's Br. at 24.

First, Mother has not presented any specific argument that she was prejudiced by the trial court's decision to hold the two hearings on the same date. Mother and her counsel were present at both hearings, presented witnesses on Mother's behalf, and thoroughly cross-examined the DCS's witnesses. Mother also cannot establish that she was denied a fair trial when she failed to challenge the admission of Z.T.'s statements at the fact-finding hearing. Once the trial court determined that two of Z.T.'s three statements were reliable, pursuant to sections 31-34-14-2 and 3, the statements were admissible at the fact-finding hearing.

In support of her argument concerning incorporation of evidence from the child hearsay hearing into the fact-finding hearing, Mother relies on L.H. v. State, 878 N.E.2d

425 (Ind. Ct. App. 2007). In L.H., the juvenile argued that incorporation of evidence is inappropriate at juvenile fact-finding hearings. At trial, the juvenile objected to incorporating the evidence from the child hearsay hearing into the fact-finding hearing. On appeal, our court concluded that because L.H. objected to incorporating the testimony into the fact-finding hearing, L.H. was denied the fact-finding hearing to which he was entitled. Id. at 430. Our court also observed:

> A defendant would clearly approach a child hearsay hearing differently than he would a trial as far as the making of objections and the scope of his own questioning. Some evidence may be received for purposes of determining the reliability of the hearsay statements that would not be admissible in a fact-finding hearing.

Id.[2]

In this case, unlike L.H., Mother agreed to incorporate the testimony into the fact-finding hearing. Mother's counsel may have had a strategic reason for doing so, but even if counsel's decision was defective performance, Mother cannot establish that she received an unfair trial. Mother unconvincingly argues that "by stipulating to incorporation of the evidence, Mother's counsel necessarily agreed to admission in the fact finding hearing of Z.T.'s statements, despite their unreliability." Appellant's Br. at 24. Even if Mother had objected to incorporation of the evidence, the trial court had already concluded that Z.T.'s statements were reliable and therefore admissible at the fact-finding hearing.

[2] Judge Kirsch dissented and would have concluded that the trial court acted within its discretion when it incorporated the evidence from the child hearsay hearing into the fact-finding hearing because L.H. failed to show any resulting prejudice. Id. at 431 (Kirsch, J., dissenting).

Moreover, Mother thoroughly cross-examined the DCS's witnesses and presented evidence on her own behalf. Specifically, Mother presented evidence of Z.T.'s cognitive abilities on the date the bruise was first observed in an attempt to challenge the credibility of the DCS's witnesses, and Z.T.'s pediatrician testified that the discoloration near Z.T.'s eye was not a bruise, but rather, an allergy shiner. Our review of the record leads us to conclude that Mother's counsel's overall performance was not defective, and therefore, Mother has not established that she was denied a fair trial.

II. Excluded Testimony

Next, Mother argues that the trial court abused its discretion when it excluded the testimony of the school psychologist who evaluated Z.T. approximately one year prior to Z.T.'s statement that Mother hit him. The admission of evidence is entrusted to the sound discretion of the trial court. In re A.J., 877 N.E.2d 805, 813 (Ind. Ct. App. 2007), trans. denied. We will find an abuse of discretion only where the trial court's decision is against the logic and effect of the facts and circumstances before the court. Id. And we will not reverse a court's decision to exclude evidence unless a "substantial right of the party is affected." Ind. Evidence Rule 103.

The trial court excluded the psychologist's testimony after concluding that it was not relevant. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid. R. 401. Relevant evidence is generally admissible, while irrelevant evidence is inadmissible. Evid. R. 402.

The school psychologist evaluated Z.T. in September 2008. Mother argues that her testimony would have established that Z.T. has a significant cognitive disorder and would, at most, have answered "yes" after being asked if Mother hit him, rather than actually saying, "My mom hit me." Appellant's Br. at 26. Mother argues that the "nature of [Z.T.'s] disability was extremely relevant to the CHINS determination, as the trial court necessarily had to consider Z.T.'s limitations in determining whether he was endangered and what services were necessary." Id. at 28.

At the CHINS fact-finding hearing, Mother argued that she sought to admit the school psychologist's testimony to attack the reliability of Z.T.'s statement even though the trial court had ruled that Z.T.'s statement was reliable during the child hearsay hearing. Tr. p. 91. Specifically, Mother asserted that the psychologist would testify "as to [Z.T.'s] ability to assess or make an assertion that his mom hit him. He has . . . a significant cognitive disorder." Tr. p. 90. Mother wanted the psychologist's testimony admitted to support her argument that Z.T. was asked whether his mom hit him, and that he simply said "yes," which was his general response to most questions. Id.

The DCS observes that Mother was attempting to collaterally attack the trial court's child hearsay ruling, and could have, but failed to offer the psychologist's testimony during the child hearsay hearing. Furthermore, the psychologist's evaluation was conducted approximately one year prior to Z.T.'s statement, and she had no more contact with the child after the evaluation; therefore, the psychologist was not aware of the extent of Z.T.'s cognitive abilities on the date the statement was made. Finally, the school psychologist's 2008 evaluation of Z.T. was admitted as a part of Respondent's

Exhibit A (i.e. Z.T.'s "Multidisciplinary Evaluation Team Report"). For all of these reasons, we conclude that the trial court did not abuse its discretion when it excluded the school psychologist's testimony at the fact-finding hearing.

III. Sufficient Evidence to Support the CHINS Finding

Finally, we address Mother's argument that the evidence is insufficient to support the CHINS adjudication. Indiana Code section 31-34-1-1 (2009) provides that a child under eighteen years old is a CHINS if:

> (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 the child:
> (A) is not receiving; and
> (B) is unlikely to be provided or accepted without the coercive intervention of the court.

The DCS must prove by a preponderance of the evidence that Z.T. is a CHINS. In re N.E., 919 N.E.2d 102, 105 (Ind. 2010); In re M.W., 869 N.E.2d 1267, 1270 (Ind. Ct. App. 2007).

The trial court appropriately entered findings of fact and conclusions of law in its order adjudicating Z.T. a CHINS as defined by Indiana Code section 31-34-1-1. We therefore apply a two-tiered standard of review. First, we determine whether the evidence supports the findings, and second, whether the findings support the conclusions. In re V.C., 867 N.E.2d 167, 179 (Ind. Ct. App. 2007). We will reverse only if the evidence does not support the findings or the findings do not support the judgment. Id. We consider only the evidence most favorable to the judgment and the reasonable

inferences flowing therefrom. Id. We will not reweigh the evidence or judge the credibility of the witnesses. Id.

Mother argues that the evidence is insufficient to support the CHINS adjudication because the DCS failed to "establish that Z.T. was injured by Mother's act or omission." Appellant's Br. at 31. Specifically, Mother argues that the discoloration around Z.T.'s eye was caused by "allergy shiners" and that Z.T. was incapable of speaking in four-word sentences; therefore, he could not have stated, "My mom hit me." Mother's argument is simply an invitation to reweigh the evidence and credibility of the witnesses, which our court will not do.

The trial court found that the bruising near Z.T.'s eye exhibited in a photograph admitted as Petitioner's Exhibit One is "consistent with [Z.T.'s] statements." Appellant's App. p. 15. And the court found that Mother's use of excessive discipline resulted in bruising to [Z.T.'s] face." Id. This evidence supports the conclusion that Z.T.'s physical well-being, and possibly mental well-being, are seriously endangered and that he needs care and treatment he is not receiving from Mother. For all of these reasons, we conclude that the DCS proved by preponderance of the evidence that Z.T. is a CHINS.[3]

Conclusion

The trial court did not abuse its discretion when it determined that Z.T.'s statements were reliable and therefore admissible. And the court did not abuse its

[3] See also Ind. Code § 31-34-12-4 ("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 . . . if the state introduces competent evidence of probative value that . . . the child has been injured" while in the parent's "care, custody or control" and "the injury would not ordinarily be sustained except for the act or omission of a parent[.]").

discretion when it excluded the IPS school psychologist's testimony. Moreover, Mother has not established that she was denied her right to a fundamentally fair trial. Finally, the trial court's CHINS adjudication is supported by sufficient evidence.

Affirmed.

BAKER, C.J., and NAJAM, J., concur.