STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In Re*: S.F., A.B., and C.B..**

No. 12-0489 (Doddridge County 11-JA-3, 4 & 5)

MEMORANDUM DECISION

Petitioner Father's appeal, by counsel Scott A. Windom, arises from the Circuit Court of Doddridge County, wherein his parental rights to the children, S.F., A.B., and C.B, were terminated by order entered on April 2, 2012. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Lee A. Niezgoda, has filed its response. The guardian ad litem for S.F., Michael D. Farnsworth Jr., has filed a response on behalf of the child, and the guardian ad litem for A.B. and C.B., Harry P. Montoro, has filed a response on behalf of the children. Petitioner has also filed a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The proceedings below were initiated after the DHHR received a referral that petitioner was sexually abusing his twelve-year-old daughter, S.F. During an interview with the child, she admitted that petitioner perpetrated a pattern of sexual abuse against her, including sexual intercourse. Prior to adjudication, the parties agreed upon the DHHR's motion for the circuit court to take S.F.'s testimony through an in camera hearing, and the circuit court granted the motion. The parties were thereafter allowed several opportunities to submit proposed questions for the child, and petitioner filed a motion objecting to the manner in which the in camera hearing was scheduled to proceed. During the adjudicatory hearing, in addition to the child's in camera interview, the circuit court also admitted a recording of an interview she had previously given regarding the sexual abuse. Following this hearing, petitioner was adjudicated as an abusing parent, and his parental rights to the children were later terminated.

On appeal, petitioner alleges that the circuit court erred in the following ways: by permitting the DHHR to introduce unsworn testimony of S.F. via a videotaped interview instead of requiring the child to testify under oath during the adjudicatory hearing; by denying him an opportunity to fully cross-examine S.F.; in its application of Rules 8 and 9 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings; by permitting psychologist Jason Nichols to opine that petitioner was the perpetrator of the alleged sexual abuse; in admitting the hearsay testimony of J.A.; and, through the cumulative effect of the numerous errors committed

during petitioner's adjudication, all of which denied him due process and a fair adjudication of the case on the merits. Each of petitioner's assignments of error and the respondent's arguments in response are addressed below.

The Court has previously established the following standard of review:

> "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Cecil T.* 228 W.Va. 89, 717 S.E.2d 873(2011). To begin, petitioner argues that because the declarant, S.F., was available to testify at the adjudicatory hearing, an analysis of the admissibility of her videotaped statement must be undertaken pursuant to Rule 803 of the West Virginia Rules of Evidence, and that the Rule does not provide an exception in this instance. For these reasons, petitioner argues that the videotaped statement should have been excluded from evidence, and by allowing the DHHR to introduce the same in lieu of actual sworn testimony, the circuit court prevented petitioner from receiving a fair hearing on the merits. In his reply, petitioner argues that respondents fail to dispute that the videotaped interview is hearsay or that the child was available to testify. Instead, petitioner argues that respondents attempt to carve out an unrecognized exception to the hearsay rule.

The DHHR argues in support of the circuit court's termination of petitioner's parental rights and asserts here that the circuit court correctly determined that the videotaped interview in question was the most accurate and credible evidence available in regard to the allegations in the petition. According to the DHHR, placing the child under oath in order to again provide the details of petitioner's sexual abuse would not have made the evidence any more credible and could have potentially damaged the child's well-being. Further, the DHHR argues that the evidence in question satisfies the general exception set forth in Rule 803(24) of the West Virginia Rules of Evidence and was, therefore, admissible. The guardian ad litem for S.F. also responds in support of the circuit court's termination of petitioner's parental rights and argues that Rule 8 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings contains a rebuttable presumption that the potential psychological harm a child will experience from testifying outweighs the need for the testimony. Further, Rule 8 allows circuit courts to exclude the testimony if equivalent evidence can be procured through other reasonable efforts and other criteria are met. The guardian argues that petitioner was even allowed to question the

child about the interview by proposing questions for the circuit court to ask during an in camera interview. Lastly, the guardian ad litem for the remaining children supports the termination below and fully joins in the response of the DHHR and the response of the guardian for S.F.

Upon review, the Court finds no error in the circuit court's decision to introduce the child's recorded statement during the adjudicatory hearing. "'Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' *State v. Louk*, 171 W.Va. 639, 301 S.E.2d 596, 599 (1983)." Syl. Pt. 3, *State v. Payne*, 225 W.Va. 602, 694 S.E.2d 935 (2010) (internal citations omitted). As noted above, Rule 8 of the West Virginia Rules of Procedures for Child Abuse and Neglect Proceedings establishes a rebuttable presumption that the potential psychological harm to the child outweighs the necessity of the child's testimony and allows the circuit court to exclude such testimony if

> (A) the equivalent evidence can be procured through other reasonable efforts; (B) the child's testimony is not more probative on the issue than the other forms of evidence presented; and (C) the general purposes of these rules and the interest of justice will best be served by the exclusion of the child's testimony.

The circuit court specifically found that the interview in question was "the most accurate and credible evidence which can be obtained with regard to the allegations set forth in the petition." For these reasons, the circuit court did not abuse its discretion in admitting the videotaped statement in question.

Next, petitioner argues that the circuit court erred by denying him an opportunity to fully cross-examine S.F. as required by West Virginia Code § 49-6-2(c). He argues that the circuit court alone determined which questions to ask S.F. The examination was done in camera after the parties submitted written questions, and petitioner asserts that several questions that he submitted were not asked despite being fundamental to the presentation of his defense. According to petitioner, this violated his right to impeach S.F.'s credibility pursuant to Rule 607 of the West Virginia Rules of Evidence. Further, he argues the circuit court improperly denied him the right to introduce extrinsic evidence of S.F.'s prior inconsistent statement through the third party to whom it was made. In his reply, petitioner argues that the Rape Shield Law as found in West Virginia Code § 61-8B-11 is not applicable to the instant matter.

In response, the DHHR argues that Rule 8 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings provides for an in camera interview of the minor child outside the presence of the parents and attorneys. The DHHR argues that the wording of this rule contemplates that a circuit court is not bound to even accept questions from parties, let alone ask every question that is submitted. Further, the circuit court was fully apprised of the evidence petitioner sought to elicit because it was presented through the testimony of another witness and the process of submitting questions for the circuit court's consideration. The guardian for S.F. also argues that the circuit court did not deny petitioner a meaningful opportunity to cross-examine the child and that the questions he submitted were properly denied by the circuit court pursuant to West Virginia's Rape Shield law.

Upon review of the record, the Court finds no error in the circuit court's decision to conduct an in camera interview of S.F., and further finds that petitioner was not denied the right to fully cross-examine the child. Rule 8 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings specifically provides for a child to testify in the manner that occurred below, and the circuit court provided petitioner with the opportunity to present questions for the witness's cross-examination. We find no error in the circuit court's decision to proceed in this manner in the interest of the child's well-being. Further, the circuit court was not bound to ask every question petitioner submitted. The circuit court was free to disregard questions it found irrelevant or improper, just as it would make evidentiary rulings on such questions if asked by counsel. As such, we find no abuse of discretion in the circuit court's evidentiary decisions in relation to petitioner's cross-examination of S.F., pursuant to the standard of review as expressed in *Payne*, as quoted above.

Petitioner next argues that the circuit court improperly applied Rules 8 and 9 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings by combining the two rules while failing to require that the examination be conducted in the same manner as if the child had testified in the courtroom. Petitioner simply reiterates his prior allegations that it was improper for the circuit court to allow the videotaped interview with the child into evidence, and to conduct limited cross-examination of the child. The DHHR argues that this assignment of error is directly contrary to petitioner's argument that he was denied due process. Further, the DHHR argues that the circuit court clearly applied Rule 8(b) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings in taking the child's testimony, but also found it appropriate to allow her in camera testimony to be transmitted by closed circuit television as permitted by Rule 9. Therefore, petitioner was granted the added benefit of observing the witness and having time to formulate additional questions. The guardian for S.F. asserts that petitioner's argument disregards a plain reading of the rules in question and that the circuit court's utilization of closed circuit television does not alter or change the fact that it had the discretion to require the attorneys to submit questions for it to ask.

Upon our review, we find no error in the circuit court's application of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings. A plain reading of Rule 8 of those rules grants circuit courts the discretion to allow a child to testify through an in camera interview outside the presence of the parents and attorneys. Rule 8 further provides that "unless otherwise agreed by the parties, [the circuit court will] have the interview electronically or stenographically recorded and make the recording available to the attorneys before the evidentiary hearing resumes." A review of the record shows that the circuit court simply substituted live, closed-circuit television for a recording of the interview, which does not automatically make Rule 9 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings applicable. We decline to find that the circuit court failed to properly follow Rule 8 and note that the circuit court would have been within its discretion under Rule 8 to have barred the attorneys from ever viewing the interview. As such, we find no error in this regard.

Petitioner next argues that the circuit court erred in permitting psychologist Jason Nichols to opine that petitioner was the perpetrator of the alleged sexual abuse. Citing Syllabus Point 7,

State v. Edward Charles L., 183 W.Va. 641, 398 S.E.2d 123 (1990), petitioner argues that this Court has held that such a witness may not give an opinion as to whether a defendant committed the sexual assault in question. Petitioner argues that the circuit court erred by *sua sponte* permitting Mr. Nichols to testify as an expert and in allowing him to provide improper opinion testimony. Petitioner argues that there is ample evidence that S.F. was sexually abused by someone else and that the circuit court's decision in this regard denied him a fair hearing and due process.

In response, the DHHR argues that Mr. Nichols met the qualifications of an expert in the field of psychology and the circuit court had the authority to make this determination. Further, the DHHR argues that petitioner failed to cite any testimony wherein Mr. Nichols stated that he personally believed the child's allegations or that he believed petitioner perpetrated the abuse. According to the DHHR, Mr. Nichols simply testified that S.F. stated that petitioner abused her. As such, the testimony was admissible because the statements were made during therapy or evaluation for the sole purpose of diagnosis and treatment of the child victim. *See generally*, *Misty D.G. v. Rodney L.F.*, 221 W.Va. 144, 650 S.E.2d 243 (2007). The guardian for S.F. also argues that petitioner has failed to cite a specific statement by Mr. Nichols evidencing an opinion that petitioner perpetrated the abuse, and argues that even if such testimony were offered, it constitutes harmless error because the child had already identified petitioner as her abuser.

Upon our review of the record, the Court finds no error in regard to Mr. Nichol's testimony. Specifically, petitioner has failed to identify any particular instance of this witness testifying to his opinion as to whether he believed the child or whether petitioner actually perpetrated the abuse. Further, based upon Mr. Nichols' testimony concerning his qualifications, the Court finds no error in the circuit court qualifying him as an expert, or in allowing him to testify to S.F.'s statements made for purposes of diagnosis or treatment of the child. We have previously held that

> "[t]he two-part test set for admitting hearsay statements pursuant to W.Va.R.Evid. 803(4) is (1) the declarant's motive in making the statements must be consistent with the purposes of promoting treatment, and (2) the content of the statement must be such as is reasonably relied upon by a physician in treatment or diagnosis." Syl. Pt. 5, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

Syl. Pt. 4, *Payne*, 225 W.Va. 602, 694 S.E.2d 935 (2010). The record shows that Mr. Nichols was performing psychological testing on S.F. during a diagnostic program, and any statements the child made concerning petitioner perpetrating abuse were clearly made for the purposes of promoting treatment. For these reasons, we find no error in regard to this witness's testimony.

Petitioner next alleges that the circuit court erred in admitting hearsay testimony of J.A. According to petitioner, this witness testified that S.F told her that petitioner had been sexually abusing her for two years. Petitioner argues that this testimony constitutes inadmissible hearsay because it was offered to prove the truth of the matter asserted. Petitioner further argues that this does not constitute harmless error because the trier of fact was presumably influenced by the

hearsay testimony. In response, the DHHR argues that in ruling on petitioner's objection to this testimony, the circuit court clearly stated that it would not necessarily consider the evidence against petitioner. Further, in its adjudicatory order, the circuit court makes it clear that it did not rely on this portion of the witness's testimony in reaching its decision. The guardian for S.F. argues that the admission of this testimony constitutes harmless error because the circuit court did not rely upon it and because S.F.'s testimony was sufficient in naming petitioner as the perpetrator of the abuse.

Upon our review, the Court finds no error in the circuit court's decision to admit the testimony in question. We further find that, if any error did occur in this regard, it constitutes harmless error. A review of the record shows that S.F. testified that petitioner abused her, and the circuit court properly admitted other evidence to corroborate this fact, including the child's disclosures to a nurse and to psychologist Jason Nichols. Based upon the record below, it is clear that, absent the testimony of J.A., the circuit court had sufficient evidence to find that petitioner perpetrated the abuse against S.F., and we decline to find error in this regard.

Lastly, petitioner argues that the cumulative effect of the numerous errors committed during his adjudication denied him a fair hearing as required by both the West Virginia and United States Constitutions and that the circuit court's rulings should therefore be set aside. In response, both the DHHR and the guardian for S.F. argue that because petitioner's individual assignments of error are without merit, his assertion of cumulative error is equally without merit. Upon our review, we find no error in regard to any of petitioner's previous assignments of error and, therefore, find no cumulative error in regard to petitioner's adjudication as an abusing parent.

This Court reminds the circuit court of its duty to establish permanency for the children. Rule 39(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings requires:

> At least once every three months until permanent placement is achieved as defined in Rule 6, the court shall conduct a permanent placement review conference, requiring the multidisciplinary treatment team to attend and report as to progress and development in the case, for the purpose of reviewing the progress in the permanent placement of the child.

Further, this Court reminds the circuit court of its duty pursuant to Rule 43 of the Rules of Procedure for Child Abuse and Neglect Proceedings to find permanent placement for the children within twelve months of the date of the disposition order. As this Court has stated,

> [t]he [twelve]-month period provided in Rule 43 of the West Virginia Rules of Procedures for Child Abuse and Neglect Proceedings for permanent placement of an abused and neglected child following the final dispositional order must be strictly followed except in the most extraordinary circumstances which are fully substantiated in the record.

Syl. Pt. 6, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Moreover, this Court has stated that

> [i]n determining the appropriate permanent out-of-home placement of a child under *W.Va.Code* § 49-6-5(a)(6) [1996], the circuit court shall give priority to securing a suitable adoptive home for the child and shall consider other placement alternatives, including permanent foster care, only where the court finds that adoption would not provide custody, care, commitment, nurturing and discipline consistent with the child's best interests or where a suitable adoptive home can not be found.

Syl. Pt. 3, *State v. Michael M.*, 202 W.Va. 350, 504 S.E.2d 177 (1998). Finally, "[t]he guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home." Syl. Pt. 5, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

For the foregoing reasons, we find no error in the decision of the circuit court, and the termination of petitioner's parental rights is hereby affirmed.

Affirmed.

ISSUED: October 22, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh