FILED
May 13, 2024
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In re* E.M., A.M., S.S., and R.S.-1**

No. 23-254 (Monongalia County 22-JA-138, 22-JA-139, 22-JA-140, and 22-JA-141)

MEMORANDUM DECISION

Petitioner Father R.S.-2[1] appeals the Circuit Court of Monongalia County's March 29, 2023, order terminating his custodial rights to E.M. and A.M. and his parental rights to S.S. and R.S.-1, arguing that the circuit court erred in adjudicating him of physical and sexual abuse.[2] Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming the circuit court's order is appropriate. *See* W. Va. R. App. P. 21.

In October 2022, the DHS filed a petition alleging that the petitioner physically and sexually abused the children. According to the petition, all four children underwent Child Advocacy Center ("CAC") interviews, with then-fourteen-year-old R.S.-1 disclosing that he witnessed the petitioner digitally and orally penetrate E.M. Further, R.S.-1 explained that the petitioner's abuse occurred for years but he "was afraid to say anything" as the petitioner had "hit him in the face, the chest, and punches his ribs." Then-nine-year-old S.S. confirmed that the petitioner physically abused R.S.-1 and that "when mom leaves [the petitioner] messes with the girls," having witnessed the petitioner in the bedroom with the female children without their clothes. S.S. also stated that the petitioner was "doing things too [sic] [h]is sisters that Uncle [B.] did to them when they lived" in another city. Then-ten-year-old A.M. disclosed prior sexual abuse by this uncle, but further explained that the petitioner "shows her his private parts." Finally, then-eight-year-old E.M. disclosed, in great detail, the sexual abuse the petitioner perpetrated upon her and A.M.

---

[1] The petitioner appears by counsel John C. Rogers. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrisey and Assistant Attorney General Andrew T. Waight. Counsel Diane D. Michael appears as the children's guardian ad litem.

Additionally, pursuant to West Virginia Code § 5F-2-1a, the agency formerly known as the West Virginia Department of Health and Human Resources was terminated. It is now three separate agencies—the Department of Health Facilities, the Department of Health, and the Department of Human Services. *See* W. Va. Code § 5F-1-2. For purposes of abuse and neglect appeals, the agency is now the Department of Human Services ("DHS").

[2] We use initials where necessary to protect the identities of those involved in this case. *See* W. Va. R. App. P. 40(e). Additionally, because one child and the petitioner share the same initials, we refer to them as R.S.-1 and R.S.-2, respectively.

The court held two adjudicatory hearings, the last of which occurred in December 2022. During the hearings, the DHS presented testimony from a DHS caseworker who had observed some of the children's CAC interviews and had reviewed the materials from all the interviews. According to this witness, the children all disclosed abuse as set forth in the petition. The witness further explained that E.M. and A.M. underwent examinations by a sexual assault nurse examiner ("SANE"), though the DHS had not yet obtained the results. Next, the individual who conducted the CAC interviews of A.M. and E.M. testified to those children's disclosures about the petitioner's abuse. Again, this testimony was consistent with the allegations as set forth in the petition. Although the interviewer explained that A.M.'s interview was very brief, she indicated that she had no concerns with the child's responses to the questions. Despite disclosing that the petitioner "showed her his private parts," the interviewer explained that A.M. was unable to identify male and female "private parts" on an anatomical drawing. This interviewer further recounted E.M.'s lengthy interview in which the child made extensive, detailed disclosures and ultimately stated that "when a child is able to give the amount of details that [E.M.] was able to give us, that is consistent with a child who has been abused." The petitioner's counsel questioned the interviewer as to whether A.M. or E.M. could have confused the petitioner with their uncle, who previously sexually abused the children. The interviewer was clear that the children made distinctions between the uncle and the petitioner. The petitioner's counsel further questioned the interviewer about A.M. being on the autism spectrum, and the witness indicated that this would not have any impact on whether she "believe[d] the disclosure that they were making."

Based on the evidence, the court found that the DHS "met its burden and . . . submitted clear and convincing evidence that these children were in imminent danger due to the sexual abuse that was perpetrated" by the petitioner. Further, the court found that the children's statements, taken together, "tell a story that verifies these children were not confused. They were very clear. They were very concise in identifying where, when, and who perpetrated these acts upon them." Accordingly, the court found that the petitioner "inflicted intentional acts of sexual abuse upon these children" and that at least one child was physically abused. As such, the court adjudicated the petitioner as an abusing parent. Given that the petitioner challenges only his adjudication, it is sufficient to note that the circuit court subsequently terminated his custodial rights[3] to E.M. and A.M. and his parental rights to S.S. and R.S.-1 following a dispositional hearing in March 2023.[4] The petitioner appeals from the dispositional order.

On appeal from a final order in an abuse and neglect proceeding, this Court reviews the circuit court's findings of fact for clear error and its conclusions of law de novo. Syl. Pt. 1, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011). Before this Court, the petitioner raises a single

[3] The order terminated the petitioner's parental rights to all four children. However, the record reveals that E.M. and A.M. are not the petitioner's biological children, and he, instead, was exercising legal custody of these children pursuant to an order of a court from another jurisdiction. Because the petitioner possessed no parental rights to E.M. and A.M., we will treat the court's termination as pertaining to his custodial rights.

[4] The permanency plan for the children is to be returned to the mother following the successful completion of her improvement period.

assignment of error in which he attacks the sufficiency of the evidence at adjudication. In this regard, we have explained that in abuse and neglect cases, West Virginia Code § 49-4-601(i) "requires the [DHS] . . . to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing [evidence],'" though the statute "does not specify any particular manner or mode of testimony or evidence by which the [DHS] is obligated to meet this burden." Syl. Pt. 1, in part, *In re Joseph A.*, 199 W. Va. 438, 485 S.E.2d 176 (1997) (quoting Syl. Pt. 1, *In Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981)). Further, we have explained that "'clear and convincing' is the measure or degree of proof that will produce in the mind of the factfinder a firm belief or conviction as to the allegations sought to be established." *Brown v. Gobble*, 196 W. Va. 559, 564, 474 S.E.2d 489, 494 (1996). Finally, we note that this standard is "intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases." *Cramer v. W. Va. Dep't of Highways*, 180 W. Va. 97, 99 n.1, 375 S.E.2d 568, 570 n.1 (1988). Upon our review, we find that the DHS clearly satisfied this burden.

As established above, the circuit court was presented with evidence that the children made extensive, specific, detailed disclosures about the petitioner's physical and sexual abuse. While it is true that A.M. was unable to identify certain anatomy on a drawing, this does nothing to undercut her disclosure that the petitioner exposed himself to her. Further, this has no bearing on the other children's disclosures, especially those of E.M. which were graphic in their depiction of the sexual acts the petitioner performed, demonstrated extensive understanding of sexual anatomy and function, and were corroborated by other children having witnessed the petitioner's sexual abuse of A.M. and E.M. Before this Court, the petitioner attacks the credibility of the children's disclosures in various unsupported ways. For example, the petitioner speculates that the children may have been confused about the perpetrator of the abuse, given that the children's uncle had previously sexually abused them. This argument has no basis in the record however, as the petitioner readily admits that the individual who conducted CAC interviews of A.M. and E.M. testified that the children were able to differentiate the petitioner's abuse from the uncle's abuse. Further, the petitioner asserts that the length of time R.S.-1 was aware of the abuse without reporting it calls the child's credibility into question, but he ignores the fact that R.S.-1 explained that he delayed reporting the abuse out of fear of the petitioner and the physical abuse to which the petitioner had subjected the child. Simply put, the petitioner's attempt to attack the children's credibility cannot entitle him to relief, as we refuse to disturb the circuit court's credibility determinations on appeal. *See Michael D.C. v. Wanda L.C.*, 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997) ("A reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations."). Further, the petitioner's arguments that the DHS's failure to interview him "in an attempt to ascertain his version of events" or to obtain the results of the children's SANE examinations do not entitle him to relief, as these allegations have no bearing on the quality of the evidence that was introduced against him.

For the foregoing reasons, we find no error in the decision of the circuit court, and its March 29, 2023, order is hereby affirmed.

Affirmed.

ISSUED: May 13, 2024

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Elizabeth D. Walker
Justice John A. Hutchison
Justice William R. Wooton
Justice C. Haley Bunn