STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
November 14, 2024
released at 3:00 p.m.
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In re I.J., O.J., A.J., and S.J.
No. 23-353 (Raleigh County 22-JA-127, 22-JA-128, 22-JA-129, and 22-JA-130)

MEMORANDUM DECISION

Petitioner K.L.[1] is the mother of the four children named in the petition for abuse and neglect instituted by the West Virginia Department of Human Services ("DHS")[2] against Respondent J.J., the children's father. She appeals the Circuit Court of Raleigh County's May 15, 2023, order dismissing the petition for failure to prove, by clear and convincing evidence, that respondent sexually abused the youngest child, I.J.[3] On appeal, petitioner argues that the circuit court erred in failing to find that respondent was an abusing parent and the children were abused children[4] because (1) the evidence at the adjudicatory hearing was sufficient to establish that respondent sexually abused I.J. and (2) respondent's own testimony that his physical discipline of the child S.J., which resulted in physical injury to petitioner, was also sufficient to establish that respondent physically abused S.J. and/or committed domestic violence against petitioner in the presence of the children. Upon our review, we find that a memorandum decision affirming the circuit court's order is appropriate. *See* W. Va. R. App. P. 21(c).

Facts and Procedural History

Petitioner and respondent were married for approximately twenty years before they were divorced in 2021. They have four children, O.J., A.J., S.J, and I.J.

[1] We use initials instead of full names to protect the identities of the juveniles involved in this case. *See* W. Va. R. App. Proc. 40(e).

[2] 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").

[3] Petitioner appears by counsel Lori J. Withrow. The West Virginia Department of Human Services is represented by Attorney General Patrick Morrisey and Assistant Attorney General Andrew T. Waight. Matthew A. Victor represents respondent. Robert P. Dunlap appears as the children's guardian ad litem.

[4] *See* W. Va. Code § 49-1-201 (defining "abused child" and "abusing parent").

Petition for Abuse and Neglect

DHS filed the petition for abuse and neglect against respondent on October 12, 2022, following an investigation precipitated by a referral to DHS from medical personnel at Plateau Medical Center involving the youngest child, five-year-old I.J. On August 8, 2022, petitioner and her boyfriend transported I.J. to the emergency department after I.J. disclosed that respondent had touched her inappropriately while she was staying with him at his home. According to I.J.'s medical records from that visit, petitioner reported that I.J. complained of pain in the pelvic area and told petitioner's boyfriend that "'Daddy gave me a whipie [sic] to clean the blood off with' and [I.J.] said the blood came from 'daddy's fingers.'" Petitioner reported that she observed redness at I.J.'s vaginal opening. The medical records noted I.J. as "withdrawn" and "not speaking" and "[w]hen asked where she is hurting she pointed between her legs towards vagina." I.J. was examined in the emergency department by Dr. Todd Lares, who noted that there were "[n]o injuries seen[] [and] [h]ymen intact." The matter was referred to law enforcement.

On August 12, 2022, I.J. underwent a forensic interview at Just for Kids Child Advocacy Center. Also on that date, the Family Court of Fayette County approved an emergency protective order upon a petition filed by petitioner on behalf of I.J.[5]

A Progress Note from a September 20, 2022, counseling session with therapist Christel Moore of Just for Kids indicated that I.J. was asked whether she "remember[ed] someone older touching [her] private parts when they shouldn't." I.J. answered "yes" and identified respondent. The Progress Note also indicated that, when asked "if he touched her in the front/back, [I.J.] stated, 'Front.' When this provider asked what he touched her with, [I.J.] raised her hand with her palm facing this provider, and she stated[,] 'with his hand.'"

On September 22, 2022, Child Welfare Workers Damian Howard and Myah Adkins interviewed the children and petitioner at petitioner's home, and subsequently completed a Family Functioning Assessment (FFA) reflecting, inter alia, the substance of the interviews. I.J. informed the workers that she does not "feel safe at daddy's." Referring to her buttocks as her "booty," I.J. stated that "daddy has touched my booty," that "daddy hurt me," and answered affirmatively to the question of whether he "put a finger in [her] 'booty.' She denied that anyone coached her into making this accusation against respondent.

[5] The protective order was dismissed on September 27, 2022. On October 3, 2022, Petitioner filed a petition for domestic violence emergency protective order in the Magistrate Court of Raleigh County (where Respondent resides) and the petition was granted. The matter was subsequently transferred to the Circuit Court of Raleigh County.

Mr. Howard and Ms. Adkins also interviewed petitioner. She recounted that, after she picked up I.J. from respondent's home on August 8, 2022, I.J. told her that respondent "touched her 'in her private areas,'" and so she immediately took her to the emergency department. Petitioner also disclosed that, in 2021, I.J. told her and the eldest child, O.J., that respondent had touched her inappropriately. As stated in the FFA, I.J. told petitioner and O.J. that "'she was on the couch, and she told me that he put fingers inside of me.' [Petitioner] stated that she did not want to believe that it happened, and so they did not report [it]." Petitioner also stated that, in another prior incident, respondent broke her (petitioner's) finger and recalled another incident that occurred in 2018 involving O.J.'s cat when respondent "'was coming at [O.J.] with a belt. . . . I ran to get in between them. Then [respondent] grabbed me by the throat and took me across the room.'"

The eldest child, O.J., was also interviewed. She stated that she was with petitioner when I.J. previously said that respondent inappropriately touched her in 2021. In addition, O.J. informed Mr. Howard and Ms. Adkins that that she had not been to respondent's home since 2021 when she and respondent had an altercation and respondent "took off his belt to whip me in public." O.J. also recalled the incident concerning her cat in which respondent "'tried to hit me, mom stopped him, and then he choked her out,'" and another incident in which respondent dragged her other sister, S.J., up the stairs. O.J. reported that petitioner "got in the way and stopped it."[6]

On September 29, 2022, Mr. Howard and Ms. Adkins interviewed respondent, which they also documented in the FFA. In denying the allegations of inappropriately touching I.J., Respondent "picked up his hands and stated 'don't you think if I touched her there would be a sign of it in the doctor's records?'" ." Respondent stated that I.J. "calls her rear end a 'butt' and not a ['booty.']" He further stated that he does not

[6] O.J. testified that this incident occurred in 2020. We discern from respondent's subsequent testimony at the adjudicatory hearing that it was during this incident that he broke petitioner's finger as she attempted to intervene. He testified that the incident occurred in 2019. *See infra.* In her recorded interview with members of the Beckley Police Department that was conducted shortly after I.J.'s disclosures, O.J. stated that while respondent used corporal punishment on her, he did not use corporal punishment on either I.J. or A.J., and that the only incident of corporal punishment involving S.J. was the incident described above. During the child welfare workers' interview with S.J., S.J. "stated that she 'feels safe at dad's only a little.'" According to the FFA, S.J. "did not disclose any abuse or neglect." The other child, A.J. stated that "he has not witnessed any abuse/neglect" and "did not disclose any abuse towards his siblings by this respondent nor anyone else."

bathe his daughters "'because I've been scared since the first allegation in 2021.'" Respondent stated that he believes petitioner coached I.J. to accuse him of sexual abuse. As for whether he ever physically disciplined the children, respondent reported that "he has disciplined them probably a total of 7 times. . . . 'I have hit my kids, mostly spanking.'" Respondent admitted to "hit[ting] [O.J.] with a belt before, but [he] has never left any marks or bruises. [Respondent] stated that he mostly just raises his voice and the kids will listen."

Finally, on October 3, 2022, Mr. Howard met with petitioner's boyfriend, G.C. G.C. recounted an incident that occurred the previous week while G.C. was playing "zombies" with his grandson and I.J. "[G.C.] stated that he made the comment that I am going to give you to your zombie daddy, and that [I.J.] stopped and appeared to be nervous. . . . [She] then disclosed that 'daddy sticks his finger in my peepee.'"

Based upon the foregoing, on October 12, 2022, DHS filed its petition for abuse and/or neglect as to all of the children, specifically alleging that I.J. is an abused and/or neglected child and that aggravated circumstances exist, *see* W. Va. Code §§ 49-1-201 through 209 and 49-4-601 through 610, and naming respondent as having sexually abused I.J. *See id.*

Respondent waived the preliminary hearing, and an adjudicatory hearing was scheduled.

Adjudicatory Hearing

The adjudicatory hearing was conducted over two days,[7] and evidence consistent with that which was the basis for the petition was presented. I.J.'s video-recorded forensic interview with Timothy Vickers of Just for Kids and O.J.'s video-recorded interview with members of the Beckley Police Department were also presented and admitted into evidence, as were I.J.'s medical records and the FFA prepared by Mr. Howard. Respondent's motion to require I.J. to testify at the hearing was denied.

Additionally, Dr. Lares, the emergency room physician, testified consistent with the information concerning his examination of I.J. as stated in her medical records. He also clarified that I.J. presented to the emergency department "having alleged to have been touched by [respondent] on her perineum, and reported that [respondent] had given her a, . . . 'wipee,' to wipe blood from her perineum, or her private area." Dr. Lares testified that the physical examination of I.J. "was completely within normal limits." Although he examined I.J. for "injury" and saw no evidence of injury, he clarified that he did not know whether the child was sexually assaulted, sexually molested, or touched in any way. Dr. Lares testified that he "did not witness anyone coaching [I.J.] to tell me anything."

[7] The adjudicatory hearing was held on January 11 and 25, 2023.

Nurse Ivy Bolar, who assisted Dr. Lares, interviewed I.J., and performed the rape kit examination of I.J., also testified.[8] As noted in I.J.'s medical records, I.J. informed her that respondent "touched her to make her bleed[.]" Nurse Bolar did not find any injuries on I.J. According to Nurse Bolar, although petitioner was present during the examination and interview, she did not tell I.J. what to say.

Mr. Vickers testified regarding his forensic interview of I.J. on August 12, 2022, and as previously noted, the video-recorded interview was admitted into evidence. Mr. Vickers testified, and the recording revealed, that he used an anatomical drawing of a female during the interview.[9] When Mr. Vickers circled the area on the drawing where the vagina is located and asked I.J. if she had a name for this area, she replied, "the bad area." Mr. Vickers testified, consistent with the recorded interview, that I.J. disclosed to him that respondent "had put his finger in her 'booty;'" that "it hurt;" and that "[i]t happened more than one time." The interview also revealed, however, that when Mr. Vickers pointed to the "bad area" and asked if anyone had ever hurt her or put anything inside her bad area, I.J. responded, "No."

Ms. Moore, I.J.'s therapist, testified consistently with the September 20, 2022, Progress Note discussed above. Ms. Moore further testified that, based upon I.J.'s disclosures, she believed that I.J. "had sustained some form of sexual abuse or sexual touching . . . . that she was uncomfortable with."

Petitioner testified consistent with her prior statements to medical personnel at the emergency department and her interview with Mr. Howard. Likewise, Mr. Howard testified consistent with the FFA he prepared and the information that formed the basis of the petition.

Respondent also testified. He denied that he inappropriately touched I.J. in August of 2022 reiterating that, after he was falsely accused of inappropriately touching I.J. in March of 2021, he ceased changing and bathing his daughters "to the point, like, I laid out their clothes in the bathroom, along with their towels, any of the necessities they need to take their showers, and I'd let the older one help the youngest with their showers." Respondent testified that he believed petitioner coerced I.J. into accusing him of sexual abuse. According to respondent, petitioner has a history of mental health problems and of making false sexual abuse allegations against him and others. He testified that petitioner previously accused his parents and brother of molesting the eldest child, O.J., when she

[8] Nurse Bolar testified by telephone.

[9] I.J. has a significant speech impediment. Mr. Vickers testified that he uses anatomical drawings in instances where a child may be difficult to understand.

was approximately two years old, and also accused a friend of molesting O.J. while he was changing her diaper. Respondent admitted to spanking his children and that the last time he tried to spank O.J. was in 2021. Respondent further admitted to the incident in which he broke petitioner's finger when she intervened while respondent was spanking the child S.J. but characterized petitioner's injury as "unintentional." Respondent testified that this incident occurred in 2019.

Finally, two of respondent's coworkers and his girlfriend, S.S., all of whom were guests at respondent's home during the weekend when the abuse was alleged to have occurred, testified that I.J. appeared to be a happy child, acted lovingly towards respondent, and was in no way fearful of him. S.S. also testified that she is a frequent overnight guest at respondent's home and had never seen respondent "invade the children's privacy" or act inappropriately with them. S.S. further testified that she accompanied respondent when he returned I.J. to petitioner's custody at the end of the weekend and that I.J. was happy and did not appear to be upset or fearful of respondent.

Adjudicatory Order

By order entered May 15, 2023, the circuit court concluded that DHS failed to prove, by clear and convincing evidence, that respondent sexually assaulted or sexually abused I.J. In so ruling, the court noted that I.J.'s "disclosures as to the touching were at various times inconsistent where in some disclosure(s) she reported that Respondent Father touched her in the area of her vagina while in other disclosure(s) she indicated that he touched her in the area of her anus." It further noted that Dr. Lares, the emergency department physician who examined I.J., testified that "he did not observe any physical evidence or manifestation of sexual abuse and found no evidence of injury." Nurse Bolar, who also examined I.J., similarly found no "physical evidence of sexual abuse or injury, did not see any evidence of bleeding and [noted] the infant minor's hymen was intact."

The circuit court further emphasized respondent's testimony denying petitioner's past accusation of abuse against I.J. and further denying ever being alone with I.J. for that reason for fear that petitioner would make additional false allegations against him.

As to respondent's testimony at the adjudicatory hearing admitting to his past use of corporal punishment against O.J. and S.J., the circuit court found that DHS was previously aware of these incidents through O.J.'s disclosures to law enforcement[10] and elected not to include them as allegations of abuse and/or neglect in the petition. The circuit

[10] As noted in the FFA, both O.J. and petitioner also disclosed the incidents to Mr. Howard and Ms. Adkins.

court thus "assume[d] that it was determined [by DHS] [that] those matters did not rise to the level of abuse and/or neglect."

The petition for abuse and neglect against respondent was, accordingly, dismissed.[11] It is from this order that petitioner now appeals[12] and, although DHS and the guardian ad litem elected not to appeal the circuit court's ruling, they have submitted briefs to this Court in support of petitioner's appeal.

Standard of Review

In this case, we are asked to review the circuit court's order dismissing the abuse and neglect petition against respondent. Generally, this Court accords plenary review to a circuit court's resolution of questions of law, while its factual findings are reversible only if clearly erroneous. "For appeals resulting from abuse and neglect proceedings. . . we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." *In re Emily*, 208 W. Va. 325, 332, 540 S.E.2d 542, 549 (2000). We have long held:

> 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.

[11] Noting that the children had not seen Respondent since August 2022, the circuit court determined that it was not in the children's best interests to immediately return the case to the status quo. Thus, it stayed the previously entered parenting plan for ninety days and ordered DHS to provide wraparound services for at least that amount of time.

[12] Petitioner subsequently filed with this Court a motion to stay execution of the May 15, 2023, order. This Court granted the motion by order entered July 21, 2023.

Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). Guided by these standards, we now consider the petitioner's assignments of error.

Discussion

On appeal, petitioner argues that the circuit court erred (1) in concluding that DHS failed to prove, by clear and convincing evidence, that respondent sexually abused I.J., and (2) in failing to adjudicate respondent as an abusing parent and the children as abused children based upon his testimony at the adjudicatory hearing in which he admitted that, while physically disciplining S.J., he broke petitioner's finger as she attempted to intervene. We will address each of these assignments of error in turn.

First, we consider whether the circuit court erred in concluding that DHS failed to establish the requisite proof that respondent sexually abused I.J. West Virginia Code § 49-4-601(i)] requires DHS, "in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which [DHS] is obligated to meet this burden." Syl. pt. 1, in part, *In Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981). This Court has 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)." *In re F.S.*, 233 W. Va. 538, 546, 759 S.E.2d 769, 777 (2014).

An adjudication of sexual abuse in an abuse and neglect proceeding may be supported by the victim's uncorroborated testimony. *See In re K.P.*, 235 W. Va. 221, 230, 772 S.E.2d 914, 923 (2015). However, it is well established that questions concerning the credibility of witnesses, including that of the victim, are for the factfinder and must be accorded deference. *Francis v. Bryson,* 217 W.Va. 432, 436, 618 S.E.2d 441, 445 (2005) ("The lower court heard the evidence presented by the opposing parties in the present case and was in a position to make credibility determinations that must be accorded deference."). This is because a reviewing court, unlike the trial court or jury, lacks the benefit of "observ[ing] the demeanor of the witnesses and other nuances of a trial that a record simply cannot convey." *Gum v. Dudley*, 202 W. Va. 477, 484, 505 S.E.2d 391, 398 (1997). Stated another way, "[t]he critical nature of unreviewable intangibles justify the deferential approach we accord findings by a circuit court." *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 562, 490 S.E.2d 642, 649 (1997), *superseded by statute as stated in State ex rel. S.W. v. Wilson*, 243 W. Va. 515, 845 S.E.2d 290 (2020). *See also Mulugeta v. Misailidis*, 239 W. Va. 404, 408–09, 801 S.E.2d 282, 286–87 (2017) ("It is

within the sole province of the family court, as fact-finder, to decide issues of credibility, and this Court will not disturb those determinations."); Syl. pt. 2, in part, *Faris v. Harry Green Chevrolet, Inc.*, 212 W.Va. 386, 572 S.E.2d 909 (2002) ("It is the peculiar and exclusive province of the jury to weigh the evidence and to resolve questions of fact when the testimony of witnesses regarding them is conflicting[.]" (quotations and citation omitted)); *State v. Butcher*, 165 W.Va. 522, 527, 270 S.E.2d 156, 159 (1980) ("The trial court had the benefit of observing the demeanor of the witness as he testified, and we are without such benefit.").

In this case, the circuit court was presented with evidence that I.J. disclosed to multiple witnesses that respondent digitally penetrated either her vagina or her buttocks during a weekend visit at his home and, specifically, that respondent "touched her to make her bleed." However, the physical examination of I.J. revealed no injury and that I.J.'s hymen was intact. The circuit court also reviewed the recording of I.J.'s forensic interview with Mr. Vickers. When Mr. Vickers pointed to I.J.'s self-described "bad area" (i.e., her vagina) on the anatomical drawing and asked I.J. whether anyone had ever hurt her or put anything inside her "bad area," I.J. responded, "No." The circuit court also heard testimony from respondent in which he categorically denied the allegation and claimed that petitioner has a history of mental health issues and of accusing people of molesting their children and that he believed that petitioner coached I.J. into making the sexual abuse allegation against him in this case. Also testifying at the adjudicatory hearing were guests at respondent's home during the weekend when the alleged conduct was said to have occurred and who characterized I.J. as a happy child who acted lovingly toward respondent. Respondent's girlfriend, S.S., further testified that when respondent returned I.J. to petitioner's custody at the end of the weekend, I.J. was happy and was neither upset nor fearful of respondent.

Upon our review of the record, we decline to disturb the circuit court's conclusion that the evidence failed to satisfy the clear and convincing standard of proof that respondent sexually abused I.J. It is well established that "[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." *Michael D.C. v. Wanda L.C.*, 201 W.Va. 381, 388, 497 S.E.2d 531, 538 (1997). *See also Gentry v. Mangum*, 195 W.Va. 512, 520 n. 6, 466 S.E.2d 171, 179 n. 6 (1995) ("Only rarely and in extraordinary circumstances will we, from the vista of a cold appellate record, reverse a circuit court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect."). Given all of the evidence, and ever mindful of the circuit court's unique function of judging the credibility of witness testimony, this Court is not "left with the definite and firm conviction that a mistake has been made" and, as we have often stated, we will "not overturn a finding [in an abuse and

neglect matter] simply because [we] would have decided the case differently[.]" *In re Tiffany Marie S.*, 196 W. Va. at 225, 470 S.E.2d at 179, syl. pt. 1, in part.

In her second assignment of error, petitioner argues that the circuit court erred in failing to adjudicate respondent as an abusing parent and the children as abused children based upon respondent's testimony at the adjudicatory hearing in which he admitted that, while physically disciplining S.J., he broke petitioner's finger as she attempted to intervene. Petitioner argues that respondent's testimony establishes that he committed physical abuse of S.J. and/or domestic violence against petitioner in the presence of the children and that the circuit court erred in "assum[ing] that it was determined those matters did not rise to the level of abuse and/or neglect." Petitioner argues that respondent should have been adjudicated as an abusing parent and the children as abused children based upon his testimony at the adjudicatory hearing. We find no error.

During DHS's investigation into I.J.'s allegation against respondent, petitioner and O.J. disclosed to Mr. Howard and Ms. Adkins that respondent previously broke petitioner's finger as she attempted to intervene while he was disciplining S.J. O.J. also disclosed the incident to law enforcement, the recording of which was reviewed by Mr. Howard before filing the petition. At the adjudicatory hearing, respondent admitted to breaking petitioner's finger albeit unintentionally. As noted above, O.J. testified that the incident occurred in 2020 while respondent testified that it occurred in 2019. Regardless, it is clear that DHS was aware of this incident when it filed the petition and, critically, that the incident predated the petition by, at a minimum, two years. Evidence that is " not seasonable as remote in time'"[13] is not appropriate to support adjudication given that "[a]t the conclusion of the adjudicatory hearing, the court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether the child is abused or neglected and whether the respondent is abusing, neglecting, or, if applicable, a battered parent . . . . *The findings must be based upon conditions existing at the time of the filing of the petition*[.]" W. Va. Code § 49-4-601(i) (emphasis added). Evidence that respondent employed physical discipline on S.J. resulting in a physical injury to petitioner at least two years prior to the filing of the instant petition fails to satisfy this temporal statutory requirement. Accordingly, we find petitioner's argument that the circuit court erred in failing to adjudicate respondent as an abusing parent and the children as abused children based upon this evidence to be without merit.

Thus, for the foregoing reasons, we find no error in the decision of the circuit court, and its May 15, 2023, order is hereby affirmed.

Affirmed.

[13] *In re K.S.*, 246 W. Va. 517, 527, 874 S.E.2d 319, 329 (2022) (quoting *In re Willis*, 157 W. Va. 225, 247, 207 S.E.2d 129, 142 (1973)).

ISSUED: November 14, 2024

CONCURRED IN BY:
Justice Elizabeth D. Walker
Justice John A. Hutchison
Justice William R. Wooton

Dissenting:
Chief Justice Tim Armstead
Justice C. Haley Bunn

BUNN, Justice, concurring in part and dissenting in part:

I concur with the majority's conclusion that the circuit court did not err by declining to adjudicate respondent father based on his testimony admitting to physical abuse. The testimony did not establish "conditions existing at the time" DHS filed its petition alleging father's abuse and neglect. W. Va. Code § 49-4-601(i). However, I respectfully dissent from the majority's conclusion that the evidence was insufficient to adjudicate father for sexually abusing I.J.

The burden DHS bore at adjudication was to prove by clear and convincing evidence that father sexually abused I.J. and that such abuse existed at the time DHS filed its petition. *See* Syl. pt. 1, *In re Joseph A.*, 199 W. Va. 438, 485 S.E.2d 176 (1997); W. Va. Code § 49-4-601(i). However, West Virginia Code § 49-4-601(i) "does not specify any particular manner or mode of testimony or evidence by which [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 (quotations and citations omitted). "This Court has 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.'" *In re C.M.*, 236 W. Va. 576, 583, 782 S.E.2d 763, 770 (2016) (quoting *Brown v. Gobble*, 196 W. Va. 559, 564, 474 S.E.2d 489, 494 (1996), (additional quotations omitted)). "Clear and convincing evidence means that more than a mere scintilla of evidence has been presented to establish the veracity of the allegations of abuse and/or neglect, but it does not impose as exacting an evidentiary burden as criminal proceedings which generally require proof beyond a reasonable doubt." *In re A.M.*, 243 W. Va. 593, 598, 849 S.E.2d 371, 376 (2020).

DHS presented "clear and convincing evidence" of father's sexual abuse of I.J. and the circuit court should have adjudicated father as an abusing parent based on that evidence.

W. Va. Code § 49-4-601(i). At the adjudicatory hearing, DHS established how I.J. consistently stated that her father inappropriately touched her, which is sufficient to prove sexual abuse. *See In re K.P.*, 235 W. Va. 221, 230, 772 S.E.2d 914, 923 (2015) ("Sexual abuse may be proven solely with the victim's testimony, even if that testimony is uncorroborated."). Although I.J. did not testify at the adjudicatory hearing,[1] DHS presented other evidence and testimony to prove father's abuse.

A Family Functioning Assessment ("FFA") prepared by child welfare workers related that, when I.J. returned to mother after a visit with father, I.J. complained of "pain in her private areas" and she revealed that father had touched her "private areas," causing her to bleed. Mother did not observe any blood, but immediately took I.J. to the hospital. The nurse who performed a rape-kit examination of I.J. testified that I.J. said her father touched her and made her bleed. The nurse found no blood or injury. Medical records of the visit indicate that staff asked I.J. where she was hurting and she "pointed between her legs towards her vagina." The forensic interviewer who talked to I.J. testified about I.J. disclosing that her father "put his finger in her 'booty,'" it hurt, and that it had happened more than once.[2] I.J.'s therapist testified that I.J. affirmed that father was touching her private parts with his hand. When the therapist asked I.J. if father touched her in the front or back, I.J. answered the front, however, there is no indication that the therapist used a picture or doll to help I.J. identify specifically where father had touched her. The therapist concluded that I.J. had endured "some form of sexual abuse or sexual touching . . . that she was uncomfortable with," and "anxiety . . . was there." Finally, one of the child welfare intake workers who prepared the FFA testified. He stated that he reviewed I.J.'s Child Advocacy Center interview, therapist notes, and law enforcement reports, and the disclosures I.J. made to him were consistent with her disclosures he reviewed. He also said it "stuck out" to him that I.J. did not name her father as one of her safe persons.[3] According

[1] The circuit court granted DHS's motion to quash father's subpoena that would have required I.J. to testify. The court found that father failed to rebut the presumption that "the potential psychological harm to the child outweighs the necessity of the child's testimony." W. Va. R. Child Abuse & Neglect P. 8(a). *See also In re K.B.-R.*, 246 W. Va. 682, 690, 874 S.E.2d 794, 802 (2022) (explaining that Rule 8(a) "presumes that the act of testifying may be psychologically harmful to children and imposes constraints and conditions as guidance for the court in determining whether to permit a child to testify.").

[2] The forensic interviewer used an anatomical drawing to assist I.J. In addition to indicating on the drawing that father had touched her anus, I.J. also used the drawing to identify the vagina as "the bad area." She denied ever having someone put anything inside her "bad area."

[3] The FAA also related I.J.'s statement that she did not feel safe at father's, as well as comments by her sister, S.J., that S.J. "feels safe at dad's only a little," and that she is scared of her father.

to the FFA, I.J. had also disclosed to her mother's fiancé that "daddy sticks his finger in my peepee." There was no evidence in the record before this Court indicating that I.J. had been coached to allege sexual abuse.

In determining that DHS failed to meet its burden of proof, the circuit court found significant the fact that I.J.'s "disclosures as to the touching were at various times inconsistent." While I.J. alternately indicated her vagina and anus when describing where father penetrated her, such varying descriptions may be expected from a five-year-old. *Cf., e.g., Alba v. State*, No. 03-16-00680-CR, 2018 WL 895584, at *3 (Tex. App. Feb. 15, 2018) (finding evidence sufficient to support conviction for indecency with a child by sexual contact and stating, "The child victim's description of what happened to her need not be precise; she is not expected to express herself at the same level of sophistication as an adult.").[4]

Furthermore, either type of touching I.J. described constitutes sexual abuse. *See* W. Va. Code § 49-1-201 (defining "sexual abuse," and adopting definitions of "sexual intrusion" and "sexual contact" from "§ 61-8b-1 of this code");[5] W. Va. Code § 61-8b-1(6)

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[4] Courts have found children's imprecise descriptions of sexual contact to be sufficient even under the more stringent, beyond a reasonable doubt, evidentiary standard applied to criminal proceedings. *See State v. Minor*, 648 S.W.3d 721, 737 (Mo. 2022) (acknowledging that "children often use unsophisticated language when describing body parts because they may lack the technical language for an accurate description" and "[t]estimony using unsophisticated language does not preclude an inference of contact"); *Smith v. State*, 459 S.W.3d 707, 710 n.2 (Tex. App. 2015) (finding child's testimony alone was sufficient to support conviction for aggravated sexual assault and commenting "[i]t is understood that child sexual assault victims may well describe their relevant body parts without the sophistication, specificity, or anatomical accuracy employed by adults or, for that matter, by the criminal statutes being enforced. 'Where the child has sufficiently communicated to the trier of fact that the touching occurred to a part of the body within' the Penal Code's definitions, 'the evidence will be sufficient to support a conviction regardless of the unsophisticated language that the child uses.'") (quoting *Clark v. State*, 558 S.W.2d 887, 889 (Tex. Crim. App.1977)).

[5] Pursuant to West Virginia Code § 49-1-201, "sexual abuse" means:

> (A) Sexual intercourse, sexual intrusion, sexual contact, or conduct proscribed by § 61-8c-3 of this code, which a parent, guardian, or custodian engages in, attempts to engage in, or knowingly procures another person to engage in, with a child notwithstanding the fact that for a child who is less than 16 years of age, the child may have willingly participated in that conduct or the child may have suffered no apparent physical, mental or emotional

(establishing that "sexual contact" includes intentionally touching the "buttocks, anus, or any part of the sex organs of another person");[6] W. Va. Code § 61-8b-1(8) (defining "sexual intrusion" to include penetration of the female sex organ or of the anus").[7]

Applying these definitions, the circuit court concluded that it could not find that father's touching was for the purpose of sexual gratification. *See* W. Va. Code § 49-1-201; W. Va. Code § 61-8b-1(6); W. Va. Code § 61-8b-1(8). However, father provided no rational explanation for such touching, thus, the evidence presented by DHS supports a finding of sexual gratification and the circuit court erred by finding otherwise. *See State v. Mitter*, 168 W. Va. 531, 537-38, 285 S.E.2d 376, 380 (1981) (finding sexual gratification "is a subjective state of mind," that "the average juror can understand from the facts surrounding the defendant's conduct . . . based on [a] common sense view of human affairs"). *See also In re E.A.-1*, No. 22-688, 2024 WL 578664, at *5 (W. Va. Feb. 13, 2024) (memorandum decision) (applying *Mitter* to abuse and neglect case involving an allegation

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> injury as a result of that conduct or, for a child 16 years of age or older, the child may have consented to that conduct or the child may have suffered no apparent physical injury or mental or emotional injury as a result of that conduct;

Additionally, "Sexual contact" "means sexual contact as that term is defined in § 61-8b-1 of this code," and "Sexual intrusion" "means sexual intrusion as that term is defined in § 61-8b-1 of this code." W. Va. Code § 49-1-201.

[6]West Virginia Code § 61-8b-1(6) provides:

> "Sexual contact" means any intentional touching, either directly or through clothing, of the breasts, buttocks, *anus*, or *any part of the sex organs* of another person, or intentional touching of any part of another person's body by the actor's sex organs and the touching is done for the purpose of gratifying the sexual desire of either party.

(emphasis added).

[7] Pursuant to West Virginia Code § 61-8b-1(8), "'Sexual intrusion' means any act between persons involving penetration, however slight, of the *female sex organ* or of *the anus* of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party." (emphasis added).

of sexual abuse); *In re H.S.*, No. 22-0413, 2023 WL 2385715, at *2 (W. Va. Mar. 7, 2023) (memorandum decision) (same).

The circuit court also erroneously relied on the fact that "there was no sign of injury or blood, and that the minor's hymen was intact. The fact that neither IJ's examining nurse nor physician found evidence of injury does not preclude the conclusion that father sexually abused I.J. Sexual abuse for child welfare purposes does not require an injury. *See* W. Va. Code § 49-1-201(defining "sexual abuse," in part, as "sexual intrusion [or] sexual contact . . . which a parent . . . engages in . . . with a child notwithstanding the fact that for a child who is less than 16 years of age, . . . the child may have suffered no apparent physical . . . injury as a result of that conduct"). Furthermore, the physician who examined I.J. stated that his "role was to look for injury," and he had no idea whether I.J. had been sexually assaulted, sexually molested, or touched in any way. Importantly, physical evidence of such trauma is not always evident in a child. In a Missouri case where the child victim's examination was normal, the court observed that,

> Dr. Frazier[, a child abuse pediatrician,] referred to the exhibits to clarify her explanation regarding the reasons she did not expect to find any physical evidence of Child's trauma. Dr. Frazier testified regarding the anatomy of a prepubescent girl's genitalia and anus. She explained an examination of the hymen generally will not reveal penetration because there should always be an opening to the hymen and it is composed of mucosal tissue, which heals quickly. Similarly, Dr. Frazier explained an examination of the anus generally will not reveal penetration because just past the opening, it also is comprised of mucosal tissue and is designed to stretch to allow things to pass through.

State v. Minor, 648 S.W.3d 721, 735-36 (Mo. 2022) (finding black-and-white diagrams used by doctor were properly admitted into evidence).

Finally, the circuit court erred by finding that this is the only time father has been accused of sexual abuse by his children. The record shows that I.J. alleged similar abuse in 2021, more than a year prior to her allegations that prompted this abuse and neglect proceeding.

Father's self-interested denial and uncorroborated accusations of mother's history of mental health issues and of accusing people of molesting the children do not overcome DHS's evidence, and neither does the testimony of father's girlfriend and co-workers, who stated that they observed I.J. happy, loving, and unafraid around her father. Such evidence is refuted by the testimony of the physician who examined I.J. and stated, "part of the evil of child sexual assault is that it's usually performed by someone [the child] love[s] and trust[s]. So I'm not sure that the child would be fearful of her father, even if he had sexually assaulted her."

Because DHS established by clear and convincing evidence that father sexually abused I.J., I respectfully dissent from the majority's decision affirming the circuit court's contrary finding. This case should have been reversed and remanded with instructions to adjudicate father as an abusing parent. However, I concur in the majority's determination that the evidence was insufficient to adjudicate father for the physical abuse he admitted during his testimony.

I am authorized to state that Chief Justice Armstead joins me in this decision concurring in part and dissenting in part to the majority's decision.