FILED
March 19, 2025
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In re* A.K.-1 and A.K.-2**

No. 24-189 (Roane County CC-44-2023-JA-89 and CC-44-2023-JA-90)

MEMORANDUM DECISION

Petitioner Father F.K.[1] appeals the Circuit Court of Roane County's March 3, 2024, order terminating his parental rights to A.K.-1 and A.K.-2, arguing that the record did not support the court's finding of sexual abuse by clear and convincing evidence.[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 September 2023, the DHS filed a petition alleging that the petitioner sexually abused A.K.-1 and A.K.-2. According to the petition, A.K.-2 was observed attempting to inappropriately touch another student at school and A.K.-1 and A.K.-2 both stated during interviews that they played a "touching game" with the petitioner.[3] The petition also stated that the petitioner was a registered sex offender as a result of a 2015 conviction in Maryland.

The circuit court held two adjudicatory hearings in November and December 2023, during which the court received into evidence video recordings of the children's Child Advocacy Center ("CAC") interviews without objection. The court also heard testimony from personnel from A.K.-2's school who testified to A.K.-2 inappropriately touching another student. According to these

[1] The petitioner appears by counsel Craig Mills. The West Virginia Department of Human Services appears by counsel Attorney General John B. McCuskey and Assistant Attorney General Katica Ribel. Because a new Attorney General took office while this appeal was pending, his name has been substituted as counsel. Counsel Erica B. Gunn 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). Because the children share the same initials, we use numbers to differentiate them.

[3] At the time of these interviews, A.K.-1 was five years old and A.K.-2 was six years old.

witnesses, A.K.-2 described this as a "touching game" that the petitioner taught him. One witness testified that A.K.-2 stated that the game involved touching all areas of the body, including the child's private parts; involved all members of the family; and was played with clothes both on and off. According to testimony from one school employee, A.K.-1 corroborated A.K.-2's statements. Both witnesses from A.K.-2's school testified that they had no issues understanding A.K.-2's statements, despite the child's speech impediment. The court then heard from a Child Protective Services worker who interviewed A.K.-1, who testified that A.K.-1 disclosed the same information regarding the "touching game" and further stated that A.K.-1 and the petitioner showered together and washed each other.

The court heard from multiple witnesses regarding the petitioner's criminal history, which included convictions in Maryland for solicitation of a minor and for third-degree sexual offenses, and subsequent requirement to register as a sex offender. The children's mother testified that she was aware that one of the victims in the petitioner's criminal case was the eight-year-old daughter of the petitioner's partner at the time. However, the mother also denied any knowledge of the "touching game" and stated that the petitioner only showered with A.K.-2 to treat a rash via lotion and that the petitioner had worn a bathing suit when doing so. Following this, the court heard from a court appointed special advocate, who testified that she witnessed an incident where A.K.-1 forcefully kissed A.K.-2 before she intervened. Finally, the children's Sunday school teacher testified that A.K.-2's speech impediment made him difficult to understand. She also testified that she had not noticed anything abnormal in the year that the children had been in her class and had been going to her church, but admitted that her interactions with the children were limited. Critically, the petitioner refused to testify at adjudication and, instead, exercised his Fifth Amendment right despite being informed that the court could consider his silence as affirmative evidence of his culpability.

Ultimately, the circuit court entered an order finding that there was clear and convincing evidence that the petitioner sexually abused the children. The court found that the "touching game," as described, constituted an act of sexual abuse and that the evidence and testimony were largely consistent, with the only exception being the testimony of the mother. Further, the court found that the Sunday school teacher's testimony, while credible, had very little relevance due to her limited contact with the family. Thus, the court adjudicated the petitioner of abusing and neglecting the children. Given that the petitioner substantively challenges only his adjudication, it is sufficient to note that the petitioner's parental rights to the children were terminated via a dispositional order entered in March 2024.[4] It is from this dispositional order that the petitioner appeals.

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). The petitioner argues the circuit court erred in

[4] The mother's parental rights were also terminated. The permanency plan for the children is adoption in their current placement.

finding that he sexually abused the children because the record did not support such a finding by clear and convincing evidence.[5] We disagree.

West Virginia Code § 49-4-601(i) requires the DHS to prove the allegations set forth in its petition by clear and convincing evidence. *See* Syl. Pt. 1, in part, *In re S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981) ("W. Va. Code [§ 49-4-601(i)], requires the [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.'"). "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). Here, the evidence in the record supports the circuit court's finding that the petitioner sexually abused the children. *See* W. Va. Code § 49-1-201 (defining "Sexual abuse," in part, as "sexual contact" as defined in West Virginia Code § 61-8b-1); *see also* W. Va. Code § 61-8b-1(5) (defining "Sexual contact" as "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"). This includes testimony from school personnel and DHS workers who indicated that the children described the petitioner touching them on their sex organs as part of a "touching game," the children's recorded CAC interviews, and A.K.-2's display of sexualized behavior.

Additionally, the court concluded that the DHS's witnesses were credible and that their testimony conflicted only with that of the mother, whose testimony the court found lacked credibility. The court further concluded that the testimony of the Sunday school teacher, though credible, had little to no relevance to the proceedings. We refuse to disturb these 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 refusal to testify in response to the evidence presented permitted the circuit court to properly consider that silence as affirmative evidence of his culpability, which it did. *See* Syl. Pt. 2, *W. Va. Dep't of Health & Human Res. ex rel. Wright v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996) (stating that the remedial purpose of abuse and

[5] The petitioner also argues the circuit court erred in denying his motions for psychological evaluations and in camera testimony of the children. However, the petitioner fails to comply with Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure in that his brief does not "includ[e] citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal." The lone citation the petitioner includes regarding these motions cites to the petitioner's proposed findings of fact and conclusions of law from adjudication, which include his assertion that "The Court denied the Motions." This is simply insufficient to preserve this issue for review, as the petitioner has failed to cite to any ruling from the circuit court or, in fact, establish that he actually made the motions in question. Given that Rule 10(c)(7) permits this Court to "disregard errors that are not adequately supported by specific references to the record on appeal," we refuse to address these arguments.

neglect proceedings allows lower courts to "properly consider that [parent]'s silence as affirmative evidence of that [parent]'s culpability"). Based on the foregoing, we find that the circuit court did not err in finding that the petitioner sexually abused the children.

For the foregoing reasons, we find no error in the decision of the circuit court, and its March 3, 2024, order is hereby affirmed.

Affirmed.

ISSUED: March 19, 2025

CONCURRED IN BY:

Chief Justice William R. Wooton
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice C. Haley Bunn
Justice Charles S. Trump IV