RENDERED: APRIL 26, 2024; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-0950-ME

C.S. AND B.S. APPELLANTS

APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE ACENA JOHNSON BECK, JUDGE
ACTION NO. 13-J-01204-002

COMMONWEALTH OF KENTUCKY;
B.S., PARENT; J.S., AN INFANT;
AND S.J., PARENT APPELLEES

AND

NO. 2023-CA-0952-ME

C.S. AND B.S. APPELLANTS

APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE ACENA JOHNSON BECK, JUDGE
ACTION NO. 13-J-01205-002

COMMONWEALTH OF KENTUCKY;
B.S., PARENT; M.S., AN INFANT;
AND S.J., PARENT APPELLEES

AND

NO. 2023-CA-0953-ME

C.S. AND B.S. APPELLANTS

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE ACENA JOHNSON BECK, JUDGE
ACTION NO. 13-J-01206-002

COMMONWEALTH OF KENTUCKY;
B.S., PARENT; M.S., AN INFANT;
AND S.J., PARENT APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON, CHIEF JUDGE; EASTON AND GOODWINE, JUDGES.

GOODWINE, JUDGE: C.S. and B.S. appeal the July 20, 2023 disposition orders of the Kenton Circuit Court, Family Division. We affirm.

BACKGROUND

On January 13, 2023, the Cabinet for Health and Family Services ("Cabinet") filed petitions regarding J.S., M.S., and M.S.S., minor siblings who were in the custody of their maternal great aunt and uncle, C.S. and B.S.[1] The

[1] C.S. and B.S. were granted permanent custody of the children in 2013 after the children were removed from their parents' custody through dependency, neglect, and abuse ("DNA") actions.

petitions alleged the two oldest children, J.S. and M.S., reported B.S. sexually abused them. In November or December 2022, the children disclosed the abuse to their mother, who then confronted C.S. and B.S. No one reported the abuse to law enforcement or the Cabinet at that time. C.S. and B.S. told the children's mother they needed to keep the children's allegations in the family.

Eventually, the Cabinet received a report of the allegations on January 10, 2023. The children were then placed with their mother. Thereafter, the three children participated in forensic interviews at a children's advocacy center ("CAC") and the Cabinet filed the petitions. The parties stipulated to the temporary removal of the children from C.S. and B.S.'s custody on January 23, 2023.

At adjudication, the family court heard testimony from several witnesses including law enforcement officers, the Cabinet worker, J.S., M.S., C.S., and the children's mother. During the hearing, the court disallowed counsel for C.S. from calling M.S.S. and E.S., C.S. and B.S.'s adult son, as witnesses. At the close of evidence, the court found abuse had been proven by a preponderance of the evidence. Under KRS[2] 600.020(1)(a)5. and 6., the court found C.S. and B.S. "[c]ommit[ted] or allow[ed] to be committed an act of sexual abuse, sexual

[2] Kentucky Revised Statutes.

exploitation, or prostitution upon the child[ren]" and "[c]reate[d] or allow[ed] to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child[ren.]" Record ("R.") at 53.[3] In its written findings of fact, the court found, in part

> 9. That both [J.S.] and [M.S.] testified that [B.S.] never sexually abused [M.S.S.] and [M.S.S.] did not know that they were being sexually abused.
>
> 10. That the Court finds [J.S.] and [M.S.'s] testimony to be credible.
>
> 11. That the Court finds that [C.S.'s] testimony to not be credible.

Id. at 56. The court ordered the children to remain in the custody of their mother. At disposition, the court ordered custody to remain with their mother and closed the cases.

This appeal followed.

STANDARD OF REVIEW

We review appeals in DNA actions for clear error. In DNA cases, the Cabinet has the burden to prove the allegations by a preponderance of the evidence, meaning "it was more likely than not" the children were abused or neglected. *M.C. v. Cabinet for Health and Family Services*, 614 S.W.3d 915, 921 (Ky. 2021) (footnotes omitted).

[3] Citations are to the record on appeal in No. 2023-CA-0950-ME. The records in the three appeals are nearly identical.

> A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person. If the family court's findings of fact were supported by substantial evidence, and it applied the correct law, its decision will not be disturbed absent an abuse of discretion. An abuse of discretion occurs when the family court's decision is unreasonable or unfair. Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.

Id. (internal quotation marks and footnotes omitted).

ANALYSIS

On appeal, C.S. and B.S. argue (1) the evidence presented at adjudication did not support the family court's findings against C.S.; (2) the family court violated C.S. and B.S.'s due process rights by limiting its cross-examination of M.S.; and (3) the court erred by not allowing M.S.S. and E.S. to testify.

First, substantial evidence supports the family court's findings under KRS 600.020(1)(a)5. and 6. against C.S.

> Substantial evidence is evidence that a reasonable mind would accept as adequate to support a conclusion and evidence that, when taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men. Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses because judging the credibility of witnesses

> and weighing evidence are tasks within the exclusive province of the trial court. Thus, mere doubt as to the correctness of a finding will not justify its reversal, and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) (internal quotation marks and footnotes omitted).

C.S. argues there is no evidence in the record that she should have known about the abuse, and that she cannot be held responsible for conduct that occurred when she was asleep and/or intoxicated. At adjudication, C.S. testified the children's allegations were "unbelievable" and continued to defend her husband against them. Video Record ("V.R.") June 20, 2023 at 2:21:34. She described the children as "really bad." *Id*. at 2:21:44. She said she had "no inclination" as to her husband's actions. *Id.* at 2:25:02. She claimed that B.S. was never not in bed with her at night during their marriage and that she never saw him in the children's bedrooms. *Id*. at 2:23:56, 2:24:47.

The family court did not find C.S.'s testimony credible. R. at 56. In oral findings, the court stated

> I don't find [C.S.'s] testimony credible. Specifically, she testified that she **never** . . . saw [B.S.] in their rooms. I'm sure he was in their rooms at some point. And that she never woke up and that he was not in the room. . . . I find that hard to believe that in 31 years of marriage you've never woken up once to [] find your partner not in the room.

V.R. June 20, 2023 at 3:03:43-04:33. The determination of C.S.'s testimony as uncredible is within the family court's discretion and we will not disturb it.

Substantial evidence establishes that B.S. sexually abused J.S. and M.S. for years in C.S.'s home. B.S. touched M.S. under a blanket in the living room when C.S. was present. Otherwise, the abuse occurred in the children's bedrooms at night. It is true that neither child claimed C.S. saw the abuse occur. They did not tell her about it at the time. Evidence shows she was either asleep or intoxicated when B.S. abused the children. However, after she was confronted with the allegations, C.S. did not report them to the Cabinet or law enforcement.[4] Instead, she insisted the matter be kept within the family to protect her husband's reputation as a law enforcement officer. It is reasonable, based on the evidence presented at trial and the lack of credibility of C.S.'s testimony, that the family court found C.S. allowed B.S. to commit acts of sexual abuse and/or created or allowed to be created a risk of sexual abuse.

Next, the family court did not violate C.S. and B.S.'s due process rights by limiting the cross-examination of M.S. "A civil litigant's right of confrontation and cross-examination is grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments." *Cabinet for Health and Family Services v.*

[4] This is especially concerning because C.S. was trained as a "mandatory reporter" as an employee of KinderCare.

A.G.G., 190 S.W.3d 338, 345 (Ky. 2006) (citing *Willner v. Comm. on Character and Fitness*, 373 U.S. 96, 103, 83 S. Ct. 1175, 1180, 10 L. Ed. 2d 224 (1963)). However, these rights are not universally applicable in civil actions. *Id*. (citation omitted). Due process demands only that the evidence be "reliable." *Id*. at 346 (citation omitted).

Kentucky has a "wide open" rule for cross-examination, meaning that a witness may be crossed on "any matter relevant to any issue in the case, including credibility." *Conley v. Commonwealth*, 599 S.W.3d 756, 780 (Ky. 2019) (citation omitted). However, the scope of cross-examination rests in the sound discretion of the family court. *Id*. (citation omitted); *Baker v. Kammerer*, 187 S.W.3d 292, 294 (Ky. 2006) (citation omitted). The court "may limit cross-examination with respect to matters not testified to on direct examination." KRE[5] 611(b). "So long as a reasonably complete picture of the witness' veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries." *Bratcher v. Commonwealth*, 151 S.W.3d 332, 342 (Ky. 2004) (footnote omitted).[6]

[5] Kentucky Rules of Evidence.

[6] As a criminal case, *Bratcher* was decided based on the Confrontation Clause of the Sixth Amendment. We find it pertinent to the due process analysis applicable to civil actions.

Here, C.S. and B.S. claim they were not allowed to interrogate M.S.'s credibility. This argument is unsupported by the record. Defense counsel questioned M.S. about several inconsistencies between her CAC interview and her testimony at adjudication, including:

- that she told the CAC interviewer the abuse began when she was eight years old, but she testified to being seven years old when it began;
- that she did not testify to seeing B.S. sexually abuse J.S. at adjudication after disclosing it during the CAC interview; and
- that she told the CAC interviewer B.S. didn't touch her with his hands but, on cross-examination, admitted her answer was not truthful.

The Cabinet then objected. The family court instructed defense counsel that they were "limited to what's asked on direct." V.R. June 20, 2023 at 10:24:50. Defense counsel argued that they should be allowed to attack M.S.'s credibility. The court then stated, "I think you've accomplished that," acknowledged the inconsistencies already elicited, and told counsel they would not be allowed to go through every statement in the CAC interview. *Id*. at 10:24:58. Defense counsel continued with cross-examination and attacked additional inconsistencies including that M.S. first raised her allegation that B.S. touched her breasts during her testimony and that she was not present for a conversation she claimed to have been a part of during her CAC interview.

The family court acted within its discretion by limiting the cross-examination of M.S. At the time of the Cabinet's objection, the court, as factfinder, was satisfied with counsel's cross-examination on M.S.'s credibility. Despite this, counsel was allowed to continue questioning her about inconsistencies in her statements. Defense counsel was given a sufficient opportunity to interrogate the credibility of her testimony and the court was given a reasonably complete picture of her truthfulness. There was no abuse of discretion.

Finally, C.S. and B.S. argue the family court erred by disallowing M.S.S. and E.S.'s testimony. They cite no law in support of their argument. Appellants are obligated to cite to "authority pertinent to each issue of law" within their argument. RAP[7] 32(A)(4). This Court will not grant relief based on "mere conclusory statements[.]" *Jones v. Livesay*, 551 S.W.3d 47, 52 (Ky. App. 2018). We also are not obligated to construct a party's legal arguments. *Prescott v. Commonwealth*, 572 S.W.3d 913, 923 (Ky. App. 2019). However, we will proceed with our review as best we can in light of this deficiency.

Generally, "[e]very person is competent to be a witness except as otherwise provided in these rules or by statute." KRE 601(a). However, the family court may exclude relevant evidence where "its probative value is substantially outweighed by . . . needless presentation of cumulative evidence."

[7] Kentucky Rules of Appellate Procedure.

KRE 403. "[N]ot all evidence that is duplicative is therefore cumulative, and evidence should not be excluded on this ground merely because it overlaps with other evidence." *Doneghy v. Commonwealth*, 410 S.W.3d 95, 109 (Ky. 2013) (footnote omitted). The testimony of multiple witnesses to the same events may be helpful to the factfinder. *Id*. (footnote omitted).

C.S. and B.S. wished to call M.S.S. and E.S. as witnesses to support their defense that the allegations were implausible. Counsel claimed both witnesses would have testified that they never saw or heard B.S. enter the children's bedrooms or sexually abuse them even though E.S. slept in a room next to the children and M.S.S. shared a room with one or both of her siblings throughout the period in which the abuse occurred.

The family court did not evaluate either potential witness' competency. Instead, the court essentially determined both witnesses' testimony would be cumulative of what had already been testified to by others, specifically J.S. and M.S. The court stated, "[M.S.S.] never woke up. [M.S.S.] never heard. [E.S.] never heard. . . . I'm taking that as fact." V.R. June 20, 2023 12:11:38-45. The court also found "[t]hat both [J.S.] and [M.S.] testified that [B.S.] never sexually abused [M.S.S.] and [M.S.S.] did not know that they were being sexually abused." R. at 56. The court, as factfinder, did not think it necessary or helpful to hear the same testimony from multiple witnesses.

The Cabinet argues any error which may have occurred when M.S.S. and E.S. were barred from testifying was harmless. We agree.

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

CR[8] 61.01. "When considering a claim of harmless error under CR 61.01, the court determines whether the result probably would have been the same absent the error or whether the error was so prejudicial as to merit a new trial." *T.R.W. v. Cabinet for Health and Family Services*, 599 S.W.3d 455, 465 (Ky. App. 2019) (citation omitted). The family court found neither M.S.S. nor E.S. heard or saw anything. C.S. and B.S. claim they would have elicited those very facts had the witnesses testified. On this basis, it is difficult to see how the outcome of the adjudication would have been changed by their testimony. Any error was harmless and, as such, does not merit reversal.

[8] Kentucky Rules of Civil Procedure.

CONCLUSION

Based on the foregoing, the July 20, 2023 disposition orders of the Kenton Circuit Court, Family Division are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Kelly Sensel Wiley
Covington, Kentucky

BRIEF FOR APPELLEE:

Daniel Cameron
Attorney General of Kentucky

Christopher S. Nordloh
Special Assistant Attorney General
Covington, Kentucky