

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

In re:	:	
	:	
A.W.	:	
Za.W.	:	Case No. 04CA27
H.W.	:	
	:	
Children adjudicated dependent	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
Z.W.	:	
	:	
Child adjudicated abused, neglected,	:	FILED STAMPED DATE: 9-30-04
and dependent.	:	AMENDED 3-5-12
	:	

APPEARANCES

K. Robert Toy, Athens, Ohio, for appellant.

George J. Reitmeier, Athens County Assistant Prosecutor, Athens, Ohio, for appellee Athens County Children Services.

Melinda K. Bradford, Athens, Ohio, for appellee children.

Kline, P.J.:

{¶1} Appellant, father of A.W., H.W., Za.W., and Z.W., appeals the Athens County Court of Common Pleas, Juvenile Division, adjudication granting temporary custody of the children to Athens County Children Services (“ACCS”). Father contends that the trial court abused its discretion when it determined that four-year-old Z.W. was competent to testify.

Because ACCS met its burden of proving that Z.W. is capable of receiving just impressions and relating them truly, we disagree. Father also contends that the trial court's finding that all four children were dependent and the finding that Z.W. is abused, neglected, and dependent is against the manifest weight of the evidence. Because the record contains some competent, credible evidence supporting the trial court's findings, we disagree. Finally, Father contends that the trial court improperly excluded him from the courtroom during Z.W.'s testimony. Because the record contains probative medical evidence that testifying in front of Father would traumatize Z.W., and because Father suffered no prejudice, we disagree. Accordingly, we overrule each of Father's assignments of error and we affirm the judgment of the trial court.

I.

{¶2} Father and Mother are the parents to four children: A.W.; Za.W.; Z.W.; and H.W. In January of 2004, Z.W.'s day care teacher contacted ACCS after she found Z.W. in the bathroom, suffering extreme pain from lesions on her rectum and vagina. The teacher contacted ACCS. An ACCS investigator interviewed Z.W. in the presence of her teachers. Z.W. reported that Father stuck his "wee-wee" in her butt and in her mouth.

{¶3} ACCS obtained an emergency custody order with regard to all four children, and filed complaints alleging that all four children are abused, neglected and dependent children. A pediatric nurse examined Z.W. and determined that Z.W. has Type 1 Herpes. The nurse testified before the trial court that Type 1 Herpes can be spread via genital to genital contact, but also can be spread from a mother to her child via the birth canal, or via autoinoculation, i.e., from a person touching the lesion on their mouth and then touching her hand to her genitals. The nurse also opined that Type 1 Herpes lesions are excruciatingly painful, and that Z.W. had the lesions for five to seven days before the examination. Finally, she testified that while no cure for herpes exists, the painful lesions are treatable with a doctor's care.

{¶4} The trial court conducted a competency hearing to determine whether Z.W. could testify. During the hearing, the court permitted Z.W. to wander around the room. Z.W. became distracted several times by things such as the microphone, her shoes, a strange noise, and the sight of a police officer outside. The court permitted Z.W.'s counsel to interact with Z.W. to a limited extent in order to keep Z.W. on task. Father made no objections during the competency hearing. Ultimately, the court determined that Z.W. is competent.

{¶5} Z.W. testified in detail regarding the sexual abuse perpetrated upon her by Father. She stated that the abuse occurred in her parents' bedroom while Mother was not home. She described the position of her body relative to Father's during the abuse. She stated that Father used a pink lotion on her bottom, which he would wipe off with a towel when he finished. Father told Z.W. not to tell Mother about the incidents.

{¶6} On cross-examination, Father's counsel asked Z.W. about the Easter Bunny and Santa Claus. Z.W. reported that the Easter Bunny spoke to her and that Santa Claus took her on a sleigh ride to the North Pole. She testified that she observed green and brown elves making pink lotion at the North Pole. She also provided details about her visit to the North Pole, such as the number of elves in each room and what they were wearing.

{¶7} The court found that Z.W. is an abused, neglected, and dependent child, and found that A.W., Za.W., and H.W. are dependent children. The court found that Father was the perpetrator of the abuse on Z.W. Mother informed the court that she was filing for divorce from Father. The court granted temporary custody to ACCS, and instated a case plan that includes visitation for Mother, but not Father.

{¶8} Father appeals, asserting the following assignments of error: "I. The trial court abused its discretion when it determined that the four-

year-old minor child was competent to testify. II. The court's finding that Z.W. was an abused, neglected and dependent child and the finding that the other three minor children herein were dependent children was against the manifest weight of the evidence. III. The trial court improperly excluded Father from the courtroom during child's testimony."

II.

{¶9} In his first assignment of error, Father contends that the trial court abused its discretion when it determined that Z.W. was competent to testify.

{¶10} Evidence Rule 601 provides: "Every person is competent to be a witness except * * * children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." A witness under the age of ten is not presumed to be incompetent. *State v. Clark* (1994), 71 Ohio St.3d 466, 469. Rather, "the proponent of the witness's testimony bears the burden of proving that the witness is capable of receiving just impressions and relating them truly." *Id.* The competency determination is a matter within the trial court's sound discretion, and we will not reverse a competency determination absent an abuse of discretion. *State v. Allard*, 75 Ohio St.3d 482, 496, 1996-Ohio-208.

{¶11} “In determining whether a child under ten is competent to testify, the trial court must take into consideration (1) the child’s ability to receive accurate impressions of fact or to observe acts about which he or she will testify, (2) the child’s ability to recollect those impressions or observations, (3) the child’s ability to communicate what was observed, (4) the child’s understanding of truth and falsity and (5) the child’s appreciation of his or her responsibility to be truthful.” *State v. Frazier* (1991), 61 Ohio St.3d 247, syllabus. Once the trial court determines that a child witness can properly recount events from past and knows she should tell truth in court, the child is competent; whether the child’s testimony at trial is believable is separate issue of credibility for trier of fact to determine. *State v. Mayhew* (1991), 71 Ohio App.3d 622, 629.

{¶12} Father complains that the court allowed Z.W. to wander about the room during the hearing and permitted Z.W.’s counsel to interact with her. Father also asserts that counsel coached Z.W. to provide answers supporting a finding of competency, and that the court was determined to find Z.W. competent no matter what she said. As ACCS notes in its brief, Father did not raise any objections during the competency hearing. Ordinarily, errors that arise during the course of a trial but are not brought to the attention of the court by objection or otherwise, are waived and may not

be raised upon appeal. *In re Johnson*, Franklin App. No. 03AP-1264, 2004-Ohio-3886, citing *Stores Realty Co. v. Cleveland Bd. of Bldg. Standards and Bldg. Appeals* (1975), 41 Ohio St.2d 41, 43. In limited circumstances, we may review an issue otherwise waived using the plain error doctrine. *Id.* at ¶ 14. Applying that doctrine, “reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings.” *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121.

{¶13} Under the circumstances, we find that this is not one of those extremely rare cases that mandates the application of the plain error doctrine. Our review of the hearing transcript reveals that the court used many age appropriate questions from a publication of the American Bar Association Center on Children and the Law. Any irregularities in the proceeding, such as counsel helping Z.W. with her shoe or reminding Z.W. to answer the court’s questions, related to Z.W.’s short attention span, not to the content of her answers. Thus, we find that no manifest miscarriage of justice occurred due to the manner in which the court conducted the hearing.

{¶14} Father also asserts that the trial court erred in ruling that Z.W. was competent to testify based upon the *Fraizer* competency factors. In particular, Father notes that Z.W.’s statements during the competency hearing indicate that she does not understand what a “promise” means. Additionally, Father contends that Z.W.’s incompetence is demonstrated by her testimony under oath that she has conversed with the Easter Bunny and flown to the North Pole with Santa Claus.

{¶15} In ruling that Z.W. is competent, the trial court reasoned that Z.W. understands the difference between truth and falsity. The court asked Z.W. several times during the hearing, each time with slightly different wording, whether she understood the distinction. Each time, Z.W.’s answers demonstrated her understanding of truth. The court recognized that the concept of what a “promise” means seemed to be outside of Z.W.’s realm of understanding, but determined that her understanding of truth versus falsity is all that is required for competency.

{¶16} In addition to her demonstration of understanding the concept of truth, during the competency hearing Z.W. correctly gave her first and last name, the names of her siblings and parents, her age, her birth month, and her age at her next birthday. When asked whether she remembered what she had done on her last birthday, she responded that she did not. She was able

to relate her daily routine. She knew that her visitation days with Mother were first on Wednesdays and Fridays, that the visitation days changed recently, and that Father did not attend visitation. We find that these answers support a finding that Z.W. is able to receive, recall, and communicate accurate impressions of fact and observations of acts.

{¶17} Z.W.'s statements regarding the Easter Bunny and Santa Claus occurred during her trial testimony, after the court determined she is competent. Thus, those statements relate to her credibility, not her competence. See *Mayhew*, supra.

{¶18} In sum, we find that during the competency hearing Z.W. demonstrated her ability to: (1) observe facts, (2) recollect those facts, (3) communicate those facts, (4) understand the distinction between truth and falsity, and (5) appreciate her responsibility to be truthful. Thus, we find that the trial court did not abuse its discretion in ruling that Z.W. is competent to testify. Accordingly, we overrule Father's first assignment of error.

III.

{¶19} In his second assignment of error, Father contends that the trial court's findings that A.W., H.W., and Za.W. are dependent children, and its finding that Z.W. is an abused, neglected and dependent child, are against the manifest weight of the evidence.

{¶20} We will not reverse a judgment as being against the manifest weight of the evidence when some competent, credible evidence going to all the essential elements of the case supports the judgment. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, syllabus. When conducting our review, we must make every reasonable presumption in favor of the trial court's findings of fact. *Myers v. Garson* (1993), 66 Ohio St.3d 610, 614; *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶21} Clear and convincing evidence must support a finding of abuse, neglect or dependency. R.C. 2151.35(A). The "clear and convincing evidence" standard is a higher degree of proof than the "preponderance of the evidence" standard generally utilized in civil cases. *In re Baby Girl Doe*, 149 Ohio App.3d 717, 738, 2002-Ohio-4470, ¶89, citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74. However, the standard is less stringent than the "beyond a reasonable doubt" standard used in criminal cases. *Id.* It does not require that the evidence be unequivocal. *In re Estate of Haynes* (1986), 25 Ohio St.3d 101, 104. Again, we will not reverse the trial court's

judgment where some competent and credible evidence supports the trial court's factual findings. *Schiebel; C.E. Morris Co.*, syllabus.

A.

{¶22} Pursuant to R.C. 2151.031(A), an abused child is one who “[i]s the victim of ‘sexual activity’ as defined under Chapter 2907. of the Revised Code * * *.” The record contains some competent, credible evidence that Z.W. is a victim of sexual activity. Specifically, the record contains Z.W.’s testimony that Father put his “wee-wee” in her and that he told her not to tell her mother. Although Z.W. was inconsistent in her testimony regarding whether Father “hurt” her, she did not waiver when asked specifically about the sexual contact.

{¶23} The credibility of Z.W.’s testimony regarding the sexual contact was bolstered by the details she provided. Specifically, Z.W. described the locations and times where the abuse occurred, the positions of her body in relation to Father’s body, and the fact that he used pink lotion in the manner of a lubricant. According to Z.W.’s nurse, who specializes in treating abused children, Z.W.’s knowledge of sexual positions is not typical for a four year old, and serves as an indicator that she has been abused.

{¶24} Father contends that the ACCS investigator did not follow established protocols for interviewing children under age ten, and that

Z.W.'s testimony is merely a story she was led to construct by the investigator. However, Z.W.'s teacher, who witnessed the entire interview, testified that the ACCS investigator did not put words in Z.W.'s mouth. The teacher testified that Z.W. volunteered that Father put his "wee-wee" in her butt and in her mouth. The fact that the ACCS investigator admitted that she failed to follow the established protocols, and in particular failed to tape record the initial interview of Z.W., goes to the weight of the evidence, but does not render Z.W.'s testimony entirely unreliable.

{¶25} Z.W.'s genital herpes and her spontaneous report of pain when urinating corroborates her testimony. Father notes that the testimony indicates that Z.W. could have contracted herpes in some manner other than sexual contact, and that the record does not contain any evidence that he has herpes. However, the herpes evidence nonetheless is probative because, even though ACCS could not conclusively establish that Z.W. contracted herpes through sexual contact with Father, the fact that she has genital herpes tends to support her story.

{¶26} Because the record contains some competent, credible evidence that Father sexually abused Z.W., we find that the trial court's finding that Z.W. is an abused child is not contrary to the manifest weight of the evidence.

B.

{¶27} Pursuant to R.C. 2151.03(A)(3), a neglected child is one whose parents neglect or refuse to provide proper or necessary medical care to the child. The record contains some competent, credible evidence to support a finding that Z.W.’s parents did not provide her with necessary and proper medical care. Specifically, a pediatric nurse testified that Z.W.’s herpes lesions caused her excruciating pain for five to seven days preceding her examination. She further testified that the lesions were very easy to see and that, while they are not curable, they are treatable. Thus, we find that the trial court’s finding that Z.W. is a neglected child is not contrary to the manifest weight of the evidence.

C.

{¶28} R.C. 2151.04(C) provides that a child is dependent if the child’s “condition or environment is such as to warrant the state, in the interests of the child, in assuming the child’s guardianship.” The record contains some competent, credible evidence that the environment in the W. household warranted the state, in the interests of the four W. children, in assuming the children’s guardianship. Specifically, the record contains some competent, credible evidence that Father sexually abused Z.W. The evidence indicates that Father perpetrated this abuse while the other children

were home. Additionally, the evidence indicates that Z.W.'s caregivers chose to ignore the indicators of this sexual abuse and her physical pain. Based on these factors, a finding that the environment in the home is unsafe or unsuitable for children is not contrary to the manifest weight of the evidence.

{¶29} We find that the trial court's finding that A.W., H.W., and Za.W. are dependent children, and its finding that Z.W. is an abused, neglected, and dependent child, are supported by some competent, credible evidence. Therefore, the trial court's findings are not against the manifest weight of the evidence. Accordingly, we overrule Father's second assignment of error.

IV.

{¶30} In his third assignment of error, Father contends that the trial court deprived him of his due process rights when it excluded him from the courtroom during Z.W.'s testimony without a substantial justification for doing so. He contends that due process requires that the trial court set forth substantial justification for "deviation from the usual, physical, face-to-face confrontation." *In re Henderson* (Nov. 28, 1997), Lake App. No. 96-L-68.

{¶31} ACCS presented evidence in the form of expert testimony that Z.W. would suffer at least moderate trauma if she were forced to testify

in front of Father. Thus, ACCS established a substantial justification for excluding Father from the courtroom.

{¶32} Additionally, the court took steps to ensure Father's due process rights were not compromised. Father's counsel remained in the courtroom while Z.W. testified. The court provided Father with a closed circuit television so that he could observe Z.W.'s testimony, and simultaneously allowed Father to maintain continuous communications with his counsel. The closed circuit television system allowed Father's counsel to raise objections to the testimony as well as to confer with his client during the questioning. We have previously concluded that such closed circuit systems effectively prevent any deprivation of due process rights. See *In re Burchfield* (1988), 51 Ohio App.3d 148, 153. Likewise, we find that the system prevented Father from suffering any deprivation of his due process rights here. Accordingly, we overrule Father's third assignment of error.

{¶33} Having overruled each of Father's three assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that Appellees recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Court of Common Pleas, Juvenile Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 for the Rules of Appellate Procedure.
Exceptions.

Harsha, J. and Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.