

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

"S" CHILDREN

MINOR CHILDREN

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. Julie A. Edwards, J.

Hon. Patricia A. Delaney, J.

Case No. 2009CA00016

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common
Pleas, Juvenile Division, Case No.
2008JCV00874

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

July 20, 2009

APPEARANCES:

For Appellant

MARY G. WARLOP
200 West Tuscarawas Street
Suite 200
Canton, OH 44702

For Appellee

LISA A. LOUY
221 Third Street, SE
Canton, OH 44702

Farmer, P.J.

{¶1} On August 6, 2008, appellee, the Stark County Department of Job and Family Services, filed a complaint for the temporary custody of V.S. born December 31, 1998, E.S. born June 23, 2000, A.S. born March 26, 2004, and A.S. born September 26, 2006, alleging the children to be dependent and/or neglected. Mother of the children is appellant, Ashanti Bell; father of V.S., E.S., and A.S. (born in 2004) is Antonio Still, and father of A.S. (born in 2006) is Adrian Burt. An amended complaint was filed on September 11, 2008 to include additional allegations and add an alternative dispositional request.

{¶2} An adjudicatory hearing before a magistrate was held on October 15, 2008. By decision filed October 16, 2008, the magistrate found the children to be dependent, and granted appellee temporary custody of the children. Appellant filed objections. A hearing was held on December 4, 2008. By judgment entry filed December 29, 2008, the trial court denied the objections and approved and adopted the magistrate's decision.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED BY IMPROPERLY ALLOWING THE INTRODUCTION OF INADMISSABLE (SIC) EVIDENCE DURING THE ADJUDICATORY HEARING."

II

{¶5} "THE TRIAL COURT ERRED IN ADJUDICATING THE "S" CHILDREN DEPENDENT CHILDREN UNDER R.C. 2151.04(C) BECAUSE SCDJFS FAILED TO PROVE DEPENDENCY BY CLEAR AND CONVINCING EVIDENCE."

III

{¶6} "THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS GUARANTEED UNDER THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND GUARANTEED UNDER SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION, AND ERRED AS A MATTER OF LAW WHEN IT PROHIBITED APPELLANT FROM CROSS-EXAMINING A WITNESS."

I

{¶7} Appellant claims the trial court erred in permitting inadmissible evidence during the adjudicatory hearing on temporary custody. We disagree.

{¶8} The admission or exclusion of evidence lies in the trial court's sound discretion. *In re S.* (1995), 102 Ohio App.3d 338. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶9} During the direct examination of Jessica Dean, the current investigative caseworker assigned to the family, she was asked about "past history with this family." T. at 5. Appellant's counsel objected on the basis of hearsay, and the trial court ordered appellee's counsel to lay a foundation:

{¶10} "THE COURT: Well let's get some foundation then, Mr. Phillips.

{¶11} "Q. Alright. After you, at some point you were assigned this case, is that correct?

{¶12} "A. Correct.

{¶13} "Q. And at some point as part of your investigation, did you check to see if the Agency had any history with Mother?

{¶14} "ATTY WARLOP: Your Honor, I still object.

{¶15} "THE COURT: Okay. Again, basis?

{¶16} "ATTY WARLOP: Hearsay and lack of personal knowledge.

{¶17} "THE COURT: Okay, overruled, go ahead.

{¶18} "Q. Okay. And at that point in time were you able to determine the extent of that history?

{¶19} "A. Yes.

{¶20} "Q. And did you have a chance to actually look at those old case files?

{¶21} "A. Yes.

{¶22} "Q. And did you review them?

{¶23} "A. Yes.

{¶24} "****

{¶25} "Q. And from reviewing that history, were you able to determine how far back the Agency's history with this mother dates back to?

{¶26} "A. Yes.

{¶27} "Q. And how long was that?

{¶28} "A. According to the Complaint, we start (inaudible) in '05." T. at 5-6 and 7, respectively.

{¶29} Ms. Dean testified from the amended complaint which was mailed to appellant and her attorney via certified mail. T. at 7; Docket Entry No. 19.

{¶30} The issue presented in this case falls within Juv.R. 32(A)(3) which states the following:

{¶31} "The court may order and utilize a social history or physical or mental examination at any time after the filing of a complaint under any of the following circumstances:

{¶32} "(3) Where a material allegation of a neglect, dependency, or abused child complaint relates to matters that a history or examination may clarify."

{¶33} Further, a clear exception to the hearsay rule applies:

{¶34} "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

{¶35} "**(8) Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness." Evid.R. 803(8).

{¶36} Evid.R. 1006 also applies:

{¶37} "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for

examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court."

{¶38} Upon review, we find the trial court did not err in admitting the complained of testimony because the history of appellee's prior involvement with the family was established by appellee's trial counsel, as said counsel laid a proper foundation and qualified the records under Evid.R. 803(8).

{¶39} Assignment of Error I is denied.

II

{¶40} Appellant claims the trial court erred in finding the children to be dependent as the evidentiary burden of clear and convincing evidence was not met. We disagree.

{¶41} A dependency adjudication must be supported by clear and convincing evidence. Juv.R. 29(E)(4); R.C. 2151.35. Clear and convincing evidence is such evidence which will produce in the mind of the trier of fact a firm belief or conviction as to the conclusion to be drawn. *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361. "Where the degree of proof required to sustain an issue must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *Cross v. Ledford* (1954), 161 Ohio St. 469, 477.

{¶42} R.C. 2151.04 defines "dependent child" as follows:

{¶43} "(A) Who is homeless or destitute or without adequate parental care, through no fault of the child's parents, guardian, or custodian;

{¶44} "(B) Who lacks adequate parental care by reason of the mental or physical condition of the child's parents, guardian, or custodian;

{¶45} "(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child's guardianship;

{¶46} "(D) To whom both of the following apply:

{¶47} "(1) The child is residing in a household in which a parent, guardian, custodian, or other member of the household committed an act that was the basis for an adjudication that a sibling of the child or any other child who resides in the household is an abused, neglected, or dependent child.

{¶48} "(2) Because of the circumstances surrounding the abuse, neglect, or dependency of the sibling or other child and the other conditions in the household of the child, the child is in danger of being abused or neglected by that parent, guardian, custodian, or member of the household."

{¶49} In its judgment entry filed December 29, 2008, the trial court found the following:

{¶50} "The magistrate found the children dependent under Section 2151.04(C), which states a dependent child means any child whose condition or environment is such as to warrant the state, in the interest of the child, in assuming the child's guardianship. There was ample evidence in the transcript regarding Mother's instability, numerous evictions, lack of food, lack of adequate sleeping facilities and that these factors had negatively impacted the children, for example causing the children to miss school excessively."

{¶51} Appellee has had previous involvement with the family dating back to 2005. T. at 7. Appellant had been evicted in 2005 and 2006, and in 2007, lacked proper food, beds, and supplies for the children. T. at 7-8. At one point in early 2008, appellant was homeless and Ms. Dean and a co-worker "picked them up off the side of the road with all their belongings." T. at 9.

{¶52} Appellant argues the evidence established that she was able to provide a safe environment for the children as well as shelter and food. Appellee's own witness, Ms. Dean, did not dispute these claims. T. at 17-18, 19. However, appellant was living with her mother at the time until her mother was evicted. T. at 17. Appellant then went to a motel and was providing basic needs for the children; however, she was not able "to pay to stay there any longer." T. at 19. Appellant then found an apartment on Belden Avenue. Id. There was no furniture and no working refrigerator. T. at 9, 21. Appellant decided on her own to send the three oldest children to live with their father, Mr. Still. T. at 9-10. After the children returned to her, Ms. Dean testified appellant had food in the home, a working refrigerator, and some furniture. T. at 11, 22-23. However, Ms. Dean testified that appellant "was also being evicted from the Belden address." T. at 12. When the complaint was filed, appellant was in the Stark County Jail and she was unable to care for her children. T. at 11. Appellee requested protective supervision "[d]ue to her history of non-compliance, the history of unstable housing, the children not going to school." T. at 15.

{¶53} Mr. Burt has no involvement with his child A.S. Id. Mr. Still has stepped in and provided support and care when appellant faltered; however, Mr. Still is not the

legal custodian of the children and other than establishing paternity, he has not sought custody or visitation. T. at 13-14.

{¶54} As Ms. Dean opined and the evidence substantiates, there is a recurrent "pattern of unstable living environment for the children." T. at 12. We find the evidence presented was clear and convincing and not disputed, and sufficient to support the trial court's finding of dependency.

{¶55} Assignment of Error II is denied.

III

{¶56} Appellant claims the trial court erred in denying her trial counsel the right to cross-examine the ongoing caseworker, Anita Young, during the dispositional hearing. We disagree.

{¶57} Following the adjudicatory hearing, the trial court moved on to disposition. T. at 41. The trial court called on Ms. Young:

{¶58} "Miss Young, I need you to raise your right hand. Just stay right there, testify and I will tell counsel right now, I'm invoking Juvenile Rule 34(B), number 3 and will not be cross examining this worker." T. at 41.

{¶59} Juv.R. 34(B) governs hearing procedure during dispositional hearings. Subsection (3) states the following:

{¶60} "Medical examiners and each investigator who prepared a social history shall not be cross-examined, except upon consent of all parties, for good cause shown, or as the court in its discretion may direct. Any party may offer evidence supplementing, explaining, or disputing any information contained in the social history or other reports that may be used by the court in determining disposition."

{¶61} Following Ms. Young's testimony, the trial court gave appellant's counsel the opportunity to speak on the subject of disposition:

{¶62} "THE COURT: Okay, now in terms of what you would like the Court to see from your client's perspective, Miss Warlop, what would you wish to say relative to disposition?

{¶63} "ATTY WARLOP: Your Honor, I would like the Department to look into Ashanti's current residence where she's residing with her sister to see if placement there would be appropriate. Mom just wants to do anything that she can to get her kids back as soon as possible and she is working and looking for new housing." T. at 45-46.

{¶64} At no time during the dispositional hearing did appellant's counsel object to being denied the opportunity to cross-exam Ms. Young, nor did counsel proffer any questions and answers for the record. Under the doctrine of "invited error," it is well-settled that "a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make." *State ex rel. Smith v. O'Connor* (1995), 71 Ohio St.3d 660, 663, citing *State ex rel. Fowler v. Smith* (1994), 68 Ohio St.3d 357, 359. See, also, *Lester v. Leuck* (1943), 142 Ohio St. 91, paragraph one of the syllabus. As the Supreme Court of Ohio has stated:

{¶65} "The law imposes upon every litigant the duty of vigilance in the trial of a case, and even where the trial court commits an error to his prejudice, he is required then and there to challenge the attention of the court to that error, by excepting thereto, and upon failure of the court to correct the same to cause his exceptions to be noted. It follows, therefore, that, for much graver reasons, a litigant cannot be permitted, either intentionally or unintentionally, to induce or mislead a court into the commission of an

error and then procure a reversal of the judgment for an error for which he was actively responsible." *Lester* at 92-93, quoting *State v. Kollar* (1915), 142 Ohio St. 89, 91.

{¶66} With no proffer, we cannot find plain error in the manner of Ms. Young's testimony.

{¶67} Assignment of Error III is denied.

{¶68} The judgment of the Court of Common Pleas of Stark County, Ohio, Juvenile Division is hereby affirmed.

By: Farmer, P.J.

Edwards, J. and

Delaney, J. concur.

s/Sheila G. Farmer

s/Julie A. Edwards

s/Patricia A. Delaney

JUDGES

SGF/jbp 0618

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	JUDGMENT ENTRY
"S" CHILDREN	:	
MINOR CHILDREN	:	CASE NO. 2009CA00016

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, Juvenile Division is affirmed. Costs to appellant.

s/Sheila G. Farmer

s/Julie A. Edwards

s/Patricia A. Delaney

JUDGES