[Cite as *In re N.C.*, 2009-Ohio-4514.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

IN RE: N. C. G. C.	C. A. No. 24590
	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE Nos. DN 08-10-0862 DN 08-10-0863

DECISION AND JOURNAL ENTRY

Dated: September 2, 2009

WHITMORE, Judge.

{¶1} Appellant/Cross-Appellee, the Summit County Children Services Board ("CSB"), appeals from the decision of the Summit County Court of Common Pleas, Juvenile Division, which found that CSB failed to prove by clear and convincing evidence that N.C. and G.C. are dependent, neglected, or abused children. Appellees/Cross-Appellants, Michael C. ("Father") and Marjorie C. ("Mother"), cross-appeal on other grounds. This Court affirms.

I

{¶2} On October 23, 2008, CSB filed complaints in the Summit County Juvenile Court seeking the removal of Father from his children's home, a no contact order, and protective supervision on the basis that Father's children, N.C. and G.C., were abused, neglected, and dependent. According to CSB, Father exposed N.C., born June 6, 2002, and G.C., born October 10, 1999, to profane and sexually graphic language in podcasts that Father created and posted on

his website. Father's website contained approximately forty hours worth of podcasts, all of which were audio podcasts. In the podcasts, Father and one or more of his children acted as co-hosts and discussed various topics, some of which were vulgar in nature (e.g., those titled "Ball kicking is even painful when you're just thinking about it," "Wet farts usually smell bad longer," "Giving the finger," "Big bushy triangular va-jay-jay," and "Approximate quantitative difference between 'bitch' and 'c**t'") and some of which were not (e.g., discussions regarding televisions shows). When discussing profane or otherwise sexually graphic items on the podcasts, Father would give the children his interpretation of what a profane or sexually graphic word or phrase meant and generally would tell the children that it would be inappropriate for them to use such words or phrases. Father would then, however, continue to use the "inappropriate" word or phrase himself, apparently for entertainment value, which would often lead the children to laugh. CSB relied upon the podcasts, Father's creation of them, and Mother's failure to protect the children from them as evidence that N.C. and G.C. were abused, neglected, and dependent children. A magistrate ordered Father to vacate the home and specified that he was to have no contact with his children.

{¶3} Subsequently, the magistrate conducted a shelter care hearing and ordered that Dr. Michael Esson conduct a psychological evaluation of the children. On November 14, 2008, the magistrate terminated the no contact order, indicating that he had received Dr. Esson's report and had spoken with Dr. Esson by telephone. On November 24, 2008, CSB filed a motion for a second expert opinion. CSB alleged that Mother and Father had chosen Dr. Esson and CSB was not afforded an opportunity to provide Dr. Esson with "collateral information" before he conducted the children's evaluation. The record does not indicate the nature of the "collateral information."

{¶4} On December 1, 2008, the trial court ordered that N.C. and G.C. participate in an evaluation with Northeast Ohio Behavioral Health ("NEOBH"), but that evaluation was never conducted. On December 5, 2008, CSB filed a show cause motion, seeking to hold Father and Mother in contempt for failing to make N.C. and G.C. available for further evaluation at NEOBH. Yet, CSB took no further action during the next two weeks leading up to the adjudication hearing on December 22, 2008.

{¶5} After receiving evidence at the adjudication hearing, the trial court vacated its December 1, 2008 decision ordering a second evaluation for the children. The trial court determined that, despite the testimony presented at the hearing and the content of the podcasts, CSB failed to prove that N.C. and G.C. were dependent, neglected, or abused children. The trial court journalized its order, dismissing the action, on January 6, 2009.

{¶6} CSB now appeals from the trial court's order and raises two assignments of error for our review. Father and Mother cross-appeal and raise one cross-assignment of error.

II

Assignment of Error Number One

> "THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE CHILDREN WERE NOT DEPENDENT, NEGLECTED, OR ABUSED AS DEFINED BY THE OHIO REVISED CODE AND ERRED IN DISMISSING CBS'S (sic) COMPLAINT."

{¶7} In its first assignment of error, CSB argues that the trial court erred in dismissing its complaint on the basis that N.C. and G.C. are not dependent, neglected, or abused children. We disagree.

{¶8} R.C. 2151.35(A)(1) provides, in relevant part, as follows:

> "If the court at [an] adjudicatory hearing finds from clear and convincing evidence that [a] child is an abused, neglected, or dependent child, the court shall

> proceed *** to hold a dispositional hearing and hear the evidence as to the proper disposition to be made ***.
>
> "If the court does not find the child to *** be an abused, neglected, [or] dependent *** child ***, it shall order that the case be dismissed[.]"

Clear and convincing evidence is that which will "produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 368, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus. "Where the proof required must be clear and convincing, a reviewing court will examine the record to determine whether the trier of fact had sufficient evidence before it to satisfy the requisite degree of proof." *In re K.B.*, 9th Dist. No. 21365, 2003-Ohio-3784, at ¶13, quoting *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74. "A reviewing court 'should not substitute its judgment for that of the trial court when there exists competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial court judge.'" *In re V.R.*, 9th Dist. No. 23527, 2008-Ohio-1457, at ¶16, quoting *Schiebel*, 55 Ohio St.3d at 74.

{¶9} "[A]n 'abused child' includes any child who *** [b]ecause of the acts of his parents, *** suffers physical or mental injury that harms or threatens to harm [his] health or welfare." R.C. 2151.031(D). A "neglected child" includes any child:

> "(2) Who lacks adequate parental care because of the faults or habits of the child's parents, *** [or]
>
> "(3) Whose parents *** neglect[] the child or refuse[] to provide proper or necessary subsistence, education, medical or surgical care or treatment, or other care necessary for the child's health, morals, or well being[.]" R.C. 2151.03(A).

"[A] 'dependent child' means any child *** [w]hose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child's guardianship[.]" R.C. 2151.04(C).

{¶10} This case does not involve any allegations of physical injury or of any failure to meet the tangible needs, such as the need for medical care, of the children at issue. Rather, CSB's claim that N.C. and G.C. are abused, dependent, or neglected children stems solely from its "concerns that the creation and dissemination of [Father's] podcasts are adverse to the normal development of the children and pose an ongoing risk to [them]." CSB had the burden of proof in this matter. It argues that the testimony elicited at the adjudication hearing regarding the podcasts provides a sufficient basis for a finding, by clear and convincing evidence, that N.C. and G.C. are victims of abuse, dependency, or neglect.

{¶11} Detective Daniel Lance testified that he began investigating this case after receiving information that Father had engaged N.C. and G.C. in sexually graphic and otherwise profane conversations, recorded those conversations, and broadcast them as podcast episodes on his website. After listening to several of the podcasts, Detective Lance interviewed Mother. Mother informed Detective Lance that she had not listened to the podcasts involving N.C. and G.C. Detective Lance testified that when he began describing the podcasts to Mother she became "very upset, crying, and at that point begged me to stop due to the content" and because she did not want the children to hear their discussion. He further testified that Mother defended Father and said "that he was great with the kids and that it was just his way of sharing time with them." As for Father, he told Detective Lance that he "consider[ed] himself a progressive parent and *** fe[lt] [it was] necessary to teach his children about the terminology and the issues that he brings up in these podcasts." Father indicated that he did not believe that he had done anything wrong.

{¶12} Detective Lance admitted that although he heard N.C.'s and G.C.'s voices on the podcasts, there was no evidence that N.C. and G.C. ever saw their Father's website or listened to

the podcasts on the website. Detective Lance also admitted that there were no criminal charges pending against Father, for child endangering or otherwise, based on the creation and dissemination of the podcasts. Finally, he indicated that he had no concerns regarding the physical safety of N.C. and G.C.

{¶13} Annette Lucarelli, an intake social worker with CSB, testified that she met with Mother and the children after CSB initiated its investigation in this matter. Lucarelli indicated that Mother had a loving, close relationship with N.C. and G.C. Lucarelli found N.C. to be "very mature." N.C. described the podcasts as "a fun activity" that he shared with Father, but also "said that there were some bad words that *** he was embarrassed to say [and] *** would rather not repeat[.]" Lucarelli described G.C. as "pretty calm and pretty collected." G.C. indicated to Lucarelli that her Father's podcasts sometimes made her feel uncomfortable. According to Lucarelli, both N.C. and G.C. seemed to be "pretty intelligent children." Lucarelli testified that it appeared to her N.C. and G.C. "would not be inhibited to tell if something had happened to them *** [because] they seem[ed] to be pretty aware."

{¶14} Dr. Michael Esson, a clinical psychologist, conducted N.C. and G.C.'s psychological evaluation. Dr. Esson testified that he met with N.C. and G.C. and looked for responses from them that might indicate some type of physical, emotional, or sexual abuse. He testified that N.C. and G.C. appeared "outgoing, well dressed, clean, no bruises, interacted well with each other, communicated well with me, [and] seemed to be of average or above-average intelligence." According to Dr. Esson, N.C. and G.C. understood "good touches" and "bad touches" and that some of the verbiage from Father's podcasts was not to be used around friends or others.

{¶15} Dr. Esson also interviewed Father and reviewed several of the podcasts in his evaluation process because "if [he] found something wrong, some emotional problem, something that would affect or risk the children or *** place the children at risk, then [he] could make recommendations to the court accordingly." Dr. Esson indicated that he found the podcasts "disturbing" primarily because of the age of the children. Accordingly, Dr. Esson recommended that Father secure counseling to focus on judgment and decision-making issues. He specified, however, that he did not believe Father's bad judgment had put the children at risk or that Father's actions rose to the level of abuse. Although Dr. Esson thought the podcasts created a potential for harm because there was a possibility that the children might "react to information, sexual information, verbiage, et cetera that they did not understand," he maintained that no abuse had occurred. He also opined that the dissemination of the podcasts did not enhance any risk to the children of predation from outsiders. Dr. Esson further testified that N.C. and G.C. had a "pretty healthy relationship" with their Father overall and that Father and Mother "provided for the children's physical and emotional well-being." Consequently, Dr. Esson recommended that the family stay together.

{¶16} Contrary to CSB's argument, it did not present clear and convincing evidence sufficient to support a finding of abuse, dependency, or neglect and neither this Court or the trial court is permitted to indulge in speculation otherwise. While everyone who testified at the adjudication hearing expressed concern about N.C. and G.C.'s exposure to the content of Father's podcasts, no one testified that N.C. and G.C. had actually suffered any harm (mental, emotional, psychological, or otherwise) as a result. Any reasonable reviewer of Father's podcasts would agree with Dr. Esson's conclusion that they amount to extremely poor judgment and decision-making on Father's part and that the children and Mother were very uncomfortable

with the graphic language used. Without additional evidence, however, these conclusions alone do not support a finding of abuse, dependency, or neglect. As such, we must conclude that the record does not contain clear and convincing evidence sufficient to support a finding of abuse, dependency, or neglect. CSB's first assignment of error is overruled.

Assignment of Error Number Two

> "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING CSB'S MOTION FOR A SECOND EXPERT OPINION AND FAILING TO ADDRESS CSB'S SHOW CAUSE MOTION PRIOR TO THE START OF THE ADJUDICATION."

{¶17} In its second assignment of error, CSB argues that the trial court abused its discretion by refusing CSB's request to have a second expert evaluate N.C. and G.C. We disagree.

{¶18} A trial court has the discretion to admit or exclude evidence and to determine whether expert testimony is warranted. *Hudkins v. Stratos*, 9th Dist. No. 22188, 2005-Ohio-2155, at ¶10-12; *Harrold v. Collier*, 9th Dist. No. 02CA0005, 2002-Ohio-3864, at ¶18. Accordingly, this Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *In re J.F.*, 9th Dist. No. 24490, 2009-Ohio-1867, at ¶7. An abuse of discretion is not merely an error of law or judgment, but means that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶19} The trial court initially granted CSB's motion to obtain a second expert evaluation for N.C. and G.C. in light of CSB's assertions that: (1) Dr. Esson had been "chosen by the parents"; (2) CSB had not had any "opportunity to provide Dr. Esson with collateral information prior to his evaluation"; and (3) it was unclear whether Dr. Esson had reviewed the podcasts before interviewing the children. After the adjudication hearing, however, the court vacated its

decision on the basis of Dr. Esson's testimony and its determination that Dr. Esson was an independent psychologist chosen by the court. CSB argues that the trial court abused its discretion by vacating its initial order and, in particular, by waiting until CSB had presented its case-in-chief before doing so.

{¶20} Father's counsel indicated at the adjudication hearing that the magistrate, not Father or Mother, had selected Dr. Esson to evaluate the children. Moreover, Dr. Esson testified as follows:

> "[CSB]: And at some point fairly recently you were contacted I believe by [Father and Mother], correct?
>
> "[DR. ESSON]: I was contacted by Magistrate Vuillemin.
>
> "[CSB]: Okay, and what was your understanding of the purpose of your involvement in this case?
>
> "[DR. ESSON]: He called and told me that there was a case involving some podcasts and two children and that the podcasts were considered inappropriate. *** [H]e asked me if I would be willing to evaluate the children for possible harm that resulted from the podcasts.
>
> "[CSB]: Prior to that date, did you have any connection to either [Father] or [Mother]?
>
> "[DR. ESSON]: No. I had never met them.
>
> "[CSB]: And so how was an appointment scheduled then with you?
>
> "[DR. ESSON]: The magistrate contacted [Father's] attorney, and then I was contacted and set up an appointment."

Dr. Esson was apparently chosen at the shelter care hearing before the magistrate. No record of the hearing's content exists, however, because the hearing was not recorded and CSB never sought to create a record of the hearing's content through alternate means. See, e.g., App.R. 9(C) (providing for creation of statement of evidence or proceeding when hearing transcript is unavailable). Following the hearing, the magistrate simply ordered that Dr. Esson would

conduct the children's psychological evaluation. As such, there is no evidence demonstrating that Father and Mother selected Dr. Esson.

{¶21} Although CSB filed a show cause motion to initiate contempt proceedings against Father and Mother several weeks before the adjudication hearing occurred, CSB took no further action to ensure that a second expert evaluation took place before the hearing. Nor did CSB insist upon a continuance at the hearing. See *Fugo v. Fugo* (Jan. 8, 1986), 9th Dist. No. 12140, at *2 ("[I]f plaintiff needed more time to prepare his case, his remedy was to request a continuance.") Instead, CSB called Dr. Esson as its own witness and agreed with the court's determination that the court would decide upon the necessity of an additional expert after receiving the evidence at the hearing. That evidence reflected the following: (1) the magistrate contacted Dr. Esson to perform N.C. and G.C.'s evaluation; (2) Dr. Esson interviewed N.C. and G.C. and based his evaluation on risk-factor criteria, which he indicated were approved by the Medina County Court system; and (3) Dr. Esson listened to several of the podcasts to aid in his psychological evaluation of the children. Accordingly, the evidence adduced at the hearing arguably satisfied all of the concerns CSB raised when it initially sought the appointment of a second expert. When the parties reconvened after the adjudication hearing, the trial court noted the foregoing and concluded that the children "would benefit more from therapy than they would from another assessment." As such, the trial court vacated its initial order that provided for a second psychological evaluation. Based on all of the foregoing, we cannot conclude that this constituted an abuse of discretion. CSB's second assignment of error is overruled.

Cross-Assignment of Error

> "THE TRIAL COURT ERRED IN REPEATEDLY AND SUMMARILY GRANTING MOTIONS FILED BY THE CROSS-APPELLEE WITHOUT NOTICE OR HEARING BEING AFFORDED TO CROSS-APPELLANTS,

THUS DENYING TO THEM THEIR DUE PROCESS RIGHTS IN VIOLATION OF BOTH STATE AND FEDERAL CONSTITUTIONS."

{¶22} In their sole cross-assignment of error, Father and Mother argue that the trial court offended their due process rights by not affording them opportunities to respond to CSB's motions. Specifically, Father and Mother argue that the trial court repeatedly "rubber-stamp[ed]" CSB's motions before they had notice of or a chance to respond to them.

{¶23} Initially, we note that Father and Mother do not identify the motions to which they claim they were not afforded the opportunity to respond. See App.R. 16(A)(7) (providing that an appellant bears the burden of demonstrating error on appeal and supporting that error with citations to the record and to applicable legal authority); *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349, at *8 ("If an argument exists that can support this [cross-]assignment of error, it is not this [C]ourt's duty to root it out."). Apart from that defect, however, Father and Mother cannot demonstrate prejudice as a result of any motions that the trial court may have ruled upon without their input. The trial court ultimately vacated its decision, ordering a second expert evaluation for N.C. and G.C., and dismissed CSB's case. "It is an elementary proposition of law that an appellant, in order to secure reversal of a judgment against him, must not only show some error but must also show that that error was prejudicial to him." *Smith v. Flesher* (1967), 12 Ohio St.2d 107, 110. Because Father and Mother have not demonstrated prejudice, their sole cross-assignment of error lacks merit.

III

{¶24} CSB's assignments of error are overruled. Father and Mother's cross-assignment of error is overruled. The judgment of the Summit County Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant/Cross-Appellee.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellant/Cross-Appellee.

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