2014 IL App (1st) 142393-U

Sixth Division
Order filed: December 31, 2014

No. 1-14-2393

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

In re A.B. and A.B., Minors,	)	Appeal from the Circuit Court of Cook County.
	)	Nos. 14-JA-127 and 14-JA-128
(The People of the State of Illinois, Petitioner-Appellee v. Armet B., Respondent-Appellant).	)	Honorable Maureen F. Delehanty, Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court was affirmed where the court's finding was not against the manifest weight of the evidence and where the respondent's ineffective assistance of counsel claim failed.

¶ 2 The respondent, Armet B., appeals from the circuit court order which adjudicated his five-year-old daughter, A.B. a sexually abused minor pursuant to the Juvenile Court Act of 1987 (Act) (705 ILCS 405/2-3(2)(iii) (West 2012)) and naming him as the perpetrator of the abuse. The respondent argues that the circuit court's finding be vacated because (1) it is against the

manifest weight of the evidence, and (2) he received ineffective assistance of counsel during the adjudication hearing. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 Five-year old A.B. came to the attention of the Illinois Department of Children and Family Services (DCFS) when her younger brother, A.B (hereinafter Baby A.B.). was born in 2011 with heroin in his system. The agency recommended family services for the respondent, including a recommendation that he participate in substance abuse services, ensure appropriate medical treatment for the children, and improve the conditions of their unkempt home. The case remained open, when, in December 2013, A.B. tested positive for gonorrhea infections in her eye and rectum. Thereafter, in February 2014, the State filed petitions for adjudication of wardship for A.B. (case no. 14-JA-127) and Baby A.B. (case no. 14-JA-128) pursuant to the Act, alleging that both children were neglected and abused because their environment was injurious to their welfare (705 ILCS 405/2-3(1)(b) (West 2012)) and created a substantial risk of injury to them (705 ILCS 405/2-3(2)(ii) (West 2012). Additionally, in regard to A.B., the State alleged that she had been sexually abused (705 ILCS 405/2-3(2)(iii) (West 2012)), and in regard to Baby A.B., that he was a drug-exposed infant (705 ILCS 405/2-3(1)(c) (West 2012)).

¶ 4 After conducting an adjudicatory hearing in July 2014, the court adjudicated both children abused and neglected as defined by the Act for the reasons alleged in the State's petitions. The respondent does not dispute the court's findings related to Baby A.B., and therefore, any issue pertaining to him is forfeited. Ill. S. Ct. R. 341 (eff. Feb. 6, 2013); *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010). The respondent further does not dispute the court's findings that A.B. was abused and neglected on the basis of an injurious environment or that her environment created a substantial risk for injury. As such, any arguments related to those findings are also forfeited. Ill. S. Ct. R. 341 (eff. Feb. 6, 2013); *Vancura*, 238 Ill. 2d at 369. The

sole issue presented by the respondent in this appeal relates to the court's finding that A.B. was sexually abused by him, as the State alleged pursuant to section 2-3(2)(iii) of the Act. Accordingly, we state only the facts necessary to address this issue.

¶ 5 Shanetha McDaniel, a family services counselor employed by Lutheran Children and Family Services, testified that she began working with the respondent when Baby A.B. was born substance-exposed in 2011. She visited the home consistently, working toward keeping the family together. For the respondent, McDaniel recommended that he participate in Alcohol Anonymous meetings, ensure that A.B.'s foot condition was medically cared for, and maintain the unkempt home in which they resided. She also expressed concern about the cleanliness of the children. Neither A.B.'s foot condition nor the other issues were addressed by the respondent during 2012 and 2013. McDaniel admitted that A.B. never reported any instances of sexual abuse to her on her many visits with the family. When she learned in December of 2013 that DCFS had opened another investigation because A.B. tested positive for gonorrhea, McDaniel admitted that she was surprised because A.B. never gave her any indication that she had been sexually abused. Cynthia Pettis, an investigator with DCFS, similarly testified that she interviewed A.B. after she tested positive for gonorrhea and that A.B. denied that anyone had abused her.

¶ 6 The parties stipulated that Dr. Marjorie Fujara was an expert in pediatrics and child abuse. Dr. Fujara testified that she was employed by John H. Stroger, Jr. Hospital, working in the pediatrics' division of Child Protective Services and the Chicago Children's Advocacy Center (CAC), where she examined A.B. in December 2013. She stated that A.B. had been referred to the CAC after her family doctor diagnosed her with a gonorrhea infection in her eye. The respondent accompanied A.B. to her visit with Dr. Fujara, and he informed the doctor that he had

been infected with gonorrhea twice in the past; most recently, he tested positive for the disease in October 2013. The respondent stated that his only sexual partner was A.B.'s mother, who also had gonorrhea. He told Dr. Fujara that A.B.'s mother "had a habit of coming over to visit [A.B.] and picking out the crusty stuff in her eye." He also stated that he had a significant amount of discharge from his infection and that A.B. often climbed into bed with him at night, even though he slept without any clothing.

¶ 7 Dr. Fujara testified that the respondent's two explanations were not medically feasible ways to spread gonorrhea. According to the doctor, gonorrhea "is considered a very fragile organism" that does not live outside of the body. She explained that any transmission of the infection occurs from the immediate contact of a body part with the infected body part. According to Dr. Fujara, gonorrhea eye infections are unusual in preschool or school-aged children and are often seen in newborns as they may contract the disease through an infected mother's birth canal. Typically, in older children, the disease is "autoinoculated," meaning the infection is spread from the child's finger "digging in [her] vaginal or anal area and then touching their eye." Dr. Fujara explained that, while autoinoculation is not "touching" of a sexual nature, the initial infection in the vagina or anus is contracted through sexual contact.

¶ 8 After examining A.B., Dr. Fujara determined that the antibiotics her family doctor had prescribed had improved her eye condition and that her anal-genital exam was normal, meaning there were no physical signs of injury, bruising or tears. In her experience, Dr. Fujara did not find it unusual that A.B.'s physical exam was normal because 95% of all abused children have normal physical exams. She admitted that A.B. did not make any disclosures indicating or referencing that she had been sexually abused. Dr. Fujara testified that children often do not disclose that they have been sexually abused, even after testing positive for a sexually

transmitted disease (STD). She reported that she tested A.B. for other types of infections during her exam and that those tests were negative for the presence of other STD's. However, A.B. tested positive for gonorrhea in her anus. In her opinion, Dr. Fujara believed that A.B. had gonorrhea infections of her rectum and her eye as a result of sexual abuse. She testified that she was clinically certain that A.B.'s infections were the result of sexual abuse "[b]ecause gonorrhea is a sexually transmitted disease that is only contracted through sexual contact." Dr. Fujara testified that she spoke to the respondent after receiving A.B.'s test results, and he "was in disbelief" and then turned angry that she was reporting that A.B. had been sexually abused. Dr. Fujara admitted that the respondent told her that he was A.B.'s primary caretaker, but that her mother visited with A.B. on several occasions.

¶ 9 The State admitted various records pertaining to A.B., including the medical records from Dr. Fujara's examination. In the history section of her report, dated December 12, 2013, Dr. Fujara noted that she spoke to the respondent, who thought that A.B.'s mother spread her infection to A.B.'s eye by wiping "the crusted stuff out of her eyes in the morning." The respondent also thought that she may have contracted the disease from using his towel or crawling into bed with him when he sleeps in the nude. The respondent told Dr. Fujara that he experienced "a lot of discharge" with his infection.

¶ 10 At the conclusion of the evidence, the court addressed the sexual abuse issue, stating that it found Dr. Fujara to be a reliable and highly credible witness. The court believed Dr. Fujara when she opined that A.B. had contracted the disease through sexual contact with her anus and then transmitted the infection to her eye through autoinoculation. The court acknowledged that A.B. had denied that anybody had touched her "private parts," but that there was no evidence rebutting Dr. Fujara's opinions. Regarding the perpetrator of the abuse, the court stated that it

believed, based on the totality of the evidence, that the respondent was the abuser since he was the sole caretaker of A.B. at the time and because Dr. Fujara had ruled out the respondent's explanations for A.B.'s infection as feasible methods of contracting the disease. .

¶ 11 The case then proceeded to the dispositional and permanency hearing. On July 30, 2014, the court adjudged both children to be wards of the court, appointed a guardian for them, and ordered supervised visitation with the respondent when "therapeutically appropriate." Regarding permanency, the parties agreed with a goal of returning the children home in 12 months, pending a sexual perpetrator evaluation of the respondent. The respondent timely appealed under Illinois Supreme Court Rule 660(b) (eff. Oct. 1, 2001).

¶ 12 The respondent first argues that the court's finding that he sexually abused A.B. is against the manifest weight of the evidence. We disagree.

¶ 13 Upon the filing of a petition for an adjudication of wardship, the Act provides that the circuit court conduct an adjudicatory hearing to determine whether the allegations that a minor is abused, neglected or dependent are supported by a preponderance of the evidence. 705 ILCS 405/1-3(1), 2-21 (West 2012); *In re K.T.*, 361 Ill. App. 3d 187, 200-01 (2005). An abused minor includes any minor whose parent "commits or allows to be committed any sex offense against such minor, as such sex offenses are defined in the Criminal Code of 1961 or the Criminal Code of 2012, or in the Wrongs to Children Act." 705 ILCS 405/2-3(2)(iii) (West 2012). The preponderance of the evidence is that amount of evidence that leads a trier of fact to find that the fact at issue is more probable than not. *K.T.*, 361 Ill. App. 3d at 200-01. On review, a trial court's finding of abuse or neglect will not be reversed unless it is against the manifest weight of the evidence. *In re Arthur H.*, 212 Ill. 2d 441, 464 (2004). A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *Id.*

¶ 14 The respondent maintains that the State must present corroborating physical evidence of abuse or the minor's outcry of abuse. In this case, he argues that the State presented evidence of neither as it was undisputed that A.B. denied that she was abused and her physical examination was normal. He further contends that there was no evidence that A.B. contracted gonorrhea through sexual contact, noting that there was no physical evidence that he or anyone else had rubbed or penetrated A.B.'s anus.

¶ 15 We reject the respondent's arguments as Dr. Fujara, whom the circuit found to be a reliable and credible witness, testified that A.B.'s anal gonorrhea infection could only have been contracted through sexual contact. Her testimony, as the court noted, was unrebutted. Dr. Fujara also refuted the respondent's explanations of innocent transmission of the disease, including A.B.'s use of his towel or sleeping in his bed. She specifically testified that gonorrhea "is considered a very fragile organism" that does not live outside of the body and that any transmission of the infection must occur from direct and immediate contact between the infected body part and another body part. While the record indicates that A.B.'s mother visited the child and also had a history of gonorrhea infections, it was undisputed that the respondent was A.B.'s primary caretaker and had been infected with the disease shortly before A.B.'s diagnosis.

¶ 16 Moreover, the Criminal Code includes sex offenses that do not require any proof that the purpose of the contact with A.B.'s anus be for sexual arousal or gratification. Such an offense could support a finding of sexual abuse in an adjudication proceeding. See 720 ILCS 5/11-1.20(1)-(4) (West 2014) (criminal sexual assault based on sexual penetration); 720 ILCS 5/11-0.1 (West 2014) (Criminal Code's definition of sexual penetration, which does not require proof of sexual arousal or gratification). Given Dr. Fujara's testimony, the respondent's unfeasible explanations for the transmission of the disease, and the Act's broad inclusion of all sex offenses

defined in the Criminal Code, we cannot say that the circuit court's finding is against the manifest weight of the evidence.

¶ 17 Next, the respondent argues that the court's finding that he abused A.B. must be vacated because he received ineffective assistance of counsel during the adjudicatory hearing. He contends that counsel's performance was deficient where she failed to present medical evidence to refute Dr. Fujara's testimony and corroborate his position that A.B. contracted gonorrhea from a nonsexual manner. He further states that he was prejudiced by counsel's deficient performance because the court would not have found A.B. sexually abused but for counsel's failure to rebut Dr. Fujara's opinions. We disagree.

¶ 18 Although there is no constitutional right to counsel in proceedings under the Act, a statutory right is granted thereunder. *In re Charles W.*, 2014 IL App (1st) 131281, ¶¶ 32-33. Our courts have applied the standard utilized in criminal cases to review the effectiveness of counsel in juvenile proceedings. *Id.* Under that standard, the respondent must show both that (1) counsel's representation fell below an objective standard of reasonableness, and that (2) a reasonable probability exists that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668(1984)).

¶ 19 To satisfy the deficient-performance prong, the respondent must overcome the strong presumption that counsel's conduct may have been the product of sound trial strategy as matters of trial strategy are generally immune from claims of ineffective assistance of counsel. *In re Charles W.*, 2014 IL App (1st) 131281, ¶ 32. To satisfy the prejudice prong, the respondent must show a reasonable probability that the result of the proceeding would have been different or show that counsel's deficient performance rendered the result of the trial unreliable or the

proceeding fundamentally unfair. *Id.* Further, an ineffective-assistance-of-counsel claim fails if either prong of *Strickland* is not met. *People v. Nitz*, 143 Ill. 2d 82, 109 (1991).

¶ 20 In this case, the respondent's claim fails under both prongs of *Strickland.* First, in his brief, the respondent cites to a 1992 "treatise" entitled *True and False Accusations of Child Sex Abuse*, which refers to past medical studies that found instances of gonorrhea being transmitted in nonsexual ways, such as newborns in hospitals exposed to contaminated thermometers, through close physical contact among peers, and indirect contact with contaminated bedclothes and hands. However, the respondent fails to support the assertion that this "treatise" or the medical studies cited therein represent a current view accepted by anyone in the medical community.[1]

¶ 21 Second, the record refutes the respondent's claim that his counsel never investigated the possibility of introducing medical evidence to rebut the opinions of Dr. Fujara. On May 7, 2014, the respondent's attorney informed the court that she required more time for discovery after having received numerous medical reports from the State. Counsel specifically stated that she needed more time because she was "looking into the possibility of hiring an expert witness." The court granted the respondent additional time and continued the hearing. Quite possibly, the respondent's counsel did not find an expert willing to provide opinions that contradicted the opinions of Dr. Fujara. We also note that the respondent's counsel vigorously cross-examined

[1] As counsel for A.B. points out, *True and False Accusations of Child Sex Abuse* by Dr. Richard A. Gardner is a self-published book which may not be considered an authoritative treatise. Counsel also notes that other experts have called the theories of Dr. Gardner "unique" and unrepresentative of the "mainstream of generally accepted clinical practice" by others in the field of child sexual abuse.

Dr. Fujara regarding the possibility that A.B. contracted the disease through the nonsexual ways that the respondent suggested. Based on the record before us, we cannot conclude that the respondent has overcome the presumption that counsel's decisions not to call an expert to testify or introduce contrary medical evidence were matters of sound trial strategy.

¶ 22 Even if counsel's performance was deficient, the respondent's ineffective assistance claim fails under the second prong of *Strickland.* The respondent cannot demonstrate that a reasonable probability exists that, but for his counsel's failure to introduce medical evidence rebuking the State's expert, that the result of the proceeding would have been different. It was not disputed that the respondent told Dr. Fujara that: A.B. often slept in his bed while he was nude; he was A.B.'s primary caretaker; and he had a gonorrhea infection two months before A.B.'s diagnoses. Further, Dr. Fujara opined that gonorrhea is a sexually transmitted disease, most often spread through the direct and immediate contact between the infected body part and another body part. Counsel cross-examined Dr. Fujara regarding the possibility of other methods of transmittal, and she testified that it was possible for A.B. to have spread the anal infection to her eye through autoinoculation, but that the initial infection had to be sexually transmitted. Had another medical expert testified that A.B. could have contracted the disease through an indirect manner, we cannot conclude that the outcome of the proceeding would have been any different as it is the duty of the fact-finder to determine the credibility and weight of the witnesses' testimony. *In re B.D.*, 321 Ill. App. 3d 161, 164 (2001). Given the record, we cannot say that a reasonable probability exists that the circuit court would have accepted the respondent's medical evidence and rejected the State's expert and found that A.B. was not sexually abused.

¶ 23 Finally, the respondent argues that he was prejudiced by counsel's error because, if he continues denying that he sexually abused A.B. during the court-mandated treatment program, he

will lose his parental rights. We reject this speculative argument as our supreme court has held that a parent cannot be required to admit to a criminal act in order to avoid losing parental rights. *In re A.W.*, 231 Ill. 2d 92, 108 (2008). Rather, the circuit court "may order a service plan that requires a parent to engage in effective counseling or therapy, but may not compel counseling or therapy requiring the parent to admit to committing a crime." *In re A.W.*, 231 Ill. 2d at 108. Thus, contrary to the respondent's claim, the circuit court's sexual abuse finding will not require him to admit to the conduct in a therapy program order to avoid termination of his parental rights.

¶ 24 Based on the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.