UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0616

SEPTEMBER TERM, 2015

IN RE: MALACHI M.

Eyler, Deborah S.,
Arthur,
Salmon, James P. (Retired,
Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: December 30, 2015

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The Circuit Court for Wicomico County, sitting as the juvenile court, entered an order changing the primary permanency plan for Malachi M., the minor child of Mary M., the appellant, from reunification to adoption by a non-relative. The appellant noted an appeal, presenting the following questions for review, which we quote:

1. Did the court err by admitting prejudicial hearsay evidence from the mother's prior case in Worcester County?

2. Did the court err by refusing to allow the mother to testify, when she returned late from a break in the proceedings?

For the following reasons, we shall affirm the order of the circuit court.[1]

FACTS AND PROCEEDINGS

On April 29, 2013, the appellant consented to the termination of her parental rights to her daughter in a Child in Need of Assistance ("CINA") case pending in Worcester County.[2] Two weeks later, on May 14, 2013, she gave birth to a son, Malachi M.

On May 29, 2013, the appellant came to the attention of the Wicomico County Department of Social Services ("the Department") pursuant to the "Birth Match" law,

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[1] Malachi's father is not participating in this appeal.

[2] "Child in need of assistance" means a child who requires court intervention because:

> (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and
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> (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs.

Md. Ann. Code, Courts and Judicial Proceedings Article ("CJP") (1973, 2013 Repl. Vol.), § 3-801(f).

which requires a local department of social services to complete a safety assessment for every infant born to a mother whose parental rights to another child previously have been terminated. As a consequence of its assessment, the Department provided income services and intense case management services to the appellant. According to the Department, she was unable to properly supervise Malachi, and on one occasion left him unattended for several hours. The appellant refused to take responsibility for her actions. She was unable to sustain stable housing and displayed "aggressive behaviors" toward members of her church, with whom she had sought shelter. She ended up homeless.

In October of 2013, when Malachi was five months old, he was placed into shelter care. On November 13, 2013, with the consent of the parties, the court found Malachi to be a Child in Need of Assistance and committed him to the care of the Department for appropriate placement.

In March of 2014, at a permanency plan hearing, the Department recommended, and the court ordered, a plan of reunification with the parents. The permanency plan of reunification was continued at the review hearings in June of 2014 and December of 2014. In January of 2015, a daughter born to the appellant after Malachi was born was diagnosed with "failure to thrive" and was placed in the same foster home as Malachi.

At the next review hearing, on May 6, 2015, the Department recommended that the permanency plan be changed to adoption by a non-relative. Evangelina Hall, a foster care worker with the Department, testified regarding the appellant's lack of progress toward reunification in the 18 months that Malachi had been in foster care. She

explained that the service agreement between the Department and the appellant required the appellant to participate in mental health treatment, but the appellant had been dismissed from the treatment program due to non-compliance, having attended only two visits in a year. The appellant was given a "fit to parent" evaluation and was found to be functioning at a fourth-grade level. She refused to participate in one of the parenting skills classes the Department referred her to. She had missed 10 out of 19 scheduled visits with Malachi in the six months prior to the review hearing, even though the Department had arranged for her to have transportation to the visits. The appellant acted unreasonably and was uncooperative and argumentative with Department staff. The Department had information that the appellant had a "delusional disorder," but she refused an assessment that would have allowed a diagnosis to be made.

The Department informed the court it had provided the appellant all the services it had available, and, although she had secured housing in September of 2014, she had failed to make any other progress toward reunification in the previous 18 months and was unable to recognize and meet Malachi's needs. According to the Department, Malachi displayed no bond with the appellant, but exhibited a very strong bond with his foster family members. Attempts to place Malachi with a family member had been unsuccessful.

In its report, the Department stated:

> This agency has great concerns about the ability of [the appellant] to provide care and supervision for her children. The Local Department has been working with [the appellant] for years and addressed on numerous times the issues of not providing the proper care and supervision for her

> children. The Local Department workers have worked with [the appellant] on parenting education, and she does not retain nor apply the information. [The appellant's] parenting skills are very poor at this time to provide care and supervision for her children.
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> * * *
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> [The appellant] does not demonstrate an appropriate bond with [Malachi]. She is not cognitively able to understand developmental milestones and emotional attachment issues. She does not seem to comprehend the importance of weekly visits to establish a bond, and she does not understand that her son will not develop a bond with her when she has only completed less than . . . half of the visits scheduled in the past six months. Since [the appellant's] visits have not been consistent, she cannot receive advice or feedback without aggression and hostility, she shows a lack of interest in attending visits regularly, and [Malachi] does not have a bond with her, and due to the length of time he has been in care with no progress from [the appellant], the Department recommends that visits be ceased or decreased to once per month as that would be in the best interest of the child.

Counsel for Malachi agreed with the Department's recommendation that the permanency plan be changed to adoption by a non-relative. The appellant objected to the proposed change. Malachi's father did not object.

The court found that the Department had made reasonable efforts and had provided adequate services to accomplish the goal of reunification, but the appellant had not engaged meaningfully in required mental health treatment, which interfered with her ability to parent, and, after 18 months, she had not made sufficient progress toward the permanency plan of reunification. The court also found that Malachi's bond with the appellant was "minimal" and that he was doing "beautifully" at his foster home. Noting that adoption is "an appropriate plan because there is no parent or relative capable of

taking custody of the child," the court ordered a change in the permanency plan from reunification to adoption. The appellant noted a timely appeal.

Additional facts will be included in the discussion as needed.

DISCUSSION

I.

At the May 6, 2015 hearing, the Department offered in evidence its report of the same date ("the report"). The court asked if there were any objections. Counsel for the appellant responded, "[s]ubject to cross examination, no objection[.]" On that basis, the report was admitted in evidence.

The report includes passages based on information from the Worcester County Department of Social Services concerning the appellant's prior CINA case in that county, which, as stated above, had resulted in the termination of her parental rights to her older daughter. The references to the Worcester County case are:

> Prior to [the appellant's] involvement with Wicomico County DSS, she had an open case in Worcester County from 11/23/10 until 4/29/13 until termination of parental rights occurred. A review of Worcester County records indicate that [the appellant] entered services agreements and was unable to be compliant. She struggled with stability and housing, and although [she] was in a residential program for women, she was non compliant with the program and unsuccessfully discharged due to "Village of Hope does not have the manpower necessary to care for her." During the time [the appellant] was involved with Worcester DSS she lived in over twenty different locations. [The appellant] was also unable to obtain stable employment. The Department had referred her to DORS at least two separate times for employment services; however, again, [the appellant] failed to follow through with any of the referrals or recommended programs.

> [The appellant's] mental health was a major concern for the Worcester County Department. [The appellant] completed a neuropsychological evaluation with Dr. Lewis on February 24, 2011. He recommended that [the appellant] participate in trauma therapy. Referrals were made to the Worcester County Health Department and Eastern Shore Psychological Services (ESPS) by the Department. [The appellant] completed an intake with Kelly Hawkins at ESPS, but when Ms. Hawkins recommended [the appellant] have a psychiatric evaluation for possible medication management [the appellant] was not interested. ESPS was unable to provide the level of needed service due to [the appellant's] refusal; therefore, she was discharged on July 14, 2011. A referral was made by Ms. Hawkins to Life Crisis Center, but [the appellant] did not contact them and it is unlikely they will provide service due to Ms. M's noncompliance in the past with their services. [The appellant] was seen at Three Lower Counties (TLC) for an initial evaluation with Lisa Pease on August 4, 2011. [The appellant] then had two therapy sessions with Ms. Pease. On October 20, 2011, Ms. Pease wrote a letter indicating that [the appellant] is in need of more intensive trauma therapy and the practice is unable to meet [the appellant's] psychiatric needs. [The appellant] went back to ESPS for mental health services on November 1, 2011 and met with Catherine Cocky. On November 22, 2011, Ms. Cocky reported she only saw [the appellant] one time and was still completing her assessment, but [the appellant] told her that she does not need mental health services but would attend once a month for court. The worker sent Ms. Cocky the neuropsychological evaluation on [the appellant] and spoke with her after she read it and met with [the appellant] a second time. Ms. Cocky explained she is worried about doing trauma therapy with [the appellant] because she does not seem to be reality oriented. She also said she wanted to see [the appellant] more often. Ms. Cocky reported again on January 4, 2012, that she would like to see [the appellant] more often, but she is only coming once a month. Ms. Cocky referred [the appellant] to Dr. Ahmed for a psychiatric evaluation because Ms. Cocky is concerned that [the appellant] is delusional. The Department agreed to pay [the appellant's] insurance co-payments for the next ten sessions, and then reevaluate. Due to [the appellant's] past and current mental health concerns and recommendations, it was imperative that she be consistent with mental health treatment and follows through with recommendations. [The appellant] being compliant regarding her mental health is discussed regularly with her, but she continues to be in denial that she needs any treatment.

> [The appellant] did complete some basic parenting classes while involved with Worcester County DSS which were basic six hour classes. The Department recommended [the appellant] complete a comprehensive parenting class for infants and be able to demonstrate the skills she learns, which she did not do consistently during visitation with her child. [The appellant] said she understood about completing a more comprehensive parenting class, and even stated at court on August 5, 2011 that she would participate through Village of Hope, however, she was dismissed from this program. [The appellant's] visitation while involved with Worcester Co DSS was also sporadic and inconsistent. During the time her daughter entered care, 75 visits were offered to [the appellant] and she missed 26 visits, and was late or left early 10 times, and fully attended 39 visits over two and a half years. [The appellant] today still believes that the only reason her daughter was adopted was because she consented, otherwise, she believes her daughter would be with her. She is unable to comprehend why her daughter was never able to be reunified with her.

The report also contains references to prior diagnoses of bi-polar syndrome, cognitive limitations, dyslexia, Asperger's Syndrome, and to the results of a psychological evaluation performed in February of 2011.

The appellant acknowledges that she did not object to the report when the Department offered it in evidence, and indeed agreed to its admission, subject to her right of cross-examination. Without addressing non-preservation, the appellant contends the court erred in admitting the report because it contains "accusations" about her that "were not found elsewhere in the record" and that were prejudicial. In particular, she asserts that the information in the report about the termination of parental rights case in Worcester County was not reliable and she was prejudiced by the admission of the report because she was not able to cross-examine anyone from Worcester County. She maintains that, through the report, the Department admitted expert witness testimony without the expert having first been qualified. She also argues that the court's decision to

change the permanency plan was based "in significant part" on references to the Worcester County case made in the report.

The Department responds that this issue is not preserved for appellate review. The appellant did not object to the admission of the report. On the contrary, she agreed to its admission subject only to cross-examination. On the merits, the Department asserts that the report was admissible because the rules of evidence do not strictly apply in juvenile cases, and even if they did, the public records exception to the rule against hearsay applied.[3]

The issue whether the court abused its discretion in admitting the report was waived by the appellant. She consented to the report's admission, "[s]ubject to cross examination," which meant cross-examination of Ms. Hall, the Department's witness through whom the report was admitted. And in fact her counsel cross-examined Ms. Hall. Under Rule 2-517, "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." *See also In re Colin R.* 63 Md. App. 684, 695 (1985) (holding where no objection is raised before the juvenile court, the question is

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[3] As an appellee, Malachi has filed a brief in which he agrees with the appellant on both issues she has raised on appeal, and asks this Court to reverse the juvenile court's order. In the proceedings below, Malachi did not object to the admission of the report. Moreover, Malachi (through counsel) argued *in favor* of the court's changing the permanency plan from reunification to adoption. Malachi did not note an appeal from the court's order. The arguments Malachi now advances on appeal have been waived.

not preserved for appellate review). At no time during the hearing did the appellant move to strike any part of the report or express any concern about its admission. This is a clear case of waiver.

Even if the appellant had not waived any objection to the report coming into evidence, and even if we were to assume, merely for the sake of argument, that the court abused its discretion in admitting the report, it is clear that the admission of the report did not affect the outcome of the case and therefore was not prejudicial. "It is well settled in Maryland that a judgment in a civil case will not be reversed in the absence of a showing of error *and* prejudice to the appealing party." *In re Ashley E.*, 158 Md. App. 144, 164 (2004) (citations omitted) (emphasis in original). "[P]rejudice means that it is likely that the outcome of the case was negatively affected by the court's error." *Id*. (Citation omitted).

In ruling from the bench, the court made plain that the "overarching" issue was the appellant's failure in the preceding 18 months to abide by the terms of the service agreement, in particular to engage in meaningful, ongoing mental health treatment, which was essential for her to make any progress toward becoming able to parent Malachi. The court also emphasized as a basis for its decision the number of visits with Malachi that the appellant had missed, her "minimal" bond with Malachi, and Malachi's strong bond with his foster family. The court concluded that despite reasonable efforts by the Department toward the goal of reunification, the appellant had not made sufficient progress toward that end, and the Department had not been able to locate a relative

capable of taking custody of Malachi. The court's decision to change the permanency plan was not based "in significant part," much less at all, on any information about the prior Worcester County case.

II.

After the Department closed its case, appellant's counsel requested a five-minute recess to confer with her client. After the break, the appellant did not return to the courtroom, and her whereabouts were unknown. The court granted an additional five minute recess in order to try to find her. The appellant's attorney explained that, during the initial break, she consulted with the appellant and advised her not to testify. The appellant did not like that advice and left. Counsel stated that she assumed that the appellant would return because her purse was in the courtroom. The courtroom deputy had been dispatched to try to find the appellant. He reported to the judge that the courthouse had been searched with the aid of the video surveillance system, but the appellant had not been located. Counsel for the appellant speculated that her client may have gone to the District Court "to get a letter from a security guard."

The court declined to wait any longer for the appellant to return, finding that she had voluntarily absented herself from the hearing. As there were no other witnesses to be called, the evidentiary phase of the hearing was closed. The appellant's attorney proffered that had the appellant testified (contrary to counsel's advice) she would have stated that she had attended three therapy sessions in the two weeks prior to the hearing and was employed. Counsel asked the court not to change the permanency plan, and

argued that the appellant had tried her best to comply with Department directives and was cooperating.

The court proceeded to announce its ruling from the bench. In the middle of the court's doing so, the appellant returned to the courtroom. She explained that she had left the courthouse to get evidence to support her testimony.[4] Her counsel stated for the record that the appellant still wished to testify, but that it would be against the advice of counsel. The Department and the father objected to reopening the appellant's case to allow her to testify. The court stated that it would not reopen the case, and resumed its ruling.

The appellant then addressed the court herself to object to the court proceeding to rule without allowing her to testify. The court responded, explaining that the appellant had had an opportunity to testify, but that she was not present when court had reconvened after the recess and the court had waited "a while" for her to return before proceeding without her. The court indicated that it would consider a motion for a subsequent permanency plan hearing. No such motion was filed.

The appellant contends the court deprived her of her due process rights by declining to reopen the evidence so she could testify. The Department counters that the appellant waived her opportunity to testify by choosing to leave the courthouse during the

[4] It is unclear from the record how long after the hearing resumed that the appellant returned to the courtroom. It also is unclear what "evidence" the appellant had been seeking or where she had gone.

brief recess without notifying the court or her counsel that she was doing so. It maintains that the court had discretion over whether to allow the appellant to reopen her case in order to testify and did not abuse its discretion by declining to do so. The Department further responds that, in any event, the appellant's testimony would not have been essential to the court's decision because nothing in the proffer demonstrated that the appellant had made any progress toward reunification.

Parents must be afforded a reasonable opportunity to be present and participate in any judicial proceeding involving their parental rights. *See In re Damien F.*, 182 Md. App. 546, 569–70 (2008). Here, the juvenile court did not deny the appellant that opportunity. The court did not exclude her from the hearing. Had she been present when the case was called after the recess, she would have had the opportunity to testify if she so chose. Instead, the appellant left the courthouse just before she would have taken the stand, and did so without notifying the court or her attorney where she was going, what she was doing, or when she would be back. The court delayed the proceedings so efforts could be made to locate the appellant by means of video cameras in various areas of the courthouse. Those efforts were unsuccessful. By the time the appellant finally returned to the courtroom, the judge was in the middle of ruling from the bench. In that situation, the court did not deny the appellant her *opportunity* to testify and did not abuse its discretion by declining to allow the appellant to reopen her case. *See Gillespie-Linton v. Miles*, 58 Md. App. 484, 499–500 (1984) ("The decision to permit a party to re-open her case for the purpose of supplying additional evidence is within the sound discretion of the

trial judge and will not be disturbed on appeal unless there has been an abuse of that discretion.”).

Even assuming an abuse of discretion, for the sake of argument, the appellant would not have been entitled to relief because there is no showing of prejudice. The Department presented a strong case that the appellant had not made progress toward reunification in the 18 months prior to the hearing. The court heard her proffer that she had made three visits to a therapist in the two weeks prior to the hearing and that she had a job and stated the proffered information would not change the ruling. Because the outcome of the case would not have changed if the appellant had been permitted to reopen her case to testify, the court's ruling precluding her from doing so was not prejudicial.

ORDER OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.