

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1598

September Term, 2014

IN RE: MAKAYLA E., REBECCA C., AND
LAURA P.

Zarnoch,
Wright,
Hotten,

JJ.

Opinion by Hotten, J.

Filed: May 21, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant's four daughters were all adjudicated Children in Need of Assistance by the Circuit Court for Allegany County, based on allegations of sexual abuse against appellant's husband by two of the daughters. At the adjudication hearing, the circuit court admitted a videotaped interview of one daughter describing the alleged abuse to a social worker. Appellant appeals, challenging the circuit court's admission of the interview, presenting one question for our consideration:

Did the court err by finding that Makayla's statements were admissible?

For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

Appellant, Ina P. ("Ms. P."), is the mother of four daughters: Kianna (born November 2003), Makayla (born June 2008), Rebecca (born April 2011), and Laura (born November 2014). Ms. P. is married to Chris P. ("Mr. P."), who is the father of Makayla, Rebecca and Laura. In March 2012, Kianna alleged that Mr. P. had sexually abused her. Criminal charges were filed against Mr. P. and he was incarcerated. Ms. P. acknowledged that she was aware of other allegations of abuse besides the ones made by Kianna, but indicated that she did not believe Kianna. Ms. P. entered into a safety plan with appellee, the Allegany County Department of Social Services ("the Department"), which required that Mr. P. remain away from the home. Mr. P. was released from incarceration pending trial on March 27, 2012, subject to the condition that he have no contact with Kianna or any other minor children.

Notwithstanding these conditions, the Department received several reports that Ms. P. was permitting Mr. P. to have contact with the girls. On May 22, 2012, Ms. P. visited

the Allegany County Department of Health with Makayla, Rebecca and Mr. P. and an employee contacted the Department and the State's Attorney's Office, informing them that Ms. P. was permitting Mr. P. to have contact with the girls. As a result, Mr. P. was incarcerated for violating the terms of his pretrial conditions.

On August 10, 2012, Mr. P. was released when the State declined to pursue prosecution of the sexual abuse charges. However, the safety plan between Ms. P. and the Department remained in effect. Days later, the Department learned that Mr. P. was residing with Ms. P. and her daughters in violation of the safety plan. The Department removed the girls from the home that same day and filed a shelter care petition with the juvenile court. The court granted the Department custody of Kianna, Makayla and Rebecca (Laura was not yet born), and they were placed in foster care. Kianna was sent to a different home than Makayla and Rebecca.

On September 11, 2012, the Department received new sexual abuse allegations against Mr. P. from Makayla, who was four years old at this time. An adjudicatory hearing was held on October 12, 2012 regarding Kianna, Makayla and Rebecca. The Department had videotaped an interview with Makayla the day she made the sexual abuse allegations and intended to introduce the video. The Magistrate attempted to establish the veracity of Makayla's statements by speaking with her in chambers, however, the conversation was not fruitful. Both the Magistrate and counsel for the Department attempted to establish that Makayla could distinguish between the truth and a lie, but after several attempts, Makayla grew restless and indicated that she wanted to go home. Accordingly, the Department did not introduce the September 12, 2012 videotaped interview, but the parties

stipulated to the facts and agreed that the girls would be found Children in Need of Assistance (“CINA”).¹ The juvenile court allowed the three girls to remain with Ms. P. under specified conditions, including that Mr. P. have no contact with the girls except through the Department, and that Ms. P. had to secure housing. Ms. P. and the three girls began residing at the Family Crisis Resource Center in October 2012. The staff informed Ms. P. that she would be permitted to stay there for two months and in January 2012, it terminated her residency. The Department learned that Ms. P. was not seeking housing without Mr. P. Following a hearing on January 8, 2012, the court ordered that the children be placed in shelter care and granted Ms. P. and Mr. P. weekly supervised visits. The children remained in foster care throughout 2013. In February 2014, Laura was born. During a February 21, 2014 hearing, the court permitted overnight visits between Ms. and Mr. P. and Makayla and Rebecca. There were four overnight visits scheduled in February and March of 2014. Following the third, the Department suspended the fourth as a result of sexual abuse allegations made by Makayla.

On March 11, 2014, the Department videotaped an interview between Makayla who was now five years old. In the interview, she described to a social worker how Mr. P. had lifted up her nightgown, pulled down her panties and touched her vaginal area with his pointed finger. The Department conducted an investigation and made a finding of

¹ A “Child in Need of Assistance” is a child who requires court intervention because he or she has been abused, neglected, has a developmental disability and/or a mental disorder, and his or her parents, guardian, or custodian, are either unwilling or unable to provide proper care and attention to the child and the child’s needs. Md. Code (1974, 2013), § 3-801(f) of the Courts and Judicial Proceedings Article.

indicated sexual abuse against Mr. P., and suspended future overnight visits. The Department also initiated a shelter care hearing regarding Laura and the court granted temporary custody to the Department for foster care. At a supervised visit between Makayla and Ms. P., Ms. P. questioned Makayla regarding why she had stated that Mr. P. had touched her. When the social worker confronted Ms. P. about this statement, Ms. P. stated that Makayla had a right to know that she was responsible for the children not returning home.

The juvenile court consolidated the CINA review hearings for Makayla and Rebecca,² with the adjudicatory and disposition hearings for Laura. Hearings were held April 11, 2014, May 30, 2014, June 12, 2014 and July 18, 2014. The court admitted the videotaped interview of Makayla from March 11, 2014, finding that it possessed guarantees of trustworthiness. At the conclusion of the hearings, the court found Laura to be a CINA, and ordered that all three remain in foster care with Ms. P. having supervised visits.

Ms. P. filed exceptions to the court's report and recommendations. The court held a hearing on the exceptions on August 21, 2014 and overruled the exceptions. Thereafter, Ms. P. noted a timely appeal, Mr. P. did not and therefore is not a party to this appeal. The children are also noted as appellees along with the Department. Additional facts and details shall be provided *infra*, to the extent they prove relevant in addressing the issue on appeal.

² Kianna had a different father than Makayla, Rebecca and Laura. Accordingly, she was subject to separate CINA proceedings.

STANDARD OF REVIEW

Upon review of CINA proceedings, this Court applies three interrelated standards of review:

When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Md. Rule 8–131(c)] applies. [Secondly,] if it appears that the chancellor erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor’s decision should be disturbed only if there has been a clear abuse of discretion.

In Re Shirley B., 191 Md. App. 678, 704 (2010) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003). Additionally, “[i]n reviewing the factual findings required by [Crim. Proc. §11-304], we apply the ‘clearly erroneous’ standard of review.” *Reece v. State*, 220 Md. App. 309, 319 (2014) (citing *Jones v. State*, 410 Md. 681, 700 (2009)).

DISCUSSION

Ms. P.’s sole contention on appeal is that the circuit court erred in admitting the videotaped interview of Makayla because her statements lacked the reasonable particularized guarantees of trustworthiness required by Maryland Code (2001, Repl. Vol. 2008) Criminal Procedure Article §11-304 [hereinafter *Crim. Proc.*]. Specifically, she contends that Makayla’s interview failed to demonstrate that she was a reliable witness and that her statements were not trustworthy. Appellees respond that the court made the statutory findings required by the statute and accordingly, there was no error.

Generally, out of court statements being admitted for the truth of the matter asserted are barred from admission as hearsay. *See* Maryland Rules 5-801³ & 5-802⁴. Criminal Procedure §11-304 provides an exception by permitting hearsay statements made by a child victim to be admitted subject to several requirements. For Crim. Proc. §11-304 to apply, the child must be under the age of 12 and alleged to be a CINA as a result of child abuse, neglect, or sexual abuse. Crim. Proc. §11-304(b). Additionally, the statements may only be admissible if they were made to a physician, a psychologist, a nurse, a social worker, a principal (or certain other school staff), a licensed counselor or therapist. Crim. Proc. §11-304(c). The parties do not dispute that the above requirements were met. Makayla was four years old at the time of the interview, and made the statements to a social worker regarding alleged sexual abuse by Mr. P. The requirement which is challenged by appellant is Crim. Proc. 11-304(e) which states:

Out of court statements with particularized guarantees of trustworthiness

(e)(1) A child victim's out of court statement is admissible under this section only if the statement has particularized guarantees of trustworthiness.

(2) To determine whether the statement has particularized guarantees of trustworthiness under this section, the court shall consider, but is not limited to, the following factors:

- (i) the child victim's personal knowledge of the event;
- (ii) the certainty that the statement was made;

³ (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

⁴ "Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible."

(iii) any apparent motive to fabricate or exhibit partiality by the child victim, including interest, bias, corruption, or coercion;

(iv) whether the statement was spontaneous or directly responsive to questions;

(v) the timing of the statement;

(vi) whether the child victim's young age makes it unlikely that the child victim fabricated the statement that represents a graphic, detailed account beyond the child victim's expected knowledge and experience;

(vii) the appropriateness of the terminology of the statement to the child victim's age;

(viii) the nature and duration of the abuse or neglect;

(ix) the inner consistency and coherence of the statement;

(x) whether the child victim was suffering pain or distress when making the statement;

(xi) whether extrinsic evidence exists to show the defendant or child respondent had an opportunity to commit the act complained of in the child victim's statement;

(xii) whether the statement was suggested by the use of leading questions; and

(xiii) the credibility of the person testifying about the statement.

Maryland courts have reviewed challenges to the admission of child victim statements of abuse on a number of occasions. *See Jones v. State*, 410 Md. 681 (2009); *State v. Snowden*, 385 Md. 64 (2005); *Reece v. State*, 220 Md. App. 309 (2014); *In re Michael G.*, 107 Md. App. 257 (1995). This matter frequently arises within the context of criminal prosecutions since the rules were codified in the Criminal Procedure Article, thus many of the applicable

cases are criminal. However, as the statute explains, it governs both criminal and juvenile matters.

In *Reece*, we reviewed a defendant’s challenge to his conviction of several sexual abuse charges perpetrated against R.M., a seven year old boy. 220 Md. App. at 311-12. After several instances of sexual abuse over the course of at least one year, R.M. told his parents about the assaults. *Id.* at 314. Initially, during a sexual assault evaluation, R.M. denied that the defendant had ever touched him inappropriately. *Id.* However, a few days later, he was seen by another doctor at which point R.M. acknowledged that the defendant had performed a number of sexual acts on him. *Id.* at 315. He described the acts in detail to the doctor, the resulting pain he would feel afterwards, recounted conversations between the defendant and himself, and described a number of acts in child-like language. *Id.* For example, he explained that they would do “boy stuff” that the defendant would touch his penis and “white stuff” would come out and that the defendant would place his penis in R.M.’s “butt.” *Id.* Other relatives of R.M. later corroborated times when the defendant would be alone with R.M. or when R.M. would have behavioral changes after visiting with the defendant. At the defendant’s trial, the state admitted R.M.’s statements through calling the pedestrian who evaluated R.M. and to whom R.M. described the acts of abuse. *Id.* at 317. On appeal, the defendant argued that the court erred in its finding that R.M.’s statements had the particularized guarantees of trustworthiness. *Id.* at 319. We disagreed, holding that the court did not err and that it had performed a detailed review of each of the thirteen factors before finding that the statements were admissible. *Id.* The trial court considered the doctor’s assessment of R.M. as “very articulate” and that his statements

were detailed and he was very serious while giving them. *Id.* at 321. The doctor had extensive training on how to interview children and that she attempts to use open ended questions. The doctor believed that there was little chance that R.M. was fabricating the statements and there was corroborating evidence that the defendant had the opportunity to commit the alleged acts. *Id.* at 321-23. The court also found that based on its examination of R.M. in chambers, that he was an intelligent child who was competent to testify. Since the circuit court properly considered the enumerated factors of §11-304(e), we found no error and affirmed the court’s admission of R.M.’s statements.

This Court has previously explained that the purpose of a consideration of these factors is primarily to determine whether the child was telling the truth when the statements were made. *See e.g. Prince v. State*, 131 Md. App. 296, 302 (2000). Following our review of the record in the case at bar, we conclude that the circuit court’s application of the factors outlined in Crim. Proc. §11-304 to the facts and testimony was without error.

In the circuit court’s order, it addressed each of the factors of §11-304(e), stating:

Findings on factors of particularized guarantees of trustworthiness concerning the statements of Makayla during the interview held on March 11, 2014:

(i) the child victim’s personal knowledge of the event: The child shows that she has personal knowledge as she was present and observed the events directly.

(ii) the certainty that the statement was made: The statement was recorded.

(iii) any apparent motive to fabricate or exhibit partiality by the child victim, including interest, bias, corruption, or coercion: There was no evidence of any apparent motive to fabricate or exhibit partiality. There was evidence that the child was interviewed on at least one previous and once [sic] subsequent occasion.

(iv) whether the statement was spontaneous or directly responsive to questions: The statements made on March 11[th] were part of an interview. The March 11th statements do not appear to be coached or the responses to leading questions.

(v) the timing of the statement: The March 11[th] statements were made two days after the visit that occurred between March 7[th] and 9[th].

(vi) whether the child victim's young age makes it unlikely that the child victim fabricated the statement that represents a graphic, detailed account beyond the child victim's expected knowledge and experience: The child's description during the March 11th interview is sufficiently detailed to show that she was present and actually experienced the events she describes and is not fabricated.

(vii) the appropriateness of the terminology of the statement to the child victim's age: Her vocabulary was age-appropriate and not beyond her knowledge and experience.

(viii) the nature and duration of the abuse or neglect: She described being fondled by Mr. P[] while she was sleeping on the couch in the living room.

(ix) the inner consistency and coherence of the statement: The statement is internally consistent and coherent.

(x) whether the child victim was suffering pain or distress when making the statement. The declarant did not appear to be in pain or distress while making the statement.

(xi) whether extrinsic evidence exists to show the defendant or child respondent had an opportunity to commit the act complained of in the child victim's statement: The parties admitted that the child was present in the home of Mr. P[] two days prior to the March 11[th] interview.

(xii) whether the statement was suggested by the use of leading questions: The statements were not suggested by leading questions.

(xiii) the credibility of the person testifying about the statement: The declarant appears to be credible.

Based on the above, the court found the recorded interview of Makayla to be admissible. The facts before the court were that following an overnight visit with Ms. P. and Mr. P. the weekend of March 7, 2014, Makayla reported that Mr. P. had inappropriately touched her private area. Her interview with a Department social worker was videotaped. The original statements regarding the abuse appear to have been made spontaneously, and not as a result of targeted questions regarding the touching. To the contrary, she volunteered the information.

Approximately eleven minutes into the interview, which up to that point had primarily been spent discussing Makayla's family and where she resided, the social worker displayed a picture of a human body on an easel. She and Makayla began naming the various body parts when the following ensued:

Social Worker: What do you call this?

Makayla: Booby

Social Worker: What do you call this?

Makayla: Hand

Social Worker: What do you call this?

Makayla: Belly button

Social Worker: What do you call this?

Makayla: Private

Social Worker: What do you call this?

Makayla: Leg

Social Worker: What do you call this?

Makayla: Feet

Social Worker: Ok, that's the front

[social worker flips over paper to show a picture of the back of a human body]

Makayla: This is the back!

Social Worker: How did you know what I was going to say? This is the back. What do you call this?

Makayla: Uhhh your neck

Social Worker: What do you call this?

Makayla: Private

Social Worker: The other parts are pretty much the same name again so we do have to do all of them

Makayla: Ok

Social Worker: Something else I do when I talk to kids is I talk about touches that they get. Sometimes kids can get touches that they like or that they are ok with them. Do you ever get touches like that?

Makayla: Well my dad touched me before.

Social Worker: Your dad touched you before?

Makayla: On the private.

Social Worker: On the private tell me about that.

Makayla: Um. He touched me right here [gesturing to her lower body]

Social Worker: Can you show me on the picture?

Makayla then identified the area on the picture she had previously labeled as the “private”, and indicated to the social worker that Mr. P. touched her with his hands while she was sleeping.

A trial court is vested with the discretion to determine the credibility of a witness. *See* Md. Rule 8-131(c) (stating in relevant part that appeals courts “will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.”); *see also Herring v. Herring*, 251 Md. 516, 518 (1968). Absent an abuse of that discretion, appellate courts will not disturb the court’s finding. *See In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (“Questions within the discretion of the trial court are ‘much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred.’”). The circuit court had more than one opportunity to observe Makayla in order to determine her ability to be a reliable witness. Of note is the observation that Makayla made prior allegations of abuse in September of 2012 which were also recorded. The circuit court declined to admit these statements because of Makayla’s young age at the time and based on its in chambers examination of her. The court concluded that those statements were not reliable. To the contrary, following the March 2013 allegations, the court found that she was a credible witness. This is an even stronger case than the one we were presented with in *Reece*, because there, the treating doctor merely described the child victim’s demeanor and the court found the description to be reliable. Here, the interview was videotaped, so the court was able to

assess Makayla's demeanor when she discussed the alleged abuse. Furthermore, akin to *Reece*, Makayla was able to describe in detail the circumstances surrounding the abuse: that she and Mr. P., were laying on the couch together while she was asleep when he touched her. She described what she was wearing and where other members of the family were. She was able to recount a conversation the next day she had with Mr. P. regarding the incident. Additionally, there was corroboration since Ms. P. had previously explained that the children would normally sleep in a bedroom but she and Mr. P. would sleep in the living room due to repairs that needed to be made in their room. Finally, she described the interaction as a child of five years old would, which indicates that she was not coached.

Under the clearly erroneous standard of review, we can only reverse when the trial court failed to refer to any guiding principles or rules. *See In re Yve S.*, 373 Md. 551, 583 (2003). Since the trial court clearly following the guidelines established in Crim. Proc. §11-304, we perceive no error and decline to reverse.

**JUDGMENT OF THE CIRCUIT
COURT FOR ALLEGANY COUNTY
IS AFFIRMED. COSTS TO BE PAID
BY APPELLANT.**