ARKANSAS COURT OF APPEALS

DIVISION I
No. CA08-752

	Opinion Delivered January 28, 2009
DAVID WHITHAM, APPELLANT V. ARKANSAS DEPARTMENT OF HUMAN SERVICES and MINOR CHILDREN, APPELLEES	APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT, [NO. JV-07-611] HONORABLE RHONDA K. WOOD, JUDGE AFFIRMED

RITA W. GRUBER, Judge

Appellant David Whitham appeals from an order of the Faulkner County Circuit Court adjudicating as dependent-neglected his four children: two daughters, A.W. (DOB 7/8/93) and C.W. (DOB 1/24/00); and two sons, D.W. (DOB 10/31/98) and K.W. (DOB 3/7/01).[1] On appeal, appellant contends that the circuit court erred in admitting into evidence a "Report to Prosecuting Attorney" because it contained inadmissible hearsay. We affirm the circuit court's order.

This case began on November 27, 2007, when DHS took appellant's children into

[1]The petition for emergency custody and dependency-neglect states that the legal/putative father of another daughter, Cy.W. (DOB 7/7/95), is unknown. The circuit court adjudicated all five children as dependent-neglected in its order, the parties refer to all five children as appellant's children, and thus this opinion affirms the circuit court's order with regard to all five children.

custody after receiving information that C.W. had reported to her school counselor that she had been sexually abused by appellant and that her mother had participated in and encouraged the abuse. The affidavit in support of the petition for emergency custody and dependency-neglect also alleged that their house had no running water, that the children and their clothing were dirty, and that the children smelled bad. The circuit court entered an order for emergency custody on November 30, 2007, finding probable cause to believe the children were dependent-neglected.

At the adjudication hearing on March 24, 2008, the school counselor for the three youngest children testified that the children wore the same clothes for several days in a row without washing them, that C.W.'s hygiene was very poor, and that C.W. had a very strong body odor. A CASA court report, entered into evidence without objection, described visits to the Whithams' home. According to the report, the house was "filthy"; there was very little food; the shower in the parents' bathroom was not connected to anything and there was no toilet in that bathroom; there were mouse or guinea pig droppings on the floor; clothes and trash were everywhere; and the condition of the house "was completely deplorable/unsanitary/unsafe." The DHS caseworker testified that the house was filled with trash, the floors were "ripped up," and the house contained no working bathroom or running water.

Testimony was also presented at the hearing that, during a physical examination of C.W. at Arkansas Children's Hospital for collection of evidence for a rape kit on November 27, 2007, two pubic hairs were found in C.W.'s genital area, and that C.W. did not have

pubic hair. Dr. Farst, who performed a follow-up examination on C.W. on December 5, 2007, testified that C.W. was "very permissive" during the examination, which she found to be "unusual, because it usually takes much more preparation in a child this age to get [her] to understand what we are going to do with the examination."

C.W. testified that she remembered two things: "That yellow stuff that my dad gave me, and it came out of his body front. And he put his finger and hit my potty spot." She testified that her dad touched her "potty spot" and that she didn't like it. She explained, "He only touched my potty spot twice already, but I don't know why." She also testified that her dad told her to take her clothes off and that she had her clothes off when her dad touched her "potty spot." Finally, she testified that she had seen her mom and dad do things with their "potty spots," that they had their clothes off, and that she was on their bed at the time.

Tracey Sanchez, a forensic interviewer who interviewed the children in December 2007, testified that C.W. was consistent in her statements. She stated that C.W. verbally explained the abuse and also acted it out and demonstrated with dolls. She also testified that C.W. told her that their mother taught her and her sisters how to masturbate appellant.

Finally, Tollece Sutter, the investigator with the Arkansas State Police who conducted the investigation of abuse and prepared the report to prosecuting attorney, testified that he found the allegations of sexual abuse and environmental neglect to be true. Counsel for DHS then offered the report into evidence pursuant to Ark. Code Ann. § 12-12-514 (Repl. 2003), and appellant's attorney objected to the report, arguing that the information in it was hearsay. In support of his argument, appellant cited *Donahue v. Arkansas Department of Health and*

Human Services, 99 Ark. App. 330, 260 S.W.3d 334 (2007) (holding a similar argument regarding admission of hearsay contained in maltreatment-investigation report was waived, but recognizing that the argument was correct). The court reserved the issue of whether the Report to Prosecuting Attorney was admissible.

At the conclusion of the hearing, appellant admitted, through his attorney, that there was dependency-neglect because he was incarcerated and could not go home and take care of his children. His attorney also agreed that DHS proved environmental neglect on the basis of the conditions of the home. Appellant argued, however, that DHS did not prove the sexual-abuse allegations.

On March 25, 2008, the circuit court entered an adjudication and disposition order, admitting into evidence the Report to Prosecuting Attorney and finding by a preponderance of the evidence that the five children were dependent-neglected, as they were at a substantial risk of serious harm as a result of "abandonment, sexual abuse, sexual exploitation, and environmental neglect." The court also specifically found that there were aggravated circumstances because the children had been sexually abused and that there was little likelihood they could ever be successfully reunited with their parents. Specifically, with regard to abandonment, the court stated that all counsel had stipulated that both parents were currently incarcerated and had been for more than ninety days on rape charges against one of the minor children. With regard to environmental neglect, the court again noted that all counsel had stipulated to this ground due to the unlivable conditions in the home and the failure to provide adequately for the children's hygiene. Finally, while it admitted the Report

to Prosecuting Attorney, the court stated that it would make the same finding in this case without the report. Appellant filed this appeal.

Admissibility of Report

Appellant's sole point on appeal is that the circuit court erred in admitting into evidence the Report to Prosecuting Attorney because it contained inadmissible hearsay. The minor children, through their attorney ad litem, concede that the hearsay contained in the report was inadmissible and, therefore, that the circuit court erred in admitting it. The attorney ad litem argues, however, that the error was harmless because the admissible evidence presented is sufficient to support the finding of dependency-neglect based on sexual abuse. While DHS does not specifically concede error in its brief on appeal, it does not respond to appellant's argument that the report was erroneously admitted but, rather, argues that any error was harmless.

We review the circuit court's findings of fact de novo, and we will not set them aside unless they are clearly erroneous, giving due regard to the court's opportunity to judge the credibility of the witnesses. *Brewer v. Ark. Dep't of Human Servs.*, 71 Ark. App. 364, 367–68, 43 S.W.3d 196, 199 (2001). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Id.* We will not reverse a circuit court's ruling on the admissibility of evidence absent a manifest abuse of discretion. *Hopkins v. Ark. Dep't of Human Servs.*, 79 Ark. App. 1, 7, 83 S.W.3d 418, 422 (2002). And even if we determine that the circuit court erred in admitting evidence, we will affirm absent a showing of prejudice. *Dodson v. Allstate Ins.*

Co., 345 Ark. 430, 447, 47 S.W.3d 866, 877 (2001); *Schmidt v. Stearman*, 98 Ark. App. 167, 179, 253 S.W.3d 35, 45 (2007).

The circuit court admitted the report pursuant to Ark. Code Ann. § 12-12-514(e), which provides that a child maltreatment investigative report "shall be admissible in evidence in any proceeding related to child maltreatment." Ark. Code Ann. § 12-12-514(e) (Repl. 2003). Pursuant to this statute, a report is to be prepared by the agency responsible for the child-maltreatment investigation and shall include the following information:

> (1) The names and addresses of the child and his or her legal parents and other caretakers of the child, if known;
> (2) The child's age, sex, and race;
> (3) The nature and extent of the child's present and past injuries;
> (4) The investigative determination;
> (5) The nature and extent of the child maltreatment, including any evidence of previous injuries or child maltreatment to the child or his or her siblings;
> (6) The name and address of the person responsible for the injuries or child maltreatment, if known;
> (7) Services offered and accepted;
> (8) Family composition;
> (9) The source of the notification; and
> (10) The person making the notification, his or her occupation, and where he or she can be reached.

Ark. Code Ann. § 12-12-514(b) (Repl. 2003). Subsection (c)(1)(A) further provides that "a copy of the written report *and any supporting documentation, including statements from witnesses and transcripts of interviews*, shall immediately be filed at no cost with the central registry." Ark. Code Ann. § 12-12-514(c)(1)(A) (Repl. 2003) (emphasis added).

While we recently held in *Donahue* that a similar hearsay argument under this statute was waived, we said in *Donahue* that appellant's argument— that admitting the report containing hearsay into evidence was error—was correct. We reasoned that "the statute does

not say that the supporting documents, which contain hearsay, shall be a part of the Report or are admissible into evidence." *Donahue*, 99 Ark. App. at 332, 260 S.W.3d at 335-36. The report in this case contained extensive interviews with all five children about the sexual abuse and summaries of the investigator's interviews with the school counselor and the hospital social worker, all hearsay. Appellant properly preserved this point for appeal, and we hold that the circuit court abused its discretion in admitting and considering the report without redacting the inadmissible hearsay.

Harmless Error

However, determining that admission of the report was error does not resolve the case. Our final inquiry is whether the error in admitting the report was prejudicial. An error in the admission of hearsay evidence does not automatically result in a reversal if the error was harmless. *Proctor v. State*, 349 Ark. 648, 668, 79 S.W.3d 370, 383 (2002). We will not reverse the circuit court's evidentiary ruling without a demonstration of prejudice. *Schmidt*, 98 Ark. App. at 179, 253 S.W.3d at 45.

A dependent-neglected juvenile is one who is at substantial risk of serious harm as the result of, among other things not relevant in this case, abandonment, sexual abuse, or neglect. Ark. Code Ann. § 9-27-303(18)(A) (Repl. 2008). Dependency-neglect must be proven by a preponderance of the evidence. Ark. Code Ann. § 9-27-325(h)(2)(B) (Repl. 2008).

At trial, appellant stipulated that dependency-neglect existed on the grounds of abandonment (due to his incarceration) and environmental neglect (due to the deplorable home conditions). He does not challenge these findings on appeal. The issue before us then

is whether the circuit court's finding of sexual abuse is clearly erroneous if we consider only the admissible evidence and not the inadmissible hearsay contained in the report—that is, was admission of the report prejudicial.

Appellees contend that any error in admitting the evidence was harmless because the court indicated that it would have made the same finding without the report and because the evidence was sufficient to support the court's finding of sexual abuse without the report. "Sexual abuse" means "[b]y a person eighteen (18) years of age or older to a person who is younger than sixteen (16) years of age and is not his or her spouse: (i) Sexual intercourse, deviant sexual activity, or sexual contact; or (ii) attempted sexual intercourse, deviant sexual activity, or sexual contact." Ark. Code Ann. § 9-27-303(50)(B) (Repl. 2008). "Sexual contact" means "any act of sexual gratification involving: (i) touching, directly or through clothing, of the sex organs, buttocks, or anus of a juvenile or the breast of a female juvenile." Ark. Code Ann. § 9-27-303(51)(A) (Repl. 2008).

The following testimony from the adjudication hearing supports the circuit court's finding of sexual abuse. C.W. testified that her father made her remove her clothes and he then touched her "potty spot." She testified that he had done this several times before. She also testified that he made her drink from a cup containing his semen. In addition, testimony at the hearing indicated that two pubic hairs were found in C.W.'s genital area during her examination for the rape kit and that C.W. did not have pubic hair. Further, hearsay testimony was admitted without objection through Tracey Sancez that C.W. said her mother taught her and her sisters how to masturbate appellant. We will not set aside a circuit court's

findings of fact unless they are clearly erroneous "giving due regard to the trial court's opportunity to judge the credibility of the witnesses." *Hopkins*, 79 Ark. App. at 4, 83 S.W.3d at 420 (quoting *Brewer v. Ark. Dep't of Human Servs.*, 71 Ark. App. 364, 367-68, 43 S.W.3d 196, 199 (2001)).

We hold that sufficient evidence exists without the report to support the circuit court's finding of sexual abuse. Thus, the error in admitting it was harmless.

Affirmed.

VAUGHT, C.J., and ROBBINS, J., agree.