Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-391

JANUARY TERM, 2009

In re J.B., Juvenile	}	APPEALED FROM:
	}	
	}	Essex Family Court
	}	
	}	DOCKET NO. 1-1-08 Exjv
		Trial Judge: Thomas A. Zonay

In the above-entitled cause, the Clerk will enter:

Father appeals from the family court's order adjudicating J.B. as a child in need of care or supervision (CHINS). He argues that the court erred in concluding that J.B. was abused and neglected. We affirm.

J.B. was born in August 2001. He was taken into custody of the Department for Children and Families in January 2008, following disclosures that father sexually abused him. After a merits hearing, he was adjudicated CHINS. The family court found as follows. J.B. has a significant history of behavior difficulties and developmental delays. He was often violent and out-of-control. J.B. was diagnosed by one doctor in January 2007 as having Attention Deficit Disorder with hyperactivity (ADHD) and oppositional defiant disorder (ODD). In March 2007, J.B. underwent a psychiatric evaluation where he was diagnosed as having ODD, and ADHD was ruled out as a condition. J.B. was evaluated again in June 2007 by a different doctor and diagnosed with ODD and ADHD. This doctor noted that it would be helpful to be able to work collaboratively with the school to see the effect of medication on J.B.'s symptoms, but J.B.'s mother had not informed the school when J.B. was, or was not, taking his medication. In August 2007, another doctor diagnosed J.B. with ketotic hypoglycemia, stating that his behavioral symptoms were related to this disorder, and that he needed snacks between meals. In October 2007, mother revoked consent for school officials to contact this doctor. That same month, J.B. was evaluated by an endocrinologist. This doctor noted that J.B. had a severe behavior disorder, and that he was one of the most aggressive children the doctor had seen. The doctor noted that J.B.'s blood-sugar levels were normal during his examination—when the child was essentially out-of-control—and thus, it was safe to say that his behavior was not secondary to hypoglycemia.

In December 2007, J.B. began attending a special school for children with emotional and behavioral disorders. J.B. remained out-of-control while at this school. He would, among other things, continually hit, spit, and dig at staff members, sometimes leaving scars. He would also take out his penis and show it to other children in the classroom. Parents took the position that

J.B.'s behavior was related to his eating habits. School staff followed parents' recommendations for feeding J.B., but noticed no correlation between J.B.'s behavior and his diet. Staff informed parents of this.

In January 2008, a teacher noticed a bruise on J.B.'s forehead, which J.B. stated was inflicted by father. J.B. demonstrated at the merits hearing that the bruise was caused by a striking of some force rather than a light tap. That same month, while at school, J.B. removed his clothing, urinated on the carpet, and defecated on the floor. He then rubbed the feces into the carpet and proceeded to also throw it around the room. When father came to pick up J.B., J.B. acted provocatively with father, saying, "Daddy, touch me, come on daddy, touch me." A similar incident occurred the following day. When the school principal began to help J.B. clean himself up, J.B. asked her to "stick her finger in his butt like his daddy does." J.B. then began to act more aggressively and he showed his penis and buttocks to those in the room. He asked the staff if they wanted to touch his penis. When J.B. was asked who else touched his penis, he replied "daddy." J.B. also indicated that father rubbed his penis and buttocks areas. During the day, J.B. would also bend down, spread his butt cheeks, and ask those in the room, "Do you like that?" and "Does that look good to you?" He continued to engage in such conduct throughout the day and asked people to touch his anus. While having lunch that day, J.B. punched the principal in the face. He also grabbed the guidance counselor's hair and began humping against her back in a sexual manner.

Following these disclosures, the school contacted DCF. When a police officer and DCF worker arrived to interview J.B., the child continued to engage in sexualized behavior. When father arrived, he told the officer that J.B.'s behavior was caused by hypoglycemia. When told of the allegations of sexual abuse, father stated that he did not believe J.B. had made such statements, but also that J.B. was not capable of lying.

After being taken into DCF custody, the child's behavior improved, but degenerated once he began visiting father. One DCF worker observed that during visits with father, J.B. would engage in sexualized behaviors. In connection with one of these visits, J.B. asked the same DCF worker, "What if someone touched your private parts?" An expert psychologist testified for the State at the merits hearing as to his general opinion regarding the type of conduct reportedly exhibited by the child. According to the expert, based on such acting out, there was a high degree of probability that J.B. had been exposed to inappropriate sexual behavior. He also noted that there was a high correlation between the behaviors described and a child being touched in a sexualized way. The court found the expert's testimony credible.

The court also found that while J.B. was living with parents, they disciplined him by locking him outside on the porch in the cold with no shoes, and putting him inside a dark closet where he screamed and tried to get out. The court found that this frightened J.B. and there was no valid corrective purpose to these disciplinary techniques. At the hearing, J.B. testified about these incidents as well as being struck on the forehead by father, and the court found J.B.'s testimony credible. J.B. did not testify as to any sexual contact by father. Father denied rubbing J.B.'s buttocks and penis or sticking his finger in J.B.'s anus, but instead blamed the school for trying to make him the scapegoat for its own failure. The court found his testimony not only incredible, but inculpatory.

Based on these and other findings, the court found that the State proved J.B. was a child in need of care and supervision by a preponderance of the evidence. It first concluded that J.B. was abused, finding that J.B. was struck by father, locked in a closet, and locked out on the porch. Individually, the court explained, these incidents each served to establish a separate and distinct basis for an abuse finding. Collectively, they evidenced a pattern of abusive conduct with J.B. as the victim. The court next considered DCF's allegation that J.B. was sexually abused. The court noted that J.B. had not made any statements directly incriminating father other than those made to school staff in January 2008. Parents argued that these statements were inadmissible under Vermont Rule of Evidence 804a, but the court disagreed, finding that the statements satisfied the requirements set forth in the rule and that they were credible. Based on that evidence, the court concluded that it was more probable than not that father sexually abused J.B.

The court also found that J.B. was neglected based on parents' demonstrated and persistent inability to properly address J.B.'s needs. While parents took some steps, the court found that they fell far short of what was required for J.B.'s identified deficiencies. As the court explained, it was one thing to seek an opinion and quite another to disregard or fail to follow it, as was generally the case here. The court also found that parents' ability to gain insight into J.B.'s conduct and to assist him in addressing his conduct in a meaningful way was limited, if not foreclosed, by their focus on what was not the problem, and their failure to work collaboratively with his care-providers and educators. For example, parents insisted that J.B.'s aberrant behaviors stemmed from hypoglycemia well after that initial diagnosis was discounted as irrelevant. The parents similarly could not recognize their own role with respect to J.B.'s disruptive behavior. The court thus concluded that J.B. was CHINS under 33 V.S.A. §§ 5502(a)(12)(A) and (B). This appeal by father followed.

Father first challenges the family court's conclusion that J.B. was CHINS under 33 V.S.A. § 5502(a)(12)(A). He treats the court's findings regarding sexual and nonsexual abuse separately, although they are not treated so under § 5502. Father asserts that the record does not support the court's conclusion that he sexually abused J.B. According to father, the record indicates only nonsexual motivations for his behavior, such as helping J.B. use the bathroom. Father acknowledges that rubbing J.B.'s penis could be seen to have a sexual motive, but he maintains that J.B.'s statement about this incident was untrustworthy and uncorroborated by any other statements. Father also argues that the court improperly relied upon expert testimony to conclude that his behavior was sexually motivated. As to the court's remaining findings regarding abuse, father argues that the act of striking J.B. on the forehead was an isolated incident not shown to be intentional, and the remaining nonsexual acts—locking the child in the closet and locking him outside of the house—were not shown to be abusive.

We find no error. The State had the burden of proving by a preponderance of the evidence that J.B. was a child in need of care or supervision, i.e., that he had been abandoned or abused or was without proper parental care or subsistence necessary for his well-being. In re M.B., 158 Vt. 63, 70 (1992); see also E.J.R. v. Young, 162 Vt. 219, 222-23 (1994) ("[T]he central concern in CHINS proceedings is the ability of the parents to render appropriate and necessary care for the child's well-being."). On review, we will uphold family court's findings of fact unless "there is no credible evidence to support them." In re C.B., 162 Vt. 614, 614 (1994) (mem.). As discussed below, the record supports the family court's findings, which in

turn support its conclusion, that J.B. was "abused by his parents" and was therefore CHINS under 33 V.S.A. § 5502(a)(12)(A).

We begin with the court's conclusion that it was more probable than not that father sexually abused J.B. While father maintains that J.B.'s out-of-court statements about the abuse were untrustworthy, the family court concluded otherwise. It specifically found J.B.'s hearsay statements about sexual abuse to be credible and admissible under Rule 804a. See V.R.E. 804a (witness may testify to hearsay statements made by a child ten years old or younger if the statements are offered in a sexual abuse case where the child is an alleged victim, the statements were not taken in preparation for a legal proceeding, the child is available to testify, and the "time, content and circumstances of the statements provide substantial indicia of trustworthiness"). As the court explained, J.B.'s statements were made spontaneously and not in response to any leading or suggestive questions; they were also witnessed by numerous individuals. The court also noted that J.B.'s statements were internally consistent, and except for limited questioning by a counselor, unprompted. The court did not err in finding the statements trustworthy or in deeming J.B. credible. See State v. Gallagher, 150 Vt. 341, 348 (1988) (Supreme Court will uphold trial court's finding that hearsay statements are trustworthy under Rule 804a(a)(4) if finding is supported by credible evidence and not clearly erroneous); see also Cabot v. Cabot, 166 Vt. 485, 497 (1997) ("As the trier of fact, it [is] the province of the trial court to determine the credibility of the witnesses and weigh the persuasiveness of the evidence."). J.B. was not required to make multiple statements about the same act of abuse before the court could find such testimony credible, as father appears to suggest. Nor does J.B.'s failure to testify to the abuse at the merits hearing render his earlier hearsay statements untrustworthy. See State v. Tester, 2006 VT 24, ¶ 29, 179 Vt. 627 (mem.) (upholding defendant's conviction of aggravated sexual assault based on child's Rule 804a hearsay statement notwithstanding fact that child did not describe elements of sexual assault at trial, and noting that Supreme Court has not required that corroborating evidence exist before Rule 804a hearsay statements may be used as direct evidence of a defendant's guilt). The court reasonably concluded that father's behavior, as recounted by J.B., constituted sexual abuse.

Father contends that the court found his conduct sexually motivated based on "nonspecific profile characteristics of abused children" proffered by the State's expert. See In re D.C., 160 Vt. 608, 609 (1993) (mem.) (stating that there must be some evidence of a sexual motive or intent for a finding of sexual abuse where act at issue was not per se an act of sexual abuse, and finding that expert testimony regarding nonspecific profile characteristics of abused children was not sufficient to support inference that father's motivation or intention was sexual). To the contrary, the family court reached its conclusion without relying on the expert's testimony, rejecting any argument that the acts at issue could be justified by some nonsexual motivation, such as a massaging technique or other treatment plan designed to address J.B.'s behavioral problems. The court noted that J.B.'s behavior changed markedly after he was taken into DCF custody, and that his sexualized conduct reemerged after he again began visiting father. It also found that J.B. had asked a DCF worker about someone touching his private parts when told he was going to visit father. The court could and did reasonably infer from the evidence that father's behavior—described by J.B. as including not only rubbing J.B.'s penis but also sticking his finger in J.B.'s anus—was sexually motivated.

Although the court's recitation that the expert's opinion "buttress[ed] the court's conclusion that J.B. was probably abused by his father" appears erroneously over-broad, the court makes clear that its already-reached conclusion that father was the abuser was bolstered by, but not based on, the expert's opinion. Cf. State v. Catsam, 148 Vt. 366, 374-75 (1987) (in criminal case, distinguishing between expert testimony properly offered to help jury understand child sexual abuse victim's behavior and expert testimony improperly used to support inference of defendant's guilt). While it is true that the expert's testimony about correlation between the conduct of other sexual abuse victims and J.B.'s sexualized behaviors was irrelevant to any motivation by father, it is also true that the family court did not invoke that testimony to substantiate any sexual motive for the alleged abuse. Therefore, the present case is unlike the case on which father relies. Cf. In re D.C., 160 Vt. at 609 (reversing trial court where trial court concluded that father sexually abused daughter based on "expert testimony that the child met some profile characteristics of a sexually abused child"). That the expert's opinion was not determinative of culpability is further reinforced by the court's explanation that father's statements, from his initial interview through his testimony, were incredible and blame-shifting to the point of being incriminatory.

Given that the State proved that J.B. was CHINS under 33 V.S.A. § 5502(a)(12)(A), we need not address whether father's additional acts against J.B., such as striking him on the forehead, locking him in the closet, and locking him outside, also showed that J.B. was "abused" within the meaning of § 5502. We note that father does not appear to have preserved his argument that the State must prove that J.B. was an "abused or neglected child" as defined in 33 V.S.A. § 4912 in order to establish that J.B. was CHINS under 33 V.S.A. § 5502(a)(12)(A). See id. § 4912(2) (defining "abused or neglected child," at least for mandatory reporting purposes, as a child who is sexually abused, or is at substantial risk of sexual abuse, as well as a child whose physical health, psychological growth and development or welfare is harmed or at substantial risk of harm by the acts or omissions of his parent). Assuming arguendo the relevance of § 4912, sexual abuse alone, as found by the family court here, satisfies the standard set forth in that statute. See id.

We next address father's challenge to the court's conclusion that J.B. was CHINS under § 5502(a)(12)(B). Father argues that the court's findings regarding parental neglect are unsupported by the record and inadequate to support the court's conclusion. He asserts that the court here failed to link parents' deficiencies to any resulting adverse impact on J.B. Father also asserts that parents' behavior was not unreasonable given the multiple conflicting diagnoses of J.B.

We reject these arguments. By statute, a child in need of care or supervision means, as relevant here, a child who is "without proper parental care or subsistence, education, medical, or other care necessary for the child's well-being." 33 V.S.A. § 5502(a)(12)(B). As recounted above, the court found that parents persistently failed to meet J.B.'s demonstrated needs. They continued to blame the child's behavior on low blood sugar, and refused to work collaboratively with J.B.'s educators and care providers. The court concluded that until parents were able to take a more realistic view of J.B.'s behaviors and begin to properly, and consistently, address them, parents were failing to provide him the proper care for his well-being. The court emphasized that this was not a case where the State was trying to impart its view of proper parenting upon parents who were exercising their parental duties in a reasonable manner.

Rather, it was a case of the State stepping in to assure that a child's needs were met when the parents either did not understand, or refused to accept, that they were not meeting their child's needs in a manner sufficient for his well-being.

The court's findings amply support its conclusion that the statutory standard was satisfied here. Parents were not helping J.B. improve, but rather, were impeding his progress. They blamed J.B.'s behavior on low blood sugar, despite all evidence to the contrary, including the experience that treating this condition was having no positive impact on J.B.'s behavior. While father points to conflicting diagnoses, the record shows that the doctor who originally diagnosed J.B. with hypoglycemia referred parents to an expert, who specifically rejected the notion that the child's problems were caused by low blood sugar. Parents were also informed by school staff that there was no correlation between what J.B. was eating and his behavior. As the court found, parents' beliefs limited their ability to gain insight into addressing J.B.'s needs in any meaningful way, which thereby deprived J.B. of the care necessary for his well-being. While father disagrees with the way in which the family court evaluated the evidence, he fails to demonstrate that the court's findings are clearly erroneous or that its conclusion is unsupported by its findings.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice