Circuit Court for Baltimore City
Case No. 820203005

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1324

September Term, 2020

IN RE: S. J.

Arthur,
Beachley,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: June 29, 2021

Sean J., a 17-year-old youth who is currently in pretrial detention awaiting trial on charges that he murdered his first child, has appealed from a determination that his second child, S.J., is a Child in Need of Assistance ("CINA"). We affirm.

BACKGROUND

S.J. was born on July 18, 2020, at the University of Maryland Medical Center. S.J.'s parents are K.M. ("Mother"), who was 16 years old when S.J. was born, and Sean J. ("Father").

Both Mother and S.J. tested positive for tetrahydrocannabinol or "THC," the psychoactive component in marijuana, while they were at the hospital following S.J.'s birth.

On July 22, 2020, the Baltimore City Department of Social Services filed a petition with request for shelter care, alleging that S.J. was a CINA. In support of the petition, the Department noted the positive drug tests. In addition, the Department alleged that Mother and Father, both of whom were minors themselves, had a "prior CPS [child protective services] history" in connection with their other child, Sy. J., who was born on July 29, 2019, and died approximately a month later.

The juvenile court granted the Department's petition and found that S.J.'s continued residence with Mother and Father was contrary to the child's welfare. The court ordered the Department to provide care and custody for S.J. pending an adjudicatory hearing as to the allegations in the Department's petition.

The Department amended its petition to allege: that both Mother and S.J. tested positive for THC at the time of S.J.'s birth; that Mother was in foster care and routinely

missed curfew; that Mother was enrolled in mental health therapy and, although compliant with individual therapy, had a history of failing to take her prescribed medications; that Mother and Father had a history of using marijuana, beginning at age 13; that Mother had submitted to one urinalysis test, which was negative for illicit substances, but had not continued with treatment or testing; that Mother and Father had a prior encounter with CPS because their first child, Sy. J., had died; that Mother and Father had been "indicated" for neglect and physical abuse of Sy. J.;[1] that Father had been charged with first-degree murder and other offenses in connection with Sy. J.'s death; and that Father was being held without bail pending his trial on those charges.

Adjudication Hearing

Mother was not present at the adjudication hearing and did not contest the Department's allegations. Father, who was present, contested only the allegations that he and Mother had a prior CPS history related to Sy. J. and that they had been indicated for neglect and physical abuse. The juvenile court took testimony as to those allegations.

Pamela Kendall, a caseworker for CPS, testified for the Department that she was assigned to S.J.'s case on July 20, 2020, after S.J. was deemed a "substance exposed newborn." During her investigation, Ms. Kendall looked into Mother's CPS history. Over Father's objections on hearsay grounds, Ms. Kendall testified that, in reviewing the Department's internal database she discovered that Mother had "a CPS history" relating

[1] "'Indicated' means a finding that there is credible evidence, which has not been satisfactorily refuted, that abuse, neglect, or sexual abuse did occur." Maryland Code (1984, 2019 Repl. Vol.), § 5-701(m) of the Family Law Article.

to her other child, Sy. J. Ms. Kendall also testified, over Father's objections on relevancy grounds, that Mother's CPS history showed "indicated neglect and indicated physical abuse" of Sy. J. Ms. Kendall added that Father had no CPS history.

After the Department rested, Father called Ms. B., S.J.'s paternal grandmother (i.e. Father's mother). Ms. B. testified that she lived in a four-bedroom house in Baltimore County with her two younger children, ages 13 and 11, and that she was gainfully employed. Ms. B. also testified that she was able and willing to care for S.J.

In rebuttal, the Department offered S.J.'s medical records from her stay at the hospital following her birth. In those records one of S.J.'s attending physicians noted that Mother's "previous child" had been admitted "for non-accidental trauma after being in [Mother's] custody (arm fracture and posterior rib fractures) and was [discharged] to the baby's paternal grandfather, [and] then died at home a few days later." A second entry read: "Throughout this hospitalization, [Mother] also exhibited neglectful behavior in which multiple providers observed the newborn crying and exhibiting hunger cues to which both [Mother] and [Father] did not respond." A third entry indicated that one of the attending nurses had entered Mother's room and found the "baby crying loudly in crib" and "Mother lying in bed with the covers pulled over her head." A fourth entry noted that both Mother and Father "appeared unresponsive to the child's crying and hunger cues."

The Department then called Felicia Moore, a caseworker with the Department. Ms. Moore had been assigned as Mother's caseworker and had later been assigned as the

caseworker for both Sy. J. and S.J. She testified that she had investigated Ms. B. as a potential resource for S.J. Ms. B. did not have "any CPS history" and had "passed the home inspection," but had yet to complete a criminal background check.

Ms. Moore testified that she had several "concerns" about Ms. B.'s supervision of the child. According to Ms. Moore, Sy. J. suffered serious injuries, including "[bruised] ribs, a broken arm in four places, and bite marks," at Ms. B.'s residence. Neither Mother nor Father could explain how the baby's ribs had been bruised, except to suggest that the injuries somehow occurred when Ms. B. took them to the store and left Sy. J. in the care of one of the younger children. Ms. Moore said that the Department was not inclined to place S.J. in Ms. B.'s care at that time, because it needed "more time to assess Ms. B." In addition, Ms. Moore expressed concerns regarding Father's potential return to Ms. B.'s home were he to be released from pretrial detention.

On cross-examination, Ms. Moore clarified that the Department had conducted a preliminary background check on Ms. B. The background check revealed that she did not have a criminal history in Baltimore City and that she was not on the federal sex offender registry. On redirect, Ms. Moore stated that a full background check on Ms. B. had yet to be completed, in part because Ms. B. had not submitted her fingerprints despite multiple requests by the Department.[2]

[2] Long after Ms. Moore left the stand, Father proffered that Ms. B. had filled out the fingerprint card on the day before the hearing. Ms. B. apparently failed to inform the Department that she had done so.

At the conclusion of the evidence, Father reiterated that he was disputing only the allegations that he and Mother had a prior CPS history relating to Sy. J. and that they had been indicated for neglect and physical abuse. Father requested that the court make an additional finding that, although he was in jail and being held without bail (for the alleged murder of Sy. J.), he had presented his mother as a potential caregiver for S.J.

The juvenile court sustained virtually all of the Department's allegations, including the allegation that Mother had previously been "indicated for neglect and abuse." The only allegation that the court did not sustain was that Father had a prior CPS history.

In response to Father's claim that Ms. B. was a possible resource for S.J., the court found that, although Ms. B. had passed the initial criminal background check and home assessment, the Department had yet to complete "the fingerprint and [federal] criminal background check." The court expressed some reservation about putting S.J. in Ms. B.'s care, apparently because of the possibility that Father might be released from pretrial detention and return to Ms. B.'s residence.

Disposition Hearing

Immediately thereafter, the juvenile court held the disposition hearing. In that hearing, Ms. Moore testified that Mother had completed an initial intake with a substance abuse program and that her urinalysis had come back negative. She added that the program's caseworker had recommended continued treatment, but that Mother had not participated in any additional treatment. Mother had enrolled in parenting classes, but had been suspended because of her failure to attend them. Mother was compliant with her mental health therapy, except that she had refused to take her psychiatric medication. Mother was enrolled in high school, but was not currently participating in classes, ostensibly because she had lost the charger to her computer.

Ms. Moore testified that Father was incarcerated at the time of the hearing. Before his incarceration, the Department had recommended that Father complete mental health therapy and substance abuse therapy. According to Ms. Moore, Father had not participated in either.

Ms. Moore reiterated that the Department had concerns regarding "Ms. B.'s supervision." The Department was "working on reunification with [Mother]" and wanted "more time to assess Ms. B. and her ability to safely supervise [S.J.]." The Department was also looking into other relatives as potential resources.

At the conclusion of the hearing, the juvenile court found S.J. to be a CINA. The court noted Mother's concession that she was either unwilling or unable to care for S.J.

and that S.J. was a CINA. The court found that Father was unable to care for S.J. because he was incarcerated.

The court expressed "concerns" regarding Ms. B. as a possible resource, because her "fingerprint criminal background check has been delayed and/or held up over several months[.]" Ultimately, the court ordered that S.J. be committed to the care and custody of the Department.

Father appealed; Mother did not.

QUESTIONS PRESENTED

Father presents four questions:

1. Did the juvenile court err in admitting evidence that Mother had been indicated for abuse and neglect of S.J.'s sibling?

2. Did the juvenile court err in refusing to make additional findings proposed by Father at the adjudication and disposition hearing?

3. Did the juvenile court err in declaring S.J. to be a CINA?

4. Did the juvenile court err in refusing to place S.J. with her paternal grandmother?

For reasons to follow, we hold that the juvenile court did not err. Accordingly, we affirm the judgment of the circuit court.

STANDARD OF REVIEW

Appellate review of a juvenile court's decision regarding child custody involves three interrelated standards. First, we review factual findings for clear error. *In re Yve S.*, 373 Md. 551, 586 (2003). Second, we review legal conclusions on a *de novo* basis. *Id.* Finally, if the court's ultimate conclusion is "founded upon sound legal principles and

based upon factual findings that are not clearly erroneous," we uphold the conclusion unless the court has clearly abused its discretion. *In re J.J.*, 231 Md. App. 304, 345 (2016). We reverse a decision for an abuse of discretion only if it is well removed from any imaginable center mark and beyond the fringe of what we deem minimally acceptable. *Id.*

DISCUSSION

I.

Father contends that the juvenile court erred in sustaining the allegation that Mother was indicated for abuse and neglect of S.J.'s sibling, Sy. J. He argues that the sole evidence in support of that allegation was the CPS caseworker's testimony that she had reviewed the Department's database and discovered that Mother had been indicated for neglect and physical abuse of Sy. J. Because the caseworker, Ms. Kendall, was reciting statements and findings of other social workers, Father argues that the court should have disallowed the testimony on hearsay grounds.

The Department responds that Father's argument is unpreserved because the allegation at issue pertained solely to Mother, who agreed with the finding and has not challenged the juvenile court's decision on appeal. The Department argues that, even if preserved, Father's claim is without merit.

We begin by discussing the Department's preservation argument. The record shows that Father objected to the testimony on hearsay grounds and that the juvenile court considered the objection and allowed the testimony. Father's objection was

sufficient to preserve the issue. We are unpersuaded that Father's argument is unpreserved simply because Mother did not join in the objection. "[A] principal purpose of the preservation requirement is to prevent 'sandbagging' and to give the trial court the opportunity to correct possible mistakes in its rulings." *Bible v. State*, 411 Md. 138, 149 (2009). If Mother were claiming that the court erred in admitting the evidence, then the Department's preservation argument might have merit. But Father made his objection known and gave the court the opportunity to correct any mistake. The issue was therefore preserved.

We now turn to the merits of Father's argument.

"'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." Md. Rule 5-801(c). Hearsay is generally inadmissible. Md. Rule 5-802. "An out-of-court statement is admissible, however, 'if it is not being offered for the truth of the matter asserted or if it falls within one of the recognized exceptions to the hearsay rule.'" *In re Matthew S.*, 199 Md. App. 436, 463 (2011) (quoting *Conyers v. State*, 354 Md. 132, 158 (1999)). In general, we conduct a *de novo* review of "whether evidence is hearsay and, if so, whether it falls within an exception and is therefore admissible." *Hallowell v. State*, 235 Md. App. 484, 522 (2018).

One exception to the general rule against hearsay is Maryland Rule 5-803(b)(8)(A), which permits the admission of hearsay in "public records and reports." Specifically, the exception permits the admission of "a memorandum, report, record,

statement, or data compilation made by a public agency setting forth: (i) the activities of the agency; (ii) matters observed pursuant to a duty imposed by law, as to which matters there was a duty to report; [or] (iii) in civil actions . . . factual findings resulting from an investigation made pursuant to authority granted by law[.]" *Id.* Such a record may be excluded, however, "if the source of the information or the method or circumstance of the preparation of the record indicate that the record or the information in the record lacks trustworthiness." Md. Rule 5-803(b)(8)(B). Public records generally carry a "presumption of reliability." *In re H.R.*, 238 Md. App. 374, 405-06 (2018). Thus, "'the burden rests upon the party opposing the introduction of a public record to demonstrate the existence of negative factors sufficient to overcome [that] presumption[.]'" *Id*. at 406 (quoting *Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581, 612 (1985)).

We hold that Ms. Kendall's testimony, that Mother had been indicated for neglect and physical abuse of Sy. J., was properly admitted under the "public records" exception to the rule against hearsay. Ms. Kendall's testimony was based on the Department's own internal records, which it compiled during its statutorily-mandated investigation into Mother's culpability in Sy. J.'s death. *See generally* Md. Code (1984, 2019 Repl. Vol.), § 5-706 of the Family Law Article (requiring the Department to investigate suspected abuse or neglect and to complete a written report of its findings at the conclusion of the investigation). Father has presented no evidence to suggest that the Department's records were anything but reliable. Thus, the juvenile court did not err in admitting Ms. Kendall's testimony based on those records.

Father argues that the public records exception did not apply because the statement at issue – that Mother had been indicated for neglect and abuse – was not a statement of fact but rather a conclusion or opinion. He asserts that conclusions and opinions contained in public records are not admissible under the public records exception. In support of that proposition, Father relies principally on *Ellsworth v. Sherne Lingerie, Inc*., 303 Md. 581 (1985), a case that predates the codification of the rules of evidence in Title 5 of the Maryland Rules. In discussing the common-law hearsay exception for public records, the *Ellsworth* Court stated that "evaluations or opinions contained in public reports will not be received unless otherwise admissible under this State's law of evidence." *Id.* at 612.[3]

Father's argument is unpreserved. When Father's counsel objected to the disputed testimony at the hearing, he argued that the Department's finding of indicated neglect or abuse should be excluded because it was the Department's "opinion" and was "not relevant." At no point did counsel argue that the testimony should be excluded for the reasons Father now raises – that a finding of indicated abuse or neglect is an unreliable

[3] Father also relies on *In re H.R.*, 238 Md. App. 374 (2018), a case involving a court's reliance on a local department's CINA disposition reports in a case involving the termination of parental rights. Although *H.R*. concerns the public records exception as codified in Rule 5-803(b)(8), the case is of little assistance to Father. In *H.R*. this Court recognized that the contents of most of the reports were entirely factual. *Id*. at 407. This Court did not actually hold that any portion of the reports amounted to inadmissible conclusions or opinions. Instead, we stated: "[T]o the extent that any portions of the Court Reports containing the social workers' conclusions and opinions *may* not have been admissible under the public records exception, any error in admitting them was harmless." *Id*. (emphasis added). Furthermore, unlike this case, *H.R.* did not concern the findings in an investigative report that the Department has a statutory obligation to conduct.

opinion that is inadmissible under the public records exception to the rule against hearsay. We cannot fault the circuit court for failing to credit an argument that Father did not make.

II.

Father claims that the juvenile court erred in not sustaining his requested finding that his mother, Ms. B., was available to take care of S.J. while Father was in jail. Father argues that he provided sufficient evidence to support that finding.

In our view, the juvenile court did not err, and certainly did not commit prejudicial error, in not making the requested finding. The decisive issue in this case is not whether Father had proposed Ms. B. as a resource while he was in jail; the issue is whether the court erred in opting not to grant custody to Ms. B. after it found that S.J. is a CINA. For the reasons discussed in section IV, below, we conclude that the court did not err.

III.

Father claims that the juvenile court erred in declaring S.J. to be a CINA. He argues that the Department failed to prove that either he or Mother had abused or neglected S.J.

Section 3-801(f) of the Courts and Judicial Proceedings Article ("CJP") of the Maryland Code (1974, 2020 Repl. Vol.) defines "child in need of assistance" as "a child who requires court intervention because: (1) [t]he child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) [t]he child's parents, guardian, or custodian are unable or unwilling to give proper care and attention

to the child and the child's needs." If a court finds that a child is a CINA, it may commit the child to the custody of a parent, a relative or other appropriate person, or the local department or Maryland Department of Health. CJP § 3-819(b)(1)(iii).

As previously stated, a child may be found to be a CINA if the child has been neglected. "'Neglect' means the leaving of a child unattended or other failure to give proper care and attention to a child . . . under circumstances that indicate: 1) [t]hat the child's health or welfare is harmed or placed at substantial risk of harm; or 2) [t]hat the child has suffered mental injury or been placed at substantial risk of mental injury." CJP § 3-801(s). "In determining whether a child has been neglected, a court may and must look at the totality of the circumstances[.]" *In re Priscilla B.*, 214 Md. App. 600, 621 (2013). Moreover, in evaluating whether the child faces a "substantial risk of harm," "the court has 'a right – and indeed a duty – to look at the track record, the past, of a parent in order to predict what her future treatment of the child may be.'" *In re J.J.*, 231 Md. App. at 346. A court need not wait until children suffer some injury before determining that they are neglected, but may find the children "to be at risk and, therefore, a CINA," because of a parent's past conduct. *In re Nathaniel A.*, 160 Md. App. 581, 596-97 (2005).

Here, the evidence at the adjudication and disposition hearings established that one year before S.J.'s birth Mother and Father had another child, Sy. J., who died when she was one month old, after sustaining multiple, intentional injuries while in the care and custody of Mother, Father, or both. Neither Mother nor Father, who were both minors

themselves, could explain how Sy. J. had been injured. Father had been charged with first-degree murder in connection with Sy. J.'s death and was in a juvenile detention center awaiting trial as an adult at the time of the adjudication and disposition hearing.

The evidence also established that Mother and Father had regularly used marijuana in the years leading up to S.J.'s birth and that S.J. was exposed to THC at birth. Both Mother and Father were, on multiple occasions, unresponsive to S.J.'s crying and hunger cues while at the hospital following S.J.'s birth. After S.J. was placed in shelter care in July 2020, both Mother and Father refused to participate in the recommended drug-treatment programs, Mother failed to participate in the recommended parenting classes, and Father failed to participate in the recommended mental health therapy. Mother, who admitted that she was unable or unwilling to care for S.J., conceded that S.J. was a CINA.

On this record, the juvenile court had an ample basis to find that Mother and Father had failed to give proper care and attention to S.J. and that S.J. would be at a substantial risk of harm were she to remain in their care. The court likewise had an ample basis to find that Mother and Father were unable or unwilling to give proper care and attention to S.J. and her needs. We hold, therefore, that the court did not err in determining that S.J. was a CINA.

Father attempts to minimize the weight of the evidence by attacking the evidence on a piecemeal basis and arguing that each individual piece of evidence was insufficient in itself to sustain the court's finding. But, as previously stated, it is the "totality of the

circumstances," and not the individual pieces of evidence, that drive the court's determination as to whether a parent has neglected a child. The totality of the circumstances supported the court's finding of neglect in the instant case.

Father goes on to argue that, even if the juvenile court correctly found that Mother had neglected S.J., the court erred in declaring S.J. to be a CINA, because, he says, he had not neglected S.J. and he was willing and able to care for her. Father asserts that his "ability to arrange for the care of S.J. with his mother while he remained incarcerated should have foreclosed the Department and the juvenile court from assuming *jurisdiction* over the child." (Emphasis added.)

Father is incorrect. First, the juvenile court had ample evidence to find that Father had neglected S.J and that he was unable or unwilling to provide her with proper care.

Second, Father's alleged ability to arrange for S.J.'s care has no effect on the juvenile court's "jurisdiction." The juvenile court obtained jurisdiction when the Department filed its CINA petition. CJP § 3-803(a)(2). Upon obtaining jurisdiction, the court had a statutory obligation to hold a hearing on the Department's petition and determine whether S.J. was a CINA. CJP §§ 3-817 and 3-819. The court complied with its obligation.

It is true that, under CJP § 3-819(e), "[i]f the allegations in the petition are sustained against only one parent of a child, and there is another parent available who is able and willing to care for the child, the court may not find that the child is a child in need of assistance[.]" Thus, if the court had sustained the allegations of neglect against

Mother alone and if Father were "able and willing" to care for S.J., then Father is correct that a CINA finding would have been inappropriate.

Father argues that even though he was being held in pretrial detention, without bail, at the time of the CINA hearing, he was "able to care" for S.J. because he had arranged for his mother to care for her. We need not decide whether Father was "able to care" for S.J. by placing her in the care of someone else, because the court sustained the allegations of neglect against both Father and Mother. Under CJP § 3-819(e), Father's ability to care for the child is irrelevant if the allegations are sustained against both parents, as happened here.

IV.

Father's final argument is that, even if the CINA determination was correct, the court erred in refusing to place S.J. in the care of Ms. B., Father's mother. He asserts that the Department did not establish "good cause" to deny his request to have S.J. placed with Ms. B. His arguments have no merit.

CJP § 3-819(b)(1)(iii) states, in pertinent part, that, when a court finds that a child is a CINA, it must choose between "[n]ot chang[ing] the child's custody status; or [c]omit[ting] the child on terms the court considers appropriate to the custody of: [a] parent; [s]ubject to § 3-819.2 of this subtitle, a relative or other individual; or [a] local department, the Maryland Department of Health, or both[.]" CJP § 3-819(b)(3) states that, "[u]nless good cause is shown, a court shall give priority to the child's relatives over

nonrelatives when committing the child to the custody of an individual other than a parent."

Before committing a child to the custody of a "relative or other individual," however, the court must consider the best interests of the child. CJP § 3-819.2(f)(1)(ii). In addition, the court must consider a "report by a local department . . . on the suitability of the individual to be the guardian of the child." CJP § 3-819.2(f)(1)(iii). That report "shall include a: (i) Home study; (ii) Child protective services history; (iii) Criminal history records check; and (iv) Review of the proposed guardian's physical and mental health history." CJP § 3-819.2(f)(2). "A court may not enter an order granting custody and guardianship under this section until" that report "is submitted to and considered by the court." CJP § 3-819.2(h).

Contrary to Father's contention, the Department was not required to show "good cause" before the court could deny his request to have S.J. placed with Ms. B. Under the literal language of CJP § 3-819(b)(3), the Department must show "good cause" not to give priority to the child's relatives when the court commits the child to the custody of "an individual," i.e., to a human being. *See* MARYLAND STYLE MANUAL FOR STATUTORY LAW 99 (2021) (directing drafters to "[u]se 'person' to include human beings, corporations, and other entities," but to "use 'individual'" if "the reference is intended to apply only to human beings") (available online at http://dls.maryland.gov/pubs/prod/NoPblTabPDF/StyleManual2018.pdf#search=drafting

%20manual). Because the Department is not an "individual," the requirement of "good cause" does not apply when the court commits the child to the custody of the Department.

In any event, even if the court was required to give priority to Ms. B., the court could not award custody to her without considering the required report from the Department on her suitability. The court, however, did not have and thus could not consider that report, because Ms. B. had failed to submit her fingerprints for the criminal history records check.[4]

Finally, even if the juvenile court was required to give priority to Ms. B., and even if the court did not need the requisite report before granting custody of S.J. to Ms. B., the court had a sufficient basis to find that it was not in S.J.'s best interest to grant custody to Ms. B. Not only had Ms. B. not been cleared as a potential resource, but the court heard evidence that Sy. J. may have suffered grievous injuries when Ms. B. left the child in the custody of one of her minor children. In these circumstances, the court did not err in refusing to grant custody of S.J. to Ms. B. at the time of the court's CINA determination.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

[4] Father argues that CJP § 3-819.2 is inapplicable because "placing a child with a relative at disposition while working toward reunification with the parents is not a grant of custody and guardianship to that relative under CJP § 3-819.2." Father is mistaken, as CJP § 3-819(b)(1)(iii) clearly establishes that CJP § 3-819.2 applies when a child is found to be a CINA and the court grants custody to someone other than the parent (or the Department).

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