Circuit Court for Montgomery County
Case No: 06-I-19-164

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1891

September Term, 2019

IN RE: B.S.

Meredith,
Arthur,
Friedman,

JJ.

Opinion by Meredith, J.

Filed: May 20, 2020

J.O. ("Mother"), appellant, appeals from an order entered by the Circuit Court for Montgomery County, sitting as a juvenile court, adjudicating her child ("B.S.") to be a child in need of assistance ("CINA") and committing B.S. to the Montgomery County Department of Health and Human Services ("the Department") for placement in foster care.[1]

On appeal, Mother first contends that the court made "two significant errors in its evidentiary rulings" during the testimony of Dr. Evelyn Shukat, the expert in pediatrics and child-abuse pediatrics called as a witness by the Department. Mother argues that the court erred when it "admitted as *substantive* evidence inadmissible hearsay underlying Dr. Shukat's expert opinion," and also erred when it "allowed Dr. Shukat to vouch for the credibility of [B.S.'s treating pediatrician,] Dr. Warner." Mother also contends that the court erred "when it found B.S. to be a CINA and ordered the child removed from Ms. O's care." Counsel for B.S. filed a brief as appellee, as did the Department, urging this Court to affirm the juvenile court's disposition. For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTS AND PROCEDURAL BACKGROUND

The facts, as set forth herein, are drawn from the testimony and exhibits entered into evidence during the CINA adjudication hearing held on October 31 and November 1, 2019.

[1] A child in need of assistance is 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." Maryland Code, Courts and Judicial Proceedings Article ("CJP"), § 3-801(f).

The Child's Family History

B.S. was born to Mother on January 24, 2018. There is no father identified on B.S.'s birth certificate. But Mother was married to T.L. at the time of B.S.'s birth. When Mother "conceived and gave birth" to B.S., Mother and T.L. were "separated" and "in the process of waiting the year to file for a divorce." The putative biological father of B.S.—Mr. S.—did not participate in the CINA proceedings. Although T.L. was present for the first day of the CINA proceedings underlying the present appeal, he expressed indifference as to the result and "voluntarily absented" himself from the remainder of the proceedings.[2]

Mother reported having suffered "a long-standing history of depression," including post-partum depression. In connection with these proceedings, it was noted by the Department that, in 2012, Mother had "cognitive impairment, emotional and behavioral issues, poor judgment, and a limited physical and mental capacity to protect herself from dangerous situations."

Mother uses a wheelchair, although the precise nature and extent of her physical impairment is unclear. Mother has described herself as "being paraplegic," and as being a "partial paraplegic" with "full sensation in [her] legs" and the ability to "stand with help, with therapists, with orthopedic surgeons." Mother advanced several conflicting accounts as to the cause of her paralysis. In one account to child protective services ("CPS"), Mother

[2] Through counsel, T.L. filed a "Line" in this appeal stating that T.L. "asserts that he does not want any further involvement in this case."

"reported that she along with several others were on the eight[h] floor" of a building "when the floor collapsed," resulting in the death of "125 people" and leaving her the "sole survivor." But, when asked about this account on cross-examination, Mother denied being injured in the building collapse. A separate report to CPS indicated that Mother "was reported to have hurt herself when she jumped from a window." In another account, Mother stated that, "when she was 18 years old, a [third-story] balcony she was standing on gave way," forcing her to jump "directly off of it because it started coming off," and, as a result, she sustained a "crushed spinal cord and torn left knee ligaments." Mother also communicated to Children's Hospital in 2019 that she was "active duty military" and that she was "injured while deployed."

Events Leading Up to the Department's CINA Petition

In March 2018, CPS received a report that five-week-old B.S. had been "shaken," "fed cow's milk past the expiration date by his maternal grandmother," and "smacked and grabbed . . . too hard by the arm" by Mother. Mother reported that she and Mr. S. were living with "family friends" in Bowie at the time, having recently left the home of her adoptive mother (the "maternal grandmother" of B.S.). Mother reported that living with maternal grandmother was a "stressful arrangement" in which the "grandmother provided little support to the family," and that the two "did not get along." Mother admitted to "smack[ing]" B.S., "grabb[ing] him too hard by the arm," and "'patting' [B.S.] too hard over his diaper area . . . when he was crying and couldn't be soothed." In speaking with CPS, Mother acknowledged having "symptoms of postpartum depression" and "thoughts

of choking [B.S.]" when "frustrated," though she "denied she would ever do anything like that." CPS observed, however, that, at that point (March 2018), Mother "was attentive and appropriate with [B.S.]." Following a psychiatric assessment clearing Mother, CPS ruled out physical abuse and recommended that the family "[c]ontinue to work with PG County Infants and Risk and the Healthy Families America Program."

In October 2018, CPS again became involved when B.S. was "observed with two half circle shaped injuries on his left check," which CPS described as a "bite mark." In Mother's explanation of the source of the mark, she admitted that she "nipped" B.S. on his face because he had bitten her while breastfeeding. She then tried to conceal the injury on B.S.'s left cheek with makeup when they attended a housing interview. No other marks or injuries were observed on B.S. at that time. Mother reported to CPS that she was again residing with maternal grandmother and that she was seeking "housing at the [redacted] House for herself and [B.S.]."

CPS performed a follow-up home visit with Mother and B.S. in November 2018, at which time Mother "reported that she bit her son . . . to teach him not to bite." On that occasion, CPS observed that Mother was "limited by her mobility" due to her wheelchair and that she "appeared easily frustrated when [B.S] wanted to grab things off the table and move around." In December 2018, the Department concluded that "[t]here was no evidence to support the allegations of neglect" and "there [were] no CPS concerns" at that time. Further, on December 11, 2018, a notice of investigation closure was sent to Mother, informing her that "physical abuse was ruled out."

Six months later, in June 2019, B.S. was taken by Mother to Suburban Hospital due to fever. Mother reported to the hospital that B.S. "fell and hit [his] head [two times] yesterday and [one time] on Sunday." The record does not disclose the circumstances of these falls.

In July 2019, B.S. was transported to Children's National Hospital by ambulance "with a head injury resulting from a direct blow." On that occasion, Mother reported to the hospital that B.S. was "throwing a temper-tantrum" when he "banged his head against the bars covering a window and went limp and lost consciousness for 5 minutes." Mother also reported that B.S. "bangs his head a lot."

In August 2019, while accompanied by Mother, B.S. was bitten on the head by a "cane corso" (a large breed of dog). In describing how the incident transpired, Mother testified that B.S. loves dogs, but "does not understand [that] he cannot grab the front of a dog's face," and, in this particular instance, the dog "decided to bite him" when B.S. "pulled on his whiskers." Mother reported that, at the time of the incident, the dog "appeared rabid-red eyes and drooling profusely." The hospital report notes that Mother reported that the dog "was shot and killed and was confirmed to have rabies." In contrast, during the CINA proceedings, Mother testified that the hospital *told her* that the dog had been shot.

As a result of the dog bite, B.S. was taken to Children's National Hospital by ambulance, where he received "rabies shots and a tetanus shot." Mother reported to the hospital that the "encounter with the dog occurred in their neighborhood." But Mother

later testified that the bite occurred on the "metro." When asked at the CINA hearing why she would allow her young son to come into contact with a dog "capable of killing" B.S., Mother stated:

> It should not matter about aggression or what type of breed it is. I believe every single breed has a personality. It all depends on how you raise them. So when you say that a Cane Corso could kill my son, yes, I'm aware of that. But I believed at the time that that dog would not harm my son, and I was wrong. But incidents happen all the time, and I was told by Children's Hospital that it is very common for all types of dog bites, not let alone a Cane Corso. But every other dog I have ever come in contact with, any other aggressive breed, has not harmed my son. No. This is the first time my son has ever been aggressively bit.

Mother further testified that she "believe[s] all dogs are friendly until they're proven otherwise." Mother conceded that the incident with the cane corso was not the first time B.S. had ever been "nipped" by a dog. She testified that, on three prior occasions, B.S. "[had] been rough with other dogs at the park, and he [had] been nipped." In each instance, B.S. had done something that caused the dogs to nip at him.

On September 15, 2019, during a follow-up medical visit for B.S.'s fifth rabies shot, Mother reported that a "newspaper box fell on top of [B.S.]," resulting in "some bruising over his mid back." Additionally, Mother testified about an occasion when B.S. "was out in [her] yard" and he climbed up brick stairs and fell, sustaining "some scrapes." At the time, B.S. was being supervised by his maternal grandmother, although Mother acknowledged that she, too, was at "the end of the stairs" when B.S. fell.

On September 28, 2019, B.S. was taken to Suburban Hospital for treatment that was required because of an incident on the metro. B.S. had apparently ingested a "pink object,"

later "identified as a pill," and "hit his head" while in Mother's care. After ingesting the pill, B.S. began to vomit and Mother observed a pink capsule in his mouth. Mother called poison control, and B.S. was then transported to the hospital via ambulance, where he was forced to ingest charcoal and was kept overnight for observation. Mother described the events which transpired on the metro as follows:

> My son likes to go onto the metro freely. When the train is stopped, I have him pick a seat. He's not always on my lap. He went to a section of the metro where it is blindsided to where he found a seat, and with the old metro cars, to where he went behind an opening and found pills and other objects on the seat. Right then, he started to put things in his mouth, and at the time, I sat him on the chair and I started prying things out of his mouth. That's when the train started moving, and he was still sitting down when he bumped his head. Nothing was eaten off the floor or anything like that. It was on the seat.

In contrast, Mother reported to Suburban Hospital that B.S. "was eating stuff off the floor of the metro." Maternal grandmother also contacted the hospital and reported that Mother lets B.S. "sit on her lap without [a] strap or anything in the metro and leave[s] him on the metro seat by himself while the metro is slowing down." Maternal grandmother also reported that B.S. had "already [fallen] twice" that day from Mother's wheelchair and that Mother had "dropped him and he fell on his face at the Safeway." The hospital noted a "small bruise" on B.S.'s "forehead." The hospital also observed other "small multiple bruises throughout his body and bug bite on his legs."

Additionally, a mark described by the hospital as a "bite mark" was observed on B.S.'s neck, measuring 4 cm x 2.5 cm. CPS noted that the "mark was red with spaces in an oval shape." When nursing staff inquired about the mark, Mother "said that he got [the]

bite from other toddler" at daycare. The hospital also noted, however, that grandmother reported that B.S. did not go to daycare. While nursing staff noted that they "did not believe it to be an adult mouth" which caused the mark, they observed that it was "in an odd position on the body." Mother gave CPS multiple explanations for the mark, including that it may have come "from the playground because he has bitten other kids," and it might have been caused by "scratching due to mosquito bites."

The hospital nurse communicated to CPS "that Mother had challenges maintaining the child as he is 21 months old and she uses a wheelchair." It was noted by CPS that Mother and B.S. "appeared bonded" at the hospital, and that "Mother was appropriately concerned for her son . . . staying there and providing comfort." CPS also observed that "mother and child appear[ed] dirty with greasy hair, dirty hands." Mother communicated that she was "planning to move out of her mother's home and live on her own" in October or November 2019.

At the hospital, Mother entered into a safety plan with CPS in which she agreed that the maternal grandparents would supervise all contact between her and B.S. for twenty-four hours. Following a meeting on October 1, 2019, the safety plan was extended; it included requirements that B.S. attend follow-up medical appointments and that he "always [be] strapped in . . . mother's lap." Mother testified, and CPS confirmed, that she complied with the safety plan.

CINA Petition and Shelter Care Proceedings

On October 3, 2019, CPS held a Family Involvement Meeting at which time they learned that the grandparents were no longer willing or able to provide the necessary supervision of Mother and child. Accordingly, B.S. was sheltered by the Department due to CPS's concerns regarding Mother's "inability to safely supervise [B.S.], possible physical abuse, mental health concerns, and . . . inability to meet her own basic needs, which impaired her ability to safely care for her child."

On October 4, 2019, the Department filed a CINA petition, asking that the court "make appropriate findings and dispositions" that B.S. had been neglected and was a CINA. The petition also requested that B.S. "be committed to the Department . . . for a minimum of 30 days pending further investigation." On October 4, 2019, the juvenile court held a shelter care hearing and entered an order denying the Department's request for shelter care. The court ordered that B.S. would remain in Mother's care subject to the requirement that she "not leave the home with [B.S.] unless [B.S.] is strapped into a suitable carrier or, if Mother does not use a carrier . . . then Mother shall be accompanied by another adult and the child shall be buckled into Mother's wheelchair."

Immediately following the juvenile court's decision on October 4, Mother proceeded to Shady Grove Hospital to pick up B.S. B.S. had been taken to the emergency room by his foster parents after they observed multiple injuries on his body while bathing him. The hospital records document the following injuries on B.S.'s body:

> 5 x 1 cm linear abrasion with 3 individual lines at the lateral thoracic area, 6 x 1 cm linear abrasion with 3 individual lines at the lateral lower

> lumbothoracic area, followed by a 4 x 2 cm horizontal contusion that appears faded in the lateral lumbar region on the left, 5 x 4 cm approximately circular faded contusion in the right medial thoracic area of the back, 1 x 1 cm contusion over the left posterior deltoid, 2.5 x 1 cm linear vertical abrasion with 3 individual lines over the left proximal humerus, 1 x .3 cm contusion over the left proximal humerus.

The health care providers at Shady Grove Hospital concluded that B.S.'s examination was "concerning for physical abuse as there [were] multiple injuries that appear[ed] inflicted in nature." When Mother arrived at the hospital, she was notified that B.S. had injuries suggestive of child abuse. CPS did not show Mother pictures of the injuries at that time, nor did they communicate what the specific identified injuries were. When asked by CPS what caused B.S.'s injuries, Mother "came up with different reasons," including that a "friend could have hurt him," that maternal grandmother "could have hurt him," and that B.S. "fell down brick stairs." She indicated that she was "not quite certain" that these were the actual causes of B.S's injuries, but that they could have been the possible causes.

On October 7, 2019, the Department filed an emergency request for shelter care based on the hospital's report of injuries that appeared to be inflicted in nature. The court granted the Department's request on October 7, 2019.

CINA Adjudication and Disposition

On October 31, 2019, the Department filed the First Amended CINA Petition. The Department recommended that B.S. be placed under the jurisdiction of the juvenile court and committed to the Department for placement in foster care. The Department also requested that Mother have visitation with B.S. twice weekly, that Mother undergo

psychological evaluation, and that visitation with T.L. be suspended until he presents himself to the Department.

At the CINA adjudication hearing, the Department called two expert witnesses: Dr. Evelyn Shukat ("Dr. Shukat"), a board-certified pediatrician and child abuse pediatrician; and Karen Lemus ("Ms. Lemus"), a CPS investigative social worker assigned to B.S.'s case. Dr. Shukat's medical reports concerning B.S. were moved into evidence, and admitted over Mother's objection regarding out of court statements contained therein,. Additionally, the complete file documenting CPS's past involvement with B.S. was admitted into evidence.

Dr. Shukat opined with a reasonable degree of medical certainty that B.S. would not be safe in Mother's care. Similarly, Ms. Lemus opined with a reasonable degree of social work certainty that "[B.S.] would be put at substantial risk of harm if he were returned to [Mother]." As a basis for their opinions, both experts expressed concern regarding "the number of unexplained injures that have been reported" and "the number of risky scenarios that have been explained [as to what] could have potentially caused these injuries." Although neither expert could state with certainty the precise cause of B.S.'s injuries documented at Shady Grove Hospital on October 4 2019, they expressed concern that the hospital concluded that some injuries appeared "inflicted in nature."

Both experts were concerned with the multiple discrepancies in explanations offered by Mother, as described in part above, for various circumstances involving her care of B.S. These discrepancies cast doubt on Mother's credibility and raised concern regarding "the

way [M]other perceives reality." For example, Dr. Shukat noted that Mother's "history stating that [B.S.] nips at her, falls down a lot, [and] head butts her" was "incongruent" to her direct observations of B.S. Moreover, Dr. Shukat observed that B.S's foster parents had not complained of any such behavior, and B.S. had not acquired any new injuries since being placed in foster care. Dr. Shukat stated that Mother reported that a "hospital lead" had been the cause of a bruise on B.S.'s "lower left back," but, according to Dr. Shukat, "[t]his location is not a location for any leads for cardiac monitoring." Although one medical record reflected that Mother "planned to engage in Mommy and Me classes at Glen Echo from 9:00 to 5:00 daily," Dr. Shukat did not believe that such a schedule existed.

Both experts observed that Mother's suggestion that B.S. may have possibly been bitten at daycare was inconsistent with the fact that, in reality, B.S. did not attend daycare. Additionally, Ms. Lemus expressed concern regarding the multiple explanations communicated by Mother relative to her paralysis and use of a wheelchair.

And both experts raised concerns regarding Mother's "ability to properly care [for] and supervise" B.S. Dr. Shukat relied on statements by B.S.'s treating physician, Dr. Warner, who relayed concerns "regarding mother's lack of understanding and ability to parent," her ability to "understand normal childhood development and nutrition," and Dr. Warner's observation of Mother yelling at the child. Dr. Shukat was concerned that B.S. "bonded to multiple strangers" while at her office, which, she noted, is the "antithesis of normal development of a child this age, who usually demonstrates stranger anxiety, rather

than seeking comfort from strangers." Dr. Shukat testified that this was a safety issue for B.S. moving forward.

Ms. Lemus testified regarding the "multiple reports made by grandmother in regards to mother's ability to properly care for [B.S.] and keep him safe." Because there were multiple reports of B.S. falling off of Mother's lap, Ms. Lemus expressed concerns regarding Mother's lack of use of a "harness," "seatbelt," or "leash" given Mother's mobility limitations. Ms. Lemus also found it concerning that Mother had stated that B.S. may have been injured at a playground when Mother "left the child alone with a group of teenagers while she went to go use the bathroom**.**"

Mother testified during the CINA proceedings as well. In pertinent part, Mother testified that she had not bitten, nor physically bruised B.S. since the October 2018 biting incident. She testified that B.S. was up to date on all of his shots and wellness checkups, which was corroborated by Dr. Shukat and Ms. Lemus.

Several of the discrepancies in Mother's prior accounts were explained away as reporting errors by others. As to the multiple explanations offered for B.S.'s injuries, Mother testified that neither CPS nor the hospital showed her or specified the injuries they were inquiring about. So, when asked how B.S. could have been injured, "she came up with different reasons," but "she was not quite certain." She explained:

> Any mother would try to come up with reasons why her child has possibly been hurt or what could have happened, especially when they're in an emotional state. It's just a common reaction we all have. I have many friends that make the same mistake that I do, and it is not wrong for somebody to give repeated explanations when they don't know what the injuries are or

> they are emotional. And at the time, I was very emotional. I was really upset that I was not taking my son home, and I really wanted my baby.

Mother testified that B.S. was an active child and allergic to mosquito bites. Mother testified that she had a harness for B.S., which she uses "every time" she gets the chance to, but she also acknowledged that she does not always wear the harness. For instance, she testified that she has allowed B.S. to ride by himself on the metro "three times" when she's sitting right next to him. She testified that she has a belt that goes around her wheelchair which B.S. does not like, but she uses it anyway. At the time of the hearing, Mother had looked into securing a little backpack that has a leash on it which would allow B.S. to only travel a few feet away.

The Court's Ruling

The court found that B.S. had been neglected and that he was a CINA. The court explained:

> The statute tells me that neglect means the leaving of a child unattended or other failure to give proper care and attention to a child by any parent or individual who has permanent or temporary care of custody or responsible for supervision of the child under circumstances that indicate that the child's health or welfare is harmed or placed at substantial risk of harm and the child has suffered a mental injury or had been placed at a substantial risk of a mental injury. I don't think the mental injury occurred in this case, and I don't think we're considering any of that.
>
> So the question is, whether or not we can view these series of events as just really bad karma. . . . I think that the statute requires with a small child that you be proactive. And I don't think we have to wait until something bad happens. And in this particular instance, we heard from mom that she assumes that dogs are nice until they're not. Well, I can tell you that's probably the wrong way to have [sic] when you know you have a child that likes to grab and pull and has been nipped at before.

So, I think to be proactive and not neglectful, okay, you have to assume the opposite when you have a child who is that way. If you have a child that runs in the parking lot, you have to hold their hand or put them on your hip. If you have a child that is active and runs away, you can't allow him to be unharnessed in the metro and stand on a seat and when it stops to bang his head. You have to be proactive. And even if she wasn't proactive, she should have learned from experience. This child is active, and she cannot just supervise from afar.

And I have some real concerns with her ability to be a good historian as to how things happen. Her multiple explanations as to how things happen. Her multiple explanations as to her injuries concerns me as to her mental health because when the truth - - or not even explanation. She could just say, I had an accident, but she doesn't do that. She tells people she was on the eighth floor of a Florida building which killed 125 other people and she was the sole survivor.

She claimed that she drank a glass of champagne before the collapse. Those are details that people don't make up. Those are details that people remember. . . .

* * *

[Quoting Exhibit 3] Mom says she is active duty military currently working with the MP's at Walter Reed. She said she was injured while deployed. She said she has looked for help and resources through the military but they're unable to help her. She goes on to talk about mom and patient take the bus everywhere and take it to D.C. Mom was appreciative of the support.

And then there's the statement that she made to Dr. Shukat that she was injured when she -- standing on a balcony and that she can move her legs. And we've heard often in the explanation that people got it wrong, that they must have misheard. That's not what I meant, that's not what I said. I was emotional, so I got it wrong.

Well, when you're emotional, you might leave out facts, but you don't get facts wrong. You don't get facts wrong when you're emotional. You could leave out facts, you could not describe it as fully as you should, but I don't think that you make wholesale statements that are inconsistent with the truth.

And the concern I have in this case is that Mom allows this child - - she said he was on the metro and he went into a space where there's these openings on the old metro thing, and he was able to get on the floor, and now he's not eating stuff off the floor because that sounds terrible. Now he was on - - he got some stuff, and then he put it in his mouth and he's back on the seat, and she's able to finally get the pill - - and I'm not sure why if she had the pill, why it wasn't turned over to the hospital to determine whether or not they needed to give this child charcoal.

But the concern I have is not that she doesn't, when necessary, take him to the doctor's. That's not the concern I have. The concern I have is she doesn't prevent him from being injured, and the risk of harm to get proper care and attention is just not after a child's been injured. It's prior to a child being injured. And it's the prevention of a child being injured. And in this particular case, this child had to undergo rabies shots, which are painful, undergo forced ingestion of charcoal, which is painful, and has been to the doctor's on multiple occasions because of other things.

And so merely because she's up to date on her immunizations and she takes him to the pediatrician doesn't make her not a neglectful mom. And when you have lack of evidence with respect to the inflicted injuries and who did it, I guarantee you Dr. Shukat is not going to say that it's from this mother and she can guarantee physical injury, because she doesn't know where it came from. But we know that he has all these injures, and we know that he's in Mother's care, and when she says that she [sic] was injured - - the bruises on the arm are because somebody from daycare, a teacher from daycare, grabbed him to prevent him from going in the street - - well, there's two concerns there. One, is that really how the injury occurred, because he's not in daycare, and two, why did they have to grab him to stop him from going in the street?

Newspaper stand fell on the child. And we've had testimony here that he is under her control, under restraint, harness, backpack, all the time, and yet we have him falling, things falling on him, running into the street, having a lot of issues. And so let's assume for purposes of argument this is an active child. Well, then, you have to be proactive. When children are little, you don't stand behind them. Sometimes you have to stand in front of them. And what I mean by that is you have to anticipate what they're doing. When they're older you stand behind them. And when they make mistakes, then that's the way you support them. But when they're little, you have to anticipate.

> And so I find that under - - and I don't think we have to wait, that neglect means, again, the leaving of a child unattended or a failure to give proper care and attention - - has occurred in this case. It's not just one incident. It's just like the constellation of injuries in a child abuse case. It's not in isolation. You have to look at everything. And I do have concern, quite frankly, about mom's mental health and her moving from place to place and the support that this child is going to have. And so, therefore, I'm going to find this child a child in need of assistance.

The disposition hearing was held immediately after the court's adjudication of B.S. as a CINA. The record reflects that the Department relied on the evidence presented during the adjudication hearing and the sustained allegations of the amended CINA petition. Counsel for Mother declined to recommend a disposition, stating: "I'm not going to say one way or the other. My client doesn't believe that this is CINA, so . . . we're just going to submit . . . in terms of what Your Honor wants."

The court committed B.S. to the Department for placement in foster care. Mother was ordered to engage in "visitation with the child supervised, minimum twice weekly for two hours per visit" and to "complete a psychological evaluation and follow . . . treatment recommendations." Further, visitation between T.L. and B.S. was suspended until T.L. presented himself to the Department.

The juvenile court's order was entered on November 5, 2019. Mother noted a timely appeal.

DISCUSSION

I. Evidentiary Rulings of the Juvenile Court

A. Standard of Review

During an adjudicatory hearing to consider the allegations set forth in a CINA petition, the court is the trier of fact and shall apply the rules of evidence under Title 5 of the Maryland Rules. CJP § 3-808; § 3-817. The Department bears the burden to prove the allegations in the petition "by a preponderance of the evidence." CJP § 3-817(c).

Mother contends that the juvenile court made "two significant errors in its evidentiary rulings during the adjudication phase of the case." When the juvenile court's evidentiary ruling is "based upon a pure conclusion of law," this Court reviews a ruling on admissibility of evidence *de novo*. *Lamalfa v. Hearn*, 457 Md. 350, 373 (2018) (citing *Brown v. Daniel Realty Co*., 409 Md. 565, 583 (2009)). We apply the abuse of discretion standard when the court's evidentiary ruling is "based on a discretionary weighing of relevance in relation to other factors." *Id.* *Accord Gordon v. State*, 431 Md. 527, 538 (2013) ("Under this two-dimensional approach, the trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review. Accordingly, the trial court's legal conclusions are reviewed de novo, but the trial court's factual findings will not be disturbed absent clear error[.]" (citations omitted)).

Pursuant to Maryland Rule 5-103(a), "error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the rule." The Court of Appeals has explained that "the erroneous admission of evidence will not justify reversal unless the complaining party can show that the admission was prejudicial to him." *Kapiloff v. Locke*, 276 Md. 466, 472 (1975). "The burden of proving prejudice in a civil case is on the complaining party, here the appellant." *Id*. *Accord Crane v. Dunn*, 382 Md. 83, 91 (2004) (the Court of Appeals stated, with respect to civil cases: "It is the policy of this Court not to reverse for harmless error and the burden is on the appellant in all [civil] cases to show prejudice as well as error.").

B. Admissibility of Treating Pediatrician's Out-of-Court Statements

On appeal, Mother first contends that the court erred when it considered out-of-court statements made by Dr. Warner, B.S.'s treating pediatrician, as substantive evidence even though the statements came into evidence pursuant to Maryland Rule 5-703 as part of the explanation for Dr. Shukat's opinion.

Dr. Shukat, was accepted by the court as an expert in pediatrics and child abuse pediatrics, and she opined that B.S. had been neglected by Mother. In her capacity as the medical director at the Tree House Child Advocacy Center in Rockville, Maryland, Dr. Shukat created three reports documenting her interactions with B.S. and Mother, and her medical recommendations. She testified that she kept these records in the ordinary course of business.

When the Department moved to introduce Dr. Shukat's reports into evidence, Mother objected "on the grounds that portions of this document are hearsay, in particular, the portion in which Dr. Shukat . . . elicits information from Dr. Warner, who is [B.S.'s] pediatrician." Mother objected to the admission of the following portion of Dr. Shukat's report:

> [B.S's] prenatal information was not provided at time of this medical visit[.] I called and spoke with child's Pediatrician, Dr. Warner, who told me that although child has been brought regularly for well child check ups and is up to date on immunizations, she has been continually concerned as to mother's lack of understanding and ability to parent, understand normal childhood development and nutrition, and felt that she functions intellectually as a "13 year old", having witnessed mother yell at the child, characterizing it as "verbal abuse". Although Dr. Warner was aware of the history of mother biting the child, she stated that she had not witnessed any physical findings of this on her examinations.

Mother objected to the admission of these statements, arguing that the statements attributed to Dr. Warner constituted hearsay, and that any inquiries made by Dr. Shukat as to whether Mother "should or shouldn't have a psychological evaluation" were "beyond…the scope of Dr. Shukat's evaluation." The court did not solicit a reply from the Department, but responded to Mother's objection as follows:

> Okay. So when experts testify, it's a little different than when anybody else testifies, and experts are entitled to rely on hearsay information if it is reasonable within their expertise to rely on such information.
>
> If you had called somebody in a criminal case, such as from Children's Hospital, who would testify as to whether or not she's reviewed all the documents, she's reviewed the police reports, she's reviewed statements of individuals, just like the medical examiner, it's not in a vacuum in order to render their opinion.

> So I believe that if she spoke to another pediatrician about the care and the observations of that pediatrician, that is reasonable and, therefore, it's not hearsay. She didn't speak to the plumber, she didn't speak to the neighbor, she didn't speak to people at her church or place of faith or she didn't speak to, you know, somebody she works with.
>
> She spoke to like treating individuals who she got a history from, and so, [if] that is hearsay, yeah, sure it's hearsay, but it's the kind of hearsay that's permissible by experts in testimony. It's just like a doctor testifies to what the radiologist said, so I don't find it to be outside her ability to rely on that hearsay and put it in her report.

Mother, in response, requested that, "if it's going to be hearsay based on her rendering an expert opinion, then I would ask that it only be for that purpose and not be for the truth of the matter." The court's reply to that request for limited admissibility is the comment that is the focus of this issue:

> Okay. No, it comes in as part of her opinion. It has to come - - I mean you could ask her why she would rely on that when she doesn't know the person. You can cross-examine her as to it, but I'm going to allow it. It's an exception to the hearsay rule with regards to experts, so I'm allowing it in.

On appeal, Mother focuses on the "no" in the court's response, deeming it an indicator that the court intended to admit Dr. Warner's statements for the truth of the matter asserted.

As further support for this interpretation of the court's ruling, Mother directs us to a similar objection she asserted later during the hearing relative to out-of-court statements reported by Ms. Lemus, who testified as an expert in the field of social work. When Mother inquired whether hearsay statements made to Ms. Lemus would be admitted as substantive evidence, the court replied:

> THE COURT: It's coming in as a basis for her opinion, which if she's relying on it to reach her opinion, I don't know how it doesn't come in - - it has to come in as substantive evidence for her to rely on it. I don't know how you could - - you could couch it however you want to, but that's not going to - - I could say no, it's not, but then she uses her opinion on it, so it, in fact is.
>
> [COUNSEL FOR MOTHER]: Well, Your Honor, I would then just, if you can allow me to note my objection as it relates to specific statements that are made so I can at least make my record?
>
> THE COURT: Sure, sure.
>
> * * *
>
> [COUNSEL FOR THE DEPARTMENT]: We'll withdraw this line of questioning.
>
> THE COURT: Okay.

We are not persuaded that the admission of any of Dr. Warner's statements during Dr. Shukat's testimony constituted legal error. It is undisputed by the parties on appeal that Dr. Warner's statements were admissible for the purpose of explaining the basis of Dr. Shukat's opinion. Indeed, the Court of Appeals has stated that "'[a]n expert may give an opinion based on facts contained in reports, studies, or statements from third parties, if the underlying material is shown to be of the type reasonably relied upon by experts in the field.'" *Lamalfa*, 457 Md. at 354 (quoting *U.S. Gypsum Co. v. Mayor and City Council of Balt.*, 336 Md. 145, 176 (1994)). Maryland Rule 5-703, as revised effective July 1, 2019, stated at the time of the adjudication hearing in this case:

> (a) Admissibility of Opinion. An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If the court finds on the record that experts in the particular field would

> reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.
>
> (b) If Facts or Data Inadmissible. If the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury over objection only if the court finds on the record that their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
>
> (c) Instruction to Jury. If facts or data not admissible in evidence are disclosed to the jury under this Rule, the court, upon request, shall instruct the jury to use those facts and data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.
>
> (d) Right to Challenge Expert. This Rule does not limit the right of an opposing party to cross-examine an expert witness or to test the basis of the expert's opinion or inference.

Because the underlying reports, data, or statements an expert "has been made aware of" may be admitted into evidence for the purpose of explaining the basis of an expert's opinion, Dr. Shukat's medical reports containing statements attributed to Dr. Warner were properly admitted under Rule 5-703. In this instance, the court found that it was "reasonable" that Dr. Shukat spoke to "another pediatrician about the care and the observations of that pediatrician" in formulating her expert opinion.

Mother contends, nonetheless, that the court was not permitted to admit Dr. Warner's statements as substantive evidence. With respect to Maryland Rule 5-703, we agree with Mother that, "[i]f such information received from others is inadmissible hearsay, 'it ordinarily comes in not as substantive evidence but only to explain the factual basis for the testifying expert's opinion.'" *Alban v. Fiels*, 210 Md. App. 1, 21 (2013) (quoting *United*

States Gypsum Co., 336 Md. at 176 n.10)). In Professor McLain's treatise on evidence, she comments:

> Experts who rely on information from others may sometimes, in the trial court's discretion, exercised in compliance with Md. Rule 5-703(b), relate that information in their testimony. If the supporting information is inadmissible as substantive proof, it may be admitted for the limited purpose of explaining the basis of the expert opinion. The opposing party then is entitled, on request, to an instruction to the jury that it may consider that evidence "only for the purpose of evaluating the validity and probative value of the expert's opinion or inference."

LYNN MCLAIN, MARYLAND EVIDENCE, STATE AND FEDERAL § 703:1 (Westlaw version, September 2019 Update) (footnotes omitted). Professor McLain explains in § 703:2, discussing the analogous federal rule:

> The rationale for Fed. R. Evid. 703's permitting expert testimony that is based on hearsay not admitted in evidence is set forth as follows in a pre-Federal Rules of Evidence decision of the U.S. Court of Appeals for the Fifth Circuit:
>
> > The rationale for this [expert testimony] exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion. Moreover, the opinion of expert witnesses must invariably rest, at least in part, upon sources that can never be proven in court. An expert's opinion is derived not only from records and data, but from education and from a lifetime of experience. Thus, **when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise**.

MCLAIN § 703:2 (quoting *United States v. Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971) (footnote omitted)) (emphasis added).

Despite the ambiguous, and arguably erroneous, comment made by the judge in this case regarding a statement that "has to come in as substantive evidence for [the expert witness] to rely on it," there is no clear indication in this record that the juvenile court *relied on* Dr. Warner's hearsay statements as substantive evidence. The court's ruling on the merits does not reflect that the court considered Dr. Warner's statements at all, let alone based the CINA decision upon the truth of any hearsay statements attributed to Dr. Warner. Mother concedes that Dr. Warner's statements "were not expressly included in the sustained allegations of the First Amended CINA Petition." Although Mother argues that the court must have relied on Dr. Warner's statements in finding that B.S. was neglected, we decline to infer that such an inference was a material, but unstated, part of the rationale for the court's decision in light of the ample evidence expressly cited by the court to support the court's finding of neglect (to be discussed in more detail below). Given the juvenile court's lack of mention of any hearsay statement of Dr. Warner, even if we were to find that the court erred in suggesting during the hearing it would consider Dr. Warner's out-of-court statements as substantive evidence (rather than as merely a basis for Dr. Shukat's opinions), Mother has not met her burden to show that she was prejudiced by such error. *See Kapiloff*, 276 Md. at 472.

C. Admissibility of Statement Regarding Dr. Warner's Objectivity

When Dr. Shukat was cross-examined with respect to some of Dr. Warner's opinions and assessments, Dr. Shukat was unable to provide specific examples communicated by Dr. Warner of Mother's purported lack of understanding and ability to

parent, functioning like a teenager, lack of understanding of childhood development or nutrition, or yelling at B.S. Despite Dr. Warner's failure to provide specific examples to support each comment, Dr. Shukat expressed the view that, "as a pediatrician, [Dr. Warner's] assessment of parenting would be objective."

Mother objected to, and moved to strike, Dr. Shukat's "objective" comment as an improper "character evaluation." The juvenile court disagreed and did not strike Dr. Shukat's statement from the record. On appeal, Mother contends that Dr. Shukat's statement "can only be interpreted as Dr. Shukat opining that Dr. Warner's comments were worthy of belief due to Dr. Warner's status as a pediatrician." Mother further contends that this was impermissible because "a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth."

This is not, however, an instance of a witness commenting upon the credibility of another *witness*; Dr. Warner did not testify as a witness during B.S.'s adjudicatory CINA hearing; she merely provided Dr. Shukat her professional observations made as the child's treating physician, and the juvenile court concluded that Dr. Shukat's testimony satisfied the requirement of Rule 5-703 that "experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject." In refusing to strike Dr. Shukat's "objective" comment, the court viewed the comment as an explanation for Dr. Shukat's reliance, in forming her own expert opinion, on information communicated by Dr. Warner. We perceive no abuse of discretion in the court's refusal to strike the testimony. And, again, given the juvenile court's detailed explanation for its ruling on the

merits that appeared to give no material weight to Dr. Warner's observations, we fail to see how any error in this regard would be anything other than harmless.

II. Adjudication as a CINA and Removal from Mother's Custody

A. Standard of Review

During the adjudicatory hearing on the Department's CINA petition, it was the Department's burden to show, by a preponderance of the evidence, that B.S. was a CINA. CJP § 3-817(c); *see also In re Nathaniel A.*, 160 Md. App. 581, 595 (2005). A CINA is "a child who requires court intervention" because he or she has been "abused" or "neglected," and the child's parents are "unable or unwilling to give proper care and attention to the child and the child's needs." CJP § 3-801(f).

The juvenile court found that B.S. had been neglected, and that Mother was "unable" to give proper care and attention to B.S.'s needs. Mother contends, on appeal, that the Department failed to meet its burden to show that Mother neglected B.S. She also contends that the Department did not meet its burden to prove that B.S. needed to be removed from Mother's care.

When we review CINA proceedings on appeal,

> (1) we review factual findings of the juvenile court for clear error, (2) we determine, "without deference," whether the juvenile court erred as a matter of law, and if so, whether the error requires further proceedings or, instead, is harmless, and (3) we evaluate the juvenile court's final decision for abuse of discretion.

In re O.P., 240 Md. App. 518, 546 (2019) (citing and quoting *In re Adoption/Guardianship of H.W.*, 460 Md. 201, 214 (2018)), *cert. granted*, 464 Md. 586 (2019).

We will find that there has been an abuse of discretion only "where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles.'" *In re Andre J.*, 223 Md. App. 305, 323 (2015) (quoting *In re Yve S.*, 373 Md. 551, 583 (2003)). Moreover, the court's decision must "be well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *In re Ashley S.*, 431 Md. 678, 704 (2013) (quoting *In re Yve S.*, 373 Md. at 583-84).

We note, additionally, that the juvenile court possesses "a wide discretion" to "determine any question concerning the welfare of children within [its] jurisdiction[.]'" *Reichert v. Hornbeck*, 210 Md. App. 282, 305 (2013) (quoting *Bienenfeld v. Bennett-White*, 91 Md. App. 488, 503–04 (1992)). The juvenile court enjoys such wide discretion "because only [the juvenile court] sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; [it] is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor." *Baldwin v. Bayard*, 215 Md. App. 82, 105 (2013) (quoting *In re Yve S.*, 373 Md. at 585-86)).

B. No Clear Error in the Adjudication of B.S. as a CINA

Mother contends that the Department failed to show by a preponderance of the evidence that Mother neglected B.S. "Neglect," is defined, in pertinent part, as "the leaving of a child unattended or other failure to give proper care and attention to a child by any parent . . . under circumstances that indicate [t]hat the child's health or welfare is harmed

or placed at substantial risk of harm." CJP § 3-821(s). When the juvenile court considers whether a child is a CINA, it "may and must look at the totality of the circumstances." *In re Priscilla B.*, 214 Md. App. 600, 621 (2013).

As we have previously stated, "[n]eglectful behavior toward a child may seem more passive in character, but a child can be harmed as severely by a failure to tend to her needs as by affirmative abuse." *In re Priscilla B.*, 214 Md. App. at 621. We have further observed:

> It makes sense to think of "neglect" as part of an overarching pattern of conduct. Although neglect might not involve *affirmative* conduct (as physical abuse does, for example), the court assesses neglect by assessing the *inaction* of a parent over time. To the extent that inaction repeats itself, courts can appropriately view that pattern of omission as a predictor of future behavior, active or passive: "[it] has long been established that a parent's past conduct is relevant to a consideration of the parent's future conduct. Reliance upon past behavior as a basis for ascertaining the parent's present and future actions directly serves the purpose of the CINA statute." *In re Adriana T.*, 208 Md. App. 545, 570 (2012) (citations omitted). Differently put, "[c]ourts should be most reluctant to 'gamble' with an infant's future; there is no way to judge the future conduct of an adult excepting by his or her conduct in the past." *McCabe v. McCabe,* 218 Md. 378, 384 (1958). And of course, we need not and will not wait for abuse to occur and a child to suffer concomitant injury before we can find neglect: "The purpose of [the CINA statute] is to protect children—not wait for their injury." *In re William B.*, 73 Md. App. 68, 77–78, 533 A.2d 16 (1987).

In re Priscilla B., 214 Md. App. at 625–26.

There was substantial evidence in the record, cited by the court in its ruling, supporting the finding that Mother had failed to give proper care and attention to B.S., resulting in past harm and substantial risk of future harm to B.S. The court considered the "constellation of injuries" sustained by B.S. while in Mother's care, which served to

illustrate that Mother "doesn't prevent [B.S.] from being injured." Although the record discloses that Mother "always obtained necessary medical treatment for B.S. in a timely fashion and ensured that the child was up-to-date on his immunizations and well-child checkups," the court expressed concern over Mother's repeated failures to prevent harm in the first instance. Additionally, the court expressed doubt about Mother's ability to be "proactive" in mitigating future risk to B.S., or at the very least, in learning from past experience what behavior to adopt to prevent B.S. from sustaining injury.

As one example, the court cited Mother's testimony that B.S. likes "to grab and pull and tug" at dogs, and that B.S. had been "nipped" by dogs on three occasions prior to being bitten by the large cane corso dog. The court also observed that, despite Mother's knowledge that B.S. interacted with dogs in a manner which resulted in nips and bites, Mother continued to stand by her personal policy that she would "assume that dogs are nice until they're not." It was reasonable for the court to draw two separate conclusions from this testimony: 1) that B.S.'s dog bite by the cane corso was evidence of Mother's inability to properly evaluate risk and take appropriate preventative measures; and 2) that Mother's continued assumption about the tolerance of toddlers by dogs exposed B.S. to future risk of dog bites.

As another example, the court pointed to Mother's own description of B.S. as an "active" child, subject to frequent falls. The court observed:

> If you have a child that is active and runs away, you can't allow him to be unharnessed in the metro and stand on a seat and when it stops to bang his head. You have to be proactive. And even if she wasn't proactive, she should

> have learned from experience. This child is active, and she cannot just supervise from afar.

There were numerous reported incidents of B.S. falling or striking his head, including reports from the maternal grandmother that B.S. had fallen multiple times from Mother's lap while riding in her wheelchair. Mother's testimony that she does not always use a harness to secure B.S. while in the wheelchair despite B.S.'s history of several falls led the court to reasonably conclude that Mother has demonstrated an inability to adjust her behavior and minimize risk of injury to B.S. Had B.S. been properly secured on the metro, Mother might have prevented him from ingesting the "pink pill," saving him from another trip to the hospital. It was reasonable for the court to find that, while B.S. was in Mother's care, he was subject to an unacceptable level of risk for future injuries.

To support her argument that the Department had not shown neglect, Mother asserts that "Dr. Shukat acknowledged that she had not determined that [Mother] had neglected the child." Indeed, Dr. Shukat acknowledged that her diagnosis of "rule out neglect" was "a diagnosis that need[ed] to be thought of and investigated and either substantiated or ruled out." But the record is replete with descriptions of trips to doctors and hospitals during the first two years of the child's life, and the court was in a position to reasonably conclude that B.S. had been subjected to neglect based upon Mother's pattern of inaction over time. *See In re Priscilla B.*, 214 Md. App. at 625–26.

Mother also asserts that the Department was "unclear whether any injuries observed on B.S." were "inflicted, caused by neglect, or purely accidental." It was within the court's discretion, however, to either believe or disbelieve the hospital's reports that B.S's injuries

appeared "inflicted in nature." Likewise, it was within the court's discretion to disbelieve Mother's various explanations of B.S.'s injuries. Given the numerous inconsistencies in Mother's explanations, it was reasonable for the court to doubt her "ability to be a good historian."

And the court was not required to find that B.S. had suffered actual harm in order to find that there had been neglect. As we have noted above, neglect can exist "without *actual* harm to the child" (*i.e.*, through the "*substantial* risk of harm"). *In re Priscilla B.*, 214 Md. App. at 625. So, regardless of whether the injuries were inflicted or accidental, it was not error for the court to be persuaded that B.S.'s injuries and his repeated exposure to risk of harm established Mother's neglect.

C. Removal B.S. from Mother's Care

Following an adjudicatory hearing that results in a CINA finding, the court holds a separate disposition hearing in order to decide whether to "commit the child on terms the court considers appropriate to the custody of . . . a parent . . . a relative . . . or the local department." CJP § 3-819(b)(1)(iii).

Mother asserts that "the Department, at the very least, did not meet its burden to prove that B.S. needed to be removed from [Mother's] care." In support, she asserts on appeal that "the evidence warranted a conclusion that B.S. could remain in [Mother's] care with an order of protective supervision in place." She further contends on appeal that Mother's past compliance with prior CPS safety plans, in which B.S. was placed in

Mother's care with oversight from the maternal grandparents, proved that "B.S. could be safe in [Mother's] care with supportive services in place and Department oversight."

These arguments, however, were not raised during the court's hearing on disposition. As quoted above, when the court solicited input from the parties regarding the appropriate disposition, Mother, through counsel, made no suggestions, let alone requests, whatsoever. Mother's counsel stated: "I'm not going to say one way or the other. My client doesn't believe that this is CINA, so Your Honor – we're just going to submit – in terms of what Your Honor wants."

Accordingly, we decline to consider Mother's unpreserved arguments regarding disposition. *See* Maryland Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue [except jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court.").

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1891s19cn.pdf