UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2358

September Term, 2015

IN RE: B.W.

Meredith,
Reed,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: August 30, 2016

This appeal is from the finding of the Circuit Court for Queen Anne's County, sitting as a juvenile court, that B.W. is a Child in Need of Assistance ("CINA") due to parental neglect. B.W.'s mother, the appellant, presents two questions for our review, which, for clarity, we rephrase as follows:[1]

1. Did the circuit court err where it excluded B.W.'s psychological evaluations from evidence on the grounds that the psychologist-patient privilege applied and had not been waived?

2. Did the circuit court err in adjudicating B.W. to be a CINA due to parental neglect rather than a developmental disability?

For the following reasons, we answer both of these questions in the negative. Therefore, we affirm the judgment below.

FACTUAL AND PROCEDURAL BACKGROUND

The appellant, Heather C., has four children, the second oldest of whom is B.W. B.W. was born on January 3, 2000. His father, Antwain W., is deceased. The appellant testified that her troubles with B.W. began when he was six months to one year old.

[1] The appellant presents the following questions in her brief:

1. Did the court err in excluding evidence of B.[W.]'s psychological evaluations in evidence, where the psychologist-patient privilege did not exist, or, in the alternative, B.[W.]'s mother, the natural guardian, waived the privilege?

2. Did the court err in adjudicating B.W. to be a CINA based on parental neglect rather than developmental disability?

However, she did not seek the assistance of the Queen Anne's County Department of Social Services ("Department") until B.W. was approximately seven and a half years old.

The appellant first contacted the Department regarding B.W.'s behavioral and mental health needs on July 26, 2007. That was the first of eight contacts the appellant made with the Department regarding B.W. before August 2015. The Department referred the appellant for services each time, but the appellant did not always follow through on these recommendations. Services recommended by the Department that the appellant refused include family therapy (which the appellant refused on a number of occasions), equestrian therapy (which the Department offered to pay for), participation in the Department's own Nurturing Program, and participation in a program known as Maryland Choices. The appellant dealt with B.W. by yelling and cussing at him and physically restraining him, yet rejected the Department's offers to teach her different parenting techniques.

On August 6, 2015, the appellant took B.W. to the Department of Juvenile Services ("DJS"), where she requested that B.W. be detained because she was frustrated with him and did not want to take him home. However, because B.W. had not committed a delinquent act or violated his probation, Lauren Scearce, a DJS community case manager, informed the appellant that B.W. could not be detained. Therefore, the appellant left DJS and, immediately thereafter, took B.W. to the Department. Upon arriving, the appellant indicated to one of the Department's family services caseworkers that she wanted B.W. out of her home because he was neither doing his chores nor showing her respect. The appellant

proceeded to leave B.W. at the Department without giving him permission to stay anywhere else, such as at the home of his grandfather. For this reason, Ms. Slama arranged for B.W. to spend the night at the Department's emergency foster home.

On August 7, 2015, the day after the appellant left B.W. at the Department, Ms. Slama filed a shelter care petition on B.W.'s behalf. While Ms. Slama was at the courthouse filing the shelter care petition, the appellant called the Department and indicated that she wished to come in and discuss what had happened the day before. At approximately 2:00 p.m. on August 7, 2015, the appellant arrived back at the Department. She met with Ms. Slama and Terri Lowther, the Department's foster care supervisor, for forty five minutes to an hour. At the conclusion of that meeting, the appellant agreed to place B.W. in a respite home and to participate in a family involvement meeting.[2] As a result of her cooperation,

[2] According to the Department's website, a family involvement meeting is

> a casework practice forum to convene family members during key child welfare decision points. The purpose of the [family involvement meeting] is to establish a team to engage families and their support network to assess the needs and develop service plans. The goal is to develop service plan recommendations for the safest and least restrictive placement for a child while also considering appropriate permanency and well-being options for that child. Supervisors shall assume the primary responsibility for family engagement and teaming within their respective units.

MD. DEP'T OF HUMAN RES., *Policy Directive SSA 10-08: Guidelines for Conducting Family Involvement Meetings*, available at https://www.dhr.state.md.us/blog/wp-content/uploads/2012/10/ssa-10-08-family-involvement-meetings-fims.pdf (last visited June 24, 2016).

the Department withdrew its shelter care petition. From August 7, 2015, to August 16, 2015, B.W. spent all but one night in the respite home.

On August 10, 2015, the Department conducted a family involvement meeting with the appellant. Also in attendance were a number of social services professionals who were already providing services to the appellant or were otherwise willing to do so. At the meeting, the Department offered the appellant both in-home services and mobile crisis services.[3] The Department assigned Sarah Bowman to be the appellant's in-home services provider. The appellant met separately with Ms. Bowman following the family involvement meeting. Ms. Bowman referred the appellant for ongoing respite care for B. W., family therapy, individual therapy for the appellant's other children, mobile crisis services, and participation in both the Nurturing Program and Maryland Choices. Ms. Bowman testified that the appellant initially indicated a willingness to participate in all of the aforementioned programs and services. However, Ms. Bowman was unable to reach the appellant for approximately a week after their initial meeting, and when she eventually did reach her, the appellant seemed "really hesitant to follow through with the . . . services that we had suggested." Although the appellant did seek out school-based mental health counselling and respite services for B.W., she refused to participate in individual or family therapy, the Nurturing Program, and Maryland Choices. And while the appellant eventually

[3] A mobile crisis team member gave the appellant a phone number that she could call 24 hours a day, 7 days a week for telephonic or in-person assistance to avert or resolve any behavioral crisis that might have arisen.

contacted the mobile crisis unit, she did not do so without "a lot of work" on Ms. Bowman's part.

On August 16, 2015, B.W. returned home from respite care. Three days later, the appellant called the police and asked them to remove B.W. from her home. The police did not remove B.W. that day. However, on August 31, 2015, the police were called again—this time by the appellant's youngest daughter—after B.W. took the appellant's cell phone and a struggle ensued. Ms. Slama facilitated in B.W.'s grandfather picking him up from the police station that night and taking him back to his house, where he stayed until September 3, 2015.

On September 3, 2015, the Department conducted a second family involvement meeting with the appellant. At this meeting, the appellant indicated that she no longer wished to work with the Department or mobile crisis services. Despite being advised that the Department would have to place B.W. in foster care if she did not accept services, the appellant simply got up and left. In doing so, she left B.W. at the Department for a second time. The Department placed B.W. in shelter care later that day.

On September 24, 2015, adjudicatory and dispositional hearings were held before a magistrate of the juvenile court. The magistrate recommended a finding that B.W. was a CINA due to parental neglect, continued his placement in foster care, and recommended that Dr. Michael Gombatz, who had psychologically evaluated B.W. in April 2014, update his previous evaluation. The appellant filed timely exceptions.

The juvenile court held a *de novo* exceptions hearing on November 17, 2015. The appellant subpoenaed Dr. Gombatz to testify and filed a motion to introduce B.W.'s psychological evaluations into evidence, but the court quashed the subpoena and struck the motion for failure to comply with Md. Code Ann., Health-Gen. § 4-306. At the conclusion of the exceptions hearing, the juvenile court approved the magistrate's recommendations and proposed order, thus finding B.W. to be a CINA due to parental neglect. This timely appeal followed.

DISCUSSION

I. EXCLUSION OF EVIDENCE PERTAINING TO B.W.'S PSYCHOLOGICAL EVALUATIONS

A. The Contentions of the Parties

The appellant argues "the court erred in excluding evidence of B.[W.]'s psychological evaluations" because the confidentiality requirement of the psychologist-patient privilege was not met. The appellant asserts that both evaluations were done "at the direction of the Department" and "B.[W.] was informed that the communications between himself and Dr. Gombatz would not be confidential." The appellant specifically contends that the first evaluation was non-confidential because one of the Department's social workers "was not only present during the evaluation but actively participated in the evaluation by answering questions and offering information to Dr. Gombatz." Likewise, the appellant argues the second evaluation was non-confidential because, as B.W. was aware, it was ordered by the magistrate "merely to 'update' the first evaluation." Thus,

according to the appellant, the psychologist-patient privilege was waived by B.W. himself where he underwent the evaluations with full knowledge of their non-confidentiality.

Additionally, the appellant argues the psychologist-patient privilege was negated by Md. Code Ann., Cts. & Jud. Proc. ("CJP") § 9-109(d)(1), which provides that "[t]here is no privilege if . . . [a] disclosure is necessary for the purposes of placing the patient in a facility for mental illness." She asserts that Dr. Gombatz's evaluations were necessary for purposes of placing B.W. in the Board of Child Care (the residential boys' home wherein B.W. was placed after exhibiting unmanageable behaviors in his first foster care placement), which in turn satisfies the definition of a "facility for mental illness" under Md. Code Ann., Est. & Trusts § 13-101.

The final argument advanced by the appellant is that if the psychologist-patient privilege did exist, then she was authorized under Maryland law to waive it on B.W.'s behalf. The appellant acknowledges that, under Maryland law, "[w]here a conflict of interest [between parent and child] exists, the parent can neither assert nor waive the child's [psychologist-patient] privilege." *McCormack v. Bd. of Educ. of Baltimore Cty.*, 158 Md. App. 292, 310 (2004). However, she contends that there was no substantial conflict of interest between her and B.W. Instead, she argues that she simply "wished to advance B.[W.]'s best interests and have him receive treatment under a Voluntary Placement Agreement." Therefore, she argues that she "was authorized to and did waive B.[W.]'s psychologist-patient privilege."

The Department responds that, for three reasons, the appellant did not preserve her argument regarding B.W.'s psychological evaluations. First, the Department argues that we should not consider the exclusion of Dr. Gombatz's April 2014 evaluation because while the appellant included a copy of it in the appendix to her brief, she did not include it in the record. Second, the Department asserts that the exclusion of the evaluations is unpreserved because "when the court quashed the subpoena and denied the motion to introduce the evaluation, [the appellant] made no proffer of Dr. Gombatz's testimony or the relevant portions of the evaluations." Therefore, the prejudice and proffer requirements of Md. Rule 5-103(a)(2) have not been met. Finally, the Department contends that the appellant has altogether failed to address Section 4-306 of the Health General Article, the requirements of which served as the sole basis for the juvenile court's ruling on the psychological evaluations. For these reasons, the Department argues this issue has not been properly preserved for review.

If, however, we determine that this issue is preserved for review, the Department asserts "the juvenile court's ruling should not be disturbed because [the appellant] has not demonstrated that B.W. 'expressly consent[ed] to waive the privilege[.]'" *Quoting* CJP § 9-109(d)(6). The Department contends that although B.W. was aware of the social worker's presence at the evaluation, he was never advised "that he had a privilege or that by having the . . . worker present he would waive his privilege." Moreover, the Department argues that "it is not clear that the [worker]'s presence could have waived B.W.'s privilege"

because the worker may have had "a separate confidential relationship with B.W. arising out of the Department's provision of services."

The Department also asserts that the 2015 "update" evaluation recommended by the magistrate did not become a court order until signed by the judge after the exceptions hearing. Thus, the Department contends "[the appellant]'s argument that B.W. also waived any privilege with respect to this evaluation under [CJP] § 9-109(d)(2) . . . is unfounded."

Regarding the appellant's argument that the evaluations were non-privileged because they were conducted for purposes of placing B.W. in a "facility for mental illness," the Department argues "there is no evidence that [the Board of Child Care]'s group home in Denton[, which is where B.W. was placed,] qualifies as 'a facility for mental illness.'" The Department argues that the Board of Child Care in Denton provides therapeutic, academic, and behavioral support to its residents, but not support for mental illness. Furthermore, the Department asserts that B.W. was committed to its own care and custody, not that of an impatient treatment center under CJP § 3-819(h).

Finally, the Department disputes the appellant's assertion that there was no conflict of interest between her and B.W. The Department contends the conflict of interest is evidenced by the fact that the appellant filed exceptions to the magistrate's recommendations and proposed order while B.W. did not, the fact that the appellant opposed the juvenile court's CINA finding while B.W. did not, the fact that the appellant left B.W. at the Department twice because she wanted him out of her home, and the fact that the appellant has a long history of refusing to take advantage of recommended

treatment programs for her and her family. Nevertheless, the Department argues that the appellant has failed to show prejudice because the evaluations of Dr. Gombatz, who viewed the appellant as part of the problem, would "only have provided further support for the court's finding of neglect."

B. Standard of Review

The Court of Appeals has explained that the standard of review with respect to a trial court's decision to exclude certain evidence depends on the basis for underlying ruling:

> Generally, the standard of review with respect to a trial court's ruling on the admissibility of evidence is that such matters are left to the sound discretion of the trial court and unless there is a showing that the trial court abused its discretion, "its ruling[ ] will not be disturbed on appeal." *Bern–Shaw Ltd. Partnership v. Mayor and City Council of Baltimore,* 377 Md. 277, 291, 833 A.2d 502, 510 (2003), *quoting Farley v. Allstate Ins. Co.,* 355 Md. 34, 42, 733 A.2d 1014, 1018 (1999) (brackets in original). The application of that standard, however, "depends on whether the trial judge's ruling under review was based on a discretionary weighing of relevance in relation to other factors or *on a pure conclusion of law.*" *Bern–Shaw,* 377 Md. at 291, 833 A.2d at 510 (emphasis added). If "the trial judge's ruling involves a pure legal question, we generally review the trial court's ruling *de novo.*" *Id.; Nesbit v. GEICO,* 382 Md. 65, 72, 854 A.2d 879, 883 (2004) (concluding that when a trial court's decision in a bench trial "involves an interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are 'legally correct' under a *de novo* standard of review"), *quoting Walter v. Gunter,* 367 Md. 386, 392, 788 A.2d 609, 612 (2002). *See also Bernadyn v. State,* 390 Md. 1, 8, 887 A.2d 602, 606 (2005) (concluding, in a criminal case, that a trial court's decision to admit or exclude hearsay is not discretionary and that "whether evidence is hearsay is an issue of law reviewed *de novo*").

Hall v. Univ. of Maryland Med. Sys. Corp., 398 Md. 67, 82-83 (2007).

The evidence at issue in this case was excluded under the psychologist-patient privilege, which "was created by the legislature and is codified in [CJP] § 9-109." *Bryant v. State*, 393 Md. 196, 204 (2006). The privilege provides that

> a patient or the patient's authorized representative . . . [may] refuse to disclose, . . . [or] prevent a witness from disclosing:
>
> (1) Communications relating to diagnosis or treatment of the patient; or
>
> (2) Any information that by its nature would show the existence of a medical record of the diagnosis or treatment.

CJP § 9-109(b). However,

> [t]here is no privilege if:
>
> (1) A disclosure is necessary for the purposes of placing the patient in a facility for mental illness;
>
> (2) A judge finds that the patient, after being informed there will be no privilege, makes communications in the course of an examination ordered by the court and the issue at trial involves his mental or emotional disorder; [or]
>
> * * *
>
> (6) The patient expressly consents to waive the privilege, or in the case of death or disability, his personal or authorized representative waives the privilege for purpose of making claim or bringing suit on a policy of insurance on life, health, or physical condition[.]

Id. at § 9-109(d). Therefore, because the exclusion of evidence under the psychologist-patient privilege involves an issue of law, we review the trial judge's decision to exclude

the evidence at issue under a *de novo* standard. *See Hall*, 398 Md. at 82-83 ("If 'the trial judge's ruling involves a pure legal question, we generally review the trial court's ruling *de novo*.'" (quoting *Bern-Shaw*, 377 Md. at 291)); *see also Bryant*, 393 Md. at 204 ("While not specifically privileged under the common law, communications between a patient and his or her psychotherapist or psychologist are now statutorily privileged.").

C. Analysis

We agree with the Department that the issue of the exclusion from evidence of the psychological evaluations performed by Dr. Gombatz was not properly preserved for our review. We explain.

By Order dated November 17, 2015, the Circuit Court for Queen Anne's County, sitting as a juvenile court, ruled as follows with respect to the appellant's motion to introduce B.W.'s psychological evaluations:

> Upon consideration of the Motion to Strike Motion to Introduce Respondent Child's Psychological Evaluations and any response thereto, it is this 17[th] day of November, 2015 by the Circuit Court for Queen Anne's County Maryland hereby ORDERED that the Motion to Introduce Respondent Child's Psychological Evaluations is STRICKEN for failure to comply with Md. Code Ann., Health-Gen. §4-306.

Also by Order dated November 17, 2015, the juvenile court ruled on the subpoena that the appellant issued to Dr. Gombatz:

> Upon consideration of the Motion to Quash Subpoena, it is this 17[th] day of November, 2015 by the Circuit Court for Queen Anne's County, Maryland hereby ORDERED that the subpoena issued for Dr. Gombatz issued on October 27, 2015 is hereby QUASHED for failure to comply with Md. Code Ann., Health-Gen. §4-306.

It is clear, based on these two Orders, that the juvenile court struck the motion to introduce B.W.'s psychological evaluations and quashed the subpoena issued to Dr. Gombatz for the same singular reason: failure to comply with the requirements of Md. Code Ann., Health-Gen. §4-306. Generally, appellate review of a circuit court ruling is "limited to the grounds relied upon by the circuit court." *La Belle Epoque, LLC v. Old Europe Antidue Manor, LLC*, 406 Md. 194, 209 (2008) (quoting *Deering Woods v. Spoon*, 377 Md. 250, 263 (2003)). However, the appellant fails to make as much as a reference to Section 4-306 of the Health General Article, instead relying entirely on arguments related to the psychologist-patient privilege. Because "arguments not presented in a brief or not presented with particularity will not be considered on appeal," this issue has been waived. *Klauenberg v. State*, 355 Md. 528, 552 (1999).

Having agreed with one of the Department's preservation arguments, we need not address the other two.[4] However, we do note that even if this issue had been properly preserved and the privilege had been waived, the lower court's ruling would still most likely stand because the appellant has not demonstrated that she has suffered prejudice. As this Court has explained in an earlier case, "[i]t is well settled in Maryland that a judgment in a civil case will not be reversed in the absence of a showing of error and prejudice to the

[4] On June 30, 2016, the day before oral arguments were heard in this case, the appellant filed a Motion to Correct the Record to include a copy of Dr. Gombatz's report of his April 2014 psychological evaluation of B.W. That Motion is hereby denied. In light of our holding that the appellant has failed to preserve for appeal the issue of whether the psychological evaluations were properly excluded from evidence, the request made in the June 30, 2016, Motion to Correct the Record is moot.

appealing party." *In re Ashley E.*, 158 Md. App. 144, 164 (2004). As a result of his 2014 evaluation of B.W., Dr. Gombatz reported that "[w]ithout an intensive evaluation of [the appellant] and the entire family, B.[W.]'s behavior is likely to continue." Furthermore, Dr. Gombatz opined that "there are factors and interactions occurring in his home that are maintaining this level of agitation. An intervention focusing only on B.[W.] is not likely to be the most effective approach. The focus also needs to be family intervention." However, the evidence indicates that the appellant refused family therapy on a number of occasions. Thus, because "the court assesses neglect by assessing the inaction of a parent over time[,]" it is likely that the psychological evaluations would have only provided further support for the juvenile court's finding that B.W. is a CINA due to parental neglect. *In re Priscilla B.*, 214 Md. App. 600, 625 (2013). Accordingly, had this issue been properly preserved, it is likely that the appellant would have failed to establish the requisite prejudice for reversal of the juvenile court's orders.

II. CINA ADJUDICATION

A. The Contentions of the Parties

The appellant argues the juvenile court erred where it found B.W. to be a CINA due to parental neglect. She asserts that B.W. had either a developmental disability or a mental disorder that was not caused by her failure to participate in the services that were recommended to her. Therefore, she contends that "[i]t would be in B.[W.]'s best interest to be placed in a therapeutic setting under a Voluntary Placement Agreement."

The Department and B.W. argue that "[t]he juvenile court acted well within its discretion in concluding that B.W. was a CINA based on [the appellant]'s neglect." Furthermore, they assert that voluntary placement agreements are only appropriate where they are necessary to obtain treatment that the parent is *unable* to provide. The Department and the child contend that "[the appellant] was not unable to care for B.W., but she was *unwilling*." (Emphasis added).

B. Standard of Review

The Court of Appeals has outlined a three-part standard of review for child custody disputes:

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

In re Yve S., 373 Md. 551, 586 (2003) (quoting *Davis v. Davis*, 280 Md. 119, 125-126 (1977)) (some brackets in original).

C. Analysis

We agree with the Department and B.W. that the juvenile court acted within its discretion where it determined B.W. to be a CINA due to parental neglect. Again, we explain.

Pursuant to CJP § 3-801(f), a

> "[c]hild in need of assistance" means a child who requires court intervention because:
>
> > (1) The child has been abused, has been *neglected*, has a developmental disability, or has a mental disorder; and
> >
> > (2) The child's parents, guardian, or custodian are unable or *unwilling* to give proper care and attention to the child and the child's needs.

(Emphasis added). Moreover, "neglect" is defined as

> 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 custody or responsibility for supervision of the child under circumstances that indicate:
>
> > (1) That the child's health or welfare is harmed or placed at substantial risk of harm; or
> >
> > (2) That the child has suffered mental injury or been placed at substantial risk of mental injury.

Id. at § 3-801(s).

Applying these definitions to the facts of the present case, it is clear that the juvenile court did not abuse its discretion. The appellant abandoned B.W. at the Department on August 6, 2015, and September 3, 2015, indicating both times that she was "done" with B.W. and did not want him in her home anymore. On one of those occasions, the appellant refused to give her consent for B.W. to stay with another relative. In addition to the instances of abandonment, the police were called to the appellant's home on two separate occasions in mid- to late August 2015 to respond to complaints related to B.W.'s behavior. One of those complaints was made by the appellant herself, who asked the police to take

B.W. away. Finally, the court was presented with evidence that the appellant had, over the course of approximately eight years, established a history of refusing services and treatment programs recommended to her by the Department for B.W.'s behavioral benefit. All of this evidence was cited by the juvenile court in the written Order in which it found B.W. to be a CINA due to parental neglect:

> [B.W.]'s mother is unable/unwilling to provide [him] with proper care and attention.
>
> * * *
>
> [B.W.]'s mother took him to the Department; refused to provide names and contact information for family member placements; initially declined respite care as a solution to family conflict; [and] refused to accept/utilize services offered by the Department.

Accordingly, we hold that the record contains sufficient evidence to support the action taken by the juvenile court. *Cf. Owens v. Prince George's Cty. Dep't of Soc. Servs.*, 182 Md. App. 31, 54 (2008) (where the facts were similar to those in the case at bar, we held that "the ALJ's finding that appellant had 'kicked out' Sandy from her home and refused to provide for her needs was supported by substantial evidence.").

CONCLUSION

For the foregoing reasons, we hold that the issue of the exclusion of evidence of B.W.'s psychological evaluations was not properly preserved for appeal and that the

juvenile court acted within its discretion where it found B.W. to be a CINA due to parental neglect.

JUDGMENT OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.