6/17/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01140 COA

J.L.W.W. AND M.F.W.

APPELLANTS

v.

CLARKE COUNTY DEPARTMENT OF HUMAN SERVICES BY CLAYTON R. BARNETT, SOCIAL SERVICES REGIONAL DIRECTOR, AND M.S.W.,

C.L.W., J.L.W., AND B.S.W., MINORS, BY AND

THROUGH THEIR NEXT FRIEND CLAYTON R.

BARNETT

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. SARAH P. SPRINGER

COURT FROM WHICH APPEALED: CHANCERY COURT OF CLARKE COUNTY

ATTORNEYS FOR APPELLANTS:

LESLIE GATES FOR M.W.

JAMES POTUK FOR J.L.W.W.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: BRIDGETT E. WILLIAMSNATURE OF THE CASE: DOMESTIC

TRIAL COURT DISPOSITION: TERMINATION OF PARENTAL RIGHTS

MANDATE ISSUED: 7/8/97

BEFORE McMILLIN, P.J., DIAZ, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

J.L.W.W. and M.F.W., parents of four minor children, appeal the decision of the Chancery Court of Clarke County terminating their parental rights. Both parents argue that the chancellor erred (1) in admitting statements under the tender years exception to the hearsay rule, (2) in admitting opinions of a social worker as to the credibility of the children, (3) in finding clear and convincing evidence of abuse warranting termination of parental rights, and (4) in denying post trial motions to alter or amend the judgment or grant a new trial.

The mother appeals individually the chancellor's denial of her motion for a directed verdict.

We find that the chancellor did not apply the proper legal standard in determining that the children were unavailable to testify under the tender years exception to the hearsay rule. We reverse and remand for specific findings. On the remaining issues, we find no error and affirm.

FACTS

After notification of allegations of sexual abuse of the appellants' daughter, who was five, and two sons, who were ages three and one, the Clarke County Department of Human Services (D.H.S.) investigated and obtained custody of the children. When the fourth child was born, D.H.S. gained custody of that child based on the adjudications of the other three children as abused. All four children remained in the custody of D.H.S. while it pursued an action to terminate the parental rights and free the children for adoption.

In the Chancery Court of Clarke County, the chancellor found clear and convincing evidence that both parents should have their parental rights terminated. As grounds for termination, the Chancellor found the parents were responsible for a series of abusive acts concerning one or more of the children. An erosion of the parent-child relations had occurred between the minor children and their parents.

DISCUSSION

I. Tender years exception: unavailability of children

The parents argue that the chancellor improperly admitted hearsay statements under the "tender years" exception to the hearsay rule. Mississippi Rule of Evidence 803(25) allows statements made by a child of tender years describing any act of sexual contact performed with or on the child by another. Before doing so, the court must find in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide substantial indicia of reliability; *and the child either testifies or is unavailable as a witness*. When the child is unavailable as a witness, the statement may be admitted only if there is corroborative evidence of the act. *Eakes v. State*, 665 So. 2d 852, 865 (Miss. 1995).

The matter of the children's unavailability first was raised in a preliminary hearing, when the court addressed whether the children were going to testify. The guardian ad litem responded:

Mr. Kramer: I wish them held unavailable. They're child - - they're children. They can't testify. The youth court has held them unavailable. They are abused children by these parents, according to the youth court, and, therefore, they are to have no contact with those parents and are not to confront those parents.

Mr. Gates, attorney for the father, then asked the chancellor to defer ruling on the issue until other testimony was presented. The court stated:

The Court: And the facts surrounding this case occurred two years ago, three years ago, I would find that their testimony probably would not be probative to any issue before the court, so at this time, I would find that they are unavailable to testify. If it occurs in the course of trial that their testimony is essential, and that can be shown to the court, the court would reconsider this ruling at that time.

Thus the chancellor's initial decision on unavailability was solely based on her conclusion that the testimony was not probative.

The relevant hearsay statements were made by the children to a social worker, Lori Woodruff, who testified as an expert at trial. At trial, Ms. Wagner, attorney for D.H.S., questioned Woodruff about her initial interview with the young girl. The attorney asked Woodruff to relate the specific statements made by the child during the interview. Mr. Gates, attorney for the father, objected on the grounds of hearsay. After a discussion as to whether the statements were admissible under the business records exception to the hearsay rule, the chancellor allowed the statements under the tender years exception. In her ruling, the chancellor stated:

Well, this witness is an expert, and I will make an exception on her interviews with these children. And, also, there is a section under Rule 803(25) which specifically deals with statements made from a child describing any act performed with or on the child is admissible if the Court finds, in a hearing, outside the presence of the jury, which we don't have here, the time, and circumstances of the statements made to determine if there is sufficient indicia of reliability. This witness has described her training to interview children in this manner, and I believe her testimony as to the way this interview has been conducted goes along the lines of this section, so I would allow her to testify.

Mr. Gates responded to the chancellor's ruling, pointing out that the rule requires not only a finding of sufficient reliability, but that the witness either testify or be unavailable to testify. To support his position that the children were not unavailable, the father's attorney read rule 804(a) into the record which addresses unavailability. Ms. Wagner then argued that the children were unavailable under 804(a)(6) which states that "unavailability as a witness" in the case of a child, means that there is the "substantial likelihood that the emotional or psychological health of the witness would be substantially impaired if the child had to testify in the physical presence of the accused." Her argument follows:

We would make the argument that the children, both of the - - all of the children in this case are unavailable under 804(a)(6). It has been thoroughly explored by the Guardian Ad Litem, and if he has any further questions regarding what happened to these children, it will be traumatic to them. Even

some of the therapists that the children have seen, made that recommendation to the Department. And if the court would, you know, have a problem with that, or require some sort of hearing on that, I do have Dr. Paul Davey who is prepared to testify, later on, regarding other issues in this matter, shed some light on this matter for the court.

The chancellor then allowed the testimony.

The issue of the children's unavailability also came up after the trial in the parents' motion to amend the judgment or grant a new trial. In the chancellor's ruling, she again discussed the ages of the children and reiterated her finding that the children would not be able to offer any probative evidence of abuse that happened three years prior.

In *Griffith v. State*, the Court reversed a conviction of felonious sexual penetration and remanded for a new trial where hearsay statements were admitted under the excited utterance exception to the hearsay rule. *Griffith v. State*, 584 So. 2d 383, 386 (Miss. 1991). In giving guidance to the lower court as to what it should do on remand, the court stated that unavailability under Rule 804(a)(6) should be read in conjunction with Rule 617 which allows a child sexual abuse victim to testify by way of closed-circuit television upon a finding by the court that "there is a substantial likelihood that the child will suffer traumatic emotional or mental distress if compelled to testify in open court and, in the case of criminal prosecution, if compelled to testify in the presence of the accused." *Griffith*, 584 So. 2d at 387. The court held that the availability of a child to testify is not measured solely in terms of trauma stemming from his physical presence but refers to the child's ability to communicate in a trial setting. *Id.* at 388.

The Court in *Griffith* relied on the United States Supreme Court case of *Maryland v. Craig*, which held that the trial court must find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant, and the emotional distress that would be suffered by the child witness must be more than mere nervousness or a reluctance to testify. *Griffith*, 584 So. 2d at 387, citing *Maryland v. Craig*, 110 S.Ct. 3157, 3169 (1990).

In *Quimby v. State*, the Mississippi Supreme Court reversed a father's conviction of sexual battery of his five year old daughter and remanded for a new a trial because the court allowed hearsay statements under the "catch-all" exception to the hearsay rule without an on the record finding of unavailability. *Quimby v. State*, 604 So. 2d 741, 747 (Miss. 1992). The Court stated that on remand, the court should use the guidelines set forth in *Griffith v. State* in allowing statements made by children in child abuse cases. *Quimby*, 604 So. 2d at 747. The Court pointed out that at the time *Quimby* was decided, the trial court did not have the benefit of the tender years exception to the hearsay rule, and that on remand, the court, after determining whether the child was unavailable, must then determine whether the statements were admissible under the tender years exception. *Id.* at 748.

The chancellor in this case based her ruling of unavailability on whether the testimony of the children would be probative on issues in the trial, which is not a determining factor of unavailability for purposes of the tender years exception to the hearsay rule. There are six factors to consider. The final factor of unavailability in the case of a child is the psychological effect testifying in front of the parents would have on the children. M.R.E. 804 (a) (6). While the attorney for D.H.S. stated that he had a psychologist prepared to say that testifying would be traumatic for the children, the chancellor

did not require such testimony. In her rulings on the issue, the chancellor did not address the issue of whether testifying would be traumatic for the children and whether the trauma would substantially impair the children.

The only testimony that arguably came close to addressing the issue of the psychological effect confronting the parents would have on the children was offered through the psychologist who treated the children, Paul Davey. Davey testified that he asked each child if he or she wanted to see the parents. The girl stated that she did not want to see them, but did agree to do so if they brought Christmas presents. The girl expressed concern that they would "hurt" her again "down there." The oldest boy said he did not want to see them, Christmas presents or not. Davey testified that the children were fearful of contact with their parents, but he did not testify as to what effect testifying would have on the children.

Because the chancellor did not require that evidence be introduced on the issue of unavailability, reversible error occurred. Consistent with *Griffith* she must require evidence and determine whether the children would be traumatized by having to testify in front of their parents, that the trauma would be more than mere nervousness, and that there are not other means of testifying that would eliminate that trauma.

We must now determine whether to reverse and remand for a new trial, or reverse and remand for specific findings. Both *Griffith* and *Quimby* reversed and remanded for a new trial. However, both were criminal cases with juries sitting as fact finders. We find that a new trial is not necessary in this case and remand for the chancellor to make specific findings in accordance with this opinion.

If on remand, the chancellor finds that the children were not unavailable under 803(25) or 804(a)(6) as interpreted in *Griffith*, then she should grant the parents a new trial.

II. *Bolstering of witnesses*

The parents argue that the chancellor erred in allowing the social worker, Lori Woodruff, to comment on the credibility of the abused children. The relevant portion of Woodruff's testimony follows:

Q. Okay. Okay. Based on your interviews then with the children, and the reports you received from medical doctors, and the reports from the therapists the children were seeing, did the Department make any conclusion, or did you make any conclusion, regarding the allegation of sexual abuse against the children?

A. Yes, ma'am.

Q. What was that conclusion?

Mr. Gates: Object to that now, Your Honor. I object to that whether she is an expert or not. She shouldn't be able to say whether they were abused.

The Court: She can state what her opinion is. I will allow her to do that.

Ms. Wagner: Well, I will rephrase that question.

Q. Were you able to form an opinion, based on a reasonable degree of social work certainty and your expertise and education, as to whether or not these children had been sexually abused?

A. I felt that no one had protected these children, and they had been sexually abused. That we for sure had no idea the extent due to the systematic nature we were witnessing at that time.

Q. Likewise, were you able to form an opinion, based on a social work certainty and from your expertise and education, as to the probable or likely perpetrators of this abuse?

A. Yes, ma'am.

Q. What is that opinion?

A. That all of the individuals that S---- and S--- named had been involved with these children, and that included the parents of these children. And further more, the failure to protect those children from abuse by others.

Woodruff was qualified and admitted as an expert in the field of social work with an emphasis on child sexual abuse. The parents did not object to her being admitted as an expert, and did not voir dire her on her qualifications when given the opportunity to do so. They do not raise her qualifications on appeal. The objection to Woodruff's giving an opinion as to whether the children were abused was preserved for appeal, but the chancellor properly overruled the objection. See *Hosford v. State*, 560 So. 2d 163, 168 (Miss. 1990).

On appeal, the parents argue that Woodruff was allowed to offer "numerous thinly disguised opinions" on the credibility of the children that were accepted and relied upon by the court. They argue that Woodruff improperly bolstered the children's complaints by rendering such opinions. When an expert witness testifies that he believes a witness is telling the truth, the testimony constitutes improper bolstering. *Hosford*, 560 So. 2d at 166, citing *House v. State*, 445 So. 2d 815 (Miss. 1984). A direct opinion offered by a witness in a child sexual abuse case as to the child's veracity has been held by a majority of courts to be inadmissible. *Griffith v. State*, 584 So. 2d 383, 386 (Miss. 1991), citing *State v. Holloway*, 347 S.E.2d 72, 73 (1986).

The parents reason that because Woodruff based her opinion on statements made by the children during interviews, then it follows that she believed the children to be telling the truth. They argue that her opinion that the children were abused was an improper comment on the children's credibility. Even if Woodruff did indirectly comment on the children's veracity, the issue was not raised at trial and thus, not properly preserved for appeal. A party may not base their appeal on different grounds from the grounds for their objection at trial. *Thornhill v. State*, 561 So. 2d 1025, 1029 (Miss. 1989).

The parents admit "the defendants' objection to such testimony could have been better preserved in the record," but nonetheless, ask the court to find that if it was not properly preserved, then it was such improper bolstering as to constitute plain error. The general rule is that this Court will not consider issues which are not properly raised at trial. *Whigham v. State*, 611 So. 2d 988, 995 (Miss. 1992). Only errors that are so grave as to affect a fundamental right are exceptions to this rule. *Id.* There is no fundamental right to be free from improper bolstering of a witness, and thus, we find no plain error.

III. *Absence of clear and convincing evidence*

The parents argue that the chancellor erred in finding clear and convincing evidence which warranted termination of both parties' parental rights. As long as the chancellor's findings are supported by substantial credible evidence and not manifestly wrong, we must respect those findings and cannot reverse. *Magee v. Magee* 661 So. 2d 1117, 1122 (Miss. 1995).

The parents argue that the hearsay statements by the children were ambiguous, in that the children could have been calling someone besides their father "daddy" and that the techniques used by the interviewers questioning the children were suspect in that they suggested child abuse. The parents admit the children were abused, but deny that they in fact were the perpetrators of the abuse.

In the chancellor's opinion, she stated the reasons for her decision to terminate the parental rights and the evidence which supported her decision. The chancellor noted the guardian's recommendation that the parents' rights be terminated. The chancellor discussed the testimony of Jackie Davis, a social worker who stated that D.H.S.'s initial intention was to return custody to the parents; but the allegations of sexual abuse and statements made by the children caused them to seek to free the children for adoption. Davis testified that the children had adjusted to foster homes extremely well and were, at the time of trial, active, happy children. She testified that there had been an erosion of the parent-child relationships due to the abuse of the children by their parents. The chancellor discussed the testimony of Dr. Sherwood, who found physical evidence of sexual abuse in the two boys but did not find conclusive evidence in the girl, but did note that some redness in the girl's hymen.

The chancellor also discussed the testimony of Lori Woodruff, the social worker who actually took the children into custody. Woodruff described the condition of the children as being poor with no socks, shoes, sores on their feet, nits in their hair, and generally unkept. She stated that one of the boys had constant running bowel movements and had difficulty walking. Woodruff interviewed the two oldest children and each made statements and indicated with the use of anatomically correct dolls that led Woodruff to believe that they had been sexually abused. In Woodruff's opinion, no one had protected these children, and they had been abused, by the parents as well as other individuals who lived in the house with the children.

The chancellor also relied on the testimony of Paul Davey, who was an expert in counseling and psychotherapy, with an emphasis on child sexual abuse. Both of the oldest children were treated by Davey and he opined that the children had been sexually abused within the family home environment.

The evidence of abuse was overwhelming, and the chancellor's decision to terminate both parents' rights was supported by substantial credible evidence.

IV. *Post-trial motions*

The parents argue that the chancellor erred in failing to grant their post trial motions to alter or amend the judgment or to grant them a new trial. The grant or denial of a new trial is within the sound discretion of the trial judge, and absent an abuse of discretion, this Court is without the power

to disturb such a determination. *American Fire Protection, Inc. v. Lewis*, 653 So. 2d 1387, 1390 (Miss. 1995).

Three issues were raised in these post trial motions. The first concerned the role of the guardian ad litem in this case. The parents argued that it was error for the guardian to be both attorney and advocate for the children and give his opinion regarding factual issues in the case without being subject to cross examination. The chancellor found that the guardian was required by Mississippi law in a termination of parental rights case and that in order for the guardian to be effective, it was necessary for him to be involved with the children and in the case. The chancellor stated that while the report of the guardian was admitted into evidence, it was not the basis of her opinion and was not considered as evidence.

The second issue was whether the parents' constitutional rights to confront the witnesses against them were violated by allowing hearsay evidence under the tender years exception based on a finding of unavailability of the children to testify. The Mississippi Supreme Court has held that when hearsay testimony is introduced in a civil case against a parent accused of child sex abuse, the Sixth Amendment right of the accused to be confronted with the witness against him must be observed. *Doe v, Doe,* 644 So. 2d 1199, 1206 n. 9 (Miss. 1994); *Hall v. State*, 611 So. 2d 915, 922 (Miss. 1992), citing *Parker v. State*, 606 So. 2d 1132, 1138 (Miss. 1992). However, it is the "substantial indicia of reliability" requirement of Rule 803(25) that is necessary to prevent confrontation clause problems, and not the separate unavailability issue. *Doe*, 644 So. 2d at 1206, citing *Griffith v. State,* 584 So. 2d 383, 388 (Miss. 1991). Factors to be considered in determining reliability of hearsay statements made by children in sexual abuse cases, enumerated in the United States Supreme Court case of *Idaho v. Wright*, 497 U.S. 805, 822 (1990), are spontaneity, consistent repetition, mental state of child, use of terminology unexpected of a child of similar age, and lack of motive to fabricate. *Id.* at 1206.

In the chancellor's ruling, she discussed the requirements set forth in *Doe v. Doe* to determine whether there exists a substantial indicia of reliability to avoid confrontation problems. The chancellor found the requirements of *Doe* were met and affirmed her earlier ruling to allow the social worker to testify to the children's statements. We find no separate reason for reversal beyond what we have already discussed on unavailability.

The third issue was whether the chancellor considered the criminal charges that were pending against the parents, and whether the fact that the criminal charges were dropped should require the chancellor to amend or alter her judgment or grant them a new trial. The chancellor stated in her opinion that while she did make reference to pending criminal charges against the father, she did not consider that fact in rendering her opinion to terminate parental rights. The chancellor further stated that she was unaware of any criminal charges pending against the mother.

We find that the chancellor's opinion and decision on the post trial motion was well reasoned and she considered the relevant facts and applied the correct legal standards. There was no abuse of discretion in denying the motion.

V. *Termination of mother's rights*

The mother of the children separately argues that the chancellor erred in failing to grant her motion for directed verdict based on the fact that there was no evidence that she abused the children. She argues that the chancellor applied an erroneous legal standard when she found that even if the mother did not know, that she should have known the children were being abused.

The chancellor stated that she found clear and convincing evidence that the three older children were in fact abused and the abuse took place in the parent's house while in custody of the parents. The chancellor stated that she found it impossible to believe that the mother did not know the children were being abused. Holding firm to that fact finding, the chancellor said that even were the mother unaware, she should have known and protected her children. Making that observation did not change the finding that the mother did know. The chancellor relied on *Carson v. Natchez Children's Home*, 580 So. 2d 1248, 1258 (Miss. 1991), where the court found that "no mother should be permitted to have custody or control of any children if she permits one child to be molested." *Id.* The chancellor found that the mother knew of the abuse and for that reason, the mother should not retain parental rights of any of the four children.

We find that the chancellor correctly denied the mother's directed verdict, based on her finding that the mother knew the children were being abused and allowed it to happen.

THE JUDGMENT OF THE CLARKE COUNTY CHANCERY COURT TERMINATING THE PARENTAL RIGHTS OF APPELLANTS, J.L.W.W. AND M.F.W. ARE REVERSED AND REMANDED FOR SPECIFIC FINDINGS ON THE ISSUE OF UNAVAILABILITY AND AFFIRMED ON ALL OTHER ISSUES. COSTS OF THIS

APPEAL ARE ASSESSED ONE-HALF TO CLARKE COUNTY DEPARTMENT OF HUMAN SERVICES AND ONE-HALF TO APPELLANTS.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, AND KING, JJ., CONCUR.

PAYNE, J., CONCURRING IN PART AND DISSENTING IN PART WITH SEPARATE WRITTEN OPINION.

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PAYNE, J., CONCURRING IN PART, DISSENTING IN PART:

I concur in that part of the opinion affirming the judgment of the lower court. I respectfully dissent, however, as to that portion of the opinion remanding the case for further determination of unavailability. Although the majority correctly states the law as it pertains to the application of M.R.E. 803(25), I must disagree with their assertion that the chancellor erred in failing to specifically find that the children were "unavailable."

The majority thoroughly presents the discussions and testimony that took place on the record regarding the issue of unavailability; a reading of which very clearly indicates that these children were unavailable as that term is defined under M.R.E. 804(a)(6). More specifically, a reading of the record indicates that the guardian ad litem informed the chancellor that the children had been adjudged abused children by the youth court and were to have no contact with the parents. While I do agree that the chancellor could have done a better job in setting out her findings for the record, I strongly believe that remanding this case so as to permit the chancellor to speak the magic words that the majority commands is an exercise in futility which would, in fact, further traumatize the children. Despite the chancellor's omission of a specific finding that the children would be traumatized if forced to confront their parents in a courtroom setting, it seems only logical to presume that the chancellor made such a determination by the very fact that (1) she stated on the record that the children were unavailable and (2) she permitted the social worker to testify to what the children had told her regarding the abuse pursuant to M.R.E. 803(25). *See Love v. Barnett*, 611 So. 2d 205, 207 (Miss. 1992) ("[a]s to issues of fact where no specific findings have been articulated by the chancellor, this Court proceeds upon the 'assumption that the chancellor resolved all such fact issues in favor of appellee,' or as a minimum, in a manner which would be in line with the decree."); *Gates v. Gates*, 616 So. 2d 888, 890 (Miss. 1993) ("all reasonable presumptions are in favor of the validity of the trial proceedings and judgment thereon, and it is our duty to affirm in the absence of some showing that the trial court erred").

I would take this opportunity to point out that chancellors function in courts of equity and therefore, should not be required to conform to a rigid literal interpretation of the law. Clearly, the chancellor in the present case found these children to be unavailable. I can find no error in this determination and

am opposed to remanding this issue so that the chancellor can tell us again what we already know: the children *are* unavailable.