

NOT DESIGNATED FOR PUBLICATION

No. 125,823

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

J.H.,
Appellee,

and

K.H.,
Appellant.

MEMORANDUM OPINION

Appeal from Franklin District Court; DOUGLAS P. WITTEMAN, judge. Opinion filed September 1, 2023. Reversed and remanded with directions.

BreAnne Hendricks Poe, of Harris Kelsey, Chtd., of Ottawa, for appellant.

No appearance by appellee.

Before COBLE, P.J., GARDNER and CLINE, JJ.

PER CURIAM: In the divorce between J.H. and K.H., the district court granted K.H. (Mother) full custody of the parties' two minor children and ordered that J.H. (Father) would have unsupervised parenting time on the weekends. Mother now appeals the district court's denial of her motion to reconsider that custody order. Mother argues the district court erroneously excluded a police officer's testimony concerning Father's alleged sexual abuse of Mother's child from a previous relationship as hearsay, because the reporting child was present and available for cross-examination. Because the district

court failed to admit this evidence, Mother argues the order allowing Father unsupervised parenting time was unreasonable.

On review, we find the district court's decision to exclude the evidence was based on an error of law, and this error implicated Mother's due process right to be meaningfully heard regarding her fundamental right to the care, custody, and control of her children. We therefore reverse the district court's order of custody and parenting plan and remand the case for further proceedings consistent with the rulings herein.

FACTUAL AND PROCEDURAL BACKGROUND

Father and Mother were married in 2017. On May 4, 2020, Father filed for divorce from Mother, and both parties moved for temporary orders preserving the marital assets. At the time of the divorce filing, the parties shared one minor child born in 2018, and were expecting another child due in June 2020. Mother also had two minor children from a previous relationship including J.B., who was seven years old at the time the divorce was initiated. Before the divorce trial, the district court temporarily granted Father supervised parenting time progressing up to six hours per week with the parties' two minor children.

The divorce trial to address both the parenting plan issue and property issue was held on May 18, 2022. Father testified that he began supervised visitations with the two children in May 2021. The visits occurred once per week and lasted two to three hours. But Father stated Mother would occasionally cancel the visits and he did not receive six hours of visitation time as anticipated by the temporary parenting plan. At that time, Father lived in a house in Topeka with his new girlfriend and her seven-year-old son. Father felt that he had bonded with his and Mother's two children during his supervised visits and could care for both at his new residence. Father requested unsupervised

visitation of the children for three weekends per month, and possibly even a day of the week, summer visitation, and standard holiday schedule.

A protection from abuse (PFA) order was previously filed in a separate case against Father that prevented him from seeing J.B. The order alleged Father had inappropriately touched J.B. on several occasions. The allegations were substantiated by the Kansas Department for Children and Families (DCF). Father appealed the findings through the Office of Administrative Hearings but, at the time of the hearing, had not yet received a result. Law enforcement officers investigated Father, but the State did not charge him with a crime.

Father had prior convictions of aggravated assault, aggravated battery, and criminal discharge of a firearm for which he spent 15 years in prison. Accordingly, Father was registered as a violent offender. Father's most recent therapist diagnosed him with post-traumatic stress disorder, intermittent explosive disorder, and antisocial personality disorder. Father stated that other physicians had diagnosed him with bipolar disorder as well, but he does not agree with his diagnoses.

Father called three witnesses to testify. Char'dae Bell was a supervisor with TFI Family Services and supervised Father's visitations with the children at her Lawrence office from April 2021 to November 2021. Bell testified that Father and the children would play together for the entire visit. She believed Father's behavior with the children was normal and appropriate but acknowledged most parents can maintain their behavior for the brief visits. Next, Father's girlfriend testified she had no concerns about Father's parenting of her son.

Tracey Lyn, a mediator and conciliator with People Solutions, began supervising Father's visits in December 2021 and had been doing so for approximately 16 weeks. Lyn was concerned that Father tends to treat the children differently when he buys them gifts,

but he tries to equally divide his time between the children. She was also concerned that Father would openly discuss the court process with her while the children were present. Normally, the visits would last two hours because the youngest child would begin asking for Mother halfway through. Lyn felt she could not evaluate parenting skills from the supervised visits because Father did not perform certain parenting tasks and most people can behave themselves for two to three hours.

Testifying for Mother was Ottawa Police Detective Josh Pence, who investigated Father's alleged sexual abuse of J.B. In April 2020, Detective Pence interviewed Mother and another detective conducted a forensic interview with J.B. A few months later, Detective Pence observed a DCF investigator conduct a second forensic interview with J.B. Detective Pence stated the substance of the child's interview stayed the same, but she disclosed more information in the second interview.

When Mother's attorney asked Detective Pence to describe what J.B. disclosed during the April interview, Father's attorney raised a hearsay objection, arguing the child was not made available to testify. Mother's attorney immediately informed the district court that J.B. was present at the hearing and available to testify. The district court asked Mother's attorney whether she intended to call J.B. as a witness, and Mother's attorney responded that Father's attorney could call her.

The district court sustained the objection and refused to allow Detective Pence to testify about what J.B. disclosed in the forensic interview. The court ruled that hearsay testimony based on a child's statements was inadmissible if the child either did not testify or attempted to testify but was unable to finish testifying. Mother's attorney then stated she was willing to call J.B. to the stand and suggested the district court could conduct its own interview with the child in chambers. The district court had no stance either way about Mother calling J.B. to testify but stated it was not prepared to interview the child on

its own. Ultimately, J.B. did not testify, and no evidence was admitted regarding the substance of J.B.'s forensic interviews.

Detective Pence also interviewed Father in April 2020. Father denied the abuse allegations and told the detective that J.B. fabricated the allegations to break up the family. Detective Pence stated it was uncommon for a seven-year-old child to lie about such allegations and did not find it believable that a seven-year-old child would do so to break up the family. When the information that a child provides stays consistent, Detective Pence stated he believes the child based on his child interview training. There was no physical evidence to support the allegations, and the State eventually declined to prosecute.

Next, Father's ex-girlfriend testified that her relationship with Father from 2015 to 2017 was tumultuous because of Father's heavy drinking. She claimed Father would verbally and physically abuse her. The ex-girlfriend also testified Father would often enforce physical exercise as a punishment for her son. Because her son had seen Father treat her poorly, she stated her son resented Father, but her daughter had a close relationship with Father. As a result, Father favored her daughter.

Finally, Mother testified that J.B. first reported to J.B.'s maternal grandmother that Father had molested J.B. in December 2019. J.B. told her grandmother that she had crawled into bed with Father and Mother, and Father began touching her private parts. After J.B.'s grandmother told Mother what had happened, Mother called Father and asked if it was true. Father denied that it had happened, and if it did happen then he did so accidentally. In April 2020, J.B. told Mother that Father had inappropriately touched her again. When Mother confronted Father, Father became angry and accused J.B. of lying. Mother called the police and filed a PFA.

In August 2022, the district court issued its ruling. It granted Mother sole legal custody of the parties' minor children and granted Father a graduated yet accelerated schedule of visitation. In this accelerated schedule, Father would have parenting time every weekend from August 28, 2022, through October 15, 2022, except for one weekend set aside to Mother. Father would start with two hours of unsupervised visitation every Saturday or Sunday for two weeks, progress to four hours of unsupervised parenting time for two weeks, then 24-hour visitation each weekend for two weeks, and then finally progress to Father having the children every other weekend from Saturday morning until Sunday evening.

Mother filed a motion to reconsider the issues of parenting time and child support. Mother argued Detective Pence should have been allowed to testify on what he observed during the forensic interview under the hearsay exception for previous statements of persons present because J.B. was present at the hearing. At the motion hearing, the district court asked Mother's counsel why she did not call J.B. to testify. Mother's attorney stated she had believed the district court was not willing to allow J.B. to testify when Mother's attorney asked whether she could call the child. The district court did not understand that Mother's counsel was asking whether she could call J.B. to testify and clarified its response that it was not prepared to conduct its own interview with the child. Mother also argued the parenting plan was not in the children's best interests because they were not prepared to stay with Father so soon after only having limited supervised time with him.

The district court denied Mother's request to recall Detective Pence to testify and to change the parenting plan. The court reasoned that the other detective and the DCF investigator could have been called to lay the foundation for the admission of the child's statement through recordings of the interviews. The district court also stated that although J.B. was present at the hearing under the hearsay exception, neither party was adequately prepared nor trained to examine such a young child. The district court pointed out the

lengthy preparations an attorney should make to elicit testimony from a young child and felt it would be harmful to make the child testify on the stand without any of the necessary preparations. Even had the district court permitted Detective Pence to testify about what J.B. said in the forensic interviews, the district court stated it would have given the detective's testimony little weight because Detective Pence was not trained in interviewing children about this subject matter and a video recording of the interview would have been the best evidence. Lastly, the district court acknowledged that it applied the wrong legal standard during trial when it stated the child was required to testify, but it did not consider this inapplicable standard as part of the basis for its current ruling.

Mother timely appeals.

THE DISTRICT COURT ERRED BY EXCLUDING
EVIDENCE ON THE BASIS OF HEARSAY

Mother asserts two primary issues for our review. First, she contends the district court misapplied K.S.A. 2022 Supp. 60-460(a) by excluding testimony regarding J.B.'s out-of-court statements and, in doing so, violated her due process right to fully present her case. Second, she argues the district court abused its discretion by setting an accelerated and unsupervised parenting plan, which was not in the children's best interests under K.S.A. 2022 Supp. 23-3203. We turn first to Mother's evidentiary argument.

Applicable Legal Standards

In general, "all relevant evidence is admissible." K.S.A. 60-407(f). To be relevant, evidence must have "any tendency in reason to prove any material fact." K.S.A. 60-401(b). In this case, no party disputes relevance, and statements regarding possible sexual abuse of Mother's child by Father during a trial involving child custody is no doubt

relevant. But even relevant evidence is subject to evidentiary rules. Rules governing the admission and exclusion of evidence can be "applied either as a matter of law or in the exercise of the district judge's discretion, depending on the contours of the rule in question." *In re J.D.C.*, 284 Kan. 155, 162, 159 P.3d 974 (2007).

One such evidentiary rule governs the admission of hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible. K.S.A. 2022 Supp. 60-460. But a statutory exception permits the admission of hearsay if it is "[a] statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by the declarant while testifying as a witness." K.S.A. 2022 Supp. 60-460(a).

Kansas law generally requires a contemporaneous objection at trial to the erroneous admission or exclusion of evidence. K.S.A. 60-404; *State v. Hillard*, 313 Kan. 830, 839, 491 P.3d 1223 (2021). If evidence is excluded at trial, under K.S.A. 60-405, an appellate court is precluded from reviewing a challenge to the erroneous exclusion of evidence unless the proponent of the evidence proffers the substance of the expected evidence to the district court. Here, the district court sustained Father's hearsay objection at trial, and Mother informed the district court that she anticipated Detective Pence's testimony would expand on the allegations in the PFA based on his observation of J.B.'s forensic interview. Mother also raised the issue of the district court's decision to exclude Detective Pence's testimony in a motion to reconsider filed after the final ruling. Therefore, Mother's challenge of the district court's decision to exclude the evidence as hearsay is sufficiently preserved for our review.

An appellate court typically reviews a trial court's determination of hearsay admissibility for an abuse of discretion. The district court abuses its discretion if its decision is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3)

based on an error of fact. *State v. Evans*, 313 Kan. 972, 983, 492 P.3d 418 (2021). But when the adequacy of the legal basis for the district court's evidentiary ruling is challenged, the appellate court reviews such a ruling de novo. 313 Kan. at 983.

If evidence is excluded erroneously, the exclusion is subject to review for harmless error under K.S.A. 2022 Supp. 60-261. *Water Dist. No. 1 of Johnson Co. v. Prairie Center Dev.*, 304 Kan. 603, 618, 375 P.3d 304 (2016). This statute requires us to "disregard all errors and defects that do not affect any party's substantial rights." K.S.A. 2022 Supp. 60-261. However, if the error implicates a constitutional right, the effect of that error must be assessed under the constitutional harmless error standard—that is, whether the party benefitting from the error persuades the court "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, proves there is no reasonable possibility that the error affected the verdict." *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801 (2011) (citing *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 [1967]).

Application of These Standards

We first review Mother's claim regarding the exclusion of evidence. Mother sought to admit Detective Pence's testimony regarding what he observed during J.B.'s first forensic interview in April 2020. This testimony meets the definition of hearsay because it is evidence of J.B.'s out-of-court statements and is offered to prove the allegations against Father were true. But Mother argues the hearsay exception for previous statements of persons present should have applied because J.B. was present at the hearing and available for cross-examination.

To support her position, Mother cites to *In re J.D.C.*, which involved hearsay evidence in a child in need of care (CINC) case. Like this case, the disputed evidence was testimony concerning a minor's allegations of sexual abuse, but there, the district court

allowed the minor child's out-of-court statements. The mother whose child was adjudicated to be CINC argued the child should have been required to testify at the hearing for the child's out-of-court statements regarding alleged sexual abuse by her stepfather to be admissible. Our Supreme Court disagreed, finding it was enough that the child was in the courthouse and available to be called to the witness stand. The court found that the "language of K.S.A. 60-460(a) is clear and unambiguous" and "[s]peaking strictly statutorily, it was enough that [the child] was in the courthouse and available to be called to the witness stand." 284 Kan. at 163. Because the child was in the courthouse during trial and subject to call by either party, she was available.

In line with *In re J.D.C.*, Mother argues the district court should have admitted J.B.'s hearsay statements because J.B. was present at the hearing and available for cross-examination, and the district court's decision to exclude the hearsay statements amounted to an error of law. We must agree. Here, because J.B. was present in the courthouse during trial and available for cross-examination, our Supreme Court's analysis in *In re J.D.C.* directs us to conclude that the district court's decision to exclude the hearsay testimony was an error of law.

Additionally, the district court made multiple assumptions regarding J.B.'s availability; specifically, her qualifications to testify. See K.S.A. 60-459(g)(2) (witness is unavailable if disqualified from testifying on the matter). Although the district court suggested that J.B. may not be qualified to testify due to her age, age alone is not a valid criterion for disqualification. *State v. Cameron*, 300 Kan. 384, 394, 329 P.3d 1158 (2014). Under K.S.A. 60-417 a court is permitted to disqualify a witness if the proposed witness is incapable of understanding his or her duty to tell the truth. Here, the district court assumed J.B. was potentially incapable, but made no inquiry of her, nor permitted the parties to do so, to support such a finding. See *State v. Chappell*, 26 Kan. App. 2d 275, 280-81, 987 P.2d 1114 (1999) (when examining child, necessary to explore child's conceptual awareness of truth and whether child understands duty to tell truth). The

district court also focused on the potential harm J.B. faced if compelled to testify without undergoing any preparations to discuss a difficult and traumatic experience, and the possibility that a child her age would be amenable to manipulation. However, once again, these were all assumptions made without further inquiry, and based on the faulty hypothesis that the child was required to testify to be legally available.

Our review of the trial and reconsideration hearing transcripts leads us to conclude that the district court relied primarily on J.B.'s age to determine the hearsay exception did not apply to permit Detective Pence's testimony. The district court's decision to exclude evidence of the child's hearsay statements on the basis that the child was unavailable to testify was an error of law.

Finding error, we must next examine the erroneous exclusion of hearsay evidence under the harmless error test. Mother suggests the exclusion violated her due process rights, so the constitutional harmless error test should apply.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *State v. Hillard*, 315 Kan. 732, 758-59, 511 P.3d 883 (2022). And a parent's right to make decisions regarding the care, custody, and control of his or her child is a fundamental liberty interest protected by the Fourteenth Amendment. U.S. Const. amends. V, XIV § 1; Kan. Const. Bill of Rights, § 18; *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *Sheppard v. Sheppard*, 230 Kan. 146, 152, 630 P.2d 1121 (1981). Before a parent can be deprived of his or her right to the custody, care, and control of his or her child, he or she is entitled to due process of law. *In re J.D.C.*, 284 Kan. at 166-67 (due process for parent whose fundamental right to care, custody, and control of child is challenged includes opportunity to cross-examine).

As stated above, when a trial error infringes upon a party's federal constitutional right, a court will declare a constitutional error harmless only when the party benefiting from the error convinces the court "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, proves there is no reasonable possibility that the error affected the verdict." *Ward*, 292 Kan. at 569.

Here, the erroneous hearsay exclusion infringed upon Mother's due process right to be meaningfully heard in a matter concerning the custody and care of her children. As the party benefiting from the error, then, Father bears the burden of proof to show that the exclusion did not affect the outcome of the trial. But Father did not submit a brief on appeal, and by neglecting to make any argument at all, he has failed to meet this, or any burden to show harmless error.

The district court abused its discretion in excluding testimony regarding the detective's hearsay statements when J.B. was present at the hearing and available for cross-examination. Father does not meet his burden to prove the error did not affect the outcome of the trial, and we cannot say with confidence that the error had no effect. For these reasons, we reverse the district court's custody order and remand this matter for an evidentiary hearing.

WE NEED NOT REACH WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY
ALLOWING FATHER UNSUPERVISED PARENTING TIME

Mother also argues the district court's order allowing Father unsupervised parenting time with the children was unreasonable. But we need not resolve this issue because we remand this case for a new trial based on the evidentiary error. We do not address the substance of the parenting plan because that issue will necessarily be considered and addressed by the district court after hearing the evidence on remand.

Reversed and remanded with directions.