

IN THE COURT OF APPEALS OF IOWA

No. 3-732 / 13-0713
Filed August 21, 2013

**IN THE INTEREST OF L.R. and M.R.,
Minor Children,**

**P.R., Father,
Appellant.**

Appeal from the Iowa District Court for Scott County, Mark Fowler, District Associate Judge.

A father challenges the juvenile court's denial of his request to continue a child-in-need-of-assistance hearing. **AFFIRMED.**

Murray W. Bell of Murray W. Bell, P.C., Davenport, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Michael Walton, County Attorney, and Julie Walton, Assistant County Attorney, for appellant.

Steven Stickle of Shinkle Law Firm, P.L.C., Davenport, for mother.

Patricia Rolfstad, Davenport, attorney and guardian ad litem for minor children.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

TABOR, J.

A father, who is accused of shaking his three-week-old son and causing life-threatening injuries, challenges the juvenile court's denial of his request to continue a child-in-need-of-assistance (CINA) adjudicatory hearing. The father asks us to reverse the adjudicatory and dispositional orders and to remand for a new hearing so he may offer expert testimony. The father also renews his foundation and authenticity objections to a hospital report and an email from his son's physician offered into evidence by the State at the adjudicatory hearing.

In light of the father's admission to shaking or rocking the infant too hard, we find his request for more time to secure a witness to address shaken baby syndrome did not constitute good cause to continue the adjudicatory hearing. The father also fails to show he was prejudiced by the admission of the challenged evidence. Accordingly, we affirm the CINA adjudication.

I. Background Facts and Proceedings

Peter and Jennifer are the parents of L.R. and M.R. The family came to the attention of the Iowa Department of Human Services (DHS) on November 5, 2012, when M.R. arrived at the University Hospitals and Clinics with suspicious injuries. Jennifer had left the infant alone in Peter's care that morning. When she returned home from a trip to the grocery store, she found M.R. screaming, pale, and having difficulty tracking with his eyes.

Jennifer rushed M.R. to the emergency room where doctors determined he had suffered a subdural hematoma, retinal hemorrhages to his right eye, and a fractured clavicle. M.R. also had several fractured ribs—some that could have

occurred at the same time as the subdural hematoma, and some that were older and in the process of healing. Medical personnel believed M.R.'s injuries were consistent with having been shaken or sustaining trauma. A surgeon placed a shunt inside M.R.'s skull to drain fluid off his brain. Medical personnel predict M.R. will experience developmental delays as a result of his injuries.

Neither parent provided an immediate explanation of how M.R. had been injured. But on November 7, 2012, Peter admitted to Jennifer that he shook M.R. during the 5 a.m. feeding on November 5 because the baby would not stop crying. During an interview with a social worker, Peter amended his statement, claiming he rocked M.R. "harder than he ever had before." Peter acknowledged he "could have" caused M.R.'s injuries.

The DHS initiated a safety plan. The children remained in Jennifer's custody with Peter initially receiving one hour of supervised visitation each day.¹

On December 5, 2012, the DHS issued a founded report, naming Peter as the perpetrator of M.R.'s physical abuse. On December 31, 2012, the State filed a petition seeking to adjudicate L.R. and M.R. as CINA.² On January 16, 2013, the juvenile court entered an order setting the adjudicatory hearing for February 19, 2013.

On January 22, 2013, Peter filed a motion to continue the adjudicatory hearing. Peter's counsel asked to set the matter "for a prehearing conference

¹ Peter received visitation from November 5, 2012, until November 28, 2012, when Jennifer obtained a temporary protective order. After Peter moved to reinstate visitation, the juvenile court entered a February 15, 2013 order granting Peter one hour of supervised visitation three times per week.

² In addition to the juvenile proceedings, Peter faced criminal charges alleging multiple counts of child endangerment.

approximately two months from the date of the original prehearing conference.” He requested additional time “to obtain and consult with at least one, and possibly two expert witnesses,” but stated counsel “cannot properly determine what kind of experts may be needed until the State has produced all the necessary medical reports.” He also alleged he would be denied due process without a continuance.

The State resisted the motion, noting it had already produced 143 pages of medical reports, in addition to the police report and other documents. The State also argued clear and convincing evidence would support a CINA adjudication—even if the father produced expert medical testimony—given the State’s evidence, Jennifer’s stipulations, and Peter’s admissions.

On January 29, 2013, the court held a hearing on the motion to continue. Peter’s counsel argued none of the parties would be prejudiced by a continuance because the children would remain in Jennifer’s custody and would receive the same services that would be offered if they were adjudicated CINA. The juvenile court denied the motion on February 8, 2013. The court noted that adjudicatory hearings are to be held within sixty days of filing the petition unless good cause is shown. On February 12, 2013, Peter filed a motion to reconsider, asserting his juvenile attorney and his criminal attorney had “now had contact” with three doctors who had agreed to review the medical records and render “preliminary opinions” by March 12, 2013. The court denied Peter’s motion to reconsider.

The court held the adjudicatory hearing on February 19, 2013. Peter did not offer any evidence but asked to make an offer of proof regarding the subject

matter of the expert witness testimony he would have introduced if granted a continuance. The juvenile court told Peter's counsel: "I will allow you to make an argument, but it will not be an offer of proof." Counsel then argued:

We will have the medical expert testify about the change in evidence regarding shaken baby and how it has changed in the last fifteen years and refer to medical journal articles to demonstrate that, and I know he would testify to that. How it affects this case, I can't tell, because the Court has not given me time to get that information. That is a due process problem. I can't have a meaningful hearing if I don't have time for the experts to look at the records

In its March 11, 2013 order, the court adjudicated the children to be CINA under Iowa Code sections 232.2(6)(b), (c)(2), and (n) (2011).³ The court cited Peter's statements acknowledging his actions may have caused M.R.'s injuries, the ongoing domestic violence committed by both Peter and Jennifer in the presence of the children, Peter's anger management issues, and his failure to "adhere to care requirements" mandated by M.R.'s fragile health status. The court ordered the children to continue in Jennifer's care.

On April 2, 2013, the court held a dispositional hearing. On April 17, 2013, the court continued the children's placement with Jennifer. This is Peter's appeal.

II. Analysis

A. Motion to Continue

Peter first challenges the denial of his motion to continue. As a part of his argument, he asserts the court erred in refusing to allow him to make an offer of proof regarding the expert opinion he wanted to present concerning shaken baby

³ Jennifer stipulated to the CINA adjudication.

syndrome. Peter also claims the court admitted a medical report into evidence at the adjudicatory hearing without requiring proper foundation.

A juvenile court should not grant a motion to continue unless the party seeking more time can show good cause. Iowa Ct. R. 8.5. We only reverse a juvenile court's denial of a continuance if the court abused its discretion and the moving party can show prejudice. *In re R.B.*, 832 N.W.2d 375, 378 (Iowa Ct. App. 2013); *In re C.W.*, 554 N.W.2d 279, 281 (Iowa Ct. App. 1996).

But Peter challenges the denial of his motion to continue on due process grounds. Where constitutional rights are implicated, our review is de novo. *In re N.N.E.*, 752 N.W.2d 1, 6 (Iowa 2008). This means we review both the facts and the law, and adjudicate rights anew. *In re H.G.*, 601 N.W.2d 84, 85 (Iowa 1999). We give weight to the juvenile court's fact findings, though we are not bound by them. *In re N.M.*, 528 N.W.2d 94, 96 (Iowa 1995).

A parent is entitled to due process in a CINA proceeding. *In re A.M.H.*, 516 N.W.2d 867, 870 (Iowa 1994). Due process requires a meaningful opportunity to be heard. *Id.* "This may include a right to notice of the hearing, to confront and cross-examine adverse witnesses, to be represented by counsel, to an impartial decision maker, and to a decision based solely on legal rules and the evidence presented at the hearing." *Id.*

Peter contends the juvenile court's refusal to continue the hearing prevented him from "putting on a defense" to the State's medical evidence. His choice of wording betrays a slight misperception of the nature of these proceedings. Peter is not being asked to defend himself against the State's

petition seeking to adjudicate his children as needing assistance. Indeed he faces criminal charges for his conduct, but the State is pursuing the prosecution independent of the juvenile court case. In this case, the question is whether the children have suffered or are imminently likely to suffer harmful effects based on physical abuse by a parent. Iowa Code § 232.2(6)(b).

The right to present a defense, including the opportunity to call witnesses, stems from the sixth amendment right to compulsory process. *Washington v. Texas*, 388 U.S. 14, 18 (1967). This right has been incorporated into state criminal trials through the due process clause. *Id.* at 17-18. But because a CINA proceeding is civil in nature, the sixth amendment is not implicated. *Cf. In re D.J.R.*, 454 N.W.2d 838, 846 (Iowa 1990) (holding a parent has no right to confront a child-witness at a termination of parental rights hearing); *In re T.P.*, 757 N.W.2d 267 (Iowa Ct. App. 2008) (finding no constitutional right to effective assistance of counsel).

To the extent Peter claims a due process right to be heard, how that right is protected depends on balancing three considerations: his private interests, the government's interests, and the risk that the procedures used will lead to erroneous decisions. *A.M.H.*, 516 N.W.2d at 870. Here, the private interest at stake—a CINA adjudication—is less weighty than in a termination proceeding. *See id.* at 871 (holding while a CINA proceeding may be the first step toward termination of parental rights, we do not equate the consequences of a CINA proceeding with termination); *In re L.K.S.*, 451 N.W.2d 819, 822 (Iowa 1990) (noting the separation of parent and child in CINA proceedings will ordinarily be

temporary nature, and therefore the intrusion upon the interest of a parent is less severe than in cases where termination is decreed).

As for the government's interest, Iowa court rules and case law underscore the need to resolve CINA petitions promptly. Under our rules, the court shall not continue the adjudicatory hearing "except for good cause." Iowa Ct. R. 8.5. Barring a showing of good cause, the court shall hold an adjudicatory hearing within sixty days of the filing of a CINA petition. Iowa Ct. R. 8.11. Our supreme court has emphasized the importance of observing deadlines in juvenile court proceedings, noting childhood will not await "the wanderings of judicial process." *In re A.C.*, 415 N.W.2d 609, 613 (Iowa 1987); *see also C.W.*, 554 N.W.2d at 281 (noting the juvenile court is not obligated to grant a motion for continuance in a termination case due to the importance of stability in a child's life). Delays in the process may harm the children. *A.C.*, 415 N.W.2d at 615. Our fundamental concern in juvenile proceedings is the child's best interests, and here those interests are not served by continuing the adjudicatory hearing. *In re K.N.*, 625 N.W.2d 731, 733 (Iowa 2001). We do not find the juvenile court abused its discretion in declining to continue the adjudicatory hearing for two months.

The third factor, the risk of an erroneous decision, is the focus of Peter's complaint. He contends the juvenile court "boxed itself into an adjudication" by denying him the right to meaningfully challenge the State's medical evidence. We disagree that a continuation would have changed the outcome of the adjudicatory hearing.

Peter complains the juvenile court erred in denying him the opportunity to make an offer of proof. An offer of proof is often necessary to preserve error when a court ruling excludes evidence. Iowa R. Evid. 5.103. It allows a party “to provide a meaningful record for appellate review.” *State v. Buchanan*, 800 N.W.2d 743, 752 (Iowa Ct. App. 2011); see also *In re S.D.*, 671 N.W.2d 522, 529 (Iowa Ct. App. 2003) (concluding issue not properly preserved where father did not make an offer of proof for each witness he sought to introduce). Our cases strongly disapprove of prohibiting counsel from proffering expected evidence. *Buchanan*, 800 N.W.2d at 752. But a refusal to allow an offer of proof is not reversible error if a reviewing court is able to determine what its contents would have been. *Id.* at 753.

Here, the juvenile court did not exclude evidence offered on Peter’s behalf. Rather, Peter’s counsel argued he needed a continuance to secure the testimony of medical experts. We can glean from the record what testimony Peter would have sought to introduce if the hearing was continued. Counsel explained his plans to have a “medical expert testify about the change in the evidence regarding shaken baby and how it has changed in the last fifteen years and refer to medical journal articles to demonstrate that.” Counsel also stated, “I will have experts that will testify about the lack of empirical evidence to justify the diagnosis of shaken baby on any child, and for years it’s been lack of evidence and all speculation.” This record allows us to decide whether granting Peter’s motion to continue would have affected the outcome of the adjudicatory hearing.

The evidence presented at the adjudicatory hearing shows Peter and Jennifer have a history of domestic violence. A DHS protective summary described an incident in which Peter grabbed Jennifer by the neck when she was seven months pregnant. Peter has admitted difficulty managing his anger. Before M.R.'s injury, Peter showed frustration with M.R.'s incessant crying. On November 5, 2012, M.R. was alone in Peter's care during early-morning feedings and for approximately forty-five minutes when Jennifer was at the grocery store; Jennifer discovered M.R.'s injuries when she returned home. Two days after medical personnel diagnosed M.R. as having sustained multiple, non-accidental injuries, Peter disclosed that he may have caused M.R.'s injuries. Peter first admitted to shaking M.R. but quickly corrected himself by saying he rocked M.R. harder than he ever had before. Peter's own admission to possibly being the source of his son's injuries, standing alone, would be enough to move forward with a CINA adjudication. Even if the father's statements fall short of a confession to shaking the baby, his proffered expert opinion would have not have deterred the juvenile court from adjudicating M.R. and his older sister as CINA.

At the adjudicatory hearing, Peter stressed that M.R. had medical issues throughout his first three weeks of life, suggesting these problems accounted for the injuries discovered on November 5, 2012. While the record supports Peter's claim that M.R. was a "fussy" baby, Jennifer immediately noticed something was wrong when she returned home from the grocery store on the morning in question. She described M.R.'s screaming as "different" from his normal cry. While it is possible M.R. could have sustained some of his older fractures during

delivery, other fractures dated as being zero to seven days old at the time of his hospitalization. The evidence suggests these fractures likely occurred at the same time as the subdural hematoma and retinal hemorrhages—injuries linked to some sort of trauma.

Furthermore, unrelated to the question of how M.R.'s injuries were caused, Peter failed to demonstrate he could provide proper care for M.R. in light of the infant's special medical needs following his injuries. Peter continued to exhibit frustration in trying to calm M.R. when crying after his hospitalization. The CINA adjudication would be appropriate on these bases as well. See Iowa Code § 232.2(b) (a parent is imminently likely to abuse or neglect the child), (c)(2) (the parent fails to exercise a reasonable degree of care in supervising the child), (n) (the parent's mental capacity or condition results in the child not receiving adequate care).

Balancing the three considerations discussed above, we conclude the juvenile court's denial of a two-month continuance did not violate Peter's right to due process. The juvenile court emphasized the children's need for safety and stability. The court concluded: "Delaying the adjudicatory hearing and thus the goal of permanency so a scorch the earth criminal defense can be provided in an adjudication is unnecessary." Upon our de novo review, we find no ground for reversal.

B. Evidentiary Ruling

Peter also contends the juvenile court erred in admitting into evidence two exhibits—a November 8, 2012 report from the University Hospitals regarding a

CT scan of M.R.'s chest and an email from Dr. Resmiye Oral to a DHS case worker concerning the negative results of M.R.'s osteogenesis imperfecta (OI) test. Peter argues the State failed to lay a proper foundation for their admission.

Despite our overarching de novo standard of review in juvenile proceedings, *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010), we continue to review subsidiary rulings, like those involving the admission of evidence, for an abuse of discretion. *Cf. In re A.K.*, 825 N.W.2d 46, 49 (Iowa 2013) (applying abuse-of-discretion standard to evidentiary issues in delinquency case). We will reverse an evidentiary ruling only if the record shows prejudice to the complaining party. *See State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998).

Iowa Code section 232.96 provides that—with some exceptions—the rules of evidence applicable at civil trials are to be followed in CINA proceedings. Under those rules, exhibits are generally not admitted unless there is “evidence sufficient to support a finding that the matter in question is what its proponent claims.” Iowa R. Evid. 5.901(a); *In re A.B.*, 815 N.W.2d 764, 774 (Iowa 2012). Neither the doctor nor a hospital representative appeared at the hearing to authenticate the records.

The State does not defend the admission of the exhibits on appeal. Rather, the State argues substantially the same information was contained in the child abuse report.⁴ Because the challenged evidence is cumulative, we find no prejudice. *See Hildreth*, 582 N.W.2d at 170. Reviewing the record without considering the two challenged exhibits, we find clear and convincing evidence

⁴ See Iowa Code § 232.96(4) (“A report made to the department of human services pursuant to chapter 235A shall be admissible in evidence . . .”).

supports the CINA adjudication. See *In re C.M.*, 526 N.W.2d 562, 565 (Iowa Ct. App. 1994) (holding error is harmless where even without it, juvenile court has more than enough proof to support its decision). Accordingly, we affirm.

AFFIRMED.