Circuit Court for Charles County
Case Nos. C-08-FM-20-809485 & 809487

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

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**CONSOLIDATED**

Nos. 1339 & 1340

September Term, 2020

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LISA BUNDY

v.

SHEAN POOLE

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Berger,
Wells,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Sharer, J.

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Filed: December 14, 2021

Lisa Bundy appeals from the final protective orders entered by the Circuit Court for Charles County awarding physical custody of her two minor children to their father, Shean Poole, on grounds that Ms. Bundy had physically abused them.[1] On appeal, Ms. Bundy asks the following two questions, which we have slightly rephrased:

I. Did the circuit court err in admitting certain inadmissible hearsay evidence?

II. Was the evidence sufficient to support a finding of abuse?

For the reasons that follow, we shall affirm the circuit court's orders.

## BACKGROUND AND PROCEDURAL FACTS

Ms. Bundy (the "Mother") and Mr. Poole (the "Father") are the biological parents of two children: a son born in December of 2010, and a daughter born in November of 2012. Mother and Father never married. Pursuant to a child custody agreement, the children have lived primarily with Mother, who currently lives in Virginia.

On October 27, 2020, Father filed a petition for a temporary protective order in the Circuit Court for Charles County on behalf of the children. Father made two allegations of physical abuse by Mother: that she had thrown their son across the floor leaving a contusion on the back of his head; and hit their daughter with a belt leaving a welt on her face. The court entered a Temporary Protective Order against Mother that maintained the current custody arrangement pending a final protective order hearing. Pursuant to Md.

[1] The circuit court entered two orders, one for each minor child. Ms. Bundy appeals the orders, which we have consolidated on appeal because she has filed only one brief and her arguments as to each order are identical.

Code Ann., Family Law ("FL") § 4-505, a case referral was made to the Charles County Department of Social Services (Charles County "DSS").

A Charles County DSS social worker conducted individual interviews with Mother, Father, and the children, and also interviewed the children together. During the interviews, Mother denied physically hitting the children, but the children in their individual interviews affirmed that Mother had abused them. The social worker subsequently signed and issued a report (the "Report") recounting the interviews, among other things. The Report, in conclusion, did not express an opinion about the truthfulness of the children's statements nor did it recommend a certain custody outcome. Rather, the Report recommended that the court speak to the children and decide custody of them.

On December 29, 2020, a hearing was held regarding entry of a final protective order. Both parties were represented at the hearing by counsel. Father and his mother testified in support of a final protective order; Mother, her married neighbors, and Mother's boyfriend, with whom she has a four-year old, testified against a protective order. After the court heard testimony from the parties and their witnesses, the court spoke to the children, ages ten and eight, *in camera*. After doing so, the court informed the parties that "I asked them specifics about any part of the incident, they did not want to talk, did not want to discuss anything, did not discuss anything." During the hearing, both parties and the court stated that they had received and reviewed the DSS Report. They also referred to the Report during the hearing. The Report, however, was not admitted into evidence.

At the conclusion of the hearing, the court stated: "So, I find that given all of the evidence in this case, given the fact of the children's [statements] to the Department of

Social Services, who are trained in investigating these type of matters, that the physical abuse did, in fact, occur." The court awarded custody of the children to Father, with Mother to have supervised weekly visitation. The order was effective for a year, until December 29, 2021.

## DISCUSSION

### I.

Mother argues that the circuit court erred when it admitted into evidence certain inadmissible hearsay. Specifically, Mother argues that the court erred in allowing Father to testify about out of court statements the children made to him, and in admitting into evidence the children's out of court statements in the DSS Report. Mother argues that admission of the hearsay was "devastating" to her case, "blatantly unfair," and requires reversal of the protective order. We shall address each argument in turn.

#### Father's testimony

Mother argues that the circuit court erred in allowing Father to testify about out of court statements the children made to him. Specifically, she argues that Father, who has "every motive to fabricate was allowed to testify to out of court statements by [the children, who] had 'a noticeable pattern' of changing their story, with no opportunity to confront or cross-examine." Father, who is proceeding pro se on appeal, does not respond to this argument. We find Mother's argument problematic for several reasons.

First, Mother makes only a general allegation of hearsay and does not direct us to any particular page of the transcript where the allegedly improper testimony was admitted, nor does she quote in her brief any testimony by Father from the transcript. The transcript

is almost 200 pages long and Father's testimony takes up over 30 pages. Md. Rule 8-504(a)(4) states that an appellant shall include in her appellate brief "[a] clear concise statement of the facts material to a determination of the questions presented[.] . . . Reference shall be made to the pages of the record extract supporting the assertions." It is not our burden to comb the transcript and evaluate each and every answer by Father for possible error. *See Rollins v. Cap. Plaza Assocs., L.P.*, 181 Md. App. 188, 201 (stating that "[w]e cannot be expected to delve through the record to unearth factual support favorable to [the] appellant") (quotation marks and citation omitted, brackets in *Rollins*), *cert. denied*, 406 Md. 746 (2008).

Second, a perusal of Father's testimony reveals that Mother's attorney never objected to many instances of what might be considered inadmissible hearsay.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). When Father took the stand, the first question he was asked by his attorney was why he had moved for a temporary protective order. Father testified that his daughter had gone to school and "either her principal or a teacher noticed a mark that she had on her face. And [his daughter] told them that her mother hit her in the face with a belt, leaving a mark on her face." Mother's attorney did not object. When then asked what had happened in the 30 days before he filed for the order, Father testified that Mother had "[p]icked up my son by his right arm and threw him across the floor, causing him to hit his . . . hit the back of his head on the floor, causing a large knot on the back of his head." Again, Mother's attorney did not object.

Father explained that when his children arrived at his home during the visitation following the incident involving his son, his son "said that he had a knot on his head." Seeing a knot the size of a golf ball on the back of his son's head, he asked his son what had happened. Father testified:

> He told me that his . . . he was mad, and his mother got mad at him because he hit the couch with his hand because he was mad. And she came in there and picked him up, and threw him across the room.
>
> She picked him up a second time and threw him across the room again. And that's when he hit his head on the floor.

Mother's attorney did not object. When Father responded in the affirmative when asked whether his son is "afraid to return to his mother's care?", Mother's counsel objected for the first time on grounds that it called for speculation. The court overruled the objection. Father was then asked, "[W]hat if anything happened from that conversation with [daughter]?" and Father testified: "She verified that her mother threw him across the floor." Again, Mother's attorney did not object.

We also note that Father's mother testified that sometime in November 2020 during the children's visitation with their Father, she noticed a "knot" on the back of her grandson's head. She testified: "And when I asked him what happened, he told me that his mom had thrown him across the floor, and he hit his head on the floor." Mother's attorney did not object. The following colloquy occurred:

> [FATHER'S ATTORNEY]: Okay, and have there been other incidents, other . . . any other incidents of injury that you can recall, with the children?
>
> [FATHER'S MOTHER]: Not with . . . not with my two grandkids, but they share a concern with their brother, their youngest brother, being hit in the face by their mother, with her fist.

Again, no objection from Mother's attorney. Father's mother explained that over the years: "They have expressed they didn't want to go back home [following a visitation with Father], that their mother was mean to them." Again, no objection. When asked why she believes the children about their statements of physical abuse by Mother, the following colloquy occurred:

> [FATHER'S MOTHER]: Because there have been some occasions where one will be speaking, and the other grandchild will say, "You better not say that. You know what's gonna happen."
>
> [FATHER'S ATTORNEY]: Um.
>
> [FATHER'S MOTHER]: That makes me think that they are fearful of what's going to happen when they get home.

Again, Mother's attorney did not object.

Md. Rule 4-323(a) provides: "An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." *See also Ware v. State*, 170 Md. App. 1, 19 (2006) (stating that the rule is "well established") (quotation marks and citations omitted), *cert. denied*, 549 U.S. 1342 (2007). By not objecting to allegedly inadmissible hearsay during Father's testimony, Mother has failed to preserve for our review her hearsay argument. Additionally, "absent a continuing objection, an appellant waive[s] its objection to [the] admission [of testimony] by permitting subsequent testimony to the same effect to come in without objection." *Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 763-64 (2007) (quotation marks and citation omitted) (brackets in *Pulte*), *aff'd*, 403 Md. 367

(2008). Mother has also failed to preserve for our review her hearsay argument by not objecting to later admitted testimony by Father's mother.

In sum, Mother has failed to preserve her hearsay argument for our review because she did not state in her appellate brief what testimony was admitted in error and why. Additionally, she waived any hearsay argument regarding Father's testimony by not objecting to earlier and later admitted testimony.

### A. DSS Report

Mother argues that the DSS Report should not have been admitted because it contained inadmissible hearsay, specifically out of court statements made by the children to the social worker. She acknowledges that Md. Rule 5-803(b)(8)(A)(iv), the "record and report" exception to the hearsay rule, allows for admission of "factual findings" found in DSS reports that are presented in final protective order hearings. She argues, however, that the children's statements in the DSS Report were not factual findings. Father responds that Mother has failed to preserve this argument for our review because she did not object below to the admission of the Report. Father further argues that even if preserved, the DSS Report fell within the record and report hearsay exception.

Mother's argument is not properly before us because, notwithstanding Mother's and Father's belief to the contrary, the Report was never admitted into evidence. Nonetheless, because both parties acknowledged receiving and reading the Report, the parties and the circuit court referred to the Report on occasion throughout the hearing, and the court relied

on the Report in its ruling[2], we believe that the Report was by implication admitted into evidence.[3] Accordingly, we shall address Mother's argument but are ultimately persuaded that the impliedly admitted Report was admissible, notwithstanding Mother's argument that the Report contained inadmissible hearsay.

Hearsay, the definition of which we set out above, must be excluded, unless it falls within an exception. *See* Md. Rule 5-802. Relevant here is the public records and reports exception to the rule against hearsay. That exception provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *

[2] In rendering its decision, the court stated:

> So, I find that given all of the evidence in this case, given the fact of the children's [statements] to the Department of Social Services, who are trained in investigating these type of matters, that the physical abuse did, in fact, occur.

[3] It seems that Mother also has a preservation problem regarding the Report because she never objected to the court's reliance on the Report in its ruling. *See Rivera v. State*, 248 Md. App. 170, 183 (2020) (holding that because the defendant in a bench trial did not object to matters relied upon but not admitted into evidence when the court rendered its verdict, the defendant's claim that the trial court erroneously relied on facts not in evidence in its verdict was not preserved on appeal). Because both parties have briefed Mother's argument that the children's statements in the Report were inadmissible hearsay, Father will not be prejudiced if we exercise our discretion and address Mother's argument, notwithstanding the preservation requirements of Md. Rule 4-323(c) and Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court" but going on to state that "the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.").

> (8) Public Records and Reports. (A) Except as otherwise provided in this paragraph, a memorandum, report, record, statement, or data compilation made by a public agency setting forth
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> * * *
>
> (iv) in a final protective order hearing conducted pursuant to Code, Family Law Article, § 4-506, factual findings reported to a court pursuant to Code, Family Law Article, § 4-505, provided that the parties have had a fair opportunity to review the report.

Md. Rule 5-803 (b)(8)(A)(iv).[4] In *Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581, 612 (1985), the Court of Appeals discussed the "record and report" hearsay exception at length, noting that "the term factual findings will be strictly construed and that evaluations or opinions contained in public reports will not be received unless otherwise admissible under this State's law of evidence." (quotation marks and footnote omitted).

Mother argues that the court erroneously relied on the children's statements in the DSS Report because those statements were not "factual findings." Mother, however, fails to direct us to any particular statement by either child in the Report. Moreover, she fails to explain why the "children's statements" are not factual findings. On the contrary, we believe that the "statements" by the children in the Report are quintessentially factual findings for the children relating what they observed and what had happened to them. They did not express any opinion. For the above reasons, we find no error by the circuit court in impliedly admitting the Report and relying on the statements by the children in the Report in its ruling.

[4] The Court of Appeals adopted the rule by Order dated September 17, 2015, effective January 1, 2016.

## II.

Mother argues that the circuit court erred in finding sufficient evidence that she abused her children to support its final protective orders. Mother argues that the concern expressed in the Report about the children's pattern of making and then denying incidents of abuse was an opinion and could not be relied upon in sustaining a finding of abuse because it was inadmissible hearsay. She also argues that the interviews with the children produced no evidence of abuse against her. According to Mother, because no witness testified as to first-hand knowledge about the abuse, issuance of the final protective orders was clearly erroneous. We disagree.

Section 4-506(c)(1)(ii) of the Family Law Article provides that "if the judge finds by a preponderance of the evidence that the alleged abuse has occurred, . . . the judge may grant a final protective order to protect any person eligible for relief from abuse." Pertinently, "abuse" is defined as "(i) an act that causes serious bodily harm; (ii) an act that places a person eligible for relief in fear of imminent serious bodily harm; (iii) assault in any degree[.]" FL § 4-501(b). The petitioner of a protective order bears the burden of proving that the alleged abuse occurred by a preponderance of the evidence. FL § 4-506(c)(1)(ii). "When conflicting evidence is presented, we accept the facts as found by the hearing court unless it is shown that its findings are clearly erroneous." *Barton v. Hirshberg*, 137 Md. App. 1, 21 (2001) (quotation marks and citation omitted). This is because we "leave the determination of credibility to the trial court, who has the opportunity to gauge and observe the witnesses' behavior and testimony during the trial." *Id*. (quotation marks and citation omitted).

The Report contained statements from both children, who were interviewed jointly and separately. Tellingly, prior to their individual interviews, the son asked the social worker if anything he said would be shared with Mother. He was assured that nothing would be shared. The son then told the social worker that in October 2020, Mother picked him up by the right arm and threw him twice, causing him to hit the back of his head on the wooden floor. The daughter in her individual interview told the social worker that in March 2020, Mother hit her in the face with a leather belt because she would not wake up for school. Daughter said she denied the incident when interviewed by Loudoun County CPS because Mother told her she would kill her if she was ever arrested because of an abuse disclosure. Both children told the social worker that in September 2020, Mother hit their four-year-old brother (by a different father) giving him a black eye. Both children also said that when interviewed by CPS about that incident, they did not tell the truth because they feared their Mother would be upset. During the children's joint interview, they were asked about physical discipline at their Mother's house, and before the daughter could respond, the son said, "No [sister], we're not going to talk about that."

Father testified that the children had told them that Mother threw son across the floor causing a contusion on the back of his head and Mother hit daughter in the face with a belt leaving a mark. Father's mother testified that her grandson had told her that he hit his head when Mother threw him across the floor. The court could properly consider this testimony in rendering its decision, even if this evidence was inadmissible hearsay, because there was no objection. *See Schmitt v. State*, 140 Md. App. 1, 22–24 (2001) (citing, among other things, *Mahoney v. Mackubin*, 54 Md. 268, 274 (1880) ("Objectionable evidence

admitted without objection has the force and effect of proper evidence)), *cert. denied*, 367 Md. 88 (2001). *See also Williams v. State*, 251 Md. App. 523, 569 ("In considering Williams' challenge to the sufficiency of the evidence, we analyze all of the evidence—admitted erroneously or not—presented at trial.") (citations omitted), *cert. granted*, 476 Md. 262 (2021).

After all the witnesses testified, the court questioned the children *in camera* and then advised the parties:

> So, when I asked them specifics about any part of the incident, they did not want to talk, did not want to discuss anything, did not discuss anything.
>
> And I did not pressure them, because you could obviously see they were in distress, which always worries me about bringing kids into these type of hearings.

In rendering its decision, the court stated:

> And I find most persuasive the reports of the children to the Department of Social Services, who gave no indication that the children were not telling the truth during the first interview and during the second interview.
>
> It was stated that [the son] said, "No, [sister], we're not going to talk about that." And the parties agreed not to discuss that.
>
> So, I find that given all of the evidence in this case, given the fact of the children's [statements] to the Department of Social Services, who are trained in investigating these type of matters, that the physical abuse did, in fact, occur.

Under the circumstances presented, there was sufficient evidence for the court to determine that Mother physically abused the children. The court could credit the statements the children made to the social worker as related in the Report, both Father's

and his mother's testimony, and the children's evasive statements *in camera* when asked about abuse at the hands of Mother. Accordingly, we shall affirm the judgments.

**JUDGMENTS OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED.**

**COSTS TO BE PAID BY THE APPELLANT.**