

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Natesia P.)
and Michael P.,)
Children under 18 years of age.)
)
State of Nebraska,)
)
Appellant,)
)
v.)
)
Conisha P.,)
)
Appellee.)

No. A-14-0175.

MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL

FILED

SEP 22 2014

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

INBODY, Chief Judge, and RIEDMANN and BISHOP, Judges.

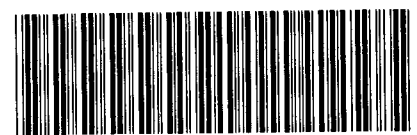
BISHOP, Judge.

The State filed a petition alleging that Michael P. (Michael Jr.) was within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) due to the faults or habits of his father, Michael P. (Michael Sr.). After a hearing, the separate juvenile court for Douglas County dismissed the State's petition as to Michael Sr., finding there was a lack of sufficient evidence. The State appeals.

BACKGROUND

Conisha P. and Michael Sr. are the parents of Michael Jr., born in July 2011. Conisha is also the mother of Natesia, born in September 2002. Michael Sr. is Natesia's stepfather.

On November 3, 2013, Conisha and Michael Sr. were involved in a domestic violence altercation in their home wherein Michael



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Sr. punched Conisha and broke her nose. Neither Michael Jr. nor Natesia were present when the incident occurred.

On November 13, 2013, the State filed a petition alleging that Michael Jr. and Natesia were children within the meaning of § 43-247(3)(a). Count II of the petition alleged that both children lacked proper parental care by reason of the faults or habits of Conisha, in that: (A) Conisha engaged in domestic violence with Michael Sr. in the presence of the children; (B) Conisha failed to provide proper parental care, support, and/or supervision for the children; and (C) due to the above allegations, the children were at risk for harm. Count III of the petition alleged that Michael Jr. lacked proper parental care by reason of the faults or habits of Michael Sr., in that: (A) Michael Sr. engaged in domestic violence with Conisha in the presence of the children; (B) Michael Sr. failed to provide proper parental care, support, and/or supervision for the children; and (C) due to the above allegations, the children were at risk for harm.

Also on November 13, 2013, the State filed an "Ex Parte Motion for Immediate Custody" of Michael Jr. and Natesia, alleging that the children were seriously endangered in their surroundings and immediate removal appeared necessary for their protection. The juvenile court filed an Order for Immediate Custody that same day. The court granted temporary custody of

the children to the Nebraska Department of Health and Human Services (DHHS) for appropriate placement, which was to exclude the home of Conisha and Michael Sr.

The juvenile court filed a "Protective Custody/Detention Order" on November 20, 2013, relating to Michael Jr. and Michael Sr. In its order, the court noted that a hearing was held that day wherein the State requested continued detention and detention was not resisted. The court found that it would be contrary to Michael Jr.'s health and safety to be returned home because Michael Sr. was incarcerated and had allegedly perpetrated domestic violence. The court found that it was in Michael Jr.'s best interests to remain in the temporary custody of DHHS for appropriate care, education and maintenance, which was to exclude the home of Michael Sr.

In an order filed on February 11, 2014, the juvenile court noted that an adjudication hearing was held on February 10 (the proceedings of which do not appear in our record) with regard to the allegations against Conisha only (Count II of the petition). Conisha admitted to Count II-A and II-C of the petition. The State dismissed Count II-B on its own motion. The juvenile court found Count II-A and II-C of the petition to be true based on the admission of the same by Conisha, and the court adjudicated the children. The court found that it was in the children's best interests to remain in the temporary custody of DHHS for

appropriate care and placement, which was to exclude the home of Conisha.

An adjudication hearing was held on February 20, 2014, with regard to the allegations against Michael Sr. (Count III of the petition). The court received into evidence: a certified copy of Michael Sr.'s criminal docket regarding the November 3, 2013, incident, wherein he pled guilty to and was convicted of third degree domestic assault (on January 9, 2014, he was placed on probation and, as a condition of his probation, was sentenced to 104 days' jail, with credit for 100 days served); pictures of blood on the front door and couch in the family's home, and pictures of Conisha's face after the November 3, 2013, incident (showing her bloodied lips, cheeks, and nose). Only two witnesses testified: Conisha and Danielle Schmidt, an initial assessment worker for the State.

Conisha testified that she had been married to Michael Sr. for nearly 4 years, and that their marriage had had its "ups and downs." Conisha testified that on November 3, 2013, she and Michael Sr. had argued, things got out of hand, and then things got physical. Conisha and Michael Sr. punched and pushed each other back and forth and things in the house were broken. She stated that Michael Sr. punched her and broke her nose, and that blood splattered on the walls and the furniture. Michael Sr.'s daughter, Ava P., was in the room during the altercation;

however, neither Michael Jr. nor Natesia were present during the altercation. Conisha testified that the children (Michael Jr. and Natesia) never asked what happened on November 3, and she did not talk to the children about the incident.

Conisha testified that the altercation on November 3, 2013, was not the first altercation she had had with Michael Sr. She testified that there had been a total of three or four physical altercations since the birth of Michael Jr., but only one previous altercation resulted in physical injury.

Schmidt testified that she received an intake regarding the November 3, 2013, domestic violence situation between Conisha and Michael Sr. and that, as a result, she conducted an investigation. She reviewed the family's history with "CPS" and their criminal history. Schmidt also spoke with Conisha, Michael Sr., Conisha's mother, and Natesia. Based on her investigation, Schmidt opined that the children were at high risk for harm.

Schmidt met with Natesia at school. (We note that Schmidt's testimony regarding her conversation with Natesia was only admitted for purposes of showing the basis for Schmidt's opinion. The court found that the testimony was otherwise "clearly hearsay" and was not being admitted for the truth of the matter.) Natesia talked about the domestic violence in her home life between Conisha and Michael Sr., and indicated that the incident on November 3, 2013, was not an isolated incident.

Natesia was not home during the November 3 incident, but talked about seeing blood all over the house and Conisha being in the hospital. Natesia talked about being pushed during a previous incident. She also said she was scared of Michael Sr.

Schmidt testified that during a meeting with Conisha and Michael Sr., the two argued about the domestic violence incident that occurred on November 3, 2013, and about whose injuries were worse as a result of the incident. Michael Sr. also showed Schmidt scratches on his arm, said he thought about calling the cops, but said "we squared up again and then I broke her nose."

Schmidt testified that Conisha's mother also provided her with information that Schmidt took into consideration in formulating her opinion as to the children's risk for harm. However, the contents of that conversation were stricken from the record pursuant to Michael Sr.'s foundation objection.

At the conclusion of the State's case, Michael Sr. moved to dismiss, asserting that the State had not met their burden of proof. Michael argued that there was no testimony that the domestic violence occurred in front of the Michael Jr. or Natesia. In response to Michael Sr.'s motion to dismiss, the court stated:

You know, I was sitting here thinking as this was going on that -- and in -- in the presence of the children doesn't have to mean they witnessed it, saw it when it was happening.

However, I also have no evidence that was received for the purpose of the truth of the matter that they saw the end result. I know that there's some evidence that they saw the mother in the hospital, saw her face, saw the blood in the home. But that was received as a basis for Ms. Schmidt's opinion, not for the truth of what was asserted.

So -- and, frankly, it really bothers me when I look at these pictures to do what I'm going to have to do here, which is to dismiss the case.

So the motion to dismiss is granted.

In its order filed on February 20, 2014, the juvenile court granted Michael Sr.'s motion to dismiss due to insufficient evidence. The court dismissed all "charges" relating to Michael Sr. and found that DHHS was relieved of any further responsibility as to Michael Sr. It is from this order that the State now appeals.

ASSIGNMENTS OF ERROR

The State assigns that the juvenile court erred in finding that Michael Jr. does not come within the meaning of § 43-247(3)(a) due to the faults and habits of Michael Sr. and was therefore at risk of harm.

STANDARD OF REVIEW

Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. However, when the evidence is in conflict, the appellate court

will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Justine J. et al.*, 286 Neb. 250, 835 N.W.2d 674 (2013).

ANALYSIS

The State must prove the allegations in a petition for adjudication filed under § 43-247(3)(a) by a preponderance of the evidence. *In re Interest of Justine J. et al.*, *supra*.

The following is the only evidence received for the truth of the matter at the adjudication hearing on February 20, 2014. Conisha and Michael Sr. had been involved in a total of three or four physical altercations since the birth of Michael Jr., but only one previous altercation resulted in physical injury. There is no evidence to show the extent of that physical injury, nor was there any evidence that the children were present or had knowledge of the physical altercations. On November 3, 2013, Conisha and Michael Sr. argued and things escalated into a physical altercation in their home, with pushing and punching by both parties. During the incident Michael Sr. punched Conisha and broke her nose; blood splattered on the walls and the furniture. Neither Michael Jr. nor Natesia were present during the altercation and there was no evidence that the children were even aware that the incident occurred. As a result of the incident, Michael Sr. pled guilty to and was convicted of third

degree domestic assault. On January 9, 2014, Michael Sr. was placed on probation and, as a condition of his probation, was sentenced to 104 days' jail, with credit for 100 days served. Schmidt testified that she conducted an investigation as a result of the November 3, 2013, incident and as a result of her investigation opined that the children were at high risk for harm.

Any additional testimony by Schmidt (e.g. testimony regarding her conversation with Natesia) was only admitted for purposes of showing the basis for Schmidt's opinion. The court correctly determined that the additional testimony was otherwise "clearly hearsay" and was not being admitted for the truth of the matter. See *In re Interest of Ashley W.*, 284 Neb. 424, 821 N.W.2d 706 (2012) (the Nebraska Evidence Rules control adduction of evidence at an adjudication hearing under the Nebraska Juvenile Code). See, also, Neb. Rev. Stat. § 27-801 (Reissue 2008) (hearsay is 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); Neb. Rev. Stat. § 27-802 (Reissue 2008) (with certain exceptions, hearsay is generally not admissible).

In arguing that it did prove by a preponderance of the evidence that Michael Jr. comes within the meaning of § 43-247(3)(a) due to the faults and habits of Michael Sr., the State

relies heavily on this court's unpublished opinion in *In re Interest of Ajal B. & Akur B.*, No. A-06-1354, 2007 WL 2122183 (Neb. App. July 24, 2007) (not designated for permanent publication). However, the State's reliance on *In re Interest of Ajal B. & Akur B.*, *supra*, is misplaced because when considering only the evidence admissible for the truth of the matter in the instant case, *In re Interest of Ajal B. & Akur B.*, *supra*, actually supports the juvenile court's dismissal of the allegations against Michael Sr.

In *In re Interest of Ajal B. & Akur B.*, *supra*, the children were adjudicated under § 43-247(3)(a) due to the faults or habits of their mother and father, because the parents engaged in a domestic altercation in the home where the children resided, and exposed the children to a risk of harm. The father appealed and this court reversed the juvenile court's order of adjudication after finding that the State failed to meet its burden of proof because (1) the children were not in the home at the time of the incident and the evidence did not demonstrate any awareness of the event or other impact upon them and (2) there was no evidence of a history of domestic violence.

In *In re Interest of Ajal B. & Akur B.*, *supra*, we noted that the children suffered no harm, but also recognized that if evidence of the fault or habits of a parent or custodian indicates a risk of harm to a child, the juvenile court may

properly take jurisdiction of that child, even though the child has not yet been harmed or abused. We cited several cases wherein the Nebraska appellate courts had upheld adjudications where the children suffered no harm or were not present at the time of the events alleged in the petition. However, in each of those cited cases, the parents had previously caused harm to another child. See *In re Interest of M.B. and A.B.*, 239 Neb. 1028, 480 N.W.2d 160 (1992) (father had been convicted of sex crimes against other children and mother continued to leave the daughters in his care); *In re Interest of W.C.O.*, 220 Neb. 417, 370 N.W.2d 151 (1985) (father had been charged with first degree sexual assault on another child); *In re Interest of Hailey M.*, 15 Neb. App. 323, 726 N.W.2d 576 (2007) (mother's abuse of another child, which conduct had occurred 9 years prior to Hailey's birth, was of such a nature as to place Hailey at risk of harm). The facts in *In re Interest of Ajal B. & Akur B.*, *supra*, did not imply that the parents had previously caused harm to any child. And the same is true in the instant case. There was no evidence admitted for the truth of the matter that Michael Sr. had ever harmed a child.

The State also argues that "[a] parent's inability to perform his parental obligations because of imprisonment, the nature of the crime committed, as well as the person against whom the criminal act was perpetrated, and the parent's conduct

prior to imprisonment are all relevant to the issue of parental fitness and child welfare." Brief for appellant at 14 (citing *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999); *In re Interest of Brettany M. et al.*, 11 Neb. App. 104, 644 N.W.2d 574 (2002)). Again, the State's reliance on these cases is misplaced.

The State argues that in the instant case, evidence was provided demonstrating that Michael Sr. and Conisha

had a history of domestic violence incidents dating back several years, culminating in a physical altercation which left [Conisha] with serious injuries and [Michael Sr.] incarcerated for a significant period of time, during which he was unable to provide proper parental care or support for his child.

Brief for appellant at 16. Our de novo review of the record shows that Conisha testified that she and Michael Sr. had been involved in three or four physical altercations after Michael Jr.'s birth, and that only one previous incident resulted in physical injury. She did not testify as to the nature or the severity of that physical injury (e.g. whether it involved broken bones and hospitalization, or whether the physical injury consisted of minor scratches) or whether the injury was accidental in nature. See, e.g., *In re Interest of Ajal B. & Akur B.*, No. A-06-1354, 2007 WL 2122183 at *3 (Neb. App. July 24, 2007) (not designated for permanent publication) ("For all

we know, based on the limited evidence in the record, the incident at issue may have been nothing more than a heated quarrel in which the mother accidentally injured herself.") Additionally, there is no evidence in the record that Conisha was hospitalized as a result of the November 3, 2013, domestic violence incident. *Cf. In re Interest of Brettany M. et al., supra* (during the altercation the father assaulted the mother and caused serious bodily injury; the mother spent approximately 1 month in the hospital and was then released to a nursing home where she remained largely uncommunicative and unable to care for herself).

Furthermore, contrary to the State's assertion, Michael Sr. was not incarcerated for a "significant" period of time. On January 9, 2014, Michael Sr. was placed on probation and, as a condition of his probation, was sentenced to 104 days' jail, with credit for 100 days served. Accordingly, he served a little over 3 months in jail, and would have been released more than 1 month before the adjudication hearing. *Cf. In re Interest of Kalie W., 258 Neb. 46, 601 N.W.2d 753 (1999)* (father sentenced to 5 to 8 years' imprisonment for the assault of his child's mother and put himself in a position in which he was unable to care for his child); *In re Interest of Brettany M. et al., 11 Neb. App. 104, 644 N.W.2d 574 (2002)* (father sentenced to 19 to 20 years' imprisonment for the assault of his children's

mother). In the instant case, Michael Sr.'s incarceration was not of such length that incarceration, by itself, would warrant an adjudication based on the fact that that Michael Sr. was unable to provide care for Michael Jr.

Finally, in *In re Interest of Ajal B. & Akur B.*, No. A-06-1354, 2007 WL 2122183 at *3 (Neb. App. July 24, 2007) (not designated for permanent publication), we noted that the children were approximately ages 3 and 1½ at the time of the incident, and "there is no evidence that they were aware of -- or even at an age that they could comprehend -- the incident." The same is true in this case. At the time of the November 3, 2013, incident between Conisha and Michael Sr., Michael Jr. was not quite 2½ years old. There was no evidence that he was aware of the incident, or even at an age that he could comprehend the incident.

While the November 3, 2013, incident between Conisha and Michael Sr. is concerning to this court, as it was to the juvenile court, we find that when considering only the evidence that was received for the purpose of the truth of the matter, the State did not meet its burden of proof to show that Michael Jr. comes within the meaning of § 43-247(3)(a) due to the faults and habits of Michael Sr. Therefore, we affirm the juvenile court's order dismissing all allegations/charges relating to Michael Sr.

CONCLUSION

For the reasons stated above, we affirm the juvenile's court's order dismissing all "charges" relating to Michael Sr.

AFFIRMED.