

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF SHAYLA H. ET AL.

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IN RE INTEREST OF SHAYLA H. ET AL., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT,

V.

DAVID H., APPELLANT AND CROSS-APPELLEE, AND
ROSEBUD SIOUX TRIBE, INTERVENOR-APPELLEE.

Filed May 18, 2010. No. A-09-1142.

Appeal from the Separate Juvenile Court of Lancaster County: LINDA S. PORTER, Judge.
Affirmed.

Patrick T. Carraher, of Legal Aid of Nebraska, for appellant.

Gary Lacey, Lancaster County Attorney, and Jeremy Lavene for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

David H. appeals from an order of the separate juvenile court for Lancaster county, adjudicating his minor children as juveniles under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). This is the second appearance of the case before this court. We reversed a previous adjudication order and remanded for further proceedings because the initial pleadings did not contain the requisite allegations under Nebraska's Indian Child Welfare Act (ICWA). See *In re Interest of Shayla H. et al.*, 17 Neb. App. 436, 764 N.W.2d 119 (2009). Upon remand, the State filed an amended petition containing the requisite ICWA allegations, and the children were again adjudicated. In the present appeal, David assigns error to certain evidentiary rulings made by the court and to the court's decision to take jurisdiction of the children under § 43-247(3)(a). The

State has cross-appealed, assigning error to the standard of proof used by the juvenile court in assuming jurisdiction. For the reasons set forth herein, we affirm.

BACKGROUND

David and Tanya H. (Tanya) are the parents of three minor children, Shayla H., born in August 2001; Shania H., born in August 2003; and Tanya H., born in September 2004. Because Tanya, the mother, is not involved in the present appeal, we have limited our recitation of the facts to only those applicable to David. Through David, the children are eligible for enrollment with the Rosebud Sioux Tribe (the Tribe).

The State filed a petition in the juvenile court on February 15, 2008, alleging that the children were within the meaning of § 43-247(3)(a) in that they lacked proper parental care by reason of the faults or habits of David. The petition included the following allegations: (1) that since November 2007 David had failed to provide one or more of the children with proper medical care, (2) that on one or more occasion since January 2007 David had been involved in physical or verbal domestic confrontations with Tanya occurring in the presence of or vicinity of one or more of the children, and (3) that on one or more occasion since November 2007 David had been under the influence of methamphetamine while being the primary caretaker of one or more of the children. The State alleged that because of these allegations, the children were at risk of physical or emotional harm. The petition did not contain any allegations under or references to the Nebraska ICWA, Neb. Rev. Stat. §§ 43-1501 to 43-1516 (Reissue 2008).

An adjudication hearing was held on May 29 and July 2, 2008, at which time David entered his voluntary appearance and waived service of summons of the petition on the record. The court heard testimony from Tanya's mother, two police officers, employees of the Nebraska Department of Health and Human Services (the Department), and Tanya. During the course of the July 2 hearing, David's attorney argued that the case should be dismissed, in part, because the petition did not include any ICWA allegations. The record shows that while the Tribe was notified of the adjudication hearing, it did not appear.

The juvenile court entered an order on August 15, 2008, adjudicating the children as juveniles under § 43-247(3)(a). The court denied David's request to dismiss the petition on the ground that it failed to include allegations pleading the applicability of the ICWA. The court found that the children were Indian children and eligible for membership in the Tribe. The court also found that the notice requirements of the ICWA had been met. The court found that the State failed to prove the allegations of count I of the petition (medical neglect) as they related to David and dismissed that count for failure of proof. The court determined that the State proved the remaining counts of the petition (domestic violence and drug use) by clear and convincing evidence as they related to David.

David appealed from the August 2008 adjudication order, and this court determined that the juvenile court erred in failing to sustain David's motion to dismiss the petition due to the lack of ICWA allegations. See *In re Interest of Shayla H. et al.*, 17 Neb. App. 436, 764 N.W.2d 119 (2009). We determined that the defects in the State's petition appeared capable of being cured by amendment and therefore reversed the adjudication order and remanded the cause for further proceedings.

On February 26, 2009, the juvenile court granted a request from the Tribe to intervene in the case.

On June 26, 2009, the State filed the operative amended petition, which contained the same three counts as to David (medical neglect, domestic violence, and drug use) as were found in the initial petition. The petition also included the requisite ICWA allegations, specifically stating that active efforts had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that because these efforts had proved unsuccessful, continued custody of the children by the parent or Indian custodian was likely to result in serious emotional or physical damage to the children.

An adjudication hearing was held on September 25, 2009. For the sake of brevity, we have set forth the details of that hearing as they relate to the issues in this present appeal in the analysis section below. Although notice of the hearing was given to the Tribe, no representative of the Tribe appeared.

On November 29, 2009, the juvenile court entered an order adjudicating the children as juveniles under § 43-247(3)(a). The court again found that the State failed to prove the allegations of count I of the petition (medical neglect) as they related to David and dismissed that count for failure of proof. The court again determined that the State proved the remaining counts of the petition (domestic violence and drug use) by clear and convincing evidence as they related to David. David subsequently perfected the present appeal to this court.

ASSIGNMENTS OF ERROR

David asserts that the juvenile court erred in (1) taking judicial notice of “the entire trial record from the previous trial in this matter,” (2) refusing to take judicial notice of one of its own records and refusing to receive into evidence a certified copy of a district court order, and (3) taking jurisdiction of the children under § 43-247(3)(a) when there was insufficient evidence to support counts II and III of the operative petition.

On cross-appeal, the State asserts that the juvenile court erred in using “clear and convincing” as the standard of proof in adjudicating the children.

STANDARD OF REVIEW

Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court’s findings. *In re Interest of Chance J.*, 279 Neb. 81, 776 N.W.2d 519 (2009). When the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other. *Id.*

ANALYSIS

Judicial Notice of Record From Previous Adjudication.

David asserts that the juvenile court erred in taking judicial notice of “the entire trial record from the previous trial in this matter.”

At the September 25, 2009, adjudication hearing, the attorney for the State initially asked the juvenile court to take judicial notice of the prior proceedings in this case. David’s attorney objected on the basis of hearsay and argued that it was not proper for the State to prove its case

in chief using the testimony from a prior proceeding. Following a discussion between the court and counsel to clarify the record sought to be received by judicial notice, the court stated that it would take judicial notice of the record created at the formal adjudication hearings held on May 29 and July 2, 2008, on the original petition. The court reasoned that all parties were present and participated fully in the prior adjudication, the allegations in the prior and current petitions were the same, the rules of evidence were applied at the prior adjudication hearings, and there was no undue prejudice resulting from the court taking judicial notice. The State rested its case after the court took judicial notice of the prior adjudication proceedings. David then presented testimony from Tanya and from a drug tester. In questioning Tanya, David's attorney focused on evidence relating to the credibility of her testimony at the prior adjudication hearing. The drug tester testified that she had been testing David for drug use since February 2009 and that the test results had all been negative.

Although David does not assign error to the overruling of his hearsay objection to receipt of the record from the prior adjudication hearing, we note that, had there been a showing of witness unavailability, the material judicially noticed would fit under the hearsay exception found in Neb. Rev. Stat. § 27-804(2)(a) (Reissue 2008). No such showing of unavailability was made, and, in fact, some of the witnesses from the first hearing were present at the second hearing. The State did not ask the juvenile court to receive the evidence under such an exception, but, rather, relied on the judicial notice statute in seeking to bring the evidence before the court.

As a subject for judicial notice, existence of court records and certain judicial action reflected in a court's record are, in accordance with Neb. Rev. Stat. § 27-201(2)(b) (Reissue 2008), facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003). A juvenile court has a right to examine its own records and take judicial notice of its own proceedings and judgment in an interwoven and dependent controversy where the same matters have already been considered and determined. *Id.* Adjudicative facts within the meaning of § 27-201 are simply the facts developed in a particular case, as distinguished from legislative facts, which are established truths, facts, or pronouncements that do not change from case to case but apply universally. *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006). The Nebraska Supreme Court has stated, however, that care should be taken by courts taking judicial notice to identify the facts they are noticing, and the justification for doing so. *Id.*

The parties draw our attention to *In re Interest of C.K., L.K., and G.K.*, 240 Neb. 700, 484 N.W.2d 68 (1992), where the Supreme Court determined, in making its de novo review of the record in a termination of parental rights case, that it would disregard those items or materials indicated by the juvenile court as subject of its judicial notice where there was confusion as to what was being noticed by the lower court. The trial court in that case took judicial notice of all pleadings, adjudications, and records that were "admissible," without any specific designation of what was being judicially noticed. *Id.* at 710, 484 N.W.2d at 74. The Supreme Court found that because there was no identification or indication of the adjudicative fact or facts judicially noticed in the "expanse of the proceedings involving the children," it was unable to ascertain what facts were the subject of the trial court's judicial notice. *Id.* at 710, 484 N.W.2d at 73. Compare *Strunk v. Chromy-Strunk*, *supra* (finding trial court was correct in receiving its prior proceedings into evidence and making such evidence part of record but finding that court should

have done so by individually noticing elements considered relevant and competent for issues presented).

Unlike the situation in *In re Interest of C.K., L.K., and G.K.*, the matter that the juvenile court in this case took judicial notice of was specifically identified as only that portion of the bill of exceptions and exhibits received at the prior adjudication hearings. These items were marked as exhibits for purposes of introduction at the current adjudication hearing. The court did not take judicial notice of the portion of the bill of exceptions or exhibits prepared from the previous dispositional hearings, where the rules of evidence were not applied. In short, the material judicially noticed by the juvenile court was sufficiently identified to enable a meaningful de novo review by this court. In addition, the records admitted through judicial notice were only those in which the rules of evidence had been applied. See Neb. Rev. Stat. § 43-279(1) (Reissue 2008) (rules of evidence applicable in adjudication proceedings).

Ultimately, we need not decide whether the juvenile court erred in taking judicial notice of the prior adjudication proceedings. Regardless of whether the juvenile court erred in taking judicial notice of the bill of exceptions from the prior adjudication hearing, David has not shown how he was prejudiced by the court's consideration of that evidence. Error without prejudice provides no ground for relief on appeal. *In re Interest of Tyler F.*, 276 Neb. 527, 755 N.W.2d 360 (2008). The operative amended petition upon which the children were adjudicated contains the same allegations against David as were found in the initial petition upon which evidence was presented during the course of the 2008 adjudication hearing. The only significant difference between the two petitions is the addition of the requisite ICWA language. At the previous adjudication hearing, David had the opportunity to cross-examine the State's witnesses and present evidence on his own behalf, and the record shows he took advantage of that opportunity. The rules of evidence controlled the receipt of evidence at the prior adjudication hearing. During the subsequent September 2009 adjudication hearing, David had the opportunity to present further evidence on his own behalf, and he again took advantage of that opportunity. David presented evidence attacking Tanya's credibility during the prior adjudication hearing and showing that he had received negative drug tests since February 2009. We also note that the same juvenile court judge presided over both adjudication hearings.

David has not shown how the result would have been different had the State been required to call the same witnesses and present the same evidence at the subsequent adjudication hearing as it did at the first adjudication hearing. Because David has not shown prejudice in connection with any error in the receipt of the record from the prior adjudication hearing, we find that David's assignment of error is without merit.

Other Evidentiary Rulings.

David takes issue with two additional evidentiary rulings made by the juvenile court. David asserts that the court erred in refusing to take judicial notice of one of its own records and in refusing to receive into evidence a certified copy of a district court order.

At the September 2009 adjudication hearing, David called Tanya to testify. During the course of Tanya's testimony, she was asked whether she had been under the influence of methamphetamine at the time of her testimony at the May 2008 hearing and answered that she had not. Later, David's attorney asked the court to take judicial notice of exhibit 59. Exhibit 59 is

a copy of a motion for change in visitation filed in September 2008 and the corresponding affidavit from an employee of the Department. The State made a hearsay objection to the exhibit, which was sustained by the court. The court stated that it was not proper to impeach Tanya's testimony with hearsay in the form of an affidavit of an individual who was not present and subject to cross-examination. The court further explained that its prior receipt of evidence by judicial notice came from the formal adjudication hearing where the rules of evidence applied, whereas exhibit 59 was not part of the adjudication record but was proffered at a dispositional hearing.

We find no error in the juvenile court's refusal to take judicial notice of exhibit 59. Because the rules of evidence are applicable in adjudication hearings, there needed to be some basis within the rules of evidence for receiving exhibit 59 into evidence. David does not argue that exhibit 59 should have been admitted under any other rule of evidence, and upon our de novo review of the record, we do not find any such basis for the admission of the exhibit. David's arguments relating to the exclusion of exhibit 59 from evidence are without merit.

David also argues that the juvenile court erred in excluding exhibit 55 from evidence. Exhibit 55 is a certified copy of an order in a district court proceeding denying an ex parte request for a harassment protection order, and it contains some statements from the district court about David's and Tanya's behavior relative to various protection order proceedings. The juvenile court excluded the same order from evidence in the 2008 adjudication hearing, reasoning that the exhibit did not indicate that a hearing was held or evidence received, and appeared to be based on only the opinion of the judge as to the parties' actions, which the juvenile court found was not relevant to the juvenile court proceeding. During the September 2009 adjudication hearing, the juvenile court again excluded the district court order from evidence as not being relevant and as being "unduly prejudicial."

In his argument, David notes that several exhibits received by the juvenile court in the 2008 adjudication hearing and judicially noticed by the court in the September 2009 adjudication hearing were copies of petitions for protection orders filed by Tanya. However, the exhibits referenced by David were all supported by affidavits from Tanya, who also testified at the prior adjudication hearing about her knowledge of the truth of the statements found within those exhibits. Because those exhibits related to the alleged domestic violence between David and Tanya, they were clearly relevant to the issues being adjudicated. A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009). We find no abuse of discretion in the juvenile court's exclusion of exhibit 55 from evidence. The statements found in exhibit 55, without supporting proof about the allegations involved in the denial of that protection order, have little to no bearing on the truth of the domestic violence allegations at issue in this case. David's arguments are without merit.

Standard of Proof.

Before addressing David's final assignment of error, we turn our consideration to the State's cross-appeal. The State asserts that the juvenile court erred in using "clear and convincing" as the standard of proof in adjudicating the children. We note that the court initially stated that it found counts II and III of the petition to be true by a preponderance of the evidence,

but that elsewhere in the adjudication order, it found these allegations against David to have been proved by clear and convincing evidence. In the portion of the court's order finding that the children were as defined by § 43-247(3)(a), the court made no reference to either standard of proof.

At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor child under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence. *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008); Neb. Rev. Stat. § 43-279.01(3) (Reissue 2008). Section 43-279.01(3) provides that in cases involving Indian children standards of proof for adjudication and for termination of parental rights "shall be in compliance with the Nebraska [ICWA], if applicable." This court recently addressed the burden of proof for an adjudication hearing in an ICWA case. See *In re Interest of Emma J.*, 18 Neb. App. 389, ___ N.W.2d ___ (2010). In that case, we determined that because the ICWA statutes did not contain language indicating a heightened or enhanced burden of proof for the adjudication phase, § 43-247(3)(a) requires that the State prove the allegations set forth in the petition by a preponderance of the evidence in cases involving both non-Indian and Indian children.

Adjudication.

David asserts that the juvenile court erred in taking jurisdiction of the children under § 43-247(3)(a) when there was insufficient evidence to support counts II and III of the operative petition. In the operative petition, the State alleged that since January 2007, David had been involved in physical or verbal domestic confrontations with Tanya in the presence of or vicinity of one or more of the children and that on one or more occasion since November 2007, David had been under the influence of methamphetamine while being the primary caretaker of one or more of the children, placing the children at risk of physical or emotional harm.

At the September 2009 adjudication hearing, in addition to the evidence judicially noticed by the court at the State's request, the court heard testimony from Tanya and another witness offered on David's behalf.

The evidence concerning the allegations of domestic violence included testimony of Tanya, Tanya's mother, and police officers who responded to a domestic assault call involving David and Tanya. Tanya testified about an incident occurring in the early morning hours of February 11, 2008, where David woke her up, became angry when she would not prepare food for him, and threw a can at her, causing a cut to her face. All three children were present in the residence at the time, and one child was in close proximity to Tanya on the bed at the time of the incident. Testimony from police officers who responded to the incident confirmed the injury received by Tanya as a result of the incident. David's response to the officers at the time of the incident was initially to deny throwing the can and then to claim that if it happened, he did not remember it. As a result of the February 2008 incident, both David and Tanya were jailed, David for the domestic assault and Tanya for violation of a protection order, and the children were placed with a relative. Both Tanya and her mother testified at length about ongoing domestic violence and conflict between David and Tanya during 2007 and early 2008, as well as in earlier years. Tanya's mother testified about a number of telephone calls she received from Tanya in 2007 with the children crying in the background and audible verbal threats of a serious and

violent nature being made by David toward Tanya. The evidence shows that Tanya expressed fear on many of these occasions and asked her mother to come get her and the children. Tanya's mother testified that the police were frequently called and that after they arrived, Tanya was often not allowed to leave with the children and David was not excluded from the residence because of the parties' marital status. David also made violent threats to Tanya's mother in the presence of the children. A representative of the Department testified that she overheard a violent threat made by David to Tanya's mother during a telephone conversation she had with Tanya's mother in February 2007. Tanya's mother testified that she had never seen David hit or strike Tanya but that she had seen bruises on Tanya.

Tanya also testified at length about the history of violence between herself and David, which frequently resulted in law enforcement intervention. The record shows that both David and Tanya sought, obtained, and vacated various protection orders against one another. David also sought and obtained a protection order on behalf of the children against Tanya. In her testimony, Tanya confirmed that the children were present on multiple occasions during fights between David and Tanya and that the children were demonstrably upset by these fights. Tanya noted, in particular, that the middle child cried a lot.

In reviewing the evidence relating to the domestic violence count, the juvenile court found the testimony of the officers about their response to the February 2008 domestic assault in the family home to be credible and corroborative in all ways of Tanya's testimony. The court also found it clear that David used the protection orders he obtained on behalf of the children to control Tanya's behavior and access to the children. The court found both Tanya and her mother to be essentially believable as witnesses. The court stated that their testimony did not appear exaggerated or embellished in any way and found their demeanor to be "notably resigned and somewhat matter of fact under the circumstances." Based upon the evidence presented, including the demeanor and credibility of Tanya and her mother while testifying under oath, the court found it clear that the children were frequently present during violent and threatening altercations between David and Tanya and were emotionally harmed by that exposure. The court concluded that the State had proved the allegations of the petition as to domestic violence relative to David.

The evidence offered in support of the allegations of David's drug use came from the testimony of Tanya and two caseworkers at the 2008 adjudication hearing. Both caseworkers raised concerns of drug usage with David, but he denied these concerns or stated that he had only used drugs in the past. Tanya testified that she had used methamphetamine with David 8 to 10 times in December 2007. Tanya testified that she saw or was aware of countless other times when David was under the influence of methamphetamine, including February 2008, when he was living with her and the children. Tanya testified that, having been with David for 8 years, she was familiar with the signs of his using or being under the influence of methamphetamine. The record shows that neither David nor Tanya made formal arrangements for Tanya's mother to have legal responsibility for the children in December 2007. Both testified that the children were frequently with them at least during parts of the day during this period.

The juvenile court found Tanya's testimony about her familiarity with the signs of David's methamphetamine use to be credible. Although the evidence was unclear whether the children were physically present at a time when David was under the influence of or using methamphetamine, the court found that the allegations of the petition about David's drug use and

its effect on the children were true even if the children were often at the residence of Tanya's mother during this period of his drug use. The court found it "neglectful parental behavior to place children in a relative's home so that the parent can use a highly dangerous and addictive controlled substance on a repeated basis over a month long period." The court found that David's use of methamphetamine during this period constituted an abdication of parental responsibility, at a time when one of the children was missing physical therapy appointments and the family's stability was precarious. Accordingly, the court found that the State had proved this count of the petition as it related to David.

David's arguments in support of this assignment of error consist of attacks on Tanya's credibility as a witness. The juvenile court found Tanya's testimony, as well as the testimony of various other witnesses, to be credible, and we consider and give weight to the fact that the court observed the witnesses and accepted one version of the facts over the other. See *In re Interest of Chance J.*, 279 Neb. 81, 776 N.W.2d 519 (2009). In our de novo review, we find that the State proved the allegations as to David of counts II and III of the operative petition by a preponderance of the evidence. Accordingly, the juvenile court did not err in taking jurisdiction of the children under § 43-247(3)(a).

CONCLUSION

David's assignments of error about various evidentiary issues are without merit. Upon our de novo review of the evidence, we find that the State proved counts II and III of the operative petition as to David by a preponderance of the evidence. Accordingly, the juvenile court properly took jurisdiction over the children.

AFFIRMED.