

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Ayodele F.,)
A child under 18 years of age.)
)
State of Nebraska,)
)
Appellee,)
)
v.)
)
Azibataram F.,)
)
Appellant.)

No. A-13-0601

**MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL**

FILED

JAN 27 2014

**CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS**

IRWIN, MOORE, and BISHOP, Judges.

MOORE, Judge.

INTRODUCTION

Azibataram F. (Azi) appeals from the order of the separate juvenile court for Douglas County which adjudicated her daughter, Ayodele F. Because we find that Azi was not denied due process and that there was sufficient evidence to adjudicate Ayodele and continue her out-of-home placement, we affirm. However, because the record does not support the juvenile court's finding that Azi had failed to protect Ayodele from inappropriate sexual contact, we reverse that finding as a basis for the adjudication.

BACKGROUND

Azi is the mother of Ayodele, who was born in February 2004 in the United States. Azi is originally from Nigeria and has



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lived in the United States since 2003. Ayodele's father lives in Nigeria and is not involved in this case. Azi is a licensed practical nurse (LPN) and has studied to be a registered nurse (RN). In addition to working as an LPN, Azi also works in retail at Wal-Mart. Azi is engaged to Richard M., whom she met in the winter of 2008. Azi and Ayodele lived in an apartment in Omaha from December 2005 until March 2012, at which time they moved into a house which Azi purchased. Richard moved into the house with them at that time and was still living in the house with Azi at the time of Azi's testimony in this case.

On November 1, 2012, the Child Protective Services hotline received information that Ayodele was not eating her school lunch. As a result, initial assessment workers with the Nebraska Department of Health and Human Services (the Department), visited Ayodele at school on November 7. Following this visit, law enforcement officers transported Ayodele to Project Harmony for a forensic interview.

On November 8, 2012 the State filed a petition in the juvenile court, alleging that Ayodele was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), due to the faults and habits of Azi, in that (A) Azi had subjected Ayodele to inappropriate physical discipline, (B) Azi had failed to protect Ayodele from inappropriate discipline, (C) Ayodele had been subjected to inappropriate threatening and discipline

detrimental to her welfare in the past by Richard, (D) Azi had failed to protect Ayodele from inappropriate sexual contact, (E) Azi had failed to provide safe, stable and/or appropriate housing for Ayodele, (F) Azi had failed to provide Ayodele with proper parental care and/or support, (G) Azi has failed to provide proper supervision for Ayodele, and (H) due to the above allegations, Ayodele was at risk for harm. Also on November 8, the State filed a motion for temporary custody supported by an affidavit for removal from the Department caseworker, Danyeale Schmidt. The court granted the removal request on November 8 and placed Ayodele in the custody of the Department for placement in foster care or other appropriate placement outside the family home.

An adjudication hearing was held on January 18, March 8 and 25, and June 11, 2013. During the course of the hearing, the juvenile court heard in-chambers testimony from Ayodele, testimony from two caseworkers for the Department and Azi, and received a copy of Ayodele's birth certificate into evidence. The court also received exhibit 1, a copy of the removal affidavit, into evidence during the course of the January 18 hearing. Later, during the March 8 hearing, the court vacated its ruling and excluded exhibit 1 from evidence.

Ayodele was 8 years old (almost 9) and in the third grade at the time of her in-chambers testimony. Ayodele described

"good touches" as hugs, kisses, and pats on the back and "bad touches" as hitting, spitting, slapping, disciplining, choking, and sometimes jabbing. Ayodele testified that Azi gives her bad touches when she has "bad days" and that bad days occur "any time Richard is home." Ayodele is sometimes scared of Richard because "he just get[s] so mad."

When Azi and Ayodele lived in the apartment, bad days included Richard whipping Ayodele with a leather belt. Ayodele testified about the "apartment accident," which involved Richard becoming angry with Ayodele for crying. Richard threatened to whip Ayodele with a studded belt, and then he lifted her up and put her in a choke hold. According to Ayodele, she blacked out and was frightened by the incident. After the incident, Azi implemented a rule that Richard not touch Ayodele. According to Ayodele, Richard eventually violated the rule and she told Azi about it. Ayodele testified that when Azi is not home, Ayodele and Richard still have bad days. Azi sometimes punishes Ayodele as well. Ayodele testified that when she was 4 years old, Azi hit her with a wooden spoon. She denied that Azi ever hit her with anything else.

Ayodele testified about being placed in the garage at the house for time outs and Richard's use of duct tape on her. Ayodele described an incident when she started crying and Richard pushed her down two staircases. Richard then carried her

to the garage and duct taped her mouth, hands, and feet. According to Ayodele, Richard places duct tape over her mouth whenever she is "being loud." Ayodele told Azi about the duct tape, but Azi told her it was okay for Richard to do this when she was "loud." According to Ayodele, when Richard places her in the garage, the lights are off and she is not allowed to leave until Richard calls her name or returns to check on her. Ayodele testified that she has been left in the garage for up to 3 hours at a time and that she is not allowed to use the bathroom. She denied there ever being a time when she could not "hold it" while in the garage. Ayodele told Azi about being sent to the garage, that it was dark, that she was sometimes in the garage for up to 3 hours, and that she was scared. According to Ayodele, Azi does not send her to the garage, but Azi said it was "okay" for Richard to do this.

Ayodele testified that she had only had a couple of good days with Richard. On good days, nothing bad happens and Ayodele is allowed to watch television and read books. Ayodele testified that she has not been allowed to watch television for 2 years. On some good days, Ayodele and Richard play checkers in bed. Ayodele testified that when they play checkers, Richard is wearing underwear and she is wearing "these short shorts that [she] call[s] [her] underwear." Ayodele testified that she has not told Azi about playing checkers with Richard and that she

does not want Azi to ever know about it. On other good days, Richard gives Ayodele "good touches," including kisses, holding hands, and hugs. Richard gives Ayodele "whisker kisses" by rubbing his beard on her cheeks. Ayodele testified that Richard never rubs her anywhere else. He does kiss her neck. Azi is aware of the "whisker kisses."

Schmidt received an intake regarding the family on November 1, 2012. Schmidt was familiar with the family because she had completed a prior assessment and investigated allegations of physical abuse in December 2011 when the family lived in the apartment. After receiving the current intake, Schmidt and another intake worker, Michele Hug, met with Ayodele at her school on November 7, 2012. The intake received by Schmidt reported that derogatory language used in the home was affecting Ayodele's eating at school and that cameras had been placed in the home to watch Ayodele's behaviors. At the November 7 meeting, Ayodele told Schmidt that there were cameras in the home and she reported physical abuse by Richard. Specifically, Ayodele reported the incident in which Richard shoved her down the stairs and tried to cover her mouth with duct tape. Ayodele told Schmidt that Richard asked her to keep the incident a secret but that she eventually told Azi about it. Schmidt also discussed good and bad touches with Ayodele, and Ayodele described good and bad days for Schmidt. Ayodele told Schmidt

that a bad day was when she was in trouble and that punishments included being locked in the garage or forced to sit in time out for long periods. Ayodele told Schmidt that on a "perfect day," she would get to play checkers with Richard in bed. Ayodele told Schmidt that when playing checkers, it was hot, so they would be in their underwear and that she would get sweaty and take her clothes off. Ayodele also told Schmidt that on a perfect day she would lay in bed with Richard, they would not have clothes on, and she would "comfort and hug him and they'd play around." She did not describe what she meant by playing around. Ayodele reported to Schmidt that Richard called her names, such as "jerk," "stupid," and "son of a bitch." Ayodele also reported that Richard had told her she was "a grown woman now." Following her interview with Ayodele at the school, Schmidt alerted law enforcement about Ayodele's disclosures, and officers transported Ayodele to Project Harmony.

Schmidt observed Ayodele's forensic interview at Project Harmony in a viewing room and talked with Ayodele toward the end of the interview. Schmidt testified that during the forensic interview, Ayodele talked about playing checkers in her underpants but did not report that she and Richard were naked in bed. During their conversation at the end of the forensic interview, Schmidt and Ayodele further discussed the game playing in the bedroom. Ayodele again told Schmidt that she and

Richard played checkers in their underwear and that the bedroom door was closed when this happens. During this discussion, Ayodele drew what appeared to be a penis on a piece of paper. The drawing occurred while the conversation was focused on Ayodele's interactions with Richard. Schmidt asked Ayodele what she was drawing, and Ayodele indicated something along the lines of "I don't know."

Schmidt also met with Azi at Project Harmony on November 7, 2012. Another caseworker, Michelle Hug, was present for this conversation with Azi. Schmidt discussed with Azi her concerns of potential inappropriate sexual contact between Richard and Ayodele. Azi told Schmidt she was aware that Ayodele and Richard played together in their underwear, which was something Azi said they did when it was hot outside. Azi did not express any concern about this activity. Schmidt also conveyed Ayodele's report that Richard "kisses her all over her body." Azi told Schmidt that she does not understand American culture where people hug and kiss all the time and that she thought it was not okay.

On November 9, 2012, Schmidt had a second meeting with Azi which took place in the family home. Richard, Hug, and a third case worker were also present for that meeting. At this meeting, Schmidt discussed both the concerns of inappropriate physical discipline and potential sexual contact. Azi again expressed

doubt about the occurrence of any sexual contact between Ayodele and Richard. She did tell Schmidt, however, that she often told Ayodele she was hugging Richard too much. Schmidt also discussed with Azi Ayodele's report to the forensic interviewer that her vaginal area was shaved. Azi confirmed that she shaved Ayodele's pubic area three times in the context of what she believed to be medical advice with respect to a urinary tract infection Ayodele had in January 2012. Schmidt did not recall having ever previously encountered a family in which the mother shaved a minor child's pubic hair for any reason.

Schmidt also testified about her concern with Azi and Richard's attitudes toward Ayodele and how they punished Ayodele. According to Schmidt, Azi and Richard blamed or "scapegoated" Ayodele for many things including their relationship issues and Azi's inability to pass the RN board exams. Azi reported that Ayodele was showing certain behaviors; including manipulation, sassing back, lying, taking too long to change her clothes, not eating quickly enough, and showing general disrespect towards Azi and Richard. Azi and Richard described disciplining Ayodele with time outs, including time outs in the garage with no lights on, and physical discipline. They told Schmidt that physical discipline was used if Ayodele was being extremely bad, for example, if she had harmed another child. Azi and Richard showed Schmidt a chart where they

recorded Ayodele's behaviors and time outs. One entry that drew Schmidt's attention was a notation that on one occasion, Ayodele was "[d]efiant, and also urinated on the garage floor." The chart also noted that Ayodele was not eating nutritious meals and "sneaking" food such as muffins, candies, and cookies. Azi and Richard told Schmidt that the behavior chart had been recommended by a therapist. Schmidt later spoke with the therapist who told her he did not recommend the chart. With respect to physical discipline, Azi reported spanking Ayodele with a wooden spoon or a flip flop. Richard reported an incident where Ayodele laid down in the hall and he spanked her with a belt. Schmidt testified that she did not ask Azi or Richard about the use of duct tape and she did not recall its use being documented on the behavior chart.

At the conclusion of her testimony, Schmidt expressed her opinion, based upon her education and investigation, that Ayodele would be at a high risk of harm if returned to the family home because Azi had shown a failure to protect Ayodele.

Azi testified about the 2011 investigation by Schmidt of allegations that Richard had strangled Ayodele. Azi did not believe Richard had strangled or choked Ayodele because the investigation was resolved as unfounded. Azi testified that Ayodele told her in October 2011, prior to Schmidt's investigation, that Richard had spanked Ayodele with his hand.

After learning this, Azi confronted Richard and implemented a no-touch rule. Azi stated that after implementing the no-touch rule, she never had any reason to know or suspect that Richard was disciplining Ayodele by any physical means. Azi testified that because of Ayodele's allegations in 2011, she did tell Ayodele that there were cameras in the house, that the police were watching them all the time, and that they always had to tell the truth. Azi agreed that due to her work schedule, Richard is the one to greet Ayodele when she gets home from school and that on some days, Richard is alone with Ayodele from 4 p.m. to midnight.

Azi testified that Ayodele is a gifted and talented child, but has behavioral problems that have been on-going since Ayodele was 2 years old. Azi took Ayodele to a counselor after her accusations against Richard in 2011. Azi reported learning positive reinforcement techniques from this counselor and testified that he told her to just ignore Ayodele if she acted inappropriately. Azi admitted to spanking Ayodele, and Azi believes that spanking is positive reinforcement. Azi and Richard saw another counselor in 2012 for relationship building and family enhancement.

Azi was asked about her use of physical discipline on Ayodele. She denied ever beating Ayodele with a shoe, flip flop, or spatula, but she admitted to spanking Ayodele with her hand

and to having swatted Ayodele with a wooden spoon, which Azi called the "whipping spoon" or "whooping spoon." Azi testified that she only used the spoon on Ayodele once, striking Ayodele three times over her clothing. Azi used the spoon because when she used her hand, Ayodele would walk away and say that it did not hurt. Azi testified that she used the spoon after receiving a call from the school that Ayodele had hurt another child at school. Although Azi denied using the spoon on additional occasions, she did testify that if Ayodele starts acting up, she tells her to remember the whipping spoon, and Ayodele stops. Azi also admitted to putting Ayodele in the garage for time outs, although Azi stated that the garage time outs did not happen often. According to Azi, Ayodele was only in the garage without lights on one occasion, and Ayodele urinated on the floor during one of these time outs because she was being defiant.

Azi acknowledged the 2011 allegations with respect to Richard and Ayodele, but she testified that she never had concerns with Richard's behavior around Ayodele after he moved into the house. She did not believe that anything unwholesome had ever happened between Richard and Ayodele. Azi testified that if she had knowledge of or suspected that Richard was doing anything inappropriate, she would contact law enforcement and would not allow Richard to continue being around Ayodele. Azi testified that "[r]ight now" she does not believe Ayodele's

allegations, does not believe that Richard put duct tape over Ayodele's mouth, does not believe that Richard spanked Ayodele after Azi initiated the no-touch rule, and does not believe that Richard choked, poked, or prodded Ayodele. Azi testified that she knew Richard and Ayodele played games together in their underclothes but testified that their playing never made her uncomfortable. Azi stated that Richard is just being a father to Ayodele. Azi testified about the differences between public displays of affection in Nigeria and the United States. Azi testified that she had no reason to believe or suspect that Richard kissed Ayodele all over her body and denied ever telling anyone that she had no concerns about Richard doing this. Azi defined the meaning of "underpants" in her home as being "a short that you wear at home" and also as "a little shirt" to be worn indoors. She described a bra and panties as "'way' underpants" or "really, really underpants." Azi admitted to shaving Ayodele's pubic area in early 2012 and testified that this was done on the advice of a physician's assistant (PA) who treated Ayodele for a urinary tract infection. According to Azi, the PA prescribed a cream and told her to shave the area for easier application of the cream.

The State presented rebuttal testimony from Hug. Hug's testimony was consistent with Schmidt's and for the sake of

brevity, we have not set forth the specific details of her testimony.

On June 13, 2013, the juvenile court entered an order adjudicating Ayodele. The court found the testimonies of Ayodele, Schmidt, and Hug to be individually credible, probative, and entitled to weight. The court found the allegations of the petition true by a preponderance of the evidence, adjudicated Ayodele as a child within the meaning of § 43-247(3)(a), and found that it would be in Ayodele's best interests to remain in the Department's custody in out-of-home placement. Azi subsequently perfected her appeal to this court.

ASSIGNMENTS OF ERROR

Azi asserts, restated, that she has been deprived of her constitutional rights and that the juvenile court erred in adjudicating Ayodele; erring specifically by (1) finding evidence of physical abuse, (2) finding evidence of sexual contact, (3) denying Azi's motion for directed verdict, (4) making a finding of fact based on exhibit 1, and (5) finding that Ayodele should continue in the Department's custody with placement outside of the parental home.

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. In

re *Interest of Justine J.*, 286 Neb. 250, 835 N.W.2d 674 (2013). 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. *Id.*

ANALYSIS

Due Process.

Azi asserts that she has been deprived of her constitutional rights, specifically, that "[t]he Process has Deprived and Continues to Deprive [Azi] of Her Constitutional Rights and is not in [Ayodele's] Best Interest."

The purpose of the adjudication phase is to protect the interests of the child. *In re Interest of Justine J.*, *supra*. The parents' rights are determined at the dispositional phase, not at the adjudication phase. *In re Interest of Andrew S.*, 14 Neb. App. 739, 714 N.W.2d 762 (2006). However, parents are entitled to due process in adjudication proceedings. *In re Heather R.*, 269 Neb. 653, 694 N.W.2d 659 (2005). Procedural due process requires notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and

a hearing before an impartial decisionmaker. *In re Interest of Landon H.*, 287 Neb. 105, ___ N.W.2d ___ (2013).

Azi's arguments in support of this assignment of error are difficult to follow, but she appears to argue that her rights were somehow violated by virtue of exhibit 1. As discussed further below, exhibit 1 was ultimately excluded from evidence, and we disagree with Azi's assertion that the juvenile court relied on exhibit 1 in adjudicating Ayodele. Azi was represented by counsel at all dates of the adjudication hearing. Her attorney cross-examined witnesses and presented evidence. He was clearly familiar with the contents of the forensic interview and thoroughly questioned witnesses who had knowledge of the interview. Azi does not effectively explain how her due process rights were violated, and in our de novo review, we find no due process violation. In many ways, Azi's arguments appear to attack the credibility of Schmidt's testimony. To the extent that her argument is one of credibility, we 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.*, 286 Neb. 250, 835 N.W.2d 674 (2013). Azi's assignment of error is without merit.

Adjudication.

Azi asserts that the juvenile court erred in adjudicating Ayodele and in specifically finding evidence of physical abuse

and sexual contact and denying her motion for directed verdict. The purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child and ensure the child's safety. *In re Interest of Taeven Z.*, 19 Neb. App. 831, 812 N.W.2d 313 (2012). When establishing that a child comes within the meaning of § 43-247(3)(a), it is not necessary for the State to prove that the child has actually suffered physical harm, only that there is a definite risk of future harm. *Id.* 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, and the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247. *Id.* While the State need not prove that the juvenile has actually suffered physical harm, at a minimum, the State must establish that without intervention, there is a definite risk of future harm. *Id.*

We agree with Azi that the State did not prove allegations of sexual contact between Richard and Ayodele. While there was evidence of some concerning activities, there was no evidence that either Richard or Azi touched Ayodele's sexual or intimate parts or the clothing covering those parts for the purpose of sexual arousal or gratification. See Neb. Rev. Stat. § 28-318(5)

(Cum. Supp. 2012). Accordingly, we reverse the juvenile court's finding that the State proved count D of the petition by a preponderance of the evidence.

Nonetheless, the State did prove the remaining allegations of the petition by a preponderance of the evidence. The record shows that Ayodele has been subjected to verbal abuse and inappropriate physical discipline. Azi has administered physical discipline in the nature of spanking with a "whipping spoon" and Azi believes that spanking is positive reinforcement. Ayodele testified that Richard has choked her until she blacked out, has pushed her down stairs, and has duct-taped her mouth, hands, and feet. Ayodele is sent to the garage, in the dark, for lengthy time out sessions. Ayodele is afraid of Richard and the conditions in the home have affected her eating at school. Azi does not believe much of Ayodele's testimony, although Azi admits to use of a behavior chart and time-outs in the garage, in addition to spankings. The record shows that Azi is not always home to observe Ayodele and Richard due to Azi's work schedule. We recognize that Azi provided conflicting testimony, but we consider and give weight to the fact the juvenile court specifically credited the testimony of Ayodele, Schmidt, and Hug. See *In re Interest of Justine J.*, 286 Neb. 250, 835 N.W.2d 674 (2013). Accordingly, the court did not err in adjudicating Ayodele or in denying Azi's motion for directed verdict.

Exhibit 1.

Azi asserts that the juvenile court erred in making a finding of fact based on exhibit 1, the removal affidavit. The court initially admitted exhibit 1 into evidence during the January 18, 2013 hearing over hearsay, best evidence, and relevancy objections from Azi's attorney. The court received the exhibit only for statements by Azi to Schmidt, the author of the exhibit. During the course of the March 8 hearing, the court reversed its decision and excluded the exhibit from evidence. Azi's assignment of error specifically relates to the court's finding in the adjudication order that count D of the petition, "insofar as [Azi] failing to protect [Ayodele] from her boyfriend Ric[hard] as set forth in exhibit 1," was true by a preponderance of the evidence. We do not read this as a finding in reliance on exhibit 1, but rather, as a somewhat awkwardly worded finding that the court found sufficient properly admitted evidence to support the allegations of count D of the petition. Even if the court did rely on exhibit 1 in making this finding, we have not considered it in our de novo review, and as set forth above, we have reversed the court's finding that the State proved the allegations of count D. Azi's assignment of error is without merit.

Out-of-Home Placement.

Azi asserts that the juvenile court erred in finding that Ayodele should continue in the Department's custody with placement outside the parental home. We have already determined that the juvenile court did not err in determining that Ayodele was a child within the meaning of § 43-247(3)(a). The juvenile court has broad discretion as to the disposition and placement of children who are adjudicated as abused or neglected under § 43-247(3)(a). See *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012); *In re Interest of P.L.*, 236 Neb. 581, 462 N.W.2d 432 (1990). Upon our de novo review, we find that the court did not err in determining that Ayodele should remain in the custody of the Department with placement outside of the parental home.

CONCLUSION

Azi was not denied her due process rights. The juvenile court did not err in adjudicating Ayodele. While we reverse the court's finding with respect to count D of the petition, we affirm the adjudication order in all other respects.

REVERSED IN PART AND AFFIRMED IN PART.