

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Kade T.,)
Ryder S., Javen D.)
Children under 18 years of age.)
)
State of Nebraska,)
)
Appellee,)
)
v.)
)
Kathy S.,)
)
Appellant.)

Nos. A-11-784,
A-11-785, A-11-786

**MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL**

FILED

MAY 29 2012

MOORE, SIEVERS, and PIRTLE, Judges.

MOORE, Judge.

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

INTRODUCTION

Kathy S. appeals from an order of the Scotts Bluff County Court, sitting as a juvenile court, which adjudicated her minor children as juveniles within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Because the juvenile court did not err in adjudicating the children as juveniles within the meaning of § 43-247(3)(a), we affirm.

BACKGROUND

Kathy is the biological mother of Kade T., born May 29, 2001; Javen D., born January 16, 2006; and Ryder S., born January 8, 2009. Kathy had been involved with Shawn H. off and



on for over two years prior to the adjudication hearing in this case. Kathy and Shawn have no children together, but Shawn has stood in a parental role to all three children. The children's biological fathers are not involved in the present appeal. The children were removed from Kathy's home on April 8, 2011, and since the end of May, they have resided with Kathy's parents.

On April 8, 2011, the State filed a petition in the juvenile court alleging that Kade was a juvenile within the meaning of § 43-247(3)(a) due to Kathy's involvement in a violent relationship with Shawn. The State set forth specific allegations, including certain instances of domestic violence between Kathy and Shawn and Kade's reports of seeing drugs in the family home. The State filed a petition in Javen's case on April 8 and an amended petition in Ryder's case on April 18, setting forth identical allegations about the violent relationship between Kathy and Shawn and reports of drugs in the home.

An adjudication hearing was held in all three cases on August 15, 2011. Evidence admitted at the hearing reflects a history of domestic violence between Kathy and Shawn.

The record shows that on February 14, 2010, the Scottsbluff Communications Center received a 911 call from Kathy, who reported that Shawn "beat the crap out of me." The police officer who responded to the call observed that Kathy was very

upset, was crying, and had bruises on her neck and face. Kathy reported that Shawn had become angry with her, beat her, broke various items in the apartment, and held her down and choked her. The officer's observations at the scene were consistent with the information provided by Kathy, who also reported that Shawn had assaulted her before.

Criminal charges were filed as a result of the February 14, 2010, incident, but Kathy refused to testify and on March 4, she submitted an affidavit in the criminal case in which she recanted her initial report. Shawn plead no contest to an amended complaint and was convicted of attempted third degree domestic assault and disturbing the peace.

On June 4, 2010, Kathy submitted a petition and affidavit to obtain a domestic abuse protection order to the district court outlining a pattern of violent behavior by Shawn. Specifically, she stated in her affidavit that on June 3, he came to her house, acted like he was going to hit her on the side of the head with a boot, then grabbed her throat and told her that when he saw her on the street she was a "dead bitch." Kathy stated that on May 26, Shawn came to her house drunk, called her names, hit her in the face, and choked her. Kathy stated that on May 15, she had to go to a friend's house because Shawn would not leave her alone and that she awoke to text messages from Shawn indicating that he had followed her and

flattened her tires. Kathy also stated in her affidavit that Shawn stalks, harasses, and threatens her; that he is controlling; that she could not sleep because she was afraid of him; and that her children "see everything he says and does and I refuse, for my kids, to have to go through all his drama 'cuz my kids deserve better and so do I."

The district court granted Kathy's request for a protection order on June 4, 2010, and the order was served personally on Shawn on June 15. On June 19, Shawn was charged with possession of marijuana and violating the protection order. He pled guilty to both charges and was sentenced to a fine and 3 days in jail.

On August 5, 2010, Kathy filed a motion in the district court, seeking to vacate the June 2010 protection order. In her motion, she stated, "We, meaning my kids and I, would like to have contact with Shawn. He is like a dad to my kids and we would like to return to being a family." The court denied Kathy's motion, stating that the application for a protection order had alleged multiple incidents of physical abuse and finding that the motion to vacate contained no factual allegations which would support dismissal. Kathy filed a second motion seeking to vacate the June 2010 protection order on March 7, 2011. In her second motion, she stated:

Shawn and I have been together for about 6 months now. We are both clean and staying out of trouble. Shawn has been

working and helping me with my kids. We have both changed and no longer led [sic] the life we used to. Shawn has changed and has not been violent at all.

The court dismissed the second motion because Shawn failed to appear.

Two incidents occurred in March 2011. First, on March 5, an officer with the Gering Police Department pulled over a vehicle for littering. The officer identified the driver as Kathy and the front passenger as Shawn. Ryder and Shawn's two sons were also present in the car. The officer arrested Shawn for violation of the protection order. Then on March 17, Kathy reported to a Gering police officer that Shawn had called and threatened her, stating that he was going to slice her throat. Upon completing his investigation, the officer requested that Shawn be charged with a protection order violation.

On March 30, 2011, a preliminary hearing was conducted on the two cases arising out of the March incidents. At the hearing, Kathy testified that she did not want Shawn prosecuted and that they had been together for a long time. Kathy testified that on March 5, she was with Shawn voluntarily and her youngest son was there. Kathy admitted that there has been violence between her and Shawn in the past but that when charges were filed she testified on his behalf. Kathy further testified that she lied to police about Shawn threatening to slice her throat.

On April 7, Kathy wrote a letter to the district court requesting that Shawn's bond be set "as low as possible." Kathy stated, "He has stood by my side . . . I want to continue to stand by his side. . . . We love each other--what more can I say!" She also wrote a letter to the court for sentencing, expressing her commitment to Shawn. Shawn pled guilty to a second offense protection order violation in connection with the March 5 incident, and the second case was dropped. As of the date of the adjudication hearing in the juvenile court, Kathy remained aligned with Shawn.

At the adjudication hearing, 10-year-old Kade testified that Shawn had lived off and on with Kade, his brothers, and Kathy. Kade described being scared when Shawn got mad and being physically hurt when Shawn hit him on the buttocks. He testified that Shawn hit him and his brothers hard enough to leave marks and bruises which lasted for a couple of days. Kade agreed that when Shawn yelled at or spanked him and his brothers they had gotten in trouble and deserved to be reprimanded. Kade described feeling afraid for Kathy because he could hear Shawn yell at her. Kade never saw Shawn hit, push, shove, or choke Kathy. Kade testified that he did not feel that he, his brothers, or Kathy were safe when Shawn was living in the home with them. Kade did not tell anyone he was afraid of Shawn because he was afraid he would be removed from Kathy's house. During his testimony, Kade

cried hard enough that the next witness had to wipe his tears off of the witness stand.

Several witnesses corroborated Kade's testimony that he was afraid of Shawn. Kathy's father testified that Kade told him he did not like Shawn and admitted that Kade is afraid of Shawn because of Shawn's physical abuse of Kathy including choking and hitting her. Kade also mentioned the strangulation incident to Javen's biological grandmother, who is a teacher's aide working in the library at the Scottsbluff schools. Kathy's testimony also confirmed that Kade does not like Shawn. Kathy testified that she knows Kade is afraid of Shawn, that she knows when Kade speaks of Shawn he becomes tearful and sad, but that she still hopes to continue her relationship with Shawn. Kathy has gotten counseling for Kade to try to address his feelings. Other witnesses testified that they had never seen any signs of Kade or Javen being physically abused and that Kade and Javen had never expressed any concerns about their treatment at home.

Lisa Bell, a family and children services specialist with the Nebraska Department of Health and Human Services, conducted the Department's initial assessment regarding the safety of the children in March 2011. At that time, all three of the children were living in the home. The March 2011 intake reported concerns of extensive domestic violence between Shawn and Kathy, Shawn's 2010 arrest for strangling and assaulting Kathy and Kathy's

testimony on his behalf, Shawn's violations of the protection order and Ryder's presence in the vehicle during one of those incidents, a previous removal of Kade and Javen from Kathy's care due to her drug use, Shawn's excessive violent history and criminal history with other women, and Kade's concerns about Shawn's actions toward the children and Kathy. Bell had contact with Kade on two occasions. During those times, Kade presented as a typical little boy; however, when Shawn was mentioned, he became emotional, started crying, and expressed his fear of Shawn. Bell testified that Kade was traumatized just at the mention of Shawn's name.

Witnesses presented by Kathy also corroborated the history of domestic violence between Kathy and Shawn. Kathy's mother admitted she had concerns about Shawn being around her grandchildren before the past year and also admitted that Kade and Javen had been in her care previously through another juvenile case. Kathy's father testified that he had concerns as recently as 2011 when Kathy reported that Shawn called and said he was going to slice her throat. But when asked if he would report safety concerns regarding the children to the authorities, he testified that he would probably report any such concerns but that it "would depend upon the . . . type of thing, you know."

At the adjudication hearing, Kathy described her health as "[n]ot good." According to Kathy, she has been diagnosed as bipolar, has "OCD and ADD," and has back problems and a few other health problems. She testified that during the February 2010 domestic violence incident, she pushed Shawn and they had a "mutual fight." According to Kathy, she received the marks on her neck when Shawn held her down because she would not stop hitting him and that he choked her out of revenge. She admitted that Ryder was present when this incident occurred and that a chair and bookcase were broken during the incident. Kathy testified that she signed the affidavit she submitted in her application for the protection order "[o]ut of anger" and insisted again that the fight had been mutual. Kathy admitted that she and Shawn were together when Shawn was arrested for the February 2010 assault, that Shawn harassed her between February and March, that he came to her house in June holding a boot as if he were going to hit her with it, and that in May he called and threatened to slash her tires. Kathy testified that the report from March 17, 2011, that Shawn threatened to slice her throat was untrue and that she made the report because she was mad at Shawn. On cross-examination, Kathy admitted that her statement in the affidavit for the protection order that her children "have been there and they see everything [Shawn] says and does" was true "in general." She agreed that at the time she

completed the affidavit, she had been concerned for her children's safety because of Shawn's behavior.

On August 15, 2011, the juvenile court entered orders adjudicating all three children. The court found no evidence of drug use or possession by Kathy or Shawn, but it found that all other allegations of the juvenile petitions had been proven by a preponderance of the evidence. The court observed that the family dynamics are chaotic and involve violent relationships. Specifically, the court stated:

[Kathy's] testimony since she originally reported the abuse and subsequent protection orders [is] riddled with inconsistencies which point to an attempt to minimize and, in some instances, completely deny [Shawn's] violent attacks. [Kathy] appears willing to say whatever she thinks will give her the best chance to continue her relationship with [Shawn] and, at the same time, be a mother to her children. Her testimony is not credible.

Kade's testimony was very credible. Visual observations by the court reflect a nervous and scared boy. His testimony did not appear to be contrived or practiced.

Kathy subsequently perfected her appeal to this court.

ASSIGNMENT OF ERROR

Kathy asserts that the juvenile court erred in finding that all allegations of the petition, other than the drug allegations, were proven by a preponderance of the evidence.

STANDARD OF REVIEW

An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Elizabeth S.*, 282 Neb. 1015, 809 N.W.2d 495 (2012). An appellate court reviews questions of law independently of the juvenile court's conclusions. *Id.*

ANALYSIS

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 Taeven Z.*, 19 Neb. App. 831, ___ N.W.2d ___ (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.*

The record in this case firmly establishes a history of domestic violence between Kathy and Shawn and Kathy's intention to continue her relationship with Shawn. Kathy attempts to minimize and discount the violence occurring in the relationship, but regardless of whether the February 2010 incident was instigated by Shawn or was a "mutual fight" between the parties, it has clearly had an impact on Kade, who is afraid of Shawn and fearful for the safety of himself, his mother, and his brothers. The juvenile court found Kade's testimony persuasive and credible and found Kathy's 911 call and affidavit in support of the protection order application more credible than Kathy's later attempts to downplay and negate her reports of those incidents. The court noted the unusual circumstances of the adjudication hearing where he had "the parents of a victim testify for the perpetrator without even knowing his past or the things . . . he has been involved in." The court noted that Shawn's criminal records admitted into evidence at the hearing showed a history of serious convictions for violence, drugs, weapons, and false reporting. The court recognized Shawn's past disregard for court orders reflected in his convictions for driving under suspension and protection order violations, stating that the circumstances of this case show "an extremely unhealthy and dangerous situation for these children." The court observed that Kathy's judgment as to "the protection of her

children is very clouded and is more bent on her own relationship" with Shawn. The juvenile court's observations are supported by our own de novo review of the record. Kade has already suffered emotional harm due to the relationship between Kathy and Shawn, and Kathy's stated intention to continue her relationship places the children at further risk for both emotional and physical harm. We find no error in the court's decision to adjudicate the children as juveniles under § 43-247(3)(a).

CONCLUSION

The juvenile court did not err in adjudicating the children as juveniles within the meaning of § 43-247(3)(a).

AFFIRMED.