

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF MANUEL C.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
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IN RE INTEREST OF MANUEL C., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLANT,

V.

JESUS C., APPELLEE.

Filed January 5, 2010. No. A-09-767.

Appeal from the Separate Juvenile Court of Douglas County: CHRISTOPHER KELLY,
Judge. Reversed and remanded with directions.

Donald W. Kleine, Douglas County Attorney, and David M. Wear for appellant.

Thomas C. Riley, Douglas County Public Defender, Ashley R. Trankle, and Jeanine E.
Creighton for appellee.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

The State appeals from an order of the juvenile court for Douglas County dismissing the State's petition after finding that the State failed to prove by a preponderance of the evidence that Manuel C. came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). After reviewing the record, we conclude there was sufficient evidence to support the finding that the court had jurisdiction over Manuel under § 43-247(3)(a), and therefore, we reverse, and remand with directions.

BACKGROUND

On April 14, 2009, the State filed a petition alleging that Manuel came within the meaning of § 43-247(3)(a), being under the age of 18 years and lacking proper parental care by

reason of the faults or habits of his father, Jesus C., in that on April 13, Jesus subjected Manuel to inappropriate and/or excessive physical contact or discipline; Jesus has failed to provide Manuel with proper parental care, support, and/or supervision; and due to the above allegations, Manuel is at risk for harm.

A hearing on the State's petition was held on July 7, 2009. Jesus is the father of Manuel, born in August 1995. Manuel testified that on April 13, he got into an argument with his father at home. Manuel stated that he and his father began to argue when Manuel's parents and uncle wanted him to fill out papers for Boys Town and Manuel refused. Manuel stated that his uncle then stated that "if you were my kid, I'd hit you already." Manuel stated that he then left the house and walked toward Hanscom Park, which is approximately 5 minutes away.

Manuel stated that his father called out to him and that he continued to walk. Manuel stated that his father caught up with him and that they continued to argue. Manuel stated that at one point his father grabbed his shoulder and tried to pull him back. Manuel testified that he pushed his father away and continued to walk. Manuel testified that his father then picked up a cable, much like an extension cord, off of the ground and hit him four or five times. Manuel testified that his father hit him with the cable on his arm, back, and head. Manuel stated that his father stopped hitting him when a man walking by yelled out "hey."

Manuel stated that the police arrived a few minutes later and that he was taken to Project Harmony. Manuel stated that while at Project Harmony, a woman took pictures of his injuries. The State offered into evidence 18 pictures showing Manuel's injuries.

Manuel testified that this was the first time his father had hit him and that his father usually disciplined him by taking his telephone away. Manuel also stated that there was a rule in his home that he must tell his parents where he was going, but that he failed to tell his parents he was going to the park.

Officer Jeremy Kerwin of the Omaha Police Department testified that while on duty on April 13, 2009, he received a radio call regarding a disturbance in Hanscom Park. Kerwin stated that when he arrived at the park, Manuel's father and uncle were standing above Manuel who was lying on the ground crying. Kerwin stated that when he asked Jesus what had happened, Jesus stated that he was trying to stop Manuel from running away from home. Kerwin observed marks on Manuel's body that appeared consistent with marks made from an extension cord that Jesus was holding. Kerwin decided to place Manuel in protective custody and transported Manuel to Project Harmony. Kerwin testified that based on his education, training, experience, and involvement in Manuel's case, including his observations of Manuel's injuries, Manuel was at risk for harm at the time he was taken into protective custody. Kerwin testified that he believed Manuel was at risk for harm because of the manner in which Jesus had disciplined Manuel.

Katherine Johnson, an initial assessment worker for the Department of Health and Human Services, testified that she received a referral for Manuel on April 13, 2009. Johnson testified that she interviewed Manuel and his parents. Johnson stated that she observed a cut on Manuel's forehead and two dark bruises on Manuel's arm. Johnson stated that Manuel told her that he and his father got into an argument and that his father hit him with an extension cord, causing the marks.

Johnson testified that Jesus also told her that he and Manuel argued and that afterward, Manuel left the house. Johnson stated that Jesus told her that he followed Manuel and attempted to “pull him home” but that Manuel hit him. Jesus told Johnson that he then picked up a cord from the ground and began hitting Manuel with the cord. Johnson testified that based on her education, training, experience, and her investigation into the actions Jesus took in regard to Manuel, there was a risk of harm if Manuel was allowed to remain or return to the care, custody, and control of his father.

On July 21, 2009, the trial court filed an order, dismissing the State’s petition, after finding that the State had failed to prove the allegations in its petition by a preponderance of the evidence. The State appeals.

ASSIGNMENTS OF ERROR

On appeal, the State argues that the juvenile court erred in finding that the State did not prove by a preponderance of the evidence that Manuel came within the meaning of § 43-247(3)(a).

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 Shayla H. et al.*, 17 Neb. App. 436, 764 N.W.2d 119 (2009).

When the evidence is in conflict, however, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of the facts over the other. *Id.*

ANALYSIS

The State argues that the juvenile court erred in finding that Manuel did not come within the meaning of § 43-247(3)(a) because of Jesus’ inappropriate and excessive physical contact or discipline of Manuel.

In obtaining jurisdiction over a juvenile, “[A] 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[(3)(a)].” *In re Interest of Rebekah T. et al.*, 11 Neb. App. 507, 514, 654 N.W.2d 744, 750 (2002). In order for the juvenile court to assume jurisdiction over the minor child at the adjudication, the State must first prove the facts alleged in the petition by a preponderance of the evidence. *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004). See, also, Neb. Rev. Stat. § 43-279.01(3) (Reissue 2008). Ultimately, the purpose of the adjudication phase is to protect the interest of the child and ensure the child’s safety. *In re Interest of Rebekah T. et al., supra.* 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. *In re Interest of Brianna B. & Shelby B.*, 9 Neb. App. 529, 614 N.W.2d 790 (2000).

In its petition, the State alleged that Manuel came within the meaning of § 43-247(3)(a) because he lacked proper parental care by reason of the faults or habits of his father. The State alleged that Jesus subjected Manuel to inappropriate and/or excessive physical contact or

discipline; that Jesus failed to provide Manuel with proper parental care, support, and/or supervision; and that due to the above allegations, Manuel is at risk for harm.

In finding that the State failed to prove the allegations in its petition, the trial court found that the marks inflicted upon Manuel by Jesus were significant. The trial court noted that Jesus hit Manuel hard and in numerous vulnerable places on his body. The court stated that it was significant that Manuel testified that his father had not previously struck him physically. The court found that Jesus provides Manuel with proper parental care, support, and/or supervision and that it was Jesus' caring that led to the incident on April 13, 2009. The court based its decision on *In re Interest of D.S.*, 232 Neb. 345, 440 N.W.2d 477 (1989).

In *In re Interest of D.S.*, the State brought an action to adjudicate a 14-year-old girl, D.S., as lacking proper parental care by reason of the faults or habits of her mother. The juvenile court adjudicated D.S. under § 43-247(3)(a) (Reissue 1988). The mother appealed. The Nebraska Supreme Court reversed, stating that the State failed to prove that D.S. lacked proper parental care by reason of the fault or habits of her mother based solely on an isolated incident in which D.S.' mother hit her with a miniature replica of a baseball bat.

Specifically, the record showed that D.S.' mother was often absent from the home for periods of time because of work and school. As a result, D.S. was often left in charge of the house and was required to babysit her younger brother. D.S.' mother had a longstanding rule that when she was gone, D.S. could not have her boyfriend in the house. On the occasions when D.S. broke the rule, D.S.' mother grounded D.S. and confined her to her room or required her to do more housework as punishment.

On May 11, 1988, D.S. invited her boyfriend to the house while her mother was gone and D.S. and her boyfriend engaged in sexual intercourse. When D.S.' mother arrived home, she grabbed D.S. by the arm and with a wooden bat, approximately a foot long, she hit D.S. three or four times above the knee causing some marks which became "bluish." The record did not show that D.S. received any medical treatment for her injuries. The next day at school, one of D.S.' teachers noticed the marks on D.S.' legs. D.S. stated that she was shocked that her mother hit her because previously her mother had done little more than slap her on the hand.

In reversing the trial court's judgment, the Supreme Court stated:

The specter of child-battering by a baseball bat, hyperbolically alleged in the State's petition, paled and then vanished in the light of testimony or disappeared into the dark depths of unproved allegations. If merely parental frustration and confusion in rearing an adolescent were blameworthy bases to bring a child within the purview of the Nebraska Juvenile Code, a greater number of parents would find themselves exposed to governmental intrusion into raising their children.

232 Neb. at 348, 440 N.W.2d at 479-80.

After finding that the State failed to establish that D.S. lacked proper parental care by reason of the fault or habits of her mother, the trial court reversed the judgment of the juvenile court and remanded the cause to the juvenile court with directions to dismiss the State's petition.

In contrast, in the instant case, the State offered 18 pictures of the injuries inflicted upon Manuel by his father. Those photographs show that Manuel's father hit Manuel multiple times

with an electrical cord which resulted in serious bruising to his arm, back, and head. As the trial court noted, the marks inflicted upon Manuel by his father were significant.

As previously noted, 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. *In re Interest of Brianna B. & Shelby B., supra*. In this case, unlike *In re Interest of D.S., supra*, the State not only showed by a preponderance of the evidence that Manuel had already suffered physical harm at the hands of his father, but the State also proved, by a preponderance of the evidence, that Manuel was at risk for future harm.

Kerwin testified that after he arrived at Hanscom Park and talked to Manuel and his father, he decided to place Manuel in protective custody and transported Manuel to Project Harmony. Kerwin testified that based on his education, training, experience, and his investigation into Manuel's injuries, Manuel was at risk of harm by his father at the time he was taken into protective custody. Kerwin testified that he believed that Manuel was at risk for harm because of how Jesus disciplined Manuel.

Johnson also testified that based on her education, training, experience, and her investigation into the marks inflicted by Jesus upon Manuel, there was a risk for harm to Manuel if Manuel was allowed to remain or return to the care, custody, and control of his father.

For all of the above reasons, we conclude, after a de novo review of the record, that the trial court erred in failing to find that the State had proved the allegations in its petition by a preponderance of the evidence. The record shows that the State proved that Manuel is a child who lacks proper parental care by reason of the fault or habits of his father.

CONCLUSION

After reviewing the record, we conclude that the juvenile court erred in finding that the State failed to prove that Manuel came within the meaning of § 43-247(3)(a) (Reissue 2008). Therefore, we reverse the judgment of the juvenile court and remand the cause with directions to find that Manuel is a child within the meaning of § 43-247(3)(a).

REVERSED AND REMANDED WITH DIRECTIONS.