

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Nevaeh M.,)
a child under age years of age.)
State of Nebraska,)
Appellee,)
v.)
Amber M.,)
Appellant.)

No. A-12-0373

MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL

FILED

APR 24 2013

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

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

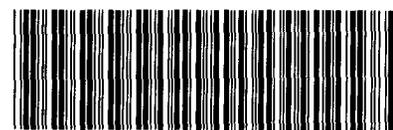
INBODY, Chief Judge.

INTRODUCTION

Amber M., the biological mother of Nevaeh M., appeals the order of the Douglas County Separate Juvenile Court adjudicating Nevaeh a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). For the following reasons, we affirm the decision of the juvenile court.

STATEMENT OF FACTS

On June 10, 2010, the State filed a petition and motion for temporary custody of Nevaeh based upon a police officer's affidavit indicating that J.C., an 11-year-old girl, was involved a sexual relationship with Amber, who was 23 years old at that time. The petition alleged that Amber subjected the child, under the age of 12, to inappropriate sexual contact and



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was found mentally incompetent to stand trial on charges of first degree sexual assault of a child and attempted kidnapping, all of which placed Nevaeh at risk of harm as a child within the meaning of § 43-247(3)(a). A detention hearing was held, after which Nevaeh was placed in the temporary custody of the Nebraska Department of Health and Human Services (DHHS) with placement to exclude Amber's and Susan Greene, Amber's mother's home. Numerous pretrial motions were filed, including an appeal to this court, which was dismissed for lack of jurisdiction. See *In re Interest of Nevaeh M.*, case No. A-10-826.

The adjudication hearing took place in conjunction with motions for placement of Nevaeh with Amber and/or Susan over numerous days and months, and included the testimony of numerous individuals. The issue of placement is not before this court on appeal and, as such, in the interest of judicial economy, any testimony or evidence adduced for that purpose will not be discussed unless it also pertains to the adjudication of Nevaeh as a child within the meaning of § 43-247(3)(a).

J.C. testified that she is 13 years old and in the seventh grade. J.C. indicated that she used to be friends with A.S., who is Amber's niece and also lives with Amber and Susan. J.C. first met Amber when J.C. was in the fourth grade. J.C. explained that she first did not speak with Amber much and thought of her like an "auntie," but later the two "started liking each other." J.C.

testified that she spent lots of time at Susan's home with J.S. and that Nevaeh was always there with Amber, who would watch the girls while Susan was out of the house. J.C. indicated that Amber began to write J.C. notes in a notebook and the two began writing each other back and forth. Amber wrote to J.C. that she was beautiful and that she was starting to have feelings for her. J.C. testified that she and A.S. would sleep in Amber's bed with her and Amber began to sleep with her arm around J.C.'s waist. J.C. indicated that A.S., herself, Nevaeh and sometimes Amber's other niece, D.S., would all sleep together in Amber's bed. J.C. testified that the first time Amber touched her was when Amber, J.C., and D.S. were playing truth or dare in Amber's room and Amber was dared to "lick [J.C.'s] private part and so she did." J.C. clarified that Amber licked on the outside of her vagina, and that Amber did it again on another occasion. During both of those occasions, Nevaeh was in the living room with Susan.

J.C. testified that on another occasion, A.S. had a sleepover with numerous friends and they were all watching a movie together with Amber. J.C. sat with Amber on the floor under a blanket and Amber reached inside of J.C.'s underwear and touched her vagina. On other occasions, Amber provided J.C. with alcoholic beverages such as vodka and Jack Daniels. Amber, J.C., A.S., and D.S. also watched pornographic DVD's together in

Amber's room. J.C. testified that she and Amber often talked about J.C.'s age and the difference between the two, but that they believed that "[a]ge isn't nothing but a number." J.C. and Amber often talked about running away together. J.C. testified that Amber told her not to tell anyone of their relationship because Amber did not want to go to jail.

During the course of the adjudication proceedings, A.S. also testified. A.S. testified that she lived with Susan and Amber, shared a bedroom with Nevaeh, and spent lots of time with her before Nevaeh was removed from the home. Contrary to J.C.'s testimony, A.S. testified that Amber did not give the girls alcohol, and that while they did sleep in Amber's room, Amber always slept in A.S.'s room instead of her own where the girls were sleeping. A.S. testified that Amber never slept in the same room as D.S., J.C., or herself and that Nevaeh slept in the same room as Amber. A.S. testified that she never saw Amber try to touch or kiss J.C., but that she did observe J.C. trying to kiss Amber. A.S. also testified that she watched pornographic materials at J.C.'s home and not at Susan's home, although she had seen pornographic materials in Susan's boyfriend's van.

Susan testified that A.S. has lived with her since she was 2 years old and that Nevaeh has lived in her home for her whole life and that she, Susan, was Nevaeh's primary caretaker. Susan testified that she receives Social Security disability income

for a blood disorder and epilepsy. Susan testified that she has three daughters, including Amber, and that they each have a mental disorder. Susan testified that one daughter has bipolar disease, another is schizophrenic, and that Amber has "mental retardation." Susan explained that Amber also suffered from hearing problems and recently underwent surgery to correct some of her hearing problems. Susan testified that Amber had been in special education classes "all her life" and that she had a guardianship over Amber and was also her representative payee.

Susan testified that she has seen "the girls" holding hands and kiss on the cheek, but did not believe that it was an inappropriate touch or kiss. Susan indicated that she was not immediately aware of the girls playing truth or dare, until after Amber was arrested, but eventually D.S. and A.S. told her that it had been going on and immediately Susan no longer allowed D.S. or J.C. in the home and sought out therapy for A.S. Susan also explained that Amber had indicated that J.C. had attempted to kiss Amber while Amber was in bed and that Amber knew that it was inappropriate behavior.

Detective Sarah Spizzirri with the Omaha Police Department testified that she was assigned to investigate J.C.'s case in April 2009. Spizzirri received information regarding the alleged sexual assault of J.C. by Amber. J.C. relayed much of the information as accounted for above, at which time Spizzirri and

another detective assisted J.C. with a one-party consent telephone call between J.C. and Amber, during which Amber admitted to all of the allegations, including having oral sex with J.C. Later that same day, Spizzirri interviewed Amber and Amber again admitted to having oral sex with J.C. Thereafter, Amber was arrested. Spizzirri opined that Nevaeh would be at risk of harm if she was returned to Amber's care based upon the allegations and videos submitted of Amber's alcohol consumption and behavior in Nevaeh's presence and the allegations of Amber engaging in inappropriate sexual contact with children while Nevaeh was sleeping in the same bed. Spizzirri testified that Nevaeh could be at risk for neglect and sexual abuse.

Dr. Kevin Cahill, a licensed clinical psychologist, testified that he has conducted several psychological evaluations of Amber beginning in 1996, at which time he diagnosed Amber with impulse control disorder, attention deficit disorder, mild mental retardation, and a reported history of Mysoline syndrome. Dr. Cahill testified that those diagnoses remained consistent in evaluations he completed in 1999 and 2009. Cahill explained that the 2009 evaluation was conducted in order to determine Amber's ability to participate in her own defense regarding criminal charges filed. Initially, Amber's test scores indicated that she has a full-scale IQ of 43 and a social equivalency of 9 years, 5 months, and that the range

equates to a moderate range of mental retardation. In 2009, Amber's scores revealed a full-scale IQ of 59, which Dr. Cahill indicated placed Amber in the low end for mild mental retardation. Amber was also given a neurological assessment procedure which suggested significant impairment in Amber's neuropsychological functioning with pronounced deficits in computational skill, general font of information, mnestic skills, and novel learning.

In a lengthy and detailed order, the juvenile court outlined the testimony and evidence received during the adjudication hearings. The juvenile court first overruled both Amber and Susan's motions for placement of Nevaeh with either of them. The court then found that, by a preponderance of the evidence, the evidence established that Amber had subjected J.C. to inappropriate sexual contact on multiple occasions. The juvenile court also found that Amber had been diagnosed with impulse control, ADHD, severe mental disabilities, and Mysoline syndrome and that those diagnoses, combined with Amber's conduct with J.C., clearly place Nevaeh at risk for harm and as a child within the meaning of § 43-247(3)(a). The juvenile court concluded that it was in Nevaeh's best interests, safety, and welfare to remain in the temporary custody of DHHS. It is from this order that Amber has appealed to this court.

ASSIGNMENTS OF ERROR

Amber assigns that the juvenile court erred by giving weight to the testimonies of Spizzirri and J.C.; by disallowing testimony about J.C.'s sexual behavior, predisposition, psychosexual development, and truthfulness; by disallowing expert testimony regarding Amber's interrogation and psychosexual development; and that the State presented insufficient evidence to prove that Nevaeh was a child within the meaning of § 43-247(3)(a).

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. When evidence is in conflict, however, an appellate court considers and may give weight to the fact that the trial court observed witnesses and accepted one version of the facts rather than another. *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012).

ANALYSIS

Weight of Evidence.

Amber's first assignment of error is that the juvenile court erred by giving weight to the testimonies of Detective Spizzirri and J.C., which argument centers upon attacks on their credibility as witnesses.

The juvenile court was presented with significant testimony and evidence throughout the lengthy proceedings of the adjudication hearing, much of which testimony was in conflict. It is apparent from the juvenile court's order that it evaluated all of the witnesses' testimony given during the proceedings. Within the adjudication order, the juvenile court specifically notes that, with the exception of the testimony of A.S. as a result of the court's observation of her demeanor, all of the individual testimony given was credible, probative, and entitled to weight. We consider and give weight to the fact that the court observed these witnesses and accepted one version of the facts over the other. See *In re Interest of Ryder J.*, *supra*. It is not within our province to second-guess the determinations of the juvenile court regarding weight given to witnesses and we find that this assignment is without merit.

J.C.'s Testimony.

Amber argues that the juvenile court erred by disallowing testimony about J.C.'s sexual behavior, predisposition, psychosexual development, and truthfulness, and that without this information Amber's rights are unfairly prejudiced. In her brief, Amber cites to specific testimony wherein, on cross-examination, she inquired with J.C. about J.C. wanting to have a relationship with Amber. Objections were made, which the

juvenile court sustained based upon past sexual history, Neb. Rev. Stat. § 27-412 (Reissue 2008). Amber's counsel argued,

I'm not asking about a relationship that she may have had with people prior to this case. I believe that is talking about her past sexual history. I'm not asking about that. I'm not even asking about a sexual relationship between my client. I'm talking about whether she wanted to pursue one with my client.

At which point, the juvenile court reconsidered and reversed its decision, overruling the previous objection. Amber's counsel was then allowed to inquire of J.C. about her intentions to have a relationship with Amber.

Thus, from the record before us, it does not appear that the issue which Amber has specifically appealed actually occurred during the adjudication hearing. As set forth above, Amber's counsel specifically stated to the juvenile court that she did not wish to elicit testimony regarding J.C.'s sexual history to which the court overruled the objection it had previously sustained and allowed questioning of J.C. about her intention to have a relationship with Amber. Therefore, there is nothing for this court to determine and we shall not address this assignment of error. See *In re State v. Albrecht*, 18 Neb. App. 402, 790 N.W.2d 1 (2010) (absent plain error, issue raised for the first time in appellate court will be disregarded

inasmuch as trial court cannot commit error regarding issue never presented and submitted for disposition in trial court).

Expert Testimony Regarding Amber's Interrogation.

Amber assigns that the juvenile court abused its discretion by disallowing Dr. Cahill from providing expert testimony about Amber's behavior during her interrogation.

During the adjudication hearing, Amber's counsel argued that Dr. Cahill's testimony was important in order for her to address the suppression of Amber's testimony as it relates to Amber's claim that she was coerced into making statements to law enforcement during her interrogation, which would in turn show that any statement Amber made during the interrogation was unreliable.

Amber argues and cites in her brief that the juvenile court erred in the following dialogue,

Q. [Amber's Counsel]: But in forming your opinion did you also rely upon and take into consideration Detective Spizzirri's statements to [Amber] during her interrogation of [Amber]?

A. Yes.

Q. All right. Now, just earlier you testified that Detective Spizzirri advised [Amber] that she already knew what happened; is that right?

[State]: Objection. Hearsay. And, Your Honor, I can be

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[Amber's Counsel]: No.

[State]: -- very specific. I don't think that this questioning fits into the medical exception to the hearsay rule because Dr. Cahill was not treating [Amber]. He testified to that himself.

THE COURT: Sustained.

Amber argues that Dr. Cahill's testimony about characteristics which Amber exhibited during the interrogation was consistent with his diagnosis of Amber and fell within the hearsay exception for medical diagnosis or treatment. Rule 803(3) provides that the hearsay rule does not exclude "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonable pertinent to diagnosis or treatment." Rule 803(3) is based on the notion that a person seeking medical attention will give a truthful account of the history and current status of his or her condition in order to ensure proper treatment. See *State v. Vigil*, 283 Neb. 129, 810 N.W.2d 687 (2012). In order for statements to be admissible under rule 803(3), the party seeking to introduce the evidence must demonstrate (1) that the circumstances under which the statements were made were such that the declarant's purpose in making the statements was to assist in the provision of medical diagnosis or treatment and

(2) that the statements were of a nature reasonably pertinent to medical diagnosis or treatment by a medical professional. See, *State v. Vigil, supra; In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005); *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004).

In this case, we have neither of the requisite circumstances. The record is very clear that Dr. Cahill had not treated Amber. Dr. Cahill specifically testified that he "conducted psychological evaluations on [Amber] in intervals during the course of her life . . ." There was no evidence presented to indicate that, other than the evaluations, any treatment was given by Dr. Cahill to Amber. The statements were not made to assist in the provision of medical treatment, nor were they pertinent to medical diagnosis or treatment by a medical professional. Dr. Cahill was not treating Amber, but he was instead attempting to testify about statements made by Amber to Detective Spizzirri. Therefore, we conclude that the juvenile court did not err in sustaining the objection to Dr. Cahill's testimony as hearsay. This assignment of error is without merit.

Expert Testimony Regarding Psychosexual Development.

Amber also argues that the juvenile court erred by disallowing Dr. Cahill to testify about the psychosexual development of girls in the 11- to 13-year-old age range as irrelevant.

[Amber's Counsel]: All right. Dr. Cahill, let's get back to the varying stages that a child goes through in sexual development.

A. Uh-huh.

Q. All right. What's the first stage?

[State]: Judge, I'm going to object to relevance.

[Amber's Counsel]: I just explained the relevance in my answer to the Court's questions.

THE COURT: The objection is sustained. . . If we are discussing your client, your client is not a child. And if you are offering that for purposes of outlining of what her developmental stage is, it is not relevant. She is not a child.

Amber argues that the evidence was relevant in order for the juvenile court to "fairly and accurately determine whether Amber's behavior constituted faults and habits or whether she was caught in the crossfire." Brief for appellant at 55.

Neb. Rev. Stat. § 43-279 (Reissue 2008) provides that at an adjudication hearing, the admissibility of evidence shall be governed by the Nebraska rules of evidence. See *In re Interest of J.L.M.*, 234 Neb. 381, 451 N.W.2d 377 (1990). In proceedings where the Nebraska Rules of Evidence apply, the rules control the admissibility of evidence; judicial discretion is a factor only when the rules make discretion a factor in determining admissibility. See *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012). It is within the trial court's discretion to determine

the relevance under rule 403, and a trial court's decisions regarding relevance will not be reversed absent an abuse of discretion. See *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011).

In the offer of proof, Dr. Cahill went on to explain that the latency stage of a child's sexual development is basically an exploratory stage and is not typical for predatory behavior. We find that the juvenile court did not abuse its discretion by sustaining the objection as the information presented in the offer of proof was not probative of Amber's development because she is not a child. This assignment of error is without merit.

Sufficiency of the Evidence.

Amber argues that the evidence was insufficient to find that Nevaeh is a child within the meaning of § 43-247(3)(a).

The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests. *In re Interest of Elizabeth S.*, 282 Neb. 1015, 809 N.W.2d 495 (2012). At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor child under § 43-247, 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. *In re Interest of Cornelius K.*, 280 Neb. 291, 785 N.W.2d 849 (2010).

The purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child and ensure the child's safety. See *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. *In re Interest of Brianna B. & Shelby B.*, 9 Neb. App/ 529, 614 N.W.2d 790 (2000). The parents' rights are determined at the dispositional phase, not at the adjudication phase. *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004). Although the child in this case suffered no actual harm, we recognize that if evidence of the fault or habits of the 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. See *In re Interest of M.B. and A.B.*, 239 Neb. 1028, 480 N.W.2d 160 (1992).

As indicated above, our review of factual issues in adjudication proceedings is de novo on the record, but where credible evidence is in conflict on a material issue of fact, we may consider and give weight to the fact that the trial judge

heard and observed the witnesses and accepted one version of the facts rather than another. *In re Interest of Ryder J., supra.*

In this case, the State alleged that Nevaeh, age 4 at that time, lacked proper parental care by reason of the faults or habits of her mother Amber, because Amber had subjected a child under the age of 12 to inappropriate sexual contact, had been adjudged mentally incompetent to stand trial on charges of first degree sexual assault of a child and attempted kidnapping, and, as such, Nevaeh was at risk for harm.

Evidence presented during the lengthy adjudication proceedings indicated that Amber, at the age of 23, subjected J.C., 11 years old at the time, to inappropriate sexual contact. J.C. testified at length about her relationship with Amber and the two occasions which Amber had oral sex with J.C. A.S. testified that J.C. did not have any type of relationship or contact with Amber, other than J.C. wanting to be around Amber, but evidence was presented revealing that Amber admitted to her relationship with J.C. and to having oral sex with J.C. on two occasions. Furthermore, evidence, in the form of the transcripts from a competency hearing, indicates that Amber was found mentally incompetent to stand trial for criminal charges. Additionally, the record indicates that Amber has mental disabilities, which the evaluating licensed clinical psychologist termed as mild to moderate mental retardation, with

a full-scale IQ of 59 and a social equivalency of 9 years, 5 months. Therefore, based upon our de novo review of the record, we conclude that the allegations of the petition were proved by a preponderance of the evidence and the juvenile court did not err in finding that Nevaeh is a child within the meaning of § 43-247(3)(a).

CONCLUSION

For the foregoing reasons, we conclude that the juvenile court did not err in adjudicating Nevaeh as a child within the meaning of § 43-247(3)(a) and, therefore subject to its jurisdiction. Therefore, we affirm.

AFFIRMED.