

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF MCKENZI D.

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

STATE OF NEBRASKA, APPELLEE,

V.

FLOYD D., APPELLANT.

Filed October 28, 2008. No. A-08-280.

Appeal from the County Court for Scotts Bluff County: G. GLENN CAMERER, Judge.
Affirmed.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellant.

Tiffany A. Wasserburger, Deputy Scotts Bluff County Attorney, for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. of App. P. § 2-111B(1), this case was ordered submitted without oral argument. Floyd D. appeals from an order of the county court for Scotts Bluff County, Nebraska, sitting as a juvenile court, which adjudicated one of his children, McKenzi D., to be a juvenile as defined in Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2006). On appeal, Floyd asserts that there was insufficient evidence to warrant adjudication of McKenzi pursuant to § 43-247(3)(a). Upon our de novo review of the record, we find sufficient evidence to support the county court's finding that it had jurisdiction over McKenzi, and we affirm the order to adjudicate her under § 43-247(3)(a).

II. BACKGROUND

These proceedings involve Floyd's youngest child, McKenzi, born March 28, 2002. In October 2003, Floyd and McKenzi's mother, Melissa D., divorced. As a part of the divorce proceedings, Melissa was awarded physical custody of the couple's two children, McKenzi and Morgan D. Floyd was awarded visitation time with the children, including overnight visits.

On December 5, 2007, McKenzi and Morgan stayed overnight at Floyd's home. The next morning, Floyd drove the girls to school. Sometime after he dropped the girls off at school, Floyd received a telephone call from a school official who informed him that McKenzi had "pottied her pants." Floyd went back to the school to pick up McKenzi. He drove her home, changed her clothes, and "disciplined her." As a part of that discipline, Floyd spanked McKenzi on her buttocks while she was not wearing any pants or underwear. Floyd then returned McKenzi to school.

Melissa picked up the girls from daycare later that same afternoon. After Melissa and the girls arrived home, Melissa observed that McKenzi had red marks on her buttocks, thighs, and upper legs. Melissa called the police.

An officer from the Scotts Bluff Police Department was dispatched to Melissa's home. Upon arriving at the home, the officer observed McKenzi's body and saw "significant" redness on the child's buttocks. The officer believed there was "enough redness [to cause] concern" and photographed McKenzi's buttocks, legs, and thighs. The officer contacted Floyd to discuss the marks on McKenzi's body. Floyd informed the officer that he had spanked McKenzi earlier that day after she had wet her pants at school.

On December 17, 2007, the State filed a petition in county court seeking to adjudicate McKenzi as a child within the meaning of § 43-247(3)(a). The State alleged that McKenzi lacked proper parental care by reason of the fault or habits of her parent or that she was in a situation or engaged in an occupation dangerous to life or limb or injurious to her health or morals because on "December 6, 2007, [Floyd] spanked [McKenzi] on bare skin resulting in red marks and bruises on her buttocks. [Floyd] has a history of leaving bruises on the juvenile, including on or about May 31, 2005, and May 19, 2007."

On February 19, 2008, a hearing was held on the State's petition. At the hearing, the State called numerous witnesses to testify regarding Floyd's disciplinary methods. McKenzi testified that her father spanked her after she "had an accident." She testified, "He spanked me real hard . . . [h]e spans me bare with no pants or no underwear on." In addition, she testified that when Floyd spanked her, she asked him to stop, but he continued to spank her. She said that when he spanked her, it hurt her and she cried. Finally, McKenzi testified that she was afraid of her father when he spanked her.

Floyd and Melissa's other child, Morgan, also testified. Morgan testified that she has observed her father spank McKenzi. She said that when she sees her father spank her sister that she feels badly because "it hurts" McKenzi. Morgan testified that there have been times when Floyd was spanking McKenzi that Morgan felt like she should go find someone to help McKenzi. Morgan also testified that although she is not afraid of her father, she does worry when he spans McKenzi.

Officer Brandy Brunz of the Scottsbluff Police Department testified that she was dispatched to Melissa's home in December 2007 after Melissa reported McKenzi's injuries to police. Officer Brunz testified that she took pictures of McKenzi's body at that time. These pictures were admitted into evidence. Officer Brunz also testified that she spoke with Floyd about the marks on McKenzi's buttocks, thighs, and legs. Officer Brunz testified that Floyd admitted that he had spanked McKenzi because she had wet her pants at school.

In addition to the testimony of McKenzi, Morgan, and Officer Brunz, the State also presented evidence that prior to the incident in December 2007, Floyd had been repeatedly warned by both the Department of Health and Human Services and law enforcement officials that his disciplinary methods were not appropriate. Floyd had previously been instructed that he was not to remove McKenzi's pants and underwear before spanking her. He was told that spanking McKenzi's bare buttocks hurt McKenzi. Floyd was also instructed on other, more appropriate means of discipline. The family's current caseworker from the Department of Health and Human Services testified that she has concerns for McKenzi's safety because she believes that McKenzi is the "target" of Floyd's frustration.

After the State presented its evidence, Floyd testified. He stated that on December 6, 2007, he picked up McKenzi from school after the school called and informed him that McKenzi had wet her pants. He testified, "I took her home, I disciplined her, I put clean clothes on, got her calmed down and took her back to school." Upon further questioning, Floyd testified that he spanked McKenzi and admitted that he may have left red marks on her buttocks. He testified that after he spanked McKenzi, he talked to her about why he spanked her and hugged, kissed, and reassured her. Floyd testified that he does spank McKenzi on her bare bottom and stated that he continues to use this form of discipline as a "last resort" even though he has been taught other methods of discipline. Floyd testified that he believes that his discipline style is effective in making the girls respectful of their parents and other authority figures.

At the close of the evidence, the county court found that McKenzi was "a child described under Section 43-247(3)(a) of the juvenile act." The court went on to state that "I'm very concerned about this situation. This -- These pictures show a beating. This is not discipline. This is a beating. This child was hit repeatedly. [Floyd was] warned about this by the police [and] by social services." The court ordered supervised visitation between Floyd and McKenzi.

Floyd appeals here.

III. ASSIGNMENTS OF ERROR

Floyd argues that the county court erred in determining that the evidence was sufficient to adjudicate McKenzi pursuant to the provisions of § 43-247(3)(a). Specifically, Floyd asserts that evidence that he spanked McKenzi after she wet her pants was not sufficient to warrant adjudication pursuant to § 43-247(3)(a).

IV. 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 Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). 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.*

V. ANALYSIS

Floyd argues that the court erred in adjudicating McKenzi as a child within the meaning of § 43-247(3)(a). Specifically, Floyd argues that evidence that he spanked McKenzi after she wet her pants at school was insufficient to warrant adjudication. He asserts, “Where the sanction to the juvenile is reasonable and does not leave bruising or require medical attention, it is improper for a court to take jurisdiction over a juvenile.” Brief for appellant at 4. After reviewing the record, we find no merit to Floyd’s assignment of error.

Section 43-247(3)(a) grants the juvenile court jurisdiction over any juvenile who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian; who is abandoned by his or her parent, guardian, or custodian; who lacks proper parental care by reason of the fault or habits of his or her parent, guardian or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; whose parent, guardian, or custodian is unable to provide or neglects or refuses to provide special care made necessary by the mental condition of the juvenile; or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile.

The purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child. The parents’ rights are determined at the dispositional phase, not at the adjudication phase. *In re Brian B.*, 268 Neb. 870, 689 N.W.2d 184 (2004). To obtain jurisdiction over a juvenile, 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.* At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence. *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005); *In re Interest of Rebekah T. et al.*, 11 Neb. App. 507, 654 N.W.2d 744 (2002).

In this case, the State alleged that McKenzi lacked proper parental care or was in a dangerous situation because, on December 6, 2007, Floyd spanked her on her bare skin “resulting in red marks and bruises on her buttocks.” The State also alleged that Floyd has a history of spanking McKenzi in such a manner. Upon our de novo review of the record, we find the State presented sufficient evidence to prove the allegations in the petition by a preponderance of the evidence.

Floyd admitted that he spanked McKenzi on December 6, 2007, and he also admitted that he may have left red marks on her buttocks as a result of this spanking. The pictures of McKenzi’s body taken on the night of December 6 reveal significant redness on McKenzi’s buttocks, including some areas of very deep redness. In addition, the pictures reveal red marks on McKenzi’s upper thighs and hips. In fact, pictures of McKenzi’s body taken on December 8, 2 days after Floyd spanked McKenzi, still show significant redness on McKenzi’s buttocks, hips, and thighs.

McKenzi testified that Floyd removed her pants and underwear before he spanked her. She testified that Floyd hurt her when he spanked her, that she cried, and that Floyd kept spanking her despite her requests that he stop.

Other evidence presented at the hearing revealed that Floyd had been repeatedly warned by the Department of Health and Human Services and by police about his disciplinary methods. Floyd had been told not to spank McKenzie on her bare buttocks because it hurts her. He was also taught other methods of discipline. Despite these warnings, Floyd continued to spank McKenzie in a manner that left redness or bruising on her body.

This evidence is sufficient to prove by a preponderance of the evidence the State's allegations that Floyd spanked McKenzie on her bare buttocks hard enough to leave red marks on her buttocks, thighs, and hips. However, Floyd argues in his appellate brief that even if this evidence adequately proves the State's allegations, the evidence is still insufficient to warrant adjudication of McKenzie pursuant to § 43-247(3)(a) because there is no evidence of bruising nor evidence that McKenzie's injuries required medical intervention. Floyd asserts that without such evidence, "it is improper for a court to take jurisdiction over a juvenile." We disagree.

We first note that we have read the case law cited by Floyd in support of his proposition that a court cannot take jurisdiction over a juvenile without evidence of bruising or injuries warranting medical intervention. In addition, we have conducted an independent review of the case law in this area. Our review of the case law does not support Floyd's assertions.

Floyd appears to primarily rely 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 alleged that D.S. lacked proper parental care by reason of the faults or habits of her mother, K.S., because K.S. struck D.S. with a baseball bat and left marks and bruises on D.S.' body. The juvenile court found that the State proved the allegations in the petition and adjudicated D.S. pursuant to § 43-247(3)(a). K.S. appealed this decision to the Nebraska Supreme Court.

In its review of the juvenile court's decision to adjudicate D.S., the Nebraska Supreme Court noted that the evidence presented at the adjudication hearing revealed that "K.S. grabbed D.S. by the arm and, with a 'foot long' wooden 'bat,' hit D.S. three or four times above the child's knees, causing some 'welts' or marks which became 'bluish.'" *Id.* at 347, 440 N.W.2d at 479. The court concluded that the "bat" was actually a miniature replica of a baseball bat, similar to those available as a souvenir at a ball park. The court then noted that there was no photograph of the bat or of D.S.' injuries contained in the record. Additionally, the court stated, "The record contains no reference to medical treatment for D.S. or any medical diagnosis on account of the 'bat' incident." *Id.* at 348, 440 N.W.2d at 479. It appears that the only evidence demonstrating the extent of D.S.' injuries was testimony that one of D.S.' teachers noticed the red marks on her legs the next day at school.

Based on its review of this evidence, the Nebraska Supreme Court reversed the judgment of the juvenile court. The court found that the State had failed to establish the allegations in the petition and held that "[t]he 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." *Id.*

While Floyd characterizes the court's holding to mean that evidence of bruising or medical intervention is required prior to adjudicating a child pursuant to § 43-247(3)(a), our

reading of the case reveals that the Nebraska Supreme Court reversed the juvenile court's decision to adjudicate D.S. because the State simply failed to prove the allegations of the petition. The absence of evidence of bruising or medical intervention did not, by itself, necessitate reversal. Rather, the court reversed the adjudication of D.S. due to the absence of proof of any injuries and the State's exaggeration of the circumstances of K.S. beating D.S. with a "bat."

Floyd does not point to any other cases which support his allegation that the State must provide evidence of bruising or medical intervention before a court can adjudicate a child pursuant to § 43-247(3)(a).

Finally, we note that we have previously held that it is not the intent or purpose of the juvenile code to require the juvenile court to wait until disaster has befallen a minor child before the court acquire jurisdiction. *In re Interest of W.C.O.*, 220 Neb. 417, 370 N.W.2d 151 (1985).

Floyd spanked McKenzi on her bare buttocks, causing significant and deep redness which lasted for at least 2 days. Floyd had been repeatedly warned that such disciplinary practices were inappropriate and harmful. Such behavior presents a risk of harm to McKenzi, and we need not wait until McKenzi is injured even more severely before finding her to be within the jurisdiction of the juvenile court. Floyd's argument has no merit.

VI. CONCLUSION

Upon our de novo review of the record, we find sufficient evidence to support the county court's finding that it had jurisdiction over McKenzi, and we affirm the order to adjudicate her under § 43-247(3)(a).

AFFIRMED.