2017 IL App (1st) 163262-U

SIXTH DIVISION
May 4, 2017

Nos. 1-16-3262, 1-16-3264 (cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re C.M., a Minor,	)	Appeal from the Circuit Court of
	)	Cook County.
Minor-Respondent-Appellee	)	
	)	
(PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Petitioner-Appellee,	)	.
	)	
v.	)	No. 15 JA 681
	)	
Renee D., and Antonio M.,	)	Honorable
	)	Bernard J. Sarley,
Respondents-Appellants).	)	Judge Presiding

.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** The trial court did not abuse its discretion in denying respondents' request to: (1) cross-examine a witness with a report she did not prepare, and (2) establish a presumption that the testimony of two witnesses, whom the State did not call, would have been adverse to the State. The trial court's finding that the minor was abused due to an injurious environment was not against the manifest weight of the evidence. Affirmed.

¶ 2 On June 18, 2016, the circuit court found that eleven-month old C.M. was neglected due to an injurious environment, pursuant to the Juvenile Court Act of 1987 (Act) (705 ILCS 405/2-

3(1)(b) (West 2016)). The court subsequently held a dispositional hearing and found both parents, respondents Renee D. and Antonio M., unable to parent C.M. The trial court then found that it was in C.M.'s best interest to adjudge her a ward of the state, and placed her under the guardianship of the Department of Children and Family Services (DCFS). Both respondents appealed from the adjudicatory and dispositional orders, and this court consolidated both appeals (No. 1-16-3262 (Renee D.) and No. 1-16-3264 (Antonio M.)). On appeal, respondents contend that (1) the trial court erred in limiting the cross-examination of a witness and in denying their request for a presumption against the State for failing to call certain witnesses, and (2) the trial court's findings were contrary to the manifest weight of the evidence. We affirm.

¶ 3 BACKGROUND

¶ 4 Respondents Renee D. and Antonio M. are the parents of C.M., who was born on June 24, 2015. On July 6, 2015, the State filed a petition for adjudication of wardship, alleging that C.M. was neglected due to an injurious environment (705 ILCS 405/2-3(1)(b) (West 2016)) and at risk of substantial physical injury (705 ILCS 405/2-3(2)(ii) (West 2016)) based upon the following facts: (1) respondents had another child in DCFS custody and were noncompliant with reunification services; (2) at C.M.'s birth, Renee tested positive for illegal substances and C.M. tested positive for cannabinoids; and (3) "[t]here is an issue of domestic violence between [the] parents." On the same day, the court entered an order granting temporary custody of C.M. to a DCFS guardianship administrator.

¶ 5 The circuit court held an adjudicatory hearing on June 13, 2016. Antonio objected to the testimony of the State's first witness, Officer Kathleen Kolovitz, arguing that she should be barred from testifying about an alleged domestic violence incident between respondents on June 20, 2015. Antonio argued that Officer Kolovitz did not witness the incident, and that it resulted

in no arrest or conviction. The court overruled the objection, noting that "[t]he witness can testify to what she observed, what any of the parents said about what she observed or what happened. The fact that there was no arrest or conviction goes to weight but not admissibility."

¶ 6 Officer Kolovitz testified that on June 20, 2015, she was called to respond to a domestic violence incident at Renee's location, and upon arriving at the scene of the incident, she saw that Renee was "very pregnant" and had a cut lip, ripped shirt, and numerous bruises about her upper body. Kolovitz testified that Renee told her "she had been in an argument with her boyfriend who she lives with, they were not married, and that he hit her." Renee also told Officer Kolovitz that her boyfriend "punched her in the face and he pushed her." After using a police report to refresh her recollection, Officer Kolovitz testified that Renee identified Antonio as her boyfriend, Antonio was not at the scene of the incident, but respondents' other child was.

¶ 7 On cross-examination, Officer Kolovitz acknowledged that she neither mentioned Renee's ripped shirt in her police report, nor Renee's statements that she was having relationship issues with Antonio and that a fight over missing money immediately preceded the alleged abuse. Officer Kolovitz also testified that she was not involved in the preparation of a supplemental police report that was added to the original police report, she never reviewed it, and that she did not know its contents. The trial court sustained the State's objection to Antonio asking Officer Kolovitz about potential inconsistencies and omissions between the supplemental report and the original report, namely that the supplemental report indicates that the perpetrator of the abuse was someone other than himself.

¶ 8 The State's next witness was Sarah Matthews, the DCFS-assigned caseworker for respondents' two children, C.M. and C.M.'s older sister, A.D. Matthews testified that, at the time of C.M.'s birth, Antonio's mother had custody of A.D. According to Matthews, Renee had

to complete various recommended services in order to have A.D. returned to Renee's care, including: parenting classes, parent-child psychotherapy, a drug assessment (and compliance with the subsequent recommendations), and visitation. At the time of C.M.'s birth, however, Matthews stated that Renee was not involved in any of those services. Matthews added, however, that Renee did begin therapy after C.M. was born.

¶ 9 Antonio was in prison at the time of A.D.'s birth, so Matthews did not recommend services for him in order to gain custody of A.D. After Antonio's release from prison, however, Matthews visited him at a halfway house and recommended the same services as those recommended for Renee. Matthew further stated that Antonio did not engage with her after she explained his recommended services. Matthews said that Antonio wanted "visits in his mother's house," and then he no longer contacted Matthews.

¶ 10 In addition, Matthews met Renee in July 2015 during an investigation of the domestic violence incident that took place during the prior month. Matthews confirmed that she was not the investigator. Matthews explained to Renee that she was asking about the incident to determine whether A.D. should be removed from Antonio's mother's house. At that point, Matthews said that Renee recanted her prior statement that Antonio physically abused her. On cross-examination, Matthews conceded that she did not recommend "domestic violence classes" to either Antonio or Renee.

¶ 11 After Matthews's testimony, the court granted the State's motion to admit and publish the certified orders entered in A.D.'s adjudication of wardship proceedings. The trial court had found A.D. neglected based upon a lack of care and an injurious environment for the following reasons: (1) A.D. tested positive for marijuana when she was born, (2) Renee tested positive for

cocaine when A.D. was born, (3) Renee failed to complete drug treatment services, and (4) Renee removed A.D. from Antonio's mother's care. Antonio was found to be noncustodial.

¶ 12 The court also admitted Renee's and C.M.'s medical records from St. Francis Hospital into evidence. The records showed that Renee appeared intoxicated when admitted to the hospital following the alleged domestic violence incident with "her boyfriend" on June 20, 2015. Medical records dated June 24, 2015 (the date of C.M.'s birth), showed that Renee tested positive for cocaine and cannabinoids, that she again appeared intoxicated, and that there was "scant prenatal care." Discharge summaries for C.M. after her birth noted that she tested positive for cannabinoids, and that she was exposed to cocaine *in utero*.

¶ 13 After the close of the evidence, the court denied Antonio's and Renee's motions for a directed verdict. Antonio then made an oral "502 motion" directed against the State's purported failure to call certain witnesses that would have been favorable to the parents. Antonio argued that, since the State failed to call the DCFS investigator and the author of the supplemental police report to testify, the circuit court should presume that their testimony would have been unfavorable to the State. In particular, Antonio noted that the supplemental police report and a DCFS investigative report showed that Renee had recanted her allegations of domestic violence against Antonio. The court denied the request, observing that there already was evidence of Renee's recantation.

¶ 14 The circuit court then entered an order of adjudication finding that respondents neglected C.M. by exposing her to an injurious environment. The court indicated that its decision was based on the removal of A.D. from respondents' care, respondents' failure to participate in reunification services, and the presence of drugs in Renee and C.M. The court then dismissed the State's claim of abuse.

¶ 15 On November 7, 2016, the court entered a disposition order adjudging C.M. a ward of the state and finding respondents unable to parent her. This appeal followed.

¶ 16 ANALYSIS

¶ 17 The Evidentiary Rulings

¶ 18 Respondents first contend that the trial court erroneously denied their request to cross-examine Officer Kolovitz with the contents of the supplemental police report (purportedly identifying another individual and not Antonio as the individual who hit Renee). In addition, Antonio contends that the trial court erred in denying his oral request for a "502 motion" at trial, which sought to establish a presumption that the testimony of two witnesses (the DCFS investigator and the author of the supplemental police report) whom the State failed to call would have been unfavorable to the State.

¶ 19 Evidentiary rulings are within the sound discretion of the trial court and we will not disturb them unless the trial court abused its discretion. *In re A.W., Jr.*, 397 Ill. App. 3d 868, 873 (2010). "A court abuses its discretion only where its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court." *Id.*

¶ 20 With respect to the supplemental police report, we initially note that Renee lists this as a separate "issue to be presented" in that section of her brief but does not discuss this issue separately in the "argument section"; instead, it is incorporated—without citation to *any* legal authority—into her challenge to the sufficiency of the evidence. On this basis alone, we could hold this matter forfeited for failure to comply with Supreme Court Rule 341(h)(7) (Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016)). Forfeiture aside, the argument fails. The record reveals that Officer Kolovitz testified that she did not prepare the supplemental police report, never reviewed it, and did not know its contents. It is improper to impeach a witness's testimony with a written

statement made by someone else. *People v. Berberena*, 265 Ill. App. 3d 1033, 1049 (1994) (citing *People v. Lucas*, 132 Ill. 2d 399, 430 (1989) ("Defendant's attempt to impeach [a witness] with a written statement of a co-worker was improper."))). Therefore, the trial court did not abuse its discretion in limiting cross-examination.

¶ 21 Antonio's contention that the trial court erred in denying his oral "502 motion" suffers a similar fate. At the outset, we note that, in his brief, Antonio states that, instead of a "502 motion," this motion should have been described as a request for a "5.01 instruction," (presumably, an instruction pursuant to Illinois Pattern Instructions, Civil, No. 5.01 (2011) (IPI 5.01). IPI 5.01 provides in part that:

> "If a party to this case has failed *** [to produce a witness] within his power to produce, you may infer that the *** [testimony of the witness] would be adverse to that party if you believe each of the following elements: 1. The *** [witness] was under the control of the party and could have been produced by the exercise of reasonable diligence. 2. The *** [witness] was not equally available to an adverse party. 3. A reasonably prudent person under the same or similar circumstances would have *** [produced the witness] if he believed *** [the testimony would be] favorable to him. 4. No reasonable excuse for the failure has been shown."

¶ 22 The contention fails for multiple reasons. First, this case was not presented to a jury; rather, it was tried before a judge, and it is well established that a trial judge is presumed to know the law and apply it properly. *People v. Koch*, 248 Ill. App. 3d 584, 591 (1993) (holding that a

pattern jury instruction on prior inconsistent statements "is obviously unnecessary in a bench trial"). For this same reason, respondents' reliance upon *Tuttle v. Fruehauf Div. of Fruehauf Corp.*, 122 Ill. App. 3d 835, 836 (1984), *Beery v. Breed*, 311 Ill. App. 469, 470 (1941), is inapt because both cases were tried before juries.

¶ 23 Moreover, a witness is generally considered not "equally available" to a party "if there is a likelihood that the witness would be biased against him, as for example a relative or an employee of the other party." IPI 5.01, Comment. Here, there is no similar likelihood that either the detective who wrote the supplemental report or the DCFS investigator would be biased in favor of the State. Neither individual was a relative of any party on the side of petitioner (*i.e.*, the State). In addition, neither individual was an employee or otherwise under the control of the State's Attorney's office; they were employees of either the Chicago Police Department or DCFS. Since there is nothing to suggest that the witnesses would have reason to develop a bias against respondents, both witnesses were equally available to respondents, and no presumption their testimony would be adverse to the State would be warranted. Therefore, the trial court did not abuse its discretion in rejecting respondents' argument on this point.

¶ 24 The Finding of Neglect

¶ 25 Both respondents challenge the trial court's finding that C.M. was neglected due to an injurious environment (705 ILCS 405/2-3(1)(b) (West 2016)). Both the State and the public guardian argue that the evidence in the record clearly supports the findings of the trial court. Respondents offer no argument in reply to the State's and public guardian's argument. [1]

[1] In an apparent attempt to support this point, respondents argue the State presented no evidence that C.M. should have been taken into protective custody. This argument, however, is forfeited for lack of citation to authority. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); see also *In re Edward T.*, 343 Ill. App. 3d 778, 792 (2003) ("Generally, an appeal of findings made in a

¶ 26 When a petition for adjudication of wardship is brought under the Juvenile Court Act, the paramount consideration is the best interests of the child. *In re F.S.*, 347 Ill. App. 3d 55, 62 (2004). When the State petitions the trial court for an adjudication that a minor has been neglected, it must prove the allegations in its petition by a preponderance of the evidence, *i.e.*, that amount of evidence establishing that the fact at issue is more probable than not. *Id.* The trial court is in the best position to determine the credibility and weight of the witnesses' testimony because it has the best opportunity to observe the demeanor and conduct of the witnesses. *Id.* at 63. Cases adjudicating abuse and neglect are *sui generis* and must be decided on their own facts. *Id.*

¶ 27 The court found that the State proved by a preponderance of the evidence that C.M. was neglected pursuant to section 2-3(1)(b) of the Act, which states that those minors who are neglected include "any minor under 18 years of age whose environment is injurious to his or her welfare." 705 ILCS 405/2-3(1)(b) (West 2016). In general, neglect is defined as the failure to exercise the care that " 'circumstances justly demand' " and includes both willful and unintentional disregard of parental duties. *F.S.*, 347 Ill. App. 3d at 67 (quoting *In re S.D.*, 220 Ill. App. 3d 498, 502 (1991)). By contrast, an injurious environment is an amorphous concept that cannot be defined with specificity; thus, each case must be reviewed on its own specific circumstances. *Id.* Under the theory of "anticipatory neglect," the State may seek protection of children who have "a probability to be subject to neglect or abuse because they reside, or in the future may reside with an individual who has been found to have neglected or abused another child." *In re Arthur H.*, 212 Ill. 2d 441, 468 (2004). Although the neglect of one child does not conclusively show the neglect of another, the neglect of one minor is admissible as evidence of

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temporary custody hearing is moot where there is a subsequent adjudication of wardship supported by adequate evidence.").

the neglect of another minor under a parent's care. *Id.* Consequently, under this theory, the juvenile court is not forced to refrain from acting until another child is injured when faced with evidence of prior neglect by parents. *Id.* at 477.

¶ 28 On review, we will not disturb the trial court's findings of neglect unless those findings are against the manifest weight of the evidence. *F.S.*, 347 Ill. App. 3d at 62. A finding is against the manifest weight of the evidence " 'if review of the record clearly demonstrates that the opposite result would be the proper one.' " *Id.* at 62-63 (quoting *In re K.G.*, 288 Ill. App. 3d 728, 735 (1997)). The trial court is thus accorded "broad discretion" when determining the existence of abuse. *Id.* at 63 (quoting *In re R.M.*, 307 Ill. App. 3d 541, 551 (1999)).

¶ 29 As a preliminary matter, respondents challenge the credibility of Officer Kolovitz, but as the State points out, the trial court did not rely upon this testimony in reaching its findings; instead, the trial court based its findings upon: (1) A.D.'s prior removal from respondents' care, (2) respondents failure to participate in reunification services, and (3) the presence of drugs in Renee and C.M. The evidence in this case amply supports the trial court's finding.

¶ 30 The record indicates that, at birth, C.M. tested positive for cannabinoids and was exposed to cocaine *in utero*.[2] Medical records also indicated that, on the day of C.M.'s birth, Renee tested positive for cocaine and cannabinoids, she appeared intoxicated, and Renee provided "scant prenatal care" before C.M.'s birth. A lengthy history of substance abuse can be a factor in determining whether a child is subjected to an injurious environment. See *In re Tatiana C.*, 2013 IL App (1st) 131573, ¶ 33.

[2] With respect to Renee's and C.M.'s medical records, Antonio's brief contains a one-line argument complaining about the lack of a "213(f)(2) or 213(f)(3) witness," but his brief fails to develop this argument or support it with citation to legal authority. Since this argument fails to comply with Supreme Court Rule 341 (Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016)), it is forfeited, and we will not consider it.

¶ 31 In addition, the evidence provided substantial support under the theory of anticipatory neglect that C.M. was likely to suffer abuse based upon the prior abuse and neglect of C.M.'s older sister, A.D. At the time of C.M.'s birth, both Renee and Antonio had already lost custody of A.D. Antonio, who was incarcerated at the time of A.D.'s birth, was found to be noncustodial, but upon his release, he refused to engage in any recommended services to regain custody except for supervised visitation of A.D. at the home of his mother (who had custody of A.D.). Renee had lost custody of A.D. for the following reasons: (1) A.D. had tested positive for marijuana when she was born, (2) Renee had tested positive for cocaine when A.D. was born, (3) Renee had failed to complete drug treatment services, and (4) Renee had removed A.D. from the care of Antonio's mother. Although Renee was required to complete certain services in order to regain custody of A.D., Matthews testified that Renee was not involved in any of the services. These facts amply support the trial court's finding under a theory of anticipatory neglect. See *In re Kenneth D.*, 364 Ill. App. 3d 797, 802 (2006) (upholding a finding of anticipatory neglect because his other maternal siblings were exposed to drugs *in utero*, despite no evidence of exposure to the new born, and the mother failed to complete reunification services). Since we cannot hold that this evidence clearly demonstrates that the opposite result would be proper, the circuit court's finding was not against the manifest weight of the evidence. See *F.S.*, 347 Ill. App. 3d at 62-63. Accordingly, respondents' contention of error necessarily fails.

¶ 32 CONCLUSION

¶ 33 The trial court did not abuse its discretion in denying respondents' request to (1) cross-examine a witness with a report she did not prepare, and (2) have the trial court presume that the testimony of two witnesses, whom the State did not call, would have been adverse to the State. In addition, the trial court's finding that the minor was abused due to an injurious environment

was not against the manifest weight of the evidence. Accordingly, we affirm the judgment of the trial court.

¶ 34 Affirmed.