2019 IL App (2d) 180827-U
No. 2-18-0827
Order filed February 21, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re BRANDON M. and JACOB M., Minors	)	Appeal from the Circuit Court
	)	of Winnebago County.
	)	
	)	Nos. 17-JA-146
	)	17-JA-147
	)	
(The People of the State of Illinois, Petitioner-Appellee, v. Patti M., Respondent-Appellant).	)	Honorable
	)	Francis M. Martinez,
	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Birkett and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: We granted appellate counsel's motion to withdraw and affirmed the judgment of the trial court because the record did not present any issues of arguable merit regarding the trial court's adjudication of the children as abused/neglected.

¶ 2 Respondent, Patti M., is the mother of Brandon M., who was born in July 2005, and Jacob M., who was born in August 2003. The children's father is William M. On August 31, 2018, the trial court adjudicated Brandon abused and Jacob neglected. The trial court later held a dispositional hearing and entered an agreed order that the parents were unable to properly parent the children and that custody and guardianship of them would be given to the Department of Children and Family Services (DCFS).

¶ 3 Patti appealed, and the trial court appointed counsel to represent her on appeal. Pursuant to the procedure set forth in *Anders v. California*, 386 U.S. 738 (1967), and *In re Alexa J.*, 345 Ill. App. 3d 985 (2003), appellate counsel has sought leave to withdraw, arguing that no meritorious issue exists. Appellate counsel has filed a memorandum of law in support of his motion and represents that he has mailed Patti a copy of the motion to withdraw and memorandum. The clerk of this court has also notified Patti of the motion and informed her that she had 30 days to respond. More than 30 days have passed, and Patti has not submitted a reply to the motion.

¶ 4 Appellate counsel avers that he has thoroughly reviewed the record and discovered no possible justiciable issue that would warrant relief in this court. The potential issues that appellate counsel has raised are: (1) whether the trial court's decision finding Brandon abused was against the manifest weight of the evidence; and (2) whether the trial court's decision finding Jacob neglected was against the manifest weight of the evidence. For the reasons that follow, we grant appellate counsel's motion to withdraw and affirm.

¶ 5 I. BACKGROUND

¶ 6 The State filed neglect petitions regarding the minors on May 1, 2017. The petition in Brandon's case alleged that Brandon was abused because his parents allowed a sex offense to be committed against him, in that Jacob had made contact between his penis and Brandon's anus. See 705 ILCS 405/2-3(2)(iii) (West 2016). The petition in Jacob's case contained two counts. The first count alleged that Jacob was neglected because his environment was injurious to his welfare, in that he had committed an act of sexual penetration and was not receiving counseling for that conduct, placing him at a risk of harm. See 705 ILCS 405/2-3(1)(b) (West 2016). The second count alleged that Jacob was a dependent minor without proper medical or other remedial

care, or other care necessary for his well-being, through no fault, neglect, or lack of concern by his parents, in that he was not receiving counseling for sexual acts with his brother. See 705 ILCS 405/2-4(1)(c) (West 2016).

¶ 7 On May 30, 2017, the parents waived their right to a shelter care hearing. They stipulated that there was probable cause to believe that the minors were neglected, that DCFS had made reasonable efforts, and that there was an urgent and immediate necessity that the children be placed in shelter care pending further proceedings. Temporary guardianship of the children was given to DCFS.

¶ 8 An adjudicatory hearing took place over the course of three days from May 11, 2018, to July 27, 2018; we summarize the relevant evidence presented. Officer Todd Stockburger testified that he was dispatched to Rockford Memorial Hospital during the night of February 28, 2017. He spoke to William around midnight on March 1, 2017. William said that he was on the road, working, and had gotten a phone call from his wife that "Jacob stuck his penis in [Brandon's] ass." He returned home and looked at Brandon's anus, which did not look "right" to him.

¶ 9 Stockburger then spoke to Patti. She said that during the evening of February 28, 2017, Jacob asked Brandon to come upstairs to play Xbox. She heard screaming and Brandon saying, " 'Ow. Leave me alone.' " Shortly after, Brandon came down, sat on an exercise ball, and said, " 'Ouch.' " He explained to Patti that Jacob had put his "peenee" in his butt. She asked if anyone else had touched him, and he said no, but that Jacob had done the same thing three days before. Patti looked at Brandon's anal area, which appeared "weird." Patti called William and asked him to come home. Jacob denied the contact when asked by Patti, but Patti told Stockburger that Jacob was not always truthful. Stockburger explained the "victim sensitive interview" (VSI) process to both parents. In court, Stockburger identified a sexual assault kit that he obtained from

the hospital and a buccal swab collection that he had later obtained from Jacob pursuant to a warrant.

¶ 10 Officer Jeff White testified that a VSI for Brandon was scheduled for March 2, 2017. White called William prior to the interview, and William said that they would not attend because his counsel advised that all arrangements be made through him. White rescheduled the VSI for March 9, 2017. The attorney canceled that interview because he said that they were waiting for a medical report.

¶ 11 Nikki Sands testified that she was a DCFS child protection specialist and had been assigned to investigate the incident. She participated in scheduling a VSI for Brandon on May 25, 2017. She arrived at the scheduled date and time, but the family did not show up. Sands called and left a voicemail, and the parents later called to say that they had taken Brandon to the doctor. Sands's supervisor instructed her to go to the residence and take protective custody of Brandon. She went to the home with law enforcement, and the parents were uncooperative. After several hours, Sands was able to take protective custody of Brandon. He did not appear to be ill. Brandon's VSI was completed in June 2017.

¶ 12 Stockburger testified that he was present to take protective custody of Brandon on May 25, 2017. William would not let anyone inside the house, and there was a "standoff" for about four hours. It ended when Patti and Brandon came out of the house.

¶ 13 The parents stipulated to the foundation for two reports, which were admitted into evidence. The first report indicated that semen was found on the anal swab from Brandon's sexual assault kit. The second report stated that Jacob could not be excluded from the DNA profile in the sperm. "Approximately 1 in 3.2 decillion Black, 1 in 13 nonillion White, or 1 in

2.6 nonillion Hispanic unrelated individuals [could not] be excluded from having contributed to this profile."

¶ 14 Patti provided testimony consistent with the statements she made to Stockburger, and we summarize her additional testimony. There were three VSIs scheduled for Brandon, but he did not attend any of them. She did not bring him to the first interview because their attorney had said not to unless the attorney was present. Patti did not remember why Brandon missed the second interview. He missed the third interview, on May 25, 2017, because he was sick. Patti had taken Brandon to see a medical professional the previous day, and she had given Patti a note excusing Brandon from school from May 24, 2017, to May 26, 2017. William contacted someone to say that Brandon would not be coming to the May 25 interview. At that time, Patti was not aware that semen was found in Brandon's anus; she first leaned of this in August 2017, after DCFS had removed the children from the home.

¶ 15 Upon questioning from the trial court, Patti testified that she had not directly spoken to the attorney, but William had. She further testified that even if Brandon were not ill on May 25, 2017, she would not have brought him to attend the interview.

¶ 16 The parties stipulated that a nurse would testify that she examined Brandon on May 24, 2017, and wrote the letter excusing him from school.

¶ 17 William also provided testimony consistent with the statements that he made to Stockburger on March 1, 2017. When Brandon told him what had occurred, he also said that it had happened about 10 times before. At the hospital, a doctor told William that he was going to take some samples from Brandon, but that there were no signs of penetration. Brandon did not attend the first VSI because William had talked to an attorney who had said not to take Brandon unless there was "evidence beyond a reasonable doubt that something happened to" him. Before

the second interview, William spoke to a different attorney who said to " '[l]et them prove evidence. If they have no evidence, then do not do the VSI interview." Brandon did not attend the third interview because Brandon was ill and had a fever. William left several messages for Sands. William would have taken Brandon to the VSI that day if he were not sick and if an attorney was present with them; William and Patti did not have an attorney at the time. William was not told that semen was found in Brandon's anus until August 2017. If he had known that earlier, he would have done what DCFS had asked, but he was not going to have Brandon participate in a VSI without any evidence. When the police and DCFS came to his house on May 25, 2017, to get Brandon, he said that he would use his second amendment right and that " '[o]ver my dead body he would take my child without any evidence.' " As of the current day, even with the semen evidence, there was still a doubt in William's mind that Jacob had a sexual encounter with Brandon.

¶ 18 The trial court issued its ruling on August 31, 2018, stating as follows. The State had the burden to prove the allegations of the petitions by a preponderance of the evidence. For Brandon, the evidence was clear that he was a minor who was a victim of sexual assault by Jacob. The evidence showed that they were home with Patti on February 28, 2017. Brandon told her that his butt hurt and disclosed what Jacob had done. Patti called William, who left work, and they took Brandon to the hospital to be examined. Patti described what had occurred to medical personnel and law enforcement, and it was consistent with the parents' testimony at the hearing. Swabs taken from the boys conclusively corroborated Brandon's statement of what Jacob had done to him. The law was clear that a child was abused when a family or household member perpetrated a sexual act on another household member, and that is what happened between the two brothers. Therefore, the State had met its burden of proving Brandon's petition.

¶ 19 Jacob's petition contained two counts. Count 1 alleged neglect in that he was not receiving counseling for his conduct, and the second count alleged dependency. Up until the point where the parents brought Brandon to the hospital, they had acted appropriately. However, afterwards they "circle[d] the wagons," failed to cooperate with setting up a VSI, and denied that the sexual contact occurred, even in light of the DNA evidence. The evidence was clear that the sexual contact had taken place, and it indicated that Jacob seriously needed counseling to decrease the risk of recidivism. Therefore, the State had proven count 1 by a preponderance of the evidence.

¶ 20 Count 2 alleged that Jacob was without proper care through no fault, neglect, or lack of concern by the parents. The count was "improperly pled" because it was inconsistent with count 1, and the trial court dismissed it.

¶ 21 A dispositional hearing took place on September 14, 2018. The State told the court that the parties had an agreement regarding the dispositional order, to wit:

> "the parents would be found unable for some reason, other than financial circumstances, to care for, protect, train, or discipline the minors, that guardianship and custody of the minors would be placed with the Department of Children and Family Services with discretion to place with a responsible relative or in traditional foster care.
>
> The visitation between the parents and the minor would be at DCFS' discretion. The supplemental protective orders which have been in place will continue. We are looking for a six-month permanency review date as well as about a 60-day status date. And the basis of this agreement are [*sic*] the court reports that were submitted for today."

The trial court accepted the agreement and entered corresponding orders.

¶ 22 Patti timely appealed.

¶ 23 II. ANALYSIS

¶ 24 A. Brandon

¶ 25 Appellate counsel argues that there is no arguable merit in challenging the trial court's adjudication of Brandon as abused as against the manifest weight of the evidence; we agree. If a trial court finds probable cause to believe that a minor is neglected, abused, or dependent during a shelter care hearing (see 705 ILCS 405/2-10(1), (2) (West 2016)), it then holds an adjudicatory hearing where it must determine whether a preponderance of the evidence shows that the minor is abused, neglected, or dependent (705 ILCS 405/1-3(1), 2-21(1) (West 2016)).

¶ 26 The State alleged that Brandon was abused because his parents allowed a sex offense to be committed against him, in that Jacob had made contact between his penis and Brandon's anus. See 705 ILCS 405/2-3(2)(iii) (West 2016). The statute provides that an "abused" minor includes any minor whose parent or any individual residing in the same home "commits or allows to be committed any sex offense against such minor, as such sex offenses are defined in the Criminal Code of 1961 or the Criminal Code of 2012 ***." *Id.* One such offense is criminal sexual abuse, which includes the following definition:

> "A person commits criminal sexual abuse if that person is under 17 years of age and commits an act of sexual penetration or sexual conduct with a victim who is at least 9 years of age but under 17 years of age." 720 ILCS 5/11-1.50(b) (West 2016).

"Sexual penetration" is defined as:

> "any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ

> or anus of another person, including, but not limited to, cunnilingus, fellatio, or anal penetration." 720 ILCS 5/11-0.1 (West 2016).

"Sexual conduct" is defined as:

> "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused." *Id.*

¶ 27 Here, Patti testified consistently with her statements to Officer Stockburger that on February 28, 2017, Brandon and Jacob were upstairs when she heard screaming and Brandon saying, " 'Ow. Leave me alone.' " He subsequently came downstairs and said, " 'Ouch,' " and that Jacob had put his "peenee" in his butt and had also done so three days prior. Patti and William then took Brandon to the hospital. The reports stipulated to by the parties showed that the anal swab taken from Brandon contained semen, and the likelihood that it came from someone other than Jacob was practically nonexistent.

¶ 28 A trial court's finding of abuse or neglect will not be reversed unless it is against the manifest weight of the evidence, meaning that the opposite conclusion is clearly evident. *In re Adam B.*, 2016 IL App (1st) 152037, ¶ 34. Here, there is no arguable merit in challenging the trial court's finding that Brandon was abused as against the manifest weight of the evidence. It is undisputed that he was heard complaining when he was upstairs with Jacob, came downstairs and again said "ouch," and said that Jacob had put his penis in his butt. Further, semen was found in a sample taken from Brandon's anus, and the DNA from that semen matched Jacob.

¶ 29 B. Jacob

¶ 30 Appellate counsel argues that there is no arguable merit in challenging the trial court's adjudication of Jacob as neglected as against the manifest weight of the evidence; we again agree. The State alleged that Jacob was neglected because his environment was injurious to his welfare, in that he had committed an act of sexual penetration and was not receiving counseling for that conduct, placing him at a risk of harm. See 705 ILCS 405/2-3(1)(b) (West 2016). Courts have stated that the term "injurious environment" is an amorphous concept that cannot be defined with particularity, but it has been interpreted to include a parent's breach of his or her duty to ensure a safe and nurturing shelter for his or her children. *In re D.M.*, 2016 IL App (1st) 152608, ¶ 16.

¶ 31 The record shows that Patti did not begin the process of obtaining counseling for Jacob, Brandon, or herself, despite DCFS directives. The trial court found that there was clear evidence that sexual contact had taken place between the boys, and that it indicated that Jacob seriously needed counseling. Accordingly, the trial court's finding that Jacob was neglected cannot be said to be against the manifest weight of the evidence.

¶ 32 We further note that we recently resolved William's appeal in this case. See *In re Brandon M.*, 2019 IL App (2d) 180826-U. He had argued that trial counsel was ineffective for advising him to agree to the entry of the dispositional order, and that the order did not contain a sufficient factual basis. *Id.* ¶ 2. We concluded that these arguments were without merit. *Id.* ¶¶ 38, 48.

¶ 33 III. CONCLUSION

¶ 34 After carefully examining the record, the motion to withdraw, the accompanying memorandum of law, and relevant authority, we agree with appellate counsel that no meritorious

issue exists that would warrant relief in this court. Accordingly, we grant appellate counsel's motion to withdraw, and we affirm the judgment of the Winnebago County circuit court.

¶ 35 Affirmed.