

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Trace M., )  
A child under 18 years of age. )  
 )  
State of Nebraska, )  
 )  
Appellee, )  
 )  
v. )  
 )  
Tremal M., )  
 )  
Appellant. )

No. A-14-0434.

MEMORANDUM OPINION  
AND  
JUDGMENT ON APPEAL

**FILED**

OCT 28 2014

CLERK  
NEBRASKA SUPREME COURT  
COURT OF APPEALS

IRWIN, INBODY, and PIRTLE, Judges.

INBODY, Judge.

INTRODUCTION

Tremal M., natural father of Trace M., appeals the decision of the Douglas County Separate Juvenile Court adjudicating Trace as a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2012).

STATEMENT OF FACTS

On January 6, 2014, the State filed an adjudication petition alleging that pursuant to § 43-247(3)(a), Trace was lacking proper parental care by reason of the faults or habits of Trace's mother, Alycia G., and Tremal. The petition, as amended to conform to the evidence adduced at the adjudication hearing, alleged that on January 3, Trace, a 7-week-old infant, was brought to Children's Hospital in respiratory distress. While being treated at



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Children's Hospital, Trace was found to have 15 rib fractures; that such injuries are consistent with intentionally inflicted child abuse; that Tremal did not have an explanation for Trace's injuries; that Tremal had care, custody and control of Trace when such injuries occurred; and that due to these allegations, Trace was at risk for harm. Alycia pled no contest to similar allegations relating to her and her rights are not at issue in this appeal.

The adjudication hearing regarding the allegations relating to Tremal was held on March 31, 2014 and continued to April 7, when the last testimony was received. The State called four witnesses: Dr. Suzanne Haney, a child abuse pediatrician and medical director of the Child Advocacy Team at Children's Hospital and Medical Center; Omaha police detective Kristine Love; Omaha police sergeant Lance Worley; and Alycia. Tremal called one witness, Andrew Thomas.

*Dr. Haney's Testimony.*

Dr. Suzanne Haney testified that as a child abuse pediatrician, she is a physician who has completed specialized training in diagnosing and treating child abuse and neglect. This is not a common specialization and she is the only child abuse pediatrician in Nebraska. She further serves as medical director of the Child Advocacy Team at Children's Hospital and Medical Center which works to ensure appropriate treatment of child abuse and neglect. As medical director, Haney treats patients, generally

receiving patients as a consulting physician. When Haney receives a request for a consultation, her protocol to reach a diagnosis is to review the records that are available, including police records; meet with the physician, hospital staff, social workers, and the family, if they are present; and, in some cases, examine the child. Haney reports her findings to the physicians and nurses involved and then frequently to law enforcement and/or Child Protective Services.

Haney received a request to consult on Trace's case on January 3, 2014. She was asked to examine Trace, who was 7 weeks old at the time of the referral. Trace was referred to the emergency room on January 2 by his primary physician because of concern for respiratory distress. Trace's parents also reported that Trace was fussy and that he kept holding his hands above his head. In making her diagnosis, Haney reviewed Trace's medical records since his admission the previous night; two sets of x-rays, a chest x-ray and a dedicated rib series; the history that she gathered from the family; her examination of Trace; and her discussion with the medical team. Haney's examination of Trace revealed that he was still having some respiratory distress and required oxygen to assist him with breathing.

Haney spoke to Tremal and Alycia separately and the information that they provided had an impact on her diagnosis. Tremal indicated to Haney that Trace had been fussy for a few days

and that he could not provide her with an explanation for Trace's injuries. Tremal further indicated that he provided care for Trace, frequently providing care at night. Thus, Haney was able to determine that there were significant periods of time that Tremal was alone with Trace prior to the injuries occurring.

A series of X-rays were taken on January 2, 3, 7 and 22, 2014. Haney determined from the final set of x-rays, which was the most accurate and the one on which she most relied on, that Trace had 15 rib fractures; 5 on the right side, 5 on the right back, 3 on the left side and 2 on the left back. According to Haney, all of the fractures were in the same stage of healing and were anywhere from 3 days to 2 weeks old which made the approximate range that the injuries occurred from December 19 to December 31, 2013. Haney testified that all of the injuries could have been inflicted at one time, but it is also possible that the injuries could have been incurred at close periods in time. According to Haney, rib fractures would cause a 7-week-old pain anytime the child was moved or picked up, which the child would express by crying, refusing food, and general fussiness. Rib fractures could also cause problems with the child's breathing resulting in respiratory distress.

Haney testified that it is not normal for a 7-week-old infant to have multiple rib fractures because these injuries take a significant amount of force, comparable to the force involved in

motor vehicle collisions. The ribs of a 7-week-old infant are different than that of an adult because they are stronger, pound for pound, and more elastic, meaning they will bend further before they break. However, Haney testified that an average adult male or female could cause such injuries and a person the size of Tremal would be able to generate the requisite force to cause rib fractures in an infant. According to Haney, fractured ribs is not the type of injury that an infant can receive without someone knowing because the child is going to start crying immediately because it is painful, the child would be upset and fussy, so somebody would recognize that the child was in distress. After the child received the injuries, the child might be comfortable as long as they are not moved.

Haney testified, within a reasonable degree of medical certainty, that there was nothing that could have caused Trace's injuries except for intentionally inflicted force which qualifies as child abuse. It was Haney's opinion, based upon a reasonable degree of medical certainty, that Trace's injuries were caused by a squeezing force by another person. In reaching her conclusion, Haney ruled out alternative explanations for Trace's injuries including metabolic bone disease, motor vehicle accident, and accidental trauma. She further opined that Trace would be at risk for harm if he was returned to the environment he was in prior to his admission to the hospital.

*Kristine Love.*

Detective Kristine Love testified that she has been a police officer for 15 years, of which she has spent the last 10 years with the Omaha Police Department's Child Victim Sexual Assault Unit which investigates child abuse, child neglect, sexual assaults of children though adult age, and child death investigations. Love was assigned a child abuse investigation involving Trace on January 3, 2014. She responded to Children's Hospital and interviewed Tremal and Alycia separately. Tremal told Love that since Trace's birth, he had been staying with Alycia at her mother's house, except for approximately three nights. Tremal stated he was not working or attending school, that he would spend over 10 hours per day with Trace, and it was Love's impression that Tremal was present and significantly participated in the caretaking of Trace.

Love testified that Tremal told her that he started noticing changes in Trace about three days prior to their interview which he described as fussiness and not being able to move Trace around without Trace becoming uncomfortable and crying. Tremal stated that he noticed that Trace's breathing was not normal which he described as a "popping" noise when Trace was breathing. He told Love that he examined Trace's chest in an attempt to determine what was causing the "popping" noise. During the interview, Tremal indicated that he had notice changes in Trace even earlier than

three days prior. Tremal mentioned that he first noticed changes in Trace on the evening of December 28, 2013. He was watching Trace by himself from between 10:30 p.m. and 1:30 or 2 a.m. because Alycia had gone out for the evening. Trace stated that he noticed that Trace was fussier, he was not able to switch positions with Trace, and was not able to move Trace around very well. Then, on December 31, Trace had vomited the entire contents of his bottle and that Trace would just cry when Tremal picked him up. The following day, January 1, 2014, Trace was fussy and crying and switching positions would make Trace fussy. During the interview, Tremal also indicated that when Trace was 3 to 4 weeks old, he started noticing that Trace always held his fists up by his face or above his head.

Tremal did not provide Love with an explanation for Trace's injuries or implicate anyone else as the perpetrator of Trace's injuries and, at the conclusion of her interview, Love placed Trace into protective custody. Love further testified that she believed that Trace would be at risk for harm if he remained in Tremal's care and custody.

*Lance Worley.*

A follow-up interview with Tremal was conducted by Love's sergeant Lance Worley. During this interview, Tremal again did not have any explanation for the cause of Trace's injuries, did not implicate anyone else as the perpetrator of Trace's injuries, and

Tremal restated that he was alone with Trace on December 28, 2013, from approximately 10:30 p.m. until 1:30 or 2 a.m.

*Alycia G.*

Alycia testified that Trace's birth was uneventful and he was given a clean bill of health following his birth. Alycia acknowledged that Tremal was very involved in the caretaking of Trace and that he had stayed overnight every night with her at her mother's home since Trace's birth except two or three nights. During the times when Alycia was attending classes during the day or evening classes, Tremal usually watched Trace. Further, although they started out sharing the middle of the night caretaking duties, Alycia stated that changed the last couple of weeks in December when Tremal took over. Alycia confirmed that she was out with friends on December 28, 2013, and it was after that date she noticed that Trace seemed more uncomfortable when he was picked up and he was not eating or sleeping normally.

On cross-examination, Alycia testified to her cellular telephone number on or about January 2, 2014. Tremal's attorney offered into evidence exhibit 8, a screenshot of text messages between Alycia and Tremal, which was received with no objection. Alycia testified that exhibit 8 contained text messages that she sent to Tremal after she had to leave the hospital on January 3, one of which stated "Can we talk about what would happen if you lied and took the fall for it please." At this point in the cross-



examination, counsel for the State and for Alycia both challenged the exhibit on the basis that they were under the impression that exhibit 8 encompassed the entire text message conversation between Alycia and Tremal, not a portion of that conversation; however, exhibit 8 remained in evidence. When Tremal's attorney offered exhibit 9, another screenshot depicting another portion of the text conversation between Alycia and Tremal, Alycia's attorney objected that it was not the best evidence because it did not present the entirety of the text conversation; this objection was taken under advisement. Thereafter, during redirect examination of Alycia, the State offered exhibit 10, a copy of the entire text message conversation between Alycia and Tremal that occurred on January 3, 2014, beginning at 11:17 a.m. Exhibit 10 was received into evidence with no objection. Alycia testified that after it was explained to her that she could not come to the hospital or visit after January 2 because Trace was a ward of the State, she "fell apart" and Tremal was telling her to calm down and that she was trying to get Tremal to take the fall for what happened so Trace could return home because she was "worried," "frantic" and "distraught."

*Andrew Thomas.*

Thomas, a good friend of Tremal's, testified on Tremal's behalf. Thomas testified that he has witnessed interactions between Tremal and Trace and that he had never seen Tremal

frustrated or aggressive in dealing with Trace. However, Thomas could not recall the last time he had seen Tremal and Trace together, he did not see Tremal and Trace during the days when Alycia was at school or at work, he had not seen any night feedings between Tremal and Trace, and he did not see Tremal and Trace on the evening of December 28, 2013.

*Juvenile Court's Order.*

In an order filed April 15, 2014, the juvenile court noted that the State had amended the petition to conform to the evidence that Trace had suffered 15 rib fractures and removed allegations that the injuries were in various stages of healing. The juvenile court found that the State had proved the allegations relating to Tremal by a preponderance of the evidence and that Trace was a child within the meaning of § 43-247(3)(a) by a preponderance of the evidence insofar as Tremal was concerned. The court further noted that Alycia's objection to exhibit 9 was sustained and that exhibit was not received into evidence.

ASSIGNMENTS OF ERROR

Tremal contends that the juvenile court erred in not receiving exhibit 9, a photocopy of a screen shot of text messages, into evidence and in finding that the State had proved the elements of the adjudication petition by a preponderance of the evidence.

## 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. However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Joseph S.*, 288 Neb. 463, 849 N.W.2d 468 (2014).

## ANALYSIS

*Exhibit 9.*

Tremal contends that the juvenile court erred in not receiving into evidence exhibit 9, a photocopy of a screen shot of text messages between Tremal and Alycia.

The Nebraska Rules of Evidence apply in adjudication proceedings. *In re Interest of Ashley W.*, 284 Neb. 424, 821 N.W.2d 706 (2012); *In re Interest of Jordana H.*, 22 Neb. App. 19, 846 N.W.2d 686 (2014). In all proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997); *Hill v. Hill*, 10 Neb. App. 570, 634 N.W.2d 811 (2001). It is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on

appeal absent an abuse of discretion. *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 452 N.W.2d 270 (1990); *Hill v. Hill*, *supra*.

We note that exhibit 9 is contained, in its entirety, within exhibit 10, which was received into evidence without objection. Exhibit 10 contains the entire text conversation between Tremal and Alicia. Nebraska rule of evidence 403 provides that relevant evidence may be excluded if there is "needless presentation of cumulative evidence." Neb. Rev. Stat. § 27-403 (Reissue 2008). Where evidence is cumulative to other evidence received by the court, its exclusion will not be considered prejudicial error. *Campagna v. Higday*, 14 Neb. App. 749, 714 N.W.2d 770 (2006); *Scott v. Khan*, 18 Neb. App. 600, 790 N.W.2d 9 (2010). Since exhibit 9 is cumulative and is actually contained within exhibit 10, the district court did not abuse its discretion in excluding exhibit 9.

*Adjudication.*

Tremal also contends that the juvenile court erred in finding that the State had proved the elements of the adjudication petition by a preponderance of the evidence.

At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor child under § 43-247(3)(a), 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 Laticia S.*, 21 Neb. App. 921, 844 N.W.2d 841 (2014); *In re Interest of Cornelius K.*, 280 Neb. 291, 785 N.W.2d 849 (2010). Section 43-247(3)(a) states that the juvenile court shall have jurisdiction of "[a]ny juvenile . . . whose parent . . . neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile." The purpose of the adjudication phase is to protect the interests of the child. *In re Interest of Laticia S.*, *supra*; *In re Interest of Cornelius K.*, *supra*.

A finding of abuse of neglect may be supported where the record shows (1) a parent's control over the child during the period when the abuse or neglect occurred and (2) multiple injuries or other serious impairment of health have occurred which ordinarily would not occur in the absence of abuse or neglect. *In re Interest of Chloe L.*, 14 Neb. App. 663, 712 N.W.2d 289 (2006); *In re Interest of McCauley H.*, 3 Neb. App. 474, 529 N.W.2d 77 (1995). Tremal concedes that the State has provided evidence regarding both prongs of the analysis but contends that the text messages indicate that Alycia knows that Tremal did not cause Trace's injuries. Further, Tremal's argument that the text messages from Alycia indicate that she knows that the perpetrator

is someone other than him, is unsupported by reading the text message conversation in its entirety.

#### CONCLUSION

In the instant case, Tremal had control over Trace during the period of time when the abuse or neglect occurred and Dr. Haney testified that Trace's injuries, 15 fractured ribs, were intentionally inflicted, which constitutes child abuse. Additionally, Haney ruled out alternative explanations for Trace's injuries including metabolic bone disease, motor vehicle accident, and accidental trauma. Tremal did not offer an explanation offered for Trace's injuries, nor did he implicate anyone else as a possible perpetrator of those injuries. Although Tremal argues that the text messages from Alycia indicate that she knows that the perpetrator is someone other than him, this inference is unsupported by the text message conversation as a whole. Thus, based upon our de novo review of the record, the evidence establishes, by a preponderance of the evidence, the allegations against Tremal. Therefore, the decision of the juvenile court adjudicating Trace as a child within the meaning of § 43-247(3)(a) is affirmed.

AFFIRMED.