Cite as 2012 Ark. App. 34

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA11-850

MARY WEATHERSPOON APPELLANT	**Opinion Delivered** January 11, 2012
V.	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, EIGHTH DIVISION [NO. JV2011-352]
ARKANSAS DEPARTMENT OF HUMAN SERVICES and MINOR CHILD APPELLEES	HONORABLE WILEY A. BRANTON, JR., JUDGE AFFIRMED

JOSEPHINE LINKER HART, Judge

Mary Weatherspoon appeals from an order of the Pulaski County Circuit Court adjudicating her daughter, TN2 (born May 12, 2006), dependent-neglected. The only issue on appeal is whether the circuit court's decision is clearly erroneous. We affirm.

This case began on January 14, 2011, when DHS received a report that TN2 had told employees at her school that her six-year-old brother, TN1, had gotten into bed with her at night; tried to pull her panties down; and "was hunching on her." Appellant denied knowing about any sexual contact between the children. In a January 25, 2011 interview, TN2 told the investigator that TN1 had stuck a "pink stick" up her "coo-coo." She also stated that she had informed her mother that TN1 had touched her "coo-coo" and that her mother had told him "not to touch it no more." In his interview with the investigator, TN1 denied touching TN2 or having been sexually abused himself. The same day, appellant agreed to a safety-protection

plan requiring her to sleep with TN2 and provide around-the-clock supervision of the children. On February 2, 2011, Dr. Maria Teresa Esquivel conducted a sexual-abuse examination of TN2 at Arkansas Children's Hospital. Dr. Esquivel found that TN2's hymen was thin, which could be normal or could be consistent with sexual abuse. However, based on the available history, Dr. Esquivel suspected sexual abuse. On February 11, 2011, a protective-services case on the family was opened and assigned to Tammy Blount, a family-service worker. Blount visited the home on February 18, 2011.

On February 28, 2011, DHS took a seventy-two-hour hold on TN2. On March 2, 2011, it filed a petition for emergency custody of TN2, which the circuit court granted the same day. The court then issued a probable-cause order on March 21, 2011.

The court held an adjudication hearing on May 3, 2011. At the beginning of the hearing, the circuit court stated that it was taking judicial notice of two prior cases involving the family. In both cases, appellant was reunited with the children. A DVD of the interview with TN2 was played at the adjudication hearing. Rhonda Wilson, a DHS investigator, then testified that TN2's school had also raised concerns about TN2 urinating on herself in the classroom. She stated that she had interviewed appellant, who denied having any knowledge about TN2's allegations and related that TN2 slept with her every night. Wilson said that she had implemented a safety plan whereby appellant, who was initially cooperative, agreed to let TN2 sleep with her and to monitor the children at all times.

Tammy Blount, a DHS caseworker, testified that when she went to appellant's home on February 18, 2011, appellant refused to let her come inside and talked with her outside

because TN1 and TN2 had, as appellant explained, "fucked up" the home.[1] Blount stated that appellant had "somewhat of an attitude" after Blount informed her that she would refer the family for the Family Treatment Program, but "it wasn't as bad as it is now." She also testified that while she was there, appellant made a phone call to the Children's Protection Center to obtain information about the report and stated that she did not believe that TN1 had done anything to TN2. She further stated that appellant had attended parenting classes, but had missed her psychological evaluation scheduled for April 6, 2011, had informed the worker providing intensive-family services that she did not need such services, and was upset because anger-management classes were recommended. Blount added that, when she went to appellant's home with the homemaker-services provider on April 22, 2011, appellant became upset and cursed:

> After I observed Ms. Weatherspoon being upset, the lady who wanted to do the homemaker services said she was just there to see if we could come into the home. At that time, [Weatherspoon] went into the house and then she came back out and said, "Well, the house is a mess, but you can still come in." She went in again. At that time when Ms. Weatherspoon went in, we heard banging. Her front window was shaking at that time. I looked at Ms. Cardwell and told her, "We're not going in."

Blount recommended that TN2 remain in DHS's care and that DHS continue offering services to appellant.

Dr. Esquivel testified that TN2's hymen was very thin, which indicated that there may have been some penetration of her vagina. She also stated that appellant had acknowledged

[1]Ms. Blount stated that, through the open door, she could see objects on the floor inside the apartment.

that TN2 had a problem with urinating on herself, usually during the school day. Dr. Esquivel said that TN2's inability to control her urination also raised the possibility that she was being sexually abused, especially if she had been toilet trained previously. She further stated that a child of TN2's age would not make up a disclosure of sexual abuse "out of the blue" and that, based on the history, she believed that sexual abuse had occurred.

On June 3, 2011, the court filed an order adjudicating TN2 dependent-neglected. It stated: "If the court were dealing with only the narrow issue of sexual abuse and no other issues, this would be a very close case. However, based on the totality of the evidence and the family history, the court is compelled to make a finding of dependency-neglect." The court credited TN2's interview and concluded that the incident occurred, in part, as a result of inadequate protection and supervision by the mother. The court further found "general unfitness and general neglect," and "a lack of stability, on the mother's part, which fails to meet the minimum stability required for children."

Appellant filed a timely notice of appeal. Appellant argues on appeal that there was insufficient evidence to support the adjudication of TN2 as dependent-neglected.[2] We will not reverse the circuit court's findings unless they are clearly erroneous. *Parker v. Ark. Dep't of Human Servs.*, 2011 Ark. App. 18, 380 S.W.3d 471. In reviewing a dependency-neglect

[2]Under this point, appellant includes two arguments that she did not raise to the circuit court: she challenges its taking of judicial notice of the prior dependency-neglect cases, and asserts that the statutory definition of sexual abuse by a person younger than ten, under Arkansas Code Annotated section 9-27-303(51)(D) (Repl. 2009), is "problematic." Appellant, however, failed to raise these issues to the circuit court, and it would be improper for us to review them on appeal. *Maynard v. Ark. Dep't of Human Servs.*, 2011 Ark. App. 82, 389 S.W.3d 627.

adjudication, we defer to the circuit court's evaluation of the credibility of the witnesses. *Id.*

In pertinent part, Arkansas Code Annotated section 9-27-303(18)(A) (Repl. 2009), defines "dependent-neglected juvenile" as any juvenile who is at substantial risk of serious harm as a result of abandonment, abuse, sexual abuse, sexual exploitation, neglect, or parental unfitness. The definition of "neglect" in Arkansas Code Annotated section 9-27-303(36)(A) (Repl. 2009). includes acts or omissions of a parent that constitute

> (i) Failure or refusal to prevent the abuse of the juvenile when the person knows or has reasonable cause to know the juvenile is or has been abused;
>
> . . . .
>
> (iii) Failure to take reasonable action to protect the juvenile from abandonment, abuse, sexual abuse, sexual exploitation, neglect, or parental unfitness when the existence of this condition was known or should have been known . . . .

The statutory definition of a neglected child does not require proof of actual harm having been experienced by the child; the term "substantial risk" speaks in terms of future harm. *Maynard*, 2011 Ark. App. 82, 389 S.W.3d 627.

To support its dependency-neglect petition, DHS was required to prove, by a preponderance of the evidence, that TN2 was at substantial risk of future sexual abuse by her brother because of her mother's neglect or unfitness. The circuit court acknowledged that this was a "very close case," and based its decision, to a significant degree, on the prior cases. However, in each of those cases, which involved unrelated problems, appellant successfully completed the case plan and regained custody of her children. Appellant agreed to sleep with TN2 and to supervise the children at all times, and there is no evidence to suggest that she

did not comply with that aspect of the plan. Nevertheless, the circuit court's concern here was with Weatherspoon's general unfitness and neglect and lack of stability. Appellant missed her psychological-evaluation appointment and resisted DHS's efforts to remedy household instability and neglect. Giving deference to the circuit court's superior opportunity to observe the witnesses and evaluate their credibility, we cannot say that its finding that TN2 was dependent-neglected was clearly erroneous.

Affirmed.

ROBBINS and ABRAMSON, JJ., agree.

Deborah R. Sallings, Arkansas Public Defender Commission, for appellant.

Tabitha Baertels McNulty, Office of Chief Counsel, for appellee.

Bristow & Richardson P.L.L.C., by: *Melissa B. Richardson*, attorney ad litem for minor children.