

**ARKANSAS COURT OF APPEALS**

DIVISION IV

No. CV-19-53

JOSEIA LIBOKMETO

APPELLANT

V.

ARKANSAS DEPARTMENT OF  
HUMAN SERVICES AND MINOR  
CHILDREN

APPELLEES

Opinion Delivered: May 15, 2019

APPEAL FROM THE WASHINGTON  
COUNTY CIRCUIT COURT  
[NO. 72 JV-18-761]

HONORABLE STACEY  
ZIMMERMAN, JUDGE

AFFIRMED

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**MEREDITH B. SWITZER, Judge**

Joseia Libokmeto appeals from the November 2, 2018 adjudication and disposition order finding MO dependent-neglected. MO, who was thirteen years old when this case began, had been living in the custody of Joseia and Katrinda Libokmeto.<sup>1</sup> A petition for emergency custody and dependency-neglect concerning MO and two male juveniles living in the same household, JL and RO, was filed on September 12, 2018.<sup>2</sup> Emergency custody was ordered the same day, the probable-cause order was entered on September 17, 2018, and the dependency-neglect hearing was held on November 1, 2018. The trial court specifically found that Joseia had sexually abused MO; therefore, MO was adjudicated

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<sup>1</sup>Two other children were involved in this case, RO and JL, but they are not part of this appeal. Katrinda Libokmeto has not appealed the decision.

<sup>2</sup>The petition was amended on September 19, 2018, to add the name of MO and RO's deceased mother, Jacklynn Labwij.

dependent-neglected. Joseia contends the trial court clearly erred in making this finding. We disagree and affirm.

A dependent-neglected juvenile includes any juvenile who is at substantial risk of serious harm as a result of sexual abuse or parental unfitness. Ark. Code Ann. § 9-27-303(18)(A) (Supp. 2017). Dependency-neglect allegations must be proved by a preponderance of the evidence. *Araujo v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 181, 574 S.W.3d 683. The purpose of adjudication hearings is to determine whether the allegations in a petition are substantiated by the proof. *Id.* In our review of a dependency-neglect adjudication, we defer to the trial court's superior position to observe the parties and judge the witnesses' credibility. *Id.* We will not reverse the trial court's findings unless they are clearly erroneous. *Id.* A finding is clearly erroneous when, even though there is evidence to support it, on the entire evidence we are left with a definite and firm conviction that the trial court made a mistake. *Id.*

In this appeal, Joseia contends the trial court clearly erred in finding dependency-neglect based on sexual abuse because the finding "rested solely on the mere allegation of a thirteen-year-old intellectually disabled girl who never testified, thus preventing the circuit court from adequately assessing her credibility." We hold that the trial court did not err.

At the hearing, Amber O'Malley was qualified as an expert witness and testified that she conducted a sexual-assault physical examination of MO. O'Malley found no anal or genital injury but testified that the lack of physical findings did not negate sexual contact. She explained that she made a record of her examination, and it was admitted without objection as State's exhibit No. 5.

On cross-examination, O'Malley explained she did not get a report of abuse directly from MO. O'Malley documented in her examination record a third-party advocate's account of the initial interview with MO. In the interview, MO reported penile-genital contact, penile-anal contact, and forced use of MO's hand on the offender's penis. MO also reported she was afraid to go home because the offender had raped her, and MO reported "it hurts down there," pointing to her vaginal area. The advocate provided O'Malley these "disclosures" before her examination so that she did not have to ask MO questions that could revictimize her. O'Malley further stated that the information was used for diagnosis and treatment purposes. She testified that she was told MO was intellectually disabled, and although she wrote in her report that MO was not able to give full answers due to "intellectual disability," she still documented the answers MO was able to give.

Michael McHenry, who works with the Arkansas State Police Crimes Against Children Division, testified without objection that he observed Lindsey Carter, a child advocate and forensic interviewer at the Children's Safety Center, conduct an interview with MO. MO disclosed the sexual assault during the interview and stated she had told Katrinda in March 2018 what Joseia was doing to her.

Still without objection, McHenry continued to testify regarding specific allegations MO had made during her interview. MO revealed that on at least two occasions Joseia told her to take off her clothes, rubbed her "boobs," and "put his thing" in her "bottom hole," which she clarified was her "butt." MO stated that on one occasion Joseia did not have anything on his penis, but nothing came out of his penis that time because the family

returned to the house in “the middle of the incident.” MO also disclosed that he had rubbed her vagina with his “thing” until white stuff came out.

MO also reported in the interview that Joseia had put his “thing” in her hole where she poops, that he used baby oil, and that he stopped when white stuff came out of his “thing.” She said that Joseia would have her touch his “thing” and move her hand back and forth on it until white stuff came out, telling her to squeeze harder. Finally, MO reported in the interview that Joseia had shown her videos of a girl and a guy with their clothes off having sex. Joseia told her not to tell anyone what they were doing and that he was just teaching her things she needed to know when she got a boyfriend. She told the interviewer she was very scared to go home and did not want to be around Joseia or Katrinda.

McHenry then testified that his investigation resulted in a true finding against Joseia on MO’s allegations of sexual abuse. He explained that Joseia and Katrinda were interviewed by another detective and that Joseia denied the allegations and described MO as a liar. McHenry did not witness those interviews but read or was told about them as part of his investigation.

McHenry acknowledged that the Washington County Prosecutor’s Office declined to pursue charges. He further stated he had made a true finding against JL regarding MO’s allegations that he, too, had sexually abused her, but he was not aware the finding was found to be unsubstantiated by the administrative law judge. McHenry was also aware MO was temporarily placed with two school teachers but had no knowledge of MO’s accusing one of the teachers of sexual abuse or that she had accused another caretaker of sexual abuse.

The defense then presented its case, beginning with Katrinda's testimony. Katrinda acknowledged MO told her one time that Joseia was sexually abusing her, but she did not believe MO. Joseia denied it when Katrinda asked him about it, and Katrinda believed Joseia. Katrinda stated that MO had told lies since she was very little. Katrinda further testified that MO got a check each month for mental disability and was in special education at school. She stated kids at school did not like MO and that she stole things. Katrinda reported that MO was raped by an unknown assailant when she was about six years old and that MO had accused her "uncle" of sexually abusing her. She said she did not think it would be good for MO to return home because MO had said things that were not true.

Joseia testified that he and Katrinda had custody of MO and RO. He denied MO's allegations of abuse and believed she was lying because she wanted to live with her father. Joseia explained how upset he had been about the allegations.

Following the hearing, the trial court concluded MO was dependent-neglected and specifically found that MO "disclosed facts that would not be known to a child of this age, especially if she was delayed, about white stuff coming out of the penis" and other vivid details.

Counsel for Joseia candidly acknowledges trial counsel did not raise a hearsay objection (1) when O'Malley testified about the things that were reported to her concerning MO's sexual-abuse allegations; (2) when O'Malley's record of the medical examination she performed on MO was introduced as State's exhibit No. 5; and (3) when McHenry testified about what he had heard MO say in the forensic interview he observed. Counsel further

acknowledges that because the hearsay issue was not raised below, it was not preserved for this court to address on appeal.

Evidence admitted without objection may constitute substantial evidence. *See, e.g., Jones v. State*, 332 Ark. 617, 967 S.W.2d 559 (1998); *Moseby v. State*, 2010 Ark. App. 5. Acknowledging that he is precluded from raising the hearsay objections for the first time on appeal, Joseia's counsel nevertheless extrapolates from *Cochran v. Arkansas Department of Human Services*, 43 Ark. App. 116, 860 S.W.2d 748 (1993), arguing that the trial court could not adequately judge MO's credibility based on hearsay. In other words, counsel contends the trial court cannot resolve credibility issues by crediting "testimony" from an absent victim, MO, over other inconsistent evidence such as Joseia's denial, Katrinda's testimony about MO's history of lying and making other sexual-abuse allegations, and the results of the sex-abuse examination showing normal findings. Counsel asserts that the burden of proof was on DHS and that DHS did not make MO available for cross-examination to aid in the trial court's credibility determination. Counsel concludes by arguing that the trial court's credibility determination was therefore void of substance, rendering it clearly erroneous. We are not persuaded.

DHS was not required to call witnesses that parents' counsel might want to cross-examine in order to demonstrate credibility and meet its burden of proof. *See Ark. Dep't of Human Servs. v. A.B.*, 374 Ark. 193, 286 S.W.3d 712 (2008). Here, because there were no hearsay objections or objections of any other kind, the trial court had before it the following evidence: testimony from a sexual-assault nurse detailing a report she received from the Children's Advocacy Center about MO's statements regarding sexual abuse; the record of

the nurse's medical examination of MO (State's exhibit No. 5), which included the reports she received of the alleged abuse; the nurse's expert opinion that the absence of physical findings did not negate sexual contact; and McHenry's testimony about the specific allegations of sexual abuse MO made during her interview with Lindsey Carter. The trial court weighed the evidence presented by DHS against other conflicting evidence and concluded Joseia had sexually abused MO. We defer to the trial court's superior position, ability, and opportunity to observe witnesses and judge credibility, especially in cases involving minor children. *See, e.g., Carrillo v. Ibarra*, 2019 Ark. App. 189, 575 S.W.3d 151. The evidence presented, without objection, supports the trial court's finding that MO was dependent-neglected based on its determination that Joseia had sexually abused MO. We are not left with a definite and firm conviction that the trial court made a mistake in so finding and therefore affirm.

Affirmed.

GLADWIN and HIXSON, JJ., agree.

*Leah Lanford*, Arkansas Public Defender Commission, for appellant.

*Andrew Firth*, Office of Chief Counsel, for appellee.

*Chrestman Group, PLLC*, by: *Keith L. Chrestman*, attorney ad litem for minor children.