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2011 IL App (3d) 110316-U

Order filed October 6, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

<i>In re</i> B.M.,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
a Minor)	Will County, Illinois,
)	
(The People of the State of Illinois,)	
)	Appeal No. 3-11-0316
Petitioner-Appellant,)	Circuit No. 08-JA-61
)	
v.)	
)	
Bryn B. and Jeff M.,)	Honorable
)	Paula Gomora,
Respondents-Appellees).)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Carter concurred in the judgment.
Justice McDade's special concurrence to follow.

ORDER

- ¶ 1 *Held:* The trial court's finding that the State failed to prove the minor was neglected due to an injurious environment was contrary to the manifest weight of the evidence.
- ¶ 2 Following an adjudication hearing, the trial court found that the State failed to prove that B.M., the son of respondents Bryn B. and Jeff M., was neglected due to an environment injurious

to his welfare (705 ILCS 405/2-3(1)(b) (West 2010)). As a result, the trial court dismissed the State's juvenile petition. On appeal, the State argues that the trial court applied an incorrect burden of proof and erred in finding that the State failed to prove that B.M. was neglected. We reverse and remand.

¶ 3

FACTS

¶ 4 On March 17, 2008, B.M. was brought to the hospital in an unresponsive state. On April 2, 2008, the State filed a juvenile petition alleging that B.M. was neglected in that his environment was injurious due to "[an] inflicted injury as a result of non-accidental head trauma[.]"¹ A shelter care hearing was conducted. The trial court found probable cause that B.M. was neglected due to his diagnosis of "shaken baby syndrome and hav[ing] severe brain injuries." The trial court placed B.M. into the temporary custody and guardianship of the Department of Children and Family Services (DCFS). B.M. was hospitalized from March 17 until April 5, 2008, and then placed in a rehabilitation center. Upon his release from the rehabilitation center on May 23, 2008, B.M. was placed into relative foster care with his paternal grandmother.

¶ 5 On February 7, 2011, an adjudication hearing took place. Evidence indicated that B.M. was born on January 16, 2008. Bryn, Jeff, and B.M. resided in the home of Bryn's grandmother and Bryn's 53-year-old mentally handicapped uncle. Bryn and Jeff had a room in the basement. B.M.'s room with a crib was on the first floor, and Bryn's grandmother and uncle had bedrooms on the second floor.

¹ The State's petition also alleged that B.M. was abused. The trial court's finding that it was "unable to conclude that the minor was abused" is not at issue on appeal.

¶ 6 On March 11, 2008, Jeff was starting a new job as a security guard working the midnight shift. That evening Jeff had asked his mother to meet him and Bryn at a gas station to look at B.M. because he was not acting right. Jeff's mother had been a medical assistant for 20 years. Other than B.M. appearing extremely tired and having a bruise on his chin, she did not notice anything unusual. B.M.'s pulse, color, and reflexes were normal. Although Jeff's mother was not concerned about B.M., she had advised Jeff and Bryn to take B.M. to the hospital if they were concerned. Jeff and Bryn left the gas station, indicating that they would take B.M. to the hospital. However, 30 minutes later they called Jeff's mother to inform her that they were not going to the hospital because Bryn said B.M. was eating and acting normal.

¶ 7 According to Bryn, as of March 14, 2008, B.M. had no marks on him other than the recurring bruising on his chin, which Bryn and Jeff both attributed to B.M.'s car seat straps. On the evening of March 14, 2008, Bryn's father noticed that B.M. had a dazed look and would not track his finger at one point that evening but otherwise was normal.

¶ 8 On March 16, 2008, B.M. had a normal feeding at 6 p.m. According to Jeff, B.M. was "perfectly fine" at 8 p.m. before he left for work. Jeff noticed the bruising on B.M.'s chin and a small scratch on his left eye but did not notice any blood in B.M.'s eye. After Jeff left for work, B.M. was fussy through the night. Bryn's grandmother tried to feed B.M. but had trouble getting him to eat. At 12:45 a.m., Bryn brought B.M. downstairs, held him for an hour, and then placed him in his swing. B.M. fell asleep at 3 a.m. At 7:30 a.m., Jeff returned from work. B.M. was crying in his swing, and Bryn was sleeping. Although B.M. appeared hungry, he only ate two ounces of formula, which was less than normal. B.M. and Jeff slept in the morning. At 12:30

p.m., Bryn fed B.M. six ounces of formula, which he ate more slowly than normal. In the afternoon, Bryn and Jeff brought B.M. to a car dealership until 3 p.m., during which time B.M. slept in his car seat.

¶ 9 After returning home, Bryn cleaned the house and periodically checked on B.M. Jeff went to sleep. Bryn's aunt arrived and held B.M. Bryn's parents also arrived. Bryn's mother changed B.M.'s diaper and put him in his crib. At 6:15 p.m., Bryn left for band practice. When Bryn's mother went to get B.M. for a feeding, she noticed that he was not responding normally. Bryn's father went to Bryn's band practice and informed her that B.M. needed to be taken to the emergency room (ER). Bryn returned home and woke Jeff to tell him that B.M. need to be taken to the ER. Jeff looked into B.M.'s eyes and noticed a large bloodshot area.

¶ 10 B.M. was brought to an ER in Joliet and then transferred to Children's Memorial Hospital in Chicago via ambulance. B.M. arrived unresponsive and exhibited "decerebrate[d] posturing," indicating that there was no communication between the "thinking part" of his brain and the rest of his body. B.M. presented with: (1) subdural hemorrhaging in his brain, brain swelling, and bleeding on the surface of the brain; (2) bruising on his left eyelid; (3) subconjunctival hemorrhaging in the inner corner of his left eye; (4) a scratch on his left eyelid; (5) bruises on the underside of his left and right chin; (6) numerous multi-layered retinal hemorrhages in both eyes; and (7) a right ankle fracture.

¶ 11 Jeff told the police investigator that he had not seen any problems with B.M. at the dealership but he was not really paying attention to him. He did not notice the bruising over B.M.'s left eye until he saw B.M. in the hospital. Bryn indicated that there was no problem with B.M.'s eye when they left for the car dealership but she noticed red in his eye when they returned.

Bryn told a police investigator that she had "put a cold compress on it to bring up the discoloration and get rid of the swelling." Bryn also said that she had noticed a "crack" on B.M. and put Neosporin on it, presumably referring to the scratch over B.M.'s eye. Bryn indicated that after his birth B.M. had been released from the hospital in good health and had been growing and developing normally. Jeff and Bryn had not taken B.M. for any medical checkups after his birth. DCFS worker Rosalyn Walker filed an indicated report of abuse or neglect due to B.M.'s head injuries, bone fracture, cuts, welts, bruises, and oral abrasions.

¶ 12 At the adjudication hearing, the State's theory was that most of B.M.'s injuries were consistent with abusive head trauma that may have included someone shaking B.M. The State's theory was based upon B.M.'s age, B.M.'s specific types of injuries, and the timing of the manifestation of B.M.'s symptoms. The respondents presented an expert witness who questioned the soundness of shaken baby syndrome and the diagnosis of B.M.'s fracture, and indicated that B.M.'s brain injuries could have been due to a rebleed of a pre-existing subdural hematoma, lack of oxygen, or abusive head trauma.

¶ 13 Computerized tomography (CT) head scans and a magnetic resonance image (MRI) showed bleeding on both sides of B.M.'s brain and bleeding between the two halves of his brain, with brain swelling and "hypoxic ischemic changes" that indicated B.M.'s brain had suffered from lack of oxygen at some point. The first CT scan was taken at 8:44 a.m. on March 18, 2008, and the neuroradiologist's impression was that the bleeding in B.M.'s brain was "acute [new] subdural hemorrhages" and those hemorrhages "may [have] be[en] superimposed on chronic [old] subdural collections." A CT scan taken a few hours later indicated that B.M. had an "acute subdural hematoma" and made no reference to chronic blood. The report of a subsequent MRI

made no mention of chronic blood. In the summer of 2008, B.M. suffered a rebleed of the subdural hemorrhages, and radiologic studies indicated both chronic and acute subdural hemorrhages were present.

¶ 14 Dr. Emalee Flaherty testified for the State as an expert in pediatrics and child abuse pediatrics. Flaherty was the head of the child abuse unit at Children's Memorial Hospital, where B.M. was hospitalized from March 17 until April 5, 2008. Flaherty opined that the visible bleeding in the front of B.M.'s eye (subconjunctival hemorrhaging) and bruising over his eyelid indicated some trauma to the eye occurred. Flaherty opined that some type of acceleration-deceleration and rotational force caused the bleeding in B.M.'s brain and retinas.

¶ 15 Flaherty testified that the medical profession had replaced the diagnosis of "shaken baby syndrome" as a diagnosis with the term "abusive head trauma" because shaken baby syndrome described a specific mechanism. Flaherty indicated that there was no evidence of an impact injury to B.M.'s head but children who have been slammed against a soft surface can generate enough acceleration-deceleration forces to create the type of injuries seen in B.M. Flaherty could not identify the specific mechanism that caused B.M.'s injuries, but B.M.'s specific type of diffused hemorrhaging in his brain and numerous retinal hemorrhages in his eyes were indicative of differential movement between his skull and brain, meaning some type of "acceleration-deceleration rotational forces" caused his head and retinal injuries. Flaherty's acceleration-deceleration rotational forces theory was supported by data collected from witnesses or confessions in other abusive head trauma cases. As for the lack of oxygen to B.M.'s brain, Flaherty explained that damage to the brain cells may have caused B.M. to stop breathing, or someone may have tried to suffocate or strangle him.

¶ 16 Flaherty testified that B.M.'s CT scans on March 18, 2008, showed acute bleeding and the MRI, which would have been better at indicating the age of blood, made no mention of chronic blood. Flaherty explained that children do not get subdural hemorrhaging without some trauma. She noted that B.M.'s subdural hemorrhage was diffused over the whole hemisphere of his brain, which is caused by "violent acceleration-deceleration forces to the head that cause[d] the head to rotate and cause[d] some differential movement of the skull and the brain and then caus[ed] the bridging vessels that go between the skull and the brain to *** tear." Flaherty explained that when the bridging vessels break "they bleed into the subdural space," but the bleeding does not cause pressure or damage in the brain because children have sutures that expand with the blood. The brain damage occurs because the acceleration-deceleration forces also injure the brain cells. Flaherty opined that it was not possible that B.M.'s subdural hemorrhages were caused from birth trauma because subdural hemorrhages from birth would have gone away between two to six weeks of life and would have appeared chronic on the CT scan and MRI. Flaherty noted that there was no history given by B.M.'s family to account for his injuries and opined that child abuse was the only explanation for his particular constellation of injuries. Flaherty concluded that B.M. was a victim of both abusive head trauma and physical abuse.

¶ 17 Dr. Mark Shuman reviewed medical records at the request of Bryn's attorney and was tendered as an expert in forensic pathology. Shuman opined, to a reasonable degree of medical certainty, that B.M. suffered severe brain damage from lack of blood flow or oxygen to his brain as the result of an injury. Shuman ruled out an accidental injury because "an eight-week-old with a head injury, somebody should know what happened." Shuman agreed that subdural hemorrhages have to begin at some time and do not just appear. Shuman indicated that B.M.'s

new subdural hemorrhages could have been a rebleed of a pre-existing chronic subdural hematoma that B.M. had incurred from the birthing process. He explained that a rebleed of a chronic subdural hematoma could occur spontaneously or from a minor injury because a chronic subdural hematoma can be very delicate. In viewing the CT scans, Shuman acknowledged that acute blood was present but opined that there also "could be" some chronic blood. Shuman opined that the MRI depicted different compositions of blood, but he could not say whether it was acute or subacute (in a state between old and new).

¶ 18 Shuman indicated that an impact injury to B.M. could have caused B.M.'s specific types of retinal and subdural hemorrhages. However, shaking alone would not have caused the injuries because shaking, in and of itself, does not create enough force to cause these types of injuries and would have also caused severe neck injuries. Shuman acknowledged that an impact could have been with a soft surface. Shuman indicated that he could not exclude abuse as the source of B.M.'s injuries. He stated that determining whether B.M.'s injuries were the result of abusive head trauma, accidental injury, or a spontaneous rebleed would require a very good investigation.

¶ 19 As for B.M.'s retinal hemorrhages, an ophthalmology report indicated that B.M. had numerous multi-layered retinal hemorrhages in both eyes that were "too numerous to draw." Flaherty explained that B.M.'s specific type and amount of retinal hemorrhaging was indicative of the same acceleration-deceleration forces that caused B.M.'s subdural hemorrhages. According to Flaherty, these bilateral multi-layered retinal hemorrhages are specific to children who have suffered abusive head trauma, with a few exceptions for children who have died in fatal automobile accidents. Shuman testified that retinal hemorrhages are not an absolute symptom of child abuse. Flaherty and Shuman both indicated that some retinal hemorrhaging

can occur at birth but the hemorrhages would not be nearly as numerous those found in B.M. Flaherty additionally noted that retinal hemorrhages from birth would not be in the same location on the eye and would have resolved by eight weeks. Shuman acknowledged that accidental or abusive head injuries could cause retinal hemorrhages.

¶ 20 Flaherty and Shuman disagreed as to whether B.M. had an ankle fracture. On March 18, 2008, a babygram (a single frontal x-ray of the whole body) taken of B.M. indicated that no acute or healing fractures could be seen. On March 26, 2008, a skeletal survey was taken of all of B.M.'s bones, which indicated that there was a "questionable irregularity at the distal aspect of [B.M.'s] right tibia." Pediatric radiologist Dr. Martha C. Saker's impression of a dedicated ankle study taken the following day was that B.M. had a fracture at the "distal metaphysis of the right tibia." Saker indicated that the fracture was unusual in a child of B.M.'s age and "nonaccidental injur[y] should be considered." Orthopaedist Dr. Joseph Janicki concurred and treated B.M.'s injury with a long leg posterior mold splint. On March 31, 2008, a follow-up skeletal survey was taken, and pediatric radiologist Dr. E. Benya indicated a "mild irregularity along the distal right tibial metaphysis" was present that was "less conspicuous than on the dedicated ankle series of 3/27/2008." Benya's impression was that B.M. had a "[d]istal right tibial metaphyseal fracture" and noted that "[n]o additional acute or healing fracture [was] detected on th[e] limited study." On April 11, 2008, Janicki removed B.M.'s splint, indicated that B.M. had no pain, and ordered a follow-up because the fracture had involved the growth plate that could cause growth arrest to occur. (No evidence was introduced as to whether B.M. had a resulting growth arrest.)

¶ 21 Flaherty explained that any fracture at B.M.'s age was concerning because "two-month-old bones don't just fall apart without some trauma" and this particular fracture was almost never

seen except in association with child abuse. Flaherty indicated that distal metaphyseal fractures around the wrist or ankle are frequently seen in abusive head trauma cases, because when children are shaken violently their arms and legs "swing freely[,] " which places stress on the metaphysis, the weakest part of the bone. Flaherty explained that a metaphyseal fracture heals differently than other bones, and, because there is not a lot of new bone formation, the healing is not always seen in x-rays. Shuman testified that he did not believe B.M.'s ankle was fractured because there was no healing reaction seen on the x-rays. Shuman acknowledged that with a tibial metaphyseal fracture there would not be any outward signs of the fracture and a diagnosis would rely on reported pain and possible swelling.

¶ 22 Both experts testified regarding neck injuries in abusive head trauma cases. Flaherty testified that not every child who suffered abusive head trauma also suffers a neck injury. She indicated neck injuries will sometimes be seen on CT scans or MRIs in children who have suffered abusive head trauma, but doctors would have to specifically look for those injuries. She also indicated that some neck injuries will be discovered in an autopsy that were not seen on imaging studies. Flaherty noted that B.M.'s MRI showed that there was some injury to the vessels in the artery in the back of the neck, which suggested some neck trauma. Shuman acknowledged that in some suspected shaken cases no neck injuries were found, even in autopsies, but that was the reason that he doubted shaking was the cause of injury in those cases. Shuman acknowledged that injury to the soft tissue structures of the neck caused by an acceleration-deceleration type mechanism of injury may not appear on an x-ray or CT scan.

¶ 23 The trial court concluded that based upon the evidence presented, the State failed to prove by a preponderance of the evidence that B.M. was neglected and that his environment was injurious to his health and welfare. The State appeals.

¶ 24 ANALYSIS

¶ 25 On appeal, the State argues that the trial court applied an incorrect burden of proof and erroneously found that the State failed to prove B.M. was neglected. We agree that the State sufficiently proved that B.M. was neglected.

¶ 26 It is the burden of the State to prove its allegations of neglect by a preponderance of the evidence, meaning that the State must establish that its allegations of neglect are more probably true than not. *In re Arthur H.*, 212 Ill. 2d 441 (2004). On appeal, a trial court's finding of neglect will not be reversed unless it was against the manifest weight of the evidence. *In re Faith B.*, 216 Ill. 2d 1 (2005). A court's ruling is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *Faith B.*, 216 Ill. 2d 1.

¶ 27 At the adjudicatory hearing, the trial court is to determine whether the child is neglected and not whether the parents are neglectful. *Arthur H.*, 212 Ill. 2d 441. Generally, neglect is defined as the failure to exercise the care that circumstances justly demand and encompasses both wilful and unintentional disregard of a duty. *In re N.B.*, 191 Ill. 2d 338 (2000). Section 2-3 of the Juvenile Court Act of 1987 provides that a "neglected" minor includes "any minor under 18 years of age whose environment is injurious to his or her welfare[.]" 705 ILCS 405/2-3(1)(b) (West 2010). An injurious environment does not have a fixed definition, requiring each case to be analyzed under its own unique circumstances. *Arthur H.*, 212 Ill. 2d 441.

¶ 28 In ruling at the adjudication hearing, the trial court correctly stated that the State had to prove the allegations in its petition "by a preponderation of the evidence," meaning that the allegations "must be more probably true than not true." However, the trial court also stated, "[T]he State must prove that with an injurious environment that the parents knew or should have known that the child's environment was injurious." The court went on to indicate that the State presented evidence that B.M. was unable to harm himself and his constellation of injuries were the result of abusive head trauma, but the State was also required to prove that Bryn and Jeff "left [B.M.] in the care of someone they knew or should have known would cause harm to him."

¶ 29 For the trial court to determine that B.M. was neglected due to an injurious environment, the State was not required to prove that Jeff and Bryn left B.M. in the care of someone they knew or should have known would cause harm to him. Such a fact would be one factor for the court to consider among all the circumstances surrounding the case, but it was not necessary for a neglect finding. The State was only required to prove that under the circumstances of this case it was more probable than not that B.M. was neglected.

¶ 30 Here, B.M.'s first CT scan clearly indicated that he suffered from acute subdural hemorrhages. The radiologist interpreting the initial CT scan also indicated those acute subdural hemorrhages *may be* imposed on chronic subdural collections. Shuman testified that there *could be* chronic blood in the CT scans and MRI. B.M.'s second CT scan made no reference to the presence of chronic blood. B.M.'s MRI, which is better at showing the age of blood than a CT scan, made no reference to the presence of chronic blood. We note that B.M.'s CT scans in the summer of 2008 clearly indicated the existence of chronic blood but the March 2008 CT scans

and MRI made no reference to chronic blood. On this record, any notion of a pre-existing subdural hemorrhage based on the existence of chronic blood was mere speculation.

¶ 31 There is no question that B.M. had new subdural hematomas. Both experts agreed that new subdural hematomas do not just appear. Therefore, it is clearly evident from the record that it was more probable than not that on March 18, 2008, B.M.'s acute subdural hemorrhages were due to some kind of recent trauma. Determining the exact mechanism of that recent trauma is unnecessary to a finding that B.M. was neglected, because of B.M.'s age and the constellation of his injuries. B.M. had recurring bruising on his chin, for which his parents provided an implausible explanation. Even if the finder of fact found that B.M.'s recurring chin bruises were from a car seat, B.M. also had a bruise over his left eye, swelling or a welt over his left eye, and bleeding in his left eye, for which no explanation was given. Flaherty testified that the injuries above B.M.'s left eye indicated that some type of trauma had been inflicted upon B.M. in the area of his left eye, especially in light of the fact that there was no history provided by the family to indicate an accidental injury.

¶ 32 Additionally, according to Flaherty's testimony, as supported by two radiologists and an orthopaedic physician, B.M. had an ankle fracture. Flaherty explained that healing in this particular type of fracture would not necessarily appear on an x-rays because of the lack of new bone formation. Shuman testified that B.M. could not have a fracture because there was no healing shown on the x-ray taken days later. However, the March 31, 2008, x-ray report indicated that the fracture appeared less conspicuous than it had previously. Also, Shuman acknowledged that there would not be any outward signs of a fracture and a diagnosis of this type of fracture would rely on reports of pain and possible swelling. Clearly, B.M. could not

communicate his level of pain. Further, the orthopaedic physician who examined B.M. found it necessary to splint his leg. Thus, it appears to be clearly evident that B.M. had an ankle fracture.

¶ 33 Even if the ankle fracture was not considered by the trial court, all B.M.'s other injuries were indicative of an injurious environment. Flaherty had testified that the bleeding in the brain, lack of oxygen to the brain, and retinal hemorrhaging presented together were a specific constellation of injuries common in abusive head trauma cases. The MRI showing some injury to B.M.'s neck further supported Flaherty's abusive head trauma theory. Both experts agreed that although there was no evidence of an impact injury on the outside of B.M.'s head, he could have been slammed against a soft surface. Shuman indicated that shaking alone could not cause B.M.'s injuries, but at no point did he rule out abusive impact as the source of B.M.'s injuries. In addition to the subdural and retinal hemorrhages, B.M. had unexplained bruises and swelling over his left eye with visible blood in his eye. At B.M.'s tender age of eight weeks, someone should have known how he incurred those injuries, especially because he could not inflict those injuries upon himself.

¶ 34 The trial court was required to determine whether the State established that its allegations of neglect due an injurious environment were more probably true than not. We believe that it is clearly evident from the record that the State did so and the trial court's decision was against the manifest weight of the evidence.

¶ 35 **CONCLUSION**

¶ 36 For the foregoing reasons, the judgment of the Will County circuit court is reversed, and we remand this cause for a dispositional hearing.

¶ 37 Reversed and remanded.

¶ 38 JUSTICE McDADE, specially concurring:

¶ 39 The majority has reversed the trial court's decision finding the termination that the infant, B.M., was not neglected or abused to be against the manifest weight of the evidence. I concur with that decision but write specially to make the following observations.

¶ 40 First, the standards for decision and of review in neglect and abuse cases are not always as easy to apply as to articulate. It is, for example, easy to say that "the trial court is to determine whether the child is neglected and not whether the parents are neglectful. See ¶27, citing *Arthur H.*, 212 Ill. 2s 441 (2004). But "neglect is defined as the failure to exercise the care that circumstances justly demand and encompasses both willful and unintentional disregard of a duty." ¶27, citing *In Re N.B.*, 191 Ill. 2d 338 (2000). The element of culpable action or inaction on the part of *someone* is inherent in both the concept and the definition of neglect. In order to find a child neglected, the trial court must conclude that there has been a "failure to exercise [due] care" for "willful [or] intentional disregard of a duty." It surely cannot be enough to find the mere existence of an injury justifies a determination of neglect. The trial court in the instant case may not have stated what it was doing as artfully as we might like but a careful review of the oral findings demonstrates a thorough and conscientious effort to determine only whether the baby's injuries resulted from someone's willful or unintentional dereliction of duty. I believe the court adhered to the proper standard of proof and *de novo* review is not necessary.

¶ 41 With that belief, I reviewed the trial judge's oral findings to assess whether I agreed that they were against the manifest weight of the evidence.

¶ 42 The trial court's findings focused on the child's two major injuries – the alleged abusive head trauma and the alleged fractured ankle. The court pointed to instances where the testimony

of the State's expert was not supported by the medical reports: whether there was underlying chronic bleeding suggestive of birth injury (R349-50); whether there was evidence of concurrent neck injury (R351); the possibility that there was a spontaneous rebleed of a subdural hematoma caused traumatically at birth (R353-57).

¶ 43 The court then addressed the crux of its perception of its duty and its actual finding, as follows:

"The struggle with these types of cases is that the injury is so catastrophic that it becomes easy to be invested that something must have happened. And from the Court's perspective, as I read through the records, thinking about the infant, thinking about what the allegations were, what if I were to find the State had not proved their case by a preponderance of the evidence and that the child was not abused or neglected? What then?

I potentially run the risk then of returning the child back to the home after dismissing the petition to the parents. At this point, I can't consider that. The State must prove its case. In focusing then on what the State must prove, the State made a *prima facie* case with regard to the elements. But those elements were sufficiently rebutted on – not on cross-examination, but with regard to the testimony of Dr. Shuman.

The scales are even." (Emphasis added.)

¶ 44 The court then prefaced its consideration of who might be responsible for any neglect or abuse by saying:

"Even if the Court were to assume that Brenden had sustained abusive head trauma and that the State had sustained their burden in proving that he did, the next prong is to determine if not who did it, did the parents know that someone in the household, someone that they entrusted their care to would harm their child." (Emphasis added.)

This appears to make it clear that the court's actual finding was that the State had not sustained its burden of proving a head injury resulting from willful conduct and that it remained to be determined if the cause was some unintentional breach of duty.

¶ 45 The court then concluded its findings saying:

"But there was a rush to judgment. There was a determination that this was abusive head trauma. And they fit the pieces of the puzzle together and excluded all other possibilities in the face of what the real evidence was.

The tower of cards falls when we know that the subdural hematoma also had chronic blood with acute on the day of presentation. The house of cards falls when we look at the metaphysical fracture and note that there are no signs of healing.

The bases of the opinions of Dr. Flaherty are unsubstantiated in the evidence in the face of no further evidence to support her opinions. ***."

* * *

"So I don't dismiss that the diagnosis exists. But in weighing the two experts, the Court finds that Dr. Shuman's explanation and reasons and the science to be more credible.

Just saying it is because it is because you have this constellation of symptoms is not sufficient. Intracranial pressure causes hemorrhage, retinal hemorrhage, the extent of which, no testimony. How much? I guess it would depend on the extent of the pressure.

Therefore, based upon the evidence that has been presented and in consideration of the evidence presented in defense from State's case, the Court is unable to conclude by a preponderance of the evidence that the minor was neglected and that the minor's environment was injurious to his health and welfare.

Furthermore, the Court is unable to conclude that the minor was abused. Case dismissed." (Emphasis added.)

¶ 46 It might be argued that the State's failure to convince the trial court by a preponderance of the evidence that the child's head and ankle injuries amounted to neglect or abuse merits affirmance. However, I agree with the majority that the trial court's decision should be reversed.

I do so because there was little or no consideration of the child's other injuries. Although they were minor in comparison to the other two, they are part of his constellation of injuries and they must be assessed in arriving at the overall decision. Because they were not, I do not believe we can properly find that the court's determination was supported by the manifest weight of the evidence.