

No. 1-12-3604

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> KYAHRI D., a Minor)	Appeal from the
)	Circuit Court of
)	Cook County.
(The People of the State of Illinois,)	
)	No. 11 JA 937
Petitioner-Appellee,)	
)	Honorable
v.)	Nicholas Geanopoulos,
)	Judge Presiding.
Mercedes F.,)	
Respondent-Appellant).)	

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Lampkin concurred in the judgment.
Justice Hall dissented.

ORDER

¶ 1 *Held:* The trial court's findings of neglect and abuse are not against the manifest weight of the evidence when a single mother respondent allows her child of 22 months to be out at 1 a.m. while she is sitting in a parked vehicle with her boyfriend with liquor on her breath, and, after the child is struck by a motor vehicle, does not come to her aid.

¶ 2 Following an adjudicatory hearing, Kyahri D., a 22-month-old child,¹ was found to be a

¹ Kyahri D. was born on November 15, 2009.

No. 1-12-3604

neglected and abused minor and adjudged a ward of the court. The mother, respondent Mercedes F., appeals and for the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 On October 8, 2011, at approximately 1 a.m., Kyahri D. (K.D.) was struck by an automobile backing out of an alley after she allegedly "snapped" away from her maternal grandmother LaRush F. and darted out into the street toward her mother who was sitting in a parked vehicle with her boyfriend. The child sustained a fractured leg and a fractured right eye socket.

¶ 5 Two months later, on December 8, 2011, the State filed a petition for adjudication of the wardship of K.D. pursuant to section 2-3 of the Juvenile Court Act of 1987 (Act) (705 ILCS 405/2-3 (West 2010)). The petition stated that at the time of the accident, respondent was drinking liquor in a vehicle with her boyfriend and not appropriately supervising her child. The petition noted that respondent had previously informed personnel at the Illinois Department of Children and Family Services (DCFS) that she was briefly hospitalized in 2010 for depression. The petition alleges that K.D. was neglected due to both a lack of necessary care and exposure to an injurious environment and was abused due to a substantial risk of injury.

¶ 6 On December 28, 2011, following a temporary custody hearing, the trial court determined there was probable cause to find that K.D. was abused or neglected. However, the trial court found reasonable efforts had been made to eliminate the need to remove the minor from the home because respondent had moved out of her mother's residence and had agreed to participate in services recommended by DCFS. The trial court returned custody of the minor to respondent

No. 1-12-3604

pursuant to an order of protection under section 2-25 of the Act.²

¶ 7 On February 2, 2012, Kareem D., who lives in Galesburg, Illinois, appeared before the trial court and an order was entered for genetic testing to determine if he was K.D.'s biological father. The testing confirmed he was the minor's biological father.³

¶ 8 In March 2012, the trial court vacated the order of protection and placed K.D. in the temporary custody of DCFS, who placed her in the custody of her maternal aunt. The trial court found that respondent failed to consistently participate in services recommended by DCFS, failed to remain in regular contact with her assigned caseworker, and tested positive for marijuana.

¶ 9 The adjudication hearing commenced on August 22, 2012. On that date, respondent came to the court building and spoke with a caseworker, but never entered the courtroom and left the building before the case was called. The child's father, Kareem D., was also not in court.

¶ 10 At the hearing, Chicago police officer Daniel Kolodziejski testified that on the date of the incident, he and his partner were in uniform in a marked squad car and responded to an accident involving a motor vehicle and a two-year-old child in the vicinity of 5639 West Iowa Street in Chicago. The officers arrived on the scene at approximately 1:20 a.m., within four minutes of

² Section 2-25(1) of the Act provides in part: "(1) The court may make an order of protection in assistance of or as a condition of any other order authorized by this Act. The order of protection shall be based on the health, safety and best interests of the minor and may set forth reasonable conditions of behavior to be observed for a specified period." 705 ILCS 405/2-25(1) (West 2010).

³ Kareem D. is not a party to this appeal.

No. 1-12-3604

receiving the call from dispatch. Kolodziejski described the street where the accident occurred as a one-way eastbound street with vehicles parked on both sides of the street. Street lighting provided decent illumination. The officer observed a crowd of about five people and a man cradling K.D. in his arms. There was a large bump on the child's head that was slightly bleeding. The child was crying and appeared to be in pain, and she had a bent leg that appeared to be either broken or fractured.

¶ 11 Respondent was standing on the sidewalk with a group of other adults. Kolodziejski spoke with individuals at the scene and was informed that a vehicle had struck K.D. and continued eastbound and then proceeded northbound. The officer originally thought the child was the victim of a hit-and-run accident, but later learned the driver had driven a block away from the scene for his safety and then called the police.

¶ 12 Kolodziejski spoke with respondent at the scene. Respondent told the officer she was standing on the sidewalk talking with some friends when K.D. darted out into the street. Kolodziejski surmised that respondent was about 12 to 15 feet away from K.D. when the accident occurred. The officer testified respondent appeared to be intoxicated as her speech was slurred and she had a strong odor of alcohol emanating from her breath. Respondent did not inform the officer that her mother was babysitting for her child.

¶ 13 An ambulance transported K.D. and respondent to the hospital emergency room. Kolodziejski and his partner followed in their vehicle. Kolodziejski testified that he observed respondent screaming at K.D. to be quiet as the medical staff stabilized the child. When the officers were informed that K.D. had sustained a fractured leg, they returned to the police station

No. 1-12-3604

to prepare a child endangerment report and to complete a traffic crash report. Kolodziejski did not arrest respondent at the time because she was the only person at the hospital who could consent to the child's medical treatment.

¶ 14 On cross-examination, Kolodziejski acknowledged his child endangerment report did not reflect that he had a conversation with respondent at the scene or at the hospital, and it did not reflect he observed respondent with slurred speech or observed her screaming at K.D. at the hospital. The officer claimed he wrote a supplemental report regarding these observations and conversations at a later time. The supplemental report was not produced at the hearing. On redirect examination, the officer acknowledged that police reports do not necessarily contain all of the information a police officer receives or observes. He also acknowledged that his major concern was the child's well-being.

¶ 15 After Kolodziejski completed his testimony, counsel for respondent made an oral motion to strike the officer's testimony, arguing that she never received a copy of the supplemental police report. Counsel for the child's biological father also joined in the oral motion. The trial court denied the motion, but allowed both attorneys the opportunity to obtain and examine the supplemental police report with the right to recall the officer if necessary.

¶ 16 Christine DeGrange, a child protection investigator for DCFS, was assigned to investigate K.D.'s case after the accident. DeGrange interviewed respondent five days after the accident. Respondent told DeGrange that she was sitting in a vehicle with her boyfriend when K.D. returned home from a party with her maternal grandmother. When K.D. observed her mother in the vehicle, she ran across the street to be with her. Respondent denied she was drinking or using

No. 1-12-3604

drugs on the night of the accident and denied having a history of substance abuse. Respondent admitted that she was briefly hospitalized in 2010 for depression.

¶ 17 DeGrange interviewed Kareem D. by telephone on December 5, 2011. Kareem D. told DeGrange that when he and respondent were together she smoked marijuana and would "run the streets." Kareem D. described respondent's care of K.D. by saying "she does an okay job, but could do better with the child."

¶ 18 DeGrange also spoke with the maternal grandmother, respondent's current boyfriend, and the detective assigned to the case. In addition, she spoke with identified individuals who claimed they witnessed the accident and consulted with the medical care providers. Based on DeGrange's investigation, DCFS issued an "indicated" finding of neglect and inadequate supervision against respondent on the ground that there was significant evidence of a lack of supervision which caused K.D. to sustain injuries.⁴

¶ 19 When the adjudication hearing continued on October 15, 2012, respondent and Kareem D. both failed to appear in court. At the hearing, detective Fred Marshall testified that he spoke with the driver of the vehicle that struck K.D. The driver told Marshall he was pulling out of an alley and did not see the child prior to striking the child with his vehicle. The driver claimed that the accident happened too fast to avoid it. The detective also spoke with a witness, Tanja Winder, who told him that 10 minutes before the accident, K.D. ran into the street and she picked the child up and placed her on the sidewalk. Winder then reprimanded respondent, who was

⁴ "An indicated finding means that credible evidence has been found that child abuse occurred." *S.W. v. Department of Children & Family Services*, 276 Ill. App. 3d 672, 674 (1995).

No. 1-12-3604

sitting in a nearby vehicle, to watch her child. No mention was made of a grandmother being in the area.

¶ 20 The trial court, over objection, admitted the testimony concerning the out-of-court statements of the driver and Winder, not for the truth of the matter asserted therein, but rather to show the manner in which detective Marshall investigated the case.

¶ 21 Marshall testified that in October 2011, he spoke with respondent, who agreed to talk after being advised of her *Miranda* rights. The interview took place at the police station. Respondent admitted that she was at the scene of the accident and was sitting in a vehicle with her boyfriend, but told Marshall that she had asked her mother to watch K.D. Respondent denied that her daughter had run into the street 10 minutes before the accident, but admitted that prior to the accident she was not properly supervising K.D. Detective Marshall arrested respondent and processed her for child endangerment.

¶ 22 Among various exhibits admitted into evidence was a certified copy of the disposition of respondent's criminal case No. 11 DV 80407, in which she was charged with child endangerment relating to the accident, her admission to the events, and the court's sentence of supervision. At the time of the hearing in juvenile court, a petition for a violation of supervision had been filed against respondent with an outstanding arrest warrant. The trial court denied the State's motion to introduce into evidence respondent's psychiatric hospitalization records of 2010 into evidence, finding that the records were unrelated to the present allegations against respondent.

¶ 23 After closing arguments, the trial court found Officer Kolodziejski's testimony regarding respondent's drinking credible, and Detective Marshall's testimony concerning respondent's

No. 1-12-3604

admission that she should have been supervising her child more closely credible. The trial court found that there was a nexus between respondent's drinking and her lack of supervision over K.D. prior to the accident. The court stated,

"She had been drinking. And I think that does go to the supervision of the child, and perhaps why the mother would allow the child to be out at 1:00 in the morning, and I understand the child ran across the street, but it's late at night. *** [I]t's late at night, she's a little girl, and to put her in a position where she is even able to run across the street and get hit by a car, it is indicative, to my thinking, of a lack of supervision, and that's the basis for my decision."

The trial court found that, based on the totality of the evidence, the State had proven by a preponderance of the evidence that K.D. was neglected due to a lack of necessary care, neglected due to exposure to an injurious environment, and abused due to substantial risk of physical injury.

¶ 24 A dispositional hearing was conducted on November 1, 2012. Again, both respondent and Kareem D. failed to appear in court. The first witness to testify was Genevieve Brown, a caseworker for Uhlich Children's Advantage Network (UCAN). Brown testified she was assigned to K.D.'s case in March 2012, after the trial court vacated the section 2-25 order of protection. Since that time, K.D. had been under the temporary custody of her maternal aunt.

¶ 25 Brown visited the maternal aunt's home in November 2012 and found it to be safe and

No. 1-12-3604

appropriate. K.D. was nearly three years old at the time of the hearing and was not in need of any services. She had completed a "zero to three evaluation," resulting in a recommendation for a follow-up appointment to ensure her fractured leg was healing properly.

¶ 26 Brown testified respondent was in need of individual therapy, outpatient substance abuse, counseling for marijuana, and parenting classes. Respondent dropped out of outpatient substance abuse counseling and failed to attend any individual therapy sessions.

¶ 27 Brown also claimed respondent has not maintained regular contact with her. The last time she spoke with respondent was on September 5, 2012, when respondent came into UCAN for an intake appointment for individual therapy. Before that, the last time was on August 22, 2012, just before the adjudicatory hearing started. Brown asked respondent to wait for her after court so they could discuss a substance abuse reassessment and visitation; however, respondent left the building before they could have that discussion.

¶ 28 Brown maintained that respondent was not consistently visiting with K.D. The last time respondent visited K.D. was in September when Kareem D. was in town for court and they visited their daughter together. Brown did not have a current phone number for respondent, so she contacted respondent through the maternal aunt or Kareem D. Brown recommended K.D. be adjudged a ward of the court.

¶ 29 After hearing all the evidence and arguments, the trial court adjudged K.D. a ward of the court. The trial court determined respondent was unable, for some reason other than financial circumstances alone, to care for, protect, train, or discipline the child. The trial court made the same finding as to Kareem D., but noted that he had participated in the case to a greater degree

No. 1-12-3604

than respondent. The trial court made the minor a ward of the court and placed her in the custody and guardianship of the administrator of DCFS, with the right to place the minor in an appropriate setting.

¶ 30

ANALYSIS

¶ 31 We initially observe respondent makes no argument concerning the trial court's dispositional findings. As a result, respondent has waived review of this issue. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("[P]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.") We therefore limit our review to the adjudicatory findings. See *In re Diamond M.*, 2011 IL App (1st) 111184, ¶ 18.

¶ 32 In its petition for adjudication of wardship, the State alleges that K.D. was neglected pursuant to section 2-3(1)(a) of the Act (705 ILCS 405/2-3(1)(a) (West 2010)), which provides in part that a neglected minor includes "any minor under 18 years of age who is not receiving the proper or necessary support *** for a minor's well-being." The petition further alleges that K.D. was neglected pursuant to section 2-3(1)(b) of the Act (705 ILCS 405/2-3(1)(b) (West 2010)), which provides that a neglected minor is "any minor under 18 years of age whose environment is injurious to his or her welfare." And lastly, the petition alleges that the child was abused pursuant to section 2-3(2)(ii) of the Act (705 ILCS 405/2-3(2)(ii) (West 2010)), which provides in part that an abused minor includes "any minor under 18 years of age whose parent or immediate family member, or any person responsible for the minor's welfare, or any person who is in the same family or household as the minor, or any individual residing in the same home as the minor *** creates a substantial risk of physical injury to such minor by other than accidental

No. 1-12-3604

means which would be likely to cause death, disfigurement, impairment of emotional health, or loss of impairment of any bodily function."

¶ 33 A proceeding for adjudication of wardship "represents a significant intrusion into the sanctity of the family which should not be undertaken lightly." *In re Arthur H.*, 212 Ill. 2d 441, 463 (2004) (quoting *In re Harpman*, 134 Ill. App. 3d 393, 396-97 (1985)). The best interest of the child is the paramount consideration whenever a petition for adjudication of wardship is brought under the Act. *In re N.B.*, 191 Ill. 2d 338, 343 (2000). At the adjudicatory stage, the focus of inquiry is on the status of the child and not the conduct of the parents. *In re Arthur H.*, 212 Ill. 2d at 465-67.

¶ 34 The purpose of an adjudicatory hearing is to determine whether an allegation that a minor is neglected is supported by a preponderance of the evidence. *In re Arthur H.*, 212 Ill. 2d at 465. The State bears the burden of proving neglect or abuse by a preponderance of the evidence, which is "that amount of evidence that leads a trier of fact to find that the fact at issue is more probable than not." *In re K.G.*, 288 Ill. App. 3d 728, 735 (1997). In other words, that the evidence is more probably true than not true.

¶ 35 The term "neglected" as used in the Act "is not a term of fixed and measured meaning. It takes its content always from specific circumstances, and its meaning varies as the context of the surrounding circumstances changes." *In re N.B.*, 191 Ill. 2d at 346 (quoting *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 624 (1952)). The term has generally been defined as the failure of a responsible adult to exercise the care that circumstances demand and encompasses both the unintentional and willful disregard of parental duties. *In re John Paul J.*, 343 Ill. App. 3d 865,

No. 1-12-3604

879 (2003).

¶ 36 Similarly, the term "injurious environment" has been recognized "as an amorphous concept that cannot be defined with particularity." *In re Arthur H.*, 212 Ill. 2d at 463. The term has generally been interpreted to include " 'the breach of a parent's duty to ensure a "safe and nurturing shelter" for his or her children.' " *In re Arthur H.*, 212 Ill. 2d at 463 (quoting *In re N.B.*, 191 Ill. 2d at 346).

¶ 37 Cases involving adjudication of neglect, abuse, and wardship are *sui generis* and each case must ultimately be decided on the basis of its own particular facts. *In re K.T.*, 361 Ill. App. 3d 187, 201 (2005). A trial court has broad discretion when determining whether a child has been neglected or abused, and its discretion will not be disturbed on review unless it is against the manifest weight of the evidence. *In re Stephen K.*, 373 Ill. App. 3d 7, 20 (2007). A trial court's finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *In re Arthur H.*, 212 Ill. 2d at 464.

¶ 38 Here, the trial court determined K.D. was neglected and abused based on the court's finding that there was a nexus between respondent's drinking and her lack of supervision over the minor prior to the accident. The court stated,

"She had been drinking. And I think that does go to the supervision of the child, and perhaps why the mother would allow the child to be out at 1:00 in the morning, and I understand the child ran across the street, but it's late at night. *** [I]t's late at night, she's a little girl, and to put her in a position where she is

No. 1-12-3604

even able to run across the street and get hit by a car, it is indicative, to my thinking, of a lack of supervision, and that's the basis for my decision."

¶ 39 The trial court found the testimony of Officer Kolodziejcki "very credible," and his testimony cast doubt on respondent's assertion that K.D. was under the care of LaRuth F., the maternal grandmother, at the time of the accident. Specifically, Kolodziejcki testified that he arrived at the scene within four minutes of receiving the call from dispatch, and observed at least five other people in the vicinity of K.D. and respondent on the sidewalk. At that time, respondent told him that she was standing on the sidewalk talking with some friends around 1 a.m. when K.D. darted into the street and was struck by a motor vehicle. Kolodziejcki concluded that respondent was only 12 to 15 feet away from K.D. when the accident occurred, and the street lighting provided sufficient illumination. Furthermore, Kolodziejcki observed that respondent was drinking liquor at the time of the accident and observed her slurred speech and detected a strong odor of alcohol from her breath. Kolodziejcki also observed respondent screaming at K.D. to be quiet for at least 15 to 25 minutes while medical people stabilized K.D. Notably, the maternal grandmother did not accompany respondent and K.D. to the hospital, and did not talk with the officer at the scene or anytime thereafter. In fact, there was no indication that LaRuth F. was present at the scene other than the statements by respondent, who indicated at a later time that she was there. Respondent did not mention observing the maternal grandmother at the scene, nor did the maternal grandmother talk with the officer. Officer Kolodziejcki refrained from arresting respondent at the hospital because no other family member was present to consent

No. 1-12-3604

to K.D.'s medical care. In addition, respondent did not tell Officer Kolodziejski that LaRuth F. was supposed to be supervising K.D. at the scene.

¶ 40 It was not until five days after the accident that respondent provided an additional version of the events to DCFS investigator DeGrange. Specifically, respondent asserted for the first time that she was sitting in a vehicle with her boyfriend when K.D. returned home in another vehicle from a party with LaRuth F. Respondent, who denied that she was drinking or using drugs on the night of the accident, told DeGrange that K.D. ran across the street when she noticed respondent in the parked vehicle.

¶ 41 In addition, the trial court found the testimony of Detective Marshall credible. Detective Marshall investigated the events leading up to the accident. Based on his conversations with other people, including an eyewitness listed on the case report, he conducted an interview with respondent. During that interview, respondent denied that K.D. had run into the street 10 minutes before the accident, but admitted that she was at the scene when K.D. was struck by the vehicle. Respondent told Marshall that she had asked LaRuth F. to watch K.D. Respondent said she was sitting in a parked vehicle next to the curb with her boyfriend and admitted that she failed to supervise K.D. at the time of the accident.

¶ 42 Neither respondent nor LaRuth F. testified at the adjudication hearing. Under the totality of the evidence and giving due deference to the trial court's credibility determinations, we cannot say that the trial court's findings of neglect and abuse are against the manifest weight of the evidence where it was 1 a.m. and respondent was drinking while outside in a parked vehicle with her boyfriend and placed K.D., a 22-month-old child, in a situation where she was able to run

No. 1-12-3604

across the street unattended, causing a motor vehicle to strike her.

¶ 43 Respondent's reliance on *In re A.P.*, 2012 IL 113875, to support reversal of the neglect and abuse adjudication is misplaced because its facts are distinguishable from the instant case. In *A.P.*, the mother had placed her children in the care of her boyfriend, who babysat at his home with his own children while the mother went to a scheduled doctor's appointment. *In re A.P.*, 2012 IL 113875, ¶ 3. When she returned, her younger son had first and second-degree scald burns on the left side of his head. *In re A.P.*, 2012 IL 113875, ¶¶ 3, 7. The mother immediately transported her son to the hospital, and the boyfriend later told police that he was running bathwater and left the children alone unsupervised while he went outside to smoke a cigarette. *In re A.P.*, 2012 IL 113875, ¶ 4. At the adjudication hearing, the State introduced the report of a medical doctor, who opined that the child's burns were consistent with inflicted burns due to physical abuse because the child had no burns on his hands or arms, which would be expected. *In re A.P.*, 2012 IL 113875, ¶ 6. The mother testified, *inter alia*, that there had not been any incidents involving abuse of the children by her boyfriend. *In re A.P.*, 2012 IL 113875, ¶ 9.

¶ 44 At the adjudication hearing, the trial court found the children to be neglected due to an injurious environment; however, at the subsequent dispositional hearing, the trial court found the mother to be a fit parent and ordered the juvenile case closed. *In re A.P.*, 2012 IL 113875, ¶¶ 10-11. Specifically, the trial court concluded that the mother could not have predicted that her son would be injured and that she acted appropriately afterward. *In re A.P.*, 2012 IL 113875, ¶ 11. The mother appealed the trial court's neglect finding, which was reversed by the appellate court and affirmed by our supreme court. *In re A.P.*, 2012 IL 113875, ¶ 1. Specifically, our supreme

No. 1-12-3604

court found that there was no indication the mother knew or should have known that her boyfriend was an unsuitable caregiver and could not provide a safe and nurturing shelter for her children for the duration of her doctor's appointment. *In re A.P.*, 2012 IL 113875, ¶¶ 25-26. The facts also demonstrated that the mother was otherwise a responsible and caring parent, as the court noted that she returned to the boyfriend's home immediately after her appointment, immediately transported her son to the hospital, and there was no showing that the boyfriend had any further involvement with the mother's children. *In re A.P.*, 2012 IL 113875, ¶ 26.

¶ 45 Here, in contrast, respondent, admitted to the police and investigators that she was on the scene when K.D. was injured. Moreover, the evidence showed that respondent was drinking at the time of the accident and her attention was with her boyfriend as they were sitting in a parked vehicle. In addition, after the child was struck by the vehicle, respondent was talking with her friends out on the street instead of caring for her child. Furthermore, 22-month-old K.D. was not indoors with a responsible baby sitter but, rather, was out on the same street as respondent, even though it was 1 a.m. Respondent also admitted that she failed to adequately supervise K.D. at the time of the accident. The facts here do not indicate that respondent was otherwise a responsible and caring parent. Prior to the adjudication hearing, the trial court placed K.D. in the custody of a maternal aunt and vacated an order of protection that had returned custody of K.D. to respondent because the court found that respondent failed to consistently participate in services recommended by DCFS, failed to remain in regular contact with her assigned caseworker, and tested positive for marijuana. In addition, one reason why the trial court had issued the order of protection that returned custody to respondent was the fact that she had moved out of LaRuth F.'s

No. 1-12-3604

house, which casts doubt on respondent's assertion on appeal that LaRuth F. was an appropriate caregiver.

¶ 46 The dissent contends that the finding of neglect is against the manifest weight of the evidence because respondent arranged for the grandmother to serve as a caretaker and there was no indication that K.D. had been injured in the grandmother's presence previously or that respondent had any reason to be concerned about the grandmother looking after K.D.

¶ 47 Based on the inconsistencies in respondent's three statements to the police officer, DCFS investigator, and police detective, as set forth in detail above, the record does not support an inference that K.D. was under the care of the grandmother at the time of the accident.

Furthermore, neither respondent nor the grandmother testified at the hearing or presented any evidence concerning any care-taking arrangement. Accordingly, the evidence did not establish that K.D. was under the care of the grandmother at the time of the accident, and the State, under the circumstances in this case, did not have to show some indication that respondent knew or should have known that the grandmother was an unsuitable caregiver. *Cf. In re A.P.*, 2012 IL 113875 (the boyfriend's statements to the authorities and the mother's testimony established that the boyfriend was the caregiver of the child at the time of the injury); *In re M.Z.*, 294 Ill. App. 3d 581 (1998) (the testimony of the mother and the aunt established that the aunt was the caregiver of the child at the time the aunt left the child unattended).

¶ 48 Furthermore, the dissent contends that Tanja Winder corroborates respondent's version of the incident to some extent. Winder, however, did not testify at the trial, and the detective's hearsay testimony concerning Winder's out-of-court statement was admitted, not for the truth of

No. 1-12-3604

the matter asserted therein, but rather to show the manner in which the detective investigated the case.

¶ 49 We cannot say that the trial court's findings are against the manifest weight of the evidence. We cannot find that the opposite conclusion is clearly evident when considering all of the evidence in this case.

¶ 50 CONCLUSION

¶ 51 We find that the trial court's findings are not against the manifest weight of the evidence and we affirm.

¶ 52 Affirmed.

No. 1-12-3604

¶ 53 JUSTICE HALL dissenting:

¶ 54 I respectfully dissent. I believe the evidence was insufficient to establish by a preponderance of the evidence that Kyahri D. was neglected or abused under the aforementioned sections of the Act. Although there is evidence indicating respondent was intoxicated just prior to the accident and that the minor child was outside at 1:00 in the morning, the evidence also shows that the minor was under the care and supervision of her maternal grandmother.

Respondent stated she was sitting in a car with her boyfriend when Kyahri D. returned home from a party she attended with her maternal grandmother. When the child saw respondent sitting in the car, she "snapped" away from her grandmother and darted out into the street where she was hit by a vehicle backing out of a nearby alley.

¶ 55 The majority maintains that "[b]ased on the inconsistencies in respondent's three statements to the police officer, DCFS investigator, and police detective, ***, the record does not support an inference that K.D. was under the care of the grandmother at the time of the accident." I strongly disagree.

¶ 56 Respondent's statements regarding the circumstances surrounding the accident were not as inconsistent or implausible as the majority would have one believe. Respondent told both Detective Marshall and DCFS investigator Christine DeGrange, that at the time of the accident she was sitting in a vehicle with her boyfriend and that the minor child was under the care of her mother, who had just returned home with the child from a party.

¶ 57 The only inconsistency of any possible significance concerning respondent's statements comes from Officer Kolodziejki. The officer testified that respondent told him she was standing

No. 1-12-3604

on the sidewalk talking with some friends when her daughter darted out into the street. This is inconsistent with respondent's contention that she was sitting in a vehicle with her boyfriend at the time of the accident. We note that the officer's supplemental report documenting his conversation with respondent was never produced at the hearing. More importantly, the officer's testimony as to what respondent told him concerning the events surrounding the accident, was not necessarily inconsistent with respondent's claim that her minor child was under the care of the grandmother at the time of the accident.

¶ 58 In any event, respondent's contention that she was sitting in a vehicle with her boyfriend at the time of the accident was corroborated, in part, by Tanja Winder, who claimed she observed respondent sitting in a car minutes before the accident occurred. Winder's testimony was admitted for a nonhearsay purpose. Moreover, it is logical to assume that at the time of the accident, the child was under the care and supervision of her maternal grandmother since it is unlikely the child would have darted out into the street to get to respondent if she was already in respondent's presence. The trial court obviously believed the child was under the care and supervision of her maternal grandmother at the time of the accident since the court initially found that reasonable efforts had been made to eliminate the need to remove the child from the home once respondent moved out of her mother's house.

¶ 59 Therefore, in order to support the trial court's neglect and abuse findings, there had to be some indication that respondent knew or should have known that her mother was an unsuitable caregiver. See *In re A.P.*, 2012 IL 113875 at ¶ 25; *In re M.Z.*, 294 Ill. App. 3d 581, 593-97 (1998). In this case, there was no such evidence.

No. 1-12-3604

¶ 60 No evidence was presented indicating Kyahri D. had previously been injured while under the care and supervision of her maternal grandmother or that respondent had any reason to be concerned her mother might not properly care for and supervise the minor. The evidence of an isolated accidental injury to Kyahri D. while under the care and supervision of her maternal grandmother was an insufficient basis on which to find the minor was neglected and abused. See, *e.g., Jordy v. County of Humboldt*, 11 Cal. App. 4th 735, 743-44 ("[n]o one would suggest a child could be taken from its parent where the parent, in an isolated lapse, failed to prevent the child from darting into the street, or failed to provide adequate training in the use of roller skates, or left a ladder leaning in a place where the child might find it.").

¶ 61 For these reasons, I believe the trial court's findings of neglect and abuse were against the manifest weight of the evidence. In addition, because these findings are against the manifest weight of the evidence and should be reversed, the ruling that the minor be adjudged a ward of the court should be vacated and the petition for adjudication of wardship dismissed. See *In re Arthur H.*, 212 Ill. 2d at 479.