2013 IL App (2d) 13-0478-U
No. 2-13-0478
Order filed October 15, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re KIESE C., a Minor	)	Appeal from the Circuit Court
	)	of Winnebago County.
	)	
	)	No. 11-JA-159
	)	
	)	Honorable
(The People of the State of Illinois,	)	
Petitioner-Appellee, v. S. LYMON,	)	Brian Dean Shore
Respondent-Appellant).	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly admitted the DCFS "indicated" packet into evidence, as any errors in the report went to its weight and not its admissibility. Also, the State proved by a preponderance of the evidence at the adjudicatory hearing that the minor was neglected based upon all five counts in the State's petition. At the dispositional hearing the State also proved by a preponderance of the evidence that respondent was unfit to care for the minor. Accordingly, the trial court's rulings that the minor was neglected and that respondent was unfit were not against the manifest weight of the evidence.

¶ 2 Respondent-mother, Sharzetta Lymon (respondent), appeals from an order of the trial court adjudicating her daughter, Kiese C. (Kiese), neglected and finding respondent unfit to care for her. On appeal, respondent contends that the trial court erred in: (1) admitting the DCFS "indicated"

packet into evidence; (2) determining that Kiese was neglected under all five counts in the State's petition (705 ILCS 405/2-3 (West 2010)); and (2) finding her unfit, unable and unwilling to care for Kiese (705 ILCS 405/2-27(1) (West 2010)). For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Reports filed by the Department of Children and Family Services (DCFS) indicate that Kiese was born on October 20, 2010. On April 7, 2011, respondent reported that earlier that day she had taken her five-month-old daughter off of her apnea monitor, bathed her, placed her in her car seat, and propped a bottle of water with a rolled blanket underneath it to support the bottle. She then took a shower and began cleaning the home. When she checked on Kiese after 20 or 30 minutes, Kiese's skin tone was blue and the bottle was on the floor. The mother said that she began CPR and called 911. Kiese was taken to Rockford Memorial Hospital where she was placed on a ventilator. The mother was reported to smell of alcohol when she arrived at the hospital and later admitted to having one glass of wine. Kiese was identified as having minimal brain function and needed 24 hour skilled care. On May 25, 2011, she was released from Rockford Hospital and transferred to Almost Home, a skilled nursing facility. DCFS reports also indicated that prior to this event, Kiese's medical history included premature birth, seizures, acid reflux and apnea.

¶ 5 Kiese was taken into protective custody on May 25, 2011. On May 26, 2011, a temporary shelter care hearing was held. At that hearing, Robert Nolan, a child abuse investigator for DCFS, testified that on April 7, 2011, he first observed Kiese in the pediatric intensive care unit of Rockford Memorial Hospital. Nolan was told that Kiese had been brought to the hospital by paramedics and she was reported to have stopped breathing.

¶ 6 Nolan testified that the mother told him that she had Kiese hooked up to the apnea monitor, but had removed the monitor in order to bathe her. After the bath, she rolled some blankets up to prop a bottle so that Kiese could drink the bottle while she showered. Nolan said the mother told him that from the time the bottle was placed with the child until she checked on her again was somewhere between 15 and 20 minutes. Nolan said that Kiese's physician told him that based upon the results of the EEG, Kiese was in a persistent vegetative state and that she only had brain stem activity. The physician also said that Kiese would remain in that state and would require 24-hour skilled nursing care.

¶ 7 With regard to Kiese's previous medical conditions, Nolan testified that the mother told him that on November 10, 2010, Kiese was brought to Swedish American Hospital after she stopped breathing and her lips turned blue. Kiese was then placed on an apnea monitor. Nolan said that when the hard drive of the monitor was checked, it initially showed consistent use of the monitor, but as time went on there were large gaps in the use of the monitor.

¶ 8 On cross-examination, Nolan testified that respondent and Kiese's father[1] had retained guardianship and custody of Kiese while Kiese was hospitalized, and they had participated in and agreed with the decision to move her to Almost Home. Neither parent had any prior investigations by DCFS. Further, respondent had three other children in her care, but DCFS did not take custody of them or find them to be at any risk.

¶ 9 After the hearing, DCFS was awarded temporary guardianship and custody of Kiese. That same day, the State filed a five-count neglect petition pursuant to section 2-3 of the Juvenile Court Act of 1987 (Act). 705 ILCS 405/2-3 (West 2010). On February 6, 2012, respondent filed a Bill

[1] Kiese's father, Keith C., filed a separate appeal.

of particulars. In that motion, she requested additional details with regard to counts I, IV and V of the State's petition. In response, the State amended its neglect petition on March 12, 2012. In the amended petition the State changed some of the language in counts I and IV to add more specificity to the allegations. Count V remained the same.

¶ 10 In the amended neglect petition, the State alleged that Kiese was neglected in the following ways: (1) respondent did not follow up with doctor's appointments and using the apnea monitor on Kiese between October 20, 2010[2] and April 7, 2011 (705 ILCS 405/2-3 (West 2010)); (2) Kiese's environment was injurious to her welfare in that respondent propped Kiese up with a bottle and left her unsupervised for a period of time, thereby placing her at risk of harm (705 ILCS 405/2-3(1)(b) (West 2010)); (3) Kiese was left without supervision for an unreasonable period of time without regard for her mental or physical health, safety or welfare (705 ILCS 405/2-3(1)(d) (West 2010)); (4) respondent committed the offense of child endangerment in that she removed Kiese from the apnea monitor and propped her up with a bottle after previously being advised not to engage in such conduct, and then left her unsupervised for a period of time, thereby placing her at risk of harm (705 ILCS 405/2-3(1)(b) (West 2010)); and (5) Kiese's environment was injurious to her welfare in that she had substantial medical needs and respondent had been inconsistent with those past medical needs, thereby placing her at risk of harm (705 ILCS 405/2-3(1)(b) (West 2010)).

¶ 11 On June 28, 2012, an adjudicatory hearing was held. DCFS caseworker Nolan testified again. His testimony at this hearing pertained to State's exhibit six, which was a DCFS "indicated"

[2] In count I of the neglect petition the State incorrectly noted Kiese's date of birth instead of the day she was prescribed the apnea monitor.

packet. Nolan explained that the packet contained a report with an "indicated finding," which meant that there was evidence to suggest that a reasonable person would believe that an act of abuse or neglect occurred concerning Kiese. During Nolan's testimony respondent's counsel objected to the admission of State's exhibit number six on the ground that the date that Kiese was taken into protective custody was not listed in the packet. The trial court denied the objection, and noted that any missing information in the packet went toward its weight and it could be the subject of argument in cross-examination.

¶ 12 Christina Swartout, a former respiratory therapist for Swedish American Home Health, testified that Kiese was one of her patients that she treated for apnea at Swedish American. Swartout explained that apnea occurs when a patient stops breathing for 20 seconds or longer. She said that she received detailed training on the use of an apnea monitor, and she knew that Kiese's mother had been trained on its use. She also said that all parents are told that the baby needs to be on the monitor at all times except for bathing.

¶ 13 Swartout explained that the apnea monitor needed to be downloaded in order to relay information to the child's doctor. If downloaded, the doctor would receive a compliance record, which would indicate how often the baby is actually on the monitor, along with reports of any events when the baby stopped breathing or if her heart rate went significantly up or down. The monitor was supposed to be downloaded weekly. To do this, the parent would make an appointment and bring in the monitor for downloading. Swartout said that Kiese's mother would make appointments to come in and download the monitor, but then she would not show up. She said that Swedish American left voice mails for the mother but could not get in touch with her. She also would not return phone calls and, as a result, Swartout sent the mother a certified letter. After April 7, 2011,

Swartout had the apnea monitor downloaded and discovered the monitor was not used regularly. In fact, she said that Kiese was off the monitor for days, even weeks.

¶ 14 On cross-examination, Swartout said that she had never met respondent or instructed her on how to use the monitor. She also said that apnea monitors do sometimes fail, and that it will not prevent or detect a life-threatening event. An apnea monitor will not monitor seizure activity, and it would not activate during a seizure unless the child had also stopped breathing.

¶ 15 Detective Jeff Schilling of the Rockford Police Department testified that on April 7, 2011, he was dispatched to Rockford Memorial Hospital to investigate a possible deceased six-month-old baby. Schilling spoke with respondent and she told him that she had propped a water bottle up with blankets for Kiese to drink while she did chores around the house. She told Schilling that about 20 to 25 minutes later she found Kiese blue in the face. She called 911 and performed CPR. The mother admitted to Schilling that the apnea monitor was not on Kiese at the time. She also told Schilling that Kiese was on medication for seizures and that she had a history of choking and digestive problems.

¶ 16 Mary Morrison testified that she was a child welfare specialist for DCFS. Morrison interviewed the mother on April 7, 2011. At that time, the mother told her that she had taken Kiese out of the bathtub, put her in a car seat, and propped up a bottle for Kiese to drink. The mother then proceeded to do chores around the house. She told Morrison that this was a regular routine for her. When she came back to check on Kiese she was blue in the face. Like Schilling, respondent also told Morrison that she called 911 and performed CPR on Kiese. She also told Morrison that Kiese was not on the apnea monitor when she stopped breathing on April 7, 2011.

¶ 17 DCFS investigator Nolan testified again about his involvement in this case, and then the adjudicatory hearing was continued until October 30, 2012.

¶ 18 When the adjudicatory hearing resumed, Shannon Krueger, a pediatric nurse practitioner for Crusader Community Health, testified that Kiese was her patient for five months.[3] Krueger said that when Kiese was around one month old, she had an acute life-threatening event and was prescribed an apnea monitor. Kiese had suffered from acid reflux, apnea, and seizures. She was prescribed a special formula for the reflux, anti-seizure medication, and a monitor for the apnea. The apnea monitor would not detect seizures. Krueger said that she had conversations with respondent where she reenforced to her that Kiese was supposed to be on the apnea monitor at all times except for bathing. Krueger said that she would see Kiese about every one or two months, sometimes more often. She said that although respondent missed some appointments, she followed up with all of them or went to all of the Kiese's regular check ups. She also received at least three phone calls from respondent in six months. Krueger said that although she was a mandatory reporter, she never felt the need to contact DCFS regarding respondent's care of Kiese. However, she said she did not know that respondent was not downloading the apnea monitor regularly, or that she had missed appointments to download the monitor.

¶ 19 Krueger explained that bottle propping is when a bottle is held to a baby's mouth either by a device, a blanket, or another object, when the baby is feeding from the bottle so that the baby does not have to be held during the feeding. She said that she advises parents against bottle propping because that activity creates a high risk of choking.

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[3]Krueger did not testify as to the time frame when she was Kiese's nurse, but from her testimony it is clear that she cared for Kiese prior to the incident on April 7, 2011.

¶ 20 Upon the conclusion of all testimony respondent and the father both made a motion for a directed finding. Both motions were denied. Following closing arguments the trial court took the matter under advisement.

¶ 21 On November 28, 2012, the trial court held that Kiese was a neglected minor on all five counts of the second amended neglect petition. With regard to count I, which dealt with the failure to follow up with doctor appointments and with the use of the apnea monitor, the court said that although nurse practitioner Krueger testified that respondent kept most of the regular appointments, there were problems with getting respondent in for the download appointments, which were technically doctor appointments but for a specific purpose of downloading the information contained in the apnea monitor. The court stressed that this was a matter needing a very high level of compliance because Kiese had significant, serious health issues which had led to a hospitalization very early in Kiese's life. The court went on to say that this was not a typical pediatric case, and although it did not find any neglect solely on the basis of missed doctor appointments, the failure to keep the download appointments was a serious factor to consider in determine whether Kiese was neglected. With regard to the apnea monitor, the court found that the issue was not whether the monitor was used on April 7, 2011, but that the alleged neglect was based on whether the monitor was used during the entire time it had been prescribed for Kiese. The court said the evidence showed that respondent missed appointments to download the apnea monitor several times, despite attempts to reach her, and that Swartout testified she even used certified mail in an attempt to reach respondent. Further, it noted that the reports from the monitor showed significant noncompliance, where the monitor was off for hours, days, and close to one month. Finally, the court found that when it considered the serious problems that Kiese had experienced, the failure to use the apnea

monitor on her was proof beyond a preponderance of the evidence that Kiese was not receiving the proper or necessary medical care as recognized under state law, and that Count I had therefore been proven.

¶ 22 With regard to count II, which dealt with propping up the bottle and leaving Kiese unsupervised, the court noted that there was no dispute that Kiese was left alone for 20 minutes or more with a propped up bottle. In addition, the court noted, Kiese had a significant history of choking, breathing and digestive problems, and therefore propping a bottle for Kiese under the circumstances of this case left Kiese in an environment that was injurious to her welfare and placed her at harm. Therefore, the court found that count II had been established by a preponderance of the evidence.

¶ 23 With regard to count III, which alleged that Kiese was left unsupervised for an unreasonable amount of time without regard for her mental or physical health, safety and welfare, the court noted that it had reviewed the statutory factors to be considered in determining the reasonableness of any time period of non-supervision. Specifically, it noted that Kiese was left unsupervised despite her very young age and medical condition. The court held that when taken together, there was overwhelming evidence of unreasonableness, and therefore count III had also been proven by a preponderance of the evidence.

¶ 24 With regard to count IV, which alleged that Kiese was neglected because respondent had committed the offense of child endangerment, the court said that it believed that if tried in the criminal court, the State would be able to prove child endangerment beyond a reasonable doubt. Therefore, the court held, Kiese should be found neglected on this count as well.

¶ 25 Finally, the court noted that count V pertained to Kiese's substantial medical needs and that respondent had been inconsistent with past medical needs, and thereby placed Kiese at risk of harm. The court found that the inconsistency in the apnea monitor alone, which was documented and proven, was grounds to find that Kiese's medical treatment had been inconsistent. It also found that the lack of consistent attendance at doctor visits and the failure to appear for appointments to download the apnea monitor also showed inconsistency. Therefore, the court held that count V had also been proven by a preponderance of the evidence.

¶ 26 After finding Kiese neglected on all five counts, the court set a dispositional hearing for March 19 and 20, 2013. At the dispositional hearing, Tamara Sleger, a caseworker with DCFS, testified that it was her opinion that DCFS should retain guardianship and custody of Kiese because her parents had not fully participated in services and had not visited Kiese very often. Specifically, Sleger said that respondent was supposed to complete individual counseling to address her issues of grief as well as to understand why this case came into the care of DCFS, but she had not done so. Also, respondent was only visiting with Kiese once a week for two hours, which Sleger said was not enough to gain a full understanding of the extent of the minor's injuries. Sleger acknowledged that she herself only visited Kiese once a month, so therefore respondent visited more often than she did. Sleger noted that respondent was receiving transportation to the hospital through a DCFS contracted agency.

¶ 27 Sleger also said that respondent was not having consistent contact with her with regard to Kiese's current condition and that Sleger had initiated all contact. Although respondent was willing to take guardianship and custody of Kiese, Sleger believed respondent was unfit or unable to be her guardian because she had not participated in the recommended counseling. Sleger acknowledged

that respondent had three other children, and she did not consider respondent unable to care for those children. She also acknowledged that since Kiese required skilled nursing care not even a specialized foster care parent could tend to Kiese's needs. Sleger said that there is a doctor on call to make medical decisions for Kiese as necessary, and DCFS had a nursing referral department that assists in medical decisions. Finally, Sleger said that she did not believe respondent had changed since the April 7, 2011, event.

¶ 28 Respondent testified as her only witness. She understood that Kiese might never come home, and said she would not remove Kiese from her facility unless a doctor told her to do so. She wanted guardianship and custody of Kiese because she believed DCFS did not really care about Kiese and were only involved "to win the case." While she at first thought Kiese would get better, she now knew that it did not appear likely. She would be willing to accept guardianship and custody of Kiese subject to an order that she could not move Kiese from the facility without court permission.

¶ 29 Respondent said she did not go to group grief counseling because she felt she did not belong with people whose children had already died. The first time she learned of the referral for individual counseling was in March 2013, when Sleger provided her with a copy of her assessment. Her prior caseworker did not give her a referral. She was not aware that the "recommended" service was in fact a requirement of her service plan. Finally, respondent conceded that she did not totally comply with putting the apnea monitor on Kiese prior to April 7, 2011.

¶ 30 At the conclusion of all testimony, closing arguments were heard. The guardian *ad litem* argued that custody and guardianship of Kiese should be with DCFS. At the close of arguments the court found that respondent was unfit and unable to care for Kiese. Specifically, it held that although respondent had consistently maintained her willingness to take guardianship and custody of Kiese,

it could not find that she was fit due to the grave consequences of her conduct regarding Kiese. Noting Kiese's special conditions, the court found that propping a bottle and failing to use an apnea monitor were evidence that respondent would disregard instructions that she disagreed with, and her history of doing so was evidence that the court could not trust her in the future. Further, the court noted that the testimony showed that respondent did not think counseling was for her, and therefore she did not go. The court said, "[t]his inability to hear advice or direction of others, appreciate it, and follow it has [*sic*], and follow it throughout this whole case supports the finding that she is unable and unfit for retaining custody and guardianship." The court also held that the father was unfit and unable to have custody and guardianship of Kiese. Therefore, it placed custody and guardianship of Kiese with DCFS, subject to permanency reviews in the future.

¶ 31 II. ANALYSIS

¶ 32 On appeal, the respondent argues that the trial court erred in the following ways: (1) admitting into evidence State exhibit number six, the DCFS "indicated" packet; (2) determining that Kiese was a neglected minor; and (3) ruling that respondent was unfit, unable and unwilling to care for Kiese.

¶ 33 A. Admissibility of the DCFS "Indicated" Packet

¶ 34 On appeal, respondent first argues that the trial court erred in admitting into evidence State's Exhibit number six, which contained the DCFS "indicated" packet. Respondent alleges several reasons why the packet should not have been admitted into evidence: (1) Nolan's report, contained in the packet, inaccurately stated that Kiese choked on a bottle of formula, instead of a bottle of water; (2) it was not clear from the report how Nolan concluded that Kiese had choked; (3) Nolan's allegation that he spoke to a specific doctor is not supported by the doctor's notes; (4) Nolan did not

assemble his report until almost two months after the April 7, 2011, incident and days before the time limit for him to file a report would expire; (5) Nolan had no contact with the case from late April to late May 2011, although he testified that it was jut a couple of weeks between his meeting with respondent and the decision to take protective custody of Kiese; (6) Nolan did not speak to respondent until over a week after the temporary shelter care hearing; (7) in the report Nolan indicated that respondent was going to have charges brought against her, which suggests an objective other than the minor's return home; and (8) Nolan's "indicated" decision in his report was based on incomplete or inaccurate notes, his own conclusions, and speculation rather than investigation;

¶ 35 Respondent argues that although "indicated" reports are generally admissible, Nolan's report was not reliable substantive evidence because it was not corroborated by the other facts in this case. Therefore, she argues, to the extent that the trial court drew any negative inferences against her as a result of the information in Nolan's report, this matter should be remanded for a new hearing.

¶ 36 The Abused and Neglected Child Reporting Act (325 ILCS 5/1 *et seq*. (West 2010)) (Reporting Act) provides for the reporting of suspected cases of abused or neglected children. 325 ILCS 5/4 (West 2010). Once a report is received, DCFS investigative staff conduct an initial investigation to determine whether there is reasonable cause to believe that child abuse or neglect exists. 325 ILCS 5/7.4(b)(3) (West 2010). If reasonable cause is found, the formal investigation begins. *In re J.C.*, 2012 IL App (4th) 110861, ¶ 22. Once a DCFS investigation into a suspected case of abuse or neglect of a child is completed, the investigative staff shall make a final determination as to whether a child was abused or neglected, and allegations may be determined to be indicated, undetermined, or unfounded. 325 ILCS 5/7.12 (West 2010). An "indicated" report

means a report made under the Reporting Act if an investigation determines that credible evidence of the alleged abuse or neglect exists. 325 ILCS 5/3 (West 2010)

¶ 37 Section 2-18(4)(b) of the Juvenile Court Act of 1987 provides that any indicated report filed pursuant to the Reporting Act shall be admissible in evidence at the adjudicatory hearing. 705 ILCS 405/2-18(4)(b) (West 2010). The standard of proof and the rules of evidence applicable to civil proceedings are applied at an adjudicatory hearing. 705 ILCS 405/2-18(1) (West 2010). Generally, whether evidence is admissible is within the trial court's discretion, and its ruling will not be reversed absent an abuse of that discretion. *In re A.W.*, 231 Ill. 2d 241, 256 (2008).

¶ 38 Respondent contends that she objected to the admission of the indicated packet below, but the trial court ruled that it would be admitted, and the report would only be considered for what weight the court might give to it. A review of the record pages that respondent cites for her claim that she objected to the admission of Nolan's report below indicates that she did object, but only on the ground that the report did not contain the date that Kiese was taken into protective custody.

¶ 39 An objection to evidence on a certain ground constitutes waiver on all grounds not specified. *Townsend v. Fassbinder*, 372 Ill. App. 3d 890, 906 (2007). The purpose of the rule is to inform the trial court of the particular problem and give the opposing party an opportunity to respond to it. *Hargrove v. Neuner*, 138 Ill. App. 3d 811, 816 (1985).

¶ 40 Since respondent only complained about the absence of the protective custody date in the report before the trial court she has waived any other contention of error with regard to Nolan's report. Waiver aside, however, we find no error. As noted, Illinois law provides that "*any* indicated report filed pursuant to the Abused and Neglected Child Reporting Act *shall* be admissible in evidence." (Emphasis added.) 705 ILCS 405/2-18(4)(b) (West 2010). Any alleged inaccuracies in

the report affect the weight given to it, but not its admissibility. See *Medina v. City of Chicago*, 238 Ill. App. 3d 385, 397 (1992) (alleged inaccuracies in police report affected its weight, not its admissibility). The credibility of a report is different from its admissibility. *Id*. (citing *Minor v. City of Chicago*, 101 Ill. App. 3d 823, 826 (1981)).

¶ 41 As correctly noted by the trial court, a deficiency in Nolan's report would only affect the weight given the information in the report and not its admissibility. We have reviewed the contents of the indicated report and find that it sufficiently sets out credible evidence of Kiese's neglect. Further, it is clear from the record that the trial court's determination of neglect was based upon the testimony presented at the adjudicatory hearing and not the contents of Nolan's indicated report. Therefore, we do not find that the trial court drew any negative inferences about respondent based upon Nolan's report. Accordingly, the trial court did not abuse its discretion in allowing Nolan's report into evidence.

¶ 42 B. Finding of Neglect

¶ 43 Next, respondent argues that the trial court's determination that Kiese was a neglected minor under all five counts of the State's petition was against the manifest weight of the evidence. She groups her arguments into two sections: (1) counts II, III, and IV; and (2) counts I and V. For purposes of uniformity we shall do the same.

¶ 44 Neglect occurs when a parent fails to exercise the care demanded by the circumstances and includes willful as well as unintentional disregard of the parent's duties. *In re K.B.*, 2012 IL App (3d) 110655. Cases involving allegations of neglect and adjudication of wardship are *sui generis*, and must be decided on the basis of their unique circumstances. *In re Arthur H.*, 212 Ill. 2d 441, 463 (2004). The burden is on the State to prove an allegation of neglect by a preponderance of the

evidence. *Id*. at 463-64. A proposition is proved by a preponderance of the evidence when the proposition is more probably true than not. *Id*. at 464.

¶ 45 At the adjudicatory hearing, the trial court is to determine whether the child is neglected, and not whether the parents are neglectful. *Id*. at 467. A trial court's finding of neglect will not be disturbed unless it is against the manifest weight of the evidence. *Id*. at 464. Such a determination is only against the manifest weight of the evidence when the opposite conclusion is clearly evident from the record or the determination is arbitrary, unreasonable, or not based on the evidence presented. *In re Addison B.*, 2013 IL App (2d), 121318, ¶ 22.

¶ 46 1. Counts II, III, and IV

¶ 47 In arguing that the trial court manifestly erred in determining that Kiese was neglected under counts II, III and IV of the State's petition, respondent takes issue with the fact that the State did not call a doctor as a witness and instead tendered the medical reports of Kiese's treatment and condition. Further, she suggests that there are several reasons why Kiese could have gone into cardiac arrest – a stroke, a seizure, an aneurysm, etc. – and none of the medical reports showed that the bottle she propped up for Kiese caused the incident, or that if Kiese had been on her apnea monitor the outcome would have been different. Respondent notes that the allegations in counts II, III and IV only state that she left Kiese unattended for "a period of time," and that without knowing what caused the incident, the State did not prove that Kiese was neglected, since the event could have transpired so quickly that even if Kiese was left alone for a few minutes respondent would not have been able to help. She claims that since the State did not prove the cause of the injury, and it had the burden to do so, it failed to prove Kiese was neglected under these counts. She also contends

that unless there was proof that she could have averted the massive brain injury that Kiese suffered on April 7, 2011, she did not neglect her child.

¶ 48 We are not persuaded. First, a doctor does not need to testify in order to support a finding of medical neglect. See *In re Erin A.*, 2012 IL App (1st) 120050, ¶ 5 (there is no statutory requirement or Illinois case law requiring that a finding of medical neglect be supported by expert medical testimony). Second, it is immaterial what medical condition caused Kiese to go into cardiac arrest, because whatever condition caused the event, one of the end results was that Kiese stopped breathing. Respondent never denies this fact. Had Kiese not been left alone, or if she had her apnea monitor on, respondent would have been made aware that her daughter had stopped breathing as soon as it happened. Instead, Kiese, a baby who had suffered from several serious medical conditions, was left alone for a minimum of 15 minutes before respondent checked on her and saw that she was had stopped breathing.

¶ 49 Third, respondent cites no authority for the proposition that the State had the burden of proving the specific cause of Kiese's injury. Further, the State does not have such a burden. The State's burden was to prove the allegations in its neglect petition by a preponderance of the evidence, meaning that the allegations were more probable than not. *Id*. at ¶ 7. Finally, respondent is incorrect in her assertion that unless there was proof that she could have averted Kiese's massive brain injury then she did not neglect Kiese. As we have noted, at the adjudicatory hearing, the trial court is to determine whether the child is neglected, and not whether the parents are neglectful. *In re Arthur H*., 212 Ill. 2d 441, 467 (2004). Also, the State only needed to prove that respondent's actions placed Kiese *at risk of harm* (counts II and IV) or that she was left unsupervised *without regard for her mental or physical health, safety or welfare* (count III) and *not* that respondent

definitely could have prevented Kiese's injury. Based on the testimony presented at the adjudicatory hearing, the State proved the allegations in these counts by a preponderance of the evidence.

¶ 50 Within this argument respondent raises one final contention with respect to count IV alone. Specifically, she argues that although the State alleged that she committed the offense of "child endangerment," no such offense appears in the criminal code. However, she admits that there is an offense entitled, "endangering the life or health of a child," but she argues that the latter offense was not set forth in the petition. Further, she claims that her attorney sought clarification of this through a Bill of Particulars, but that the court denied it. She alleges that the State insufficiently alleged a non-existent offense, asked the court to determine its elements, and then find proof of it beyond a reasonable doubt, when the cause of Kiese's injury was never even proven by a preponderance of the evidence.

¶ 51 Although respondent claims that her attorney objected to count IV in a Bill of Particulars, the record reflects that the only reference contained in that document with regard to that count was a request for the particular acts in which State alleged respondent committed the offense. The State complied with that request when it amended its neglect petition and added those facts on March 12, 2012. Therefore, respondent has forfeited any argument with regard to the defectiveness of the wording in count IV of the State's petition when she failed to object to its contents at trial or allow the court to remedy the alleged defect. *In re H.D.*, 343 Ill. App. 3d 483, 489-490 (2003).

¶ 52 With regard to the merits of count IV, we hold that the State proved by a preponderance of the evidence that Kiese was neglected under that count.

¶ 53 At the time of the neglect hearing, Illinois law provided that a person endangered the life or health of a child when he or she: (1) willfully caused or permitted the life or health of a child under

the age of 18 to be endangered; or (2) willfully caused or permitted the child to be placed in circumstances that endangered the child's life or health. 720 ILCS 5/12-21.6(a) (West 2010). Here, it is clear that the State proved the elements of that offense by a preponderance of the evidence. Again, DCFS investigator Nolan and Detective Schilling both testified that respondent admitted leaving Kiese unattended, anywhere from 15 to 25 minutes. Further, respondent chose to leave Kiese unattended with a propped up bottle even after she knew that Kiese suffered from a very serious medical condition in which she could stop breathing at any moment. Further, nurse practitioner Krueger, who treated Kiese for five months before the incident on April 7, 2011, testified that she advises parents against bottle propping because that activity creates a high risk of choking. As a result of this decision, Kiese has extremely limited cognitive function and requires 24-hour skilled nursing care. Therefore, the State proved that Kiese was neglected under this count by a preponderance of the evidence. Accordingly, the trial court's determination that Kiese was neglected under counts II, III and IV were not against the manifest weight of the evidence.

¶ 54 2. Counts I and V

¶ 55 Respondent next contends that the trial court's determinations of neglect under counts I and V of the State's petition were against the manifest weight of the evidence. With regard to count I, respondent notes that she brought Kiese in for all of her post-natal visits with Krueger, as well as attended several other doctor appointments for Kiese's various medical conditions. As for count V, respondent argues that she followed up with various doctor appointments, and although she may have been inconsistent with her follow-through with regard to the apnea monitor downloads, there was no evidence that Kiese was neglected as a result of this inconsistency.

¶ 56 We must disagree. Again, count I alleged that Kiese was neglected because respondent did not follow up with doctor appointments and did not use the apnea monitor between the period of October 10, 2010, and April 7, 2011. As we have previously noted, the State incorrectly listed the date of Kiese's birth instead of the date she was actually prescribed the apnea monitor, approximately one month after her birth. However, respondent did not object to the date before the trial court, and she does not do so on appeal. Therefore, she has forfeited any contention that the date is in error. See *In re H.D.*, 343 Ill. App. 3d 483, 489-90 (2003).

¶ 57 We have reviewed the evidence presented at the adjudicatory hearing and hold that it was sufficient to prove by a preponderance of the evidence that Kiese was a neglected minor under count I. First, it is clear that respondent did not follow up with the download appointments. The trial court held that the download appointments were technically doctor appointments, but for a specific purpose of downloading the information from the apnea monitor. At the hearing, Swartout testified that Kiese's monitor was supposed to be downloaded weekly, but respondent did not make or keep weekly appointments to bring the monitor in to be downloaded. Swartout said she left respondent voice messages and even sent her a certified letter in order to try to reach her about downloading the monitor. The information contained in those downloads was crucial information that Kiese's doctors needed to determine the status of Kiese's condition. The State also proved that the apnea monitor was not used consistently from the time Kiese was put on the monitor until she stopped breathing on April 7, 2011. Swartout said that when the monitor's history was checked it showed large gaps of time in which it was not used. In addition, nurse Krueger testified that after Kiese was hospitalized on April 7, 2011, she reviewed the records of the apnea monitor and learned that Kiese

had been off the monitor at almost all times. Accordingly, the trial court's ruling that Kiese was neglected under count I of the State's petition was not against the manifest weight of the evidence.

¶ 58 With regard to count V, the State alleged that Kiese was neglected because she had substantial medical needs and respondent had been inconsistent with those needs, thereby placing Kiese at risk of harm. In finding this count proven, the trial court found that the inconsistency in the apnea monitor alone, which was documented and proven, was grounds to say that Kiese's medical treatment had been inconsistent.

¶ 59 We have reviewed the trial court's findings and hold that its determination of neglect under count V of the State's petition was not against the manifest weight of the evidence. We agree with the trial court that respondent's inconsistent use of the apnea monitor, of which there was ample evidence, was alone sufficient to prove that respondent had been inconsistent with Kiese's past medical needs. Accordingly, we find no error. For all these reasons, the trial court's determination of neglect under all five counts in the State's petition was not against the manifest weight of the evidence.

¶ 60 C. Finding of Unfitness

¶ 61 Next, respondent argues that the trial court's ruling at the dispositional hearing that she was unfit, unable and unwilling to have custody and guardianship of Kiese was against the manifest weight of the evidence.

¶ 62 A trial court may make a child a ward of the court if the court finds that the parents are unfit, unwilling, or unable for some reason, other than financial circumstances alone, to care for, protect, train, or discipline the minor and that the health, safety and best interest of the minor will be jeopardized if the minor remains in the custody of the parents. 705 ILCS 405/2-27(1) (West 2010). One of the factors used in determining the best interest of a child is the risk attendant to entering and being in substitute care. 705 ILCS 405/1-3(4.05)(i) (West 2010). At the dispositional stage, where a finding of unfitness will not result in a complete termination of parental rights, the State has the burden of proving unfitness by a preponderance of the evidence. *In re April C.*, 326 Ill. App. 3d 245, 257 (2001).

¶ 63 On review, the trial court's dispositional decision will be reversed only if the findings of fact are against the manifest weight of the evidence or the trial court committed an abuse of discretion by selecting an inappropriate disposition. *In re Ta.A*, 384 Ill. App. 3d 303, 307 (2008). A determination will be found to be against the manifest weight of the evidence only if the record shows that the opposite conclusion is clearly evident. *April C*, 326 Ill. App. 3d at 257. Since a trial court is in a superior position to assess the credibility of witnesses and weigh the evidence, a reviewing court will not overturn the trial court's findings merely because the reviewing court may have reached a different conclusion. *In re Lakita B.*, 297 Ill. App. 3d 985, 994 (1998).

¶ 64 Respondent makes several arguments in support of her contention that the trial court manifestly erred in finding her unfit to care for Kiese. She argues that since Kiese's care is entirely provided by the facility where she resides, it was illogical for the trial court to find that she was unable to care for her. Also, she testified that she would abide by the advice of the medical staff at the facility with regard to Kiese's care. Further, since DCFS was not immediately available to sign

a consent form on one occasion, respondent claims that the best interest factor "the risks attendant to entering and being in substitute care" should favor her. She again reiterates that she took Kiese to several doctor appointments prior to the event in question, including specialists, and argues that although she did not always use the apnea monitor consistently, the reports of when Kiese was on the monitor do not show any apnea activity during that time. She also claims that DCFS' directive to engage in grief counseling was "partly subterfuge" because it would have required that she admit liability in order to be compliant with DCFS, and she therefore should not have been required to attend counseling. In support of her position she cites to *In re K.S.*, 365 Ill. App.3d 566, 570 (2006).

¶ 65 We find no error. Although Kiese's care is entirely provided by the facility where she resides, respondent could still have been found fit to be Kiese's guardian and make decisions on her behalf. Unfortunately, the State proved by a preponderance of the evidence that that was not the case. Although respondent testified that she would abide by Kiese's doctor's advice, the trial court found that her past conduct of propping a bottle and failing to use an apnea monitor were evidence that she would disregard instructions that she disagreed with, and her history of doing so was evidence that the court could not trust her in the future. Since the opposite conclusion is not clearly evident, such a finding is not in error.

¶ 66 Next, although DCFS may not have been immediately available to sign a consent form on one occasion, DCFS caseworker Sleger testified at the dispositional hearing that there is always a doctor on call to make medical decisions as necessary, and that DCFS had a nursing referral department that assisted in medical decisions.

¶ 67 Respondent also argues that although she did not consistently use the apnea monitor, the download reports did not show any apnea activity during the time it was used. This argument is

beside the point. Here, Kiese had been *prescribed* the apnea monitor and respondent was *specifically told* that Kiese should be on it at all times except bathing.

¶ 68 Finally, we cannot agree with respondent that DCFS' directive to attend grief counseling was partly subterfuge. Respondent argues that DCFS knew that an open criminal investigation concerning this incident remained pending, and that counseling cannot require a parent to admit liability in order to be compliant with DCFS. The case she cites in support of this proposition, *In re K.S.*, 365 Ill. App. 3d 566 (2006), is distinguishable from the instant case. In that case, this court found that it was a violation of the respondent-father's due process rights for the trial court to order that he undergo a sex offender evaluation when the State presented no competent evidence against him and he was never given an opportunity to present evidence on his own behalf. *Id*. at 570. Like in *K.S.,* respondent contends, she is being asked to take responsibility for an "act of neglect" that she maintains was never proven and which she denies.

¶ 69 Respondent's argument is without merit. In *K.S.*, the child was found neglected based upon a stipulation of the mother, and the State presented no evidence that the father had sexually molested a child. Nevertheless, the trial court ordered the father to complete a sex offender evaluation. Therefore, this court properly reversed the trial court's order and remanded the case for a new dispositional hearing. *Id*. at 571. Here, on the other hand, respondent was simply directed to attend grief counseling. Although Sleger testified that grief counseling would allow respondent to understand why this case came into the care of DCFS, the fact remains that respondent had *already* admitted to Detective Schilling and DCFS caseworker Morrison that on April 7, 2011, she propped a bottle up for Kiese and left her unattended for at least 15 minutes without attaching her apnea monitor. We fail to see how the requirement to attend grief counseling was partly subterfuge.

Respondent was simply directed to attend grief counseling and she chose not to do so. In determining that she was unfit, the trial court found that respondent was unable to hear advice or take direction from others, appreciate it, and follow it throughout this entire case. That determination was not manifestly erroneous.

¶ 70 For the following reasons, the circuit court of Winnebago County is affirmed.

¶ 71 Affirmed.