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2014 IL App (3d) 120941-U

Order filed January 22, 2014

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IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

<i>In re</i> L.S.,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
a Minor	)	Peoria County, Illinois,
	)	
(The People of the State of Illinois,	)	
	)	
Petitioner-Appellee,	)	Appeal No. 3-12-0941
	)	Circuit No. 12-JA-44
v.	)	
	)	
Victoria J.,	)	Honorable
	)	Mark E. Gilles,
Respondent-Appellant).	)	Judge, Presiding.

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JUSTICE CARTER delivered the judgment of the court.  
Justices Holdridge and Wright concurred in the judgment.

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**ORDER**

¶ 1 *Held:* In a case involving adjudications of abuse and neglect of a minor, the appellate court held that: (1) the circuit court properly barred certain anecdotal evidence; (2) the court did not err when it allowed the State to amend the juvenile petition moments prior to the start of the adjudicatory hearing; (3) the respondent lacked standing to raise an argument related to the due process rights of the third party who allegedly abused the minor; and (4) the court erred when it found the minor was neglected by reason of an injurious environment. After noting that the respondent never challenged the circuit court's abuse finding, the appellate court vacated only the part of the circuit court's order that found the minor neglected. The appellate court affirmed the circuit court's judgment in all other respects.

¶ 2 The circuit court entered an adjudicatory order in which it found the minor, L.S., abused and neglected. The respondent appealed the adjudicatory order after the dispositional hearing was completed. On appeal, the respondent argues that the circuit court erred when it: (1) barred the testimony of a defense witness concerning the minor's behavior toward the alleged abuser; (2) granted the State's motion to amend the petition on the day of the hearing; (3) made specific findings of abuse or neglect as to the alleged abuser and entered an order prohibiting contact between him and the minor; (4) found that the minor was neglected by reason of an injurious environment. We vacate the portion of the circuit court's order that found the minor neglected but affirm the court's judgment in all other respects.

¶ 3 **FACTS**

¶ 4 On February 22, 2012, a juvenile petition was filed alleging that the minor, who was born on July 14, 2006, was abused and neglected by reason of an injurious environment. With regard to abuse, in count 1, the petition alleged:

"on or about December 20, 2011, Trent Kimble, a paremour [*sic*] of the minor's parent, inflicted upon such minor physical injury by other than accidental means in that the minor had bruises to both sides of his face, scratches on his neck and bruises and scratches on both ears, bruises on his upper arm and shoulders, chest and right rib cage, and his frenulum was torn and such injuries were non accidental."

With regard to neglect in count 2A, the petition repeated the above-quoted language from count 1 and added the following in subsequent subsections: (1) the minor was special needs and could

not communicate well; (2) the respondent had a driving under the influence conviction in 2010; and (3) the father had a domestic battery conviction in 2008 in which the respondent was the victim. In her answer, the respondent challenged only the allegations that Kimble abused the minor.

¶ 5 The circuit court held an adjudicatory hearing on August 27 and September 10, 2012. At the outset, the State moved to amend counts 1 and 2A of the juvenile petition. First, the State moved to strike "and scratches on both ears." The respondent's attorney objected, claiming that the State was trying to "isolate certain injuries from other injuries that can be explained as accidental or self-inflicted." The court granted the State's motion over the respondent's objection, ruling that nothing would prohibit the respondent from presenting any evidence she wanted. Second, the State moved to add "on his right ear" after the word "bruises" to replace the stricken portion of the counts. The respondent's attorney objected again, claiming that knowing this information sooner would have helped preparation for the case. The State responded that "discovery was tendered long ago, the findings of the doctor, the findings of all of the injuries. It's merely conforming the petition to what's already been turned over in discovery." The court granted the State's motion over the respondent's objection. Third, the State moved to add "scrotum" after "rib cage." The respondent's attorney put forth the same objection, stating also that "[i]t's impossible for us to discern from the voluminous discovery which allegations the State wants to go forward with or not." The court granted the State's motion over the respondent's objection.

¶ 6 Next, the respondent's attorney moved to strike "Trent Kimble" from counts 1 and 2A because he was not a party to the case. The State objected, claiming that Kimble was the

respondent's paramour and was living in the same home at the time of the injuries. The court denied the respondent's motion.

¶ 7 The first witness to testify was Dr. Channing Petrak, who worked at the Pediatric Resource Center in Peoria. After Dr. Petrak answered some foundation questions, the State moved to admit the minor's records from the Pediatric Resource Center. The circuit court admitted the documents over a best-evidence objection by the respondent's attorney.

¶ 8 Dr. Petrak testified that she examined the minor on December 21, 2011. The respondent was present for the exam. Dr. Petrak asked the respondent what happened to the minor, and the respondent told her that the minor had fallen on his face on the previous night. Dr. Petrak also asked the respondent if the minor bruised easily. The respondent told her that the minor had no history of bruising easily or bleeding. Dr. Petrak ran tests on the minor for bruising and bleeding disorders, and the tests' results were normal.

¶ 9 With regard to the photographs taken of the minor's injuries, Dr. Petrak described that the minor had bruising on both cheeks, his lips, and on his neck. The bruising was on multiple planes of the minor's face. He also had a small laceration on his nose and a scratch on his left ear, but neither appeared to be indicative of abuse to Dr. Petrak. With regard to the specific bruises, Dr. Petrak testified that the minor had bruising: (1) on and below his left cheek bone and below the eye; (2) on his left jaw line; (3) on and below his right cheek bone, including two parallel red lines overlying some of the bruising; (4) on his right temple, including a slight breakage of the skin; (5) on and behind his right ear; (6) on the left side of his neck and around to the front of his neck, some of which was linear, and which Dr. Petrak described as petechial bruising; (7) on both of his lips, including abrasions; (8) on the inside of his upper lip, including

a torn upper frenulum with some healing tissue; (9) on his upper arm in three spots; (10) on his upper left chest; (11) on his lower chest, which Dr. Petrak described as a petechial bruise; and (12) on his lateral right chest in multiple spots. Dr. Petrak also stated that the minor had a linear, petechial bruise on the left side of his scrotum, but the minor would not allow a picture to be taken of that injury.

¶ 10 Dr. Petrak stated that multiple bruises on multiple body planes raises a suspicion of abuse. She stated that the torso, neck, and ears are areas that are "typically fairly well protected and are more highly specific for abuse." The minor's bruises on and behind his right ear were on different planes from the rest of his facial injuries. She opined that a direct blow to the ear could have caused those injuries. With regard to the petechial bruises on the minor's neck, Dr. Petrak stated that the neck is not typically injured in falls or in accidental ways. She opined that choking or grabbing could have caused the minor's neck injuries, including if a shirt had been pulled tightly enough. She also stated that bruises to the upper arms were not typical for children, given that the area is softer. She opined that the minor's upper arm bruising appeared to be consistent with grabbing. With regard to the bruises on the minor's torso, she stated that the areas in which those bruises appeared were not areas typically injured by minors in normal play. Specifically, with regard to the bruises on the minor's lateral right chest, Dr. Petrak opined that those injuries could not have been caused by a fall:

"They curved around the rib cage. It wasn't like one -- you know, if a child fell onto the ribs, you could have small bruises over each rib in that area, but this was not the case. They were spread out over a bigger area and around a curve so they weren't even in the same plane."

¶ 11 Dr. Petrak opined that the minor could not have sustained all of his injuries in one fall. She also opined that restraint could not have caused all of the injuries, given that it would be unusual for restraint to cause cheek or torso bruises and given that the neck would not be an area in which one would restrain a child. In conclusion, she opined that the bruises had been inflicted, even though she could not rule out that the midline injuries were from a fall to the face.

¶ 12 On cross-examination, Dr. Petrak stated that exams like the one she did of the minor take around 15 to 20 minutes, then another 15 to 20 minutes to take photographs, although there could also be waiting time for the photographer to arrive and additional time while the staff does a past medical history. During this particular exam, the minor did not say that anyone hit or struck him. In her process of obtaining information on the minor's history, Dr. Petrak never attempted to contact Kimble, even though she was aware that the respondent had a paramour. She also noted that the minor had no history of being abused. Dr. Petrak also stated that she did not see the minor's glasses. She noted that the mark on the minor's right temple could have been from him falling while wearing his glasses, but that would have meant that the minor would have fallen on the right side of his face. Dr. Petrak also admitted that it was not possible to determine from the photographs when the bruises on the minor occurred.

¶ 13 Brenda Ashmore testified that she worked as a sub-nurse at Whittier School on December 20-21, 2011. In the afternoon on December 20, 2011, she examined the minor's ears because he had complained of an earache at school. He had no injuries on his face or neck that day. On December 21, 2011, she examined the minor again at school after a teacher's aid noticed bruises on the minor. The minor had bruises on his face. Ashmore stated that the school day started at 8:30 a.m. and that she did not see the minor until 9:15 a.m.

¶ 14 Peoria detective Dave Wilson testified that he went to Whittier School on December 21, 2011, to investigate the minor's injuries. He observed "a couple noticeable marks" on both sides of the minor's face. Later, he was shown what appeared to be grab marks on the inside of the minor's arm, as well as some scratches on the minor's torso. When he talked to the respondent about the injuries, the respondent said that she had been at work the night before and the minor was at home with her paramour, Kimble, who had been living there for about two months. Kimble left a text message and called the respondent to tell her that the minor had fallen on the driveway. Wilson told the respondent that he doubted the story, given that the minor had marks on both sides of his face. The respondent said that she was concerned about the marks but that the minor "was very rambunctious."

¶ 15 Wilson interviewed the respondent again on January 5, 2012. The respondent told the same version of events, and she also stated that she did not notice the marks on the minor's face until the next morning because he was asleep by the time she got home from work. When asked about the apparent grab marks on the minor's arm, the respondent said she was unaware of the marks but also stated that the minor was rambunctious and difficult to control, and that she and Kimble had to restrain him at times to keep him from doing things like running out into the street.

¶ 16 Several witnesses testified on behalf of the respondent. Elaina Webber testified that she was a clinical therapist who had been working with the minor for the last 90 days. Webber observed the minor with Kimble and when she was asked about those interactions, the State objected on relevance grounds. The circuit court sustained the State's objection but allowed the respondent's attorney to make an offer of proof. During the offer of proof, Webber stated:

"I was present at the family session as it was reserved in our treatment plan and Mr. Kimball [*sic*] was there and [the respondent], the mother of the child, was there. And [L.S.] behaved very comfortably, open. He was physically unrestrained around him, giving him hugs. Trent and [L.S.] were really truthful. They were laughing and they were participating in the family session to the degree of how would [*sic*] the family members participate if they were very, um, loving and open with one another.

Trent was able to get him snacks if [L.S.] requested. [L.S.] wanted to follow Trent everywhere he went. And this was very consistent with me as what I have encountered."

Webber also stated that in her experience and in conjunction with diagnostic manuals, approximately 70% of abused children are "very reserved and withdrawn around alleged abusers." On cross-examination, Webber stated that she had observed the minor with Trent on two occasions.

¶ 17 The respondent also testified and was asked numerous questions regarding her son's injuries that were depicted in photographs entered into evidence. The respondent stated that the cracks on his bottom left lip were from prior to December 20, 2011, and the bruising on his top lip was from December 19 when he tore his skin and cut his lips. With regard to the injury to the minor's bottom lip, the respondent stated that he had suffered that prior to December 20, as he picks at the skin on his lips. With regard to the marks on his left ear, the respondent stated that the minor constantly picks at his ears. She did not recall if any of the marks on his right ear, the petechia on his neck, the scratch under his nose, the dry skin under his arm and on his torso, were



present before December 20. She also did not know if the dry skin under his arm or on his torso were present before December 20, but she did state that the minor had eczema and would scratch at his patches of dry skin. She also stated that the patch of dry skin by his right eye was present before December 20. With regard to the bruises on the minor's arm, the respondent stated that those bruises likely occurred the Wednesday prior to December 20 when she had to restrain him from running out into the street. With regard to the minor's torn frenulum, the respondent stated that he had suffered that injury on December 19 when he threw a tantrum and fell off his bed. According to the respondent, that fall was also responsible for a bruise he had on his rib cage.

¶ 18 The respondent testified that the initial examination of the minor by Dr. Petrak lasted approximately 10 minutes. She said Dr. Petrak did not ask her about the minor's injuries like her attorney did during the hearing. On cross-examination, she stated that she did not tell Dr. Petrak about the minor falling out of bed and injuring his frenulum or about having to restrain the minor from running into the street.

¶ 19 The respondent stated that the minor had "low motor skills" that resulted in abdominal weakness, but the cause of that issue was unknown. The minor would trip and fall often. His physical issues created difficulty with balance and protective skills, including the lack of attempting to brace himself when he fell.

¶ 20 The respondent testified that the minor never said anything to her about whether he was hit on December 20. She also stated that the minor has had bruises since the petition was filed and that those bruises were sustained while in the care of the father. Those bruises were present on August 27, 2012, and were on the minor's neck, back of his arm, and near his groin. The father provided explanations for those bruises to the respondent, including that the minor had

fallen out of bed.

¶ 21 The circuit court also asked several questions of the respondent. Pursuant to these questions, the respondent clarified that Kimble told her he assumed that the minor fell in the concrete driveway, as he did not see the fall occur. In reference to the photograph depicting the injuries to the minor's right ear, which the court described as "clearly very, very red, almost bruised in nature," the respondent said that the minor's ear was not like that when she left for work on December 20. The minor also did not describe to her how any of the December 20 injuries occurred; he simply said that he fell.

¶ 22 In rebuttal, the State called Carrie Green, who was a caseworker for Lutheran Social Services. Green testified that she did not receive a phone call from the respondent regarding any bruising the minor had on his groin, neck, or arm.

¶ 23 At the close of the hearing, the circuit court found the petition's allegations proven by a preponderance of the evidence. The court stated that it was not convinced that all of the injuries alleged in the petition were intentionally inflicted, but found that the facial injuries, including the frenulum injury, were caused by abuse. The court also found that the respondent was not a credible witness in that her testimony was inconsistent and untruthful at times. Accordingly, the court entered an order finding the minor abused and neglected.

¶ 24 Later, after a dispositional hearing, the respondent was found fit, the minor was made a ward of the court, and DCFS was named guardian, although the court found that placement was not necessary. The respondent appealed.

¶ 25 ANALYSIS

¶ 26 On appeal, the respondent argues that the circuit court erred when it: (1) barred Webber's

testimony concerning the minor's behavior toward Kimble; (2) granted the State's motion to amend the petition on the day of the hearing; (3) made specific findings of abuse or neglect as to Kimble and entered an order prohibiting contact between Kimble and the minor; (4) found that the minor was neglected by reason of an injurious environment.

¶ 27 I. THE COURT'S RULING ON WEBBER'S TESTIMONY

¶ 28 First, the respondent argues that the circuit court erred when it barred Webber's testimony concerning the minor's behavior toward Kimble.

¶ 29 The rules of evidence from civil proceedings apply to adjudicatory hearings held pursuant to the Juvenile Court Act of 1987. 705 ILCS 405/2-18(1) (West 2010). "Relevant evidence, which tends to prove a fact in controversy or renders a matter at issue more or less probable, is generally admissible." *Webber v. Wight & Co.*, 368 Ill. App. 3d 1007, 1028 (2006). A decision on whether evidence is admissible is a matter within the circuit court's discretion, and we will not disturb that decision absent an abuse of the court's discretion. *In re A.W.*, 231 Ill. 2d 241, 256 (2008).

¶ 30 Our review of the record in this case reveals that Webber's testimony was in fact not relevant. The offer of proof on Webber's testimony included, in essence, two points: (1) that no earlier than approximately five months after the alleged abuse occurred, she had observed the minor and Kimble on two occasions and that the minor was comfortable around Kimble; and (2) that approximately 70% of children who have been abused are typically reserved around their abusers. Webber was not asked to render an opinion regarding her observations. Thus, what the offer of proof showed was at best an anecdotal account of two interactions that occurred long after the date of the alleged abuse. We hold that this evidence was not relevant and that the

circuit court did not abuse its discretion when it barred Webber's testimony.

¶ 31 II. THE COURT'S RULING ON THE STATE'S MOTION TO AMEND

¶ 32 Second, the respondent argues that the circuit court erred when it granted the State's amendments to the juvenile petition on the day of the hearing. In this regard, the respondent claims that the court erred when it allowed the amendments: (1) without a showing of good cause by the State; (2) without verification; and (3) without providing the respondent an opportunity to prepare a new defense.

¶ 33 Section 2-13(5) of the Juvenile Court Act of 1987 (the Act) provides the following with regard to amendments to a juvenile petition:

"The court shall liberally allow the petitioner to amend the petition to set forth a cause of action or to add, amend, or supplement factual allegations that form the basis for a cause of action up until 14 days before the adjudicatory hearing. The petitioner may amend the petition after that date and prior to the adjudicatory hearing if the court grants leave to amend upon a showing of good cause. The court may allow amendment of the petition to conform with the evidence at any time prior to ruling. In all cases in which the court has granted leave to amend based on new evidence or new allegations, the court shall permit the respondent an adequate opportunity to prepare a defense to the amended petition." 705 ILCS 405/2-13(5) (West 2010).

We review a circuit court's decision on a motion to amend a pleading for an abuse of discretion. *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273-74 (1992).

¶ 34 When reviewing a circuit court's decision on a motion to amend a pleading, we look at

four factors: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Loyola Academy*, 146 Ill. 2d at 273.

¶ 35 In this case, the first *Loyola Academy* factor does not apply, as this was not a defective pleading. With regard to the third and fourth *Loyola Academy* factors, we acknowledge that the State told the circuit court that the amendments were intended to conform the petition to what had been turned over "long ago" in discovery. Accordingly, the State could have amended the petition prior to the time at which it did, but, we also acknowledge that pursuant to section 2-13(5) of the Act, the State's amendments were timely. That section provides that the petition can be amended within the 14-day time period before the adjudicatory hearing "upon a showing of good cause." 705 ILCS 405/2-13(5) (West 2010). During arguments on the amendments, the State argued that "discovery was tendered long ago, the findings of the doctor, the findings of all of the injuries. It's merely conforming the petition to what's already been turned over in discovery." Contrary to the respondent's argument on appeal regarding good cause, which the respondent never made in the circuit court, we find that the State's reason was sufficient to meet the "good cause" requirement in section 2-13(5).

¶ 36 More importantly, with regard to the second *Loyola Academy* factor, our review of the record reveals that the respondent never argued how the amendments prejudiced or surprised her. Rather, the respondent argued only that the State was trying to make it more difficult for the respondent to put on a defense and that "it would have been nice to have known [about the amendments] a lot sooner" so they could have been considered in preparing a defense. The

respondent also never asked for additional time to prepare her defense. Moreover, the facts changed in the petition were relatively minor and were readily identifiable from discovery that the respondent had previously received. Under these circumstances, we hold that these amendments neither prejudiced nor surprised the respondent.

¶ 37 Lastly, we also note that the respondent argues on appeal that despite the fact that the initial petition was verified, section 2-13 of the Act required that the amended petition be verified as well. However, like the other two sub-arguments she raised on appeal, the respondent never raised this argument in the circuit court and has therefore forfeited the argument. See *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 355 (1998) ("[q]uestions not raised in the trial court cannot be argued for the first time on appeal").

¶ 38 For the foregoing reasons, we hold that the circuit court did not abuse its discretion when it allowed the State's amendments to the juvenile petition.

¶ 39 III. THE COURT'S FINDINGS AND ORDER REGARDING KIMBLE

¶ 40 Third, the respondent argues that the circuit court erred when it made specific findings of abuse or neglect as to Kimble and entered an order prohibiting contact between Kimble and the minor. In essence, the respondent contends that the court violated Kimble's due process rights in making its findings that involved Kimble.

¶ 41 "[A]s a general rule, a litigant has standing only to vindicate his or her own constitutional rights." *People ex. rel Shockley v. Hoyle*, 338 Ill. App. 3d 1046, 1055 (2003). Here, the respondent lacks standing to assert an alleged deprivation of Kimble's constitutional rights.

¶ 42 IV. THE COURT'S NEGLIGENCE ADJUDICATION

¶ 43 Fourth, the respondent argues that the circuit court erred when it found that the minor was

neglected by reason of an injurious environment.

¶ 44 At the adjudicatory hearing, the State has the burden of proving that a minor is neglected by a preponderance of the evidence. *In re A.P.*, 2012 IL 113875, ¶ 17. We will not disturb a circuit court's determination that a minor is neglected unless the manifest weight of the evidence clearly shows that a contrary ruling was correct. *Id.*

¶ 45 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(b) (West 2010). In general, neglect means "the failure to exercise the care that circumstances justly demand." (Internal quotation marks omitted.) *In re Arthur H.*, 212 Ill. 2d 441, 463 (2004).

"It embraces wilful as well as unintentional disregard of duty. It 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 surrounding circumstances changes." *People ex. rel. Wallace v. Labrenz*, 411 Ill. 618, 624 (1952); see also *Arthur H.*, 212 Ill. 2d at 463.

¶ 46 An "injurious environment" is also an amorphous concept. *Arthur H.*, 212 Ill. 2d at 463. It includes "the breach of a parent's duty to ensure a safe and nurturing shelter for his or her children." (Internal quotation marks omitted.) *Id.*

¶ 47 In *A.P.*, the mother of two minors left her children with her paramour while she went to the doctor. *A.P.*, 2012 IL 113875, ¶ 3. While the mother was gone, one of the minors suffered first and second-degree burns to his face. *Id.* ¶¶ 3, 7. The juvenile petition alleged both abuse and neglect, with both allegations centered around a claim that the paramour abused the minor. *Id.* ¶ 4. After an adjudication hearing, the circuit court found that the State failed to prove that

the minor's injuries were caused by abuse, but it did find that the minors were neglected by reason of an injurious environment due to what the court described as the paramour's neglectful supervision of the minors. *Id.* ¶¶ 10, 23. On appeal, this court reversed, holding, *inter alia*, that there was no evidence to suggest that the mother had any reason to suspect that the paramour would be neglectful in his supervision of the minors while the mother was away. *In re A.P.*, 2012 IL App (3d) 110191, ¶¶ 21-23. Our supreme court affirmed, holding that, "[s]imply put, in order to support the trial court's neglect findings in this case, there had to be some indication that [the mother] knew or should have known that [the paramour] was an unsuitable caregiver." *A.P.*, 2012 IL 113875, ¶ 25. With regard to the evidence presented at the adjudicatory hearing, our supreme court stated:

"There was no indication that [the paramour] could not provide a safe and nurturing shelter for [the mother's] children for the duration of the appointment. Similarly, there was no indication that the minors had previously been injured in [the paramour's] presence, or that [the mother] had any reason to be concerned about him looking after the children." *Id.* ¶ 26.

¶ 48 In this case, the petition alleged that the minor was abused and neglected by reason of an injurious environment. With regard to the neglect allegation, the petition cited four reasons: (1) the alleged abuse by Kimble; (2) the minor was special needs and could not communicate well; (3) the respondent had a driving under the influence conviction in 2010; and (4) the father had a domestic battery conviction in 2008 in which the respondent was the victim. The respondent challenged the abuse allegations and stipulated to the other three reasons. At the adjudication hearing, the State's case centered on the abuse allegations. Even with the three stipulations, we



believe the evidence presented did not support a finding that the minor was neglected by reason of an injurious environment.

¶ 49 Similar to *A.P.*, there was no evidence introduced to suggest that the respondent had reason to suspect that Kimble could not provide a safe and nurturing environment for the minor while the respondent was at work. There was no evidence that Kimble had been abusive or neglectful in the past while supervising the minor. Under these circumstances, we hold that the circuit court's finding that the minor was neglected was against the manifest weight of the evidence.

¶ 50 We note that the respondent does not actually challenge the circuit court's ruling that the minor was abused. Because the circuit court's abuse finding stands, we vacate only the portion of the court's order that found the minor neglected and affirm the court's judgment in all other respects.

¶ 51 CONCLUSION

¶ 52 The judgment of the circuit court of Peoria County is affirmed in part and vacated in part.

¶ 53 Affirmed in part and vacated in part.