

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

DIVISION III

CA07-290

September 5, 2007

ELIZABETH HENSE

APPELLANT

APPEAL FROM THE DREW COUNTY
CIRCUIT COURT
[NO. JV-2006-124-5]

V.

ARKANSAS DEPARTMENT OF
HEALTH and HUMAN SERVICES

APPELLEE

HON. TERESA FRENCH,
JUDGE

AFFIRMED

Appellant Elizabeth Hense appeals an order from the Drew County Circuit Court in which her minor grandson, J.H., over whom she maintained guardianship, was adjudicated dependent-neglected. Appellant's sole point on appeal is a challenge to the sufficiency of the evidence supporting the order. We affirm.

Appellant is the grandmother and guardian of J.H., whose date of birth is December 10, 1996. This case began when appellee Arkansas Department of Health and Human Services (ADHHS) sent a caseworker to Drew Central Elementary School on December 11, 2006, to investigate a report of suspected child abuse. J.H. was interviewed in the presence

of police representatives and his school principal, at which time he told investigators that on the previous night appellant had instructed his fifteen-year-old cousin to tie J.H.'s hands together. He explained that appellant had him tied up to keep him out of the refrigerator and from eating sugar at night. Appellant's cousin was also interviewed and corroborated his story, including the fact that J.H. would get up at night and eat sugar.

Based upon the interviews, J.H. was placed in emergency custody on December 11, 2006. On December 14, 2006, a hearing was held, with appellant failing to appear, and it was determined that probable cause existed to continue J.H. in ADHHS custody until the adjudication hearing. The adjudication hearing was held on January 11, 2007.

According to his progress report, J.H. was found to have a borderline I.Q. He had difficulty answering questions at the hearing and a poor ability to recall events. Appellant testified at the hearing, explaining that she, J.H., and his cousin had been staying at her daughter's home on the night of December 10, 2006, so that she could look after her daughter's two babies while her daughter was ill. She stated that she had received two shots earlier in the day, and apparently, the pain medication left her unable to adequately care for J.H. and prevented her from accurately remembering all the events of the evening. Although appellant denies in her brief that she instructed her older grandson to tie J.H.'s wrists together, she testified at the adjudication hearing that, "I don't know when I told his cousin to tie his hands together, like I said, I passed out a little after nine." She further testified that on the following morning, her older grandson said to her, "Don't you remember telling me

to put the tape on his hands?” She further explained that she told him that she couldn’t remember what she had said to him the previous evening because she was under the influence of medication. Additionally, Investigator Libby Cox testified at the hearing that appellant told her that, “she knew it happened, she knew it happened and she fell asleep and she may have told him.” On January 11, 2007, the circuit court entered an order finding J.H. dependent-neglected. This appeal followed.

In equity matters, such as dependency-neglect cases, the standard of review on appeal is de novo, but we do not reverse the judge’s findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Moiser v. Ark. Dep’t of Human Servs.*, 95 Ark. App. 32, ___ S.W.3d ___ (2006). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Id.* However, a trial court’s conclusion on a question of law is given no deference on appeal. *Id.*

Arkansas Code Annotated section 9-27-325(h)(2)(B) requires proof by a preponderance of the evidence in dependency-neglect situations. Under Arkansas Code Annotated section 9-27-313, a child can be taken into immediate custody by the State when that child is in immediate danger. Promptly following that taking, a probable cause hearing must be held and then an adjudication hearing. During the adjudication hearing, the State is required to prove by a preponderance of the evidence that the allegations in the petition for emergency custody were substantiated. *See* Ark. Code Ann. § 9-27-327. Arkansas Code

Annotated section 9-27-303(18) describes a “dependent-neglected juvenile” as one who is at substantial risk of serious harm as a result of abandonment, abuse, sexual abuse, sexual exploitation, neglect, or parental unfitness. The statute describes “neglect” as:

- (i) Failure or refusal to prevent the abuse of the juvenile when the person knows or has reasonable cause to know the juvenile is or has been abused;
- (ii) Failure or refusal to provide the necessary food, clothing, shelter, and education required by law....
- (iii) Failure to take reasonable action to protect the juvenile from abandonment, abuse, sexual abuse, sexual exploitation, neglect, or parental unfitness when the existence of this condition was known or should have been known;
- (iv) Failure or irremediable inability to provide for the essential and necessary physical, mental, or emotional needs of the juvenile....
- (v) Failure to provide for the juvenile’s care and maintenance, proper or necessary support, or medical, surgical, or other necessary responsibility; or
- (vi) Failure, although able, to assume responsibility for the care and custody of the juvenile or to participate in a plan to assume the responsibility; or
- (vii) Failure to appropriately supervise the juvenile that results in the juvenile’s being left alone at an inappropriate age or in inappropriate circumstances, creating a dangerous situation or a situation that puts the juvenile at risk of harm.

Ark. Code Ann. § 9-27-303(36). Additionally, Arkansas Code Annotated section 9-27-303(3)(A)(vii)(f) deals specifically with the act of binding of a juvenile’s limbs as abuse. It provides, in part, that tying a child to a fixed or heavy object or binding or tying a child’s limbs together, if done intentionally or knowingly, constitutes abuse whether or not physical injury resulted therefrom.

Appellant contends that the proof offered by ADHHS fails to support the circuit court’s findings for three reasons: (1) the individual who performed the alleged act constituting abuse was not an individual to whom the legislation was directed; (2) ADHHS

failed to prove that appellant performed an intentional or knowing act that is prohibited by the statute; (3) ADHHS failed to establish that J.H.'s hands were bound together.

Initially, appellant points out that the individual who allegedly bound J.H.'s hands, his fifteen-year-old cousin, was under the age of eighteen years, and was not entrusted with J.H.'s care, as required by Ark. Code Ann. § 9-27-303(A), which states in pertinent part:

“Abuse” means any of the following acts or omissions by a parent, guardian, custodian, foster parent, *person eighteen (18) years of age or older living in the home with a child, whether related or unrelated to the child*, or any person who is entrusted with the juvenile's care by a parent, guardian, custodian, or foster parent, including, but not limited to, an agent or employee of a public or private residential home, child care facility, public or private school, or any person legally responsible for the juvenile's welfare

(emphasis added). Appellant asserts that in order to be covered by the definition, the person who performs the act in question must qualify as a person from whom the legislation was intended to protect the juvenile. It is undisputed that the cousin was fifteen years of age, and evidence was presented that he was not held to be entrusted with J.H.'s care.

Secondly, appellant claims that ADHHS failed to establish that she possessed any intent or knowledge of the alleged acts. She asserts that, pursuant to the statute, the burden was on ADHHS to establish by a preponderance of the evidence that she acted with intent or knowledge to bind J.H.'s hands. The circuit court stated in its ruling that it found the case manager and counselor, Michelle Shirey, to be a very credible witness, and based its ruling, in part, upon Ms. Shirey's testimony that appellant told the cousin to tape the child's hands. Appellant argues that Ms. Shirey said no such thing, and that only J.H., who was inconsistent

and confused, along with Investigator Cox, made such allegations, which were far from conclusive. Appellant herself adamantly denies the allegations, claiming that she had never done so previously and that she would remember if she had done so on this occasion. Accordingly, appellant claims that, at best, ADHHS presented only the mere possibility that she directed the cousin's actions, which does not meet the standard of proof required under the statute.

Appellant argues that only the person who performs the abusive act can be held responsible for the abuse; however, this argument was not properly preserved at the adjudication hearing, and further, appellant fails to support the argument with relevant case law. We do not consider issues on appeal without convincing argument or citation to authority where it is not apparent without further research that the arguments are well-taken. *See Todd v. Ark. Dep't of Human Servs.*, 85 Ark. App. 174, 151 S.W.3d 315 (2004).

ADHHS argues that there is testimony sufficient to support the circuit court's ruling that appellant instructed her fifteen-year-old grandson to bind J.H.'s wrists with duct tape. Appellant's in-court admission that her older grandson told her "Don't you remember telling me to put the tape on his hands?" is significant in and of itself, and is additionally bolstered by her admission that "she knew it happened" as testified to by Investigator Cox. Further, although appellant later attempted to retract certain comments, she initially responded to questions at the hearing by stating, "I don't know when I told his cousin to tie his hands together, like I said, I passed out a little after nine." ADHHS contends that appellant knew

that she would be receiving medication on the day in question that would cause her to become sleepy, and further, that she should have known that she could not properly supervise J.H. or her other younger grandchildren after the medication had been administered. Because she failed to make suitable arrangements for J.H. to have proper supervision, his wrists were bound with duct tape, and he was left to sleep in that condition for the remainder of the night.

The attorney ad litem urges us to take the view that if appellant, as J.H.'s guardian and care giver, directed someone else to bind J.H.'s hands together, then that direction should be treated as if appellant had bound his hands herself. The attorney ad litem contends that appellant's directions to her older grandson constituted an intentional or knowing act under the statute. Alternatively, the attorney ad litem claims that appellant ignores the other independent ground for the adjudication of dependency neglect, specifically that she was acknowledged to be the legal guardian; it was her responsibility to ensure J.H.'s health and safety, and her failure to do so constituted neglect.

We agree. At a minimum, appellant admitted that she was responsible for the boy on the evening in question and that she might have instructed his cousin to bind his wrists but could not remember because of the influence of her medication. Her failure to prevent the cousin from binding the child's hands constituted neglect, which would independently support a finding of dependency-neglect under Ark. Code Ann. § 9-27-303(18)(A)(v). A parent has a duty to protect a child, and can be found to be unfit even though she did not directly cause the child's injury. *See Todd, supra*. Even if appellant did not specifically

instruct her older grandson to bind J.H.'s wrists, sufficient evidence remains to support a finding that she was unfit to care for J.H. and that she failed to provide adequate supervision. ADHHS asserts, and we agree, that a parent or guardian who is intoxicated or under the influence of drugs to such an extent that she is rendered unconscious and experiences a memory lapse related to that time period cannot properly supervise a child.

Finally, appellant argues that ADHHS failed to conclusively show that J.H.'s hands were actually bound, showing, at most, that his hands had one or two pieces of tape on them. She claims that J.H.'s testimony was certainly confusing regarding this issue, and that neither Ms. Shirey's or her testimony established that the child was "bound." Accordingly, she asks that the dependent-neglect ruling of the circuit court be determined to be clearly erroneous on this basis alone.

The attorney ad litem argues that this contention is not supported by the proof presented at the adjudication hearing. The record indicates that Ms. Shirey testified that J.H. told her that he had his hands taped together with just one or two pieces of tape so that he would not get into the refrigerator and get into the sugar, and also that he slept like that overnight. We decline to say that it was clearly erroneous for the circuit court to have considered that one or two pieces of duct tape would be sufficient to bind his wrists together. Although J.H. was found not to be generally credible, he did testify that he remembered someone tying his hands with duct tape, which was consistent with other witnesses' testimony. Again, even appellant testified that when she woke up, she "did not know when

J.H.'s hands got tied or taped together.” We disagree that it was mere speculation for the circuit court to have determined that J.H.'s hands were still bound when appellant saw him the following morning.

At a minimum, ADHHS proved that appellant committed neglect in not protecting J.H.'s health and safety, which is in and of itself, grounds for the dependency-neglect adjudication. We affirm.

Affirmed.

GRIFFEN and VAUGHT, JJ., agree.