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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2016-CA-000844-ME

M.P.

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE DAVID A. LANPHEAR, JUDGE  
ACTION NO. 10-J-00831-002

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND  
FAMILY SERVICES; J.E., SR., FATHER;  
AND M.E., A CHILD

APPELLEES

AND

NO. 2016-CA-000845-ME

M.P.

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE DAVID A. LANPHEAR, JUDGE  
ACTION NO. 14-J-00154-001

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND  
FAMILY SERVICES; K.M., FATHER;  
AND B.P., A CHILD

APPELLEES

AND

NO. 2016-CA-000846-ME

M.P.

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE DAVID A. LANPHEAR, JUDGE  
ACTION NO. 14-J-00155-001

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND  
FAMILY SERVICES; K.M., FATHER;  
AND M.P., A CHILD

APPELLEES

AND

NO. 2016-CA-000847-ME

M.P.

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE DAVID A. LANPHEAR, JUDGE  
ACTION NO. 14-J-00156-001

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND  
FAMILY SERVICES; K.M., FATHER;  
AND B.P., A CHILD

APPELLEES

AND

NO. 2016-CA-000848-ME

M.P.

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE DAVID A. LANPHEAR, JUDGE  
ACTION NO. 14-J-00157-001

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND  
FAMILY SERVICES; J.E., SR., FATHER;  
AND J.E., JR., A CHILD APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: J. LAMBERT, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: M.P. (hereinafter referred to as Mother)<sup>1</sup> appeals from five orders of the Warren Circuit Court which found that she had neglected her children. We believe the evidence presented was insufficient to prove Mother neglected her children; therefore, we reverse and remand.

Mother is the mother of five children. On February 26, 2014, Mother and the five children were living with J.E. (hereinafter referred to as Father), the father of two of the children. On that day, Father was home with three of the children and Mother was out of the house with the two other children. According to the testimony of Mother and Father, two of the children were on the porch playing. A safety gate was placed in front of the porch stairs in order to keep the children from leaving the porch. Father was inside while the children played on the porch. Father then heard the children scream and went to the porch. Father

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<sup>1</sup> This case involves minor children; therefore, the names of the parties will not be used.

claims that while the children were playing, the safety gate gave way and the children fell down the steps.

One of the children, M.P. (hereinafter referred to as Child 1), was injured in the fall. It was later determined her arm was broken. Father picked the children up and took them into the house. At the same time, Mother returned. Father explained what happened and Mother then took Child 1 to the Bowling Green, Kentucky emergency room. While at the ER, Mother told the medical personnel that she was at home when the child was injured and witnessed the fall. Mother claims she lied to the medical staff in order to facilitate treatment more quickly; however, the Cabinet for Health and Family Services (hereinafter referred to as the Cabinet) claims that she lied in order to protect Father from charges of child abuse.

Matt Holden, a Cabinet investigator, received a call from the hospital about Child 1's injury. A detective from the Bowling Green Police Department, Detective Tim Buss, later became involved.<sup>2</sup> Mother told Investigator Holden and Detective Buss the same story she told medical staff, that she was at home when the injury occurred and she witnessed it.

Later that same day, Investigator Holden and Detective Buss went to the family's home and spoke with Father. Father told the two that he was home when the injury occurred and that Mother was not. He then described how he believed the safety gate gave way and caused the children to fall off the porch.

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<sup>2</sup> Whether the Cabinet or the hospital contacted the police is unclear from the record.

Investigator Holden and Detective Buss then returned to the hospital and spoke to Mother about Father's statement. Mother then admitted she had not been home when the injury occurred.

X-rays of Child 1's arm indicated that she had suffered a spiral fracture. Detective Buss believed that a spiral fracture was inconsistent with a fall and more likely caused by an intentional act. Detective Buss arrested Father on February 27, 2014, on physical abuse charges.<sup>3</sup> The next day, the Cabinet filed the instant petition alleging dependency, neglect, or abuse. The Cabinet claimed that Mother was neglectful because she lied to protect Father, whom the Cabinet believed to be a perpetrator of physical abuse.

After a number of continuances, an adjudication hearing was held on April 28, 2015. Only Investigator Holden testified at this time. After further continuances, the balance of the adjudication hearing was held on April 26, 2016. Detective Buss, Mother, and Father testified on this day. On May 17, 2016, the court entered an order finding Mother neglected all five children. This appeal followed.

KRS 600.020 states in relevant part:

(1) "Abused or neglected child" means a child whose health or welfare is harmed or threatened with harm when:

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<sup>3</sup> In February of 2015, Father pled guilty to endangering the welfare of a minor, which is defined by Kentucky Revised Statute (KRS) 530.060 as when "[a] parent . . . fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming a neglected, dependent or delinquent child." This is a class A misdemeanor.

(a) His or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child:

1. Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
2. Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;
3. Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005;
4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;
5. Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;
6. Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;
7. Abandons or exploits the child;
8. Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child;

9. Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months[.]

The trial court found Mother had neglected Child 1 pursuant to KRS 600.020(1)(a)4 and that Mother had neglected her other four children pursuant to KRS 600.020(1)(a)2.

KRS 620.100 governs adjudicatory hearings following the temporary removal of a child from his or her custodian. When a court determines such a hearing is required, “[t]he adjudication shall determine the truth or falsity of the allegations in the complaint. The burden of proof shall be upon the complainant, and a determination of dependence, neglect, and abuse shall be made by a preponderance of the evidence.” KRS 620.100(3). Whether a trial court correctly applied a statutory standard is assessed *de novo*, with no deference to the trial court. *Brewick v. Brewick*, 121 S.W.3d 524, 526 (Ky. App. 2003), *citing Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

Findings of fact are reviewed for clear error. Kentucky Rule of Civil Procedure (CR) 52.01. A trial court’s decision is not clearly erroneous if it is supported by substantial evidence. *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). “Substantial evidence” is “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable [people].” *Id.* Furthermore, parties have a right to have matters before trial courts “adjudicated from the evidence of record [.]” *See Skinner v. Skinner*, 249 S.W.3d 196 at 201 (Ky. App. 2008). A trial court’s reliance upon evidence not in the record constitutes clear error. *Id.*

*S.R. v. J.N.*, 307 S.W.3d 631, 634 (Ky. App. 2010).

As the fact-finder, the trial court was entitled to draw reasonable inferences from the evidence. *See Martin v. Com.*, 13 S.W.3d 232, 235 (Ky. 1999). However, the Cabinet cannot sustain its burden of proof by the compounding of inferences upon inferences. *American Ins. Co. v. Horton*, 401 S.W.2d 758, 760 (Ky. 1966). A conclusion based on multiple levels of inference does not rise above the level of mere speculation. *Rollins v. Avey*, 296 S.W.2d 214, 216 (Ky. 1956), *citing Le Sage v. Pitts*, 311 Ky. 155, 223 S.W.2d 347, 352 (Ky. 1949).

*K.H. v. Cabinet for Health & Family Servs.*, 358 S.W.3d 29, 32 (Ky. App. 2011).

“[T]he risk of harm [to a child] must be more than a mere theoretical possibility, but an actual and reasonable potential for harm.” *Id.*

As stated previously, the trial court found that Mother neglected Child 1 by repeatedly failing to “provide essential parental care and protection for the child[.]” KRS 600.020(1)(a)4. The court believed this subsection of the statute applied because Mother repeatedly lied about the circumstances surrounding Child 1’s injury. The briefs submitted to this Court and the testimony presented to the trial court focused on Child 1’s injury. Mother did not cause Child 1’s injury; therefore, we must concentrate on whether or not Mother’s lie can be characterized as repeatedly failing to provide parental care or protection to Child 1.

We do not believe Mother’s actions amount to neglect or that there was substantial evidence to find such. There was no evidence that Mother’s lie delayed, or otherwise impacted, Child 1’s medical treatment. There was also no evidence that Mother suspected Father had intentionally abused Child 1 when she lied to the medical staff and investigators. Evidence presented during the hearings

indicated that there had been no previous instances of child abuse or domestic violence in this family. Finally, when she was confronted with the possibility that Father could have intentionally injured Child 1, she told investigators that she was not home when the injury occurred.

We also note that KRS 600.020(1)(a)4 requires that a parent continuously or repeatedly fail to provide care or protection to a child. Here, even though Mother told the same lie multiple times, we believe this was a single act or course of conduct and not what was contemplated by the statute.

Furthermore, evidence that Child 1 was intentionally injured by Father is lacking. No doctor, nurse, or other medical expert testified during the two hearings. Detective Buss did testify during the hearings that he believed spiral fractures indicated intentional injury; however, he also testified that he had little to no training regarding child abuse and that Child 1's medical records would be the most accurate indication of how the child was injured. The medical records were introduced into evidence, but they suggest Child 1 was injured accidentally in a fall. Multiple medical documents state that Child 1 was not suspected as being a victim of child abuse and that the injury was caused by a fall. A radiologist report, which was focused on by the trial court, also stated that the injury could have been caused by a fall, but that further testing should be done to "exclude nonaccidental trauma." No further testing was done. Lastly, Father was not convicted of physically abusing Child 1, but of the lesser offense of endangering the welfare of a minor.

We believe the evidence against Mother was lacking and the trial court made too many inferences. The court's finding of neglect against Mother was not based on substantial evidence and we do not consider Mother posed actual harm to Child 1. *See K.H., supra.*

As to the other four children, the trial court found Mother neglected them by “[c]reat[ing] or allow[ing] to be created a risk of physical or emotional injury . . . to the children by other than accidental means[.]” KRS 600.020(1)(a)2. No evidence was presented at the adjudication hearings regarding Mother's harming of the other four children. All the evidence presented related to Child 1's injury. The Cabinet seemingly bootstrapped the other four children to the allegations regarding Child 1. There was no evidence presented that Mother created a risk of injury to her other children. Even if we were to assume Father intentionally abused Child 1, the neglect or abuse of one child does not equate to the neglect or abuse of other children. *See K.H., supra.* Furthermore, the reasons this Court set forth above in regard to the lack of evidence of Mother's neglect of Child 1 apply to the other children. We believe the trial court's finding of neglect as to the other four children was clearly erroneous.

Based on the foregoing, we reverse and remand.

ALL CONCUR.

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