

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CJ 1353

STATE OF LOUISIANA

IN THE INTEREST OF F.C. AND S.C.

Judgment Rendered: DEC 27 2013

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On Appeal from  
The Juvenile Court,  
In and for the Parish of East Baton Rouge,  
State of Louisiana  
Trial Court No. JU103778



The Honorable Darrell White, Judge Ad Hoc Presiding

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BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

**CRAIN, J.**

This is an appeal from a judgment dismissing a petition to adjudicate two minor children to be in need of care pursuant to Louisiana Children's Code article 606. We reverse and remand for further proceedings.

### **FACTS AND PROCEDURAL HISTORY**

The State of Louisiana, through the Department of Children and Family Services of East Baton Rouge, instituted this proceeding with a verified complaint filed in juvenile court. The Department alleged that it received a report on January 31, 2013 of neglect of two minor children, F.C. and S.C., while in the care of their mother, L.C., and her boyfriend.<sup>1</sup> The verified complaint further set forth that the investigation revealed that L.C. had been arrested for prostitution at a local hotel, and that F.C. and S.C., ages 10 and 11, had been left in the car while their mother was inside the hotel. L.C.'s boyfriend entered the hotel with her and was also arrested.

The Department further alleged that F.C. and S.C. were brought to police headquarters where they were interviewed by a Department case worker that same night. The children said their mother did not discuss with them what she was doing at the hotel, and she told them to stay in the car until she came back. After their mother was gone a few minutes, a police officer knocked on the window and told them to get out. They were scared and did not know what was happening, and their mother had never done this before.

According to the complaint, Department case workers also spoke with the mother, who said she had been prostituting for two months due to a hardship with money after being fired from her job. She brought the children with her because her roommate was not home, and she did not want to leave the children home

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<sup>1</sup> Pursuant to the Uniform Rules—Courts of Appeal, Rules 5-1(a) and 5-2, the initials of the parties will be used to protect and maintain the privacy of the minor children involved in this proceeding.

alone. Her boyfriend was supposed to walk with her to the hotel room and check out the scene, and then go back to the car with the children.

Based on this investigation, the Department alleged a threat of present danger to the children because L.C. “has not, or will not provide sufficient supervision to protect [the children] from potentially serious harm.” A Department case worker, Deliska Tillman, telephoned a juvenile court judge and obtained an oral instanter order at 11:09 p.m., placing the children in the temporary custody of the Department. The Department filed the verified complaint the next day, February 1, 2013, setting forth the above information. The juvenile court signed an order that confirmed the instanter order and placed the children in the temporary custody of the Department pursuant to Louisiana Children’s Code article 619. The court set a continued custody hearing on February 4, 2013, and ordered that a report of the investigation be furnished to the Office of the East Baton Rouge Parish District Attorney.

The record on appeal does not contain a transcript of the continued custody hearing, but a minute entry reflects that the hearing was attended by the mother and both children, along with their appointed counsel, and an assistant district attorney on behalf of the State. After considering the evidence and best interest of the children, the juvenile court signed a “Custody Order” that placed the children “in the care, custody and control of their maternal grandmother . . . until further order of this Court.”

On March 12, 2013, the district attorney filed a petition in the proceeding on behalf of the State, seeking to have the children adjudicated to be in need of care pursuant to Louisiana Children’s Code article 631. The matter proceeded to an adjudication hearing, although L.C. did not appear at the hearing.<sup>2</sup> At the outset of

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<sup>2</sup> An investigator from the district attorney’s office testified that he personally served a subpoena on L.C., so the court allowed the hearing to proceed in her absence pursuant to Article 642.

the hearing, counsel for the State informed the court that it was asking that the children be declared "in need of care," but the State was not requesting a change in the current custody with the grandmother. According to counsel, "[T]he Agency has informed us that is a safe and healthy place for the children. So at this time we will not be asking for a change of that custody."

The State then presented testimony from two witnesses, an undercover law enforcement agent involved in the arrest of L.C., and Deliska Tillman, the Department case worker who investigated the report of neglect. The undercover agent confirmed his participation in an internet prostitution investigation that used the internet to locate prostitutes. Once located, the suspects were contacted by telephone to discuss a price and a time to meet in a hotel room. The agent testified about his interaction with L.C. on the night of the arrest and their conversation in the hotel room. After entering the room, L.C. agreed to have sex for a specific price and began to disrobe. Other officers then entered the room and arrested her. L.C.'s boyfriend was taken into custody when he was spotted in the hallway looking through the keyhole of the door after L.C. entered the room. He was arrested on an outstanding bench warrant, purportedly for aggravated rape.

Agents outside the building approached the car and discovered the two minor children about 15 to 20 minutes after L.C. entered the hotel room. The parking lot was large, and the weather was cold that night. The agents removed the children from the car and transported them to police headquarters.

The second witness, Tillman, was part of a task force that worked with the prostitution sting. When she received the report of abuse or neglect, Tillman and another case worker went to police headquarters to interview the children and L.C. The children thought their mother was going to see a friend at the hotel. During the interview, the children were crying and did not understand what was happening. The children did not seem to be in fear of their mother and did not

make any mention of physical or verbal abuse. Tillman also interviewed L.C. and described her as remorseful. L.C. said she had been prostituting for about two months because she was out of work. She brought the children with her because her roommate was not home and "she had to do what she had to do." Her boyfriend came as a lookout and was supposed to accompany her to the hotel room to make sure everything was safe and then go back downstairs to watch the children until she was finished.

After Tillman contacted the court and obtained the instant order, she communicated with the children's maternal grandmother by telephone later that night. The grandmother informed Tillman that F.C. and S.C. lived with her, but they "would go back and forth every now and then" with their mother. After a couple of months of living with L.C., the children would return to the grandmother's house. F.C. and S.C. said they had been living with their mother for a couple of months at the time of her arrest. Another case worker went to the grandmother's home to do a walk-through and placed the children with her that night. The Department has not had any further involvement with the children since the continued custody hearing on February 4, 2013, when the juvenile court placed them in the custody of their grandmother.

After taking the matter under advisement, the juvenile court found that the State provided insufficient evidence to show that F.C. and S.C. are in "present need of care." In written reasons, the court explained that the evidence did not establish that the children were in need of care under Article 606 because "there was no conduct by the mother against the children, nor were the children without food, clothing, supervision or shelter because of a prolonged absence of the mother." According to the court, "The State provided no expert to testify as to how children sitting in a car in a hotel parking lot would mentally damage these children." The court also found no evidence of potential harm. The court concluded that the

“State failed to show by clear and convincing evidence that F.C. and S.C. . . . are ‘children in need of care.’” By an amended judgment, the juvenile court dismissed the State’s petition for adjudication.

On appeal, the State asserts that the juvenile court erred in applying a clear and convincing burden of proof instead of a preponderance, and in considering the custody arrangement of the children as relevant to the State’s burden of proof. The State also contends that the juvenile court erred in ruling that bringing the children to a place of prostitution does not constitute grounds for finding the children are in need of care pursuant to Louisiana Children’s Code article 606A(1) and (5). In its final assignment of error, the State submits that the trial court erred in maintaining the custody order issued at the continued custody hearing despite the court’s dismissal of the State’s petition.

## LAW AND ANALYSIS

### A. Burden of Proof

The burden of proof placed on the State in a child in need of care proceeding is set forth in Louisiana Children’s Code article 665, which provides, “The state shall have the burden to prove the allegations of the petition by a preponderance of evidence.” In *State ex rel. L.B.*, 08-1539 (La. 7/17/08), 986 So. 2d 62, the supreme court recognized this burden of proof and added, “It is not the [State’s] duty to prove its case beyond a reasonable doubt, by clear and convincing evidence, or to disprove every hypothesis of innocence.” *State ex rel. L.B.*, 986 So. 2d at 64.

The juvenile court’s written reasons reflect that the court imposed the more demanding “clear and convincing” burden of proof on the State in this matter. In rejecting the State’s contention that the children were placed in a position of potential harm, the court reasoned that the State did not show a likelihood of such harm by “clear and convincing evidence.” In its written reasons, the court again stated, “Clear and convincing evidence is the standard set forth for adjudications[,]”

and the Court finds that the State failed to show by clear and convincing evidence that F.C. and S.C. . . . are ‘children in need of care.’” Article 665 requires the State to prove the allegations of its petition by only a preponderance of the evidence, so the juvenile court erred by placing the more stringent “clear and convincing” burden of proof on the State. *See* La. Ch. Code art. 665; *State ex rel. L.B.*, 986 So. 2d at 64.<sup>3</sup>

This error affects the standard of review on appeal. Typically, an appellate court cannot set aside a juvenile court’s findings of fact in the absence of manifest error or unless those findings are clearly wrong. *See In re A.J.F.*, 00-0948 (La. 6/30/00), 764 So.2d 47, 61; *State ex rel. D.H.*, 04-2105 (La. App. 1 Cir. 2/11/05), 906 So. 2d 554, 559-60. However, where one or more trial court legal errors interdict the fact-finding process, the manifest error standard is no longer applicable, and, if the record is otherwise complete, the reviewing court should make its own independent *de novo* review and assessment of the record. *Campo v. Correa*, 01-2707 (La. 6/21/02), 828 So. 2d 502, 510; *State ex rel. D.H.*, 906 So. 2d at 563, n. 9. More specifically, when a lower court utilized an improper burden of proof, such an error may have interdicted the fact-finding process and calls for a *de novo* review of the evidence. *Campo*, 828 So. 2d at 510; *see also Hebert v. Terrebonne Parish School Board*, 03-1444 (La. App. 1 Cir. 5/14/04), 879 So. 2d 222, 229. Accordingly, we will conduct a *de novo* review of the evidence presented in this matter.

#### **B. Relevance of Current Custody**

We first consider the State’s contention that evidence of the children’s custody arrangement at the time of the adjudication hearing is not relevant for determining whether the children were in need of care when the proceeding was

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<sup>3</sup> The State is not seeking to terminate the mother’s parental rights under Title X of the Children’s Code, which requires a “clear and convincing” burden of proof. *See* La. Ch. Code art. 1035.

commenced. Pursuant to the order issued at the continued custody hearing, the children were placed in the custody of their grandmother. At the beginning of the adjudication hearing, counsel for the State confirmed that she had been informed by the Department that the grandmother's home was a safe and healthy place for the children, so the State did not seek a change in the children's custody. When counsel for the mother pursued a line of questioning about the grandmother, the State objected to its relevancy, but the trial court overruled the objection.

The initial instant order that removed the children from L.C.'s custody and the subsequent continued custody order placing them in the custody of their grandmother are measures authorized by the Children's Code to ensure that a child is in a healthy and safe environment pending an adjudication hearing to determine whether the child is in need of care.<sup>4</sup> This provisional change in custody for the protection of the child does not eliminate the need for judicial review of the facts and circumstances that gave rise to the proceeding. Otherwise, if the focus of the adjudication hearing shifted to the care provided to the child after the State's intervention resulted in a provisional change in custody, a finding that the child is in need of care would rarely be appropriate if the change in custody achieved its purpose of placing the child in a safe and healthy environment. Thus, under the approach proposed by L.C., a provisional change in custody would often preclude a finding that the child is in need of care. We find that such a result is contrary to

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<sup>4</sup> See La. Ch. Code art. 619C(2) (upon presentation of verified complaint and finding that the child's welfare cannot be safeguarded without removal, the court shall immediately issue a written instant order directing that the child be placed in the "provisional custody of a suitable relative or other individual capable of protecting the health and safety of the child, or taken into the custody of the state"); La. Ch. Code art. 626A (at continued custody hearing, the court may authorize continued custody of a child "prior to adjudication if there are reasonable grounds to believe the child is in need of care and that continued custody is necessary for his safety and protection"); La. Ch. Code art. 627 (following continued custody hearing, the court may return the child to the parents or, in accordance with Article 622, place the child in the custody of a suitable relative, other suitable individual, or the Department); La. Ch. Code art. 622.B (a suitable relative or other individual may obtain an ex parte order of provisional custody of the child if the person is willing and able to provide a "wholesome and stable environment . . . pending an adjudication hearing").



the purpose of the statute and the statutory scheme for protecting children in need of care.

According to Louisiana Children's Code article 632C, if a petition requesting that the child be adjudicated in need of care is not timely filed following the continued custody hearing, the child "shall be returned to the parent." Therefore, if the State fails to file a petition to adjudicate the child to be in need of care, the custody of the child will revert back to the parent, effectively terminating the continued custody order. At the adjudication hearing, if the court finds the evidence does not warrant an adjudication that either the child is in need of care or the family is in need of services, "it shall dismiss the petition." La. Ch. Code art. 666C.<sup>5</sup> As these articles suggest, the legal authority of a continued custody order is largely dependent upon the State successfully pursuing an adjudication that the child is in need of care.

We find that the children's custody arrangements established after intervention by the State are not relevant for determining whether the children were in need of care when the State intervened and effected the change in custody. The entry of a continued custody order placing the children in the custody of their grandmother does not alter the court's inquiry under Article 606 at the adjudication hearing. The relevant care under review remains the care that prompted the State's intervention, not the care received following the State's intervention. Evidence of the conditions of the children's custody after entry of the continued custody order placing them in the custody of their grandmother is not relevant for determining

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<sup>5</sup> The reference to a finding that the family is in need of services is governed by Title VII of the Children's Code, enacted for the purpose of defining self-destructive behaviors by a child and conduct by other family members that contribute to the child's harm and which warrant court intervention. *See* La. Ch. Code art. 726.

whether the children were in need of care at the time they were taken into custody by the State on the night of L.C.'s arrest.<sup>6</sup>

**C. Finding that Children are Not in Need of Care**

The State contends that the juvenile court erred in finding that F.C. and S.C. were not in need of care as contemplated by Article 606 as a result of their mother bringing them to a hotel where she intended to engage in, and was arrested for, prostitution. The court found that the children were not in need of care because the State “provided no expert to testify as to how children sitting in a car in a hotel parking lot would mentally damage these children.” The court also rejected any claim of potential harm due to a lack of evidence.

Our *de novo* review of the evidence confirms that the State proved that L.C. and her boyfriend took the children with them to a hotel where L.C. intended to engage in an act of prostitution. After parking at the hotel, L.C. and her boyfriend went inside the hotel, leaving F.C. and S.C. unattended in the vehicle in the parking lot. Shortly thereafter, L.C. and her boyfriend were arrested and taken into custody. Law enforcement officers then removed the children from the vehicle and brought them to police headquarters.

The purpose of Title VI of the Children’s Code, applicable to child in need of care proceedings, is “to protect children whose physical or mental health and welfare is substantially at risk of harm by physical abuse, neglect, or exploitation and who may be further threatened by the conduct of others . . . .” La. Ch. C. art. 601; *State ex rel. L.B.*, 08-1539 (La. 7/17/08), 986 So. 2d 62, 64. Furthermore, the health, safety, and best interest of the child shall be the paramount concern in all proceedings under Title VI. La. Ch. C. art. 601; *State ex rel. L.B.*, 986 So. 2d at 64.

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<sup>6</sup> We do not suggest that evidence of the provisional custody is not relevant for determining whether such custody should be continued or modified during the proceeding. In the present case, no party sought a change in the provisional custody awarded to the children’s grandmother.

A child who is the victim of neglect is in need of care. La. Ch. Code art. 606.A(2). "Neglect" is defined as "the refusal or unreasonable failure of a parent or caretaker to supply the child with necessary food, clothing, shelter, *care*, treatment, or counseling for any injury, illness, or condition of the child, as a result of which the child's physical, mental, or emotional health and *safety is substantially threatened or impaired.*" La. Ch. Code art. 603(18) (emphasis added). The Legislature defined a "neglected" child in broad terms precisely because foreseeing all the possible factual situations that may arise is impossible. *State ex rel. J.A.*, 99-2905 (La. 1/12/00), 752 So. 2d 806, 813.

Under this broad definition and based upon our *de novo* review of the evidence, we find that L.C.'s actions constituted neglect. By bringing her children with her on a criminal, prostitution venture and leaving them unattended in the vehicle in a parking lot, L.C. failed to provide F.C. and S.C. with necessary care that resulted in a substantial threat or impairment to their physical, mental, or emotional health and safety. A substantial threat to the children's safety was inherent when they accompanied their mother on a trip undertaken for the purpose of committing the crime of prostitution. Even if F.C. and S.C. were unaware of the purpose of the trip, such criminal endeavors can turn violent or, as evidenced by the present case, result in the arrest and incarceration of the parent. F.C. and S.C. were sitting in a vehicle in an unfamiliar place without any parental supervision when law enforcement officers were forced to take them into custody because their mother was being arrested for prostitution inside the hotel. As confirmed by the Department case worker, the children were crying, scared, and did not understand what was happening when they were interviewed at police headquarters. The definition of "neglect" at Article 603(18) does not require actual harm; rather, a "substantial threat" to the children's physical, mental, or emotional health and safety is sufficient. Under the circumstances of this case, L.C.'s actions of

knowingly placing her children in a precarious environment created by her attempt to perpetrate a crime presented such a threat. We find this to be true whether L.C. exposed the children to the prostitution itself, or the consequences of the prostitution, that is, her incarceration. Accordingly, we find F.C. and S.C. to be in need of care pursuant to Article 606.A(2).<sup>7</sup>

### **CONCLUSION**

We reverse the judgment of the trial court and render judgment adjudicating F.C. and S.C. to be children in need of care. This matter is remanded for further proceedings. All costs of the appeal are assessed to L.C.<sup>8</sup>

**REVERSED, RENDERED, AND REMANDED.**

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<sup>7</sup> Given this finding, we pretermitt any review of the State's contention that the children are in need of care because they are victims of "abuse" as defined in Article 603(2).

<sup>8</sup> Our reversal of the juvenile court's judgment that dismissed the petition, together with our remand for further proceedings, moots the State's final assignment of error that the juvenile court erred in maintaining the custody order after dismissing the State's petition.