NOT DESIGNATED FOR PUBLICATION

Nos. 126,511
126,512
126,513

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interests of C.G., K.G., and J.G.,
Minor Children.

MEMORANDUM OPINION

Appeal from Butler District Court; JOE E. LEE, magistrate judge. Submitted without oral argument. Opinion filed December 22, 2023. Affirmed in part and dismissed in part.

M. Blake Cooper, of Cooper Law Offices, LLC, of Andover, for appellant natural mother.

Chris J. Pate, of Pate & Paugh, LLC, of Wichita, for appellant natural father.

Cheryl M. Pierce, assistant county attorney, for appellee.

Before ARNOLD-BURGER, C.J., COBLE and PICKERING, JJ.

COBLE, J.: Mother and Father of three children—C.G., K.G., and J.G.—appeal the district court's finding that all three children were children in need of care (CINC) under K.S.A. 38-2202. But the oldest child aged out of the State's custody during the pendency of this case, rendering the case related to C.G. moot. And a thorough review of the record in the light most favorable to the State—a standard to which we are strictly held—shows the district court did not err, and we affirm its decision that K.G. and J.G. were children in need of care.

FACTUAL AND PROCEDURAL BACKGROUND

On September 26, 2022, 17-year-old C.G. reported to high school with bruising on her face and under her arms. C.G. advised that she and Father do not have a good relationship and when she became defiant, he ordered her to stand against the wall with arms outstretched as punishment. When she refused, he tried to force her to do wall sits. When she tried instead to sit down, he grabbed her under her arms to force her to stand up. When she would stand, Father would kick her legs out from under her (or pull her knees toward him)—apparently to try to force her to do a wall sit. C.G. reported that this repetitive cycle of Father picking her up, trying to force the wall sit, and Father pulling her legs from under her—occurred at least twice or more, though Father contends it happened once. C.G. was left with bruising under her arms. At this point, C.G. started swinging at Father. A physical fight took place, with each later claiming self-defense.

C.G. and Father agreed that after the wall sit exercise failed, Father was trying to stop C.G. from hitting him. Father grabbed her shirt to restrain her, and in the process spun her around and C.G struck her face on the door frame, resulting in bruising to her face. They kept wrestling until they fell onto the couch. Although there are a few different explanations for why Father was attempting to discipline C.G., no one disputes this general explanation of what happened.

Once the altercation regarding wall sits began, Mother directed K.G. and J.G., C.G.'s younger siblings, to leave the room. Mother did not try to stop the fight. She simply advised C.G. that she should pick her battles with Father. After Father pushed her face down into the couch, C.G. was able to break free and run out of the house. Father and Mother both went after her and Father physically restrained her, got her back into the house, and started going around with a screwdriver saying he planned to screw all the windows shut to keep her from running away.

C.G. stated Father had never forced her to do wall sits before. She said she had done them before in gym class, for exercise not punishment. She also testified that except for this incident, Father had never been physically abusive to her, but she considered him mentally abusive. She described his mental abuse toward her and her siblings as putting people down, often yelling at them until each child was crying, and many times yelling at them about failing to complete chores or for C.G. staying in the bathroom too long. Mother and Father both revealed that C.G. was often defiant, a fact C.G. did not refute. At one point before this incident, after Father barged into the bathroom after she had been in there too long, C.G. had pulled a knife on him, noting she felt attacked and like she could not control anything around her.

Immediately following C.G.'s report, all three children were placed in police protective custody. The State petitioned to adjudicate C.G., and her two siblings, K.G., and J.G., as children in need of care. The State asserted the children were: (1) without adequate parental care, control, or subsistence and it was not due solely to the lack of financial means of the parents under K.S.A. 38-2202(d)(1); (2) without the care or control necessary for the children's physical, mental, or emotional health under K.S.A. 38-2202(d)(2); and (3) physically, mentally, or emotionally abused or neglected or sexually abused under K.S.A. 38-2202(d)(3).

At the temporary custody hearing, the district court placed all three children in the temporary custody of the Kansas Department for Children and Families (DCF). C.G. was to remain out of the home and was sent to a foster care placement. Because C.G.'s two younger siblings, K.G. and J.G., initially reported no abuse towards them, they were allowed to stay in the home with Mother and Father. TFI Family Services (TFI) and DCF were given discretion as to removal of the younger children, the district court ordered no physical discipline, and all parties were to follow the case plan.

Three weeks later, K.G. arrived at middle school with bruising on her face. She revealed that Father had caused the bruising. She said they were in Walmart and when she made an inappropriate joke, Father slapped her across the face. He had a ring on his hand which made it more painful. K.G. indicated that the hit felt like her "soul left her body." Father denied such an incident happened and the police detective asked Walmart to pull the video feed of the area, but for some reason the video had a blindspot in the area this allegedly occurred. K.G. and J.G. were then removed from the home and initially placed with paternal grandparents, although during the pendency of the case, the two younger children were separated due to K.G.'s threats to harm J.G. Each of the younger children were moved to multiple kinship or foster placements.

After multiple continuances, the district court held a bifurcated adjudication hearing on February 23 and February 28, 2023 to determine whether the children were CINC. As of the hearing dates, reports to the court from TFI specifically noted the parents refused to provide TFI with documentation to confirm participation in mental health services, failed to maintain consistent contact with their case team, and refused to permit TFI to complete a walkthrough of their home. The parents had also completed no assigned case plan tasks, although Mother and Father had completed one family therapy session with K.G. and J.G. and had later sessions scheduled. Father informed the TFI worker he would only provide information about his mental health services if TFI would disclose the name and location of C.G.'s individual therapist as well as how often she engaged in therapy. C.G. requested no contact with her parents, and at the time of the adjudication hearing she had not had any contact with her parents since being taken into DCF custody. K.G. and J.G. participated in at least four video or in-person visits with their parents, but displayed extreme behaviors after parental visits, including making death threats against their grandparents after the most recent video visit.

District court's findings

At the end of the bifurcated hearing, the district court noted Father seemed to be very controlling of his family, and his demeanor during the hearing suggested he did not care about anybody's opinion except his own. The district court commented Father was more concerned about controlling his family than doing what was in the children's best interests, and the parents tended to blame others for the family's problems. Although the district court did not necessarily find the wall sits in light of C.G.'s defiance were abusive, it found Father's sweeping her legs from under her and causing her to repeatedly fall was "way out of line." Ultimately, the court found by clear and convincing evidence the children were without adequate parental care. The district court noted that Mother makes excuses for Father, and the parents' pattern of behavior resulted in the children's physical and emotional abuse. Although the younger children were initially returned to the home, the district court noted that had to be discontinued when Father struck K.G., and the younger children were also siblings of a child who had been removed from the home.

The district court issued a journal entry and order of adjudication noting clear and convincing evidence the children were: (1) without adequate parental care, control, or subsistence and the condition was not due solely to the lack of financial means of the children's parents or other custodians under K.S.A. 38-2202(d)(1); (2) without the care or control necessary for the children's physical, mental, or emotional health under K.S.A. 38-2202(d)(2); and (3) physically, mentally, or emotionally abused or neglected, or sexually abused under K.S.A. 38-2202(d)(3). Although during the hearing, the district court announced that K.G. and J.G. were siblings of a child removed from care, this box was not checked in the court's journal entry. See K.S.A. 38-2202(d)(11). The district court found the children to be children in need of care and approved and adopted the State's proposed permanency plan. The court ordered the children to remain in DCF custody.

Mother and Father each timely appealed the district court's adjudication of the children as CINC based on the February 23, 2022, and February 28, 2022 bifurcated hearing.

DISCUSSION

Father argues the district court erred in finding the children should be adjudicated as CINC. With respect to C.G., Father argues the incident was a matter of parental discipline and not one of child abuse. As to K.G., Father argues a rational fact-finder could not have determined abuse occurred. Father presents no specific arguments related to J.G. Mother, who filed a separate brief on appeal, also argues the district court erred in finding the children were CINC. Mother's brief is nearly identical to that of Father's and likewise omits any argument regarding J.G., although she does note that J.G. made no allegations of abuse.

Claims Regarding C.G. are Moot

First, we must address how the pendency of this case has affected any claims related to C.G. A child in need of care is statutorily defined as "a person less than 18 years of age at the time of filing of the petition or issuance of an ex parte protective custody order," who meets certain qualifications. K.S.A. 38-2202(d). Although C.G. was less than 18 years old when the petition was filed, C.G. has since turned 18 years old and graduated high school. C.G. wrote the district court a letter in June 2023 asking to be released from custody and TFI recommended the same. The TFI report from August 2023 noted that C.G. would be released from custody at that time.

The State notes in its brief that the "case involving C.G. has been terminated" because she reached the age of 18 years. So, the parents' appeal as to whether the district court erred in finding C.G. a CINC is now moot. See *In re A.E.S.*, 48 Kan. App. 2d 761,

764, 298 P.3d 386 (2013) ("A case is moot when a justiciable controversy no longer exists. 'A justiciable controversy has definite and concrete issues between the parties and "'adverse legal interests that are immediate, real, and amenable to conclusive relief.'"' [Citations omitted.]"). Accordingly, we must dismiss the parents' claims as they relate to C.G.

Clear and Convincing Evidence Showed K.G. and J.G. were Children in Need of Care

As for the younger children, K.G. and J.G., the district court's journal entry reflects it found the children in need of care under the three statutory bases pleaded in the petitions. K.S.A. 38-2202(d)(1)-(3). Although the district court announced at the conclusion of the adjudication hearing that K.G. and J.G. were also in need of care because they had been residing in the same home with a sibling who had been abused; the court did not cite the related statutory basis for this finding, nor was this statutory basis cited in the State's Petition. See K.S.A. 38-2202(d)(11). Although all parties reference this sua sponte finding in their briefing without any related argument, we find any reference to this particular basis for the children in need of care adjunction unnecessary, as the findings under K.S.A. 38-2202(d)(1)-(3) are sufficient to support the district court's conclusions.

Legal Principles Applicable to Children in Need of Care

To adjudicate a child under 18 years old as a CINC, the district court must find clear and convincing evidence that the child is a child in need of care. K.S.A. 38-2250; K.S.A. 38-2202(d). Clear and convincing evidence is evidence that shows the truth of the facts asserted is highly probable. *In re B.D.-Y.*, 286 Kan. 686, 695-96, 187 P.3d 594 (2008). A single statutory ground, if proved, is legally sufficient to support a CINC determination. See *In re F.C.*, 313 Kan. 31, 44, 482 P.3d 1137 (2021) (affirming CINC

adjudication where evidence clearly supported one of two statutory grounds on which district court relied).

On the appeal of a district court's CINC determination, the appellate court reviews the district court's adjudication by determining whether, after reviewing the evidence in the light most favorable to the State, a rational fact-finder could have found it highly probable, by clear and convincing evidence, that the child was a CINC. The appellate court does not reweigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact. *In re B.D.-Y.*, 286 Kan. at 705. In other words, we must resolve any evidentiary conflicts in the State's favor and against the parents, and we must give deference to the trial court's factual findings. Such "deference extends not only to just what the witnesses said, but also goes to the trial court's findings concerning credibility and demeanor of those witnesses." *In re F.C.*, 313 Kan. at 41.

The Evidence Presented Supports the District Court's Findings

After hearing two days of witness testimony, the district court announced that it found clear and convincing evidence that the children were "without . . . adequate parental care." See K.S.A. 38-2202(d)(1) ("without adequate parental care") and K.S.A. 38-2202(d)(2) ("without the care or control necessary for the child's physical, mental or emotional health"). During its oral ruling, the court outlined a "pattern of behavior" by Father—specifically, that Father had a need to control his family which resulted in harm. The court described Father's demeanor during the two days of hearing and how it "impress[ed] [the court] that [Father] doesn't really care about anybody else's opinion but his own." During the investigation, Father did not want Mother to talk to law enforcement without him being present. And testimony demonstrated Father belittled and controlled the children, if not the entire family.

Other evidence in the record supports the district court's conclusion. A TFI report conducted a few weeks before the adjudication hearing notes Father told TFI he would only provide information regarding the parents' mental health services if the agency would reveal the identity, location, and frequency of C.G.'s therapist. At the adjudication hearing, a DCF worker testified that K.G. disclosed Father hated Mother's sister, Aunt Tabbitha, because Father thought she was "'trying to help [Mother] get away.'" C.G. testified Father often yelled at each child until each of them were crying. Father admitted asking every family member for a "progress report" each day on what each of them had accomplished, including Mother. While each incident seems innocuous enough in isolation, the combination supports the district court's finding of a "pattern of behavior" in the home that resulted in the children being without adequate parental care under K.S.A. 38-2202(d)(1) or without the care necessary for the children's emotional health under K.S.A. 38-2202(d)(2).

The district court's third basis for the children in need of care adjudication was physical or emotional abuse or neglect under K.S.A. 38-2202(d)(3). First, though, to find the children had been abused or neglected, we must define the terms under the Revised Kansas Code for Care of Children, K.S.A. 38-2201 et seq. Physical, mental, or emotional abuse is the infliction of physical, mental, or emotional harm, and may include, but is not limited to, maltreatment or exploiting a child to the extent that the child's health or emotional well-being is endangered. K.S.A. 38-2202(y). Harm is defined as physical or psychological injury or damage. K.S.A. 38-2202(l). In this context, neglect means acts or omissions by a parent, resulting in harm to a child, or presenting a likelihood of harm and the acts or omissions are not due solely to the lack of financial means of the child's parents. Neglect may include but is not limited to a failure to provide adequate supervision of a child or to remove a child from a situation that requires judgment or actions beyond the child's level of maturity, physical condition or mental abilities and that results in bodily injury or a likelihood of harm to the child. K.S.A. 38-2202(t)(2).

The primary instance of physical abuse described by the district court was Father's repeated sweeping of C.G.'s legs from under her during their well-documented altercation. The facts of the altercation that resulted in visible bruising to C.G.'s face and underarms were not denied by the parents; it was the nature of the altercation that was disputed. Father describes the incident as a combination of discipline and self-defense Father told C.G. to do wall sits, which alone could constitute parental discipline—a fact the district court conceded. But a rational fact-finder could also find that repeatedly causing your child to fall to the ground, swinging her such that her face strikes a door frame, and restraining her on the couch until she struggles to breathe exceeds discipline and causes not only physical but likely emotional harm. And here is where our appellate review is necessarily constrained. The district court personally observed the testimony of both Father and C.G., in conjunction with other witnesses, and apparently made a credibility determination, given that it found the incident rose to the level of physical abuse. We must give deference to this credibility determination and view the evidence presented to the district court in the light most favorable to the State.

As for the physical abuse of K.G., the parents argue that insufficient evidence supported the district court's finding that Father's struck K.G., in part because Father denied it happened. And the only witness testimony at the adjudication hearing was from the law enforcement officer who observed K.G.'s interview at the child advocacy center and saw her facial bruise. But the officer testified he personally saw the visible bruising on K.G.'s face, and he testified to K.G.'s statement that Father struck her so hard it felt like "'her soul left her body.'" Given the competing evidence presented at the hearing about the incident with K.G., Mother and Father are essentially asking this court to reweigh the evidence, something this court does not do. See *In re B.D.-Y.*, 286 Kan. at 705. Again, because the district court found K.G. had been struck, it made a credibility determination to which we must defer.

Mother briefly argues that no allegations of abuse were raised specifically against her. We do not find her argument compelling. While true that no allegations of physical abuse were raised, evidence supports that rather than step in during the altercation between Father and C.G., Mother only told C.G. to pick her battles with Father and told the younger children to leave the room. Mother also tried to explain away Father's behavior as him being "misunderstood." While there are no claims that Mother physically harmed the children, the evidence did speak to Mother's failures to act in her children's defense, or her complicity in the pattern of behavior in the home, that increased the likelihood of the children's physical or emotional harm.

Speaking of omissions resulting in harm, although occurring after the children were taken into DCF custody, the parents failed to cooperate with the agency in a manner that could have resulted in a quicker resolution of the proceedings. At the time of the adjudication hearing, TFI reported the parents would not allow the agency access to their home without a warrant and refused to provide information regarding their mental health services. The parents also failed to maintain consistent contact with the case team or complete any of the assigned case plan tasks.

Both parents generally fail to brief any issues related to the youngest child, J.G. Both focus primarily on C.G., provide brief arguments related to K.G. addressed above, and fail to present argument related to J.G.'s adjudication as a child in need of care. Any argument regarding J.G. is, at best, incidentally raised but not argued; therefore, the parents have waived and abandoned such claims on appeal. See *State v. Arnett*, 307 Kan. 648, 650, 413 P.3d 787 (2018); *Russell v. May*, 306 Kan. 1058, 1089, 400 P.3d 647 (2017). But even had the parents sufficiently briefed the issue, the district court clearly found a pattern of behavior by the parents that affected the entire family. All TFI reports in the district court record specifically discuss each of the three children. And, as previously discussed, testimony revealed Father's verbal abuse and controlling behavior toward all three children, with Mother not interceding in the behavior. Although there

were no allegations of physical abuse directed at J.G., the clear and convincing evidence presented at hearing was sufficient to find J.G. was part of a family where physical abuse of at least one child had occurred and where the pattern of control by Father was allowed to continue.

CONCLUSION

For the above reasons, we dismiss as moot the parents' claim the district court erred in finding C.G. a child in need of care. And, reviewing the evidence in the light most favorable to the State, and providing deference to the district court's credibility determinations, we affirm the district court's findings related to K.G. and J.G. A rational fact-finder could have found it highly probable by clear and convincing evidence K.G. and J.G. were children in need of care.

Affirmed in part and dismissed in part.

* * *

ARNOLD-BURGER, C.J., dissenting: I respectfully dissent. I would reverse the district court's finding adjudicating K.G. and J.G. to be children in need of care. I reach this conclusion by starting with the burden and standard of proof in a case in which the parents' fundamental liberty interest in the care and custody of their children is at stake.

> "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

In recognition of these rights, state law requires that to adjudicate a child under 18 years old as a child in need of care, the State must prove, and the district court must find clear and convincing evidence to support such finding. K.S.A. 38-2202(d); K.S.A. 38-2250. Clear and convincing evidence is evidence that shows the truth of the facts asserted is highly probable. *In re B.D.-Y.*, 286 Kan. 686, Syl. ¶ 3, 187 P.3d 594 (2008). Clear and convincing evidence is an intermediate standard of proof between a preponderance of the evidence and beyond a reasonable doubt. 286 Kan. 686, Syl. ¶ 2. Preponderance of the evidence is evidence which shows that the truth of the facts asserted is more probable than not. 286 Kan. 686, Syl. ¶ 1.

In reviewing a district court's decision, we must determine whether, after review of all the evidence, viewed in the light most favorable to the State, we are convinced that a rational factfinder could have found by clear and convincing evidence, that the child was a child in need of care. 286 Kan. at 705. Under the facts presented by the State to support its contention that K.G. and J.G. are children in need of care, I am not convinced.

FACTUAL AND PROCEDURAL BACKGROUND

I will add just a few relevant facts to the thorough factual statement set out by the majority.

It is important to the analysis here to note that although K.G. and J.G. were initially taken into protective custody to be questioned about the incident involving C.G., they reported no personal abuse, neither mental nor physical. Accordingly, they were allowed to stay in the home with Mother and Father with no apparent concern for any current abuse, nor any concern for them being in a household where abuse had occurred. If they had such a concern, they surely would have removed them at the time. J.G. reported Father yells at C.G. the most and does not yell at K.G. And according to J.G., C.G. makes things worse by talking back to her parents. J.G. has asserted throughout the

case that Father has never physically hurt him or called him any names. There has never been any allegation that K.G. or J.G. witnessed Father's sole physical confrontation with C.G. or were even aware of what happened-except that J.G. reported C.G. was required to do "military stuff" with no explanation of what that was or exactly what J.G. observed.

The Department of Children and Families (DCF) worker assigned to the case revealed during the adjudication hearing that her office had issued its report of the incident with C.G. and found it to be unsubstantiated for abuse. She shared that both parties admitted to verbal and physical aggression toward the other. The other children did not witness it and Mother acknowledged it happened, but denied it was abuse. Although there was bruising, it did not rise to the level of severe injury. The case worker testified that there was not a preponderance of evidence to conclude the altercation constituted abuse. In fact, the DCF legal team reviewed the allegations of abuse and also found them to be unsubstantiated.

K.G. and J.G. were not removed from the home until K.G.'s report of being slapped at Walmart by Father for telling an inappropriate joke. Father denies the incident ever occurred, and video footage from Walmart did not confirm or deny K.G.'s allegations as they could not be located on the surveillance footage. The DCF case worker assigned to the case revealed during the adjudication hearing that her office issued a report finding the incident with K.G. as unsubstantiated for abuse. They found that there was not a preponderance of evidence to support a finding of physical abuse.

Yet throughout this case, including in its petition, the State asserted the children were: (1) without adequate parental care, control, or subsistence and it was not due solely to the lack of financial means of the parents under K.S.A. 38-2202(d)(1); (2) without the care or control necessary for the children's physical, mental, or emotional health under K.S.A. 38-2202(d)(2); and (3) physically, mentally, or emotionally abused or neglected or sexually abused under K.S.A. 38-2202(d)(3).

At the end of the hearing, the district court noted Father seemed to be very controlling of his family and his demeanor during the hearing suggested he did not care about anybody's opinion but his own. The district court commented Father was more concerned about controlling his family than doing what was in the children's best interests and the parents tended to blame others for the family's problems. Ultimately, the court found by clear and convincing evidence the children were without adequate parental care. The court noted that Mother makes excuses for Father, and the parents' pattern of behavior resulted in the children's physical and emotional abuse.

As for the younger children, K.G. and J.G., the district court's journal entry reflects it found the children in need of care under K.S.A. 38-2202(d)(1) lack of adequate parental care or control; (d)(2) lack of care for physical, mental, or emotional health; and (d)(3) physical, mental, or emotional abuse. The district court also announced at the end of the adjudication hearing that K.G. and J.G. were in need of care because they had been residing in the same home with a sibling who had been abused, yet it did not cite the related statutory basis for this finding, K.S.A. 38-2202(d)(11). Nor was this statutory basis cited in the State's Petition. "In a civil action, a district court's journal entry of judgment controls over a prior oral pronouncement from the bench." *Steed v. McPherson Area Solid Waste Utility*, 43 Kan. App. 2d 75, 87, 221 P.3d 1157 (2010). Yet the parties have not lodged any objection to us considering K.S.A. 38-2202(d)(11) in our analysis.

ANALYSIS

The only facts on which the State and the district court relied to find K.G. and J.G. children in need of care involved two incidents, the C.G. incident and the K.G. incident. After the C.G. incident, the State returned K.G. and J.G. to their parents. So at least at that point they had no reason to believe that K.G. and J.G. were being abused—physically, mentally, or emotionally—or living in an abusive home. The State apparently had no other factual basis to support a finding under K.S.A. 38-2202 as to K.G. and J.G.

So we must look at the second incident, the K.G. incident—the incident for which they were removed from the home. Viewing the evidence in the light most favorable to the State, the question becomes whether one act of parental discipline that leaves a facial bruise is enough to declare a child a child in need of care. Kansas has long recognized the right of a parent to inflict some physical discipline on their own child.

> "'Long before the advent of contemporary child abuse legislation, it was a well-recognized precept of Anglo-American jurisprudence that the parent of a minor child or one standing in *loco parentis* was justified in using a reasonable amount of force upon a child for the purpose of safeguarding or promoting the child's welfare. [Citations omitted.]'" *State v. Wade*, 45 Kan. App. 2d 128, 136, 245 P.3d 1083 (2010).

In fact, there is a Pattern Instructions for Kansas that can be used in prosecution for battery or aggravated battery. The jury is advised, "It is a defense to the charge of (battery) (aggravated battery) if a parent's use of physical force upon a child was reasonable and appropriate, and with the purpose of safeguarding the child's welfare or maintaining discipline." PIK Crim. 4th 54.311 (2019 Supp.).

As our Supreme Court stated in *Paida v. Leach*, 260 Kan. 292, 301, 917 P.2d 1342 (1996):

> "[I]t would be undesirable to have each judge freely imposing his or her own morality, own concept of what is acceptable, own notions of child rearing, or own standards for male-female relationships on the circumstances of the litigants. . . . [D]efining bodily injury to exclude trivial or minor consequences and require either substantial pain or impairment of physical condition would lessen the potential for the exercise of unbridled trial court discretion. We conclude that bodily injury under the [Protection from Abuse Act] requires a finding of substantial physical pain or an impairment of physical condition."

Applying this standard, which admittedly was applied to a violation of the Protection from Abuse Act and not a child in need of care proceeding, the Supreme Court ultimately concluded that the teenage son's sore shoulder and a teenage daughter's small cuts to her lips from her braces after her father washed her mouth out with soap didn't constitute bodily injury. 260 Kan. at 301; see also *Barnett v. Barnett*, 24 Kan. App. 2d 342, 352, 945 P.2d 870 (1997) (parent's act of striking child with switch causing welts and hitting child in face causing reddening on cheek not substantial).

In reviewing the statements from the district court judge when he concluded the children were in need of care, the judge noted his belief that Father was indifferent toward any harm he had caused to his children and Mother was simply his pawn. He noted that Father conveyed by his behavior his total control over the family.

We give great deference to a district judge who can see the testimony and examine credibility. But we must look at the evidence presented with regards to the two children that are now the only subjects of this case. Is an indifferent, controlling Father a Father that should have his children removed from his custody until he is no longer indifferent or controlling? And is the fact that Mother did nothing to stop Father's controlling behavior except try to protect her younger children from witnessing one altercation with an older sibling enough to remove the younger children from her custody? There was tension in the house; there was yelling in the house; there was one incident of discipline in the house; but does the evidence support that there was physical, mental, or emotional abuse in the house sufficient to take these two remaining children away from their parents? Let's examine the evidence related to each child.

The evidence related to J.G.

There was absolutely no evidence presented here regarding the treatment of J.G. by Mother or Father. There were no allegations of physical abuse, no indication of

problems in school, no indication of lack of parental care or control, or physical or emotional abuse or neglect. The TFI reports reflect that he had been living with parental grandparents for about seven months when they asked for the children to be placed elsewhere due to their behavior. Yet J.G. regularly attends therapy with his sister and parents and is doing well in school. He has expressed a desire to see his parents more often. The case file did indicate that at about the same time his grandparents said they could no longer care for the children, J.G. told the associate principal at their school that K.G. threatens to kill him and other family members and he could not sleep at night due to this fear. So J.G. and K.G. were given different placements. There was no testimony that there were similar events before K.G. and J.G. were removed from their parents' home or that Mother or Father were ever aware of any such behavior by K.G. in their home.

Based on a lack of evidence to support its findings of abuse and lack of parental care and control, I am not convinced a rational fact-finder could find it highly probable by clear and convincing evidence J.G. was a child in need of care.

The evidence related to K.G.

All the evidence related to J.G. also applies to K.G. She also wants to see her parents more often and has been participating with her parents and brother in counseling. But both were removed from the home when K.G. reported being slapped by her father at Walmart and bruising was evident when she arrived at school. So there was one allegation of physical abuse toward K.G. The judge believed the events as relayed by K.G. and deemed the slap abuse, which would be a basis to declare her a child in need of care. See K.S.A. 38-2202. Father denies the abuse happened and there was no corroboration of the slap from the cameras at Walmart. DCF issued a report that abuse was not substantiated. That is the sum total of the evidence that K.G. was abused mentally, physically, or emotionally—ever—by her parents. And, as with J.G, there was

no evidence that K.G. witnessed the abuse of other family members or resided in a house where abuse was occurring.

The district court did not make sufficient findings nor was there sufficient evidence presented by the State at the hearing for a rational fact-finder to find it highly probable by clear and convincing evidence K.G. was a child in need of care.

The evidence as it relates to Mother and Father

There was much talk about the failure of Mother and Father to cooperate here. Yet there is no evidence that any failure to cooperate signaled that they could not care for their children. They believed from the beginning that their children had been unlawfully removed from their home. And even though it requested information from Mother and Father, including the ability to enter home without a warrant, the State fails to connect this with being a parent that is so bad that their children should be removed.

Although Mother and Father have not presented proof of employment or income, case workers believed Father was working full time and had sufficient means to support the family and Mother is receiving some sort of social security disability. There are no concerns with alcohol or drug abuse by either parent. Parents would not allow case workers into their home to conduct a home check, but there have been no concerns over the condition of the home. The one time they were allowed in it met State standards. The only other testimony was C.G.'s testimony that they all had household chores to keep the home clean.

In addition, even if it were emotional abuse for Mother and Father to expose their children to the abuse of another in the family, there was no evidence that J.G. or K.G. *ever* witnessed any abuse or were aware of any abuse of other family members. The only abuse that anyone claimed ever occurred in the home was the incident with C.G. In that

case, Mother actively made sure they did not witness that incident by escorting them out of the room. And Mother sought to be the calming force when tensions were high. With the exception of the allegation of K.G. being slapped by her Father outside the home--which immediately resulted in the removal of both K.G. and J.G. from the home—both K.G. and J.G. denied they were ever subject to any abuse or that anything other than yelling at C.G. as a result of her defiance took place in the home.

And we should not ignore the fact that DCF professionals determined that both the incident with C.G. and the incident with K.G. were unsubstantiated for abuse.

CONCLUSION

Because C.G. is now over the age of majority, the parents' claim that the district court erred in finding C.G. a child in need of care was properly dismissed as moot. But reviewing the evidence in the light most favorable to the State, I would reverse the findings of the district court that K.G. and J.G. were children in need of care as defined by statute. The State did not prove abuse and the district court had insufficient evidence to support such a finding. Thus, I would hold that a rational fact-finder could not have found it highly probable by clear and convincing evidence that K.G. and J.G. were children in need of care and urge reversal of that finding.