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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-590

Filed: 21 November 2017

Wilkes County, No. 15-JT-140

IN THE MATTER OF: X.L.S.

Appeal by respondent from order entered 24 March 2017 by Judge David V. Byrd in District Court, Wilkes County. Heard in the Court of Appeals 2 November 2017.

*Erika Leigh Hamby for Wilkes County Department of Social Services, petitioner-appellee.*

*Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for guardian ad litem.*

*Anné C. Wright for respondent-appellant.*

STROUD, Judge.

Respondent-father (hereinafter “respondent”) appeals from an order terminating his parental rights.<sup>1</sup> We affirm.

Facts

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<sup>1</sup> The parental rights of the juvenile’s mother were also terminated. She did not appeal.

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On 29 July 2015, Wilkes County Department of Social Services (“DSS”) filed a juvenile petition seeking an adjudication that three-year-old X.L.S. (hereinafter “Xavier”)<sup>2</sup> was a neglected or seriously injured juvenile in that he lived in an unsafe environment. DSS alleged that on 29 November 2014, while under respondent’s supervision, Xavier ingested some of respondent’s prescription medication and ran into a heater, burning himself. On 22 August 2015, the court entered an order dismissing the petition, finding respondent had successfully completed his case plan and concluding DSS failed to present evidence to support a finding that Xavier was not safe in respondent’s home.

On 31 August 2015, DSS filed another juvenile petition, this time seeking an adjudication that Xavier was a neglected and dependent juvenile. DSS alleged that it received a report indicating that between approximately 5:00 p.m. on 23 August 2015 and 4:30 a.m. on 24 August 2015, respondent assaulted his wife in the presence of Xavier. More specifically, DSS alleged that respondent held a knife to his wife’s throat, threatened to kill her, kicked her in the stomach and ribs, shoved a shower head and hot running water in her mouth in an attempt to drown her, sprayed hairspray and foaming hand soap in her mouth, and choked her almost to the point of loss of consciousness. Respondent also, while intoxicated, forced the family to ride with him to a store so he could purchase more alcohol. Respondent was arrested and

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<sup>2</sup> For ease of reading and to protect the child’s identity, the parties stipulated to the use of this pseudonym for the name of the minor child.

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incarcerated in the Wilkes County Jail. With the consent of the parents, the court signed an order on 30 October 2015 adjudicating Xavier as a neglected and dependent juvenile and awarding custody to DSS.

The court conducted a review hearing on 15 December 2015 and subsequently signed an order on 11 January 2016 in which it found that respondent remained incarcerated awaiting trial on criminal charges arising out of the August 2015 events. The court further found that respondent had not visited with the juvenile, had made no progress in correcting the conditions which caused Xavier to be removed, and had not provided any support to the child since he came into the custody of DSS.

On 7 March 2016, the court held a permanency planning hearing and filed an order on 31 March 2016 in which it found that respondent remained incarcerated in the Wilkes County Jail on pending charges of first degree kidnapping, assault inflicting serious injury by strangulation, assault with a deadly weapon with intent to kill, and misdemeanor child abuse.<sup>3</sup> The court also found that respondent had not visited the child and had done nothing to correct the conditions leading to the placement of the child in foster care. The court ordered adoption as the best plan to

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<sup>3</sup> The finding states that respondent was charged with “first degree strangulation” and “first degree assault with a deadly weapon with intent to kill.” Because our criminal statutes do not classify strangulation or assault by first or second degree, we *sua sponte* refer to the charges by their correct names. See N.C. Gen. Stat. § 14-32(c) (2015) (assault with a deadly weapon with intent to kill); N.C. Gen. Stat. § 14-32.4(b) (2015) (assault inflicting serious injury by strangulation). We also note that the court referred to the offenses by the correct names in the termination of parental rights order.

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achieve a safe, permanent home for the child within a reasonable time and relieved DSS of further reunification efforts.

On 17 June 2016, DSS filed a petition to terminate respondent's parental rights on grounds: (1) the juvenile remained neglected; (2) respondent was incapable of providing for the proper care and supervision of the child such that the child will remain a dependent juvenile; and (3) respondent willfully abandoned the juvenile for at least six months immediately preceding the filing of the petition to terminate parental rights. *See* N.C. Gen. Stat. § 7B-1111(a) (1), (6)-(7) (2015). The court conducted a hearing upon the petition on 6 January 2017 and filed an order on 24 March 2017 terminating respondent's parental rights on the first and third grounds alleged in the petition. Respondent filed notice of appeal on 11 April 2017.

Discussion

In a termination of parental rights proceeding, the trial court "examines the evidence and determines whether sufficient grounds exist under N.C. Gen. Stat. § 7B-1111 to warrant termination of parental rights." *In re T.D.P.*, 164 N.C. App. 287, 288, 595 S.E.2d 735, 736 (2004), *aff'd per curiam*, 359 N.C. 405, 610 S.E.2d 199 (2005). The court assesses "whether the parent's individual conduct satisfies one or more of the statutory grounds which permit termination." *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007). Appellate review of the trial court's order is to determine (1) whether the findings of fact are supported by clear, cogent and convincing

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evidence, and (2) whether the findings of fact support the adjudicatory conclusions of law. *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6 (2004). The conclusions of law are reviewed *de novo*. *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

Respondent challenges both of the grounds for termination of his parental rights. If we determine that one ground is supported, we need not consider other grounds found by the court. *In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006). Because we determine that the court's findings of fact support termination of respondent's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1), we do not consider whether his rights were properly terminated on the other ground.

To terminate parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), the trial court must conclude that the parent has abused or neglected the child. N.C. Gen. Stat. § 7B-1111(a)(1) (2015). A child is neglected when the parent fails to provide proper care, supervision, discipline or a safe environment or abandons the child. N.C. Gen. Stat. § 7B-101(15) (2015). "A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997). The court must consider evidence of any changed circumstances since the time of a prior adjudication and the probability that the neglect will be repeated if

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the child is returned to the parent's care. *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). In predicting the probability of repetition of neglect, the court "must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999).

"[I]t is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). The appellate court "cannot reweigh the evidence or credibility as determined by the trial court." *In re P.A.*, 241 N.C. App. 53, 57, 772 S.E.2d 240, 244 (2015). If the findings of fact made by the trial court "are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). Unchallenged findings of fact "are deemed to be supported by sufficient evidence and are binding on appeal." *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009).

Respondent contends the court's conclusion of law that he neglected the juvenile is not supported by the findings of fact and evidence. He argues there is no finding of fact that Xavier was present during any act of domestic violence or that he suffered any impairment as a consequence of respondent's failure to provide proper

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care, supervision or discipline. He further argues there is no competent evidence to support a finding that Xavier sustained any impairment or harm.

In the termination of parental rights order, the court took judicial notice of all orders and filings in the underlying juvenile action, with the caveat that the court “affords each such document the appropriate weight, taking into consideration the differing standards of proof which govern the hearing from which a particular Order was generated.” In the order adjudicating the child as neglected, the court noted that although respondent did not admit guilt of any criminal offense arising out of the August 2015 incident, he did stipulate there was sufficient evidence for the court to find that Xavier was a neglected juvenile. The court further found in the termination order, without challenge by respondent, that DSS substantiated reports indicating respondent committed acts of domestic violence in the presence of the child. The court also found as fact that respondent pled guilty to several charges, including misdemeanor child abuse, second degree kidnapping, and assault by strangulation arising out of the domestic violence incident in August 2015.

When a child is exposed to domestic violence, a finding may be made that the child is at substantial risk of physical or emotional harm. *In re T.S., III*, 178 N.C. App. 110, 113, 631 S.E.2d 19, 22-23 (2006), *aff’d per curiam*, 361 N.C. 231, 641 S.E.2d 302 (2007). Moreover, the failure to make an express finding that the juvenile sustained, or was placed at substantial risk of, physical or emotional harm as a result

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of the neglect is not error if all of the evidence supports such finding. *In re Safriet*, 112 N.C. App. 747, 753, 436 S.E.2d 898, 902 (1993). Although respondent argues, backed by evidentiary support, that the plea to misdemeanor child abuse arose out of the incident in which Xavier ingested the medication and burned himself, he does not dispute the remainder of the finding in which the court found that respondent pled guilty to second degree kidnapping and assault by strangulation arising out of the domestic violence episode. A finding of fact that is not supported by evidence is harmless error if other findings are sufficient to support a finding of neglect. *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006).

Respondent also contends that the court's conclusion of law that the neglect is likely to be repeated if the child were to be returned to his custody is not supported by the findings of fact or evidence. The findings of fact reflect that respondent signed a case services plan on or about 23 November 2015 while he was incarcerated in the county jail. Respondent was provided with a copy of the plan, which required him to attend and complete parenting classes, anger management classes, and to obtain a substance abuse, mental health, and domestic violence assessment. Respondent did not complete any of those tasks. The court noted that respondent testified that he was unable to attend the classes or Narcotics Anonymous or Alcoholics Anonymous meetings due to his work schedule in the prison.



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“Incarceration, by itself, is insufficient to establish neglect in a termination case, but it is relevant to whether a child is neglected.” *In re J.K.C.*, 218 N.C. App. 22, 29, 721 S.E.2d 264, 270 (2012). In determining whether there is a probability of repetition of neglect, it is also relevant whether the parent has made meaningful progress in eliminating the conditions which led to the removal of the child from the home. *In re J.H.K.*, 215 N.C. App. 364, 369, 715 S.E.2d 563, 567 (2011). Because respondent has not addressed the substance abuse and domestic violence issues which led to the placement of the child in foster care, we concur with the trial court’s resolution that the neglect is likely to be repeated.

Furthermore, respondent points out that he had a prior case plan and was able to successfully complete its requirements while not incarcerated, arguing that this demonstrates a likelihood that he could do the same once released from prison at the end of 2017. But the trial court could also consider this fact to support the concern that there is an even stronger probability of a repetition of neglect since respondent failed to change his behavior after completing the prior case plan. Even though respondent father had just completed the prior case plan, he almost immediately placed Xavier in a neglectful environment again -- as the record shows the domestic violence incident with his wife occurred in Xavier’s presence on 23 or 24 August 2015 -- less than 48 hours after the prior petition was dismissed on 22 August 2015.

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Respondent also takes issue with the following portions of findings: (1) number 22 in which the court found that respondent has continued to neglect Xavier by failing to communicate with Xavier or inquire about his well-being; (2) number 29, in which the court found that respondent had not had any contact with Xavier since the child came into foster care, including contact in the form of letters, cards, gifts or tokens of affection; and (3) number 31 in which the court found that respondent did not communicate with the social worker after he was informed by letter that the child had been involved in an automobile accident. He argues that although the court made findings of fact indicating that respondent had access to contact information for DSS, the court never made a finding that respondent actually had the contact information and the ability to contact DSS, provide age-appropriate gifts or tokens, or participate in various aspects of the case plan while he was incarcerated.

The court found that: (1) the family service case plan, a copy of which respondent was provided, required respondent to maintain weekly contact with the social worker and to keep her updated as to any changes in his contact information; (2) respondent had not complied with this requirement; and (3) the last contact respondent had with DSS was when he signed the case plan. Respondent does not dispute these findings. Although respondent testified that he never received this contact information or lost it when he was transferred from the county jail to a prison unit, the social worker testified that she mailed all letters regarding agency review

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meetings to respondent and that these letters contained the contact information of DSS, including the address and telephone number. Respondent also testified that the social worker left the case plan with him and that the case plan contained the contact information for DSS. Respondent also acknowledged in his testimony at the termination hearing that he had a case manager at the prison, that he had attended several hearings in this matter and he did not request an address until the last hearing; and that his mother recently obtained the child's address for him but he had not received it from her at the time of the hearing.

Although a parent may be incarcerated and his opportunity to contact the child may be limited, he "will not be excused from showing interest in the child's welfare by whatever means available. The sacrifices which parenthood often requires are not forfeited when the parent is in custody." *Whittington v. Hendren*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 376 (2003). From the time of his arrest in August 2015 until the termination hearing on 6 January 2017, respondent did little to maintain a relationship with his child. When the evidence and court's findings show that the parent's arrest and incarceration did not prevent him from communicating with his child or the department of social services, or that the parent has made minimal effort to maintain a relationship with the child, a conclusion may be made that the parent abandoned the child. *In re B.S.O.*, 234 N.C. App. 706, 713, 760 S.E.2d 59, 65 (2014).

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We hold the court's findings of fact support its conclusion of law that respondent neglected the juvenile and that the neglect is likely to be repeated. We affirm the order terminating respondent's parental rights.

AFFIRMED.

Judges BRYANT and ZACHARY concur.

Report per Rule 30(e).