[Cite as *In re A.K.*, 2021-Ohio-4513.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

In the Matter of:	:	Case No. 21CA2
	:	
A.K., J.K., M.G., Q.B.,	:	
	:	
Adjudicated Dependent Children.[1]	:	
	:	
	:	DECISION AND JUDGMENT ENTRY
	:	
	:	**RELEASED: 12/16/2021**

APPEARANCES:

Kathryn Cornelius-Blume, Lancaster, Ohio, for Appellant.

Ryan R. Black, Hocking County Prosecuting Attorney, and Ryan Stickel, Assistant Hocking County Prosecutor, Logan, Ohio, for Appellee.

Wilkin, J.

{¶1} Appellant, Stacy Konkler, appeals a decision of the Hocking County Court of Common Pleas, Juvenile Division, that (1) adjudicated the four children who were in her custody dependent and (2) placed the children in the temporary custody of appellee, South Central Ohio Job and Family Services (the "agency").

{¶2} Appellant raises four assignments of error. In her first assignment of error, appellant asserts that the trial court plainly erred by adjudicating the children dependent and by placing them in the agency's temporary custody without first requiring the agency to create a case plan. In her second assignment of error, appellant contends that the trial court erred as a matter of

[1] The trial court also adjudicated one of the four children, A.K., an abused child.

law by failing to include a case plan in its dispositional order. In her third assignment of error, appellant argues that the trial court erred by finding the three youngest children to be dependent children. In her fourth assignment of error, appellant claims that the trial court abused its discretion by placing the children in the agency's temporary custody because the agency did not use reasonable efforts.

{¶3} After our review of the record and the applicable law, we find no merit to appellant's assignments of error. Therefore, we affirm the trial court's judgment.

FACTS AND PROCEDURAL BACKGROUND

{¶4} Several years ago, appellant adopted A.K. (now 15 years of age) and J.K. (now 14 years of age) and was granted legal custody of her two biological grandchildren, M.G. (now 11 years of age) and Q.B. (now 14 years of age).[2] In late September 2020, the agency received a referral regarding the family. Upon investigating, the agency discovered that A.K. had been living in squalid conditions while the other children appeared to have appropriate furnishings. After discussing the situation with appellant, the agency sought and received a protective order regarding the four children.

{¶5} The agency also filed abuse, neglect, and dependency complaints regarding the four children and requested the court to place the children in its temporary custody. The complaint alleged that the agency received a report that

[2] Appellant's brief indicates that she is the "biological Mother and legal custodian of" A.K. and J.K. However, at the adjudicatory hearing, the agency caseworker stated that appellant is the adoptive mother of A.K. and J.K. Additionally, the guardian ad litem's report indicates that appellant obtained custody of A.K. and J.K. several years ago and that she is the adoptive mother.

indicated the following: (1) J.K. had run away from home and returned the next morning, (2) appellant's husband hit J.K. in the head, (3) the children are locked in their rooms and must ask permission to leave, (4) appellant withholds food from the children, (5) J.K. is below average weight and size for his age, and (6) J.K.'s window is boarded up from inside his bedroom.

{¶6} The complaint further stated that a social services worker visited the home along with a representative from the Hocking County Sheriff's Office. Upon entering the home, the social worker noted (1) a large hole in the ceiling with plaster and fiberglass protruding from the opening, (2) a strong smell of urine in the home and in A.K.'s bedroom, (3) A.K.'s bedroom was empty except for a dirty mattress that had two large holes with flies and other debris inside, (4) the windows in the children's bedrooms were nailed shut, (5) J.K. and Q.B.'s bedroom appeared clean, and (6) J.K. and Q.B.'s bedroom had furniture, personal items, and a bunk bed with bedding on it.

{¶7} At a shelter care hearing, the court continued the agency's temporary custody and ordered that appellant not have any visitation with the children until further order of the court.

{¶8} On November 10, 2020, the children's guardian ad litem ("GAL") filed a "motion for emergency ex parte orders for no contact and return of property." The GAL stated that he "believes that irreparable harm will occur unless immediate action is taken to suspend all visitation between mother and children." The GAL explained that the children informed him that appellant had attended

one of their sporting events and that her attendance made them uncomfortable. The children stated that they did not want appellant to attend any further events.

{¶9} The GAL further reported that M.G.'s foster mother indicated that appellant attempted to have a third party talk to M.G., but M.G. did not want to speak to anyone involved with appellant. Also, J.K. advised that people close to appellant had "threatened" him via Snapchat. These people stated that they were going to "find [J.K.] and take care of [him] for snitching on [appellant]."

{¶10} The GAL also related that the children requested some of the property located at appellant's house be given to them.

{¶11} On November 16, 2020, the trial court entered an order prohibiting appellant from having contact with the children and requiring a return of their personal belongings.

{¶12} On December 21, 2020, the trial court held an adjudicatory hearing. At the hearing, Valkari Dietzel testified that she was the former caseworker for the family. Dietzel visited appellant's home after receiving a referral that J.K. had been hit in the head. When she first entered the home, she noted "a strong smell of urine," and "a large hole in the ceiling where the plaster and fiberglass insulation were hanging from."

{¶13} Dietzel noted that A.K.'s "room was empty with only a twin mattress on the floor." Dietzel stated that the mattress "was very dirty" and "had two really large holes" in it that were filled with debris. Additionally, it did not have any bedding. Dietzel also observed "a board nailed to the window" with the window nailed shut.

{¶14} Dietzel found J.K. and Q.B.'s bedroom to be "fairly clean" with bunkbeds that contained bedding. Their room also had furniture and personal items. Like the windows in A.K.'s bedroom, J.K. and Q.B.'s bedroom windows also were nailed shut.

{¶15} Dietzel explained that she spoke with appellant about the allegations and the concerns that Dietzel noted in the home. Appellant denied that J.K. was hit in the head or that the children were locked in their bedrooms. Appellant stated that she placed alarms on the bedroom doors "to prevent [A.K.] from stealing the food because the kids had some behavioral issues that she had been going through, getting up and wandering at night."

{¶16} Dietzel also asked appellant about the allegation that A.K. "was being fed different foods than the other children" and "that he was not being fed meals regularly." Appellant likewise denied this allegation.

{¶17} Dietzel explained that she continued to investigate the allegations by having the children interviewed at Harcum House.

{¶18} Detective Vince Scalmato testified that he accompanied Dietzel to the family's home. He too noted that the windows in the children's bedrooms had been nailed shut.

{¶19} When the detective entered A.K.'s bedroom, the odor of urine in A.K.'s bedroom "was so strong that [the detective's] eyes were watering." Detective Scalmato noted the horrible condition of the mattress and stated that he would not let a dog sleep on it. He said that it looked like "something that you

would see out on the side of the road." The detective explained that "bugs, insects, [and] gnats" were "in and around that mattress."

{¶20} Detective Scalmato testified that the other children's bedrooms were appropriate. He found it concerning that A.K. essentially was living in "absolute squalor" while the other children had bedrooms with furniture and bedding. The detective noted that appellant appeared to be providing appropriate care for the other children but not for A.K. He found the differing treatment to be "[v]ery" concerning. He also found it "concerning that [appellant] * * * chose not to" "provide adequate care for [A.K.]"

{¶21} At the end of the hearing, the court announced its adjudication on the record. The court found all of the children to be dependent children and further found A.K. to be an abused child. The court then asked if any of the parties had an objection to proceeding with disposition. None of the parties objected, so the court continued with a dispositional hearing. At the dispositional hearing several witnesses testified, including the same people who testified in the adjudication hearing.

{¶22} Samantha Burchfield testified that she has been the family's caseworker for less than two weeks. Burchfield stated that she had not made any referrals yet and that appellant "was already doing counseling with New Horizons." Burchfield indicated that the agency is in the process of creating a case plan, but she has not spoken with appellant yet to determine what the case plan goals will be. She acknowledged that she has not "made any efforts to

prevent the removal of the children from the home." Burchfield explained that appellant has not been visiting the children due to a no-contact order.

{¶23} Dietzel likewise testified that she had not made any referrals for appellant yet. Appellant had informed Dietzel that she already started counseling at New Horizons and that she would be taking a parenting class.

{¶24} Dietzel explained that the court had entered a no-contact order and that part of her role was to ensure that the court's order was being followed. Dietzel related that she had received a report from A.K.'s foster mother that appellant had contact with A.K. through Facebook. Dietzel spoke to A.K., and he confirmed the contact.

{¶25} Dietzel agreed that the no-contact order did not give the agency many options to use reasonable efforts to return the children to the home. Dietzel did, however, contact Q.B.'s and M.G.'s biological parents and scheduled phone calls and virtual visits for them. She also made a referral for the children to have in-person visits with each other, but, due to the pandemic, no in-person visits were being held. Dietzel explained that if the court had not issued a no-contact order, she would have made a referral for appellant to have visits with the children.

{¶26} Dietzel testified that she met with appellant once at appellant's home. Dietzel noted that appellant had put a board over the hole in the ceiling and was in the process of removing the carpet from A.K.'s room.

{¶27} Dietzel stated that if the agency had developed a case plan, it likely would have required appellant to participate in counseling, which she already had

begun. The case plan also would require appellant to ensure the safety and cleanliness of the home.

{¶28} Dietzel believed that appellant was aware of the agency's concerns due to their conversations. Dietzel indicated that she talked to appellant on the phone a few times. Additionally, Dietzel had pointed out the safety concerns to appellant when she visited the home.

{¶29} The GAL testified that he spoke with all four children. A.K. wants to remain with the foster family and to not have any contact with appellant. J.K. wants to remain in his current placement and to have no contact with appellant. M.G. wants to remain in her current placement, to have no contact with appellant, and to visit with her biological parents. Q.B. also wants to stay in his current placement and to have no contact with appellant. The GAL indicated that the children were "unequivocable in their response that they did not want to visit" appellant.

{¶30} The GAL stated that when he met with the children, he found them to be "generally happy kids," but when he "brought up the possibility of visitation with [appellant] * * * their demeanor changed immediately." He explained that the children "became more serious, tense, didn't really want to speak. Their voices got quieter." The GAL recommends that the no-contact order remain in place.

{¶31} On December 21, 2020, the trial court entered a written decision that adjudicated the children dependent and further found A.K. to be an abused child. The court explained that it found the children dependent for the following

reasons: "smell of urine in the home. Large hole in the ceiling. Bare mattress on the floor w/ large holes in it. Board over the window nailed shut. Dirty clothes on Alex. Alex smelled of urine. Bedroom windows nailed shut. Bugs in and around mattress in Alex's room."

{¶32} The court further found that the agency had made reasonable efforts to prevent the removal of the children from their home. Appellant was currently under a no-contact order with her children. Thus, the agency was limited on its ability to reunite the children with appellant. The agency did engage appellant in mental health counseling and parenting classes. However, despite the agency efforts, the court determined that it would be in the children's best interest to not return them to their home because: (1) appellant abused A.K., and (2) appellant violated the no contact order.

{¶33} The court placed the children in the agency's temporary custody and directed it to seek counseling for the children to determine whether visiting with appellant "would be beneficial."

{¶34} On December 28, 2020, appellant filed a motion that requested the court to issue supplemental findings of fact and conclusions of law to support its finding that A.K. is abused and that the other children are dependent along with a "motion for reconsideration." The trial court denied appellant's motions, and this appeal followed.

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT ORDERED MINOR CHILDREN TO BE MAINTAINED IN THE TEMPORARY CUSTODY OF CPS DESPITE CPS' FAILURE TO

CREATE A CASE PLAIN PRIOR TO THE ADJUDICATION AND DISPOSITIONAL HEARING.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FAILED TO INCLUDE IN ITS DISPOSITIONAL ORDER A CASE PLAN FOR REUNIFICATION FOR APPELLANT AND HER CHILDREN.

III. THE TRIAL COURT ERRED IN FINDING THAT J.K., M.G., AND/OR Q.B. WERE DEPENDENT CHILDREN, PURSUANT TO OHIO REV. CODE 2151.04.

IV. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT MAINTAINED CPS' TEMPORARY CUSTODY OF THE MINOR CHILDREN.

ANALYSIS

ASSIGNMENTS OF ERROR I AND II

{¶35} Appellant's first and second assignments of error involve related issues. For ease of discussion, we consider them together.

{¶36} In her first assignment of error, appellant contends that the trial court plainly erred by placing the children in the agency's temporary custody without requiring the agency to file a case plan with the court before the adjudicatory or dispositional hearing. Appellant alleges that the agency's failure to file a case plan means that this court must reverse the trial court's judgment and remand the matter to the trial court so that the agency can submit an appropriate case plan.

{¶37} In her second assignment of error, appellant argues that the trial court erred by failing to journalize a case plan as part of its dispositional order. Appellant likewise asserts that the failure to journalize a case plan as part of the court's dispositional order constitutes reversible error.

{¶38} R.C. 2151.412(D) requires a child services agency to "file the case plan with the court prior to the child's adjudicatory hearing but no later than thirty days after the earlier of the date on which the complaint in the case was filed or the child was first placed into shelter care." However, "[i]f the agency does not have sufficient information prior to the adjudicatory hearing to complete any part of the case plan, the agency shall specify in the case plan the additional information necessary to complete each part of the case plan and the steps that will be taken to obtain that information." *Id.* The statute further requires the case plan to "be completed by the earlier of thirty days after the adjudicatory hearing or the date of the dispositional hearing for the child." *Id.*

{¶39} Juv.R. 43(F) similarly states:

> The agency required to maintain a case plan shall file the case plan with the court prior to the child's adjudicatory hearing but not later than thirty days after the earlier of the date on which the complaint in the case was filed or the child was first placed in shelter care. The plan shall specify what additional information, if any, is necessary to complete the plan and how the information will be obtained. All parts of the case plan shall be completed by the earlier of thirty days after the adjudicatory hearing or the date of the dispositional hearing for the child.

{¶40} The rule also requires the court to journalize a case plan for the child "[a]s part of its dispositional order."

{¶41} In the case at bar, we first observe that appellant did not object to the lack of a case plan at any point before the adjudicatory or dispositional hearing. In fact, the parties frequently pointed out during the hearing that a case plan had not yet been filed in the case. Still, appellant did not assert that the lack of a case plan impeded the court's ability to proceed with either hearing.

{¶42} A well-established rule of appellate procedure is that " 'an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.' " *State v. Quarterman,* 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15, quoting *State v. Childs,* 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the syllabus. The failure to object to an error at a time when the court could have avoided or corrected the error means that the appellant forfeits the right to raise the issue on appeal. *Independence v. Office of the Cuyahoga Cty. Executive*, 142 Ohio St.3d 125, 2014-Ohio-4650, 28 N.E.3d 1182, ¶ 30 (stating that "an appellant generally may not raise an argument on appeal that the appellant has not raised in the lower courts"); *Quarterman* at ¶ 21 (explaining that defendant forfeited his constitutional challenge by failing to raise it during trial court proceedings); *Gibson v. Meadow Gold Dairy*, 88 Ohio St.3d 201, 204, 724 N.E.2d 787 (2000) (concluding that party waived arguments for purposes of appeal when party failed to raise those arguments during trial court proceedings); *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177, 602 N.E.2d 622 (1992) (explaining that an appellant cannot "present * * * new arguments for the first time on appeal"); *accord State ex rel. Jeffers v. Athens Cty. Commrs.*, 4th Dist. Athens No. 15CA27, 2016-Ohio-8119, fn.3 (stating that "[i]t is well-settled that failure to raise an argument in the trial court results in waiver of the argument for purposes of appeal"); *State v. Anderson*, 4th Dist. Washington No. 15CA28, 2016-Ohio-2704, ¶ 24 (explaining

that "arguments not presented in the trial court are deemed to be waived and may not be raised for the first time on appeal").

{¶43} Here, had appellant objected to the lack of a case plan before the adjudicatory or dispositional hearing, the trial court could have corrected the error. Moreover, after the trial court entered its dispositional order, appellant filed a request for findings of fact and conclusions of law, along with a motion for reconsideration. In neither of those filings did appellant object to the lack of a case plan. Instead, appellant raises the issue for the first time on appeal. Appellant thus forfeited the right to raise the lack of a case plan as error on appeal. *In re C.B.C.*, 4th Dist. Lawrence No. 15CA18, 2016-Ohio-916, ¶ 87, citing *In re Willis,* 5th Dist. Coschocton No. 02CA15, 2002-Ohio-6795, ¶ 10 (determining that appellant's failure to object to case plan during trial court proceedings waived right to raise issue on appeal); *see also In re Awkal,* 95 Ohio App.3d 309, 319, 642 N.E.2d 424 (8th Dist.1994) (holding that appellant's failure to object to case plan during trial court proceedings waived right to raise issue on appeal).

{¶44} Appellate courts nevertheless have discretion to consider forfeited errors and review them for plain error. *Quarterman* at ¶ 16; *State v. Pyles*, 7th Dist. Mahoning No. 13-MA-22, 2015-Ohio-5594, ¶ 82, quoting *State v. Jones*, 7th Dist. Mahoning No. No. 06-MA-109, 2008-Ohio-1541, ¶ 65 (explaining that the plain error doctrine " 'is a wholly discretionary doctrine' "); *DeVan v. Cuyahoga Cty. Bd. of Revision*, 2015-Ohio-4279, 45 N.E.3d 661, ¶ 9 (8th Dist.) (noting that appellate court retains discretion to consider forfeited argument).

{¶45} For the plain error doctrine to apply, the party claiming error must establish (1) that " 'an error, i.e., a deviation from a legal rule' " occurred, (2) that the error was " 'an "obvious" defect in the trial proceedings,' " and (3) that this obvious error affected substantial rights, i.e., the error " 'must have affected the outcome of the trial.' " *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002); *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 209, 436 N.E.2d 1001(1982) ("A 'plain error' is obvious and prejudicial although neither objected to nor affirmatively waived which, if permitted, would have a material adverse affect on the character and public confidence in judicial proceedings.").

{¶46} The plain error doctrine is not, however, readily invoked in civil cases. Instead, an appellate court "must proceed with the utmost caution" when applying the plain error doctrine in civil cases. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997). The Ohio Supreme Court has set a "very high standard" for invoking the plain error doctrine in a civil case. *Perez v. Falls Financial, Inc.*, 87 Ohio St.3d 371, 721 N.E.2d 47 (2000). Thus, "the doctrine is sharply limited to the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss*, 79 Ohio St.3d at 122, 679 N.E.2d 1099; *accord Gable v. Gates Mills*, 103 Ohio St.3d 449, 2004-Ohio-5719, 816 N.E.2d 1049, ¶ 43. Moreover, appellate courts " 'should be hesitant to decide [forfeited errors] for the reason

that justice is far better served when it has the benefit of briefing, arguing, and lower court consideration before making a final determination.' " *Risner v. Ohio Dept. of Nat. Resources, Ohio Div. of Wildlife,* 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 28, quoting *Sizemore v. Smith*, 6 Ohio St.3d 330, 332, 453 N.E.2d 632 (1983), fn. 2; *accord Mark v. Mellott Mfg. Co., Inc.*, 106 Ohio App.3d 571, 589, 666 N.E.2d 631 (4th Dist.1995) ("Litigants must not be permitted to hold their arguments in reserve for appeal, thus evading the trial court process.").

{¶47} Additionally, "[t]he plain error doctrine should never be applied to reverse a civil judgment * * * to allow litigation of issues which could easily have been raised and determined in the initial trial." *Goldfuss,* 79 Ohio St.3d at 122, 679 N.E.2d 1099. Instead, " 'the idea that parties must bear the cost of their own mistakes at trial is a central presupposition of our adversarial system of justice.' " *Id.* at 121, quoting *Montalvo v. Lapez*, 77 Haw. 282, 305, 884 P.2d 345 (1994) (Nakayama, J., concurring in part and dissenting in part).

{¶48} No plain error is evident in this case. Even if the agency's failure to file a case plan with the court before the adjudicatory or dispositional hearing is an obvious error in the proceedings, appellant cannot establish that the outcome of the proceedings would have been any different. In fact, at oral argument, appellant agreed she had been following a case plan that the agency prepared but had yet to file with the court. Further, appellant agreed that the lack of a case plan has not caused her prejudice.

{¶49} Additionally, appellant has not made any claim that the failure to comply with R.C. 2151.412(D) or Juv.R. 43(F) affected her substantial rights or that the trial court would have reached a different decision regarding the children's adjudication and disposition if the agency had complied with R.C. 2151.412(D). We therefore do not believe that appellant can establish that the failure to comply with R.C. 2151.412(D) or Juv.R. 43(F) constitutes plain error under the circumstances in the present case.

{¶50} Accordingly, based upon the foregoing reasons, we overrule appellant's first and second assignments of error because appellant has forfeited the right to raise the lack of a case plan as error on appeal. Additionally, even if the agency's failure to file a case plan and the court's failure to adopt and journalize a case plan constitute obvious errors in the proceedings, appellant has failed to establish any prejudice.

{¶51} We further note that neither party has raised any suggestion that the trial court retained jurisdiction to adopt and journalize a case plan after appellant filed her notice of appeal. Moreover, at oral argument, the parties indicated that the trial court did not adopt and journalize a case plan while this appeal is pending, because the court did not believe that it had jurisdiction to do so. However, we observe that appellate courts have treated case plans as interlocutory orders that are not subject to appeal until the court has entered a final dispositional order. *In re Z.R.*, 9th Dist. Summit No. 26860, 2016-Ohio-1331, ¶ 14, citing *In re B.M.,* 9th Dist. Wayne Nos. 12CA0009, 12CA0010, 12CA0011, and 12CA0012, 2012–Ohio–4093, ¶ 23–24 (stating that "in an appeal

from an adjudication and initial disposition of a child, this Court lacks jurisdiction to address interlocutory aspects of that order such as case plan requirements, which the trial court may continue to change and the parent has the ability to appeal after the final disposition in the case"). *See generally In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, 829 N.E.2d 1207, ¶ 9 (stating that "[o]nce a case has been appealed, the trial court loses jurisdiction except to take action in aid of the appeal," and that "trial court retains jurisdiction over issues not inconsistent with the appellate court's jurisdiction to reverse, modify, or affirm the judgment appealed from"). Thus, the trial court retained—and retains—jurisdiction to adopt and journalize a case plan.

ASSIGNMENT OF ERROR III

{¶52} In her third assignment of error, appellant asserts that the trial court's decision that adjudicated J.K., M.G., and Q.B. dependent children is against the manifest weight of the evidence. Appellant contends that the agency's concerns involved the fourth child, A.K., and that none of the witnesses who testified at the hearing indicated that appellant failed to provide proper care for the other three children.

{¶53} The agency argues that the trial court's decision is not against the manifest weight of the evidence. The evidence establishes that the condition of the home, combined with the mistreatment of A.K., establishes the children are dependent. Further, the agency states that it presented evidence that (1) the home had a smell of urine so strong that it made the detective's eyes water, (2) bugs infested one the children's bedrooms, (3) the windows in the children's

bedrooms were nailed shut, and (4) the dining room had a large hole in the ceiling. The agency contends that the mistreatment of A.K. and the condition of the home placed the children's well-being at risk.

Standard of Review

{¶54} We review a trial court's dependency adjudication using the manifest-weight-of-the-evidence standard. *In re A.C.*, 5th Dist. Richland No. 2020 CA 0053, 2021-Ohio-288, ¶ 22; *In re B.S.*, 6th Dist. Erie No. E-19-052, 2020-Ohio-6775, ¶ 61; *In re L.S.*, 3d Dist. Allen No. 1-20-19, 2020-Ohio-5469, ¶ 11. When an appellate court reviews whether a trial court's dependency adjudication is against the manifest weight of the evidence, the court " ' "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered." ' " *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20, quoting *Tewarson v. Simon*, 141 Ohio App.3d 103, 115, 750 N.E.2d 176 (9th Dist. 2001), quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist. 1983).

{¶55} We further observe, however, that issues relating to the credibility of witnesses and the weight to be given the evidence are primarily for the trier of fact. "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses

and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶56} The question that an appellate court must resolve when reviewing a dependency adjudication under the manifest weight of the evidence standard is "whether the juvenile court's findings * * * were supported by clear and convincing evidence." *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825, 895 N.E.2d 809, ¶ 43; *accord* R.C. 2151.35(A)(1) (stating that if dependency established by clear and convincing evidence, then court may proceed to dispositional hearing); *In re Barnhart*, 4th Dist. Athens No. 02CA20, 2002-Ohio-6023, ¶ 37. "Clear and convincing evidence" is:

> the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.

In re Estate of Haynes, 25 Ohio St.3d 101, 103-04, 495 N.E.2d 23 (1986).

{¶57} In determining whether a trial court based its decision upon clear and convincing evidence, "a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990); *accord In re Holcomb*, 18 Ohio St.3d 361, 368, 481 N.E.2d 613 (1985), citing *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954) ("Once the clear and convincing standard has been met to the satisfaction of the [trial] court,

the reviewing court must examine the record and determine if the trier of fact had sufficient evidence before it to satisfy this burden of proof.")

{¶58} Thus, if a children services agency presented competent and credible evidence upon which the trier of fact reasonably could have formed a firm belief that a child is dependent, then the court's decision is not against the manifest weight of the evidence. *In re R.M.*, 997 N.E.2d 169, 2013-Ohio-3588 (4th Dist.), ¶ 62; *In re R.L.*, 2d Dist. Greene Nos. 2012CA32 and 2012CA33, 2012-Ohio-6049, ¶ 17, quoting *In re A.U.*, 2d Dist. Montgomery No. 22287, 2008-Ohio-187, ¶ 9. A reviewing court should find a trial court's judgment against the manifest weight of the evidence only in the " 'exceptional case in which the evidence weighs heavily against the [decision].' " *Thompkins*, 78 Ohio St.3d at 387, quoting *Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717.

Dependent Child

{¶59} R.C. 2151.04(C) defines a dependent child as a child "[w]hose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship." A finding of dependency under R.C. 2151.04(C) focuses on the child's condition and environment and not on any fault of the parents. *In re Bishop*, 36 Ohio App.3d 123, 124, 521 N.E.2d 838 (1987); *In re Birchfield* , 51 Ohio App.3d 148, 156, 555 N.E.2d 325 (1988). However, a court may consider a parent's conduct if it affects the child's condition or environment. *In re Burrell*, 58 Ohio St.2d 37, 39, 388 N.E.2d 738 (1979); *accord In re D.W.*, 4th Dist. Athens No. 06CA42, 2007-Ohio-2552, ¶ 20.

{¶60} A trial court need not find that a child has suffered "actual harm" in order to adjudicate the child dependent. *In re Y.R.*, 12th Dist. Warren No. CA2020-09-057, 2021-Ohio-1858, ¶ 60. Instead, circumstances that suggest a child's condition or environment poses "a legitimate risk of harm may suffice to support a dependency adjudication under R.C. 2151.04(C)." *In re S Children*, 1st Dist. Hamilton No. C-170624, 2018-Ohio-2961, ¶ 36, citing *In re M.E.G.*, 10th Dist. Franklin Nos. 06AP-1256, 06AP-1257, 06AP-1258, 06AP-1259, 06AP-1263, 06AP-1264 and 06AP-1265, 2007-Ohio-4308, ¶ 62 (upholding children's dependency adjudication when father had sexually abused their sibling); *accord In re K.R.*, 9th Dist. Summit No. 29815, 2021-Ohio-495, ¶ 29 and 36 (concluding that evidence supported dependency adjudication when sibling of adjudicated dependent child died under suspicious circumstances, even though no safety hazards observed in the home and adjudicated dependent child "was not malnourished, was of the appropriate weight and height for his age, had no bruises, and did not exhibit any physical or mental health issues"); *In re Savchuk Children*, 180 Ohio App.3d 349, 2008-Ohio-6877, 905 N.E.2d 666, ¶ 59 (11th Dist.) (determining that infant-sibling's unexplained injuries supported dependency finding as to uninjured, older siblings); *In re C.T.*, 6th Dist. Sandusky No. S-18-005, 2018-Ohio-3823, ¶ 61 (concluding that evidence supported dependency finding when mother's drug use, failure to address substance abuse, and overdose created an environment that was inappropriate for child.). Furthermore, "simply because a child's physical needs are being met and a home is clean does not preclude a juvenile court from finding a child dependent."

In re Y.R. at ¶ 59, citing *In re L.H.*, 12th Dist. Warren Nos. CA2018-09-106, and CA2018-09-109, CA2018-09-110, CA2018-09-111, 2019-Ohio-2383, ¶ 47 (affirming dependency finding where agency had no concerns with the condition and cleanliness of the home, but children had been exposed to marijuana use in the home).

{¶61} We additionally note that courts must "liberally" interpret and construe R.C. 2151.04(C) to comport with the overall purpose of R.C. Chapter 2151:

> To provide for the care, protection, and mental and physical development of children subject to Chapter 2151. of the Revised Code, whenever possible, in a family environment, separating the child from the child's parents only when necessary for the child's welfare or in the interests of public safety[.]

R.C. 2151.01(A); *accord In re M.W.*, 12th Dist. Warren No. CA2020-03-018, 2021-Ohio-1129, ¶ 13, citing *L.H.* at ¶ 41 ("R.C. 2151.04(C) is to be applied broadly to protect a child's health, safety, and welfare.").

{¶62} In the case at bar, we do not agree with appellant that the trial court's dependency adjudication is against the manifest weight of the evidence. Appellant does not challenge the trial court's finding that A.K. is an abused child. She instead asserts that A.K.'s alleged abuse is insufficient to show that the remaining children are dependent children. As all of the foregoing cases indicate, however, a child need not be the victim of physical abuse or actual harm before a trial court can enter a dependency adjudication.

{¶63} Furthermore, even if appellant did not subject the three children to physical harm, Detective Scalmato testified that appellant "chose not to" provide

adequate care for A.K., even though she appeared to provide adequate care to the other three children. The trial court could have reasonably inferred that observing appellant mistreat A.K. traumatized the other three children and placed their mental health and well-being at legitimate risk. Thus, even if, as appellant alleged, the physical home environment for the other three children did not pose any physical safety risks to them, her mistreatment of A.K. created an environment in which the other three children observed one of their siblings suffering. We do not find it unreasonable to think that watching a sibling suffer at the hands of the person who is supposed to protect all of the children in her care would cause emotional trauma to a child.

{¶64} Further, the home had a strong smell of urine, an insect infestation in one of the bedrooms, and bedrooms with the windows nailed shut. These conditions placed the children's health and well-being at risk. A home with a strong smell of urine and an insect infestation suggests that part of the home is unsanitary. Additionally, bedroom windows that are nailed shut pose a safety hazard if the occupants of the bedrooms need to escape the home in an emergency that does not allow the occupants to use the bedroom doors, i.e., a fire in the hallway. Consequently, we do not believe that the trial court's dependency adjudication is against the manifest weight of the evidence.

{¶65} Accordingly, based upon the foregoing reasons, we overrule appellant's third assignment of error.

ASSIGNMENT OF ERROR IV

{¶66} In her fourth assignment of error, appellant argues that the trial court abused its discretion by maintaining the children in the agency's temporary custody. Specifically, appellant contends that the trial court could not enter a dispositional order that placed the children in the agency's temporary custody because the agency failed to establish that it used reasonable efforts to reunify the family.

Standard of Review

{¶67} Although appellant asserts that the abuse-of-discretion standard of review applies to her fourth assignment of error, this court recently has applied a manifest-weight-of-the-evidence standard of review to a trial court's reasonable efforts determination. *In re M.M.*, 4th Dist. Athens No. 20CA7, 2020-Ohio-7038, ¶ 9, citing *In re A.M.*, 2018-Ohio-646, 105 N.E.3d 389, ¶ 114, fn. 8 (4th Dist.), and *In re C.B.C.*, 4th Dist. Lawrence Nos. 15CA18 and 15CA19, 2016-Ohio-916, ¶ 75;[3] *accord In re B.S.*, 6th Dist. Erie No. E-19-052, 2020-Ohio-6775, ¶ 85. In the interest of consistency—and because neither party has argued the issue—we will apply the manifest-weight-of-the-evidence standard to the case at bar.

Reasonable Efforts

{¶68} When a trial court "removes a child from the child's home or continues the removal of a child from the child's home," R.C. 2151.419(A)(1) requires a trial court to determine whether a children services agency "made

[3] We further observe that in *A.M. and C.B.C.*, we presumed without deciding that the manifest-weight-of-the-evidence standard applied to a trial court's reasonable efforts determination. We additionally point out that both cases involved a trial court's decision granting an agency permanent custody. Also, in *A.M.*, we noted that other courts have applied an abuse-of-discretion standard of review. *A.M.* at fn.8, citing *In re C.C.*, 3rd Dist. Marion No. 9-16-07, 2016-Ohio-6981, ¶ 14 [note: Westlaw incorrectly indicates that *A.M.* cited to *In re C.F.* at ¶ 41].

reasonable efforts to prevent the removal of the child from the child's home, to eliminate the continued removal of the child from the child's home, or to make it possible for the child to return safely home." "In determining whether reasonable efforts were made, the child's health and safety shall be paramount." R.C. 2151.419(A)(1). The agency bears the burden to prove that it has made reasonable efforts. R.C. 2151.419(A)(1).

{¶69} In *In re C.B.C.*, 4th Dist. Lawrence No. 15CA18, 2016-Ohio-916, ¶ 76, we discussed the meaning of "reasonable efforts" as follows:

> In general, "reasonable efforts" mean " '[t]he state's efforts to resolve the threat to the child before removing the child or to permit the child to return home after the threat is removed.' " *C.F.* at ¶ 28, quoting Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation,* 12 B.U.Pub.Int.L.J. 259, 260 (2003). " 'Reasonable efforts means that a children's services agency must act diligently and provide services appropriate to the family's need to prevent the child's removal or as a predicate to reunification.' " *In re H.M.K.,* 3d Dist. Wyandot Nos. 16–12–15 and 16–12–16, 2013–Ohio–4317, ¶ 95, quoting *In re D.A.,* 6th Dist. Lucas No. L–11–1197, 2012–Ohio–1104, ¶ 30. In other words, the agency must use reasonable efforts to help remove the obstacles preventing family reunification. Bean, *Reasonable Efforts: What State Courts Think,* 36 U. Tol. L.Rev. 321, 366 (2005), quoting *In re Child of E.V.,* 634 N.W.2d 443, 447 (Minn.Ct.App.2001), and *In re K.L.P.,* No. C1–99–1235, 2000 WL 343203, at *5 (Minn.Ct.App. Apr. 4, 2000) (explaining that the agency must address what is "necessary to correct the conditions that led to the out-of-home placement" and must "provide those services that would assist in alleviating the conditions leading to the determination of dependency"). However, " '[r]easonable efforts' does not mean all available efforts. Otherwise, there would always be an argument that one more additional service, no matter how remote, may have made reunification possible." *In re Lewis,* 4th Dist. Athens No. 03CA12, 2003–Ohio–5262, ¶ 16. Furthermore, the meaning of "reasonable efforts" "will obviously vary with the circumstances of each individual case." *Suter v. Artist M.,* 503 U.S. 347, 360, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992).

{¶70} In the case before us, we do not believe that the trial court's reasonable-efforts determination is against the manifest weight of the evidence. When the agency received the referral, a caseworker spoke with appellant about the concerns. The agency ultimately removed the children due to concerns that (1) A.K. was being abused, (2) the other children had witnessed the abuse, (3) the home had a strong smell of urine, and (4) the windows in the boys' bedrooms were nailed shut. After the children's removal, they were placed in foster care, and Dietzel continued to investigate the allegations by having the children interviewed.

{¶71} The agency was unable to arrange visits between appellant and the children because the trial court ordered appellant not to have any contact with the children, which appellant violated by initiating contact with A.K. via Facebook. Despite the limits on visitation, the agency used reasonable efforts to assist appellant in alleviating the conditions that led to the determination of dependency and abuse. The agency had conversations with appellant about engaging in mental health counseling and parenting classes, which appellant initiated on her own and without the referral of the agency.

{¶72} The trial court further made reference that contact between the parties may be limited due to COVID pandemic restrictions but Dietzel testified she was able to speak with appellant on at least five different occasions and she conducted a home visit. Dietzel discussed with appellant the agency's safety concerns and what needed to be done in order to return the children to her care.

The trial court found that the conversations between the agency and appellant "clearly got through to mom" as she was making efforts to remedy the situation.

{¶73} Additionally, the record clearly establishes that the children do not want to have any contact with appellant or to be returned to her custody. The GAL reported that "it is unsafe for the children to return to [appellant's] care or to have visits with her."

{¶74} At the adjudicatory and dispositional hearings, all of the parties—and the trial court—recognized that the agency had not yet prepared a case plan for the family. Nevertheless, appellant has engaged in counseling, and the parties agree that the agency has since developed a case plan for the family that has yet to be journalized.

{¶75} Under the foregoing circumstances, we believe that the agency acted as reasonably as the situation allowed. Therefore, we do not believe that the trial court's reasonable efforts determination is against the manifest weight of the evidence. *See generally In re A.R.*, 8th Dist. Cuyahoga No. 109482, 2020-Ohio-5005, ¶ 45 (determining that agency used reasonable efforts under the circumstances; child stated that she did not feel safe with her mother and that she did not want to visit her mother; child engaged in trauma counseling and therapist did not recommend family counseling); *In re F.B.*, 9th Dist. Summit No. 27762, 2016-Ohio-3434, ¶ 21 (finding that agency used reasonable efforts and noting that "children could not safely be returned home because neither parents nor children had sufficient time to engage in services to eliminate the safety risks in the home environment"); *In re D.C.*, 10th Dist. Franklin No. 08AP-1010, 2009-

Ohio-2145, ¶ 17 (stating that agency's failure to schedule visits "with mother was not a lack of diligence considering [the children's] fear as result of their abuse and additional potential trauma from physically enforcing visitation").

{¶76} Accordingly, based upon the foregoing reasons, we overrule appellant's fourth assignment of error.

CONCLUSION

{¶77} Having overruled appellant's four assignments of error, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. and Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Kristy S. Wilkin, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.