IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Dependency of:	)	
	)	DIVISION ONE
S.H.L.B.-L., DOB: 02/03/2010,	)	
	)	No. 66371-2-I
Minor Child.	)	
	)	
KEVIN LOUCH,	)	
	)	
Appellant,	)	UNPUBLISHED OPINION
	)	
v.	)	
	)	
STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES,	)	
	)	
	)	FILED: July 25, 2011
Respondent.	)	
_____	)	

Dwyer, C.J. — Kevin Louch appeals from the juvenile court's order of dependency and disposition.[1] Louch contends that there was not sufficient evidence to find his daughter, S.B.-L., dependent and that the trial court erred by ordering out-of-home placement. Finding no error, we affirm.

I

[1] This matter is appropriate for accelerated review pursuant to RAP 18.13A.

Kevin Louch is the father of S.B.-L., who was born on February 3, 2010. S.B.-L. was removed from her parents' care shortly after her birth. The State filed a dependency petition,[2] which Louch contested. The matter was tried over a six-day period in the fall of 2010.[3]

The record is replete with instances of Louch's anger management difficulties; his alcohol use ("[I]t's not like you wake up in the morning at six o'clock and have a beer; I wait until about 12." (Report of Proceedings (RP) at 866)); his marijuana use[4]; his denial of any problems with alcohol dependence or anger; his authoritarian attitude; and his inappropriate expectations for children. As a result of many of these deficiencies, Louch's parental rights to S.B.-L.'s two older siblings were terminated approximately one year before S.B.-L.'s dependency proceeding began. Much of the evidence presented during S.B.-L.'s dependency proceeding related to evidence presented in the termination proceedings concerning the two older children.

Dr. Michael O'Leary, the State's expert witness, testified regarding the risks posed by Louch. Dr. O'Leary indicated that his

opinion is much the same as expressed in the previous

[2] The Department of Social and Health Services filed a dependency petition on February 5, 2010, in Kitsap County, where the parents were believed to be living. However, the court ultimately determined that King County, rather than Kitsap County, had jurisdiction over the case. The petition was dismissed but was later refiled in King County.

[3] S.B.-L.'s mother signed an agreed order of dependency in August 2010 and is not a party to this appeal.

[4] Louch testified that he held a prescription for medical marijuana, which he reportedly uses to treat a seizure disorder, back problems, and asthma. His prescription card expired during the course of trial, on September 30, 2010. Louch testified that he smokes marijuana three times a day. He stated that he would not stop using marijuana but offered that he would not use the drug around his children and that he could use it less often if that was necessary for him to be able to secure custody of his children.

> termination, that I don't see any evidence of significant change on the part of Mr. Louch over the past two years. And the same risk factors I identified are extant and pose a risk to the child especially in terms of [Louch's] emotional volatility and unwillingness to seek appropriate treatment.

RP at 835. Specifically, Dr. O'Leary indicated that the inappropriate developmental expectations held by Louch "are frequently associated with subsequent high levels of frustration and inappropriately harsh parenting behavior." RP at 828. Dr. O'Leary further explained that, notwithstanding that Louch seems to be internalizing some of the parenting instruction that he has received, "unless the alcoholism and emotional behavioral issues are under active treatment, I still consider him to be a danger to the welfare of the child." RP at 836.

Ultimately, the juvenile court herein found:

> (4) . . . In making the January 9, 2009, decision to terminate parental rights, the Kitsap Superior Court found that "[T]here is little likelihood that conditions will be remedied so the above-named child can be returned to either parent in the near future . . . [w]ith regards to the father Kevin Louch, he has failed to address any of his deficiencies. He continues to deny that he has substance abuse, mental health, and domestic violence issues. He continues to drink to intoxication which has resulted in continued law enforcement involvement and resulting arrests. After 2 1/2 years into the dependency, Kevin Louch lacks the rudimentary and essential parenting skills to safely or adequately care for this child. He manifests a narcissistic and authoritarian style. He becomes agitated and volatile when he perceives he is being criticized. His lack of understanding of the child's developmental needs places him at high risk to inflict abuse and punish the child in inappropriate ways."
>
> (5) Testimony in the SBL case supports the Kitsap court's findings. *Very little, if anything, has changed about Kevin Louch since January of 2009.*

Clerk's Papers (CP) at 611-12 (emphasis added).[5] The juvenile court herein further found that Louch "continues to have inappropriate developmental expectations" and "continues to have ongoing contact with law enforcement for incidents of domestic violence or neighborhood conflict [where the] consistent factor in these contacts is that [Louch] appears intoxicated." CP at 612. The court also found that "Louch continues to be a high safety risk for any child placed with him. The father's long history of drug abuse, domestic violence history, communication problems in the community, unmonitored seizure or pseudo-seizure disorder, intermittent explosive disorder,[6] and inappropriate high expectations of children are safety risks to SLB." CP at 612.

The juvenile court entered its findings of fact, conclusions of law, and an order of dependency as to Louch on November 6, 2010. The court also ordered that S.B.-L. was to remain in out-of-home placement with the same foster family with whom her brothers were living.

Louch appeals from the juvenile court's order of dependency and disposition.

[5] Louch assigns error to almost all of the juvenile court's findings of fact, including the court's finding of fact that S.B.-L.'s birth date is February 3, 2010. Our review of the record reveals that each of the court's challenged findings is either supported by undisputed evidence or amply supported by substantial evidence and trial testimony.

[6] One witness testified that intermittent explosive disorder is "a fancy word for being very easily triggered to high levels of anger within [a] very short period of time." RP at 811.

II

Louch first contends that the juvenile court's finding that S.B.-L. is a dependent child pursuant to RCW 13.34.030(6)(c) is not supported by substantial evidence. We disagree.

In order for a court to declare a child dependent, it must find by a preponderance of the evidence that the child meets one of the statutory definitions of a "dependent child" set forth in RCW 13.34.030. RCW 13.34.130; In re Welfare of Key, 119 Wn.2d 600, 612, 836 P.2d 200 (1992). A "dependent child" is any child who (a) has been abandoned, (b) is abused or neglected, or (c) has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which present a danger of substantial damage to the child's psychological or physical development. RCW 13.34.030(6).

The juvenile court's findings in a dependency matter are reviewed under a substantial evidence standard. Key, 119 Wn.2d at 613; In re Dependency of S.S., 61 Wn. App. 488, 504, 814 P.2d 204 (1991). We do not weigh the evidence or the credibility of the witnesses. In re Dependency of M.P., 76 Wn. App. 87, 91, 882 P.2d 1180 (1994). Evidence is substantial where, viewed in the light most favorable to the prevailing party, a rational finder of fact could find the fact in question by a preponderance of the evidence. M.P., 76 Wn. App. at 90-91.

Here, the juvenile court found S.B.-L. to be dependent pursuant to RCW 13.34.030(6)(c). Pursuant to RCW 13.34.030(6)(c), dependency is appropriate where the child "[h]as no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development." A dependency finding does not require proof of actual harm, only a danger of harm. In re Dependency of Schermer, 161 Wn.2d 927, 951, 169 P.3d 452 (2007); see also RCW 13.34.030(6)(c). Progress in being able to care for a child is not alone sufficient to prevent a finding of dependency. In re Dependency of Brown, 149 Wn.2d 836, 841-42, 72 P.3d 757 (2003).

The record here supports the juvenile court's finding that Louch is incapable of adequately caring for S.B.-L. and that there is a danger of substantial damage to S.B.-L. if she is placed in Louch's care. Louch has demonstrated physical and mental health problems[7] that remain unmonitored. Louch also has problems with drug and alcohol involvement and also has recurrent contact with law enforcement. His substance abuse presents a danger of substantial damage to S.B.-L.'s development. Due to his emotional volatility and his unwillingness to seek appropriate treatment, Louch poses a risk to S.B.-

[7] Dr. O'Leary described the personality disorders diagnosed in Louch. He explained that Cluster B personality disorders, including bipolar disorder and borderline personality disorder, have "general characteristics such as externalization of blame in the extreme[,] . . . impulsivity, low frustration tolerance, and chronically poor social adaptation in terms of conflict with community members, family, and so on." RP at 831. He further explained that "Cluster B diagnoses are the ones that repeatedly come to the attention of authorities because they do not accept authority and they tend not to learn from their experience." RP at 831.

L.'s emotional and psychological well being. Moreover, Louch's unrealistic expectations about his child's development present a safety risk to S.B.-L. It is unnecessary for the State to demonstrate that S.B.-L. was actually harmed. J.F., 109 Wn. App. at 731. Rather, the evidence of Louch's substance abuse and emotional state demonstrated that Louch presents a danger of substantial damage to S.B.-L.[8]

Thus, dependency is warranted pursuant to RCW 13.34.030(6)(c). Accordingly, the juvenile court did not err by entering an order of dependency as to S.B.-L.

III

Louch next contends that the juvenile court erred by placing S.B.-L. in out-of-home care. We disagree.

After a court finds a child to be dependent, the court must enter a disposition order. RCW 13.34.130. In the disposition order, the court may order the child removed from the home pursuant to RCW 13.34.130(1)(b). However,

> [a]n order for out-of-home placement may be made only if the court finds that reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child's home and to make it possible for the child to return home, specifying the services . . . that have been provided to the child and the child's parent . . ., and that preventive services have been offered or provided and have failed to prevent the need for out-of-home placement, unless the health, safety, and welfare of the child cannot be protected adequately in the home, and that:
>
> (a) There is no parent or guardian available to care for such child; or

[8] Louch contends that he is not presently unfit and that all the evidence related only to prior unfitness. This is simply not the case.

> . . .
>
> (c) The court finds, by clear, cogent, and convincing evidence, a manifest danger exists that the child will suffer serious abuse or neglect if the child is not removed from the home.

RCW 13.34.130(3). Furthermore, because S.B.-L. is an Indian child within the meaning of the Indian Child Welfare Act (ICWA),[9] the trial court must make additional findings in order to place the child in out-of-home care. 25 U.S.C. § 1912. ICWA requires that:

> No foster care placement[10] may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(e).

> "To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result."

In re Mahaney, 146 Wn.2d 878, 892, 51 P.3d 776 (2002) (quoting Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,593 (Nov. 26, 1979)). The trial court's placement decision in a dependency proceeding is reviewed for an abuse of discretion. In re Dependency of A.C., 74 Wn. App.

[9] It is undisputed that S.B.-L. is an Indian child within the meaning of ICWA, as she was eligible for membership in the Nooksack tribe.

[10] ICWA defines foster care placement as "any action removing an Indian child from its parent . . . for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent . . . cannot have the child returned upon demand, but where parental rights have not been terminated." 25 U.S.C. § 1903(1)(i).

271, 275, 873 P.2d 535 (1994).

Louch contends that there was not clear, cogent, and convincing evidence to support findings both that S.B.-L. was in manifest danger of serious abuse and neglect such that out-of-home placement was necessary, as required by RCW 13.34.130(3)(c),[11] and that continued custody with Louch was likely to result in serious emotional or physical damage to S.B.-L., as required by ICWA.

As described above, however, the record contains clear, cogent, and convincing evidence that placement of S.B.-L. with Louch does present such dangers. Louch's intermittent explosive disorder combined with his inappropriate development expectations presents a danger that Louch would become frustrated and would engage in inappropriately harsh parenting behavior. Moreover, Louch's substance abuse and mental health issues presented an obvious danger that Louch would cause serious emotional, if not physical, damage to his daughter. His recurrent contact with law enforcement and numerous instances of domestic violence presents an obvious danger that S.B.-L. would be subjected to abuse or neglect. Finally, Louch's "emotional volatility and unwillingness to seek appropriate treatment" presents a manifest danger to S.B.-L. RP at 835.

Accordingly, the record amply supports the trial court's findings and conclusions that placing S.B.-L. in Louch's custody would result in manifest

[11] In addition to finding RCW 13.34.130(3)(c), the trial court also found that S.B.-L should be placed in out-of-home care because "[t]here is no parent or guardian available to care for such child." RCW 13.34.130(3)(a). This finding is also supported by substantial evidence.

danger of serious abuse and neglect and would likely result in serious emotional or physical damage to S.B.-L. Thus, the trial court's disposition order placing S.B.-L. in out-of-home care was not erroneous.

IV

Louch finally contends that the trial court erred by placing S.B.-L. in out-of-home care because the State failed to demonstrate that active efforts were made to provide remedial services to prevent the breakup of the family. We disagree.

25 U.S.C. § 1912(d) requires:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

See also RCW 13.34.130(3). However, the State is not required "to continue making active efforts to remedy parental deficiencies at the expense of physical or emotional damage to the child." In re Dependency of A.M.,106 Wn. App. 123, 136, 22 P.3d 828 (2001).

To the extent that Louch challenges the disposition ordering out-of-home placement after S.B.-L. was found dependent, Louch's argument fails.[12] Louch was offered numerous services after the shelter care hearing and prior to the entry of the order of dependency, including chemical dependency assessment,

[12] To the extent that Louch challenges the out-of-home placement ordered after the shelter care hearing, his argument also fails. "[S]ervices offered in prior dependencies are properly considered as factual evidence in a current dependency." In re Welfare of Angelo H., 124 Wn. App. 578, 587, 102 P.3d 822 (2004); see also In re Dependency of P.A.D., 58 Wn. App. 18, 31, 792 P.2d 159 (1990). During the prior dependencies for his two sons, Louch was ordered to complete numerous services. The prior services that were offered included "[c]asework services, psychological evaluation and parenting assessment, parenting classes, drug/alcohol evaluation and treatment, random UA's, mental health counseling, medication management for mental health issues and pseudo-seizure disorder, domestic violence perpetrator treatment, assistance provided to help obtain secure housing free from alcohol, drugs, and domestic violence, and visitation." State's Ex. 1 at 3.

mental health assessment, domestic violence assessment, random UAs, and parenting classes. However, he agreed only to take parenting classes. A social worker attempted to engage Louch in the other proffered services, but Louch resisted these services because he had not been ordered by the court to complete them. "[A] parent's unwillingness or inability to make use of the services provided excuses the State from offering extra services that might have been helpful." In re Dependency of Ramquist, 52 Wn. App. 854, 861, 765 P.2d 30 (1988).

Louch argues, however, that the State failed to satisfy its obligations because it did not provide him with an alcohol dependency treatment program that would allow him to continue using medical marijuana. Louch's former social worker, provided by the Office of Public Defense during the prior dependencies, testified that he had located a program that he believed "would be able to work" with Louch to allow Louch to enter into treatment but to continue using marijuana. RP at 649. However, the social worker could not remember the name of the program, and he indicated that it was a "private pay" facility that the State did not have adequate funds to cover during the prior dependency proceedings. RP at 649-50. Moreover, there is no evidence that Louch provided the current social worker with information about that program or that Louch indicated that he would be willing to enter into such a program. Rather, the evidence presented at trial demonstrated that Louch was universally

resistant to all services offered by the State that were not court-ordered. In order to satisfy its statutory obligations, the State was required to make "active efforts . . . to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family"; the State was not required to provide Louch with an alcohol dependency treatment program that would allow him to continue using medical marijuana.

Affirmed.

Dwyer, C. J.

We concur:

Becker, J.

Leach, A. C. J.