IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

LOUIS C.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY AND J.C.,
Appellees.

No. 2 CA-JV 2014-0127
Filed June 25, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Pima County
No. JD20140107
The Honorable Geoffrey L. Ferlan, Judge Pro Tempore

AFFIRMED

COUNSEL

The Law Office of Mark F. Willimann, LLC, Tucson
By Mark F. Willimann
Counsel for Appellant

Mark Brnovich, Arizona Attorney General
By Laura J. Huff, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 Louis C. appeals from the juvenile court's order adjudicating his twelve-year-old son, J.C., dependent as to him. His arguments that his conduct was justified pursuant to A.R.S. §§ 13-403, and 13-413, and that the juvenile court erred in adjudicating J.C. dependent based on a preponderance of the evidence, in light of A.R.S. §§ 1-601, 1-602, and 13-205, are addressed in a separate opinion in this case. *See* Ariz. R. Sup.Ct. 111(h); Ariz. R. Civ. App. P. 28(g); Ariz. R. P. Juv. Ct. 103(G). His remaining arguments relating to certain evidentiary and other rulings are considered in this unpublished memorandum decision. For the following reasons, we affirm the court's order.

Discussion

¶2 The factual and procedural history of this matter is set forth in detail in our contemporaneously filed opinion; we refer to that history here only in the context of the remaining issues on appeal: Louis's claims that the juvenile court abused its discretion in admitting police photographs of J.C.'s injuries and in declining to admit a post-removal medical report. He also alleges the court "erred" with respect to its finding of fact about J.C.'s initial removal and "failed to establish a cohesive standard" to assess physical abuse. Louis concludes with a request for his attorney fees pursuant to A.R.S. § 13-420.

Admission of Police Photographs

¶3 Louis maintains the juvenile court erred in admitting police photographs of J.C.'s injuries during a detective's testimony because the detective had not been present when the photographs

were taken, had never seen J.C.'s injuries, and had only viewed the photographs on the photographer's camera after he arrived at the CAC. We review for abuse of discretion a court's decision to admit evidence over a party's objection. *State v. Haight–Gyuro*, 218 Ariz. 356, ¶ 7, 186 P.3d 33, 35 (App. 2008).

¶4 In this case, we need not determine whether the detective's testimony was "'sufficient evidence to support a . . . finding'" that the photographs accurately depicted J.C.'s condition on February 7. *Id.* ¶ 8, *quoting State v. Lavers*, 168 Ariz. 376, 386, 814 P.2d 333, 343 (1991) (alteration added). The next police officer to testify explained he had been with J.C. when the challenged photographs were taken and recognized them as accurately depicting J.C.'s injuries that day. The officer's testimony, based on his personal knowledge, clearly established ample foundation for admission of the photographs. *See* Ariz. R. Evid. 901(b)(1); *cf. State v. Shook*, 1 Ariz. App. 458, 462, 404 P.2d 724, 728 (1965) (any error in admitting confession outside jury's presence "cured" when foundation subsequently established); *United States v. Hughes*, 658 F.2d 317, 323 (5th Cir. 1981) (admission of tape recordings would not be disturbed where "sufficient independent evidence of [their] accuracy" developed after their admission).

Exclusion of Post-Removal Medical Record

¶5 Louis also contends the juvenile court "violated" Rule 45(D), Ariz. R. P. Juv. Ct., when it sustained DCS's objection to admission of a physician's report of J.C.'s wellness examination dated February 13, 2014, finding the exhibit lacked proper foundation. In his opening brief, Louis cites Rule 45(D) as providing, "[A]ny . . . medical . . . evaluation of any party . . . shall be admitted into evidence." He argues the court's ruling "must be reversed" because its exclusion of the medical report "contradicts Rule 45(D)'s edict directly."

¶6 As DCS points out, Louis never raised this argument at the dependency hearing; DCS argues he has therefore waived the issue on review. Assuming, without deciding, that fundamental error review applies, as suggested by Louis, we find no error.

¶7 DCS also points out that Louis has quoted Rule 45(D) selectively; the full rule provides that a medical report shall be admitted into evidence if "disclosed to the parties" and if "the author of the report is available for cross-examination." [1] Rule 44(B)(2), Ariz. R. P. Juv. Ct., requires parties to disclose, before a dependency hearing, a list of witnesses and a "list of and copies of all exhibits," and it further provides, "No witness shall be called at trial" and "[n]o exhibits . . . used at trial" other than those disclosed in a pre-hearing statement, "except for good cause shown." *Id.*

¶8 In Louis's pre-hearing statement, he listed exhibits to include "[J.C.'s] medical records" generally, without identifying the February 13 report or including a copy of it, and without identifying the report's author as a witness. And nothing in the record suggests he subpoenaed the report's author to testify, in order to comply with Rule 45(D)'s requirements. The juvenile court did not violate that rule, as Louis claims, but enforced its provisions appropriately. We find no error, much less error that could be characterized as fundamental.

Preliminary Protective Hearing

¶9 After the juvenile court had taken the matter under advisement, Louis filed a request for findings of fact, specifically asking the court to determine "[w]hether the initial [DCS] removal was based on a finding of imminent harm to the minor or the unavailability of a parent during the four days [Louis] was in custody." In response to this request, the court included the following finding in its dependency adjudication order: "[The court's] decision regarding the initial removal was based on both the

[1]Appellate counsel is reminded of his ethical duty of "Candor Toward the Tribunal," ER 3.3(a), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42, which prohibits "mak[ing] a false statement of fact or law to a tribunal" and also requires "disclos[ure] to the tribunal [of] legal authority in the controlling jurisdiction known to [him] to be directly adverse to the position of [his] client."

unavailability of a parent while [Louis] was incarcerated and the risk of imminent harm to [J.C.]." But that finding is of no moment with respect to the court's adjudication of J.C.'s dependency. Moreover, although Louis denied the allegations of dependency, the record reflects that both parents "waiv[ed] a review of temporary custody" at the preliminary protective hearing; in doing so, Louis waived any such challenge to J.C.'s initial removal.

¶10 Even assuming this waived issue is subject to fundamental, prejudicial error review on appeal, the record belies Louis's contentions that DCS's dependency petition "claiming that [he] was incarcerated . . . was filed and temporary orders issued under false pretenses" and that "there was no question [he] was available to parent J.C." when the petition was filed.[2] Specifically, the dependency petition alleged that Louis had been arrested after he "hit [J.C.] with a belt several times," and that, on the date the petition was filed, "there [was] a no-contact order in place between [Louis] and [J.C.]." Similarly, in her preliminary protective hearing report, a DCS specialist informed the juvenile court that Louis "was released from [custody] on 02/10/14" and "[o]ne of [his] conditions of release [wa]s no contact of any kind with [J.C.]."

¶11 Louis does not dispute that he was incarcerated when DCS took temporary custody of J.C. on February 7, 2014. And, after he was released, he was "unavailable" to parent J.C. because of the no-contact order identified in DCS's petition. Thus, although we conclude this issue is of no consequence to the court's determination of J.C.'s dependency, we also conclude ample evidence supports a finding that J.C.'s initial removal was based on "both the unavailability of a parent . . . and the risk of imminent harm to [J.C.]." We see no error, let alone fundamental error, in this finding.

Determination of Physical Abuse

¶12 Finally, Louis asserts the juvenile court "failed to establish a cohesive standard to judge whether Louis physically abused J.C.," but he assigns no error and develops no legal

[2]*See supra* note 1.

argument that the court was required to do anything other than apply Arizona's existing law to the facts presented. As we determined in the contemporaneously filed opinion in this matter, there was sufficient evidence to support the court's ruling.

¶13 Similarly, Louis does not support his suggestions that "Arizona needs a written standard defining 'presumed unreasonable' force" and that this court "establish a comprehensive set" of such standards for determining whether a child has been physically abused. As a rule, we will not decide a question "unrelated to an actual controversy," and we do not "act as a fountain of legal advice." *Contempo-Tempe Mobile Home Owners Ass'n v. Steinert*, 144 Ariz. 227, 229, 696 P.2d 1376, 1378 (App. 1985). We thus decline Louis's request for an advisory opinion here. *See Freeport McMoRan Corp. v. Langley Eden Farms, LLC*, 228 Ariz. 474, ¶ 15, 268 P.3d 1131, 1135 (App. 2011) (appellate court does "not issue advisory opinions or decide unnecessary issues").

Disposition

¶14 The juvenile court's ruling adjudicating J.C. dependent as to Louis is affirmed. Louis is not a prevailing party and his request for attorney fees pursuant to § 13-420 is denied.