

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

S.L. AND T.L.,
Appellants,

v.

SALLY L. AND DEPARTMENT OF CHILD SAFETY,
Appellees.

No. 2 CA-JV 2016-0193
Filed February 8, 2017

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NOT FOR PUBLICATION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. JD20160430
The Honorable Brenden J. Griffin, Judge

AFFIRMED

COUNSEL

Pima County Office of Children's Counsel, Tucson
By Edith Croxen and John Walters
Counsel for Appellants

Mark Brnovich, Arizona Attorney General
By Dawn R. Williams, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

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Ellinwood and Francis, LLP, Tucson
By D. Tyler Francis
Counsel for Appellee Sally L.

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Vásquez concurred.

H O W A R D, Presiding Judge:

¶1 Nine-year-old S.L. and his brother, five-year-old T.L., appeal from the juvenile court’s dismissal of their dependency proceedings. They argue the court erred in ruling the state failed to prove, by a preponderance of the evidence, that they were dependent children. We affirm the court’s ruling.

Factual and Procedural Background

¶2 “[W]e view the evidence in the light most favorable to sustaining the juvenile court’s findings.” *Willie G. v. Ariz. Dep’t of Econ. Sec.*, 211 Ariz. 231, ¶ 21, 119 P.3d 1034, 1038 (App. 2005). S.L. and T.L.’s parents, Sally L. and Eric L., divorced in 2013, and Sally was awarded primary legal custody of the boys. Around the same time, Sally began dating Richard H., who told her within a few weeks of their meeting that he was a registered sex offender, “that all it had to do with was public indecency,” and that he had received sex offender treatment.

¶3 Sally and the boys moved into Richard’s home in 2014, and, on the advice of counsel, she notified Eric of Richard’s sex-offender status. Near the end of that year, Eric contacted the Department of Child Safety (DCS) to report his concerns about those living arrangements. That report was closed as unsubstantiated, but it had prompted visits from a local police office and a DCS

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investigator. Sally subsequently enrolled the boys in therapy so they would be prepared for Eric's return to their lives¹ and "to make sure that they had another outlet . . . if ever they needed to talk to somebody" other than her or her parents. During the intake interview, Sally told the therapist of Richard's sex-offender background and provided her with a copy of the recent DCS report. The boys were discharged from therapy later that year.

¶4 In late April 2016, nude photographs of T.L. were found on Richard's laptop computer, and he was arrested for sexual exploitation of a minor.² While Richard was in custody, Sally moved into her parents' home, as part of a safety plan approved by DCS. She posted bond for Richard's release, using his money, but ended their relationship shortly thereafter, seeing him only once in order "to get all of [their] joint things unjointed." In mid-June, she met with Richard's attorneys to explain her belief that the photographs of T.L. had been inadvertently taken during a test run of "photo booth" software she and Richard used in their photography business.³ According to Sally, she has had no further

¹Sally testified that the boys had no contact with Eric between 2012 and 2014.

²When Richard was arrested, S.L. and T.L. were with Eric, who was exercising his approved weekend parenting time. Eric obtained an order of protection against Sally, retained physical custody of the boys, and filed a motion for modification of legal decision-making. Sally, in turn, filed a petition for emergency modification of parenting time. On May 9, the domestic relations court dismissed the order of protection against Sally and entered temporary orders granting Eric full legal decision-making authority and fifty-percent parenting time, with a weekly transfer of the boys between their parents' homes. The court also ordered Sally to obtain an order of protection against Richard, which she did. The court noted in its minute entry that "it d[id] not feel that the minor children will be in imminent danger" from the resumption of Sally's parenting time.

³Sally testified that she has never been shown the photographs that led to Richard's arrest. But she explained that the police had

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contact with Richard, and she has completed the non-offending parent class recommended by DCS.

¶5 DCS took temporary physical custody of the boys in July and placed them with Eric. In a dependency petition, DCS alleged Sally had failed to protect the children from Richard, noting his prior record and his recent arrest. According to the petition, although Sally initially had moved to her parents' home and agreed to accept in-home services, she "continued to believe [Richard] had done nothing wrong and was not a threat to her children" and had failed to inform the children's therapists about the pending allegations against him. DCS also expressed "concern that [Sally] has allowed continued contact between [Richard] and the children." With respect to the dependency as to Eric, DCS alleged he "lacks the legal ability to protect the children from [Sally's] failure to protect," stating that Sally "has a sole legal decision making order for the children" and that Eric's May motion regarding a change of custody had been denied by the domestic relations court. Eric admitted those allegations, and the children were adjudicated dependent as to him on October 6, 2016.

¶6 The DCS investigator, Sally, and Sally's father testified at a contested dependency hearing held the following week. At the close of the hearing, the juvenile court found DCS had failed to establish a dependency, citing the absence of direct evidence that Richard had abused T.L. by taking or possessing pornographic photographs of him. The court noted the photographs had not been admitted in evidence and "[t]here is conflicting evidence about what

asked her to identify T.L. by showing her a photograph of him "from the waist up," taken when he was two-and-a-half or three years old. She believed that picture was one of a series of photographs inadvertently taken by the photo booth software—while she was out of the room and T.L. was "being silly"—and she assumed the exploitation charges were based on those photographs.

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they show.”⁴ Based on its conclusion that DCS “failed to meet its burden to show that a dependency exists today in this case,” the juvenile court vacated its earlier adjudication of dependency as to Eric and dismissed the dependency proceeding. This appeal followed.

Discussion

¶7 Under A.R.S. § 8-201(15)(a)(i), a “[d]ependent child” is defined as one who is “[i]n need of proper and effective parental care and control and who has . . . no parent or guardian willing to exercise or capable of exercising such care and control.” A dependent child is also defined as one “whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent, a guardian or any other person having custody or care of the child.”⁵ § 8-201(15)(a)(iii). “Neglect” is defined, in relevant part, as “[t]he inability or unwillingness of a parent, guardian or custodian of a child to provide that child with supervision . . . if that inability or unwillingness causes unreasonable risk of harm to the child’s health or welfare.” § 8-201(25)(a).

¶8 A determination of dependency requires proof by a preponderance of the evidence. A.R.S. § 8-844(C)(1). We review a dependency adjudication for an abuse of discretion, *Louis C. v. Dep’t of Child Safety*, 237 Ariz. 484, ¶ 12, 353 P.3d 364, 368 (App. 2015), and we recognize that the juvenile court, as the trier of fact, “is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts,” *Ariz. Dep’t of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004). Accordingly, we do not reweigh the evidence on review, *id.*

⁴The lead investigator on the exploitation charges against Richard testified at the domestic relations court hearing on May 9, but he was not called as a witness for the dependency adjudication.

⁵Portions of the definitions statute were renumbered in 2016, but the applicable text was not amended. See 2016 Ariz. Sess. Laws, ch. 300, § 1. We refer to the current version of the statute throughout.

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¶ 14, but defer to the juvenile court’s ability to weigh and analyze the evidence, *Louis C.*, 237 Ariz. 484, ¶ 12, 353 P.3d at 368. Thus, we will not reverse a juvenile court’s order for insufficient evidence unless, as a matter of law, no reasonable fact-finder could have reached the same result under the applicable burden of proof. See *Denise R. v. Ariz. Dep’t of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009).

¶ 19 Citing *Shella H. v. Department of Child Safety*, 239 Ariz. 47, ¶¶ 16-17, 366 P.3d 106, 110 (App. 2016), the children argue the juvenile court abused its discretion because it failed to recognize a “substantiated and unresolved threat to [them] at the time of adjudication,” caused by Sally’s “fail[ure] to acknowledge, let alone address, the exploitation of her children through her denial of the issue.”⁶ But, in ruling from the bench, the court observed that, although DCS alleged Sally was “minimizing” Richard’s conduct, “that’s only the case if the rest of [DCS’s] case . . . reaches a preponderance of the evidence, and I don’t think . . . that it did.”

¶ 10 The court further found much of Sally’s testimony credible—including evidence that she had “taken protective steps” by obtaining an order of protection and attending classes. In focusing “on whether or not a dependency exists today,” the court “was not convinced” Sally was likely to “go back to [Richard], that she would get involved in another relationship that would submit the kids to abuse, [or] that she wouldn’t get them whatever treatment they need,” and it questioned whether the DCS investigator was qualified to render an expert opinion on those

⁶ The children dispute the juvenile court’s finding of “conflicting evidence” with respect to the photographs, maintaining the DCS investigator’s testimony provided “uncontroverted evidence” about “at least one photo obtained from the computer.” But the DCS investigator’s testimony was inconsistent with her preliminary protective hearing report, with Sally’s testimony about what she had been told by the police, and, arguably, with the charges in Richard’s indictment. Thus, the record supports the court’s finding of conflicting evidence.

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issues. Finally, the court observed, “There are also others involved in the care of the children now,” noting the temporary orders entered in the domestic relations court affording Eric full legal-decision-making authority and fifty-percent parenting time. *See supra* n.2.

¶11 In *Shella H.*, this court concluded a juvenile court must determine whether a child is dependent based upon “the circumstances as they exist at the time of the dependency adjudication hearing,” rather than at the time of the child’s removal. 239 Ariz. 47, ¶¶ 1, 12, 366 P.3d at 107, 109. In that case, “[a]lthough the juvenile court articulated the wrong moment in time when the dependency must be found to have existed,” *id.* ¶ 17, we affirmed the dependency adjudication because substantial evidence supported a determination that the parent had failed to acknowledge or address instances of domestic violence expressly found by the court. *Id.* ¶¶ 14-17.

¶12 But in affirming the court’s ruling, we emphasized that “[w]e will not second-guess the court’s assessment” of a witness’s credibility. *Id.* ¶ 15. Thus, we recognized that a “substantiated and unresolved threat is sufficient” to support a dependency based on past conduct. *Id.* ¶ 16. We did not, however, conclude a dependency must be found whenever such a threat is alleged. Essentially, the children are asking that we “reweigh the evidence or substitute our judgment for that of the juvenile court,” which we will not do. *Bennigno R. v. Ariz. Dep’t of Econ. Sec.*, 233 Ariz. 345, ¶ 31, 312 P.3d 861, 867 (App. 2013).

Disposition

¶13 The juvenile court’s determination that DCS failed to establish the dependencies of S.L. and T.L. by a preponderance of the evidence is supported by the record, and we cannot say, as a matter of law, that no reasonable person could have reached the same conclusion. *See Denise R.*, 221 Ariz. 92, ¶ 10, 210 P.3d at 1266. Accordingly, the dismissal of the dependency is affirmed.