IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

STEVEN P.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY AND O.P.,
Appellees.

No. 2 CA-JV 2019-0139
Filed May 5, 2020

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NOT FOR PUBLICATION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 Pinal County
No. S1100JD201900005
The Honorable DeLana J. Fuller, Judge Pro Tempore

AFFIRMED

COUNSEL

Harriette P. Levitt, Tucson
Counsel for Appellant

Mark Brnovich, Arizona Attorney General
By Cathleen E. Fuller, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 Steven P., father of O.P., born in August 2014, appeals from the juvenile court's order adjudicating his son dependent. Steven maintains there was insufficient evidence to support the court's dependency adjudication on the ground that he had sexually abused O.P. Finding no error, we affirm.

¶2 A dependent child includes one "[i]n need of proper and effective parental care and control . . . who has no parent . . . willing to exercise or capable of exercising such care and control," A.R.S. § 8-201(15)(a)(i), or "whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent," § 8-201(15)(a)(iii). The statute also defines abuse, in relevant part, as "[i]nflicting or allowing . . . sexual conduct with a minor pursuant to § 13-1405" or "molestation of a child pursuant to § 13-1410." § 8-201(2)(a). The allegations in a dependency proceeding must be proven by a preponderance of the evidence, A.R.S. § 8-844(C), and, because the primary concern in a dependency proceeding is the best interests of the child, "the juvenile court is vested with 'a great deal of discretion,'" *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, ¶ 21 (App. 2005) (quoting *Ariz. Dep't of Econ. Sec. v. Superior Court*, 178 Ariz. 236, 239 (App. 1994)). We defer to the juvenile court's ability to weigh and analyze the evidence. *Shella H. v. Dep't of Child Safety*, 239 Ariz. 47, ¶ 13 (App. 2016). Accordingly, "[w]e will only disturb a dependency adjudication if no reasonable evidence supports it." *Id*.

¶3 On appeal, we view the evidence in the light most favorable to affirming the factual findings upon which the juvenile court's order is based. *Willie G.*, 211 Ariz. 231, ¶ 21. In December 2018, the Department of Child Safety (DCS) received a report that O.P. had told his mother that Steven had "licked his butt and 'wee wee.'"[1] The police were contacted and

[1]The mother then obtained an order of protection naming O.P. as a protected person, although it is not entirely clear when Steven was served

a forensic interview of O.P. was conducted a few days later. Steven denied the allegations and reported that the mother, who he asserted had mental health and substance abuse issues, had fabricated the allegations and had "capitalize[d]" on O.P.'s ability to memorize things. DCS took custody of O.P. and placed him in the home with the mother and maternal grandfather. DCS filed a dependency petition as to both parents in January 2019.[2] In September 2019, following a contested adjudication hearing as to Steven, the juvenile court adjudicated O.P. dependent as to him.

¶4 At the hearing, held in July 2019, forensic interviewer Stephanie Stewart testified that O.P. had not faltered or equivocated during her interview with him and that his story had been consistent, detailed, and included a description of how he felt about what had occurred. O.P. reported to Stewart that Steven had "licked his butt and his wee" while he was in his aunt's bathroom[3] and that this had occurred more than one time while he was four years old; O.P. also provided a demonstration on Stewart's finger to show how Steven had licked his penis. Stewart opined that O.P.'s interview had been "compelling" and that she believed he had "actually experienced" the described events. She was particularly impressed that O.P. recalled how Steven had bent over him to lick him, a detail she opined showed that this "actually happened to him." Stewart explained that although young children who have been coached by an adult will often reveal that fact, that did not occur here; O.P. did not give the impression his statements were scripted.

¶5 Detective Peter Tejeda, the lead investigator on O.P.'s case, observed the forensic interview with Stewart from another room. Tejeda testified that during the interview O.P. had not faltered, changed his story from the original allegations, or appeared nervous. O.P. recalled specific details regarding the incidents, identified relevant body parts, and demonstrated what had occurred. Tejeda also testified that although

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with that order. In June 2019, O.P. recanted his allegations against Steven, discussed in greater detail below.

[2]The mother, who is not a party to this appeal, did not contest the allegations in the petition and the juvenile court adjudicated O.P. dependent as to her in April 2019.

[3]Because of an allegation that Steven had "elbowed" O.P., he was not permitted to have unsupervised visits with his son; the visits were supervised at the home of O.P.'s aunt.

Steven had denied the allegations against him, indicating the mother had "put [O.P.] up to it," he nonetheless acknowledged that he had entered the restroom alone with O.P. for four to seven minutes during the supervised visitations and that he had unsupervised time with his son in a tent in the backyard. Tejeda acknowledged that the unsupervised time with O.P. in the bathroom would have provided Steven the time and opportunity to commit the alleged acts. Tejeda testified that he was aware of the mother having reviewed the facts related to the allegations with O.P. more than once *after* the forensic interview, but he was not aware of her having done so beforehand. He further testified that although the Pinal County Attorney's Office had declined to file criminal charges against Steven, meaning they did not "believe there [was] probable cause to try [him]," that "does not indicate that the event did not happen at all."

¶6 The aunt who supervised the visits between O.P. and Steven testified that O.P. had told her Steven had licked him on his "cheek," after which he had pointed to his "butt." She believed he told her this during Steven's last visit with O.P.[4] She also testified that although O.P. usually went to the restroom alone, she recalled that Steven had at times spent approximately five or six minutes with O.P. in the restroom. She further stated that Steven and O.P. had played in a tent in her backyard without her supervision.

¶7 DCS case manager Stephanie Cooper testified that although O.P. had told her in May 2019 that Steven had "hurt him," near the end of June, he told her Steven had not done the "yucky stuff" and that he thought he was telling a joke by saying he had. However, Cooper received reports that, also in June 2019, O.P. stood up in front of an entire church congregation and announced on the microphone that "his daddy hurt him." Cooper and Stewart both testified that it is not uncommon for children to recant prior allegations, with Stewart stating this is even more common when the alleged abuser is a parent, and Cooper adding this often occurs because they miss the parent. Cooper testified that by the time O.P. recanted to her, the mother had already contacted DCS to disclose O.P.'s possible recantation.

¶8 In September 2019, the juvenile court adopted as factual findings the allegations in the dependency petition, and adjudicated O.P. dependent as to Steven. Acknowledging "[t]his is a very difficult case," the court noted that O.P.'s original story, which he had disclosed to more than

[4]That visit occurred in late November 2018.

one person, was articulate, detailed, descriptive and consistent, and added that it found the demonstration O.P. had provided to Stewart "quite compelling." The court stated that although it was unable to tell if O.P. had been coached because the disclosure and the forensic interview were so close in time, it nonetheless noted that it found Stewart's credibility "topnotch." And although the court stated it could not tell if the alleged acts had actually happened, it believed at the very least that "something happened." Notably, the court also found that O.P. believed the acts had occurred.

¶9 The juvenile court also stated, "[t]his is not a beyond-a-reasonable-doubt standard, it's a preponderance of the evidence and that's not much." Noting it needed to look out for the safety of the child, the court determined "a dependency needs to be found purely and simply for safety precautions," and concluded that Steven and O.P. need to continue to participate in counseling services to process "whatever happened." The court found the case plan goal of family reunification appropriate.[5]

¶10 On appeal, Steven argues ''if there wasn't even enough evidence to charge [him] with a crime, there certainly wasn't a preponderance of evidence that he actually sexually abused O.P." He asserts that, because the probable cause finding necessary to charge an individual criminally requires a lower burden of proof than a preponderance of the evidence standard in a dependency matter, and because he was not charged criminally, there could not have been sufficient evidence to support the dependency adjudication.[6] We disagree.

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[5]We note that our law does not support separating parents from their children as a "safety precaution" and that the "more likely than not" preponderance standard is not a trivial hurdle to clear. But, notwithstanding the trial court's characterizations, the totality of its findings are appropriate and supported by the record.

[6]To the extent Steven suggests the juvenile court failed to even consider the standard of proof to find probable cause, instead referring incorrectly to the beyond a reasonable doubt standard when it ruled, we see no error. Taken in context, it appears the court was merely commenting that the standard it was required to apply was *not* beyond a reasonable doubt, rather, it was a preponderance of the evidence.

¶11 Many factors may have influenced the prosecutor's decision whether or not to proceed with a case against Steven, and those factors are neither a part of the record before us nor has Steven established why they are dispositive of the outcome in the dependency matter. Unlike in a criminal case, the juvenile court's primary concern here was O.P.'s safety, as the court properly noted. *See In re Santa Cruz Cty. Juv. Action Nos. JD-89-006 & JD-89-007,* 167 Ariz. 98, 102 (App. 1990) (focus of definition of dependency "is not on the conduct of the parents but rather the status of the child"). The fact that the prosecutor declined to proceed with a criminal prosecution against Steven does not in any way undermine the court's dependency adjudication in this matter, which is supported by ample evidence.

¶12 Steven also points to evidence of the mother's repeated efforts to "orchestrate[]" allegations against him and to coach O.P. to make false allegations. He maintains the juvenile court failed to recognize the connection between the mother's conduct and the credibility of O.P.'s claims, and contends there was no evidence to support the allegations of sexual abuse other than testimony that Steven had taken O.P. in the bathroom alone to clean him. He also argues that Stewart was not aware of mother's "machinations" because most of them occurred after her interview with O.P. As Steven recognizes, however, the court was squarely presented with evidence that the mother may have coached O.P., a fact it expressly acknowledged when it ruled. Steven essentially asks that we reweigh the evidence on appeal, which we will not do. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 12 (App. 2002) (appellate court does not reweigh evidence on review).

¶13 We affirm the juvenile court's adjudication order.