

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

ROBERT W.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY AND N.W.,
Appellees.

No. 2 CA-JV 2019-0160
Filed February 24, 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NOT FOR PUBLICATION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 Gila County
No. S0400JD201900030
The Honorable Gary V. Scales, 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

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MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

BREARCLIFFE, Judge:

¶1 Robert W. appeals from the juvenile court's November 2019 order adjudicating his son, N.W., born in August 2016, a dependent child.¹ For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to affirming the juvenile court's findings. *See Oscar F. v. Dep't of Child Safety*, 235 Ariz. 266, ¶ 6 (App. 2014). In July 2019, the Department of Child Safety (DCS) received a report of a domestic-violence altercation between Robert and N.W.'s mother. N.W.'s mother, who has multiple sclerosis and difficulty walking, called the police the day prior. She reported that she was trying to leave Robert's home—where she was staying—in her electric scooter, with N.W. sitting with her, when Robert stopped in front of the scooter. When she moved forward, Robert attempted to stop the scooter, causing the handlebars to hit N.W. in the chest. Thereafter, the mother and N.W. went to stay with a neighbor. However, because the mother was unable to care for N.W. due to her medical condition, DCS took custody of N.W.

¶3 Shortly thereafter, DCS filed a dependency petition, alleging that N.W. was dependent as to Robert due to neglect. Specifically, the petition alleged that Robert was “unable to provide for [N.W.'s] basic necessities, such as supervision, food, clothing, shelter, financial support and/or medical care,” explaining, in part, that the mother's medical issues limit her ability to care for N.W. but Robert had failed to seek custody. In addition, the petition alleged that Robert was “unable to parent due to domestic violence,” listing both the scooter incident, as well as another incident in which he had held the mother down on their bed for thirty minutes, repeatedly telling her she was crazy.

¹The juvenile court also found N.W. dependent as to his mother, who is not a party to this appeal.

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¶4 After a contested dependency hearing, the juvenile court issued its order, adjudicating N.W. dependent. In relevant part, the court explained:

The evidence . . . showed that Mother and [Robert] have a history of domestic violence in the home to which the child was exposed. Mother attempted to leave the house on her scooter and [Robert] and Mother engaged in domestic violence when [Robert] attempted to stop Mother. The child was involved and was struck in the chest with the handle bars on the steering wheel. [Robert] also demonstrated his anger by throwing a dirty diaper against the wall in the presence of DCS staff. The police have also visited the home in disputes about the child. [Robert] has also thrown the Mother out of the house on more than one occasion with nowhere to go. According to witnesses at [t]rial the Mother and [Robert] engaged in verbal abuse in front of the child which this Court finds is domestic violence.

This appeal followed.

Discussion

¶5 Robert argues the juvenile court erred in finding a dependency exists as to him. “We will only disturb a dependency adjudication if no reasonable evidence supports it.” *Shella H. v. Dep’t of Child Safety*, 239 Ariz. 47, ¶ 13 (App. 2016). Because the paramount concern in a dependency case is the child’s best interests, the juvenile court is vested with considerable discretion. *Willie G. v. Ariz. Dep’t of Econ. Sec.*, 211 Ariz. 231, ¶ 21 (App. 2005). Moreover, we defer to the juvenile court’s ability to judge the credibility of witnesses, observe the parties, and weigh the evidence. *In re Pima Cty. Dependency Action No. 93511*, 154 Ariz. 543, 546 (App. 1987).

¶6 A dependent child is one who is “[i]n need of proper and effective parental care and control and has no parent or guardian . . . willing to exercise or capable of exercising such care and control” or “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.” A.R.S.

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§ 8-201(15)(a)(i), (iii). “Neglect” means “[t]he inability or unwillingness of a parent, guardian or custodian of a child to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes unreasonable risk of harm to the child’s health or welfare.” § 8-201(25)(a). DCS must prove the allegations in a dependency proceeding by a preponderance of the evidence based on the circumstances existing at the time of the hearing. A.R.S. § 8-844(C); *Shella H.*, 239 Ariz. 47, ¶ 12.

¶7 Domestic violence between the parents to which the child is exposed supports a finding of dependency. *Shella H.*, 239 Ariz. 47, ¶¶ 14-17; see also *In re Pima Cty. Juv. Dependency Action No. 96290*, 162 Ariz. 601, 604 (App. 1990) (where abuse exists in home, statute does not preclude state from acting to protect newborn until specific injury has been inflicted upon him). And the “domestic violence need not be continuous or actively occurring at the time of the adjudication hearing.” *Shella H.*, 239 Ariz. 47, ¶ 16. “[T]he substantiated and unresolved threat is sufficient.” *Id.*

¶8 Robert contends that “no reasonable trier of fact could make the factual findings” the juvenile court did, reasoning that they are “contrary to the evidence.” Specifically, he maintains, “[t]here was no history of domestic violence” between him and N.W.’s mother. He points to evidence, primarily his own testimony, to contradict the court’s findings concerning the scooter incident,² the multiple police visits, and the diaper incident.³ But that court judges the credibility of witnesses. See *Pima Cty. No. 93511*, 154 Ariz. at 546. Despite his assertion otherwise, Robert is in effect asking this court to reweigh the evidence. That is not our function. *Oscar F.*, 235 Ariz. 266, ¶ 13. Rather, we review the record for reasonable evidence supporting the court’s findings. See *Shella H.*, 239 Ariz. 47, ¶ 13. Such evidence exists here.

² Adult Protective Services investigated the scooter incident and closed the case, after it “did not substantiate the allegations of abuse or exploitation,” related to N.W.’s mother. However, it did not conclude, as Robert seems to suggest, that N.W. was not struck in the chest with the scooter’s handlebars.

³ Robert also points to evidence to undercut the mother’s claim that he held her down on the bed for thirty minutes, telling her that she was crazy. However, the juvenile court made no finding related to that incident.

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¶9 At the contested dependency hearing, the DCS caseworker assigned to the case testified that the scooter incident was “concerning” because N.W. “was in the middle of an argument that [the parents] were having and he ended up getting hit in the chest by the handlebars.” When the caseworker attempted to discuss the incident with Robert the day after it happened, he ended the conversation abruptly and asked her to leave. She explained that Robert had demonstrated in interactions with various DCS staff members that “he gets angry and he lashes out verbally.” She then provided the following examples: during a supervised visit, Robert threw a diaper when a case aide followed him into the restroom to change N.W., telling the aide to change the diaper;⁴ Robert accused a neighbor of calling DCS and threw his cell phone at the neighbor when she was outside watering plants; and Robert hung up on a case aide “whenever the case aid[e] called to talk to him about his visit.” DCS was concerned about Robert’s “anger getting out of control” and escalating to “[s]omething that could hurt [N.W.]”

¶10 The caseworker also testified that, during a supervised visit with his mother, N.W. asked her if she was okay and made a comment that “daddy beats you.” DCS was concerned that N.W., who was only three years old, had “seen domestic violence between his parents.” Robert admitted that the police had been to his home twice in July 2019 after incidents between him and N.W.’s mother. He also agreed that they had “heated arguments” where N.W. was “sometimes” present. We therefore conclude that the record supports the juvenile court’s findings. *See Shella H.*, 239 Ariz. 47, ¶¶ 14-17.

¶11 Robert nevertheless contends that the juvenile court erred in concluding that “verbal arguments between domestic partners which occur in the presence of a child constitute[] domestic violence.” In support of his argument, Robert relies on the definition of domestic violence in the criminal code, A.R.S. § 13-3601(A), which is cited in the definition of “[c]riminal conduct allegation” in § 8-201(8). But, as DCS points out, that definition is not controlling here, where the court was concerned only whether DCS had established N.W. was a dependent child. *See* § 8-201(15)(a)(i), (iii), (25)(a). And we are aware of no authority that would otherwise require a domestic-violence finding in a dependency proceeding

⁴Although the juvenile court stated that Robert threw the diaper at the wall, the record shows that he threw it on a table or bookshelf. The court’s finding regarding Robert’s anger, however, was based on Robert’s behavior in throwing the diaper, not what it hit.

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to be based on something more than verbal arguments occurring in front of the child, as Robert suggests.

¶12 Lastly, Robert argues that, by the time of the dependency hearing, he “had remedied the situation which gave rise to N.W.’s removal by[] ending his relationship with [N.W.’s mother] and enrolling in classes designed to help him become a better parent.” The record confirms that Robert had initiated a court proceeding to obtain custody of N.W. and established services for parenting and domestic-violence classes. However, he had not yet completed those services at the time of the dependency hearing. He also had not completed the psychological evaluation DCS suggested. Accordingly, it was within the juvenile court’s discretion to conclude that he had not resolved the threat of domestic violence warranting a finding of dependency. *See Shella H.*, 239 Ariz. 47, ¶ 16; *Willie G.*, 211 Ariz. 231, ¶ 21.

Disposition

¶13 For the foregoing reasons, we affirm the juvenile court’s order adjudicating N.W. dependent as to Robert.