IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

JESSICA R., SAMIR B., B.R., AND A.R.,
Appellants,

v.

DEPARTMENT OF CHILD SAFETY,
Appellee.

Nos. 2 CA-JV 2020-0002, 2 CA-JV 2020-0004,
and 2 CA-JV 2020-0009 (Consolidated)
Filed June 3, 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NOT FOR PUBLICATION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 Pima County
No. JD20190465
The Honorable Alyce Pennington, Judge Pro Tempore

AFFIRMED AS CORRECTED; SPECIAL ACTION JURISDICTION DECLINED

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MEMORANDUM DECISION

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

B R E A R C L I F F E, Judge:

¶1 Jessica R., Samir B., B.R. and A.R.,[1] appeal from the juvenile court's December 2019 order adjudicating the children dependent and alternatively appeal from the October 2019 order denying Jessica's motion for return of the children, filed pursuant to Rule 59, Ariz. R. P. Juv. Ct. For the reasons set forth below, we affirm the dependency as corrected and decline to accept special action jurisdiction.

¶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). On August 16, 2019, the children and their fifteen-year-old cousin, D.R., who also lived in the family home, witnessed the parents arguing, yelling and "swinging at each other"; D.R. hit Samir with a BB gun during the altercation in an effort to protect Jessica. The parents were arrested for contributing to the delinquency of a minor and domestic violence, disorderly conduct. B.R. and A.R. reported having witnessed prior incidents of physical and verbal domestic violence between the parents, some of which included physical altercations between Samir and D.R. The Department of Child Safety (DCS) removed the children from

[1]B.R. was born in April 2005 and A.R. was born in October 2010. Jessica is the mother of both children, and Samir is the father of A.R. B.R.'s father is not a party to this appeal. Jessica and Samir are referred to as "the parents" in this decision.

the home on August 19 and placed them with their maternal great aunt. DCS filed a dependency petition on August 22, alleging A.R. and B.R. were dependent as to Jessica and A.R. was dependent as to Samir due to abuse and neglect, asserting the parents neglected the children by exposing them to domestic violence, thereby endangering their health and welfare.[2] The petition also alleged the parents suffered from mental health issues.

¶3 On August 28, 2019, the day after the preliminary protective hearing, Jessica filed a motion for return of the children or alternatively change of placement.[3] *See* Ariz. R. P. Juv. Ct. 59(A), (E)(1) (on request by parent, juvenile court shall return child to parent if it finds by preponderance of evidence return of child "would not create a substantial risk of harm to the child's physical, mental or emotional health or safety"). At the October 10, 2019 hearing on the Rule 59 motion, Jessica testified that the August incident between the parents was strictly verbal, the parents do not have an issue with physical domestic violence, and she does not believe she needs any services for domestic violence issues. When asked if she intended to reunify with Samir once DCS was no longer involved with the family, Jessica responded "[p]robably not," but could not state with certainty what her future held.

¶4 Gerardo Talamantes, the DCS investigator assigned to the case, testified that Jessica had not yet "demonstrated protective capacity, or . . . that she understands the safety concerns of the domestic violence dynamics," and explained that a child who witnesses domestic violence incidents between parents is placed "at [an] unreasonable risk of further neglect." DCS specialist Beth Albertson testified that she was concerned about the discrepancies between Jessica and the children's testimony regarding the August incident and suggested that Jessica may be minimizing or denying the domestic violence occurring in the household. Albertson explained that "domestic violence just isn't putting hands on somebody. It's the arguing, the yelling, the throwing things, the breaking things." She added, "But for a child to witness it, it's scary. It's emotionally damaging to them."

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[2] Although DCS alleged the ground of abuse and neglect in the dependency petition, it specifically stated the dependency was due to neglect arising from domestic violence, a distinction that was made clear at the adjudication hearing.

[3] Samir, A.R. and B.R. supported Jessica's motion.

¶5 At the conclusion of the hearing, the juvenile court denied the Rule 59 motion, concluding the children could not be returned safely to Jessica "without a substantial risk of harm to their physical, mental, or emotional health or safety." The court stated it believed the children "suffer from observing domestic violence emotionally, their psyches," which in turn placed them at risk for mental health issues.

¶6 A three-day contested dependency adjudication hearing followed. At that hearing, which ended in December 2019, Talamantes testified he had interviewed A.R., B.R. and D.R. three days after the incident. A.R. reported that he and B.R. had witnessed the August incident from inside the house; when D.R. went outside to defend Jessica he got into a physical altercation with Samir; and, there had been prior fights of a physical nature between the parents, including one three months earlier. Talamantes believed the incidents "deeply" and "negatively" affected A.R., who appeared to be in "emotional distress" when he talked about the fights.

¶7 During her interview with Talamantes, B.R. initially denied that officers had come to the family home in August, but later admitted they had been called because the parents had been fighting, and that the parents had fought in the past. B.R. expressed no concern if anyone got hurt as a result of the fighting, adding that any injuries "will be on them," causing Talamantes to believe she had "normalized" such conduct. D.R. reported to Talamantes that Jessica and Samir had been "swinging at each other" during the August incident, although they did not hit each other. Jessica told Talamantes the August incident had not been physical, and stated that the only other domestic violence incident between parents had occurred ten years earlier.

¶8 And although Samir denied any prior domestic violence incidents during his interview with Talamantes, at the dependency hearing he testified that he had a physical altercation with Jessica in 2010. Further, despite telling officers in August 2019 that Jessica had been swinging at him and spitting in his direction, at the dependency hearing he testified that was not true.

¶9 Albertson testified the domestic violence between the parents amounted to neglect, they had not yet engaged in services designed to address the issue,[4] and the same safety issues that had existed in August

[4]Jessica did, however, complete her psychological examination the day before the hearing.

were still present. She expressed concern that there was no protective order or any other mechanism in place to prevent the parents from living together again.

¶10 At the conclusion of the dependency hearing, the juvenile court acknowledged the children want to return home, but found them dependent based on the domestic violence allegation in the dependency petition.[5] The court noted, "[j]ust because the children are not bruised or cut or show any physical or at this moment, show any mental issues does not mean they have not been damaged by what they have seen and heard and experienced." Jessica, Samir and the children filed separate notices of appeal challenging the dependency adjudication, which we have consolidated on appeal.

Dependency Adjudication

¶11 On appeal, the family argues the juvenile court erred in finding a dependency exists, asserting there was no evidence the children were in present danger or that a current safety risk existed in December 2019. They contend, "[t]he only thing that is known for sure in this case is that some kind of a domestic violence incident occurred on August 16, 2019," and maintain the court improperly relied on vague and speculative descriptions of previous incidents of domestic violence.

¶12 "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). 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.

¶13 A dependent child is 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" or "whose

[5]It appears the juvenile court misspoke when it found both children dependent as to both parents. Therefore, the court's minute entry ruling dated December 20, 2019, filed on December 27, 2019, shall be corrected to reflect that B.R. is dependent as to Jessica, and A.R. is dependent as to Jessica and Samir.

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. § 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."[6] § 8-201(25)(a).

¶14 The family maintains that, unlike in *Shella H.*, which involved admitted past incidents of domestic violence, this case "involves an isolated incident, with some references to alleged unspecified past conduct." 239 Ariz. 47, ¶ 14. They also contend, unlike the circumstances in *Shella H.*, the parents here took "corrective measures . . . immediately" after they were arrested, specifically, they "split up amicably for the good of their family" and Samir accepted responsibility for the August incident. However, domestic violence between the parents to which the child is exposed supports a finding of dependency. *Id.* at ¶¶ 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.*

¶15 Here, there was evidence the children witnessed domestic violence not only during the August incident, but on other occasions, which, according to witness testimony, placed them at risk of harm. Notably, in direct contradiction to the children's statements, the parents continued to minimize or deny the history of domestic violence in their relationship. As Albertson testified, the parents needed to acknowledge the problem that brought them to DCS's attention and demonstrate their motivation to solve that problem, something they had not yet done. Moreover, to the extent the parents assert that an absence of physical

[6]Apparently for the first time on appeal, the family criticizes the juvenile court's "silen[ce]" on whether it found neglect, maintaining the plain language of § 8-201(15)(a)(i), (iii), (25)(a), forecloses such a finding here. Because the family did not ask the court to clarify its finding in this regard, it has waived this argument on appeal. *See Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 21 (App. 2007) (appellate court generally does not consider objections raised for first time on appeal).

violence somehow lessened the impact of their actions on the children, we note the existence of evidence of prior violence and that we are aware of no authority that would otherwise require a domestic-violence finding in a dependency proceeding to be based on something more than verbal altercations occurring in front of the child. Based on the facts here, it was within the juvenile court's discretion to conclude that the parents had not resolved the threat of domestic violence warranting a finding of dependency. *See id.* at ¶ 16; *Willie G.*, 211 Ariz. 231, ¶ 21.

¶16 And, to the extent the family suggests that because the parents no longer live together and the fact that they deny having a problem with domestic violence should outweigh the other evidence, we do not reweigh the evidence presented. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 12 (App. 2002). Rather, we review the record for reasonable evidence supporting the juvenile court's findings. *See Shella H.*, 239 Ariz. 47, ¶ 13. Such evidence exists here.

Rule 59 Motion

¶17 The family alternatively asks us to reverse the juvenile court's denial of Jessica's Rule 59 motion for return of the children and order the children returned to her, arguing the court abused its discretion by denying her motion. They assert the law is "unsettled" as to whether a juvenile court's ruling on a Rule 59 motion is a final, appealable order. However, two recent Arizona cases have determined that a juvenile court's decision under Rule 59 is not appealable. *See Jessicah C. v. Dep't of Child Safety*, 248 Ariz. 203, ¶¶ 14-15 (App. 2020) (ruling on Rule 59 motion to return child not final appealable order); *Brionna J. v. Dep't of Child Safety*, 247 Ariz. 346, ¶¶ 7-12 (App. 2019) (same). *But see Dep't of Child Safety, S.P. v. Juan P.*, 245 Ariz. 264, ¶ 7 (App. 2018) (addressing appeal from order granting Rule 59 motion without discussing jurisdiction).[7]

¶18 The family also requests that, in the event we determine we lack appellate jurisdiction to address the denial of the Rule 59 motion, we

[7]*Juan P.* preceded both *Jessicah C.* and *Brionna J.* Further, even if we agreed with the family that the law is unsettled, we need not resolve the issue because the family has not appealed from the denial of the Rule 59 motion. In their notices of appeal, they made no reference to the Rule 59 motion, but instead solely challenged the dependency adjudication. *See* Ariz. R. P. Juv. Ct. 104(B) (notice of appeal shall designate final order or part thereof appealed from).

instead accept special action jurisdiction. *See Brionna J.*, 247 Ariz. 346, ¶ 13; *see also Catalina Foothills Unified Sch. Dist. No. 16 v. La Paloma Prop. Owners Ass'n, Inc.*, 229 Ariz. 525, ¶ 20 (App. 2012) (where appellate jurisdiction lacking, appellate court may assume special-action jurisdiction in case brought as direct appeal). We decide whether to exercise special-action jurisdiction after considering whether there is "an equally plain, speedy, and adequate remedy by appeal," Ariz. R. P. Spec. Act. 1(a), and if such review is necessary to address recurring legal questions of statewide importance, *State ex rel. Montgomery v. Harris*, 234 Ariz. 343, ¶ 7 (2014).

¶19 In our discretion, we decline special action jurisdiction here. *State ex rel. Romley v. Fields*, 201 Ariz. 321, ¶ 4 (App. 2001) (special action review highly discretionary). The family did not promptly challenge the juvenile court's denial of the Rule 59 motion. Nor have they offered any explanation for their delay. Rather, they waited almost five months after the court ruled to raise the issue for the first time, a factor that "weighs heavily against our exercising extraordinary jurisdiction to review it now." *Catalina Foothills*, 229 Ariz. 525, ¶ 21. Moreover, this matter does not raise issues of statewide importance, and, based on the specific facts here, is not likely to recur. *See Lear v. Fields,* 226 Ariz. 226, ¶ 6 (App. 2011) (exercise of special action jurisdiction appropriate when issue presented is purely legal and significant, and is likely to recur).

¶20 In any event, the issue in Jessica's Rule 59 motion has essentially been rendered moot by the juvenile court's subsequent December 20, 2019 order affirming the children's placement with the maternal great aunt. *See Brionna J.,* 247 Ariz. 346, ¶ 17 (juvenile court's subsequent temporary custody order rendered mother's claims regarding prior Rule 59 motion moot); *Dep't of Child Safety v. Stocking-Tate*, 247 Ariz. 108, ¶ 14 (App. 2019) ("each new [temporary custody] order necessarily replaces the last as the court gains information and perspective"); *see also Simpson v. Owens*, 207 Ariz. 261, ¶ 13 (App. 2004) (appellate court "usually w[ill] not consider" moot issues). In summary, we conclude the family has not demonstrated that this case merits the exercise of our extraordinary special-action jurisdiction.

Disposition

¶21 For all of these reasons, we affirm the juvenile court's dependency adjudication order as corrected and decline special action jurisdiction.