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MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

DEC 22 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

YOLANDA R.,)	2 CA-JV 2010-0084
)	DEPARTMENT A
)	
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC)	Appellate Procedure
SECURITY and DESTINY R.,)	
)	
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. JD201000051

Honorable Joseph R. Georgini, Judge

AFFIRMED

Kessler Law Offices
By Eric W. Kessler

Mesa
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By David M. Osterfeld

Phoenix
Attorneys for Appellee Arizona
Department of Economic Security

B R A M M E R, Presiding Judge.

¶1 Yolanda R., the mother of Destiny R., born in November 1995, challenges the juvenile court's June 2010 order adjudicating Destiny dependent, contending there was insufficient evidence to support the court's order. The Arizona Department of Economic Security (ADES) concedes that the evidence was insufficient and that the court did not make the factual findings essential to its ruling. Notwithstanding ADES's concession, we affirm the court's order for the reasons stated below.

¶2 In the dependency petition it filed in April 2010, ADES alleged, in relevant part, as follows:

Mother is neglecting the child by failing to protect the child from sexual abuse. The child, who is fourteen years old, has alleged that the mother's "male significant other" has been inappropriately touching her. The child states that she has developed a relationship with the mother's "male significant other". Because of the mother's inability or unwillingness to protect the child from sexual abuse, there is an unreasonable risk of harm to the child's health or welfare.

ADES further alleged that "[c]ontinuation of the child in the home would be contrary to the child's welfare due to mother's failure to protect the child from sexual abuse."

¶3 After the contested dependency hearing on June 18, 2010, the juvenile court entered an order in which it found, simply, Yolanda is "unwilling or unable to protect the minor from sexual abuse[,] . . . that a Dependency does exist and that the minor . . . is a dependent child as to Mother and said child is hereby made a ward of the Court." The court added that Yolanda had neglected Destiny, presumably by not protecting her from sexual abuse. Absent an abuse of discretion, we will not disturb the juvenile court's order. *See In re Pima County Dependency Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987). We will affirm "unless the findings upon

which it is based are clearly erroneous and there is no reasonable evidence supporting them.” *In re Pima County Juv. Dependency Action No. 118537*, 185 Ariz. 77, 79, 912 P.2d 1306, 1308 (App. 1994).

¶4 As the petitioner, ADES was required to prove the allegations of its petition by a preponderance of the evidence before the juvenile court could find Destiny is dependent. *See* A.R.S. § 8-844(C)(1); Ariz. R. P. Juv. Ct. 55(C). A dependent child is a child adjudicated to be “[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 “[a] child whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent.” A.R.S. § 8-201(13)(a)(i), (iii). On appeal, we view the evidence in the light most favorable to sustaining the court’s ruling. *See Willie G. v. Ariz. Dep’t of Econ. Sec.*, 211 Ariz. 231, ¶ 21, 119 P.3d 1034, 1038 (App. 2005). We do not reweigh the evidence presented at the dependency hearing because, as the trier of fact, the juvenile court “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).

¶5 Child Protective Services (CPS) received a report that Destiny was being sexually abused by Yolanda’s boyfriend, Allen, who had been living with Yolanda for about ten years, and that the two were having a relationship. When interviewed by the CPS case manager and a Coolidge police officer, Destiny claimed Allen had molested her repeatedly. The case manager told Yolanda about the allegations and Yolanda responded that Destiny was angry at Yolanda and Allen because the family planned to move to Tucson, and that Destiny previously had made false allegations about inappropriate touching, usually when she did not get her way.

¶6 Destiny was removed from the home immediately. She was examined by a nurse practitioner, who testified her physical findings were consistent with Destiny's reports to the CPS investigator, a police detective, and the nurse practitioner that she had been sexually abused. The nurse practitioner also testified that, although there appeared to have been "blunt force trauma" to the vaginal area which was well healed, she could not determine when sexual intercourse had occurred. Destiny told the nurse practitioner she had been sexually abused by her grandfather when she was ten years old and had been sexually abused by her mother's boyfriend repeatedly between September 2009 and March 2010. Destiny also said she had reported Allen's abuse to her mother in September 2009, but her mother did not believe her. Destiny admitted to the nurse practitioner that she had been sexually active with her own boyfriend or former boyfriend about two months earlier. On cross-examination and during questioning by the court, the nurse practitioner admitted she could not determine when the initial trauma to Destiny's vaginal area had occurred, that is, whether it was from the alleged abuse by the grandfather when she was ten, the recent sexual conduct with her boyfriend, or the alleged sexual intercourse with Allen.

¶7 Destiny told the forensic interviewer at the Family Advocacy Center essentially the same facts she had reported to the nurse practitioner, the detective, and the CPS investigator. In addition, Yolanda's neighbor claimed that, sometime in the latter part of 2009, Destiny had told her Allen's brother had tried to molest her. It appears that Yolanda subsequently admitted she had fabricated the allegations.

¶8 Yolanda testified Destiny never had contact with her grandfather when she was ten. She admitted knowing Destiny had become sexually active at the age of twelve and said she had tried to persuade her daughter not to engage in that conduct. She also

testified she had called the police after she found out about Destiny's sexual activity and that the boy involved had been sent to "reform" school until the age of eighteen. Yolanda stated she had confronted Allen's brother as soon as her neighbor had told her about Destiny's allegations and, even though he denied the allegations, she insisted he leave the home and has not permitted him to return. Within an hour of that confrontation, however, Destiny told Yolanda she had made up the story so that Yolanda would stay home that night.

¶9 The juvenile court essentially entered no factual findings in its minute entry, nor did the court state that ADES had proved the allegations of the dependency petition. As we previously noted, the court simply found Yolanda had neglected Destiny because she was either unwilling or failed to protect her from sexual abuse but did not make any specific findings regarding the perpetrators of the abuse or when the abuse had occurred. When asked at the dependency hearing to specify the basis for its ruling, the court appears to have avoided making any findings regarding the allegations involving Allen. Instead, the court responded,

I have found that the mother is unwilling or unable to protect her from sexual abuse. That is clear. That burden has been met. She is fully aware that the child is engaging in sexual acts. This child is being abused. She has admitted to that. She is aware that her daughter is sexually active to this day, and she has not done anything to protect her from that.

¶10 ADES concedes the juvenile court did not find ADES had sustained its burden of proving the allegations of its petition. That is, the court did not find ADES established Allen had sexually abused Destiny and that Yolanda had failed to protect Destiny from sexual abuse by Allen. As ADES points out, at the hearing, when asked by

Destiny's counsel to clarify whether it had found Allen had abused her, the court responded it hoped to "get to the bottom of" Destiny's allegations. The court added, "[i]t is a difficult situation and unfortunate, if it's true, horrific, and if it's not true, it's still horrific because you can't prove a negative."

¶11 Viewing the court's comments in context, it does, indeed, appear that the court did not make a finding as to whether ADES had established Allen had sexually abused Destiny. The court did find, however, that a preponderance of the evidence established someone had sexually abused Destiny, including the boyfriend with whom she had engaged in sexual relations within a few months of the physical examination. But it appears the court adjudicated Destiny dependent based on factual grounds broader than those alleged in the petition, despite ADES never having filed an amended petition.

¶12 We are disturbed that the adjudication seems to be based on allegations regarding persons other than Allen. *Cf. In re Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 355, 884 P.2d 234, 241 (App. 1994) (acknowledging parent entitled to notice of grounds upon which termination of parental rights sought but finding mother had adequate notice and sufficient time to defend against additional time-in-care ground for termination; amendment "merely added a new legal theory supported by facts already alleged in the original petition"); *In re Maricopa County Juv. Action No. JS-5860*, 169 Ariz. 288, 290-91, 818 P.2d 723, 725-26 (App. 1991) (finding amendment of severance petition to add additional facts relating to paternity and parental treatment of two additional children new claim; lack of service on mother insufficient to provide jurisdiction as to new claims). However, Yolanda has not argued, either in the juvenile court or on appeal, that she was denied proper notice of the allegations against her. Rather, in the juvenile court she argued Destiny's allegations of abuse by various

individuals were not trustworthy, particularly in light of her recantation of accusations against Allen's brother. And, she argued, she had responded appropriately when she had learned about Destiny's previous allegations, but had not been given the opportunity to respond to the allegations involving Allen. Thus, Yolanda essentially agreed to and defended against allegations that were broadened during the hearing to encompass Destiny's allegations involving victimization by persons other than Allen. Any claim of insufficient notice therefore was waived. *Cf. Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 21, 153 P.3d 1074, 1081 (App. 2007) (“[A] party may not ‘sit back and not call the trial court’s attention to the lack of a specific finding on a critical issue, and then urge on appeal that mere lack of a finding on that critical issue as a ground[] for reversal.’”), *quoting Bayless Inv. & Trading Co. v. Bekins Moving & Storage Co.*, 26 Ariz. App. 265, 271, 547 P.2d 1065, 1071 (1976) (alteration added).

¶13 Moreover, Yolanda does not seem to raise this claim on appeal. She asserts, instead, that the court never “ma[d]e any specific factual findings as to who abused [Destiny],” and based its ruling on the fact that Yolanda is aware that Destiny is currently sexually active, but has not stopped her from engaging in this conduct. She argues, without adequate support, that the court’s “finding is not supported by any reasonable reading of the evidence and suggests a standard of parenting that cannot support a finding of dependency.” She asserts the court’s ruling “suggests that when a 14-year old child engages in on-going sexual behavior against [a] parent’s expressed direction, and the identity of the boyfriend is unknown, that child is dependent[,] . . . a tortured interpretation of A.R.S. § 8-201(13)” She then disputes the court’s conclusion that she acted inappropriately when responding to Destiny’s allegations against various males.

¶14 We note, too, that ADES’s closing argument related to a dependency petition broadened to include all allegations of sexual abuse that Destiny made after she was interviewed and examined, insisting it had sustained its burden of establishing Destiny is dependent in every respect. It has taken a contrary position on appeal, asserting that, because the juvenile court did not find Allen had sexually abused Destiny, it had not sustained its burden. But, by permitting the court to go beyond the factual allegations of the petition, ADES waived any related contention on appeal. *Cf. Jordan C. v. Ariz. Dep’t of Econ. Sec.*, 223 Ariz. 86, n.2, 219 P.3d 296, 299 n.2 (App. 2009) (finding ADES waived right to challenge standing of older children to appeal severance order by failing to object to their participation in termination proceeding). Consequently, we attribute no significance to ADES’s concession of error in its answering brief.

¶15 Although we agree with ADES the juvenile court made no express finding directly related to the allegations about Allen, we affirm the court’s order nevertheless. Based on the record before us, we conclude there was sufficient evidence to support the adjudication, broadened as it was to include the allegations that someone had been abusing and continued to sexually abuse Destiny and that she remained at risk for continued sexual abuse. There was reasonable evidence to support that finding. The physical examination supported a finding that she had engaged in sexual intercourse; Destiny told various individuals that she had done so with her grandfather, Allen, and her boyfriend; Yolanda admitted having seen a video of Destiny, at age twelve, performing oral sex on a sixteen- or seventeen-year-old boy; and Yolanda admitted Destiny continued to have “sexual contact with boys after that,” including a more current boyfriend referred to as her “wannabe boyfriend.” To the extent there were conflicts in the evidence, it was for the juvenile court to weigh and resolve them based on its

assessment of the witnesses' credibility. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). To the extent Yolanda asks us to reweigh the evidence, we will not do so.

¶16 We reject summarily Yolanda's suggestion that the adjudication is based on nothing more than she has been unable to stop her teen-aged daughter from being sexually active. The evidence establishes Destiny is only fourteen and has been sexually active since the age of twelve, engaging in conduct that places her at great risk of harm. Additionally, Destiny has alleged she was sexually abused by her grandfather, Allen's brother, Allen, and others. That she has been sexually abused by someone cannot meaningfully be disputed.¹

¶17 We agree with Yolanda that the record does not contain reasonable evidence to support a finding that she was unwilling to protect Destiny from sexual abuse. The undisputed evidence shows Yolanda did react to the various reports of abuse and does not support the court's comments that she refused to believe Destiny. Yolanda testified that when she was shown a video of Destiny performing oral sex on a boy in Mississippi, she called the police, counseled Destiny, and "pursued the matter until the boy was sent to reform school." And she immediately confronted Allen's brother and removed him from the home permanently after Destiny alleged he had engaged in improper conduct, even though Destiny quickly had recanted the allegations. When questioned about what she would do if she learned Destiny was having sexual relations

¹We note that consent is not a defense to sexual conduct with a minor based on sexual intercourse or oral sexual contact. *See* A.R.S. § 13-1405(A); *see also State v. Getz*, 189 Ariz. 561, 564 n.2, 944 P.2d 503, 506 n.2 (1997) ("for some sexual crimes involving children, consent or lack thereof is immaterial").

with other boys, Yolanda responded that she would call the police, report the activity and continue to talk to Destiny about sexual conduct.

¶18 But the juvenile court stated in its minute entry that Yolanda was unwilling or had failed to protect her minor daughter. At the dependency hearing, the court stated that Yolanda was not prepared to deal with the fact that Destiny had been victimized by someone and, based on that finding, found Yolanda had neglected Destiny. There was sufficient evidence for the court to find Yolanda had been and currently was unable to protect Destiny from sexual abuse. Again, the physical evidence is unequivocal. And Yolanda admitted she has known Destiny has been sexually active since she was twelve. When asked on cross-examination what she has done to stop Destiny from engaging in this conduct, Yolanda responded that she has counseled her, but admitted she has not asked the names of the boys with whom Destiny is sexually involved. And she acknowledged she has obtained no professional counseling for Destiny.

¶19 For the reasons stated, we affirm the court's order adjudicating Destiny dependent.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge