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ARKANSAS COURT OF APPEALS

DIVISION I

No. CV-17-717

W.N.

APPELLANT

V.

ARKANSAS DEPARTMENT OF HUMAN
SERVICES

APPELLEE

Opinion Delivered: June 6, 2018

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT, FIFTH
DIVISION
[NO. 60CV-16-6477]

HONORABLE WENDELL GRIFFEN,
JUDGE

AFFIRMED

BART F. VIRDEN, Judge

WN appeals the order of the Pulaski County Circuit Court that affirmed the Arkansas administrative law judge's ("ALJ's") decision upholding the Arkansas State Police Crimes Against Children Division's ("CACD's") true finding of neglect by inadequate supervision as well as the decision that he must place his name on the Child Maltreatment Central Registry. WN also appeals the circuit court's decision that his name must appear on all pleadings. We affirm.

I. Relevant Facts and Procedural History

On July 24, 2015, WN accidentally left his eighteen-month-old son TN strapped in his car seat in the car on a hot day for several hours. When WN discovered TN in the car, the child had died. That day, the Child Abuse Hotline received a report of neglect by

inadequate supervision regarding the incident, and CACD investigator Charles Anderson and the Hot Springs Police Department began separate investigations. Pursuant to its investigation, the CACD entered a hearing statement in which it found that WN had neglected TN.

The CACD relied on investigator Anderson's investigation summary in making its decision and found the following: On July 24, 2015, the Child Abuse Hotline accepted a report of inadequate supervision that had led to the death of the minor child TN. TN was examined by a physician and his body temperature was 107.2 degrees. Dr. Jennifer Forsythe determined that the likely cause of TN's death was environmental hyperthermia, though the cause of death was listed as "undetermined" pending further investigation. Anderson also spoke with WN's coworkers who stated that WN seemed "perfectly normal" on the day of the incident and that he was generally very organized and routine in his habits. The daycare's sign-in records from January through July 2015 show that WN was primarily responsible for bringing TN to daycare and that TN did not attend on July 24, 2015.

Anderson also spoke with Dr. Rachel Clingenpeel who referred him to the website "Kids in Cars" that provides information regarding the effect of high temperatures in cars on a child's body. The website also describes how a person's brain can slip into "auto pilot" and follow a regular routine rather than perform a special task.

The CACD found that based on the information gathered in the investigation, there did not appear to be a change in WN's routine on the day of the incident, and no

evidence was presented that anyone other than WN was responsible for taking TN to daycare on July 24, 2015. The CACD noted that the investigator did not have statements from either parent because their attorneys had “refused to allow their clients to make a statement regarding the events of 07/24/15.” The CACD concluded that

[w]hile in WN’s care, TN was left unattended for an unknown but extended amount of time in a closed vehicle leading to his death. Without statements from either [parent], the finding can only be made on the evidence and information gathered during the course of the investigation. That being said, a TRUE finding of inadequate supervision with the Characteristic of Death will be made against WN.

WN appealed the CACD’s decision, and on October 26 and November 1, 2016, the Office of Appeals (“OAH”) held a hearing on the matter. At the hearing, transcripts of witness testimony from WN’s criminal trial were admitted into evidence, which are summarized here.¹ Dr. Stephen Erickson testified that he agreed with his colleague’s opinion that hyperthermia was the cause of death, though he would not have delayed the determination as Dr. Forsythe had done. Family and friends testified that WN is an excellent father, and TN’s parents are exceptional in their care for their child. WN, family members, and colleagues testified that it was difficult, if not impossible, for the driver of the car to see TN while he was strapped into the rear-facing car seat and that the car had dark-tinted windows that were difficult to see through from outside the vehicle. WN’s coworkers described how WN’s work routine was different on July 24, 2015, and that WN

¹Prior to the hearing, a Garland County Circuit Court jury acquitted WN of misdemeanor negligent homicide.

had been anticipating unusual and stressful work-related issues. Family members and WN explained that TN had been teething and that everyone had lost sleep because TN had been unusually fussy.

Dr. David Diamond, a neuroscientist and professor at the University of South Florida, described “lost awareness” syndrome. Specifically, he explained how people lose awareness of children in cars. Dr. Diamond offered testimony that stress, a change in routine, and lack of sleep can impair brain function. Under these conditions, the areas of the brain that control memory and storing new information are compromised, and the part of the brain that controls routine takes over. The person loses awareness of the new circumstances and proceeds with his or her normal routine. Dr. Diamond testified that many unusual circumstances (TN’s teething, lack of sleep, change in morning routine, and unusual work-related issues) caused WN to lose awareness of TN’s presence in the car and omit going to the daycare.

WN testified regarding the events of July 24, 2015. WN explained that he had lost sleep the night before because TN had been teething and had been unusually fussy. Normally his wife, AN, got TN ready for daycare, but that day the housekeeper was scheduled to clean, and AN was trying to get the house straightened up. Instead, WN prepared TN for school. The family was low on groceries, so instead of packing his lunch as normal, WN stopped by McDonald’s for breakfast. WN did not take TN to daycare as he normally did. WN testified that he went to work and stayed there until around 11:30. After lunch, WN ran errands related to his wedding anniversary plans for that evening.

WN went home, did laundry, and prepared TN's bag for swim lessons that afternoon. Around 2:00 WN left to get TN from daycare. On the way he realized TN was in the car and that TN was deceased.

WN also explained the reason for the delay in making a statement about the incident. WN testified that he had repeatedly called the prosecutor's office to make a statement and that he had fully cooperated. WN explained that he did not make a statement on the day of the incident because of his extreme emotional distress and that later, due to the trauma of recounting the event, he wanted to provide one statement for all investigative entities. WN stated that the prosecutor did not tell the Hot Springs Police Department that WN had requested a joint interview. WN's attorney also explained that the delay in making the statement was first due to the parents' extreme distress and that later the prosecutor would not arrange an interview at the same time as the CACD investigator. Counsel testified that he had reached out to the prosecutor and told him that WN and AN wanted to make one statement to avoid having to recount the event more than necessary.

CACD investigator Charles Anderson testified that he had not been given the police department's investigative materials as he had been promised by the Hot Springs Police Department detectives, and he made his decision based on his review of the sign-in sheets at the daycare, the fact that WN was the person responsible for drop off, the recorded temperatures on the day of the incident, and the autopsy report stating

environmental hyperthermia as the cause of death. Anderson stated that he had called WN's attorney to request an interview but that his request was denied.

WN made a motion to dismiss and argued that the agency had not proved that he had shown "disregard" of parental responsibility which is required by the agency's protocols. WN argued that there was no evidence presented to contradict the testimony that he lost awareness of TN's presence in the car; thus, maltreatment could not be proved. The ALJ denied the motion.

Following the testimony of the witnesses, the ALJ heard closing arguments from WN and the agency.² The agency stated that the Child Maltreatment Act ("Act") does not provide a mens rea requirement; thus, proving intent to commit neglect or disregard of responsibility is not necessary to support a finding of neglect by inadequate supervision. The agency argued that the elements listed in the statute were supported by the undisputed facts.

WN contended that the agency protocols were promulgated to implement the Act, and that the protocols require a conscious disregard of parental responsibility to found an allegation of neglect by inadequate supervision. WN argued that the statute is influenced by the protocols such that the agency must prove that WN made a conscious decision to disregard his responsibility to care for TN. WN also asserted that "the fact that the agency

²The witnesses who testified at the criminal trial offered much the same testimony at the agency hearing.

is taking a position contrary to its own protocols is a violation of due process” because people do not have notice of what standards they must live by. WN argued that the purpose of the Act is to protect children by identifying careless or reckless caregivers, which was not an issue in the instant case. Essentially, WN asserted that, due to the unusual circumstances and stresses of that day, his brain reverted to habit, and he lost awareness of his child, and to lose awareness is not disregard of a duty; therefore, no neglect occurred. Furthermore, WN claimed that the agency determination was made on unlawful procedure because Anderson based his finding of child maltreatment on inadequate information.

The agency responded that the Act takes precedence over the protocol and that the agency had proved the elements of inadequate supervision.

The ALJ affirmed the agency’s true finding of child maltreatment. In its order, the ALJ considered the testimony of Dr. Diamond and found that he offered detailed information regarding “lost awareness.” The ALJ found that Dr. Diamond maintained that WN did not neglect or disregard his responsibility to care for TN the day of the incident but that “it was about brain failure. WN’s brain lacked capacity at that moment to function properly. Even if Dr. Diamond’s analysis is accepted, WN’s lack of mental capacity is not a defense as that defense is specifically excluded by the Child Maltreatment Act.” The ALJ stated that Dr. Diamond’s testimony described a “common human problem” and was plausible; however, the ALJ also said that

this is a result of human frailty and is a human failure, but it is a failure. . . . A person should be aware of the significant risk to a child being left in the car, particularly on such a hot day. While I do not find that WN had a willful disregard

of his responsibility to care for TN, I do find he was negligent and failed to appropriately supervise TN. No person responsible for the care of a child should lose awareness or forget that the child is in such a dangerous situation. To do so is neglect.

The ALJ also made several conclusions of law in the order. The ALJ recited the Act's definition of neglect by inadequate supervision "as a parent or caretaker failing to appropriately supervise the child by leaving the child alone at an inappropriate age or in inappropriate circumstances that puts the child in a dangerous situation or in a situation that puts a child at risk." The ALJ also referred to the criminal-negligence standard that a person acts negligently when he or she should be aware of a substantial and unjustifiable risk and that the failure to be aware must involve a gross deviation from the standard of care that a reasonable person would observe in the same situation. The ALJ noted that the Child Maltreatment Act specifically rejects lack of capacity by mental disease or defect as a defense.

The ALJ concluded that the relevant facts were undisputed and that there was sufficient evidence that WN failed to appropriately supervise TN. Specifically, the ALJ found that WN had been responsible for dropping TN off at daycare on July 24, 2015, and had placed TN in his rear-facing car seat in the back seat of the car. WN stopped at McDonald's to get breakfast and then drove to work. WN did not take TN to his daycare. WN worked until lunch time, ran errands, and drove home where he packed a bag for TN's swimming lesson that afternoon. While on his way to TN's daycare, WN realized TN

was still in the car seat. TN had remained in the car seat for five hours on a very hot day with temperatures in the nineties and had died from hyperthermia.

On November 28, 2016, WN petitioned the circuit court for review of the ALJ's decision and filed a motion to seal the case. Appellant argued that the decision of the ALJ was not supported by substantial evidence, was in violation of his constitutional rights, was made in violation of statutory provision and in excess of the agency's authority, was made on unlawful procedure and affected by errors of law, and that the ALJ arbitrarily and capriciously made its decision.

The circuit court granted the motion to seal; however, on January 30, 2017, the circuit court ordered that though the exhibits, the administrative hearing decision, and the hearing record must be sealed pursuant to the Child Maltreatment Act, there was no provision for the concealment of the possible offender's identity, and all pleadings must bear WN's full name.

After hearing oral argument, the circuit court entered an order in which it found that substantial evidence supported the finding of neglect. The circuit court found that WN knew what conduct was in issue and had a fair opportunity to present a defense. The circuit court noted that the final order of the agency referenced the criminal statute defining mental states. The circuit court found that

the definition of the culpable mental state of negligence found in A.C.A. § 5-2-202, "a person acts negligently when the person should be aware of a substantial and unjustifiable risk." However, the Agency decision did not stem from the criminal burden of proof—contrary to what Petitioner argues—nor did the Agency improperly rely on the criminal statute.

....

The ALJ did not find a willful disregard of [WN's] responsibility to care for TN, nor was he required to do so under the Child Maltreatment Act.

The circuit court found that “inadequate supervision” was an exclusive instance of “neglect” according to the Act, that the ALJ did not err in finding that WN failed to adequately supervise TN, and that WN must register with the Child Maltreatment Registry.

On June 5, 2017, WN filed a timely notice of appeal. On August 24, 2017, the circuit court entered an order setting forth that the record should be sealed only as to the hearing decision and exhibits. The court found that WN's identity was not confidential information as described by Administrative Order No. 19, sections III(A)(11), III(A)(12), and VII(A) or the Act and that WN's name shall be included in the record on appeal.

The record was lodged with the Arkansas Supreme Court on September 1, 2017, and on the same day WN filed a motion to seal the case as to WN's full name. Our supreme court granted the motion to seal on September 28, 2017, and on October 3, 2017, it transferred this case to our court for review.

II. Standard of Review and Relevant Law

Our review is directed not to the decision of the circuit court, but rather to the decision of the administrative agency. *Burton v. Ark. Dep't of Human Servs.*, 2015 Ark. App.

701, 478 S.W.3d 221. Review of administrative agency decisions, by both the circuit court and the appellate courts, is limited in scope. *Id.* The standard of review to be used by both the circuit court and the appellate court is whether there is substantial evidence to support the agency's findings. *Id.*

An appellate court sitting in review of a finding of an administrative agency must affirm the agency's finding if the finding is supported by any substantial evidence. Ark. Code Ann. § 25-15-212(h). Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, giving the evidence "its strongest probative force in favor of the administrative agency." *Reed v. Arvis Harper Bail Bonds, Inc.*, 2010 Ark. 338, 368 S.W.3d 69.

As with all appeals from administrative decisions under the Administrative Procedure Act, the circuit court or the appellate court may reverse the agency decision if it concludes that the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are (1) in violation of constitutional or statutory provisions; (2) in excess of the agency's statutory authority; (3) made upon unlawful procedure; (4) affected by other error or law; (5) not supported by substantial evidence of record; or (6) arbitrary, capricious, or characterized by abuse of discretion. Ark. Code Ann. § 25-15-212(h). In this appeal, WN argues that the agency's order should be reversed because it was in violation of all six of the factors listed above. WN also appeals the circuit court's decision that WN's name appear in all pleadings.

The Arkansas Child Maltreatment Act defines child maltreatment as “abuse, sexual abuse, neglect, sexual exploitation, or abandonment[.]” Ark. Code Ann. § 12-18-103(7). “Neglect” includes acts or omissions of a parent that constitute a failure to appropriately supervise the child that results in the child’s being left alone at an inappropriate age creating a dangerous situation or a situation that puts the child at risk of harm; or the child being left in inappropriate circumstances creating a dangerous situation or a situation that puts the child at risk of harm. Ark. Code Ann. § 12-18-103(14)(A)(vii)–(viii).

The Act provides that for any act or omission of child maltreatment that would be a criminal offense, any defense or affirmative defense, including the burden of proof regarding the affirmative defense, that would apply to the criminal offense is also cognizable in a child- maltreatment proceeding with the exception of lack of capacity as a result of mental disease or defect under § 5-2-312. Ark. Code Ann. § 12-18-804. Arkansas Code Annotated section 5-2-301(7)(A)(i) defines mental disease or defect as “[s]ubstantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life[.]”

III. *Issues on Appeal*

A. The Sufficiency of the Evidence

1. *The protocols*

WN raises several arguments regarding the sufficiency of the evidence to support the ALJ's finding that WN neglected TN through inadequate supervision. A common element appears in each sufficiency argument: that the Act requires a "conscious act or omission in disregard of the caretaker's responsibility to protect a child in a potentially dangerous situation." We disagree with WN's interpretation of the Act and affirm; however, first we address a preservation issue. One aspect of WN's sufficiency argument involves the interaction between the agency protocols and the Act and what effect this interaction has on the definition of neglect by inadequate supervision. This issue is not preserved for our review.

The Department of Human Services and the Department of Arkansas State Police are required to promulgate rules or "protocols" to implement the Child Maltreatment Act. See Ark. Code Ann. § 12-18-105. The protocols identify and define the various types of child maltreatment that an investigator may encounter, when and from whom a report of child maltreatment may be taken, and the conditions that must be met before an allegation of neglect can be founded.

One section of the protocols WN cites entitled "Taking a Report" requires that the reporter of suspected child maltreatment have "reason to believe that the juvenile has been/is being inadequately supervised due to the *disregard* of responsibilities by the parent or caretaker." (Emphasis supplied.) On appeal, WN argues "[t]he protocol interprets the statute to require findings of disregard of parental responsibility to find inadequate supervision constituting neglect[.]" WN asserts that the undisputed evidence shows that he

had no awareness that TN was in the vehicle when he exited it without removing TN from the car seat; thus, the agency did not prove the required element of “disregard” for a parental responsibility.

Though the ALJ heard extensive testimony and argument regarding the interaction of the protocols and the statute, appellant did not obtain a ruling on the issue; thus, it is not preserved for our review. See *Mountain Pure, LLC v. Little Rock Wastewater Util.*, 2011 Ark. 258, 383 S.W.3d 347 (It is the appellant’s obligation to raise an issue first to the administrative agency and obtain a ruling thereupon to preserve an argument for appeal.). This case demonstrates the importance of our requirement that a ruling must be obtained to preserve an issue for review. Here, WN raised several issues to the ALJ regarding the protocols, including but not limited to the meaning of the word “disregard” as used in the protocols, the possible conflict between the Act and the protocols, the role of the protocols’ investigatory requirements that do not appear in the statute, and the question whether the statute supersedes the protocols. Without a ruling from either the administrative agency or the circuit court regarding the role of the protocols, this complex issue is not preserved for our review. *Fayetteville Express Pipeline, LLC v. Ark. Pub. Serv. Comm’n*, 2017 Ark. App. 557, 533 S.W.3d 106. We note that appellant seems to imply that the ALJ erred when it entered an opinion that “did not address the perceived conflict between the statute and protocol; in fact, the ALJ did not in his decision mention the protocol at all.” If WN desired a specific ruling regarding the applicability of the protocols,

it was his burden to obtain a ruling. We simply cannot review a ruling that was never made.

Because the issue of whether the Act violates due process ties in with the applicability of the protocols, we will address WN's constitutional argument here. WN did not develop before the ALJ the issue of whether the Act violates due process because it does not provide adequate notice of the prohibited conduct. Constitutional issues must first be raised and developed at the administrative level. *Landmark Novelties, Inc. v. Ark. State Bd. of Pharmacy*, 2010 Ark. 40, at 6, 358 S.W.3d 890, 895. When presented with an allegation that a statute or regulation is unconstitutional, this court must review the decision of the circuit court because an administrative agency lacks the authority to rule on a constitutional argument. *Arkansas Tobacco Control Bd. v. Sitton*, 357 Ark. 357, 166 S.W.3d 550 (2004). Even so, in an appeal originating from an agency decision yet involving a constitutional challenge, the constitutional challenge must be raised before the agency to preserve it for the circuit court's consideration. *Landmark, supra*.

At the administrative hearing, WN briefly touched on the issue of due process during closing argument. WN argued that

I want to say for record purposes that the fact that the agency is taking a position contrary to its own protocols is a violation of due process. Nobody can know what they are supposed to do to be on adequate notice if the agency's taking contrary positions in similar proceedings so are we to follow the protocols, are we to follow Mr. Barnes new version of the statute? That's not the way this is supposed to work, we're all supposed to know what standards we are to live by.

This statement does not adequately develop the constitutional argument before the ALJ; thus, the issue is not preserved for our review.

2. Case law

Another facet of WN's sufficiency argument involves our courts' interpretation of the Child Maltreatment Act. WN argues that our appellate courts have required conscious disregard of the responsibility to protect a child in a potentially dangerous situation when reviewing a finding that neglect by inadequate supervision has occurred. We disagree with WN's characterization of our case law.

WN argues that *Bixler v. Arkansas Department of Human Services*, 364 Ark. 292, 219 S.W.3d at 129, demonstrates that "courts interpreting the Act considered what a caretaker 'should have known' only to the extent the evidence indicated the caretaker knew of circumstances creating a risk, yet disregarded a duty to protect the child from it." In *Bixler*, the ALJ ruled that neglect by inadequate supervision occurred and that

[t]here was sufficient evidence that the Bixlers knew or should have known that their children's step-grandfather was a convicted sexual offender, and that after the death of the children's grandmother, the Bixlers had a duty to inquire about the "rumors" of his prior offense. The ALJ further ruled that the Bixlers should have assured that their children were not left alone in Roger's presence, particularly overnight. The ALJ ruled that the Bixlers' actions constituted a violation of Ark. Code Ann. § 12-12-503(12)(G) because the Bixlers allowed their children to be left alone overnight in the home of a convicted sexual offender.

Id. at 298, 219 S.W.3d 125, 129 (2005).

WN contends that by affirming the ALJ our supreme court held that the issue of neglect by inadequate supervision must involve an evaluation of “whether the caretakers put the children at risk by consciously acting or failing to act in the face of an appreciable potential for harm[.]” We agree that in *Bixler* the Arkansas Supreme Court held that foreseeability of harm and the awareness of dangerous circumstances are two factors relevant to the assessment of whether neglect by inadequate supervision has occurred. These two factors do not apply to whether the parent consciously disregarded caretaking responsibility as WN argues. Instead, the foreseeability of harm and awareness of a dangerous circumstance are relevant to the circumstances that the child is placed in, and the foreseeability of harm if left alone in that situation. The application of *Bixler* to the instant case is clear: WN placed TN in a car seat in a car on a hot day, a known potentially dangerous situation. TN was left alone in that situation, and the foreseeability of harm in that circumstance is also clear; thus, the ALJ’s finding of neglect by inadequate supervision comports with our case law.

WN cites *Arkansas Department of Human Services v. Koprovic*, 2012 Ark. App. 645, in which this court reversed the ALJ’s decision that a father had neglected his 22-month-old foster child by failing to adequately supervise her. In *Koprovic*, the father left MM playing in the yard with her siblings, among whom were 11-year-old twins, BeK and BrK. When the father called the children in for dinner, MM did not come in, and he ran outside to find her floating face down in the pool. MM sustained injuries from the incident. Koprovic told investigators that he believed that the gate surrounding the pool was locked and could not

be opened by the children. There was evidence that the Department of Human Services was aware of the pool, that Koprovic was subject to monthly and quarterly home visits by the caseworker and a home specialist, and that Koprovic had never been reprimanded or informed of any safety issues in the home or yard. Also, one of the siblings told investigators that the general rule was that they were required to stay with MM if she was playing outdoors. *Koprovic* is distinguishable from the instant case. There, the father was mistaken as to the existence of the dangerous condition that the pool was in fact accessible. By contrast, here, the potential for harm of an enclosed car on a hot day is clear.

WN also argues that in *Figueroa v. Arkansas Department of Human Services*, 2013 Ark. App. 83, our court held that a culpable mental state was necessary to found an allegation of neglect by inadequate supervision. We disagree with WN's characterization of the holding and hold that *Figueroa* is distinguishable from the instant case. In *Figueroa*, the father lost track of the knife he had used to cut down his wife's body after she had committed suicide by hanging. Later, Figueroa's minor son cut his hand on the knife. Under those unique circumstances, our court found that "[t]he mother's suicide was a traumatic event for both Figueroa and his children, and it is understandable that Figueroa lost track of the knife after he cut his wife's body down." *Id.* at 5. We did not hold that a culpable mental state was required for a finding of inadequate supervision, and we disagree that the *Figueroa* holding compels reversal in the instant case.

Neglect by inadequate supervision does not require a culpable mental state because it is defined in the Act outside of the criminal code. See Ark. Code Ann. § 5-2-204(c)(2)–

(3). In closing argument before the ALJ, counsel for WN stated, “The maltreatment act is designed to target parents or caregivers who are careless, reckless, don’t care what harm might result from their actions.” However, it is precisely that language describing a culpable mental state that the legislature specifically excluded from the statute.

With that in mind, we turn to the basic question of whether the evidence was sufficient to support the ALJ’s finding of neglect by inadequate supervision. We hold that it is, and on this point we affirm.

The Act provides that the agency was required to prove that TN’s caretaker failed to appropriately supervise TN, and that WN’s act or omission resulted in the child’s being left alone at an inappropriate age creating a dangerous situation or a situation that put the child at risk of harm; or that the child was left in inappropriate circumstances creating a dangerous situation or a situation that put the child at risk of harm. *See* Ark. Code Ann. § 12-18-103(14)(A)(vii)–(viii). The relevant evidence is as follows. WN was responsible for taking TN to daycare the morning of July 24, 2015. WN strapped the child in the car seat, and at some point in his journey WN lost awareness of TN’s presence in the car and failed to remove TN from his car seat. It was a hot day, with temperatures reaching the nineties. The ALJ concluded that “[t]his act or omission placed TN in inappropriate circumstances creating a dangerous situation and in a situation that put TN at a risk of harm.” Giving the undisputed evidence presented by the parties its most probative force, we hold that the agency’s decision is supported by substantial evidence. When the agency’s decision is supported by substantial evidence, it follows that the decision cannot be classified as

arbitrary and capricious. *Teston v. Ark. State Bd. of Chiropractic Exam'rs*, 361 Ark. 300, 305, 206 S.W.3d 796, 800 (2005).

B. Errors in the ALJ's Order

1. *Criminal-negligence standard*

On appeal, WN asserts that various errors in the ALJ's opinion resulted in prejudice to him and that we must reverse. We disagree. Though WN correctly asserts that the ALJ erred when it referred to the criminal-negligence standard, he has not demonstrated resulting prejudice. The appellate court may reverse the agency decision if it concludes that the ALJ's decision was affected by error of law and the substantial rights of the petitioner have been prejudiced. *Ogborn v. Ark. Dep't of Human Servs.*, 2017 Ark. App. 600, 532 S.W.3d 621.

The Child Maltreatment Act does not require a mens rea element, as we discussed above. See *Short v. State*, 349 Ark. 492, 496, 79 S.W.3d 313, 316 (2002). However, the ALJ's final order states that, according to the Act, "the acts or omissions must be negligent. The person's failure to be aware of the substantial risk to the child must be a gross deviation from what a reasonable person would do in the same situation." WN argues that the ALJ erred because the negligence standard he recites in the order is not a part of the Act. The criminal code defines "negligently" as follows:

(A) A person acts negligently with respect to attendant circumstances or a result of his or her conduct when the person should be aware of a substantial and unjustifiable risk that the attendant circumstances exist or the result will occur.

(B) The risk must be of such a nature and degree that the actor's failure to perceive the risk involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation considering the nature and purpose of the actor's conduct and the circumstances known to the actor.

Ark. Code Ann. § 5-2-202(4) (Repl. 2006).

It is not clear from the order that the ALJ relied on the criminal-negligence standard in making its decision because the first and last paragraph of the decision closely track the language of the Act, and the ALJ clearly based its decision on the statutory language; however, even if the court did rely on an incorrect standard, WN cannot show prejudice because applying the criminal-negligence standard only heightens the standard by which the ALJ could find that neglect by inadequate supervision occurred. We hold that WN has failed to demonstrate how his substantial rights were prejudiced by the ALJ's erroneous reference to the criminal-negligence standard.

2. Lack of capacity due to mental disease or defect

WN also alleges that the ALJ erred when it rejected the affirmative defense of lack of capacity by mental disease or defect and that he suffered prejudice as a result. Specifically, WN argues that he never asserted the defense; thus, it was error for the ALJ to address it in the order and that prejudice resulted from this error because it shows that the ALJ acted arbitrarily and capriciously. We disagree.

Arkansas Code Annotated section 12-18-804 provides that any defense or affirmative defense that would apply to the criminal offense is also cognizable in a child-maltreatment proceeding with the exception of lack of capacity as a result of mental disease

or defect under § 5-2-312. WN argues that he never raised this defense; however, WN did assert that because of stress and lack of sleep and the brain's reaction to those factors, he lost awareness of TN's presence in the car and was unable to adequately supervise TN. In support of this argument, Dr. Diamond testified that

[t]he reason I believe that this is not a situation in which he failed to properly care for his son is that this is a case of in a sense brain failure. This is where the brain shifts to a mode in which you lose awareness of the child in the car. So this is a failure of the brain to function properly at that moment and it is not a conscious act.

. . . .

As to whether, at the moment that WN left that car with TN in it, he had the brain capacity to make a decision to protect T.N. in that moment, in that moment his brain had shifted two things, to the autopilot mode and so he had lost awareness of TN in the car.

. . . .

As to whether, at that moment, he had the mental capacity to make any decision other than to get out of the car and leave TN in it, he did not have the mental capacity at that moment to . . . Absolutely not, he did not have the mental capacity at that moment to make a decision to protect TN by removing him from the car, no.

WN's expert witness repeatedly used the phrase "lack of capacity" and WN placed his mental capacity at issue by arguing that due to lack of sleep, stress, and other factors, his brain functioned differently than it would if it were not experiencing those unusual conditions, and as a result, he was unable to adequately supervise his child. Furthermore, the Act specifically excludes lack of capacity caused by mental disease or defect, and the ALJ's reference to the Act in question is not error under the circumstances presented here.

See Ark. Code Ann. § 12-18-804(2). Even if the ALJ erred by addressing a perceived issue, no prejudice results because the evidence is sufficient to support the finding of neglect by inadequate supervision. See *Teston*, *supra*.

3. Dr. Diamond's testimony

Because the issue regarding the weight of Dr. Diamond's testimony dovetails with WN's argument regarding the lack-of-capacity-defense, we discuss it here. WN argues that the ALJ did not properly consider Dr. Diamond's testimony regarding "lost awareness" and how it related to whether WN committed child maltreatment. Specifically, WN asserts that "[t]he ALJ arbitrarily and capriciously disregarded Dr. Diamond's testimony as supporting only a "lack of capacity" defense and based this finding, and thus its ultimate decision, on a fundamental error of law. . . . WN's brain functioned in the same way any person's normal brain would function under the same circumstances." Essentially, WN urges this court to give more weight to Dr. Diamond's testimony and treat it as empirical evidence that is not open to interpretation. WN states that Dr. Diamond's testimony is "basic neuroscience [that] applies to the function of every person's brain, which has been confirmed even by brain imaging[.]"

In the order, the ALJ stated that

Dr. Diamond maintains that WN's act was not about neglect or a disregard of his responsibilities. He maintains that it was about brain failure. WN's brain lacked the capacity at that moment to function properly. Even if Dr. Diamond's analysis is accepted, WN's lack of mental capacity is not a defense as that defense is specifically excluded in the Child Maltreatment Act.

. . . .

Dr. Diamond’s explanation of why WN forgot TN was in the car is plausible. . . . Dr. Diamond stated that this is a fairly common human problem, not only in regard to children but gave other examples of simply losing awareness. I do understand that this is a result of human frailty and is a human failure, but it is a failure.

Dr. Diamond’s testimony is undisputed, and the ALJ credited his testimony as being “plausible”; however, the ALJ declined to treat the testimony as empirical evidence that stress and pressure causing lost awareness can only be seen as “how normal human memory works.” The ALJ clearly weighed Dr. Diamond’s testimony and ascertained that the human brain malfunctions—in other words, fails to work normally—when a person is sleep-deprived and experiencing unusual stress. This court may not simply substitute its judgment and discretion for that of the administrative agency. *Bixler, supra*. It is also the prerogative of the agency to believe or disbelieve the testimony of any witness and to decide what weight to give the evidence. *Ark. State Police Comm’n v. Smith*, 338 Ark. 354, 994 S.W.2d 456 (1999).

C. Void for Vagueness

WN argues that the Act is unconstitutionally vague because the definition of neglect does not provide adequate notice of the prohibited behavior. Our review of the abstract and addendum does not show that WN raised this argument to the ALJ; thus, we are barred from review of the issue. In an appeal originating from an agency decision involving a constitutional challenge, the constitutional challenge must be raised before the agency to preserve it for the circuit court’s consideration. *Reed v. Arvis Harper Bail Bonds, Inc.*, 2010 Ark. 338, at 4, 368 S.W.3d 69, 72–73.

D. The Circuit Court's Decision to "Unseal" the Case

WN appeals the circuit court's decision to require that his name appear in full on the pleadings. This issue is moot. As a general rule, the appellate courts of this state will not review issues that are moot. *Terry v. White*, 374 Ark. 387, 391, 288 S.W.3d 199, 202 (2008). To do so would be to render advisory opinions, which this court will not do. *Id.* We have generally held that a case becomes moot when any judgment rendered would have no practical legal effect upon a then existing legal controversy. *Id.* In other words, a moot case presents no justiciable issue for determination by the court. *Id.* Our supreme court granted WN's motion to seal the case on September 28, 2017. The purpose of WN's motion was to remove WN's name from all documents related to the case, which was accomplished by the court's order; thus, the issue is moot.

Affirmed.

HARRISON and KLAPPENBACH, JJ., agree.

Lassiter & Cassinelli, by: *Erin Cassinelli* and *Lauren Collins*; and
Benca & Benca, by: *Patrick J. Benca* and *John D. Kennedy*, for appellant.

Andrew Firth, *Jerald A. Sharum*, and *Mary Goff* Office of Chief Counsel, for appellee.

