ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA09-112

NATASHA CALDWELL APPELLANT V. ARKANSAS DEPARTMENT OF HUMAN SERVICES APPELLEE	**Opinion Delivered** JUNE 17, 2009 APPEAL FROM THE BENTON COUNTY CIRCUIT COURT, [NO. J2008-851-DN] HONORABLE CHRISTINE HOWART, SPECIAL JUDGE AFFIRMED

M. MICHAEL KINARD, Judge

Natasha Caldwell appeals the adjudication of her infant daughter W.H. as dependent-neglected. Her sole point for reversal is that there is insufficient evidence to support the finding. We disagree and affirm.

Caldwell and Shawn Husky are the parents of W.H., who was born on May 20, 2008. On August 4, 2008, the Department of Human Services was called to a Benton County hospital with a report that W.H. had been coughing up blood. A chest x-ray showed that W.H. had three fresh rib fractures and possibly other, older rib fractures. DHS exercised a seventy-two-hour hold on W.H. and transported her to Arkansas Children's Hospital in Little Rock for further examination. The examination at Children's Hospital revealed that W.H. had three bruises on various parts of her body, as well as eleven rib fractures in various stages of healing. Three other possible fractures were noted. Genetic testing ruled out disease as a

cause of the fractures. Doctors were later able to examine W.H.'s mouth and found a small puncture wound at the base of her tongue and also a small laceration at the back of her throat.

DHS filed its petition for emergency custody on August 7, 2008. An order for emergency custody was entered that same day. The circuit court later found probable cause for entry of the emergency order.

The adjudication hearing was held on October 18, 2008. Dr. David Rodriguez, who examined W.H. in the emergency room at Children's Hospital, testified by deposition that the posterior rib fractures W.H. suffered are usually caused when a child is squeezed and force is exerted on the child's back that flexes the ribs where they are attached to the backbone, and these fractures are thought to be very specific to child abuse. According to Dr. Rodriguez, W.H. could not have caused her own injuries and "any reasonable adult" would know that they were going "overboard" in exerting enough force on W.H. to produce the types of injuries she sustained. Dr. Rodriguez said that W.H.'s care giver should have noticed something wrong with the child due to her pain level. Dr. Rodriguez could only state that the bruises occurred within thirty days of his examination of W.H. He opined that someone would have noticed the bruises when W.H. was being changed or bathed.

Natasha Caldwell testified that she did not have an explanation for what happened to W.H. and did not do anything to injure her child. She also testified that she did not notice any bruises on W.H. and neither did W.H.'s pediatrician. According to Caldwell, she did not know W.H. had any injuries when they went to the emergency room on August 4. Caldwell

said that W.H. went to a babysitter for the first time on the morning of August 4. However, Caldwell could not recall anything about the babysitter, other than her name was Carol. She said she gave information about Carol's address to her caseworker.

Shawn Husky denied that he had dropped W.H. immediately before they noticed blood coming from W.H.'s mouth. He admitted to fabricating a story for the DHS caseworker because he and Caldwell believed that, without such a story, neither would regain custody of W.H. Husky said that he knew that neither Caldwell or himself injured W.H. but did not have an explanation for how the injuries occurred. He said that he had bathed W.H. and changed her diapers, but did not notice any bruising. According to Husky, the only other people who could be responsible for W.H.'s injuries were Caldwell's parents and Carol, the babysitter.

The circuit court ruled from the bench and found that what happened to W.H. was "inexcusable." The court first noted that the parents' credibility was "seriously questioned," in part, because they did not know the babysitter's name or address and that it was "absurd" for a two-month-old child to have eleven rib fractures without anyone knowing. The court noted that it was not required to find a specific person responsible for the harm to W.H. in order for her to be found dependent-neglected, only that she was injured while in her parents' care. The court found that W.H. was dependent-neglected because W.H. had been physically abused and had been subjected to aggravated circumstances, specifically, extreme and repeated cruelty. The court's written order was entered on November 20, 2008. This

appeal followed.

Dependency-neglect allegations must be proved by a preponderance of the evidence. *See* Ark. Code Ann. § 9-27-325(h)(2)(B) (Repl. 2008). We will not reverse the circuit court's findings from a dependency-neglect adjudication unless they are clearly erroneous. *Brewer v. Arkansas Dep't of Human Servs.*, 71 Ark. App. 364, 43 S.W.3d 196 (2001). In reviewing a dependency-neglect adjudication, we defer to the circuit court's evaluation of the credibility of the witnesses. *Id*.

Our Juvenile Code contains several definitions relevant to this appeal. Arkansas Code Annotated section 9-27-303(18)(A) defines a "dependent-neglected juvenile" in part as "any juvenile who is at substantial risk of serious harm as a result of . . . abuse, . . . neglect, or parental unfitness[.]" Section 9-27-303(3)(A) defines "abuse" in part as including extreme or repeated cruelty to a juvenile, any injury that is at variance with the history given, and any non-accidental physical injury. In turn, "neglect" is defined in part as those acts or omissions of a parent that constitute the failure or refusal to prevent the abuse of the juvenile when the person knows or has reasonable cause to know that the juvenile is or has been abused or the failure to take reasonable action to protect the juvenile from, among other things, abuse, neglect, or parental unfitness when the existence of this condition was known or should have been known. *See* Ark. Code Ann. § 9-27-303(36)(A)(i) and (iii).

Although Caldwell acknowledges that the evidence shows that W.H. was abused, her sole argument on appeal is that there is no evidence that she, either by omission or

affirmative act, caused W.H.'s injuries. According to Caldwell, the circuit court was, therefore, clearly erroneous in finding that W.H. was dependent-neglected. We disagree.

In *Brewer*, *supra*, we held that parental unfitness is not necessarily predicated upon the parent's causing some direct injury to the child in question. We explained:

> Section 9-27-303([18])(A) explicitly states that a dependent-neglected child is one at risk of serious harm from an unfit parent. Parental unfitness is not necessarily predicated upon the parent's causing some direct injury to the child in question. Such a construction of the law would fly in the face of the General Assembly's expressed purpose of protecting dependent-neglected children and making those children's health and safety the juvenile code's paramount concern. To require [the child] to suffer the same fate as his older sister before obtaining the protection of the state would be tragic and cruel.

Brewer, 71 Ark. App. at 368, 43 S.W.3d at 199. The *Brewer* court went on to hold that a parent that who fails to notice obvious signs of abuse to a child is unfit.

In the present case, Dr. Rodriguez's testimony establishes that a reasonable person caring for W.H. with her broken ribs would notice that she was in a great deal of pain. He also said that someone changing or bathing W.H. would notice the bruises. Although Caldwell testified that W.H.'s pediatrician never noticed any bruises, the medical records were not introduced. Neither did her pediatrician testify as to whether bruises were found on W.H. during the occasions Caldwell said that she took the baby to the doctor. Therefore, the assertion that no bruises were found prior to the examination at the emergency room or at Children's Hospital rests entirely on the credibility of Caldwell and Husky, which, as noted, was seriously questioned by the court. We have no hesitancy in holding that Caldwell's failure to notice either the amount of pain W.H. was experiencing or the bruising

constitutes acts of omission that demonstrate that W.H. is at risk of harm because of parental unfitness.

Affirmed.

VAUGHT, C.J., and BROWN, J., agree.