

**ARKANSAS COURT OF APPEALS**DIVISION III  
No. CA 12-387

VALERIE GAER

APPELLANT

V.

ARKANSAS DEPARTMENT OF  
HUMAN SERVICES AND MINOR  
CHILDREN

APPELLEES

Opinion Delivered September 19, 2012

APPEAL FROM THE SEBASTIAN  
COUNTY CIRCUIT COURT, FORT  
SMITH DISTRICT  
[NO. JV-11-749]HONORABLE MARK HEWETT,  
JUDGE

AFFIRMED

**WAYMOND M. BROWN, Judge**

Valerie Gaer appeals from the February 24, 2012 order of the Sebastian County Circuit Court adjudicating her children, D.D. (DOB 09/23/02) and B.D. (DOB 05/28/04), dependent-neglected. Appellant's sole point on appeal is a challenge to the sufficiency of the evidence supporting the order. We affirm.

*Background*

On November 20, 2011, Fort Smith police received a call from a resident at Oakbrook Apartments who reported that someone had tried to kick in his door. During their search for the suspect, police visited the apartment of Kenneth Mullinax, a neighbor and acquaintance of appellant. The officers observed drug paraphernalia and a small baggie of white powder

in plain sight on the coffee table, and arrested Mullinax and his two visitors at the time, one of whom was appellant. DHS found D.D. and B.D. alone in appellant's apartment and took them into custody on a seventy-two-hour hold.

DHS filed a petition for emergency custody and dependency-neglect on November 22, 2011, alleging that D.D. and B.D. were dependent-neglected due to parental unfitness. The affidavit of DHS investigator Corey Williams was attached in support of the petition. At the time appellant was arrested, Williams did a walk-through of her apartment. He determined that D.D. and B.D. were clean, appropriately dressed, and healthy, and that appellant's apartment, though messy, met minimum standards. Williams then met appellant at the jail and administered a drug screen, which came back positive for methamphetamine.<sup>1</sup> Williams also learned that appellant had been prescribed thirty tablets of Xanax on November 14, 2011, with instructions to take one pill a day, but she had only five and a half pills left on November 20, 2011.

The circuit court granted the petition and filed an *ex parte* order for emergency custody on November 22, 2011. In its order, the court noted that DHS had an open protective-services case on the family from May 2009 to June 2011, after DHS made a true finding of environmental neglect against appellant,<sup>2</sup> and that DHS had made reasonable efforts to provide services to prevent the removal of the children.

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<sup>1</sup>The test was also positive for benzodiazepine, but appellant had a legal prescription for Xanax.

<sup>2</sup>Corey Williams indicated in his affidavit that the previous DHS case was for inadequate supervision.

On December 1, 2011, a probable-cause hearing was held. The circuit court found that probable cause existed to issue the emergency custody order in order to protect the boys from immediate danger and that probable cause still existed to keep them in DHS custody. The circuit court stated that the bases for its finding of probable cause were appellant's pending criminal charge and an "invalid drug screen sample." The court ordered appellant to have supervised visitation at the DHS offices, contingent on passing a drug screen; ordered DHS to schedule a hair-follicle test for appellant within ten days; and ordered DHS to conduct a home study on Spencer Daly, the boys' father, to develop an appropriate case plan, and to provide services as appropriate to achieve the goal of the case plan.

After an adjudication hearing held on January 27, 2012, the circuit court found by a preponderance of the evidence that B.D. and D.D. were dependent-neglected. In its February 24, 2012 adjudication order, the court stated:

[S]pecifically, the Court finds the juveniles are at substantial risk of serious harm as a result of parental unfitness. The Court finds that the mother has a history of drug abuse, has been recently arrested for possession of drug paraphernalia and admits to adulterating a urine sample and admits to recent methamphetamine use. Based on the totality of the circumstances in this matter, the Court finds that the juveniles are dependent-neglected due to the drug abuse of the mother.

The court thus ordered that the children would remain in the custody of DHS, with a case goal of reunification. Appellant filed a timely notice of appeal on March 2, 2012.

#### *Standard of Review*

The burden of proof in dependency-neglect adjudications is a preponderance of the evidence.<sup>3</sup> On appeal, this court reviews the trial court's findings de novo, giving due regard

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<sup>3</sup>Ark. Code Ann. § 9-27-325(h)(2)(B) (Supp. 2011).

to the court's opportunity to judge the credibility of witnesses.<sup>4</sup> Where the sufficiency of the evidence is challenged on appeal, this court will not reverse the trial court's findings unless they are clearly erroneous.<sup>5</sup> A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made.<sup>6</sup>

In an adjudication hearing, the focus is on the child, not the parent; at this stage of a proceeding, the juvenile code is concerned with whether the child is dependent-neglected.<sup>7</sup> An adjudication of dependency-neglect occurs without reference to which parent committed the acts or omissions leading to the adjudication; the juvenile is simply dependent-neglected.<sup>8</sup> The appellate court is not to act as "super fact-finder," substituting its own judgment or second-guessing the credibility determinations of the court; we reverse only in those cases where a definite mistake has occurred.<sup>9</sup>

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<sup>4</sup>*Moiser v. Ark. Dep't of Human Servs.*, 95 Ark. App. 32, 233 S.W.3d 172 (2006).

<sup>5</sup>*Johnson v. Ark. Dep't of Human Servs.*, 2012 Ark. App. 244, \_\_\_ S.W.3d \_\_\_.

<sup>6</sup>*Williams v. Ark. Dep't of Human Servs.*, 99 Ark. App. 95, 257 S.W.3d 574 (2007).

<sup>7</sup>*Johnson, supra* (citing *Seago v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 767, \_\_\_ S.W.3d \_\_\_).

<sup>8</sup>*Id.* (citing *Albright v. Ark. Dep't of Human Servs.*, 97 Ark. App. 277, 248 S.W.3d 498 (2007)).

<sup>9</sup>*Id.* (citing *K.C. v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 353, \_\_\_ S.W.3d \_\_\_).

*Discussion*

A child may be adjudicated dependent-neglected when the preponderance of the evidence shows that a parent's neglect or parental unfitness leaves the child at a substantial risk of serious harm.<sup>10</sup> A parent commits neglect when she fails to take reasonable action to protect her child from neglect or parental unfitness when the existence of this condition was known or should have been known.<sup>11</sup> Adjudication hearings are held to determine whether the allegations in a petition are substantiated by proof.<sup>12</sup>

In this case, D.D. and B.D. were removed from appellant's custody after she was arrested, charged with possession of drug paraphernalia, and tested positive for methamphetamine.<sup>13</sup> A marijuana pipe, bent spoons coated with a substance later determined to be methamphetamine, and a hypodermic needle were found in the living room of the apartment where appellant was when she was arrested. At the adjudication hearing, appellant testified that she did not own any of the drug paraphernalia found in her neighbor's apartment and was only there to borrow a cigarette. However, the police officer who arrested appellant testified that she was "very fidgety," her speech was slurred, her eyes were glassy and her pupils constricted, and she generally appeared to be intoxicated. DHS investigator Corey

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<sup>10</sup>Ark. Code Ann. §§ 9-27-303(18)(A)(v)-(vi), 9-27-325(h)(2)(B) (Supp. 2011).

<sup>11</sup>Ark. Code Ann. § 9-27-303(36)(A)(iii) (Supp. 2011).

<sup>12</sup> Ark. Code Ann. § 9-27-327(a)(1) (Supp. 2011).

<sup>13</sup>Appellant tested negative for meth in the drug screens that were performed prior to each visitation after D.D. and B.D. were removed. However, a hair-follicle test performed on January 26, 2012, was positive for methamphetamine at a level of 3724 pg/mg (the test stated that the cutoff level was 500 pg/mg).

Williams testified that appellant only had five and a half Xanax pills left at the time of her arrest, even though the prescription had been filled just six days before and she was only supposed to take one pill per day. In addition, appellant admitted that she had snorted methamphetamine several nights before the arrest to help her study for exams.<sup>14</sup> She also admitted that she had attempted to falsify the results of her post-arrest drug screen by diluting her urine sample with water from the toilet at the detention center. Appellant testified that although she took speed in her twenties, she had not taken any drugs since her sons were born, other than the one time she snorted methamphetamine in November 2011, and pointed out that D.D. and B.D. were staying with her mother that night and were therefore not in any danger.

The circuit court made it clear that its adjudication was based on the totality of the evidence:

[I]t's not just the one admitted use of meth, which she's clearly admitted to, then we have the occurrence in the apartment where she's present with drug paraphernalia in clear sight . . . . She has enough knowledge of drug paraphernalia that she was suspicious, at least, as to what it was, and then . . . [she] produced an adulterated sample for the drug screen, so it's an accumulation of things that indicates an issue.

The circuit court concluded, after examining the evidence in its entirety, that appellant had more of an issue with drug use than she would admit in her testimony:<sup>15</sup> a conclusion based on credibility that the court was singularly entitled to make. There was evidence to support this, such as the testimony that appellant appeared intoxicated when arrested and tested

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<sup>14</sup>She also testified that she snorted the drug as a “science experiment” after her professor spoke in criminal procedure class about how powerful present-day drugs are.

<sup>15</sup>The court ordered appellant to continue undergoing drug screens and to take another hair-follicle test before the next hearing.

positive for methamphetamine right after her arrest, evidence that appellant was abusing the Xanax prescribed to her for anxiety, and appellant's admission that she tried to falsify the results of her drug screen. In addition, the record shows that appellant resisted complying with the court's order to take a hair-follicle drug test until she was threatened with contempt of court.

A parent commits neglect when she fails to take reasonable action to protect her child from neglect or parental unfitness when the existence of this condition was known or should have been known.<sup>16</sup> Neglect also occurs when a parent fails to appropriately supervise the juvenile, resulting in the juvenile being left alone at an inappropriate age or in inappropriate circumstances, creating a dangerous situation or a situation that puts the juvenile at risk of harm.<sup>17</sup> Although D.D. and B.D. were not in appellant's care on the November 2011 night she admitted to snorting methamphetamine, they *were* in her care the day she was arrested and tested positive for the drug; appellant told police that the boys were playing with friends somewhere in the apartment complex, but they were found to be inside appellant's apartment, alone. They were nine and seven years old at the time. These facts supported the allegation that appellant's conduct constituted neglect and placed D.D. and B.D. at risk of substantial harm.

It is not alleged that appellant actively harmed D.D. or B.D. The statutory definition of neglect, however, does not require proof of actual harm or impairment having been

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<sup>16</sup>Ark. Code Ann. § 9-27-303(36)(A)(iii) (Supp. 2011).

<sup>17</sup>Ark. Code Ann. § 9-27-303(36)(A)(vii) (Supp. 2011).

experienced by the child; rather, the term “substantial risk” speaks in terms of future harm.<sup>18</sup> It is undisputed that appellant was under the influence of methamphetamine two to three days before being arrested, and there was also evidence (though disputed) to support a conclusion that appellant was intoxicated on the day of her arrest. Appellant’s drug use, however frequent, affected her ability to properly care for D.D. and B.D. in two ways.<sup>19</sup> First, appellant’s drug use exposed her to criminal liability, which would affect the boys’ well-being if she were incarcerated and unable to care for them.<sup>20</sup> Second, appellant’s ability to care for D.D. and B.D. may have been directly impaired under the influence of the drugs.<sup>21</sup> In light of the evidence adduced, we cannot say that the circuit court’s findings are clearly erroneous, and we are not left with a firm conviction that a mistake has been made. Therefore, we affirm the circuit court’s adjudication order.

Affirmed.

ABRAMSON and HOOFFMAN, JJ., agree.

*Deborah R. Sallings*, Arkansas Public Defender Commission, for appellant.

*Tabitha B. McNulty*, Office of Chief Counsel, for appellee.

*Chrestman Group, PLLC*, by: *Keith L. Chrestman*, attorney ad litem for minor children.

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<sup>18</sup>*Maynard v. Ark. Dep’t of Human Servs.*, 2011 Ark. App. 82, \_\_\_ S.W.3d \_\_\_.

<sup>19</sup>*See id.*

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*