SUMMARY
July 8, 2021

2021COA95

No. 20CA2005, *People in Interest of D.M.F.D.* — Juvenile Court — Dependency and Neglect — Adjudicatory Hearing; Evidence — Hearsay

A division of the court of appeals considers whether a department of social services satisfies its burden of proving that a child is dependent or neglected if the juvenile court admits key portions of the department's evidence at the adjudicatory hearing for a limited purpose only and not for the truth of the matter asserted. The division holds that, because a juvenile court cannot base its determination that a child is dependent or neglected on hearsay or other evidence not admitted for the truth of the matter asserted, the record in this case does not support the juvenile court's factual findings and legal conclusion that the child was dependent and neglected. The division also holds that a parent's

criminal convictions and pending criminal charges are irrelevant to a determination of whether the parent's child is dependent or neglected absent a link to the statutory factors addressing whether a child is dependent or neglected. The division therefore reverses the adjudicatory judgment.

COLORADO COURT OF APPEALS **2021COA95**

Court of Appeals No. 20CA2005
City and County of Denver Juvenile Court No. 20JV537
Honorable Laurie A. Clark, Judge

The People of the State of Colorado,

Appellee,

In the Interest of D.M.F.D., a Child,

and Concerning M.L.D.,

Appellant.

JUDGMENT REVERSED

Division II
Opinion by JUDGE LIPINSKY
Román and Harris, JJ., concur

Announced July 8, 2021

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¶ 1 In this dependency and neglect proceeding, we consider whether the evidence admitted for the truth of the matter asserted at the adjudicatory hearing supported the juvenile court's determination that the child was dependent and neglected. Although the Human Services Department of the City and County of Denver's case largely rested on the observations of staff at the hospital where the child was born, the Department did not call any hospital personnel to testify. Rather, the Department attempted to prove its case through father's criminal history, its own employees' testimony about what the hospital staff told them about father's interaction with the child, the employees' limited observations of and communications with father, and the employees' opinions.

¶ 2 The juvenile court correctly recognized that the testimony of the Department's employees regarding the observations, statements, and conclusions of the hospital personnel was inadmissible hearsay, and the court admitted that testimony solely for its effect on the listener. The court expressly said it was not admitting such evidence for the truth of the matter asserted. It limited the admission of other evidence solely to establish that the Department's experts relied on it in forming their opinions. Thus,

the evidence introduced at the adjudicatory hearing shed little light on father's ability to care for the child.

¶ 3 Therefore, we reverse the adjudicatory judgment because the evidence presented was insufficient to support a finding of dependency or neglect.

I. Background

¶ 4 M.L.D. (father) appeals the judgment adjudicating D.M.F.D. (the child) dependent and neglected. The Department filed a petition in dependency and neglect when the child was only six days old. The Department alleged that the hospital staff had concerns about the parents' lack of bonding with the child and inability to meet the child's needs.

¶ 5 The Department specifically asserted in the petition that

- the hospital staff was doing most of the child's feeding and diaper changes because the child was "spending most of the time in the nursery and not with parents";
- the staff had to remind the parents that the child needed to eat;

- the staff would burp and finish feeding the child because "he was only getting about one-fourth of what he needed";
- the child lost three pounds during the first two days after he was born;
- the staff observed the child "either being held by extended family or placed in his bassinette when he was in the room with [his] parents"; and
- the parents took smoke breaks "at times over an hour multiple times a day while at the hospital."

Father denied the allegations and asked for a trial.

¶ 6 At the conclusion of the adjudicatory hearing, the juvenile court adjudicated the child dependent and neglected.

II. Adjudication

A. Applicable Law

¶ 7 In a dependency and neglect adjudicatory hearing, the juvenile court must determine whether the allegations summarized in the department of social services' petition are supported by a preponderance of the evidence, § 19-3-505(1), C.R.S. 2020, and whether the child's status warrants the state's intervention into the

familial relationship, *People in Interest of A.H.*, 271 P.3d 1116, 1120 (Colo. App. 2011).

¶ 8 The preponderance of the evidence standard "directs the court to decide whether the existence of a contested fact is 'more probable than its nonexistence.'" *People v. Marx*, 2019 COA 138, ¶ 49, 467 P.3d 1196, 1206 (quoting *People v. Taylor*, 618 P.2d 1127, 1135 (Colo. 1980)). And juvenile courts may conduct hearings in dependency and neglect proceedings "in an informal manner." § 19-1-106(2), C.R.S. 2020.

¶ 9 "If . . . the court finds that the petition's allegations are supported by a preponderance of the evidence, then the court shall sustain the petition and make an order of adjudication setting forth whether the child is dependent or neglected." *A.R. v. D.R.*, 2020 CO 10, ¶ 39, 456 P.3d 1266, 1276 (citing § 19-3-505(7)(a)). The court must then hold a dispositional hearing. *Id.* (citing § 19-3-505(7)(b)).

¶ 10 But the low standard of proof and permissible use of informal proceedings in adjudicatory hearings do not mean a juvenile court may disregard the rules of evidence. *See* C.R.J.P. 1 (stating that proceedings in juvenile courts "shall be conducted according to the Colorado Rules of Civil Procedure"). The Colorado Children's Code

"does not dispense with rules of evidence which directly bear upon substantive proof." *Daugaard v. People in Interest of Daugaard*, 176 Colo. 38, 43, 488 P.2d 1101, 1103 (1971), *overruled on other grounds by People v. Ramirez*, 155 P.3d 371 (Colo. 2007).

¶ 11 For these reasons, at an adjudicatory hearing, a department of social services must introduce sufficient admissible evidence to meet its burden of proof that a child is dependent or neglected. A department cannot rest its case that a child is dependent or neglected on hearsay or other evidence that, in response to a parent's objections, the court admitted for a limited purpose other than for the truth of the matter asserted. Similarly, a juvenile court cannot base its determination that a child is dependent or neglected on such evidence.

¶ 12 Section 19-3-102(1), C.R.S. 2020, sets forth the factors establishing whether a child is dependent or neglected. As pertinent here, the statute provides that a child is dependent or neglected if (1) the child lacks proper parental care through the actions or omissions of the parent; (2) the parent fails or refuses to provide the child with proper or necessary subsistence, education, medical care, or any other care necessary for the child's health,

guidance, or well-being; or (3) the child is homeless, without proper care, or not domiciled with a parent through no fault of the parent. § 19-3-102(1)(b), (d), (e).

¶ 13 In determining whether the evidence is sufficient to sustain an adjudication that a child is dependent or neglected, we review the record in the light most favorable to the prevailing party and draw every inference fairly deducible from the evidence in favor of the juvenile court's decision. *People in Interest of S.G.L.*, 214 P.3d 580, 583 (Colo. App. 2009). We must uphold the court's findings and conclusions if the record supports them, even though reasonable people might arrive at different conclusions based on the same facts. *Id.*

B. Analysis

¶ 14 Father contends that the evidence was insufficient to support the juvenile court's findings and determination that the child was dependent and neglected. We agree.

¶ 15 At the adjudicatory hearing, the Department called two witnesses — an intake worker and the ongoing caseworker. The intake worker described the hospital staff's concerns regarding father's ability to care for, and failure to bond with, the child. She

also testified that the child's umbilical cord had tested positive for controlled substances. Because this testimony was hearsay, *see* CRE 801(c) (explaining that hearsay "is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"), however, the juvenile court admitted it for the limited purpose of its effect on the listener and not for its truthfulness.

¶ 16 In addition, the intake worker testified about her own observations regarding father's interaction with the child during her single visit to the hospital. She reported that, during her five-hour visit, she did not observe father regularly feed the child, change the child's diaper, provide routine care for the child, or check whether the child was in active substance withdrawal. The intake worker noted that she saw father hold the child "for a very short period of time" and carry the child to the child's grandmother for feeding. She faulted father for taking a break of "over an hour" to smoke a cigarette. The intake worker said she saw the child in the hospital nursery while father was smoking outside the building.

¶ 17 The intake worker also testified about the child's weight loss and the hospital staff's belief that the child was not "get[ting]

enough food." But this testimony rested on inadmissible hearsay. For example, she said "[i]t was reported by the hospital" that the child lost "at least 2 pounds."

¶ 18 She further testified that, during her visit to the hospital, she saw nurses feeding the child additional formula, burping the child, and changing his diaper. She stated that she saw father pick up the child when hospital staff said "it was time for another feeding" and that father "tried to feed the baby." According to the intake worker, the hospital staff then took the child because the child "didn't eat enough." But the intake worker did not explain why, aside from the hospital staff's statements, she believed the child was not "eat[ing] enough." As a result, the Department presented no admissible evidence regarding the child's weight loss or the hospital staff's concern about the child's loss of weight.

¶ 19 The intake worker and the ongoing caseworker also testified about father's criminal record, pending charges for a drug offense, possible substance abuse, and housing status. The intake worker said that the parents lived in hotels before the child's birth and reportedly planned to move to Montana to live with extended family. She testified that it "was unknown where they were planning on

raising this child." But she also testified that father had obtained a job "in construction." And, on cross-examination, the intake worker admitted that "[t]he reason the safety plan [for the child] was not implemented from the department's perspective [was] because of the actions of . . . mother."

¶ 20 The ongoing caseworker further questioned father's sobriety based on his drug offenses and his admission that he drank at least two beers every day, but she admitted, "I have no idea if [father] is sober." She also said that father had three other children who were not in his custody but did not say why the children were not in his custody.

¶ 21 The intake worker and the ongoing caseworker opined that father was unable to care for the child. Those opinions rested, at least in part, on evidence that the juvenile court did not admit for the truth of the matter asserted. *See People in Interest of M.M.*, 215 P.3d 1237, 1250 (Colo. App. 2009); *see also* CRE 703.

¶ 22 At the conclusion of the adjudicatory hearing, the juvenile court made the following findings of fact:

- a court in Jefferson County had sentenced father to six months' unsupervised probation and a suspended jail sentence in a case that "was non-drug related";
- in that case, father "completed [his sentence] successfully";
- father pleaded guilty to class 1 misdemeanors involving controlled substances in a case filed in Arapahoe County and in a case filed in the City and County of Denver;
- father had a warrant for noncompliance in the Arapahoe County case and father's sentencing in the Denver case was "on hold waiting for a competency evaluation";
- father faced charges for "class four possession of controlled substances" in a second Denver case, but that case was also "on hold waiting for a competency evaluation";
- father "fails or refuses to provide the child with proper or necessary subsistence, education, medical care, or any other necessary care for his or her health guidance and-or well-being" and "does not have the ability to be able to meet this child's needs, basic needs" because

father lacks "the ability to be able to feed this baby, protect this baby, provide this baby with the daily care that the child would need to thrive"; and

- "the child is homeless without proper care or not domiciled with his parents . . . through no fault of such [parent] . . . ."

The court did not make any specific findings as to why father did not have the ability to meet this child's needs.

¶ 23 The juvenile court's findings were insufficient to support its conclusion that the child was dependent and neglected for two principal reasons.

¶ 24 First, father's convictions and pending charges could not support a determination that the child was dependent or neglected absent a link between the convictions and pending charges and the factors identified in section 19-3-102. *Cf. People in Interest of E.S.*, 2021 COA 79, ¶ 22, ___ P.3d ___, ___ (holding that the juvenile court erred by enforcing the department's blanket policy that a parent with outstanding arrest warrants is barred from visiting with his or her children in the absence of "any consideration of the children's health and safety").

¶ 25 Rather, a parent's incarceration is a relevant factor in determining whether his or her parental rights should be terminated, but only *after* the child has been found dependent or neglected. *See* § 19-3-604(1)(b)(III).

¶ 26 Nothing in the Colorado Children's Code provides that a child may be found dependent or neglected solely because the child's parent has criminal convictions or faces criminal charges. This is so because adjudications of dependency and neglect "are not made as to the parents but, rather, relate only to the status of the child as of the date of the adjudication." *K.D. v. People*, 139 P.3d 695, 699 (Colo. 2006) (citation omitted).

¶ 27 Here, the court's findings regarding father's convictions and pending charges violate this principle; the court did not explain how or why such convictions and pending charges affected father's ability to meet the child's needs. The court made no attempt to link the convictions and pending charges to the child, and the Department and the guardian ad litem do not point us to any evidence establishing such a link.

¶ 28 Second, the court did not admit for the truth of the matter asserted the strongest evidence — the hospital staff's finding that

the child had lost weight in the hospital, the child was not getting enough nutrition, and the child's umbilical cord had tested positive for controlled substances — showing the child was dependent or neglected. As noted above, the Department did not call any of the hospital staff who cared for the child as witnesses. Rather, the Department attempted to admit the hospital staff's observations and conclusions through the intake worker. This ran afoul of the general prohibition against the admission of hearsay. *See* CRE 802.

¶ 29 Consequently, the court could not have considered this evidence, to which father objected, in determining whether the child was dependent or neglected. *See People ex rel. J.A.S.*, 160 P.3d 257, 261 (Colo. App. 2007) ("When trial is to a court, rather than to a jury, we presume that the trial court disregarded any immaterial, incompetent, or hearsay evidence that may have been introduced.").

¶ 30 The rules of evidence are not mere exercises in formalism; they, like our other rules of procedure, are "designed to ensure the substantive integrity of the process and to elicit reliable evidence." *Lin v. Great Rose Fashion, Inc.*, No. 08-CV-4778(NGG)(RLM), 2009 WL 1544749, at *2 n.1 (E.D.N.Y. June 3, 2009).

> The hearsay rule, subject to well defined exceptions, reflects the conviction that all testimony offered to a trier of fact should be tested for its accuracy and truth through cross-examination. Experience has long shown that "no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and . . . no statement . . . should be used as testimony until it has been probed and sublimated by that test. . . ."

People v. Howard, 198 Colo. 317, 319, 599 P.2d 899, 900-01 (1979) (quoting 5 J. Wigmore, Evidence § 1367 (Chadbourn rev. 1974)).

¶ 31 So what relevant evidence was properly before the juvenile court? Most of that evidence consisted of the intake worker's testimony regarding her observations during her visit to the hospital to check on the child and her and the ongoing caseworker's opinion testimony. But this evidence fell short of proving by a preponderance of the evidence that the child was dependent and neglected.

¶ 32 Significantly, the juvenile court acknowledged the weakness of the Department's case against father: "it is possible that [father] does have an inability to [properly care for the child] and we wouldn't know that until we receive the competency evaluation. But there are concerns in regards to his ability to be able to . . .

meet those needs." The possibility that father lacked the ability to care for the child, even coupled with the concerns that the intake worker and the ongoing caseworker expressed, falls short of establishing that the Department proved the allegations in its petition by a preponderance of the evidence. The mere possibility that an allegation is true does not mean its truthfulness is "more probable than its nonexistence." See Marx, ¶ 49, 467 P.3d at 1206 (citation omitted).

¶ 33 Accordingly, the law compels the conclusion that the record does not support the juvenile court's factual findings and legal conclusion that the child was dependent and neglected. For this reason, we reverse the adjudicatory judgment.

III. Indian Child Welfare Act

¶ 34 Because we reverse the adjudicatory judgment, we need not address the guardian ad litem's contention regarding compliance with the Indian Child Welfare Act.

IV. Conclusion

¶ 35 The adjudicatory judgment is reversed.

JUDGE ROMÁN and JUDGE HARRIS concur.