

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of J. M. S.,
a Child.

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,

v.

T. L. H. S.,
Appellant.

Marion County Circuit Court
17JU01926; A165801

Thomas M. Hart, Judge.

Submitted February 5, 2018.

Shannon Storey, Chief Defender, Juvenile Appellate Section, and Sarah Peterson, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Cecil A. Reniche-Smith, Assistant Attorney General, filed the brief for respondent.

Before Hadlock, Presiding Judge, and DeHoog, Judge, and Aoyagi, Judge.

AOYAGI, J.

Reversed.

Hadlock, P. J., dissenting.

AOYAGI, J.

The juvenile court asserted dependency jurisdiction over J, an eight-year-old girl, based on mother's failure to protect J from father, mother's mental health condition, and father's stipulated unavailability to parent. Mother appeals the judgment. Mother does not contest that she failed to protect J when J told her that father, who had sole custody of J and was her residential parent, had sexually abused her. She also does not contest that her untreated mental health condition, along with her own history as a victim of sexual abuse, contributed to her not handling the situation appropriately. Mother argues, however, that at the time of the jurisdictional hearing her mental health had substantially improved, she deeply regretted her handling of the situation, and she knew what to do if a similar situation occurred again. Also, father was under a no-contact order, and mother was planning to request a change in J's custody. As a result, mother contends, J was no longer exposed to a current risk of serious loss or injury that was likely to be realized. For the reasons that follow, we agree with mother that, at the time of the hearing, the evidence was insufficient to take jurisdiction. Accordingly, we reverse.

On appeal of a jurisdictional judgment, we determine whether, on the record before it, the juvenile court erred in making the statutorily prescribed determination. *Dept. of Human Services v. N. P.*, 257 Or App 633, 639, 307 P3d 444 (2013). We view the evidence, as supplemented and buttressed by permissible derivative inferences, in the light most favorable to the juvenile court's disposition and assess whether, when so viewed, the record was legally sufficient to permit the outcome. *Id.* We state the facts in accordance with that standard.

In 2009, mother, who has a history of alcohol abuse and mental health issues, gave birth to J. As a result of mother's alcohol abuse, father was awarded sole custody of J. Mother was given two days of parenting time each week. Otherwise, J lived with father and his parents.

When J was seven years old, J told mother in early February that "some weird things" had happened at father's house. After mother urged her to explain what she meant,

J disclosed to mother that father had sexually abused her. The record is silent as to what exactly J told mother, but the parties agree that whatever J said was enough to constitute a disclosure of sexual abuse. Mother testified that she was “so shocked” by this information that her “whole body just stopped” and she did not know what to do. Mother, who had been sexually abused herself by a family friend once when she was about nine years old, knew that sexual abuse is a crime and knew that crimes should be reported to the police. She did not, however, call the police. Instead, knowing that teachers are mandatory reporters, mother told J to tell her teacher. Mother later returned J to father’s care in accordance with the custody order.

When J came back to mother’s house the following week, mother asked J whether she had told her teacher. J said that she had not. At that point, mother made a video recording of J describing what father had done. Mother again told J to tell her teacher, but she still did not call the police herself, and she again returned J to father’s house according to the custody schedule. The record is silent as to whether any abuse occurred after J’s initial disclosure to mother.¹

On February 21, J reported father’s sexual abuse to a teacher. The school contacted DHS. While DHS and the police investigated, J was placed with mother. Mother was depressed and upset about everything that was happening. A few days after J was placed with mother, while J was playing at a neighbor’s house, mother drank alcohol and took Benadryl in an apparent suicide attempt. Mother was admitted to the hospital for treatment. She told a DHS caseworker that “everything that was going on regarding the child welfare and criminal investigation pertaining [to father] was too much for her to handle.” At that point, DHS placed J with her maternal grandparents. Around the same time, the state instituted criminal charges against father, which resulted in a no-contact order as a condition of father’s pretrial release, and DHS filed a petition for the juvenile court to assert jurisdiction over J under to ORS 419B.100.

¹ Due to the record’s silence as to what J told mother, it is also unclear how likely it appeared to mother that further abuse would occur if not reported immediately.

As a result of those events, mother voluntarily sought treatment for alcohol abuse and began mental health counseling. At the time of the jurisdictional hearing in August, mother had been meeting regularly with her counselor for five or six months, had completed an alcohol treatment program, and had not used alcohol for five or six months. She had a good relationship with the counselor and intended to continue therapy for the rest of her life. One of the topics mother was discussing with the counselor was her own sexual abuse history and how it contributed to her reaction in February. Mother also was taking medications to treat depression, anxiety, and attention-deficit disorder. Mother testified at the jurisdictional hearing that she had made a lot of progress on her mental health and never wanted to go back to how she felt before.² Mother also had completed a twelve-week parenting course and was willing to engage in other services, but the parenting course was the only referral that she had received from DHS. While mother worked on her mental health and parenting skills, she visited J regularly.

Mother has a difficult relationship with her own mother (grandmother). On June 30, mother and grandmother exchanged text messages. Grandmother used profanity and criticized mother for lacking motivation and

² When asked her opinion of how she was doing with her mental health treatment, mother responded, “I think I’m doing really good. I know I need to still engage it, but I’m not depressed. I don’t have anxiety. And I think it’s because I’m engaged. So I think if I stopped, then maybe I’d have issues, but right now, I don’t have any.” Mother then reaffirmed that her engagement included medication and regular counseling. A few minutes later, in the context of discussing a text message exchange with grandmother in June, mother was asked whether her mental health was still in the process of improving. She eventually answered, “No, I’m good. *I mean, obviously, if I stop.* I won’t you know. But I’m not going to stop. I’m going to continue my therapy. I’m not depressed. I don’t think about killing myself. Like I’m in a really good place, and I’ve worked really hard to get to where I am. And [grandmother] doesn’t understand that.” (Emphasis added.) The dissent focuses on mother’s statement, “No, I’m good,” and characterizes that testimony as mother having “denied that she had ongoing mental health issues.” 292 Or App at ___ (Hadlock, P. J., dissenting). The dissent then concludes that the court could “infer from that evidence that mother’s mental health struggles continued in ways that mother did not appreciate.” *Id.* at 292 (Hadlock, P. J., dissenting). Given the questions that mother was asked and the context of her responses, we disagree that that is a reasonable inference to be drawn from that response. In any event, there is no evidence that any lack of complete insight into the complexities of mental health on the part of mother created or contributed to a threat of serious loss or injury to J.

having an unhealthy lifestyle. Mother responded that “me being alive *** and sane is all that matters” and that J “would be even sadder if I’m dead so please stop.” She concluded the text string, “I don’t ever want to be awake right now I’m going back to bed”; mother later testified that it was supposed to say “even,” not “ever,” but auto-fill changed it. Grandmother reported mother’s statements to DHS as a suicide threat. At a team meeting at DHS two weeks later, mother agreed that she was very emotional and struggling to maintain her mental health but denied making a suicide threat. Mother’s parents refused to participate in family counseling, and J was eventually placed with her paternal grandparents.

The jurisdictional hearing took place in August 2017. Father stipulated that he was unavailable as a custodial resource due to the no-contact order and pending criminal charges, at which point the other jurisdictional allegations regarding father were dismissed. As for mother, DHS alleged three bases of jurisdiction: (A) mother’s mental health problems, if left untreated, interfere with her ability to safely parent;³ (B) mother’s substance abuse interferes with her ability to safely parent; and (C) mother failed to protect J when mother became aware of the allegations against father. Before the hearing began, DHS voluntarily dismissed allegation (B), because mother had successfully completed alcohol abuse treatment and was willing to engage in ongoing sobriety testing. The hearing therefore was limited to allegations (A) and (C).

DHS called three witnesses, each of whom testified only briefly. Roeder, a DHS caseworker, testified that she received the case after J disclosed abuse to her school and that, after mother’s hospitalization in February, mother told Roeder that she drank alcohol and took Benadryl to cope with anxiety related to J’s abuse. Fessler, a DHS caseworker who took over the case from Roeder, testified about mother’s positive engagement with mental health services and parenting classes, mother’s strained relationship with her own

³ Regarding allegation (A), the petition originally alleged that “mother’s mental health problems interfere with her ability to safely parent,” but the parties later stipulated to the court modifying that allegation to include “if left untreated.”

mother, and “very recent” concerns about domestic violence toward mother. Espelding, a hospital social worker, testified that mother was alert in the hospital in February and told her that she was under stress due to J’s sexual abuse allegations. Mother testified on her own behalf.

The juvenile court stated repeatedly during the hearing that it did not consider five or six months of sobriety and mental health counseling and a twelve-week parenting course a “magic wand” that solved everything. During mother’s testimony, the court told mother that she needed to earn the court’s trust and that, although it recognized that she was working on her mental health, “life is a journey and like you just don’t take one pill, just don’t take one set of classes and say, ho ho, ollie, ollie, I’m free, I’m okay.” Mother agreed and explained that that was why she had been working on her mental health for the past five or six months and that she was doing much better than she had been. During the DHS caseworker’s testimony, the court asked whether it could take a very long time for mother to come to terms with her own history of sexual abuse and “unwind the rest of the ball of yarn that comprises her life,” and the caseworker said yes. Asked by the court if that was why DHS wanted to stay involved, the caseworker again said yes, and the court commented, “It’s really not that complicated.”

At the conclusion of the hearing, the juvenile court concluded that DHS had proved the allegations. It explained its assertion of jurisdiction as follows:

“This is a cycle that has been ongoing for a long time for which mom has not really fully followed through with anything that first brought her into the court system. She never successfully completed the stuff required by driving under the influence. She continued to drive. She had a judgment in the custody case where she got less than a third of the time as a parent. Never really came back to the court to show that other things had been done, that she should have more or ask for changes like that. A couple of contempt proceedings associated with failure to pay child support.

“And the very unfortunate pervasive obvious issue with regard to the mental health was that mom gets brought to the hospital by her boyfriend of three years, who I wouldn’t

give him any hard time about being angry with her for being drunk on her off time. Low self-esteem in many respects. Life is really hard. A lot of feel sorry for myself kind of I hear coming out of that, and that somebody owes her something. And then when things don't go her way by gosh, darn, I'm going to talk about ending my life. You watch it's a wonderful life too many times.

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“The ongoing situation is the mental health problems that are deep seated and you know they are, we've talked about it, the complexity, need to be peeled back a little better, or really gotten a better hold of. And that interferes with your ability to safely parent.

“Those mental health issues Ms. Fessler brought up were part and parcel of mom's failure to protect. And they are capable of being repeated, I believe, in relatively short order. You have been on and off the alcohol and drugs for a fairly lengthy period of time. I don't want you to get back on. I'd just as soon you stay on the wagon. Okay?

“But I'm going to find that [J] is within the jurisdiction of the Court as to allegations 2A and 2C. And then whatever you want to put those stipulating to the requirements. I just want her to stay clean.”

The court entered a judgment of jurisdiction, which mother appeals.

The juvenile court has jurisdiction over a child whose “condition or circumstances are such as to endanger the [child's] welfare.” ORS 419B.100(1)(c). For the court to take jurisdiction, DHS must present evidence “sufficient to support a conclusion that the child's condition or circumstances expose the child to a current threat of serious loss or injury that is likely to be realized.” *Dept. of Human Services v. A. W.*, 276 Or App 276, 278, 367 P3d 556 (2016). DHS must establish the “type, degree, and duration” of the harm. *Dept. of Human Services v. S. D. I.*, 259 Or App 116, 123, 312 P3d 608 (2013). When the risk is caused by a parent's behavior, DHS must establish a nexus between the parent's allegedly risk-causing conduct and the harm to the child. *Dept. of Human Services v. C. J. T.*, 258 Or App 57, 62, 308 P3d 307 (2013). The risk of harm must be “nonspeculative”; that is, there must be “a reasonable likelihood that the threat will

be realized.” *Dept. of Human Services v. A. L.*, 268 Or App 391, 397, 342 P3d 174 (2015).

The two challenged jurisdictional bases are intertwined, so we discuss them together. Mother does not contest that she failed to protect J in February when J disclosed that father, who had sole custody of J, had sexually abused her. Mother also does not contest that her untreated mental health condition, along with her own history of sexual abuse, contributed to her reaction in February. Mother argues, however, that, at the time of the jurisdictional hearing, the evidence was that her mental health had substantially improved as a result of regular counseling, prescribed medication, and alcohol abuse treatment and that she would handle the situation much differently if it ever arose again. DHS responds that, notwithstanding the change in J’s circumstances *vis-à-vis* mother, mother’s history of depression, anxiety, and substance abuse “affects her ability to respond appropriately to child’s circumstances” and that “it is clear that mother would still be unable to respond appropriately to J’s future requests for help.”

On this record, we agree with mother that the evidence was insufficient for the juvenile court to conclude that, at the time of the jurisdictional hearing, mother’s current mental health condition and her failure to protect J six months earlier exposed J to a current threat of serious loss or injury that was likely to be realized. Juvenile dependency proceedings are not punitive in nature. Their sole purpose is to protect children. Although the conduct, condition, or circumstances of one or both parents is often what gives rise to jurisdiction over a child, the juvenile court’s focus at the jurisdictional hearing must be “on the *child’s* conditions or circumstances at the time of the hearing and whether the totality of those circumstances demonstrates a reasonable likelihood of harm to the welfare of the child.” *Dept. of Human Services v. W. A. C.*, 263 Or App 382, 393, 328 P3d 769 (2014) (emphasis added). The focus is always on the child and whether there is a current, nonspeculative risk of harm to the child. *Id.* Moreover, “a risk of *some* harm” is not enough: “the type, degree, and duration of the harm must be such that exposure to a reasonable likelihood of *that* harm justifies juvenile court jurisdiction.” *Dept. of Human*

Services v. K. C. F., 282 Or App 12, 17, 383 P3d 931 (2016) (first emphasis in original; second emphasis added; internal quotation marks omitted).

Here, DHS’s failure to identify the specific “type, degree, and duration” of the harm that it sought to establish complicates our review. *Id.* The harm at issue is a fundamental part of DHS’s case and is important both to the juvenile court’s analysis and to our review. See *K. C. F.*, 282 Or App at 17; *A. L.*, 268 Or App at 397; *S. D. I.*, 259 Or App at 123; *C. J. T.*, 258 Or App at 62. When DHS fails to identify a specific type of harm, and instead relies on an amorphous risk of unspecified harm loosely tied to multiple allegations, it hinders parents’ ability to fully respond to the state’s case. It hinders the juvenile court in making appropriate fact findings and assessing whether DHS has proven its case. And it makes it difficult for us to review whether there is any evidence to support the alleged nexus between the parent’s conduct and the specific harm at issue, *C. J. T.*, 258 Or App at 62, as well as whether there is any evidence of a reasonable likelihood of that specific harm occurring or whether it is speculative, *A. L.*, 268 Or App at 397.

In this case, based on the allegations in the petition and the circumstances giving rise to the petition as described at the hearing, we understand that DHS sought to prove that, absent dependency jurisdiction, J would be exposed to ongoing risk of abuse from which mother would fail to protect her, in part due to mother’s mental health issues.⁴ With that in mind, we turn to the record.

⁴ We disagree with the dissent’s position that the harm at issue was a more generalized inability of mother to recognize danger to J and protect her from it. Jurisdictional basis C, failure to protect, was specifically limited to sexual abuse by father. As for jurisdictional basis A, mental health, there was evidence that mother’s own past sexual abuse made it more difficult for her to respond appropriately to J’s disclosure of sexual abuse by father. There was no evidence, however, that mother’s mental health conditions—depression and anxiety—caused her to be unable to *recognize* abuse, sexual or otherwise; indeed, it is undisputed that she immediately recognized that J was disclosing sexual abuse. Nor was there any evidence that mother’s mental health conditions affected her ability to respond to threats to J *other than* sexual abuse.

Nonetheless, in its brief on appeal, the state summarily asserts in support of the jurisdictional judgment that mother is “unable to recognize evidence of domestic violence in her current relationship.” DHS did not allege domestic violence as a basis for asserting jurisdiction over J, and there is *no* evidence that J was ever exposed to domestic violence, let alone that J was abused, in mother’s

DHS put on evidence—and mother does not contest—that mother failed to protect J in February and exposed her to a nonspeculative risk of serious harm when she did not immediately report J’s abuse allegations to the police or DHS and allowed J to continue living in father’s house for two to three weeks. At the time of the jurisdictional hearing six months later, however, J’s circumstances had substantially changed in a variety of undisputed ways. J had been removed from father’s home. Father was subject to a no-contact order and facing criminal charges with the prospect of a lengthy prison term. Mother was planning to request a custody change even if father was not convicted. Meanwhile, mother had stopped drinking and voluntarily completed alcohol treatment, which caused DHS to dismiss substance abuse as an alleged basis for jurisdiction. Mother also had been working for five or six months with a mental health counselor with whom she had a good relationship, and she planned to continue therapy for the rest of her life. She was taking medications for anxiety, depression, and attention-deficit disorder. She had completed the twelve-week parenting course recommended by DHS. She expressed remorse about her failure to protect J in February and described herself as “heartbroken” about it. In a similar situation in the future, she testified, she would not make the same mistake and would immediately call the police or DHS.

home. When the state began questioning mother about domestic violence at the hearing, her attorney objected, and the juvenile court allowed the questions only for one limited purpose: as evidence of mother’s own “victimology,” as an aspect of her mental health, because there “is a whole dynamic associated with people [who] are victims of domestic violence.” Otherwise, the court stated that it was “not worried about her domestic violence” and did not “care whether it is domestic violence.” In response to questioning, mother denied that her boyfriend was violent, but she acknowledged that she had previously said yes when asked if he had ever ripped an article of clothing off her. The only other testimony regarding domestic violence was testimony by Fessler that, although DHS was not concerned about domestic violence when it filed the jurisdictional petition, one reason that it was reluctant to return J to mother was a “very recent” concern that mother does not “recognize” domestic violence. In context, it is clear that what Fessler meant is that mother did not agree with Fessler’s definition of domestic violence. We ourselves have recognized that there is no single definition of “domestic violence.” *Dept. of Human Services v. J. J. B.*, 291 Or App 226, 233, 418 P3d 56 (2018). In any event, we disagree with the dissent’s apparent view that the state’s “very recent” “concerns” that mother does not agree with the state’s definition of “domestic violence” provides support for its jurisdictional case.

DHS does not contest the changes mother had made. It suggests that they are in some way less meaningful because it was the events of February and DHS's ensuing involvement that motivated mother to stop drinking and improve her mental health. What matters for jurisdictional purposes, however, is how the changes that mother had made affected the current threat of harm to J, not whether it would have been better if mother had made them sooner. DHS offered no evidence that the changes mother had made were less likely to be durable because of what motivated them.

In *Dept. of Human Services v. D. M.*, 248 Or App 683, 275 P3d 971 (2012), the mother stipulated to jurisdiction over her children based on failure to supervise and untreated substance abuse problems. After the mother stopped using drugs for several months and completed parenting classes, she sought to terminate the court's wardship. DHS opposed the petition, arguing that the mother was still unable to safely care for the children. It offered evidence that the mother had received a "minimally adequate" grade in the Family Skill Builder program, had discussed her work as an exotic dancer in front of one child, and did not monitor the children's internet use. The juvenile court denied the mother's petition. We reversed, explaining that, "although mother may or may not have been an ideal parent," the evidence could not support the conclusion that the children were exposed to a current threat of serious loss or injury that was reasonably likely to be realized. *Id.* at 688. The evidence was insufficient to "justify state intervention into a parent's fundamental right to the care, control, and custody of her children." *Id.*

By contrast, in *Dept. of Human Services v. T. S.*, 214 Or App 184, 164 P3d 308 (2007), the juvenile court asserted jurisdiction over four children after the oldest child K, a 14-year-old girl, disclosed to DHS that her father had sexually abused her for years. DHS offered evidence at the jurisdictional hearing that K had told her mother about the abuse three years earlier but that the mother did not believe K and was hostile toward K after she made the allegations. The mother knew that the father had been investigated

previously for sexually abusing his 12-year-old stepdaughter and his 6-year-old daughter by another woman, and she knew that the father had written a fictional book that described in graphic detail a father raping his young daughter and other children. The mother did not believe that the father had sexually abused anyone, however, and took no steps to protect K or the other children. We affirmed the jurisdictional judgment, concluding that, despite the mother's explanations for believing the father, the totality of the circumstances established that the children faced a current risk of sexual abuse by their father that was reasonably likely to occur and from which their mother was not protecting them.

Unlike the mother in *T. S.*, there is no evidence that mother ever disbelieved J. She took some steps to stop further abuse, albeit woefully inadequate steps. Because of the inadequacy of mother's response, which was driven in part by her untreated mental health issues, the burden was improperly put on a young girl to disclose sexual abuse to a second adult, and J was exposed to two to three weeks of unnecessary risk of an extremely serious harm. At the time of the jurisdictional hearing, however, J's circumstances had changed. Mother had stopped drinking, which resulted in DHS dropping the jurisdictional allegation regarding substance abuse. Mother also had taken substantial steps to improve her mental health, including fully engaging in therapy and taking medication, which is especially significant because the jurisdictional basis was that "mother's mental health problems, *if left untreated*, interfere with her ability to safely parent." (Emphasis added.) Finally, mother expressed remorse about how she had handled the situation in February and testified that she would call the police or DHS immediately if a similar situation arose in the future. Meanwhile, father was out of the picture for the foreseeable future (and possibly the rest of J's childhood), and DHS did not identify anyone else in J's life as posing a risk of abuse. The juvenile court did not find that mother was not credible—rather, it indicated only that it wanted to see her sustain her success for a longer period of time.

It is always possible that someone who makes a mistake once will repeat it in the future. On this record,

however, there was insufficient evidence to establish the alleged bases for jurisdiction. Regarding allegation (C), the evidence was insufficient to establish that, at the time of the hearing, mother's "failing to protect J when mother became aware of the allegations against father" six months earlier exposed J to a "current threat of serious loss or injury that [was] likely to be realized." A. W., 276 Or App at 278. As for allegation (A), the basis for jurisdiction was that "mother's mental health problems, if left untreated, interfere with her ability to safely parent." It is undisputed, however, that mother's mental health issues were being *treated* at the time of the hearing—and successfully so. The juvenile court may have been correct that five or six months of successful treatment is not enough to fully resolve mental health issues, but that was not the issue before the court. Complete resolution of mental health issues is not a prerequisite to parenting a child without DHS supervision. The court's conclusory statement that mother's failure to protect J from sexual abuse by father in February was "capable of being repeated, I believe, in relatively short order" is nothing more than speculation on this record. The evidence was not "legally sufficient to permit the trial court to determine that ORS 419B.100(1)(c) was satisfied." *Id.*

Finally, we briefly address the dissent. On a single occasion, mother recognized but failed to adequately protect J from a very specific type of serious harm, due in part to her untreated mental health condition and her own history of that exact type of harm. The dissent takes that basic fact, couples it with an express assumption that all young children are inevitably exposed to unidentified "dangerous situations," 292 Or App at ___ (Hadlock, P. J., dissenting), and concludes that there was sufficient evidence to assert jurisdiction over J because mother's mental health condition, although now treated, interferes with her ability to *recognize* danger to J and prevent danger *of any kind* to J *in general*. Even if one accepts the dissent's premise that it is largely irrelevant what DHS argued to the juvenile court or on what bases the juvenile court asserted jurisdiction, the record simply cannot support the dissent's theory of the case.⁵

⁵ Moreover, the dissent acknowledges that we are bound by the trial court's fact findings, but it fails to explain why, when the court has expressly or implicitly

Reversed.

HADLOCK, P. J., dissenting.

After reviewing the record in the light most favorable to the juvenile court's disposition, I conclude that the evidence presented in this case adequately supports the court's exercise of dependency jurisdiction. The majority's contrary conclusion results at least in part from (1) assessing the merits of the juvenile court's expressed on-the-record reasoning, rather than reviewing the court's ultimate conclusion under the pertinent standards of review (*see, e.g.*, 292 Or App at ____), and (2) not considering the risks presented by the totality of the child's condition and circumstances. I respectfully dissent.

Before explaining why I reach a different conclusion than the majority, I pause to observe that the majority and I agree on at least two critically important points. First, as the majority states, "dependency proceedings are not punitive in nature." 292 Or App at _____. Second, and relatedly, DHS must identify the threat of harm to the child that DHS contends is posed by the child's condition and circumstances. Otherwise, a dependency case can end up seeming like one designed for passing judgment on the parent for past behaviors or circumstances, instead of a proceeding that is aimed at allowing a court to assess whether the child's condition and circumstances presently put the child at risk. Of course, a comprehensive presentation of evidence about events leading up to the dependency trial will often be necessary to explain the risk; however, the ultimate focus always must be on the *current* threat of harm. Although the majority and I view aspects of the record and of the parties' arguments differently, I agree wholeheartedly with the majority's observation that the parents (and other parties and the courts) are ill-served if DHS does not both expressly identify the harm

treated a factual dispute as irrelevant, we are permitted (or, in the dissent's view, even obligated) to make fact findings on those issues ourselves to reach an affirmative. For example, the dissent essentially finds that mother's text message to grandmother in June reflected suicidal ideations rather than a typo, 292 Or App at ____ (Hadlock, P. J., dissenting), and that mother is a current victim of domestic violence, 292 Or App at ____ (Hadlock, P. J., dissenting), both disputed issues that the trial court did not resolve, expressly or implicitly, because it viewed them as irrelevant to jurisdiction.

that it believes the child is reasonably likely to suffer if the juvenile court does not assert jurisdiction *and* present evidence demonstrating that the current threat of harm exists. 292 Or App at ____.

I turn back to this case. As the majority states, mother appeals from a dependency judgment in which the juvenile court asserted jurisdiction over mother’s eight-year-old child on three bases, two of which are pertinent on appeal: first, that mother’s mental health problems, if left untreated, interfere with her ability to safely parent the child and, second, that mother “became aware of allegations against the father and failed to protect the child placing the child at risk of harm.” On appeal, mother argues that DHS failed to prove that the alleged conditions and circumstances exposed child to a risk of serious loss or injury at the time of the jurisdictional trial.

In my view, proper resolution of this appeal depends on faithful application of the standard of review. In *Dept. of Human Services v. N. P.*, 257 Or App 633, 639, 307 P3d 444 (2013), we took the opportunity “to state clearly our standard of review *** of a juvenile court’s determination of jurisdiction predicated on ORS 419B.100(1)(c).” We explained that our task on appeal is to determine whether “the record permit[ted] the juvenile court to determine that ‘the child’s condition or circumstances’ gave rise to a current ‘threat of serious loss or injury to the child’ and that there is a ‘reasonable likelihood that the threat will be realized.’” *Id.* (quoting *Dept. of Human Services v. A. F.*, 243 Or App 379, 386, 259 P3d 957 (2011)). Specifically, we review the juvenile court’s “disposition” to determine whether “the record was legally sufficient to permit that outcome.” *Id.*¹ In doing so, “we view the evidence, as supplemented and buttressed by permissible derivative inferences, in the light most favorable to the trial court’s disposition.” *Id.* We are bound by the juvenile court’s explicit and necessarily implied findings of historical fact as long as any evidence supports them. *Id.* at

¹ As used in *N. P.*, the word “disposition” refers generally to the juvenile court’s resolution of the case; it does not refer to “disposition” as that term is sometimes used more specifically in the juvenile-dependency context to refer to the child’s placement once dependency jurisdiction has been established. See ORS 419B.325(2) (referring to “proper disposition of the ward”).

639-40. Importantly, we do not “substitute our assessment of the persuasiveness of the evidence for the juvenile court’s.” *Id.* at 640.

As those standards from *N.P.* indicate, our primary task is *not* to assess the merits of the juvenile court’s expressed reasoning. Rather, we must “assume that, if the juvenile court did not explicitly resolve a disputed issue of material fact and it could have reached the disposition that it reached only if it resolved that issue in one way, the court implicitly resolved the issue consistently with that disposition.” *Id.* at 639-40. It follows that our task is to determine whether the *record* supports the juvenile court’s disposition, not whether we find the court’s explanation for that disposition persuasive.

No law requires a juvenile court to make detailed on-the-record factual findings to support its exercise of dependency jurisdiction (the “disposition,” in *N. P.* terms).² Moreover, a juvenile court may reasonably decide that, at least in some cases, there are good reasons (including empathy for individuals in the courtroom) not to comprehensively describe all the considerations that led the court to determine that the child’s condition and circumstances present a current risk of serious harm. Thus, if the juvenile court gives no explanation for its decision to assert dependency jurisdiction on specified bases, we view the record “in the light most favorable to [that] court’s disposition and assess whether, when so viewed, the record was legally sufficient to permit that outcome,” *id.* at 639, and we do precisely the same when the juvenile court expresses a rationale for its

² Other provisions of the juvenile code do require the court to make findings. See, e.g., ORS 419B.340(1), (2) (requiring a juvenile court that has awarded custody to DHS to include in that part of its order certain determinations and “a brief description of what preventive and reunification efforts were made and why further efforts could or could not have prevented or shortened the separation of the family”); ORS 419B.476(2)(d) (requiring the juvenile court, at a permanency hearing, to “[m]ake the findings of fact under ORS 419B.449(3),” which requires findings on a variety of topics); ORS 419C.355 (requiring the juvenile court to “make a specific, detailed, written finding of fact to support” certain determinations about a youth who is being waived into circuit court for prosecution as an adult). Neither ORS 419B.100 nor the part of chapter 419B that sets out the procedure for dependency hearings (ORS 419B.305 - ORS 419B.340) includes a similar requirement regarding the juvenile court’s determination that a child is within its dependency jurisdiction.

exercise of jurisdiction, whether the court's explanation is comprehensive or can be only partly gleaned from comments it makes on the record. Our focus must remain on the court's *ruling*, and whether the record supports it, not on whether the court's in-the-moment *explanation* for its decision itself demonstrates that the legal standards for dependency jurisdiction have been met.³

Accordingly, I set out the facts in the light most favorable to the juvenile court's exercise of jurisdiction, not limiting myself to those facts that the juvenile court discussed when it announced its ruling and not focusing on that court's expressed rationale for its decision. I describe the facts in some detail because the majority opinion downplays certain evidence (such as some of mother's trial testimony about her current mental-health status and the evidence of domestic violence in her home) that I believe must be considered when undertaking to view the record in the light most favoring the juvenile court's disposition.

At the time of the trial, mother was 27 years old and lived separately from father. Father had sole custody of child as a result of what mother described as her life falling apart. Under a custody agreement in place before DHS became involved, mother had parenting time two days each week, and child divided the rest of her week between father and father's parents. In very early February 2017, child told mother about "some stuff happening at her dad's house," which involved allegations of sexual abuse. Mother

³ Of course, when a juvenile court does make express findings, its ultimate ruling must be consistent with those findings. *See, e.g., State v. L. P. L. O.*, 280 Or App 292, 309, 381 P3d 846 (2016) (when juvenile court made certain factual findings that established dependency jurisdiction as a matter of law, the court erred by dismissing the dependency petition). Thus, when the juvenile court has expressly found that DHS did *not* prove a certain fact in a dependency case, we would not rely on evidence that *could* support a finding of that fact to uphold the court's exercise of dependency jurisdiction. *Cf. State v. Hart*, 222 Or App 285, 288, 193 P3d 42 (2008) ("we cannot affirm a conviction on the ground that a factfinder *could* have found a particular fact where it is clear that it found that the fact was *not* established" (emphases in original)).

In this case, the juvenile court made no express findings that are inconsistent with its exercise of jurisdiction or that would limit our consideration of evidence in the record. Nor, in my view, did the juvenile court exclude any evidence (specifically, evidence about domestic violence) or rule that the evidence was admissible for only a limited purpose. Thus, unlike the majority (*see* 292 Or App at __ n 5), I view the entire record as pertinent to our decision.

was shocked; she later testified that her “whole body just stopped,” she “didn’t know how to process it,” and she “didn’t know what to do.” Mother did not call the police or DHS. Nor did mother seek an attorney’s assistance, even though she had retained lawyers on multiple other occasions, including in association with custody and child-support issues. She did not seek modification of the custody arrangement. Instead, mother encouraged child, who was then seven years old, to talk to child’s teacher (mother knew that teachers are mandatory reporters).

Despite child’s disclosure, mother returned child to father’s care under the terms of their custody agreement. The week after child’s initial disclosure, mother asked child if she had talked with her teacher; child said she had not. Mother still did not contact the teacher herself, report the abuse to anybody else, or file for custody. For about three weeks after her disclosure to mother, child had ongoing contact with father. At some point during that time, mother videotaped child talking about the abuse.

Later in February, DHS received a call about allegations of sexual abuse involving father. The record does not reveal who made that call. On February 22, DHS caseworker Roeder contacted mother and informed her about the allegations. Roeder next saw mother on March 2 at a hospital, where she had been admitted after attempting suicide. Two days later, mother told Roeder that she had consumed “too much alcohol and had taken too much Benadryl as a means of coping with all the information that she had recently been given.” She “basically indicated that everything that was going on regarding the child welfare and criminal investigation pertaining to the father was too much for her to handle.” Mother disclosed her own history of childhood sexual abuse and said “that was something that made it very difficult for her to know how to effectively process.” Based on that conversation, Roeder understood that mother had not effectively engaged in any mental-health services.

During the March 4 conversation, mother acknowledged that child had told her at the beginning of February about “some stuff happening at her dad’s house.”

Roeder decided at that point to remove child from mother's home because she did not "have confidence in mom's mental health and her ability to process all of this and deal with this in an effective way around [child.]" DHS placed child with her maternal grandmother. In late March or early April, the family's case transferred to DHS caseworker Fessler. Mother began engaging in substance-abuse and mental-health services in April and was engaging well in those services at the time of trial. Indeed, mother successfully completed a 90-day "UA [urinalysis] hotline" program and testified that she had stopped drinking.

DHS remained concerned about mother's mental health, however, particularly in light of events that occurred in late June and July. On June 30, grandmother sent text messages to mother that mother perceived "being malicious to [mother]" and not letting her take a breath. In responsive messages, mother made statements about having been crying all day, how being alive is all that matters, and how child "would be even sadder if I'm dead, so please stop." Mother also sent a message saying, "I don't ever want to be awake right now," although she testified at trial that "ever" was meant to be "even" in that text message, and she was indicating only that she wanted to go back to bed. During a team meeting held on July 17—two weeks before the jurisdictional trial—mother denied that those text messages included threats of self-harm, but "she made it very clear that [she was] really struggling" and that it was "really difficult for her to maintain her mental health."

At the August 2 jurisdictional trial, Fessler testified that DHS's original concerns had centered around mother's failure to protectively intervene when child disclosed sexual abuse, as well as mother's suicide attempt. Fessler testified that she was not prepared to return child to mother's home "today," in part because of "concerns about the home environment and how it could affect [mother's] mental health." In particular, Fessler was concerned that child's continuing disclosures about the abuse she had suffered would be "very triggering for [mother's] own mental health" and that mother would not process that appropriately. Mother needed therapy so she could "continue processing why she failed

to intervene on her child's behalf," with the hope that "she wouldn't fail to intervene to protect her child in the future."

Relatedly, DHS had developed "very recent" concerns about domestic violence in mother's home "that [prevented the agency] from really utilizing that as a return plan at this time." Fessler was concerned that the domestic violence involving mother's boyfriend, with whom she continued to live at the time of trial, "would create an unsafe situation for [child]." Fessler spoke with mother "multiple times about domestic violence, and [mother] has always denied them." But when Fessler pressed mother on "specifics of domestic violence, like did he ever break property in the home? Did he ever push you? Did he—you know, very specific things that are violent, [mother] will say, yes, that those things did occur." Fessler was concerned that mother "doesn't recognize that violence in that unsafe situation." That is, mother "fails to recognize that it [domestic violence] even exists." Fessler believed that child would be exposed to domestic violence and that mother would not recognize the associated safety risks to child. She also questioned whether mother "could intervene appropriately on her daughter's behalf." Although Fessler had asked mother "not to have her boyfriend around her child, he was."

Mother testified at trial and explained that she now understands that she should have reported the sexual abuse herself "and not put it on" child, although she thought she was doing the right thing at that time. Mother does not know why she did not realize at the time that telling child to report the abuse to her teacher was not the right thing to do. Mother testified that she understands that she can call 9-1-1 to report a crime and that sex abuse is a crime. She said that she would now reach out for help if a situation arose and she did not know what else to do. With respect to the domestic violence involving the boyfriend with whom she lives, mother testified that the statements she made previously about her boyfriend's violence in the home related to situations months earlier, when she had still been drinking and would initiate fights.

When asked if she was still in the process of working on her mental health, mother responded, "No. I'm good."

She acknowledged being sad because child is not at home but denied being depressed or having feelings of hurting or killing herself. Mother also said that her mental health had been good on June 30, when she engaged in the concerning series of text messages with grandmother. Mother testified that, because of “therapy and the medication,” which she planned to continue, she did not have any mental health issues at the time of trial.⁴

DHS made a brief closing statement, in which it argued that, as long as mother’s mental health problems remained unresolved, “failure to take protective actions, remains a safety threat.”⁵ Mother, in turn, emphasized her cooperation with DHS and engagement in mental-health services. Through counsel, she argued that she “has been pretty open about her struggles” and has found treatment helpful. Mother asserted that her mental-health issues did not present a nonspeculative risk of harm to child, as long as mother continues to do what she has been doing. Finally, mother argued that the allegation regarding her failure to protect child from father no longer presents a risk because a no-contact order was in place that prevented father from contacting child in a way “that mom would need to act in a protective manner.”

The juvenile court found child to be within its jurisdiction based on its determination that mother’s mental-health problems were complicated, had not yet been resolved

⁴ As the majority notes, mother made those statements in the context of describing additional details about her ongoing mental health treatment and her assertion that she planned to continue that treatment indefinitely. 292 Or App at ___ n 2. A reasonable juvenile court could certainly infer from mother’s testimony that mother’s progress in addressing her mental health issues was sufficient to alleviate the risk to her child. In my view, however, a reasonable juvenile court could also draw the opposite inference, as I discuss later in this dissent.

⁵ Contrary to the majority’s accusation, I do not deem DHS’s argument to the juvenile court or the bases on which the court asserted jurisdiction to be “largely irrelevant.” 292 Or App at ___. DHS argued below, albeit extremely briefly, that (1) the alleged bases for jurisdiction—mother’s mental health problems and her failure to protect child from father—were related, and (2) as long as mother’s mental health problems were unresolved, mother’s “failure to take protective actions, remains a safety threat.” Considered in the context of the evidence that had been presented, those arguments were enough to suggest that the juvenile court should take jurisdiction based on a determination that mother’s unresolved mental health challenges prevented her from taking protective steps necessary to maintain child’s safety.

in the few months that mother had been involved in services, and left mother at risk of failing to protect her child:

“The ongoing situation is the mental health problems that are deep seated and you know they are, we’ve talked about it, the complexity, need to be peeled back a little better, or really gotten a better hold of. And that interferes with your ability to safely parent.

“Those mental health issues Ms. Fessler brought up were part and parcel of mom’s failure to protect. And they are capable of being repeated, I believe, in relatively short order.”

The court therefore entered a judgment finding child within its jurisdiction based on the allegations related to mother’s mental health and her failure to protect child from father.

On appeal, as I explain above, this court’s task is to determine whether the record—viewed in the light most favoring jurisdiction—permitted “the juvenile court to determine that ‘the child’s condition or circumstances’ gave rise to a current ‘threat of serious loss or injury to the child’ and that there is a ‘reasonable likelihood that the threat will be realized.’” *N. P.*, 257 Or App at 639. Applying that standard—and taking into account *all* of the evidence admitted at trial—I would conclude that the record is legally sufficient to support the juvenile court’s assertion of jurisdiction.

Mother’s mental health struggles are significant and she acknowledges on appeal that those problems led to her failure to protect child when child disclosed having been sexually abused. The record amply supports a finding that mother’s difficulties persisted at the time of trial. Mother’s response to DHS becoming involved with the family was to attempt suicide. Nearly four months later, despite having begun engagement with mental health services, mother sent text messages to grandmother that the juvenile court reasonably could interpret as conveying thoughts of self-harm. Two weeks before trial, mother still struggled to maintain her mental health. Nonetheless, in her testimony—as contrasted with her legal arguments—mother denied that she had any ongoing mental health issues, essentially asserting that she was “good” and would remain so as long as she remained in therapy and took her medication. The juvenile

court could infer from that evidence that mother's mental health struggles continued in ways that mother did not appreciate.

More significantly for purposes of this appeal, the juvenile court also could find that mother had not yet gained the kind of insight or tools that would prompt her—notwithstanding her mental health challenges—to affirmatively intervene to protect child from danger. At trial, mother could not explain why she had thought that the best way to respond to her young child's report of being sexually abused by her father was to tell that child to report the abuse to a teacher. Although she said that she would call 9-1-1 in the future, she could not explain why she did not think to do that when child disclosed abuse; nor did she explain why she had not thought to call a lawyer, even though she had called lawyers to seek advice in other situations. Given that lack of insight, the juvenile court could permissibly find that mother had not gained the ability, in the few months preceding trial, to act protectively toward child in the future.

The remaining question is whether DHS met its burden to prove that mother's continuing inability to act protectively presented a threat of serious harm to child at the time of the jurisdictional trial that was reasonably likely to be realized. Given the totality of the circumstances, I would hold that DHS proved its case.

First, it matters that this child was only eight years old at the time of the jurisdictional trial; we may safely assume that any such young child at some point will encounter potentially dangerous situations (or even people) from which the child needs protection. Second, it matters that mother demonstrated an extraordinary inability or unwillingness to protect this child from the terrible harm of being sexually abused by her father. Mother's failure to protect child from that harm was not momentary; it did not exist only when mother did not take immediate action upon hearing child's disclosure of abuse. Rather, mother took no meaningful steps to protect child over the next three weeks, as child continued to spend time in father's home. We do not know how long that dangerous situation might have continued had DHS not learned, somehow, what child had

disclosed.⁶ Third, the ongoing need for mother to act protectively toward her child is not merely theoretical, based on child's young age. At trial, mother minimized what she previously had told DHS about her boyfriend's violent behavior in the home, and the juvenile court could infer from all of the related evidence that mother did not appreciate the significance of that violence and the dangers it posed.

Given the totality of those circumstances, I would hold that DHS met its burden to prove that the child's condition and circumstances at the time of trial presented a serious risk of harm that was reasonably likely to be realized. True, the record in this case does not include specific information about the nature and frequency of the domestic violence in mother's home. Under ordinary circumstances, the lack of such evidence could be fatal to a dependency petition. *See, e.g., Dept. of Human Services v. S. A. B. O.*, 291 Or App 88, 417 P3d 555 (2018) (reversing dependency judgment based on mental health and domestic violence allegations because, among other things, the record included no "evidence of an actual threat of serious loss or injury to the children that is reasonably likely to be realized"). Nonetheless, I would hold that such evidence is unnecessary here given the unusual combination of mother's extraordinary failure to take any meaningful steps in response to child's disclosure that father had sexually abused her, the fact that mother's failure to take action meant that child spent a significant amount of additional time with father without any protection from potential further abuse, what the juvenile court could reasonably view as mother's continuing mental health challenges, and mother's minimization of the domestic violence in her home. At some point, when a parent's mental health problems result in the parent's profound inability to appreciate risks or to act protectively toward a young child in the face of extreme danger, that inability—in itself—presents a

⁶ As the majority accurately notes, 292 Or App at ___ n 1, the record does not reveal the nature of child's disclosure, other than it related to sexual abuse. However, the record does include references to the resulting criminal charges against father and the fact that an order had issued that prohibited father from having contact with child. Mother has never contended that she disbelieved child (or had reason to), that whatever child disclosed did not seem particularly serious, or that her failure to take immediate steps to protect child was somehow justified.

sufficient threat to justify an exercise of dependency jurisdiction. In my view, particularly given the evidence of current domestic violence, the record is legally sufficient to support a determination that that point was reached in this case.

I respectfully dissent.