

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned ON Briefs April 11, 2014

IN RE: COLBY W., ET AL.

**Direct Appeal from the Circuit Court for Maury County
No. 14300 Robert L. Jones, Judge**

No. M2013-01060-COA-R3-JV - Filed July 30, 2014

Tennessee Department of Children’s Services filed a petition for temporary custody of child, alleging that he was dependent and neglected. On de novo review from the Juvenile Court, the Circuit Court, Maury County, adjudicated child dependent and neglected and found that child suffered severe abuse while in the care of his parents. Mother appealed. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded

DAVID R. FARMER, J., delivered the opinion of the Court, in which HOLLY M. KIRBY, J., and J. STEVEN STAFFORD, J., joined.

Samantha Elizabeth Guzall, Nashville, Tennessee, for the appellant, R.T.

Robert E. Cooper, Jr., Attorney General and Reporter and Leslie Curry, Assistant Attorney General, Nashville, Tennessee, for the appellee, Tennessee Department of Children’s Services.

OPINION

I. BACKGROUND AND PROCEDURAL HISTORY

C.W. was born to R.T. (“Mother”) and R.W. (“Father”) on October 30, 2010. Mother and Father are not married to each other, but lived together with C.W. and his four-year-old half-brother E.K.¹ During the first three months of his life, C.W. suffered two separate severe brain injuries. Because Mother and Father were unable to provide a satisfactory explanation for how C.W.’s injuries occurred, the Tennessee Department of Children’s Services (“DCS”) took him into protective custody on January 15, 2011.

¹E.K. is not involved in this appeal.

The following facts are established in the record: on Monday, January 10, 2011, bad weather forced Mother and Father to stay home with C.W. and E.K. C.W. appeared to be in perfectly good health on that day. Mother left for work around 7:00 a.m. on Tuesday, January 11th, leaving C.W. and E.K. at home with Father. According to Father, C.W. slept unusually late that morning. While she was at work, Mother received a text message from Father that C.W. began projectile vomiting around 11:00 a.m. C.W. continued projectile vomiting after Mother returned home from work that afternoon, and she called his pediatrician. The pediatrician recommended that Mother give C.W. Pedialyte. C.W. continued projectile vomiting after drinking the Pedialyte, and Mother took him to the emergency room that night. The emergency room physician diagnosed C.W. with a virus and sent them home with instructions to monitor C.W. for signs of dehydration. C.W. continued projectile vomiting off and on Wednesday, January 12th. On Thursday, January 13th, C.W. continued vomiting, and Mother noticed a bulge in the soft spot on the top of his head. Mother attempted to take C.W. to the doctor that afternoon when Father returned home with the family vehicle, but it was too late and she was not able to have him evaluated. On Friday, January 14th, Mother took C.W. to a clinic, and he was referred to Vanderbilt University Medical Center (“Vanderbilt”) for further evaluation. Mother took C.W. to Vanderbilt immediately.

Child abuse pediatrician Dr. Deborah Lowen first examined C.W. in the pediatric intensive care unit at Vanderbilt on January 15th. Dr. Lowen’s initial examination of C.W. was relatively unremarkable. Apart from his fussiness, C.W. did not show any signs of bruising and moved his arms and legs normally. Dr. Lowen was concerned, however, by tests indicating that C.W. had internal brain injuries and ordered that C.W. undergo a MRI and CT scan. Upon review of the available medical information, she diagnosed C.W. with chronic subdural bleeding, or bleeding between the brain and the membrane closest to the skull, as well as acute bleeding and contusions on the front part of his brain.

Dr. Lowen’s tests indicated that C.W.’s injuries were very serious and were inflicted on separate occasions with great force. Dr. Lowen testified at trial that C.W.’s chronic subdural bleeding was at least two weeks old, whereas the acute bleeding and contusions on the front part of his brain were only three to seven days old. Although C.W. could not have caused the injuries to himself at such a young age, Dr. Lowen was reluctant to conclude that they were the result of abuse without ruling out other causes. Dr. Lowen ordered additional tests to ensure that the blood on C.W.’s brain was not caused by a blood condition or some other disorder. After ruling out a blood disorder, Dr. Lowen spoke with Mother, who was unable to offer any explanation for C.W.’s injuries that was consistent with the injuries themselves. At that point, Dr. Lowen concluded that this was an abusive situation. At trial, Dr. Lowen testified with a reasonable degree of medical certainty that C.W.’s second set of injuries, the acute brain bleeding and brain bruises, were the result of abusive or

nonaccidental trauma. She stated that the internal bruising on C.W.'s brain was consistent with being violently shaken or thrown down on a soft surface. Conversely, with regard to C.W.'s earlier injury, evidenced by his chronic subdural brain bleeding, Dr. Lowen testified that although abuse is the most likely explanation, she could not say with great certainty that was the case. Though she acknowledged that chronic brain bleeding can occur during birth, she stated that it would have been absorbed prior to her examination of C.W.

Following Dr. Lowen's examination of C.W., Vanderbilt notified the DCS and the Columbia Police Department to investigate the matter for possible child abuse. Investigators met with Mother and Father separately at Vanderbilt. Though their stories were mostly consistent, neither Mother nor Father was able to provide a credible explanation for either of C.W.'s injuries.

Katelyn Pellowski is a child protection services worker for DCS. Ms. Pellowski interviewed Mother and Father separately on January 15th after receiving a referral for physical abuse by an unknown perpetrator. For the most part, their interviews matched up. Both parties gave similar accounts of the events that took place in the week preceding C.W.'s admission to Vanderbilt. In her interview, Mother divulged that Father had a history of domestic violence against her, and recounted two specific instances in which he had physically attacked her. Father corroborated Mother's story in his interview, admitting that they had engaged in two physical altercations in the past, which he attributed to her flirting with other men. Notably, however, their stories did not match up regarding physical discipline of the children. In her interview, Mother stated that although she occasionally threatened to "whoop" the children, she never really did, whereas Father did use physical discipline on the children. In his interview, Father admitted to having spanked both of the children on several occasions, but also said that he had seen Mother use physical punishment on the children. Father also told Ms. Pellowski that he was concerned about Mother's frustration with C.W. Father stated that he knew he did not cause C.W.'s injuries, but that he was unsure whether Mother had done it.

Detective Billy Camargo of the Columbia Police Department interviewed and took written statements from both parents at Vanderbilt in the course of his investigation. Both parents gave similar accounts of the preceding week, with Father adding that he and Mother had gotten into an argument on January 11th. Father stated that Mother had an anger problem, that she was very possessive at times, and that she had gotten jealous about something and was angry with him that day. On January 20th, Mother went to the police station to meet with Detective Camargo again to provide additional details to the case. Mother indicated to Detective Camargo that she may have caused one of the injuries to C.W. when she flopped down on the bed too hard while holding him. Detective Camargo also met with Father again the following day. In a statement inconsistent with his earlier denial of any

wrongdoing to Ms. Pellowski, Father told Detective Camargo that he felt somewhat responsible for C.W.'s more recent injury. Father stated that though he would never intentionally hurt C.W., he must have caused the injury if it occurred on January 10th or 11th because he was with C.W. on those days. Father added that even if he did cause the injury, he was not sure how it happened.

During their various interactions recounted in the record, Mother and Father provided other theories of how C.W. might have sustained his injuries. They suggested that perhaps E.K. caused the injuries. Speaking with Detective Camargo, Mother described E.K.'s behavior as wild and erratic at times. She also stated to Ms. Pellowski that E.K. had been acting different lately, like he was in trouble or had done something wrong. However, the parents did not have any specific theory on how or when E.K. might have caused the injuries to C.W. When Father asked E.K. whether anything had happened to C.W. recently, E.K. responded that maybe C.W. fell off the couch, but then jumped back on it.² Ms. Pellowski conducted a forensic interview with E.K. several weeks into her investigation, but stated that he did not provide any useful information regarding C.W.'s injuries. Mother also indicated to both Ms. Pellowski and Detective Camargo that she thought a lady at C.W.'s daycare might have caused C.W.'s first injury, though she never provided any explanation for her belief. Notably, in all of the interviews Mother and Father did with Dr. Lowen, Ms. Pellowski, and Detective Camargo, neither ever mentioned a "bouncy seat."

On January 20, 2011, DCS filed a petition in the Juvenile Court of Maury County, Tennessee to have C.W. declared dependent and neglected. The petition sought to take C.W. into protective custody. The Juvenile Court granted temporary custody of C.W. to DCS the next day. The Juvenile Court also granted temporary custody of E.K. to his father and appointed Jack West as guardian ad litem ("GAL") to represent both of the children.

The Juvenile Court conducted hearings on the dependency and neglect petition over the course of several days in January 2012. During those hearings, Mother and Father proposed for the first time that C.W.'s injuries may have been caused by E.K. pushing a "bouncy seat" in which C.W. was sitting. The Juvenile Court did not buy it. On April 17, 2012, the Juvenile Court filed an order finding C.W. to be a dependent and neglected child. It noted that experts for both the parents and for DCS testified that C.W. sustained injuries that could not have been caused by his own actions. It noted that C.W.'s injuries were not consistent with the parents' explanations of how the injury might have occurred. It stated that "if [the parents] assert that a third person caused the injury, that theory should, at the very least, be plausible and not based on pure speculation." The Juvenile Court found that

²At two months old, C.W. would not have been able to walk, crawl, or even sit up by himself in January 2011.

DCS carried its burden of proving that C.W. is a dependent and neglected child; that he suffered abuse; and that he suffered severe child abuse. Mother and Father both filed appeals to the circuit court for de novo review of the Juvenile Court's decision.

On October 8, 2012, the Juvenile Court released specific findings of fact to supplement its previous order upon the joint motion of Mother and Father urging it to do so. In the supplemental findings, the Juvenile Court carefully recounted the testimony of the two medical expert witnesses: Dr. Lowen, who testified for DCS, and Dr. William Houda, who testified for the parents. The Juvenile Court noted that both Dr. Lowen and Dr. Houda agreed that C.W. suffered a traumatic brain injury that could not have been accidental or self-inflicted and was caused by the violent rotation of his head in a front to back motion that caused his brain to collide repeatedly with the front and rear of his skull. It noted that the experts disagreed in three aspects of the case: whether the trauma should be labeled as abusive, whether the injury constituted severe child abuse; and whether E.K. could have caused the injury. The Juvenile Court noted that the first disagreement was merely a matter of semantics; Dr. Houda does not use the term "abusive" because he felt it implied the perpetrator's intent in inflicting the injury, which he could not testify to. As to the second disagreement, although Dr. Houda found severe bleeding in the brain, his conclusion that the injury was not severe was based on his assessment that C.W. appears to have since developed normally, whereas Dr. Lowen testified that the injury's effects may take a long time to manifest themselves, and her conclusion that the injury was severe was based on the likelihood of long-term deficits. Finally, although both experts agreed that E.K. could not normally generate enough force to cause C.W.'s injuries, they disagreed on the effect of his force if it was multiplied by C.W. being in a bouncy seat that would propel him forward and backward violently. While Dr. Houda testified that E.K. might have been able to cause the injury if C.W. was in the bouncy seat, Dr. Lowen unequivocally denied that the injury could have been caused by E.K., even if C.W. was in the bouncy seat. Furthermore, the Juvenile Court noted that neither doctor inspected the bouncy seat in question, as it had been sold or otherwise disposed of by the time of the hearing. Moreover, the Juvenile Court found that the parents' failure to mention a bouncy seat as a possible cause of the injury, even after hours of questioning at Vanderbilt, raised concerns about the veracity of that explanation. The Juvenile Court noted Dr. Lowen's testimony that symptoms from just an injury would have manifested immediately, and that according to the parents' own testimony, Father and E.K. were home alone with C.W. for several hours before his nausea began. The Juvenile Court found that E.K. could not have caused C.W.'s injuries. Based on the foregoing, the Juvenile Court concluded that Father severely abused C.W.

A trial was conducted in the appeal to Maury County Circuit Court on March 6, 2013. The trial court heard testimony from Dr. Lowen, Ms. Pellowski, and Detective Camargo. Mother and Father did not testify. On April 1, 2013, the trial court entered an order finding

by clear and convincing evidence that C.W. was a dependent and neglected child. The trial court found clear and convincing evidence that C.W.'s second brain injury, evidenced by acute bleeding and contusions to the front of his brain, was the result of abuse. Although the trial court did not find clear and convincing evidence that C.W.'s first injury was nonaccidental or amounted to abusive head trauma, because Dr. Lowen "emphatically" testified that the first injury would have produced objective symptoms that a caregiver should have observed and reported, the trial court found that Mother and Father failed to protect C.W. from the reoccurrence of such an injury. The trial court found that Mother and Father attempted to cover up for one another and frustrate the efforts of law enforcement and DCS to determine which of them caused the second injury. The trial court noted that at one point in the investigation, Father stated that he must be the responsible party because Mother was not at home when it happened; at another point, Mother stated that she was willing to admit to injuring C.W. if it would allow her to take him home; later, Mother stated that she must have caused the C.W.'s injuries when she flopped down onto the bed with him in her arms. Moreover, the trial court noted that in the two years that the matter had been pending in the courts, Mother and Father remained together—"the non-offending [parent] knowing all the while that the other person most likely abused their infant child, causing at least one of the child's brain injuries." Based on those actions, the trial court found by clear and convincing evidence that both of the parents knowingly failed to protect the child from abuse or neglect likely to cause serious injury or death, and that one of them actually committed acts of physical abuse and neglect likely to cause serious injury or death to C.W. The court ordered that C.W. remain in the legal and physical custody of DCS. In light of the court's finding that the parents subjected C.W. to severe child abuse, the court ordered that DCS be relieved of its requirement to make reasonable efforts to reunify Mother and Father.

Both Mother and Father initially filed notices of appeal to this Court. Father later filed a motion to dismiss his appeal. Father is therefore no longer a party to this appeal.

II. ISSUES ON APPEAL AND STANDARD OF REVIEW

On appeal, Mother argues first that there is not clear and convincing evidence in the record to support a finding that C.W. is a dependent and neglected child. Additionally, Mother contends that the trial court erred in finding clear and convincing evidence that Mother committed severe child abuse against C.W.

Dependency and neglect must be established by clear and convincing evidence. Tenn. Code Ann. § 37-1-129(c) (2010). Likewise, severe child abuse in a dependency and neglect proceeding must also be established by clear and convincing evidence. *In re S.J.*, 387 S.W.3d 576, 587 (Tenn. Ct. App. 2012). We have explained the clear and convincing standard in previous cases:

For the evidence to be clear and convincing, the evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002) (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)). The evidence should produce a firm belief or conviction as to the truth of the allegations sought to be established. *In re M.L.P.*, 228 S.W.3d 139, 143 (Tenn. Ct. App. 2007); *In re Giorgianna H.*, 205 S.W.3d 508, 516 (Tenn. Ct. App. 2006). In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is “highly probable” as opposed to merely “more probable” than not. *In re M.A.R.*, 183 S.W.3d 652, 660 (Tenn. Ct. App. 2005) (quoting *In re C.W.W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000)).

In re H.L.F., 297 S.W.3d 223, 233 (Tenn. Ct. App. 2009).

In order to apply this standard of proof, the appellate court must “distinguish between the specific facts found by the trial court and the combined weight of those facts.” *In re Tiffany B.*, 228 S.W.3d 148, 156 (Tenn. Ct. App. 2007). First, we review the trial court’s findings of fact de novo on the record with the presumption that they are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *In re M.J.B.*, 140 S.W.3d 643, 654 (Tenn. Ct. App. 2004). Those findings made by the trial court based on witness credibility are given great deference and we will not reverse them absent clear evidence to the contrary. *In re H.L.F.*, 297 S.W.3d at 233. Second, we must determine whether the combined weight of the facts, either as found by the trial court or as supported by preponderance of the evidence, clearly and convincingly establishes dependency and neglect or severe child abuse. *In re M.J.B.*, 140 S.W.3d at 654. Whether the evidence clearly and convincingly establishes the ultimate issues of dependency and neglect and severe child abuse is a question of law, which we review de novo with no presumption of correctness. *In re H.L.F.*, 297 S.W.3d at 233.

III. ANALYSIS

A parent’s right to the custody and care of his or her child is among the oldest of the liberty interests protected by the due process clauses of the United States and Tennessee Constitutions. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007). Although this right is fundamental and superior to claims of others, it is not absolute. *State v. C.H.K.*, 154 S.W.3d 586, 589 (Tenn. Ct. App. 2004). It continues without interruption only so long as the parent does not relinquish it, abandon it, or otherwise engage in conduct requiring its limitation or termination. *In re S.J.*, 387 S.W.3d 576, 588 (Tenn. Ct. App. 2012). Two of the situations in which our legislature has

determined that the rights of parents may be limited are circumstances in which the child is found to be dependent and neglected, and when a parent is found to have engaged in severe child abuse. *See* Tenn. Code Ann. § 37-1-130(a)(2) (“If the child is found to be dependent and neglected, the court may . . . transfer temporary legal custody [of the child] . . .”); Tenn. Code Ann. § 37-1-130(d) (“No child who has been found to be a victim of severe child abuse shall be returned to the custody or residence of any person who engaged in or knowingly failed to protect the child from [severe child abuse] . . .”). Here, the trial court ordered that C.W. remain in protective custody after finding that he was a dependent and neglected child and that Mother engaged in severe child abuse against him. The gravity of those findings cannot be understated, and it is with the foregoing interests in mind that we address Mother’s claims on appeal.

Dependency and Neglect

Mother contends that the trial court erred in finding C.W. dependent and neglected. Mother primarily argues by alluding to alternative explanations for C.W.’s injuries. For example, Mother notes Dr. Lowen’s testimony that C.W.’s acute brain injury likely occurred three to seven days prior to her examination of him at Vanderbilt. Mother then points out that C.W.’s last day of daycare was January 7th, which was within seven days of his admission to Vanderbilt. Though Mother does not explicitly say so, she apparently contends that C.W. may have been injured by someone at the daycare. Similarly, though she does not purport to blame E.K. for the injuries, she points out in her statements to investigators in January 2011 that she was concerned about E.K.’s erratic behavior and that he had been acting different around the time of C.W.’s injury. Finally, Mother points out that DCS did not provide any direct evidence of abuse towards C.W. From this, Mother argues that DCS failed to present clear and convincing evidence that C.W. was a dependent and neglected child.

After reviewing the record, we must respectfully reject Mother’s argument. The trial court found C.W. was the victim of abuse and was dependent and neglected. A “dependent and neglected child” is statutorily defined as a child:

- (A) Who is without a parent, guardian or legal custodian;
- (B) Whose parent, guardian or person with whom the child lives, by reason of cruelty, mental incapacity, immorality or depravity is unfit to properly care for such child;
- (C) Who is under unlawful or improper care, supervision, custody or restraint by any person, corporation, agency, association, institution, society or other organization or who is unlawfully kept out of school;
- (D) Whose parent, guardian or custodian neglects or refuses to provide

necessary medical, surgical, institutional or hospital care for such child;

(E) Who, because of lack of proper supervision, is found in any place the existence of which is in violation of law;

(F) Who is in such condition of want or suffering or is under such improper guardianship or control as to injure or endanger the morals or health of such child or others;

(G) Who is suffering from abuse or neglect;

....

Tenn. Code Ann. § 37-1-102(b)(12)(A)-(G). The term “abuse” is statutorily defined as:

. . . when a person under the age of eighteen (18) is suffering from, has sustained, or may be in immediate danger of suffering from or sustaining a wound, injury, disability or physical or mental condition caused by brutality, neglect or other actions or inactions of a parent, relative, guardian or caretaker.

Tenn. Code Ann. § 37-1-102(b)(1).

As noted above, Mother argues against the trial court’s finding of dependency and neglect by alluding to other possible causes of C.W.’s injury; however, none of the other possible causes she proposes have any evidentiary support. It is important to note that DCS need not exclude every other conceivable possibility to support a factual finding of nonaccidental trauma; as outlined above, the specific underlying facts in a dependency and neglect proceeding need only be established by a preponderance of the evidence. *In re S.J.*, 387 S.W.3d at 594. Moreover, DCS was not required to show direct evidence of abuse; oftentimes, where the only witnesses to abuse are an infant and his or her caregiver, said abuse must be gleaned from circumstantial evidence. *Id.* at 592.

The evidence in the record clearly supports the trial court’s adjudication of C.W. as a dependent and neglected child. It is undisputed that during the first three months of his life, C.W. suffered two separate brain bleeding injuries that are completely unexplained. Dr. Lowen testified to a reasonable degree of medical certainty that C.W.’s second injury was the result of abusive trauma and that there was no way C.W. could have caused either of the injuries himself. Dr. Lowen stated that the nature of C.W.’s second injury, internal brain bleeding and contusions without any external manifestation, was consistent with being violently shaken or thrown down hard on a soft surface. Dr. Lowen testified that if C.W. started throwing up at 11:00 a.m. the morning on January 11th, his second brain injury would have occurred shortly prior to that, effectively ruling out the possibility that the injury occurred while he was at daycare. Additionally, Detective Camargo spoke with a staff member at the daycare who reported that nothing out of the ordinary occurred when C.W.

was in its care on January 7th.

It is undisputed that the only individuals who could have had contact with C.W. on the morning of January 11th are Mother, Father, and E.K. Dr. Lowen expressed serious doubts as to whether E.K. could have caused the second injury to C.W. She stated that she could not imagine how a kick from E.K. could have caused the injury. Additionally, she stated that E.K. could not have caused the injury by rocking C.W. in his bouncy seat unless he catapulted C.W. out of the seat onto the floor, in which case one of the parents would have found C.W. crying abnormally on the floor. Neither parent mentioned such an incident. Thus, it appears that one of the parents must have inflicted the injury sometime on the morning of January 11th.

There is evidence in the record to suggest either of the parents may have caused the injury to C.W. on or around the morning of January 11th. Each parent alleged that the other used physical punishment with the children, though Mother denied that she ever did. In his interview with Detective Camargo, Father stated that Mother had a problem controlling her temper and was very angry with him that morning. He also stated to Ms. Pellowski that he was concerned about Mother's frustration with C.W. Indeed, Mother indicated that she could have caused the injury by flopping down too hard onto the bed with C.W.³ However, both parties agreed that Mother left for work early that morning, several hours before C.W. showed any symptoms of injury. In a later interview with Detective Camargo, Father admitted that if C.W.'s injury occurred on January 11th, he must have done it, though he stated that was not sure how. Both parents admitted that Father had a history of violence, and acknowledged two separate incidents in which Father had physically abused Mother. During one of the incidents, Father pulled out a chunk of Mother's hair. In October 2010, just weeks before C.W. was born, Father completed a six-month anger management course.

In any event, it is not incumbent upon this Court to determine which of the parents abused C.W. *See, e.g., In re N.T.B.*, 205 S.W.3d 499, 508 (Tenn. Ct. App. 2006) (affirming the trial court's finding that the child was severely abused and dependent and neglected where "in all likelihood, one parent abused the child and the other parent is protecting that parent"). After reviewing the evidence in the case, we agree with the trial court that C.W. was clearly abused while in the care of Mother and Father. Moreover, we note that claims by Mother and Father that they are unaware of how they inflicted the injury on C.W. is irrelevant. The definition of "abuse" focuses on the child's circumstances, not the state of mind of the caregiver. *In re S.J.*, 387 S.W.3d at 589 (citing *In re Samaria S.*, 347 S.W.3d 188, 204 n. 23 ("Notably, general 'abuse' (which is not 'severe') does not necessarily involve any 'knowing' conduct.")). In light of the foregoing, we find that the record contains clear

³It does not appear from the record that Mother indicated when this incident took place.

and convincing evidence that C.W. suffered from abuse and neglect and that he was a dependent and neglected child as defined by Tennessee Code Annotated section 37-1-102(b)(12).

Severe Child Abuse

Mother also contends that the trial court erred in finding that she severely abused C.W. Tennessee Code Annotated section 37-1-102(b)(23) defines “severe child abuse” as:

(A)(i) The knowing exposure of a child to or the knowing failure to protect a child from abuse or neglect that is likely to cause serious bodily injury or death and the knowing use of force on a child that is likely to cause serious bodily injury or death;

(ii) “Serious bodily injury” shall have the same meaning given in § 39-15-402(d).

Tenn. Code Ann. § 37-1-102(b)(23)(A). Tennessee Code Annotated section 39-15-402(d) is a definition for “serious bodily injury to the child” in the context of the criminal offense of aggravated child abuse and neglect; the definition includes, among other things, subdural bleeding and brain contusions. Tenn. Code Ann. § 39-15-402(d).

It is undisputed that C.W. suffered severe child abuse. Rather than argue that point, Mother focuses on the “knowing” requirement of Section 37-1-102(b)(23). Though the term “knowing” is not defined in Section 37-1-102, or in any other statute pertaining to dependency and neglect proceedings, this Court has discussed its use in this context at length in past cases. *See, e.g., In re S.J.*, 387 S.W.3d at 592-595. *In re H.L.F.*, 297 S.W.3d 223, 235-36 (Tenn. Ct. App. 2009); *In re N.T.B.*, 205 S.W.3d 499, 506 (Tenn. Ct. App. 2006). It is not unusual for the caregiver in child abuse cases to deny that the injury was purposefully inflicted, and oftentimes, there is no witness to the injury other than the offending caregiver. *In re S.J.*, 387 S.W.3d at 592. Thus, as a practical matter, the “knowing” element must often be gleaned from circumstantial evidence, such as medical expert testimony on the likelihood that the injury occurred in the manner described by the caregiver. *Id.* However, the “knowing” requirement is not limited to parents who are present when the severe abuse occurs. *In re N.T.B.*, 205 S.W.3d at 506 (quoting *In re R.C.P.*, No. M2003-01143-COA-R3-PT, 2004 WL 1567122, at *7 (Tenn. Ct. App. July, 13, 2004)). “A parent’s failure to protect a child will also be considered ‘knowing’ if the parent had been presented with sufficient facts from which he or she could have and should have recognized that severe child abuse had occurred or that it was highly probable that severe child abuse would occur.” *Id.* (quoting *In re R.C.P.*, 2004 WL 1567122, at *7).

Mother contends that the evidence establishes that C.W. suffered nonaccidental trauma sometime during the morning of January 11th, while he was in Father's care. She argues that because she had no reason to suspect that C.W. would be abused or neglected in Father's care, she did not "knowingly" fail to protect him. We reject this argument. The evidence clearly shows that several weeks prior to C.W.'s nonaccidental brain bleeding injury, he suffered another brain bleeding injury in a separate incident. Though Dr. Lowen testified that she could not say with certainty that the first injury was the result of abuse, she stated, in the words of the trial court, "emphatically" that the first injury would have caused noticeable symptoms that his caregiver should have observed and reported. Despite this, Mother never reported the injury or took any steps to prevent its reoccurrence. Even though she should have been exceedingly attentive and protective of C.W. following his first injury, and despite her firsthand knowledge of Father's propensity for violence, she apparently had no reservations about leaving C.W. alone with him. Thus, even if we accepted Mother's assertion that Father committed the actual act of physically abusing C.W., Mother's failure to protect C.W. despite having been presented with sufficient facts from which she should have recognized that severe abuse either had occurred or likely would occur is sufficient to support the trial court's finding that she committed severe child abuse.

IV. HOLDING

Based on the foregoing, the decision of the trial court is affirmed in all respects. The costs of this appeal are assessed to the Appellant, R.T., and her surety, for which execution may issue if necessary.

DAVID R. FARMER, JUDGE