IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Dependency of	)	NO. 65769-1-I
	)	
K.A.S., D.O.B. 4/28/03	)	DIVISION ONE
	)	
T.S.,	)	
	)	
Appellant,	)	
v.	)	UNPUBLISHED OPINION
	)	
THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES,	)	
	)	
Respondent.	)	FILED: March 26, 2012
	)	

Leach, A.C.J. — T.S. appeals an order of dependency for her daughter, K.A.S. T.S. contends that due process required appointment of counsel for K.A.S. Because T.S. did not raise this issue in the trial court and does not demonstrate actual prejudice, she may not raise it now. Alternatively, T.S. claims that the trial court erred by concluding that K.A.S. met the abuse or neglect definition of a dependent child. Because uncontested findings of fact support the trial court's conclusion, we affirm.

FACTS

Before this dependency action, K.A.S. lived with her mother, T.S. T.S. has significant medical problems that affect her ability to care for K.A.S. She experiences severe lower back pain and takes several medications, including

clonazepam and methadone. She blacks out frequently and requires an in-home caregiver for 130 hours per month to provide for her basic needs.

Born in 2003, K.A.S. also has extraordinary needs and requires highly skilled parenting. She can be violent toward other children and adults. She has been diagnosed with an anxiety disorder and attention deficit hyperactivity disorder. Before her placement in foster care, K.A.S. also exhibited gross motor delays and "behaviors typical of children much younger socially, physically, and emotionally."

The State filed an earlier dependency action in September 2007, after police found then four-year-old K.A.S. wandering alone near busy streets on several different occasions. K.A.S. enrolled in school and attended therapy, and T.S. worked with the Department of Social and Health Services (DSHS) to install an alarm on her apartment door to prevent K.A.S. from leaving without supervision. K.A.S. returned to T.S.'s care in December 2008, and the State eventually dismissed that dependency petition.

Between January and August 2009, T.S. had six more contacts with police regarding K.A.S.'s care and supervision. In January, K.A.S. left the apartment by herself while T.S. showered. Neighbors called police after they saw the six-year-old child walking around on the opposite side of the apartment complex from her own building. In June 2009, K.A.S. dialed 911 on two

separate occasions and told the 911 operator that she wanted friends. Police also responded after a neighbor reported slapping sounds and crying coming from T.S.'s apartment, although responding officers saw no evidence of harm or wrongdoing. On several occasions, T.S. appeared heavily medicated to the officers.

On August 8, 2009, at approximately 3:00 a.m., K.A.S. climbed out of her bedroom window when she heard adult neighbors talking outside. She went to the third floor of the apartment complex to visit with the neighbors, who called police when they saw K.A.S. wandering around the building. Once again, police responded and notified T.S., who had been sleeping and unaware that K.A.S. had left the apartment. A few days later, a social worker contacted T.S. to discuss the incident; when the social worker arrived at T.S.'s home, T.S. appeared heavily medicated. After the social worker requested a drug screen and tried to schedule a "Family Team Decision-Making Meeting," T.S. slammed the door and refused to speak with her.

On August 24, 2009, DSHS filed a dependency petition and removed K.A.S. from T.S.'s home the following day. After that, K.A.S.'s behavior "improved markedly" as she "responded well to the consistency and stability in foster care and an appropriate school setting." T.S. frequently visited K.A.S. but usually arrived late to the visits and, at times, behaved inappropriately and

appeared "droopy, dazed, unsteady, or asleep."

At a fact-finding hearing, the court considered testimony from several witnesses, including K.A.S.'s court-appointed guardian ad litem. Although the court found that T.S. and K.A.S. love each other very much, the court also found that K.A.S. met two of the three statutory definitions of a dependent child: (1) she was abused or neglected, and (2) she had no parent capable of adequately caring for her. At no point in the proceedings did any party ask the court to appoint counsel for K.A.S. T.S. appeals.

ANALYSIS

I. Due Process Right to Counsel

For the first time on appeal, T.S. claims that the due process clauses of the federal and state constitutions require the appointment of counsel for a child at all stages of a dependency proceeding. After oral argument, our Supreme Court announced its decision in In re Dependency of M.S.R.,[1] in which it held,

> [T]he due process right of children who are subjects of dependency or termination proceedings to counsel is not universal. The constitutional protections, RCW 13.34.100(6), and our court rules give trial judges the discretion to decide whether to appoint counsel to children who are subjects of dependency or termination proceedings.

Thus, we limit our review to whether T.S. may challenge the trial court's failure to appoint counsel for K.A.S. RAP 2.5 allows a party to raise for the first time on

[1] No. 85729-6, 2012 WL 664005 (Wash. Mar. 1, 2012), at *10.

appeal a manifest error affecting a constitutional right.[2] To demonstrate that an asserted error is manifest, the appellant must show actual prejudice,[3] which means, "'the asserted error had practical and identifiable consequences in the trial of the case.'"[4]

T.S. fails to demonstrate actual prejudice.[5] Because she does not challenge the trial court's findings of fact, we treat as a verity the trial court finding that K.A.S. had no parent capable of adequately caring for her.[6] This finding supports the conclusion that K.A.S. is a dependent child and defeats T.S.'s claim that failure to appoint counsel had any practical and identifiable consequence in the fact-finding hearing.

At oral argument, T.S. asserted that the entire proceeding was inherently prejudicial because K.A.S. had no "voice" throughout the proceeding and could not express her wishes to the court. But the record does not support this assertion. K.A.S.'s guardian ad litem testified that while it was difficult to "extract" information from K.A.S., she never expressed interest in increasing visitation with her mother or returning to her care. And T.S. does not contend

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[2] RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

[3] State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

[4] State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (internal quotation marks omitted) (quoting Kirkman, 159 Wn.2d at 935).

[5] For purposes of this analysis, we assume but do not decide that this alleged error is of constitutional magnitude.

[6] In re Dependency of P.D., 58 Wn. App. 18, 30, 792 P.2d 159 (1990).

that the guardian ad litem failed to perform her statutory duties to advocate for K.A.S.'s best interests and to report to the court K.A.S.'s expressed interests.[7] Moreover, T.S. has not challenged the trial court's finding of fact that K.A.S. did not express any desire to return to her mother's care to her social worker, teachers, or guardian ad litem. T.S. does not identify any place in the record where counsel for K.A.S. might have supplemented the evidence, impeached a witness, or provided more effective advocacy for K.A.S. Consequently, any alleged prejudice is entirely speculative and not sufficient to meet T.S.'s burden.[8] Because T.S. fails to show prejudice, we decline to address her due process claim.

II. Dependency

Alternatively, T.S. claims that the trial court erred by concluding as a matter of law that K.A.S. was "abused or neglected as defined in chapter 26.44 RCW." But she does not assign error to the findings of fact supporting the order of dependency. These unchallenged findings of fact, therefore, are verities on appeal. We review a trial court's conclusion of law de novo to determine if it is

[7] Under RCW 13.34.105(1)(a) and (f), the guardian ad litem must report to the court and advocate for the child's best interests, and under RCW 13.34.105(1)(b), the guardian ad litem must "report to the court any views or positions expressed by the child."

[8] See generally State v. Norby, 122 Wn.2d 258, 264, 858 P.2d 210 (1993) ("The mere possibility of prejudice is not sufficient to meet the burden of showing actual prejudice.").

supported by the findings of fact.[9]

To declare a child dependent under RCW 13.34.130, the trial court must find by a preponderance of the evidence that the child meets at least one of the three statutory definitions of dependency.[10] The statute provides that a dependent child is any child who

> (a) Has been abandoned;
> (b) Is abused or neglected as defined in chapter 26.44 RCW by a person legally responsible for the care of the child; or
> (c) Has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development.[11]

While the trial court found K.A.S. dependent under both definitions (b) and (c), T.S. challenges the court's finding of dependency only under part (b), the abuse or neglect definition. Thus, resolution of this claim is not dispositive of K.A.S.'s dependent child status because a court may declare a child dependent based on one of the three statutory definitions.

Even if it were dispositive, uncontested findings of fact support the trial court's conclusion that K.A.S. was "abused or neglected, as defined in Chapter 26.44 RCW." In relevant part, RCW 26.44.020 broadly defines "abuse or neglect" as "the negligent treatment or maltreatment of a child."[12] In turn,

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[9] Bingham v. Lechner, 111 Wn. App. 118, 127, 45 P.3d 562 (2002).
[10] See In re Welfare of Key, 119 Wn.2d 600, 612, 836 P.2d 200 (1992).
[11] RCW 13.34.030(6).

"negligent treatment or maltreatment" includes "the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety."[13]

T.S. argues that the trial court's findings of fact do not support a conclusion that she neglected K.A.S. because the trial court did not explicitly or implicitly find that her conduct, behavior, or inaction resulted in a clear and present danger to her daughter. But in findings 2.2(1), 2.2(5), and 2.2(7), the court documented several occasions when police located K.A.S.—at approximately six years old—wandering outside her home without supervision, including one incident that occurred at 3:00 a.m. And in findings 2.2(2) and 2.2(7), the court found that each time police returned K.A.S. to her mother, T.S. appeared heavily medicated and unaware K.A.S. had left the apartment.

While K.A.S. experienced no physical harm from any of the incidents, an abuse or neglect dependency need not rest on proof of actual harm.[14] In In re

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[12] RCW 26.44.020(1).

[13] RCW 26.44.020(14). Washington Administrative Code provisions, which serve as DSHS rules, expressly recognize neglect in the form of a "chronic failure on the part of a parent or guardian to perform basic parental functions, obligations, and duties, when the result is to cause injury or create a substantial risk of injury." WAC 388-15-009(5)(c).

[14] In re Interest of J.F., 109 Wn. App. 718, 731, 37 P.3d 1227 (2001); see also In re Dependency of Schermer, 161 Wn.2d 927, 951, 169 P.3d 452 (2007) ("A dependency . . . does not require proof of actual harm, only a 'danger' of harm.").

Interest of J.F.,[15] a mother sent her nine-year-old daughter on a road trip to California with a man she recently met through a personal advertisement. The mother knew that the man had extensive criminal history and that her daughter, who had been the victim of two unrelated sexual assaults, lacked boundaries with strangers.[16] While there was no evidence of actual harm to the child, this court held that the mother's conduct in creating such a risk clearly met the clear and present danger standard. There, we affirmed the trial court's dependency order based on both abuse or neglect and inadequate care.[17]

T.S. attempts to distinguish J.F. from the circumstances here. She argues that while J.F.'s mother affirmatively engaged in conduct that placed her child in danger, T.S. "did not send K.A.S. out of the house in the middle of the night to associate with strangers." We find this distinction unpersuasive. While we appreciate the fact that children may be difficult to supervise at all times, T.S. repeatedly failed to prevent her six-year-old child from leaving the home, despite ongoing assistance from social workers. This inaction demonstrates a serious disregard for the potential consequences of a six-year-old child wandering alone outside and constitutes a clear and present danger to K.A.S.'s health, welfare, and safety.

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[15] 109 Wn. App. 718, 731, 37 P.3d 1227 (2001).
[16] J.F., 109 Wn. App. at 731.
[17] J.F., 109 Wn. App. at 731, 734.

Aside from supervision, other findings of fact support the trial court's conclusion. In finding 2.2(9), the court found that T.S. failed to provide K.A.S. with adequate socialization and or allow K.A.S. adequate "physical activity necessary for children to achieve sensory integration." Finding 2.2(10) points to the marked improvement in K.A.S.'s gross motor delays and behavior issues following her removal from T.S.'s home. These facts support the reasonable inference that K.A.S.'s marked improvement while in foster care reflects that neglect was a contributing factor to her developmental delays while in the care of her mother. Coupled with T.S.'s failure to supervise her daughter, these unchallenged findings of fact support the trial court's conclusion that K.A.S. met the statutory definition of a dependent child.

CONCLUSION

Because T.S. does not demonstrate actual prejudice, we hold that she may not raise K.A.S.'s alleged due process right to counsel for the first time on appeal. We also hold that the findings of fact support the trial court's conclusion that K.A.S. was "abused or neglected, as defined in Chapter 26.44 RCW" and affirm.

Leach, A.C.J.

WE CONCUR:

Spearman, J.

Dwyer, J.