

FACTS

The Department of Social and Health Services (DSHS) filed a dependency petition on June 9, 2010, asserting that Brandi Slusser-Kelly's two year old child, L.M.K. was an abused or neglected child, and that the child had no parent or guardian capable of adequately caring for the child. L.M.K. was placed in out-of-home care with her aunt in June 2010. L.M.K.'s father, Jeffrey Youngs, is incarcerated and signed an agreed order of dependency, entered on August 10, 2010.

The trial court conducted a contested hearing on September 7, 2010 and found that L.M.K. was a dependent child under RCW 13.34.030(6)(b) and (c). The parties agreed to specifically adopt the trial court's oral findings of fact by reference in the dependency order. The trial court's finding of dependency was based primarily on four factors: (1) Slusser-Kelly's use of marijuana on a daily basis, including throughout her pregnancies with L.M.K. and L.M.K.'s younger brother; (2) Slusser-Kelly's failure to follow medical advice or obtain prescribed medical treatment for L.M.K., following L.M.K.'s fever and febrile seizures; (3) Slusser-Kelly's failure to engage in needed services such as treatments for her drug addiction, and meetings with L.M.K.'s guardian ad litem; and (4) the decision to leave L.M.K. with Slusser-Kelly's boyfriend, Todd Burns, during her incarceration.

Slusser-Kelly appeals the trial court's order of dependency.

DISCUSSION

I. Standard of Review

Parents have a fundamental liberty interest in the care and welfare of their children, and State interference is never to be taken lightly. In re Dependency of Schermer, 161 Wn.2d 927, 941, 169 P.3d 452 (2007) (citing In re Welfare of Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980)). But, the State has an interest in protecting the physical, mental, and emotional health of children. Id. A dependency is a preliminary proceeding that does not permanently deprive a parent of rights. In re Welfare of Key, 119 Wn.2d 600, 609, 836 P.2d 200 (1992). Dependency proceedings are designed to protect children from abuse and neglect, help parents alleviate problems that led to State intervention, and reunite families if appropriate. In re Dependency of T.L.G., 126 Wn. App. 181, 203, 108 P.3d 156 (2005); In re Interest of J.F., 109 Wn. App. 718, 728, 37 P.3d 1227 (2001); In re A.W., 53 Wn. App. 22, 27, 765 P.2d 307 (1988).

In evaluating a claim of insufficiency of the evidence in a dependency proceeding, this court determines whether substantial evidence supports the trial court's findings of fact and whether those findings of fact support the trial court's conclusions of law. In re Dependency of C.M., 118 Wn. App. 643, 649, 78 P.3d 191 (2003). Evidence is substantial if, viewed in the light most favorable to the prevailing party, a rational trier of fact could find the fact by a preponderance of the evidence. In re Dependency of E.L.F., 117 Wn. App. 241, 245, 70 P.3d 163 (2003). The legislature has determined that in balancing the legal rights of parents against the rights of the child, the rights and safety of the child shall be the paramount concern. RCW 13.34.020; Schermer, 161 Wn.2d at 942. Thus,

when a child's best interests conflict with the parent's interests, the child's interests must prevail. In re Dependency of J.B.S., 123 Wn.2d 1, 9-10, 863 P.2d 1344 (1993). A best interests determination is highly fact dependent. In re Welfare of Aschauer, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980). The deference paid to the trial judge's advantage in having the witnesses before him or her is particularly important in this context, and this court does not reweigh the evidence or evaluate the witnesses credibility. Id.; Quinn v. Cherry Lane Auto Plaza, Inc., 153 Wn. App. 710, 717, 225 P.3d 266 (2009). Unchallenged findings of fact are verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

An appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a); State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009). "The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The rule comes from the principle that trial counsel and the defendant are obligated to seek a remedy to errors as they occur, or shortly thereafter. O'Hara, 167 Wn.2d at 98. There is an exception to this general rule, however, when the claimed error is a manifest error affecting a constitutional right. RAP 2.5(a)(3). "Manifest" in RAP 2.5(a)(3) requires a showing of actual prejudice. O'Hara, 167 Wn.2d at 99. To demonstrate actual prejudice, an appellant must make a plausible showing that the asserted error had practical and identifiable consequences in the trial. Id.

To find a child dependent, the State must prove by a preponderance of the evidence that the child meets the statutory definition of dependency under RCW 13.34.030(6). Key, 119 Wn.2d at 612; RCW 13.34.110(1). RCW 13.34.030(6)(b) provides that a child is dependent if the child is “abused or neglected as defined in chapter 26.44 RCW by a person legally responsible for the care of the child.” RCW 13.34.030(6)(c) provides that a child is dependent where the child “[h]as 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.” In this case, the trial court found L.M.K. dependent under both RCW 13.34.030(6)(b) and (c).

Slusser-Kelly argues that both of these findings of dependency are erroneous, because they rely, at least in part, on the trial court’s finding that Burns was not a suitable caregiver for L.M.K. She argues that the trial court relied on evidence from outside the record to reach this conclusion, in violation of her constitutional rights. Because she did not object at trial to the trial court’s alleged reference to evidence outside the record, however, she may not raise this issue for the first time on appeal unless she can demonstrate manifest constitutional error. RAP 2.5(a)(3).

II. Substantial Evidence Supports the Finding of Dependency

The trial court’s dependency finding was based on four main factors. (1) Slusser-Kelly’s use of marijuana on a daily basis, including throughout her two pregnancies; (2) Slusser-Kelly’s failure to follow medical advice or obtain

prescribed medical treatment for L.M.K., following L.M.K.'s fever and febrile seizures; (3) Slusser-Kelly's failure to engage in needed services such as treatments for her drug addiction, and meetings with L.M.K.'s guardian ad litem; and (4) the decision to leave L.M.K. with Slusser-Kelly's boyfriend, Burns, during her incarceration.

Evidence at the fact-finding hearing supported each of those four factors. First, Slusser-Kelly was forthcoming in her own testimony that she smoked marijuana once or twice a day, including during her pregnancy with L.M.K., and with L.M.K.'s younger brother. She had also disclosed her marijuana habit to social workers, who corroborated the testimony.

Second, on the weekend of May 30, 2010, L.M.K. had a high fever and experienced two seizures. Both times, L.M.K. went to the emergency room, and Slusser-Kelly was instructed to give her daughter medication. After the second visit, L.M.K. was given a prescription for antibiotics. Slusser-Kelly testified that she failed to get that prescription filled or give L.M.K. the prescribed medication over the following eight days.

Third, Slusser-Kelly acknowledged her history of poor follow-through with appointments and services, though she vowed to improve in the future. Slusser-Kelly relies financially on a "Temporary Assistance for Needy Families" (TANF) grant, and has done so since before January 2010. On January 28, 2010, she was assigned to meet with a DSHS Work First social worker, Jessica Garretson. That meeting was assigned as a result of Slusser-Kelly's pregnancy, and because she was in sanction for her earlier nonparticipation in the Work First

program in Snohomish County. Slusser-Kelly self-reported to Garretson that she had been diagnosed with ADHD (attention deficit hyperactivity disorder), borderline personality disorder, PTSD (posttraumatic stress disorder), and other issues. To address the sanctions and concerns with Slusser-Kelly's mental health, Garretson and Slusser-Kelly worked out a plan for 28 days of activities, including 7.5 hours of mental health services each week and a 9 hour-per-week volunteer position. After two weeks, Slusser-Kelly began missing work for the volunteer position and failed to complete the services required to participate in Work First and to receive TANF.

On March 3, 2010, Slusser-Kelly told Garretson that the reason she missed work was that she was the victim of domestic violence at the hands of her boyfriend, Burns. She told Garretson that Burns was verbally abusive daily, physically abusive monthly, and that the previous sanction was the result of Burns breaking her ankle. She also disclosed to Garretson that Burns was drinking on a daily basis. In Slusser-Kelly's testimony at the fact-finding hearing, she denied that Burns perpetrated domestic violence against her or broke her ankle. At that time, Slusser-Kelly agreed to place L.M.K. in full-time child care by March 8, 2010; she agreed to attend an intake with Skagit Recovery and to continue services with Skagit Recovery; she agreed to schedule and attend an intake with Parent Child Assistance Program (PCAP) before March 8; she agreed to contact a domestic violence advocate in the Community Services Office; and she agreed to continue her 7.5 hours a week of mental health services. However, she did not complete any these services as required.

Garretson testified to that fact:

[Slusser-Kelly] attempted to complete several of them and had trouble with the follow through. She then attended one appointment for her CD [chemical dependency] assessment but had to leave, and then had some missed appointments

She never did follow through with domestic violence services. She accessed mental health services for a short time and then fell out of compliance with that. So it was kind of a long bumpy road.

By July 2010, Slusser-Kelly was in the third trimester of her pregnancy, and Work First program rules required the focus of her program to shift towards chemical dependency and mental health. Slusser-Kelly had admitted herself for six months of inpatient chemical dependency treatment in Spokane. But, after 10 days, she left voluntarily, based on her fear that she would lose her housing. Garretson testified that after leaving treatment, Slusser-Kelly failed to attend certain required appointments or to contact Child Protective Services about the treatments. There was also testimony from L.M.K.'s guardian ad litem, Marianne Yamashita, that Slusser-Kelly failed to make or keep appointments with her.

Fourth, Slusser-Kelly was incarcerated for 28 days during March 2010 for her 2005 possession of hallucinogenic mushrooms, a controlled substance. During that time, DSHS social worker Leann King became involved with the family, based on a referral indicating that Slusser-Kelly was incarcerated and there were concerns with the care of L.M.K. King went to the family home, where Slusser-Kelly had left L.M.K. in the care of Burns. Based on Burns' dilated pupils and rapid speech, King believed that he was under the influence of methamphetamine. Following an objection by Slusser-Kelly, the court stated

that it would consider King's observations on Burns's behavior, but not her conclusions.

Slusser-Kelly focuses her appeal narrowly on the fourth basis of the findings, the issue of Burns's suitability as a caregiver for L.M.K. But, she does not challenge or assign error to the other three bases. Those unchallenged findings are thus verities on appeal. Cowiche Canyon, 118 Wn.2d at 809. And, here, those findings are sufficient to support the trial court's ultimate conclusion of dependency under 13.34.030(6)(b) and (c), regardless of the outcome of Burns's suitability as a caregiver.

a. The RCW 13.34.030(6)(b) Finding: Neglect

The State bears the burden of proof, by a preponderance of the evidence, that the child meets one of the statutory definitions of dependency. Key, 119 Wn.2d at 612; RCW 13.34.110(1). Under RCW 13.34.030(6)(b), a child is dependent if the child is "abused or neglected as defined in chapter 26.44 RCW by a person legally responsible for the care of the child." Under RCW 26.44.020(1), "abuse or neglect" includes the negligent treatment or maltreatment of a child. Such treatment is defined as: "an act or failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to a child's health, welfare, or safety." RCW 26.44.020(14).

Slusser-Kelly assigns error to the trial court's finding of neglect under RCW 13.34.030(6)(b). But, by limiting the basis for her assignment of error

solely to the trial court's conclusion about her boyfriend, Burns, she concedes the truth of the remaining three bases that the trial court relied on. One of these bases was the finding that Slusser-Kelly failed to follow medical advice or fill a prescription for L.M.K. for eight days. Her failure to provide needed medical care was established by her own testimony. A parent's inability to provide necessary medical care may support a dependency finding. Schermer, 161 Wn.2d at 947. Viewing this evidence in the light most favorable to the State as the prevailing party, we hold that there was substantial evidence to support the trial court's finding of neglect. E.L.F., 117 Wn. App. at 245.

b. The RCW 13.34.030(6)(c) Finding: No Capable Parent/Custodian

The trial court also found that L.M.K. was dependent under RCW 13.34.030(6)(c): the child "[h]as 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." As with the finding of neglect above, Slusser-Kelly assigns error to this finding that there was no capable parent, but again she limits her argument to the trial court's conclusion about Burns, leaving the trial court's other findings unchallenged. Those other findings amply support the trial court's conclusion about the lack of a capable parent for L.M.K. Slusser-Kelly testified to smoking marijuana once or twice a day, including when she was pregnant with both L.M.K. and L.M.K.'s younger brother. Slusser-Kelly failed to provide necessary medical treatment for L.M.K., as discussed above. And, the trial court found that Slusser-Kelly failed to engage in and complete various

services she was required to do to obtain TANF money. Slusser-Kelly does not challenge these findings, and they are thus verities on appeal. We hold that these facts represent substantial evidence to support the trial court's finding that L.M.K. was dependent under RCW 13.34.030(c).

III. Manifest Constitutional Error

The trial court's conclusion that Burns was not a suitable caregiver for L.M.K. forms the sole basis for Slusser-Kelly's appeal. She argues that the trial court relied on evidence from outside the record in reaching its conclusion about Burns. The basis for her argument is the trial court's statement that it was familiar with "the file." The exchange in question occurred during the direct examination of King, a social worker. While Slusser-Kelly was in jail, King visited the family home to check on L.M.K. and to meet with Burns. King observed that Burns spoke rapidly and had dilated pupils. She asked Burns to submit to a urinalysis, which he did the following day.

Q. Do you know what the result of that [urinalysis was?]

A. Yes.

Q. What was it?

A. It was

[Slusser-Kelly's Attorney]: Objection as to hearsay, your Honor.

THE COURT: Sustained. You don't need to work too hard to prove that Mr. Burns is not an appropriate caregiver.

[Slusser-Kelly's Attorney]: Is the Court familiar with Mr? Burns. [sic]

THE COURT: I'm familiar with the file.

Slusser-Kelly made no objection to the trial court's reference to the file at that

time. The trial court was thus not appraised of any possible error in its reliance on the file.

The trial court made one other reference to the file, during its oral findings about Slusser-Kelly's judgment in leaving L.M.K. with Burns during her incarceration:

The fourth issue that was very concerning to me was when mom was in jail, [L.M.K.] was left with Mr. Burns, the boyfriend, who from all accounts and from a quick review of the file is not an appropriate person to be left with an adult, let alone a small child two years old.

Again, Slusser-Kelly did not object to the trial court's reference to the file or to the trial court's oral findings. Slusser-Kelly agreed to incorporate by reference into the dependency order the oral findings of fact. Her failure to object at trial precludes her ability to raise the issue now on appeal, unless she can demonstrate that there was a manifest constitutional error. RAP 2.5(a); O'Hara, 167 Wn.2d at 98. Slusser-Kelly attempts to argue that she implicitly objected to the trial court's reference to the file based on other objections she raised in relation to hearsay evidence submitted by DSHS. She argues that those objections should thus preserve the argument she now makes on appeal. But, her objections to hearsay are plainly distinguishable from the objection she now asserts. We hold that Slusser-Kelly must prove manifest constitutional error in order to raise this argument for the first time on appeal. RAP 2.5(a).

Slusser-Kelly argues that the trial court's references to the file constitute exactly such a manifest constitutional error. She asserts that the trial court's reference reflects its reliance on evidence from outside the record, and thus

reflects a violation of her due process rights. But, her argument is conclusory and unsupported by persuasive authority. It was never clear what the trial court meant when it referred to the file, because Slusser-Kelly never objected or sought clarification at trial. Indeed, as the State points out, without clarification, it is unclear that the reference to the file was anything other than a proper review of DSHS's dependency petition and the other documents presented to the court during the hearing as part of the case file

Slusser-Kelly cites to a case from Illinois, People v. Harris, 57 Ill. 2d 228, 231, 314 N.E.2d 465 (1974), for the proposition that due process rights are violated when a trial court conducts its own independent investigation or draws conclusions based on facts outside the record. She also relies on Lussier v. Runyon, 50 F.3d 1103, 1113 & n.13 (1st Cir. 1995), for similar support, citing to its discussion about how a trial court's consideration of extra-record evidence deprives parties of standard trial protections. "These protections include . . . the right to object to evidence, the right to question its source, relevance, and reliability, the right to cross-examine its proponent, and the right to impeach or contradict it." Id. at 1113 n.13. But, neither of these cases supports Slusser-Kelly's argument, because she has failed to demonstrate that reference to the file implicated any extra-record evidence.

Slusser-Kelly, in raising a claim of manifest constitutional error for the first time on appeal, bears the burden of proving that such an error actually occurred, and that the error resulted in actual prejudice. RAP 2.5(a); O'Hara, 167 Wn.2d at 98. To demonstrate actual prejudice, an appellant must make a plausible

showing that the asserted error had practical and identifiable consequences in the trial. Id. at 99. “In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. ‘If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.’” Id. (citation omitted) (quoting State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). Slusser-Kelly has failed to meet her burden of proof. She has not demonstrated that the trial court’s reliance on the file was error at all, let alone error that resulted in prejudice. There are no facts from the trial court record that show the trial court improperly relied on evidence from outside the record. Thus, Slusser-Kelly has not shown any actual prejudice, and the error she asserts is not manifest.

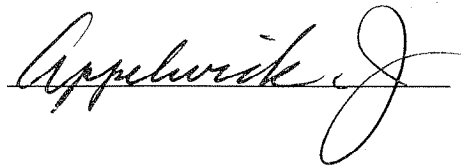
Moreover, as the State points out, Slusser-Kelly’s case is distinguishable from Harris and Lussier. Both of those cases contemplated the importance of relying on evidence from within the adversarial process and the record, to ensure the parties’ right to object to and challenge evidence. Harris, 57 Ill. 2d at 231; Lussier, 50 F.3d at 1113. But, in Slusser-Kelly’s case, the trial court’s reference to the file was made openly during the contested fact-finding proceeding, with an opportunity for either party to object or request clarification from the trial court.

And, as indicated above, the dependency petition and testimony at the hearing contained ample support, within the record, for the trial court to rely on in assessing Burns’s ability to care for L.M.K. This encompassed information

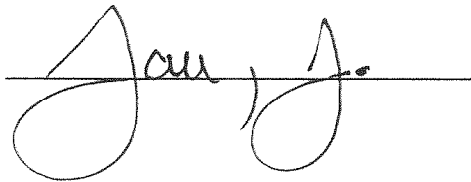
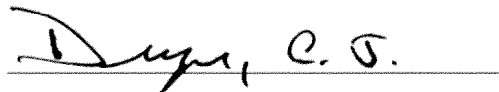
about his criminal and parenting history, including that he used to make and consume methamphetamine, that he drinks daily, and that he has been verbally and physically abusive to Slusser-Kelly.

IV. Conclusion

There was sufficient evidence to support the trial court's conclusion that Burns was not an adequate caregiver for L.M.K. Slusser-Kelly has failed to demonstrate that the trial court considered or relied on any evidence from outside the record in reaching its conclusion. We hold that there was no manifest constitutional error or violation of Slusser-Kelly's due process rights, and we affirm.

A handwritten signature in cursive script, appearing to read "Appelwick J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Justice J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Justice C. S.", written over a horizontal line.