IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

In the Matter of the Dependency of J.T. (D.O.B. 12/11/07)	)	No. 67344-1-I
Minor Child.	)	
	)	DIVISION ONE
JAMES THOMAS,	)	
Appellant,	)	
v.	)	
	)	UNPUBLISHED OPINION
STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES,	)	
Respondent.	)	
	)	FILED: July 16, 2012

Spearman, A.C.J. — James Thomas challenges the trial court's determination that his son J.T. is dependent. He contends that (1) the trial court erred in admitting J.T.'s hearsay statement, (2) the State's attorney committed prosecutorial misconduct, and (3) the trial court's findings are not supported by substantial evidence. We reject his claims and affirm.

FACTS

J.T. was born on December 11, 2007 to Thomas and Marina Avdeyeva. The court found J.T. dependent the same month because of Avdeyeva's "history of neglect and mental illness" and Thomas's "anger and mental health issues."

Clerk's Papers (CP) at 94, 383. J.T. was placed in foster care on May 29, 2008. Thomas regained custody on November 9, 2009. The court dismissed the dependency on May 6, 2010. Shortly thereafter, Thomas informed his mental health counselor, Dr. Carmela Washington-Harvey, that he no longer needed her services.

Eighteen days after the dismissal of the dependency, Thomas decided to take J.T. to Seattle Center. Because he was short on cash, Thomas decided to pawn a computer to finance the trip. At the pawn shop, J.T. began to pull away from Thomas and refused to obey Thomas's commands to stay put. Thomas asserts that he gave J.T. three warnings, put J.T. in a timeout, and then gave J.T. a smack on the bottom after J.T. refused to comply. J.T. then began to make "a crying noise" and Thomas told J.T. to "shut that noise up." Verbatim Report Proceeding (VRP) at 27, 94.

Pawn shop employees Pamela Moore and Heather Stevenson gave a substantially different account of the incident. Moore testified that she heard a smack and then a child crying "really badly." VRP at 158. She then saw Thomas grab and shake J.T. in a "very forcefully" manner while saying "shut the fuck up." VRP at 158-60. Moore told Thomas that he could not treat J.T. like that, to which Thomas replied, "Fuck you, bitch. I don't need this." VRP at 161. Thomas then forcefully grabbed J.T., left the store, and aggressively put J.T. into the car and drove away. Stevenson testified that she heard Thomas tell J.T. to "shut up" and

"shut the fuck up" while the two were inside the store, and then saw Thomas strike J.T. with a closed fist on the side of the head. After Thomas dragged J.T. out of the store, Stevenson saw Thomas place J.T. in the car and make "closed-fist swinging motions" at J.T. VRP at 228. Although Stevenson did not see Thomas make contact with the swinging motions, she testified to being "100 percent positive" that he did make such contact. Stevenson took down Thomas's license plate number and called the police.

The next day, Renton police officers, Susan Hassinger and Sergeant Daniel Figaro, went to Thomas's apartment to take him into custody. Upon his arrest, Thomas grew agitated and began to yell. Thomas was eventually placed in a patrol car and Figaro and another officer drove him to the police station. While in the vehicle, Thomas threatened to kill the officers, their wives, and their children. He told the officers they were "his enemy for life." VRP at 465. Thomas repeatedly banged his head against the Plexiglas barrier separating him and the officers while spitting profusely. He spit about one hundred times—Figaro testified that there was spit "all over the back of the car and the ceiling." VRP at 466. Thomas admitted to threatening to kill the officers but testified that he spit only two or three times to clear his sinuses.

Meanwhile, Hassinger and Detective Peter Montemayor entered Thomas's apartment to check on J.T. Hassinger saw a small cut above J.T.'s right eyelid, a cut in his left ear, and some possible swelling on his forehead.

Hassinger observed J.T. point to his forehead and say "owie." VRP at 263. Montemayor testified that he saw a small cut above one of J.T.'s eyelids and that the cut may have been swollen. Montemayor further testified that he witnessed J.T. point to his own forehead and then to the front door.

Two days after Thomas's arrest, the State filed a dependency petition. On August 11, 2010 the court entered an agreed order that J.T. was dependent as to Avdeyeva under RCW 13.34.030(6)(c).[1] Thomas remained in jail for eight months. He was eventually found not guilty of assaulting J.T., felony harassment, and malicious mischief. He was released from jail on January 26, 2011.

In June 2011, the dependency court held a fact finding hearing. The court heard testimony from Thomas, Moore, Stevenson, Hassinger, Montemayor, Figaro, several social service workers, and other individuals with knowledge of Thomas's and J.T.'s relationship. Thomas objected on hearsay grounds to Hassinger's testimony that J.T. pointed to his head and said "'owie,'" and Montemayor's testimony that J.T. pointed to his head and then to the front door. RP 261, 289-90. The court overruled the objections and admitted the evidence under ER 803(a)(3), the "then existing physical condition" hearsay exception. VRP at 262-63, 290. During closing arguments, the State's attorney argued that

[1] In 2009 the legislature amended the dependency statute to insert the definition of "department." The definition of "dependent child" was moved from RCW 13.34.030(5) to RCW 13.34.030(6) in 2010. The dependency orders entered as to Avdeyeva and Thomas both cite to RCW 13.34.030(5). RCW 13.34.030(6) is the applicable statute and both parties' briefs correctly cite to it.

believing Thomas's version of the story required finding that the pawn shop employees and police officers were lying. After the hearing, the court concluded

that J.T. was dependent as to Thomas under RCW 13.34.030(6)(b) and (c).[2]

DISCUSSION

Thomas seeks reversal of the dependency order, claiming that (1) the trial court erred by admitting hearsay evidence, (2) the State's attorney committed prosecutorial misconduct, and (3) the findings of fact are not supported by substantial evidence. We disagree with Thomas regarding all three claims and affirm.

Admission of Hearsay Evidence

This court reviews the "admission of evidence under hearsay exceptions for abuse of discretion." Brundridge v. Fluor Fed. Serv., Inc., 164 Wn.2d 432, 450, 191 P.3d 879 (2008). A court "abuses its discretion only when it takes a view that no reasonable person would take." Id.

Thomas asserts that the trial court erred when it admitted Hassinger's testimony that she saw J.T. point to his forehead and say "owie" and Montemayor's testimony that he saw J.T. point to his forehead and then to the door. He argues that the statements are inadmissible hearsay.[3] The State

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[2] The statute provides that a dependent child is one who:

> . . .
> (b) Is abused or neglected as defined in chapter 26.44 RCW by a person legally responsible for the care of the child; or
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> (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. . . .

RCW 13.34.030(6)(b), (c).

agrees that the statements are hearsay but argues that they are admissible under ER 803(a)(3), the "then existing physical condition" hearsay exception. The State further argues that even if the statements were not admissible, Thomas was not prejudiced. We agree with the State.

Under ER 803(a)(3), statements of a "declarant's then existing state of mind, emotion, sensation, or physical condition" may be admitted even if the declarant is available as a witness. ER 803(a)(3). Thomas contends that the lack of context around J.T.'s verbal and nonverbal statements makes it impossible to determine whether J.T. was actually expressing that his head hurt at the time of the statements. Thus, he argues, the statements fall outside the scope of ER 803(a)(3). But in light of the evidence that Thomas hit J.T. at least once on the head the day before, it was not an abuse of discretion for the trial court to conclude that J.T. was feeling pain on his head a day later, that the statements were referring to his present condition, and that the challenged testimony was admissible.

But even if we were to conclude otherwise, Thomas fails to establish that he was prejudiced by the alleged error. An erroneous evidentiary ruling is grounds for a

[3] Thomas also contends that the statements are "child hearsay" and inadmissible under RCW 9A.44.120 because the State failed to provide timely notice of its intent to use the statements as required by the statute. But by its own terms, the statute only applies to statements that are "not otherwise admissible by statute or court rule. . . ." RCW 9A.44.120. Because we conclude that the statements were properly admitted under ER 803(a)(3), the child hearsay statute is inapplicable.

new trial only if such error is prejudicial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). "An error is prejudicial if, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" Id. (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). Thomas asserts that the statements were prejudicial because they lent credibility to the abuse claims of the pawn shop employees. Appellant's Br. 27. His argument is without merit. When a court sits without a jury, we presume "that the trial judge…will not consider matters which are inadmissible when making [the] findings." State v. Miles, 77 Wn.2d 593, 601, 464 P.2d 723 (1970). This presumption may be rebutted by showing that there is insufficient admissible evidence that supports the verdict or that "the trial court relied on the inadmissible evidence to make essential findings that it otherwise would not have made." State v. Read, 147 Wn.2d 238, 245-46, 53 P.3d 26 (2002). Here, there is other admissible evidence to support the trial court's conclusion that J.T. is dependent. Furthermore, because J.T.'s statements are not referenced in the trial court's findings, there is no evidence that the trial court relied on them to reach its conclusion.

Prosecutorial Misconduct

Thomas contends that the State's attorney committed prosecutorial misconduct by arguing that "for the Court to believe [Thomas's account] the Court would have to find that the pawn shop employees and three police officers

were lying about what happened in that incident." VRP at 582. The State concedes the statement was improper, but argues that because Thomas failed to object below, and because he does not establish that he was prejudiced, he cannot raise this claim for the first time on appeal. We agree with the State.

"The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). A claim of prosecutorial misconduct cannot be raised "[a]bsent a proper objection, a request for a curative instruction, or a motion for a mistrial…unless the misconduct was so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993) (citing State v. Barrow, 60 Wn. App. 869, 876, 809 P.2d 209(1991)). Thomas fails to make such a showing.

Thomas asserts he was prejudiced because the court's conclusion that J.T. was dependent shows that the court was persuaded by the improper remark. But the force of this argument depends on his claim that "[t]he evidence to support a finding that Thomas's behavior create[d] unreasonable risk to J.T.'s health, safety and welfare is all but nonexistent." Appellant's Br. 28. In other words, Thomas argues that because there was no other evidence to support the trial court's conclusion, the decision could only have been based on the State's improper remark. But there was ample evidence, in particular, the testimony of the pawn shop employees and the police officers, to support the trial court's

conclusion. Thomas contends that their testimony is not credible, but credibility matters, particularly in a dependency trial, are for the trial court to resolve and will not be disturbed on appeal. In the Dependency of M.P., 76 Wn. App. 87, 91, 882 P.2d 1180 (1994).

Thomas argues, however, that in this case the court's credibility determination hinged on its adoption of the State's "liar" argument. But the record does not support this claim. There is no reference to the remark in the trial court's opinion or dependency order. Moreover, when a judge is the fact-finder, it is presumed that the court did not consider inadmissible matters. Miles, 77 Wn.2d at 601. We therefore conclude that Thomas may not raise his prosecutorial misconduct claim for the first time on appeal.

Sufficiency of the Evidence

In evaluating a challenge to the sufficiency of the evidence, we must determine whether the challenged findings of fact are supported by substantial evidence and "whether the findings as a whole sustain the challenged conclusions of Law [sic]." In re Sego, 82 Wn.2d 736, 743, 513 P.2d 831 (1973) (quoting Hollingbery v. Dunn, 68 Wn.2d 75, 82, 411 P.2d 431 (1966)). "In a dependency proceeding, evidence is substantial if, when viewed in the light most favorable to the party prevailing below, it is such that a rational trier of fact could find the fact in question by a preponderance of the evidence." In re M.P., 76 Wn. App. at 90-91. We must defer to the trial court's determinations regarding the

weight of evidence or the credibility of witnesses. In re Sego, 82 Wn.2d at 739-40.

Unchallenged findings of fact are treated as verities on appeal. Fuller v. Emp't Sec. Dep't, 52 Wn. App. 603, 605, 762 P.2d 367 (1988). Here, the unchallenged findings of fact state:

> 1. James A. Thomas and Marina Avdeyeva are the biological parents of [J.T.]. There was a prior dependency due to mother's history of neglect and mental illness and father's anger and mental health issues. The father was diagnosed with depressive disorder, NOS and intermittent explosive disorder. [J.T.] was first placed out of the home on 5/29/08 and then was returned to the father's care on 11/9/09.
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> 2. Services to the family (counseling, daycare, public health nurse and bus transportation) remained in place throughout the dependency.
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> 3. Over the Department objection, the court ordered that the dependency of [J.T.] be dismissed by an Order dated 5/6/10.
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> 4. On May 24, 2010 there was an emergent CPS intake from the Renton Police Department alleging that the father was seen in the Renton Pawn X=Change physically and verbally abusing [J.T.]. On May 25, 2010, the father was arrested and incarcerated. He was charged with Assault 4, and eventually found not guilty.
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> 5. The allegations against the father did not come from the Department or from anyone involved in the prior dependency. These allegations came from people who are accustomed to dealing with people who are distressed by the circumstances which bring them in to pawn items. The pawn shop employees had no occasion, prior to May 24, 2010, to call police other than for a robbery. The pawn shop employees are not mandatory reporters. The father's actions of May 24th, 2010 caused the pawn shop employees sufficient alarm that they recorded the father's license plate number and called 911 in an effort to protect [J.T.].

> 6. The allegations from the pawn shop stating that Mr. Thomas had assaulted [J.T.] physically and verbally came only 18 days after the prior dependency was dismissed and services to the family were terminated.
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> 7. Upon his arrest, the father had a total melt-down. He repeatedly banged his head against the Plexiglas barrier in both the patrol car and the police SUV. He spit inside the SUV over a hundred times to the point that spit was dripping from the ceiling of the vehicle. He threatened to kill the Officers, their wives, and leave their children as orphans.
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> 8. The father has major issues with his ability to control his anger, and once escalated he becomes extremely volatile.
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> 10. There has never been a question about the father's love for this child or his willingness to parent. The issue driving the prior dependency was the father's anger. The father's unresolved and uncontrolled anger issues underlie the current allegations.
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> 11. Of equal concern to the father's anger issues, is the father's inability to see his anger as a problem, and then engage in services to correct it. In each situation of concern, the father reports that his behavior was within normal bounds and reasonable.

Thomas claims the trial court erred regarding four findings of fact:

> 9. The father's anger presents a danger to [J.T.]. Once the child triggers the father's anger, the child's safety is in jeopardy.
>
> 12. The father takes absolutely no responsibility or ownership of any of the behaviors reported by the pawn shop employees or the police.[4]

[4] Thomas contends that he did take responsibility for his behavior in the pawn shop because he "admitted spanking his son, cursing at the shop employees, threatening to kill the police and spitting in the patrol car." Appellant's Br. 3. But the trial court could reasonably conclude that Thomas's description of the incidents minimized his misconduct. For example, while the officers' testified that Thomas spit in the patrol car about 100 times, Thomas testified that he only spit two or three times to clear his sinuses. Thomas also offered a different version of the pawn shop incident, in which he denied shaking J.T. or hitting him with a closed fist. This evidence supports the trial court's finding that Thomas did not accept responsibility for his behavior.

> 13. The hitting of the child, cursing at the child, shaking the child, and the father's aggressive actions with the child constitute abuse of the child.
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> 14. The father's anger issues present such a danger to this child that the child has no parents who is (sic) currently capable of caring for him.

He also claims the trial court erred in concluding that J.T. was dependent.

We reject these claims. With regard to findings of fact 9, 13 and 14, Thomas argues that there is not substantial evidence to show that that he struck, cursed at, and shook J.T., or that his anger issues present a danger to J.T. But Moore and Stevenson testified in detail about their observations of Thomas's anger and his subsequent assault on J.T. Thomas contends that their testimony is unbelievable given J.T.'s lack of visible bruising. But there was evidence that J.T. had recent injuries to his head, which corroborated Moore and Stevenson's testimony. Moreover, the gist of Thomas's complaint is that the court found Moore and Stevenson to be credible witnesses. But on issues of credibility and weight, we defer to the trial court. In re Sego, 82 Wn.2d at 739-40. In addition, there was evidence that Thomas had been diagnosed with intermittent explosive disorder as well as testimony from other witnesses that Thomas's anger presents a risk of danger to J.T. David Wilma, J.T.'s court-appointed special advocate, testified that he was concerned that as J.T. grows older, J.T. would be in danger of triggering Thomas's anger response. And social worker Jimmy Tucker testified that he was concerned that Thomas's anger impairs his parenting ability.

Finally, Thomas contends that the findings of fact as a whole, do not support the trial court's conclusion that J.T. was dependent under RCW 13.34.030(6)(b) and (c). The challenge is not well taken. RCW 13.34.030(6), in relevant part, defines a dependent child as a child who:

> (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.

The facts found by the trial court regarding the pawn shop incident amply support its conclusion that Thomas abused and neglected J.T. as those terms are defined by statute.[5] Likewise, the court's findings that Thomas suffers from intermittent explosive disorder, has not successfully engaged in treatment for the disorder, and is unable to recognize his anger as a problem support its conclusion that Thomas is incapable of adequately caring for J.T. Indeed, even if Thomas's anger issue has yet to harm J.T., the trial court did not err in concluding that the severity of the problem presents a danger to J.T.'s safety. In re Welfare of Frederiksen, 25 Wn. App. 726, 733, 610 P.2d 371 (1979) (a child need not suffer actual harm before the State is permitted to act).

[5] Child abuse or neglect is defined as: "[S]exual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety…or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child." RCW 26.44.020(1).

Affirmed.

Spearman, A.C.J.

WE CONCUR:

Jones, J.

Grosse, J.