

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1121

Filed: 16 June 2015

Caldwell County, Nos. 13 JA 157-58

IN THE MATTER OF: A.L.T. and C.T.

Appeal by respondents from orders entered 21 May 2014 and 16 July 2014 by Judge J. Gary Dellinger in Caldwell County District Court. Heard in the Court of Appeals 20 April 2015.

Lauren Vaughn for petitioner-appellee Caldwell County Department of Social Services.

Leslie Rawls for respondent-appellant father.

J. Thomas Diepenbrock for respondent-appellant mother.

Poyner Spruill LLP, by Daniel G. Cahill, for guardian ad litem.

ELMORE, Judge.

Respondent-father (“Father”) and respondent-mother (“Mother”) appeal from an adjudication order which adjudicated their children C.T. (“Clara”)¹ and A.L.T. (“Anna”) neglected juveniles, and a disposition order which continued custody of the children with the Caldwell County Department of Social Services (“CCDSS”).

Father and Mother (collectively “parents”) are the parents of Clara, born in June 2009, and Anna, born in April 2012. On 9 October 2013, CCDSS filed juvenile

¹ The pseudonyms “Anna” and “Clara” are used throughout the remainder of this opinion for ease of reading and to protect the juveniles’ privacy.

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petitions alleging Clara was an abused and neglected juvenile and Anna was a neglected juvenile. CCDSS alleged that Clara disclosed to her paternal great aunt E.D. (“Aunt D”) and CCDSS social worker Aimee Fairchild (“Fairchild”) that she was being sexually abused by Father; that Clara disclosed to Fairchild that she had been “punched” by Father; that Father admitted backhanding Clara; and that Mother disclosed to relatives that domestic violence occurred between her and Father. The petitions further alleged that CCDSS records revealed that Father was a victim of sexual abuse by his own admission; that Father was substantiated as a perpetrator of sexual abuse upon his female cousin in 2003, when she was between 9 to 12 years of age and Father was between 12 and 15 years of age; and that there was no record that Father complied with CCDSS’s recommendation that he participate in a sexual abuse intervention service (“SAIS”) assessment. CCDSS took non-secure custody of the children.

Prior to the hearing on the petitions, the District Court (“the court” or “the trial court”) allowed CCDSS’s motion that Clara be allowed to testify by remote video equipment. CCDSS also filed a notice of intent to use hearsay statements Clara made to Aunt D and Fairchild. The court denied the motion, finding that the “best evidence is the juvenile’s live testimony[.]”

The adjudication hearing was held on 26 February 2014, 26 March 2014, and 22 April 2014. Clara testified that her father hit her in the mouth, but denied that

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he touched her inappropriately. Over the parents' objections, Aunt D and Fairchild testified about statements Clara made to them regarding inappropriate touching by Father. The court also allowed, over the parents' objections, Father's cousin to testify about her sexual encounter with Father when they were children and former CCDSS investigator Shelley Triplett to testify about the 2003 investigation of events involving the Father's illicit sexual acts. At the end of the adjudication hearing, the parents renewed their objections to certain testimony and moved to dismiss the petitions. The court dismissed the abuse allegation.

By order filed 21 May 2014, the court adjudicated Clara and Anna neglected juveniles. In a separate disposition order, the court determined it was in the best interest of Clara and Anna to remain in CCDSS custody. The court ordered Father to comply with his case plan, which included completing a SAIS assessment, and denied visitation. The court ordered Mother to comply with her case plan and permitted visitation every other week. Parents appeal separately.

Both parents contend: (1) the trial court erred in allowing hearsay statements into evidence; (2) the trial court erred in allowing irrelevant testimony into evidence; (3) certain findings of fact are not supported by clear, cogent, and convincing evidence; and (4) the trial court failed to make sufficient findings of fact to support its determination that the children were neglected.

I. Standard of Review

When reviewing an adjudication of neglect, we must determine whether the trial court's findings of fact are supported by clear and convincing evidence, and whether those findings of fact support the trial court's conclusions of law. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). If the trial court's findings of fact are supported by competent evidence, they are binding on appeal, even if there may be evidence to support contrary findings. *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). We review the trial court's conclusions of law *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

II. Challenges to Testimony

The parents argue that the trial court erred in allowing into evidence hearsay statements made by Clara to social worker Fairchild and to Aunt D. Before the hearing, the trial court denied CCDSS's motion to use Clara's hearsay statements regarding Father's inappropriate touching of Clara. At the hearing, Clara denied any such conduct and, over the parents' objections, the court allowed Aunt D and Fairchild to testify about Clara's statements about the alleged conduct.

"Where the juvenile is alleged to be abused, neglected, or dependent, the rules of evidence in civil cases shall apply" to the adjudication hearing. N.C. Gen. Stat. § 7B-804 (2013). Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter

asserted.” N.C. Gen. Stat. § 8C-1, Rule 801(c) (2013). This Court has acknowledged the “well-established supposition that the trial court in a bench trial is presumed to have disregarded any incompetent evidence.” *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005) (quotation and citation marks omitted). After the trial court determines a juvenile is neglected, it “may consider any evidence, including hearsay evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.” N.C. Gen. Stat. § 7B-901 (2013).

Here, the court can be presumed to have disregarded the incompetent evidence because the court made no findings pertaining to the hearsay evidence in support of its adjudication of neglect and dismissed the sexual abuse allegation. The parents argue the trial court’s reliance on the hearsay evidence is shown by the court’s establishing a disposition that orders Father to obtain an SAIS and denies him visitation. However, the trial court was authorized to consider the hearsay evidence in its dispositional order. *Id.* Accordingly, this argument is without merit.

Parents also argue testimony from Father’s first cousin and from a former CCDSS social worker regarding Father’s prior sexual conduct should have been excluded as irrelevant.

We have stated the following regarding the relevancy of evidence:

Pursuant to the North Carolina Rules of Evidence, evidence is relevant if it has any tendency to make the

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existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. While a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard, such rulings are given great deference on appeal.

In re E.P., 183 N.C. App. 301, 303-04, 645 S.E.2d 772, 773-74, *aff'd per curiam*, 362 N.C. 82, 653 S.E.2d 143 (2007) (citation and quotation marks omitted).

Parents contend the trial court erred in admitting evidence of prior sexual activity between Father and his cousin because the sole purpose was to show propensity. However, parents only link the alleged incompetent evidence to the trial court's findings of fact in its disposition order. As noted above, the trial court "may consider any evidence . . . necessary to determine the needs of [Clara and Anna] and the most appropriate disposition." See N.C. Gen. Stat. § 7B-901. Because the trial court was authorized to consider such evidence for purposes of disposition, this argument is without merit.

III. Adjudication of Neglect

A. Challenges to Findings of Fact

Parents contend that certain findings of fact made by the trial court are not supported by competent evidence. We disagree.

The trial court made the following pertinent findings of fact² to support its conclusion that the children were neglected:

26. Respondent father has engaged in at least one act of domestic violence toward the juvenile, [Clara]. The juvenile, [Clara], has been physically struck by Respondent father on at least one occasion wherein Respondent father popped [Clara] in the mouth leaving a mark on the juvenile's mouth which included a swollen and busted lip.

27. Respondent father has engaged in at least one act of domestic violence toward the juvenile, [Anna]. The juvenile, [Anna], has been physically struck by Respondent father on at least one occasion. The juvenile, [Clara], witnessed Respondent father strike [Anna].

28. The juvenile, [Clara], is fearful or scared that she will receive a whipping or spanking from Respondent father if she states anything that has happened while she resided with Respondent mother and Respondent father.

. . . .

30. Respondent father has engaged in aggressive and violent behaviors in the home where the juveniles resided with him and Respondent mother. Respondent father engages in activities such as punching holes in walls and doors of his home, and throwing and breaking more than one cellular telephone when he is angry. On one occasion, Respondent father broke his hand from punching a wall in the family home. Respondent father has stated that when he gets angry or mad, he just has to hit something. These activities have occurred in the home where Respondent father resides with Respondent mother and the juveniles prior to the juveniles being removed from the family home on October 8, 2013.

² These findings are also set out in the trial court's disposition order as findings numbered 16, 18 and 20.

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As an initial matter, we note that the parents challenge many of the trial court's other findings of fact as not being supported by competent evidence. However, we do not address all of these challenged findings of fact because they are unnecessary to support the ultimate conclusions, and any error in them would not constitute reversible error. See *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) (“[W]e agree that some of [the challenged findings] are not supported by evidence in the record. When, however, ample other findings of fact support an adjudication of neglect, erroneous findings unnecessary to the determination do not constitute reversible error.”). Finding of fact 28 is not challenged by either parent and is deemed supported by competent evidence. See *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Parents challenge the first sentence of finding of fact 26, arguing that the court mischaracterized Father's single act of discipline as domestic violence. The rest of the finding is unchallenged and supported by the testimony of Clara and her parents. Clara testified that “[Father] popped me in the mouth” and that “he bust me in the lip.” Mother testified that Clara was “pitch[ing] a fit” about wanting a toy pictured on a cereal box, that Father tried to explain they could not get the toy, and that when Clara yelled at Mother, Father “popped like this with the back of his hand on her lip and it busted her lip.” Father testified that Clara “started getting even more belligerent with her mother and I loosely popped her with my fingertips.”

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Noting that the term “domestic violence” is not defined in Chapter 7B of the North Carolina General Statutes, parents assert that Father’s actions do not fit the definition of domestic violence in N.C. Gen. Stat. § 50B-1(a). That statute defines domestic violence as

one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship . . . :

(1) Attempting to cause bodily injury, or intentionally causing bodily injury; or

(2) Placing the aggrieved party or a member of the aggrieved party’s family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or

(3) Committing any act defined in G.S. 14-27.2 through G.S. 14-27.7.

N.C. Gen. Stat. § 50B-1(a) (2013). Here, Father intentionally caused bodily injury to a minor child with whom he resides pursuant to section (a)(1) when he struck Anna and hit Clara in the mouth, causing her to suffer a busted lip. Accordingly, the trial court properly characterized Father’s actions as domestic violence.

Mother also challenges finding of fact 27 as being unsupported by competent evidence. However, Clara testified, “[Father] popped [Anna] in the mouth” and that Anna cried as a result.

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The parents next argue that finding of fact 30 implies that Father's behaviors were untreated and continued up until the time the children were removed from the home. Mother testified that she has seen Father "hit walls" and "bust[] a couple [of] cell phones" when he is angry since they were married in August 2009 and that the children were residing in the home when Father had engaged in these acts. Mother further testified that Father "takes [Effexor] for his anger issues" and has not broken anything since he has been on medication for the past year. When Father was asked what kind of activities he engaged in when he gets mad, Father replied, "punching some holes in some walls and I've destroyed cell phones." He further testified that he has been taking medication for his anger issues for more than a year and has "been fine ever since." Further, Aunt D testified that Father broke his hand after he hit a wall and that Father told her that when he gets mad, he has to hit something. Testimony shows that Father punched walls and broke cell phones while the children resided with the parents and that Father had not done so in the year prior to the hearing in April 2014. We do not find this evidence inconsistent with the trial court's finding that Father's actions occurred "prior to the juveniles being removed from the family home on October 8, 2013." Accordingly, parents' arguments are without merit.

B. Challenges to Conclusion of Neglect

Finally, the parents contend the trial court erred in concluding that the children were neglected juveniles. We disagree.

“The purpose of abuse, neglect and dependency proceedings is for the court to determine whether the juvenile should be adjudicated as having the status of abused, neglected or dependent.” *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007). As such, our Supreme Court has ruled that “[i]n determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent.” *Matter of Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984). Thus, our analysis upon review of this matter “is whether the court made the proper determination in making findings and conclusions as to the status of the juvenile.” *In re J.S.*, 182 N.C. App. at 86, 641 S.E.2d at 399.

A “neglected juvenile” is defined in part as “[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile’s parent . . . or who lives in an environment injurious to the juvenile’s welfare[.]” N.C. Gen. Stat. § 7B-101(15) (2013). An adjudication of neglect requires “there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline.” *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (internal quotation marks omitted). “Section 7B-101(15) affords the trial court some discretion in determining whether children are at risk for a particular kind of harm given their

age and the environment in which they reside.” *In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007) (internal quotation marks omitted).

Here, competent evidence supports the trial court’s findings that: Clara and Anna resided in a home where Father had punched holes in walls when he was angry, Father engages in aggressive and violent behaviors in the home, Father “popped” Clara in the mouth causing a “busted lip[,]” Clara is scared of Father, Anna has been physically struck by Father on at least one occasion, Clara witnessed Father strike Anna, and Anna cried as a result of being struck. These findings show that Clara and Anna lived in an environment injurious to their welfare and that they were at a substantial risk of physical, mental, or emotional impairment. *See* N.C. Gen. Stat. § 7B-101(15). Thus, we hold the trial court properly concluded the children were neglected juveniles. Because we rule the trial court’s findings of fact support its legal conclusions that the juveniles were neglected, the lack of findings in the adjudication order regarding Mother’s fault or culpability in contributing to the adjudication of neglect is immaterial. *See Matter of Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252.

IV. Disposition Order

Mother also argues that the disposition order must be vacated. Mother specifically avers that because the trial court’s findings of fact do not support its legal conclusions that the juveniles were neglected, the adjudication order is erroneous, and thus, the ensuing disposition order is necessarily erroneous.

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Because we have already ruled that the trial court's adjudication order was not in error, Mother's argument necessarily fails. Additionally:

(a) An order placing or continuing the placement of a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order:

(1) Shall contain a finding that the juvenile's continuation in or return to the juvenile's own home would be contrary to the juvenile's best interest;

(2) Shall contain specific findings as to whether a county department of social services has made reasonable efforts to either prevent the need for placement or eliminate the need for placement of the juvenile, unless the court has previously determined under subsection (b) of this section that such efforts are not required or shall cease;

(3) Shall contain findings as to whether a county department of social services should continue to make reasonable efforts to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined or determines under subsection (b) of this section that such efforts are not required or shall cease;

(4) Shall specify that the juvenile's placement and care are the responsibility of the county department of social services and that the department is to provide or arrange for the foster care or other placement of the juvenile. After considering the department's recommendations, the court may order a specific placement the court finds to be in the juvenile's best interest[.]

N.C. Gen. Stat. § 7B-507 (2013).

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In the case at bar, the trial court made uncontested findings that: the return of the juveniles to the parents' home would be contrary to the juveniles' welfare and best interest because the issues that led to CCDSS involvement still exist and the juveniles require more adequate care than parents can currently provide; CCDSS made reasonable efforts to prevent or eliminate the need for the juveniles' placement; CCDSS should continue to make reasonable efforts to prevent or eliminate the need for the juveniles' placement; the juveniles' placement and care are the responsibility of CCDSS; and CCDSS is to provide or arrange for the foster care or other placement of the juveniles. Accordingly, we affirm the trial court's disposition order. *See In re A.S.*, 181 N.C. App. 706, 711, 640 S.E.2d 817, 820 (2007) *aff'd*, 361 N.C. 686, 651 S.E.2d 883 (2007).

AFFIRMED.

Judge INMAN concurs by separate opinion.

Judge TYSON dissents by separate opinion.

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INMAN, Judge, concurring.

I agree with the majority's conclusions affirming the trial court's adjudication and disposition of both Clara's and Anna's cases with respect to both parents. This case is nonetheless complicated by the array of evidence, some of it not admissible for consideration at adjudication but admissible at the disposition phase, and much of it related to acts committed years before the filing of the juvenile petitions. Accordingly, I write separately to address these issues.

Additional Factual and Procedural Background

On 9 October 2013, CCDSS filed juvenile petitions alleging that Clara, then age 4, was an abused and neglected juvenile and that Anna, then age 18 months, was a neglected juvenile. In Clara's petition, in support of its allegation that Clara was sexually abused, CCDSS alleged the following: On 21 September 2013, CCDSS received a report alleging that Clara had been sexually abused by Father. The report claimed that Clara had disclosed sexual abuse on three separate occasions: (1) to her paternal great aunt Elizabeth Duncan ("Elizabeth"); (2) to a social worker during a home visit on 21 September 2013; and (3) during a forensic interview at the Robin's Nest, a center that offers counseling and therapeutic services for children, on 23 September 2013. In both juveniles' petitions, CCDSS alleged that Clara and Anna were neglected, reasserting the facts regarding Father's alleged sexual abuse and further alleging that Father had "popped [Clara] on the mouth." The petitions stated

that “[r]elatives of [Father] have stated that [Mother] has disclosed domestic violence occurring between herself and [Father] on numerous occasions, including choking her and slapping her in the face.” The petitions alleged that Clara and Anna were neglected because, in their parents’ home, they did not receive proper care, supervision, or discipline and lived in an environment injurious to their welfare.

The trial court entered Orders for Nonsecure Custody on 9 October 2013 for both juveniles based on the allegations contained in the juvenile petitions.

The adjudication hearing was held on 26 February, 26 March, and 22 April 2014, approximately six months after the juveniles were removed from their parents’ home. The evidence presented included testimony by Clara that Father had “popped” her in the mouth and that Clara had reported to someone else that she saw Father hit Anna. Father and Mother admitted that Father hit Clara in the mouth on one occasion.

On 22 April, the trial court entered an order adjudicating both juveniles as neglected. The trial court dismissed the abuse allegations. In its order, the trial court made the following pertinent findings of fact:

24. The court finds that the facts set forth herein are true and sufficient to find that the juveniles are neglected juveniles pursuant to N.C.G.S. §7B-101(15) in that the juveniles do not receive proper care, supervision, or discipline from the juveniles' parent, guardian, custodian, or caretaker and lives in an environment injurious to the juveniles' welfare.

25. The court finds the facts are true as clear, cogent, and convincing evidence.

26. Respondent father has engaged in at least one act of domestic violence toward the juvenile, [Clara]. The juvenile, [Clara], has been physically struck by Respondent father on at least one occasion wherein Respondent father popped [Clara] in the mouth leaving a mark on the juvenile's mouth which included a swollen and busted lip.

27. Respondent father has engaged in at least one act of domestic violence toward the juvenile, [Anna]. The juvenile, [Anna], has been physically struck by Respondent father on at least one occasion. The juvenile, [Clara], witnessed Respondent father strike [Anna].

28. The juvenile, [Clara], is fearful or scared that she will receive a whipping or spanking from Respondent father if she states anything that has happened while she resided with Respondent mother and Respondent father.

29. Respondent father has problems controlling his anger. His angry temperament was noticed by Elizabeth Duncan when he was a child and his temper got worse as he got older. Respondent mother began noticing Respondent father's anger management issues after the juvenile, [Clara], was born.

30. Respondent father has engaged in aggressive and violent behaviors in the home where the juveniles resided with him and Respondent mother. Respondent father engages in activities such as punching holes in walls and doors of his home, and throwing and breaking more than one cellular telephone when he is angry. On one occasion, Respondent father broke his hand from punching a wall in the family home. Respondent father has stated that when he gets angry or mad, he just has to hit something. These activities have occurred in the home where Respondent father resides with Respondent mother and the juveniles prior to the juveniles being removed from the family home

on October 8, 2013.

31. A variety of family members have observed the holes in the walls and doors of the family home including Dakota Duncan, Elizabeth Duncan, and William Woods. Mr. Woods assisted Respondent father in repairing at least one hole in the wall of the family home.

32. Respondent father has engaged in acts of domestic violence toward Respondent mother after their first child, [Clara], was born. When [Clara] was an infant, Respondent father choked Respondent mother. Family members have observed bruises on Respondent mother including a bruise on her side and a black eye. Respondent mother has stated to family members that Respondent father caused those bruises.

33. At the time the juveniles were removed from the family home, Respondent father had not been receiving consistent treatment and/or medication for his anger management issues.

Custody of the juveniles remained with CCDSS. The trial court allowed Mother to have weekly supervised visitation with Anna but suspended Mother's visits with Clara for 30 days. After 30 days, Mother was allowed to have weekly supervised visitation with Clara. The trial court continued the matter for disposition until 21 May 2014.

On 21 May 2014, the trial court entered its disposition order. In addition to the above referenced findings in the adjudication order, the disposition order contained additional findings indicating that Mother had begun parenting classes, domestic violence counseling, and mental health counseling. The order also indicated

that Father had attended parenting classes, anger management group sessions, and had received mental health services. The trial court concluded that it was in the juveniles' best interests to have custody remain with CCDSS but that "[CCDSS] should make reasonable efforts to reunify the juveniles with" Mother and Father. The trial court also ordered Father to complete a sexual abuse intervention service (SAIS) assessment because, even though CCDSS had managed to provide payment for the evaluation, Father "refused to participate in the evaluation until ordered by the court." The trial court set a review hearing for 13 August 2014 pursuant to N.C. Gen. Stat. § 7B-906. Mother and Father appeal.

Standard of Review

This Court reviews an order in a juvenile neglect proceeding to determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re T.M.*, 180 N.C. App. 539, 544, 638 S.E.2d 236, 239 (2006). "If there is evidence to support the trial court's findings of fact, they are deemed conclusive even though there may be evidence to support contrary findings." *In re W.V.*, 204 N.C. App. 290, 293, 693 S.E.2d 383, 386 (2010).

Analysis

In support of its conclusion that the trial court properly determined that Clara and Anna were neglected, the majority relies on the trial court's findings that Father

had punched holes in the walls, Father had engaged in “aggressive and violent behaviors in the home,” Father “popped” Clara in the mouth, Clara is scared of Father, and Clara witnessed Father strike Anna. Noting the lack of findings indicating Mother’s culpability in these actions, the majority relies on *Matter of Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984), for the premise that

[i]n determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent. Therefore, the fact that the parent loves or is concerned about his child will not necessarily prevent the court from making a determination that the child is neglected.

I agree that, given the living circumstances at issue here – a nonviolent parent and children living with a violent parent – the trial court did not have to make any findings addressing Mother’s culpability in order to determine that Clara and Anna were neglected by both parents. However, the majority opinion does not address the fact that many of Father’s aggressive and violent actions, such as punching holes in the walls and destroying cell phones, occurred more than a year before the adjudication order, and that the history of domestic violence between the parents primarily occurred around the time when Clara was born.

I. The History of Domestic Violence Between Mother and Father

With regard to the history of domestic violence between them, both parents contend, and even the trial court acknowledges, that the acts of domestic violence

occurred prior to Anna's birth, *i.e.*, at least two years before the filing of the petitions. They argue that because there was no evidence showing domestic violence at the time the petitions were filed, or at the time the matter came on for hearing, those past acts could not serve as a basis for an adjudication that their children were neglected.

This Court has held in an unpublished opinion that a past history of domestic violence can be considered when determining whether a juvenile is neglected. *See In re H.R.*, 2012 WL 5864525, *4 (Nov. 20, 2012) (COA12-549) (unpublished). As this Court noted in *In re H.R.*, quoting *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999), "the decision of the trial court [at the adjudicatory hearing] must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future neglect of a child based on the historical facts of the case." Accordingly, "the trial court could consider events [of prior domestic violence] which occurred more than one year prior to the filing of the petition." *Id.*

Here, the trial court found that

32. Respondent father has engaged in acts of domestic violence toward Respondent mother after their first child, [Clara], was born. When [Clara] was an infant, Respondent father choked Respondent mother. Family members have observed bruises on Respondent mother including a bruise on her side and a black eye. Respondent mother has stated to family members that Respondent father caused those bruises.

Both Mother and Father challenge this finding, arguing that the evidence as to the domestic violence was "controverted" given their denials at the hearing.

However, the parents' denials were contradicted by other competent evidence offered at the hearing, including testimony by Dakota Duncan ("Dakota"), a relative. Dakota testified that Mother told Dakota that Father had choked Mother when Clara was about one month old. This testimony is not hearsay, because it is as an admission of a party-opponent. N.C. Gen. Stat. § 8C-1, Rule 801(d); *In re Hayden*, 96 N.C. App. 77, 81, 384 S.E.2d 558, 561 (1989) (noting that a mother's statements to social workers about the father's conduct were admissions by her that the child was subject to conduct in her presence that could be found to be abusive and neglectful, and therefore, those statements were admissible). Dakota also testified that Father had punched holes in the walls in anger after Anna was born. Elizabeth, who is Father's aunt, testified that she had seen bruises on Mother up until the time Anna was born and holes in the walls where Father had punched them.

Moreover, this past history of domestic violence must be considered in light of the undisputed evidence that Father has "popped" Clara on at least one occasion. Contrary to the dissenting opinion's characterization of this incident as "discipline," the trial court, which had the opportunity to consider the witnesses' demeanor and credibility, found that it was domestic violence. *See generally In re M.J.G.*, __ N.C. App. __, __, 759 S.E.2d 361, 366 (2014) (noting that in juvenile adjudication hearings, "the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate" and any conflicts in the evidence are resolved by the trial court);

Matter of Helms, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (“[T]he trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings.”).

Based on the foregoing circumstances found by the trial court and supported by the evidence, the trial court was not required to “hope for the best and await yet another act of domestic violence,” *In re Schoen*, 2003 WL 21790460, *6 (Aug. 5, 2003) (COA02-406) (unpublished), before it considered Father’s past history of domestic violence in order to support a finding of neglect, even if that history occurred several years before the juvenile petitions were filed.

Finally, it is important to note that an order adjudicating and disposing the juveniles as “neglected” is not the same as an order terminating the parents’ parental rights. *See Matter of Evans*, 81 N.C. App. 449, 452, 344 S.E.2d 325, 327 (1986) (“[T]he task at the temporary custody or removal stage is to determine whether the child is exposed to a substantial risk of physical injury because the parent is unable to provide adequate protection.”). The trial court ordered that both Mother and Father continue to receive counseling and support services to address the past domestic violence but was clear in its orders that reunification efforts be continued. Both Mother and Father will have further opportunities to present to the trial court evidence that they contend shows circumstances have changed sufficiently to reunify them with their children.

II. The Adjudication and Disposition of Anna as Neglected

In support of its determination that Anna was neglected, the trial court, and the majority, rely on Father's past aggressive and violent acts in the home, Father "popping" Clara in the mouth, and Clara's testimony that she had witnessed Father hit Anna on one occasion. Father contends that Clara's ambivalent testimony regarding her report that Father had hit Anna does not rise to level of "convincing competent evidence." *In re A.B.*, 179 N.C. App. 605, 610, 635 S.E.2d 11, 15 (2006). However, I do not believe it is necessary to address whether the trial court's finding that Clara saw Father hit Anna was supported by clear and convincing evidence given the other evidence presented at the hearing. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006).

N.C. Gen. Stat. § 7B-101(15) states that "[i]n determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." This Court has held that "the fact of prior abuse [of another child in the home], standing alone, is not sufficient to support an adjudication of neglect. Instead, [we have] generally required the presence of other factors to suggest that the neglect or abuse will be repeated." *In re J.C.B.*, __ N.C. App. __, __, 757 S.E.2d 487, 489 (2014). Those "other factors" may include a history of domestic violence between the parents. *See In re C.M. & M.H.M.*, 198 N.C. App. 53, 66, 678 S.E.2d 794, 801–02

(2009) (affirming adjudication of neglect based upon prior abuse of another child who lived in the home and a history of domestic violence between the parents).

Here, while Father's admission to hitting Clara in the lip does not necessarily mandate an adjudication of neglect for Anna, the presence of "other factors"—specifically, the history of domestic violence between Father and Mother and evidence of Father's violent and aggressive acts—in addition to Father's act of domestic violence against Clara are sufficient to support a determination, on clear and convincing evidence, that Anna is also neglected based on the likelihood that the acts of violence perpetuated against Clara and Mother will be repeated against her.

Furthermore, although Mother was not directly responsible for the acts which led to the filing of the petitions, see *Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252, I believe that the trial court properly considered the history of domestic violence between Mother and Father in addition to the fact that Father hit Clara in adjudicating both juveniles as neglected by both parents.

III. Disposition Order Requiring Father to Complete a Sexual Abuse Assessment.

Finally, I write separately to address more fully the trial court's disposition order requiring Father to participate in and complete the SAIS assessment. Father argues that this requirement was improper because it bears no relation to the adjudication of neglect and is based on inadmissible evidence regarding Father's sexual activity when he himself was a juvenile. The dissenting opinion asserts that

this requirement in the disposition order shows that the trial court improperly relied upon inadmissible evidence for its adjudication of neglect.

N.C. Gen. Stat. § 7B-904(c) provides, in pertinent part, that

[a]t the dispositional hearing or a subsequent hearing the court may determine whether the best interests of the juvenile require that the parent . . . undergo psychiatric, psychological, or other treatment or counseling directed toward remediating or remedying behaviors or conditions that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent.

Even though the trial court ultimately concluded that there was not sufficient clear and convincing evidence to adjudicate Clara as abused, the trial court properly considered, in the disposition phase of this matter, evidence that Father had engaged in inappropriate sexual activities with his younger cousin Cynthia in 2003, when he was around 12 years old and Cynthia was 9, and that he himself had been a child victim of sexual abuse. Specifically, according to the social worker who investigated the 2003 incidents, Father reported that he was the victim of sexual abuse by his uncle, who was eventually convicted of abusing several children, including Cynthia, his biological daughter. Although this evidence was arguably inadmissible in the adjudication hearing, N.C. Gen. Stat. § 7B-901 provides the trial court with wide discretion to consider, for purposes of disposition, any competent evidence, including evidence ordinarily prohibited by Rule 404. Additionally, although Clara in her testimony repeatedly denied that Father had sexually abused her, her report to three

adults that Father had “tip-toed” into her room at night and “touched her pee-pee” unquestionably led to the removal of Clara and Anna from the home and involved Clara and her parents in a sexual abuse investigation. Clara reported to a social worker and later to a therapist that Father had touched her “pee-pee” on numerous occasions. Her reports were articulate and detailed. This hearsay evidence was not competent to support an adjudication of neglect, but, as noted by the majority, it was competent and entirely proper for the trial court’s consideration in disposition. N.C. Gen. Stat. § 7B-901 (2013).

Based on this evidence, the trial court was within its discretion to order Father participate in an SAIS assessment.

Conclusion

Based on the foregoing reasons, I also vote to affirm the trial court’s orders adjudicating and disposing the juveniles as neglected.

No. COA14-1121 – *In re A.L.T. and C.T.*

TYSON, Judge, dissenting.

The trial court's findings of fact are not supported by clear, cogent and convincing evidence and are insufficient to support the court's adjudication and conclusion that A.L.T. ("Anna") and C.T. ("Clara") were neglected juveniles by both parents under N.C. Gen. Stat. § 7B-101(15) (2013) or controlling precedents. I respectfully dissent from the majority's opinion and would rule the trial court erred when it adjudicated the juveniles to be neglected.

I. Standard of Review

As stated in the majority's opinion, our standard of review is "whether the trial court's findings of fact are based upon clear, cogent and convincing evidence and whether the findings support the conclusions of law." *In re Baker*, 158 N.C. App. 491, 493, 581 S.E.2d 144, 146 (2003) (citations and internal quotations omitted). If the findings of fact are supported, we review *de novo* the trial court's conclusions of law. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

II. Analysis

A. Finding of Neglect

The trial court found Anna and Clara were neglected juveniles under N.C. Gen. Stat § 7B-101(15). The majority's opinion sets forth findings by the court, which purport to support its adjudication. The court's findings are minimal as to neglect; one act of physical discipline. Uncontroverted testimony indicated the act

occurred after more moderate responses and discipline for Clara's poor behaviors had failed. We have held that spanking, which also leaves a bruise, is not neglect. *In re C.B.*, 180 N.C. App. 221, 636 S.E.2d 336 (2006), *aff'd*, 361 N.C. 345, 643 S.E.2d 587 (2007). There was only one uncorroborated act of physical discipline toward Anna.

Based on four-year-old Clara's testimony, the court found she was fearful of a spanking from her father. The court further found Father had difficulty controlling his anger, had punched a hole in a wall in the family home and, *prior to the removal of the children*, was not receiving consistent treatment for his anger.

Testimony showed that Father was taking Effexor medication to help manage his anger for close to a year prior to the adjudication. No evidence showed Father's anger resulted in the neglect of his children at the time of the adjudication or any probability of neglect in the future. The trial court must "consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect" at the time of the hearing or in the future. *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984).

Father's brief cites a relevant quote from *In re Stumbo*:

[N]ot every act of negligence on the part of parents or other caregivers constitutes "neglect" under the law and results in a "neglected juvenile." Such a holding would subject every misstep of a care giver (sic) to the full impact of subchapter I of chapter 7B of the North Carolina General Statutes resulting in mandatory investigations . . . and the

potential for petitions for removal of the child or children from their family for custodial purposes . . . and/or ultimate termination of parental rights

In re Stumbo, 357 N.C. 279, 283, 582 S.E.2d 255 (2003). An isolated act of physical discipline does not support a conclusion and adjudication of neglect. *In re C.B.*, *supra*.

B. Hearsay Evidence

The North Carolina Rules of Evidence require matters and assertions the trial court admits and considers as relevant and material at the adjudication hearing to be otherwise admissible and not be subject to exclusion. N.C. Gen. Stat. § 7B-804 (2013) (“where the juvenile is alleged to be abused, neglected . . . the rules of evidence in civil cases shall apply”). Pure hearsay evidence by a four-year-old declarant, whose age carries a presumption of incompetency to testify, was admitted for the truth of the matter asserted. This hearsay was not admissible under any exception, and was improperly presented and considered in the adjudication regarding Father’s purported touching of Clara that she made to a social worker and Clara’s aunt. This allegation was denied in court by the declarant. The majority finds the court “can be presumed to have disregarded the incompetent evidence because the court made no findings pertaining to the hearsay evidence in support of its adjudication of neglect and dismissed the sexual abuse allegation.”

However, the trial court ordered Father to obtain a sexual assault intervention service (“SAIS”) as part of the dispositional plan after dismissing the allegations of abuse and entering the adjudication of neglect. This requirement is not reflective of an appropriate step to remedy conditions of neglect and clearly shows the trial court did not disregard the inadmissible hearsay in its adjudication.

In re J. B., cited by the majority, is inapplicable in the present case. In *J.B.*, the trial court admitted into evidence prior disposition orders in the underlying juvenile court action. *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005). Respondent-mother complained the trial court was required to exclude the review orders, because they were based upon a lower evidentiary standard. *Id.* at 16, 616 S.E.2d at 273. This Court disagreed and recognized “that in a termination of parental rights proceeding, prior adjudications of abuse or neglect are admissible, but they are not determinative of the ultimate issue.” *Id.* (citing *In re Huff*, 140 N.C. App. 288, 300, 536 S.E.2d 838, 846 (2000), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001)).

In *J.B.*, we noted the respondent-mother was unable to overcome the well-established supposition that the trial court in a bench trial “is presumed to have disregarded any incompetent evidence.” *Id.* (citation and quotation marks omitted). Judicial notice in a termination hearing of a prior order from the adjudication is

entirely different from allowing inadmissible and inflammatory hearsay barred by the Rules of Evidence to be asserted and admitted at the adjudication hearing.

The exclusion of such inadmissible and inflammatory hearsay is to prevent the petitioner from dragging allegations into the proceeding solely calculated to purport to show “the character of a person in order to show that he acted in conformity therewith.” N.C. R. Evid. Rules 404(b), 802 (2013). To allow and credit such inadmissible evidence at any stage opens wide the barn doors, and requires respondents to chase after the running horses, which the statute requires to be locked in the stable.

C. Prior Acts of Respondent-Father

The trial court, over objection, also allowed testimony of a consensual sexual encounter over ten years previously, between Father at age 11 or 12 and his cousin at age 9. This information was irrelevant and inflammatory and should have been excluded.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. R. Evid. 404(b).

Rule 404(b) “state[s] a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant.” *State v. Coffey*, 326 N.C. 268, 278-79,

389 S.E.2d 48, 54 (1990)(emphasis original). Exclusion of evidence is required if its “only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.” *Id.*

Our Supreme Court stated, “[t]he dangerous tendency of [Rule 404(b)] evidence to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subjected to strict scrutiny by the courts.” *State v. Johnson*, 317 N.C. 417, 430, 347 S.E.2d 7, 15 (1986).

Here, as in *State v. Al-Bayyinah*, 356 N.C. 150, 567 S.E.2d 120 (2002), cited by Father, the prior “wrong, or act” is both dissimilar to the incident alleged in the petition and is remote in temporal proximity. “Rule 404(b) evidence, however, should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused.” *Id.* at 154, 567 S.E.2d at 122. “To effectuate these important evidentiary safeguards, the rule of inclusion described in *Coffey* is constrained by the requirements of both similarity and temporal proximity.” *Id.*, 567 S.E.2d at 123 (citations omitted).

These actions occurred over ten years before and involved two pre-teens, as testified by the female cousin involved in the incident as “being curious,” rather than actions between an adult and a child, as alleged in the petition. It is difficult to see any other reason why petitioner asserted this evidence, other than an attempt to show propensity of Father’s character. Although the court dismissed the

petitioner's allegations of abuse for lack of evidence, the ruling does not show the trial court ignored these clearly inadmissible assertions.

D. Neglect as to Respondent-Mother

The stated purpose of Chapter 7B in the initial adjudication of neglect is “[t]o provide procedures for the hearing of juvenile cases that *assure fairness and equity* and that *protect the constitutional rights of juveniles and parents.*” N.C. Gen. Stat. § 7B-100(1) (2013) (emphasis supplied). The trial court’s findings of neglect all relate to alleged wrongdoing by Father. I find error in the trial court’s conclusion concerning Mother that the “juveniles do not receive proper care, supervision, or discipline from the juveniles’ parent, . . . and lives (sic) in an environment injurious to the juveniles’ welfare.”

DSS asserts the presence and allowance by Mother of Father’s physical discipline is sufficient to support her adjudication of neglect. I disagree. In *J.A.G.*, infant J.A.G. suffered a brain injury in the care of his father while the mother was away from home. *In re J.A.G.*, 172 N.C. App. 708, 617 S.E.2d 325 (2005). This Court held it was error to conclude that the mother failed to provide proper care and supervision and the child lived in an environment injurious to his health and welfare where there was evidence the child was previously developing appropriately, had not missed doctor’s appointments, and no evidence indicated the

mother knew or reasonably should have known the father would harm J.A.G. *Id.* at 715-16, 617 S.E.2d at 331.

Here, Mother knew of Father's prior bursts of anger issues. Mother testified she demanded Father to get help, and it took time to find a doctor approved by their insurance and for trials of several treatments to arrive at the correct medication. Mother's action demonstrates a commitment to protect herself and her children, while supporting and maintaining her marriage to her spouse and the father of her children.

We all agree the trial court's findings of fact regarding neglect were based on both inadmissible and controverted evidence. Mother testified that no domestic violence was aimed at her or the children by respondent father. Father acknowledged "popping" Clara in the mouth, but denied any other actions as alleged by petitioner.

The incident of physical discipline found by the trial court does not reach the threshold of clear, cogent and convincing evidence required to support findings of facts to support an adjudication of neglect.

The majority and concurring opinions cite *In re T.M.*, as a basis for the trial court ignoring certain controverted findings as the challenged findings were not necessary to support the ultimate conclusion of neglect. *T.M.*, 180 N.C. App. at 547, 638 S.E.2d at 236. However, under the admissible evidence in this case, there are

not, as in *T.M.*, the “ample other findings of fact [to] support an adjudication of neglect” on behalf of Mother. *Id.* This precedent does not support the trial court’s adjudication and ultimate conclusion.

Finally, the majority and concurring opinions cite *In re Montgomery* to support an adjudication of neglect on behalf of Mother, where there was an absence of findings in the adjudication order to support the mother’s fault or culpability in contributing to the adjudication of neglect. In *Montgomery*, the trial court found the parents failed to send the children to school, failed to provide beds and adequate living space despite having resources to do so, the parents separated and provided no living place for the children, the mother was unstable, delusional and failed to take medicine to control her conditions, and the father had failed to pay reasonable portion of cost of caring for children. *Id.* at 112-13, 316 S.E.2d at 254.

Our Supreme Court reversed a Court of Appeals decision, which appeared to require petitioners “to establish a child’s intangible, non-economic needs were not being fulfilled” by the parents before parental rights could be terminated. *Id.* at 106, 316 S.E.2d at 250.

Where the evidence shows that a parent has failed or is unable to adequately provide for his child’s physical and economic needs, whether it be by reason of mental infirmity or by reason of willful conduct on the part of the parent, and it appears that the parent will not or is not able to correct those inadequate conditions within a reasonable time, the court may appropriately conclude that the child is neglected. In determining whether a child is neglected,

the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent. Therefore, the fact that the parent loves or is concerned about his child will not necessarily prevent the court from making a determination that the child is neglected.

Id. at 109, 316 S.E.2d at 252. *In re Montgomery* is not only inapplicable to the facts at bar, it highlights the standard and weight of evidence required of petitioner to prove neglect of Mother, in the dearth of any evidence or paucity of findings to support an adjudication. No incidents, acts or omissions by Mother support an adjudication of neglect. Seeking assistance for both her children and husband and working to maintain her marriage and parent their children is not neglect or abuse under the statute.

III. Conclusion

For these reasons, I vote to reverse the trial court's adjudication of neglect and remand for entry of an order to support the parents and require DSS to make continued efforts to reunify these children with their parents.