IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1110

Filed: 16 April 2019

Wake County, Nos. 18 JA 102-03

IN THE MATTER OF: T.O., J.O.

Appeal by respondent-father from order entered 13 August 2018 by Judge Monica M. Bousman in Wake County District Court. Heard in the Court of Appeals 28 March 2019.

Wake County Attorney's Office, by Mary Boyce Wells, for petitioner-appellee Wake County Human Services.

Assistant Parent Defender Jacky Brammer for respondent-appellant father.

Parker Poe Adams & Bernstein LLP, by Elizabeth Trenary, for guardian ad litem.

INMAN, Judge.

Respondent-father ("Father") appeals from an order adjudicating his minor child, "Todd," abused and both his minor children, Todd and "Joshua," neglected.[1] Where Father challenges only the trial court's adjudication of Todd as an abused

[1] Pseudonyms are used to protect the identities of the juveniles and for ease of reading.

juvenile, this opinion focuses on the facts relevant to that determination. After careful consideration, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The record reflects the following facts:

Todd was born in November 2017. On 9 May 2018, Wake County Human Services ("WCHS") filed a petition alleging that Todd was an abused juvenile. The petition alleged that on 27 April 2018 Father held Todd upside down by his legs and threatened to drop the child if the mother did not leave the home. WCHS obtained nonsecure custody on 9 May 2018. The trial court held adjudicatory and dispositional hearings over the course of three dates in June and July 2018, after which it entered an order on 13 August 2018 adjudicating Todd to be an abused juvenile. In support of its adjudication, the trial court made the following finding of fact:

> 6. [Joshua] and [Todd] came to the attention of [WCHS] upon receipt of a report on April 30, 2018. On April 27, 2018, [Father] was angry with the mother. He held [Todd] upside down by his legs and threatened to drop the child on the ground if [the mother] did not leave the home. [Todd] was less than six (6) months old at this time. [Father] grabbed [the mother's] shirt and ripped it as she tried to run from him. [Father] may not have meant to harm [Todd] and there is no evidence that [Todd] was physically harmed but [Todd's] age makes him especially susceptible to injury from such actions. The parents created a substantial risk of serious physical injury to [Todd] by other than accidental means by holding him in this way.

Father timely filed written notice of appeal from the trial court's order.

II. ANALYSIS

Father asserts several arguments to support his contention that the trial court erred in adjudicating Todd to be an abused juvenile. We disagree.

In reviewing an adjudication, this Court must determine whether the trial court's findings of fact are supported by clear and convincing evidence and whether those findings support the trial court's conclusions of law. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re K.J.D.*, 203 N.C. App. 653, 657, 692 S.E.2d 437, 441 (2010) (quotation marks and citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [lower tribunal]." *In re Appeal of Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

Our Juvenile Code defines "abused juvenile," in relevant part, as any juvenile "whose parent . . . [c]reates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means." N.C. Gen. Stat. § 7B-101(1)(b) (2017).

Father first contends that portions of finding of fact number 6, as quoted above, are unsupported by the evidence. He argues that: (1) the finding that Father threatened to "drop the child" is unsupported where the only evidence was that Father threatened to "throw [the child] down;" (2) the finding that Father threatened

to drop Todd "on the ground" is unsupported where the evidence showed that the incident occurred in the living room, a location where there presumably was no bare ground; and (3) the finding that Father's threat was predicated on the mother's refusal to "leave the home" is unsupported where the only evidence was that the threat was based on the mother's refusal "to talk to [Father]." Father proffers no argument as to how his contentions, even if true, have any bearing on the ultimate question of whether Todd was an abused juvenile. This Court has held that the appellant "must not only show error, but also that the error is material and prejudicial, amounting to a denial of a substantial right and that a different result would have likely ensued." *Crenshaw v. Williams*, 211 N.C. App. 136, 144, 710 S.E.2d 227, 233 (2011) (quotation marks and citation omitted).

If the evidence showed that Father made a threat to physically injure the child through force—gravitational or otherwise—as a means of compelling an action from the mother, this Court will not vacate the adjudication based on the trial court's failure to correctly determine whether, for example, the child stood to suffer that physical injury through impact with dirt or linoleum flooring. Also, Father "fails to provide any explanation" as to how the trial court's findings "are material or prejudicial." *See id.* (using the same analysis when declining to overturn the custody order where the appellant "fail[ed] to provide any explanation" as to how allegedly erroneous findings were material or prejudicial).

While Father concedes that there was evidence to support the finding that he held Todd upside down by his legs, he contends that there was no evidence supporting the finding that he "threatened to drop the child." Father points to the fact that he and the mother, who were the only witnesses to the incident, both testified at the hearing that Father did not threaten to drop or throw Todd down. However, we find evidence supporting this finding in the testimony of the social worker, who stated that, on 4 May 2018, the mother told the social worker about the 27 April incident. The mother told the social worker that Father "was asking her to leave the home and she didn't want to leave and then [Father] held the leg of [Todd], head pointing down, threatening to throw the child down if she did not leave the home." The trial court, required to weigh this conflicting evidence and make a credibility determination, believed the testimony of the social worker over that of the parents. *See In re S.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 ("It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." (quotation marks, citation, and brackets omitted)), *appeal dismissed*, 363 N.C. 654, 686 S.E.2d 676 (2009). Additionally, the evidence of Father's express threat and his violent ripping of the mother's shirt during the incident belies Father's argument that he was playfully holding Todd upside down and supports the trial court's finding that Father created a substantial risk of serious injury to Todd by other than accidental means.

Additional evidence also supported the trial court's credibility determination. First, WCHS introduced into evidence the motion for domestic violence protective order that the mother filed in Wake County District Court the day of the incident in question. In the motion, the mother averred that Father "got mad because [she] didn't acknowledge his presence[ ] and speak, so therefore he decided to take [her] 6 month old son and hang him by his legs because [she] didn't leave when told to." While the motion does not explicitly mention Father's threat to drop the child, it clearly conveys that Father was using the threat of injury to Todd as a means of retaliating against or compelling action by the mother. The mother further provided in the motion that, as a result of this incident, she believed the children were exposed to a substantial risk of physical injury.

The maternal grandmother also testified, and while she did not report that the mother told her specifically about Father's threat to drop Todd, she did describe him having held Todd "upside down by his leg" and wanting the mother to leave the house. When the WCHS attorney asked the maternal grandmother whether the mother had described the incident differently that day in court than she had described to the maternal grandmother after it happened, the maternal grandmother stated, "I need her to tell the truth and get out of this," before she addressed the mother directly: "You don't have to protect him. You need to protect yourself and your kids. . . . But you can't keep covering this up." This evidence could support a determination by the

trial court that the mother was attempting to mischaracterize or downplay Father's actions. In any event, the trial court's finding that Father threatened to drop Todd is supported by clear and convincing evidence.

Father also challenges the trial court's finding that Todd's "age makes him especially susceptible to injury from such actions," arguing that there was no evidence upon which the court could base this finding. While we agree that there was no evidence introduced as to how Todd's age rendered him more or less likely to be injured by Father's actions, we believe the trial court's finding reflected a reasonable inference drawn from the particular facts of the case and from common knowledge regarding developmental stages of juveniles. *See In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985) ("The trial judge determines the weight to be given the [evidence] and the reasonable inferences to be drawn therefrom."). This Court recently discussed the trial court's authority to take notice of facts in the absence of evidence:

> N.C. Gen. Stat. § 8C-1, Rule 201 controls when the court may take judicial notice of adjudicative facts. Rule 201 provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. A fact is considered indisputable if it is so well established as to be a matter of common knowledge. Conversely, a court cannot take judicial notice of a disputed question of fact.

Crews v. Paysour, __ N.C. App. __, __, 821 S.E.2d 469, 473 n.1 (2018) (quoting *Hensey v. Hennessy*, 201 N.C. App. 56, 68-69, 685 S.E.2d 541, 550 (2009)) (quotation marks omitted).

Our courts have long recognized the existence of matters within the realm of common knowledge. *See, e.g.*, *Kientz v. Carlton*, 245 N.C. 236, 242, 96 S.E.2d 14, 18 (1957) ("It is common knowledge that various models of power mowers differ in size, weight, design, safety devices, etc., and that new models constantly come into the market, and that purchasers select according to their choice and the price of the respective models."); *Smith v. Pass*, 95 N.C. App. 243, 251, 382 S.E.2d 781, 787 (1989) ("The effect of the sun's glare on drivers is an effect to which any driver heading into the direction of the sun can attest. In this situation, Haggard's expert credentials as a meteorologist made him no more qualified than any other driver to offer an opinion."). The fact that a six-month-old child is generally more susceptible than an older child to head injury from a fall or joint injury from being held or pulled by the limbs is within the realm of common knowledge. Absent a particularized argument as to why the finding did not reflect common knowledge, we will not disregard the trial court's determination that Todd's age was a factor in determining the extent to which Father's actions could have caused injury to Todd.

Having found evidentiary support for the trial court's challenged finding of fact, we conclude that the trial court correctly found Todd to be an abused juvenile on

the basis of this finding. Just as the trial court did, we take note of the fact that a child younger than six months old could suffer serious physical injury if dropped head first on the ground. By threatening to drop Todd during a heated argument with the mother as a means of inducing the mother's compliance with his demands, Father created a substantial risk that Todd would be seriously injured, with that risk of injury being created "by other than accidental means." N.C. Gen. Stat. § 7A-101(1)(b).

As the trial court acknowledged in its finding, we cannot know whether Father would have carried out his threat. However, even making the threat to drop the child when Father was in such a state of arousal, coupled with the fact that Father held Todd up by his legs to be placed in a position for him to be dropped, created a substantial risk of serious injury to Todd. *Cf. In re A.N.L.*, 213 N.C. App. 266, 272, 714 S.E.2d 189, 194 (2011) ("Ultimately, respondent-mother's decision to enter into a physical altercation while holding one-month-old Autumn created a substantial risk of serious physical injury to her, particularly when considering her extremely young age and overall helplessness. Thus, the trial court did not err in adjudicating Autumn as abused."). As a result, we hereby affirm the trial court's adjudicatory and dispositional order.

AFFIRMED.

Judges STROUD and ZACHARY concur.

Report per Rule 30(e).