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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-320

No. COA20-878

Filed 6 July 2021

Wake County, Nos. 20 JA 60-62

IN THE MATTER OF: D.A., C.N.A. & T.A.

Appeal by Respondent-Appellant from order entered 18 August 2020 by Judge Monica M. Bousman in Wake County District Court. Heard in the Court of Appeals 26 May 2021.

Mary Boyce Wells for Petitioner-Appellee Wake County Human Services.

Robert W. Ewing for Respondent-Appellant Father.

Tin, Fulton, Walker & Owen, PLLC, by Cheyenne N. Chambers, for guardian ad litem.

INMAN, Judge.

¶ 1 Respondent-Appellant ("Father") appeals from the adjudication and disposition order of the trial court adjudicating his three children, Caleb, David, and Tina,[1] neglected and placing the children in the custody of Wake County Human Services ("WCHS"). Father contends the trial court erred because the evidence and findings of fact did not establish the children were currently impaired or at

[1] We refer to the children by pseudonyms.

substantial risk of impairment. For the reasons explained below, we affirm the trial court's order.

I. FACTS & PROCEDURAL HISTORY

¶ 2 David (13 years old), Caleb (15 years old), and Tina (17 years old) are the biological children of Father and Mother. The family has a history of involvement with WCHS beginning in 2006. Before this adjudication, in an earlier order, the trial court placed custody of the children solely with Father based on concerns about Mother's mental health and family history of sexual abuse.[2]

¶ 3 In December 2015, WCHS received a report that Father hit Caleb in the face, and after an investigation, allegations of neglect and inappropriate discipline were substantiated. Father completed in-home services and the case was closed. In November 2017, the children were removed from Father's care after Father again physically abused Caleb by hitting, strangling, and slamming him to the ground. Caleb sustained a black eye, bruised jaw, and cigarette-like burns to his hands. Father was charged with felony child abuse, inflicting serious injury, felony assault by strangulation, and contributing to the abuse and neglect of a juvenile.

¶ 4 All three children were placed with the paternal grandmother and step-grandfather. Father's progress on his case plan with WCHS while the children lived

[2] Mother is only permitted supervised visitation with the children, because, in part, Mother's current husband is a convicted sex offender.

with their grandparents was "slow" and "not adequate." Although Father retained custody of the children, WCHS closed the case because the children were safe and well-cared for in the grandparents' home.

¶ 5 When the COVID-19 pandemic began in 2020, Father moved into the grandparents' home along with the children because he could no longer afford his own living expenses.

¶ 6 On 16 April 2020, WCHS received a report alleging Father physically abused Caleb in the family home after he caught Caleb smoking marijuana. During the assault, Father smacked Caleb with an open hand, punched him in the gut, shoved him against the wall, and struck him with a belt. At some point, David and Caleb "collide[d]" heads when Father dragged Caleb into the bedroom. Father then threw Caleb into the side of the shed in the backyard. Father had been drinking beer all day.

¶ 7 David, the paternal grandmother ("Grandmother"), and Caleb's uncle witnessed the incident. Grandmother and Caleb's uncle tried to intervene and David called the police at the direction of Grandmother. Caleb was transported to the hospital by ambulance and treated for head trauma and multiple abrasions to his body. The next day, he returned to the hospital with "concussive-like symptoms" including dizziness and blurred vision.

¶ 8 Father was arrested and charged with assault and battery and misdemeanor child abuse. The children were returned to the grandparents' home as part of a temporary safety placement since they could not be with Mother. WCHS entered into a voluntary safety plan with Father, which prohibited him from having any contact with his children. The grandparents agreed to the plan and Grandmother indicated Father was no longer welcome at her home. But when Father was released on bond from his criminal charges, he came to Grandmother's house to retrieve his belongings. Grandmother told Father to leave immediately, but she let him borrow her van. A few days later, Father was re-arrested on upgraded felony charges across the street from the grandparents' house, at a neighbor's residence.

¶ 9 WCHS filed juvenile petitions on 21 April 2020, alleging that all three children were abused and neglected. The children were placed in non-secure custody of WCHS. They stayed in respite foster care for three weeks and were then placed at Free Will Baptist Children's Home.

¶ 10 At the adjudication hearing on 25 and 26 June 2020, Caleb described a pattern of serious physical abuse by Father. He also testified that his step-grandfather told him to be careful about what he said so that Father did not go to prison for life. In recounting the incident on 16 April 2020, Grandmother referred to the assault as both "too harsh" and Father's attempt to "discipline" Caleb. The *guardian ad litem* testified she was concerned about whether or not Grandmother would establish

boundaries based on her testimony and that "there would need to be some changes" before the children could return to her care.

¶ 11 On 18 August 2020, the trial court entered an adjudication and disposition order finding, in relevant part:

> 21. After assuring WCHS that [Father] was no longer welcome at her home, the paternal grandmother allowed [Father] to continue to use a van she owns. Additionally, [Father] was arrested at the house across the street from the paternal grandmother.
>
> . . . .
>
> 25. Return of the children to either of their parents' homes would be contrary to the children's health and safety.
>
> 26. The children need more adequate care or supervision than can be provided by the parents and the children are in need of placement.
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> . . . .
>
> 29. The children are currently placed at the Freewill Baptist group home. David specifically stated that he has "never felt safer" than he does at the group home. The children have expressed their wishes to live with their mother, and if that is not possible, with their paternal grandmother. Neither of these options is currently safe and appropriate for the children.
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> . . . .
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> 31. The children do not currently want contact with their father . . . .
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> . . . .
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> 32. If the paternal grandmother and step-grandfather

> desire eventual placement of the children in their home, they will need to demonstrate an understanding and appreciation of the severity of the abuse and neglect the children have experienced, and that they are able to establish and enforce appropriate boundaries between the children and parents.

¶ 12 The trial court concluded the three children were neglected as defined by N.C. Gen. Stat. § 7B-101(15) "in that the children do not receive proper care, supervision, and discipline from their parents and live in an environment injurious to their welfare." The trial court also concluded Caleb was an abused juvenile because Father "has inflicted or allowed to be inflicted on the child a serious physical injury by other than accidental means, and has created or allowed to be created a substantial risk of physical injury." The trial court determined the children would remain in WCHS custody. Father filed written notice of appeal.

II. ANALYSIS

¶ 13 Father challenges the trial court's conclusion that David, Caleb, and Tina are neglected, arguing that the evidence and findings of fact did not establish the children were impaired or at substantial risk of impairment at the time of the hearing. Specifically, Father asserts (1) findings of fact 21 and 32[3] are unsupported by clear, cogent, and convincing evidence and (2) the trial court failed to consider the safety

[3] There are two findings of fact designated by the number 32 in the trial court's adjudication and disposition order. Father challenges the last finding of fact in the order, which should be numbered 33. To avoid confusion, we will refer to it as finding of fact 32 in this opinion.

plan placement with Grandmother. Father does not challenge any other finding of fact.

¶ 14 We review a trial court's adjudication of neglect "to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by findings of fact[.]" *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (citation omitted). Unchallenged findings of fact are deemed supported by the evidence and binding on appeal. *In re J.M.W.*, 179 N.C. App. 788, 792, 635 S.E.2d 916, 919 (2006) (citation omitted).

A. Trial Court's Findings of Fact Supported by Evidence

¶ 15 In finding of fact 21 the trial court found, "After assuring WCHS that [Father] was no longer welcome at her home, [Grandmother] allowed [Father] to continue to use a van she owns. Additionally, [Father] was arrested at the house across the street from [Grandmother]." Father concedes this finding is factually accurate and Grandmother testified to the same at the adjudication hearing. We conclude this finding is supported by the evidence.

¶ 16 Finding of fact 32 provides: "If the [Grandmother] and step-grandfather desire eventual placement of the children in their home, they will need to demonstrate an understanding and appreciation of the severity of the abuse and neglect the children have experienced, and that they are able to establish and enforce appropriate boundaries between the children and the parents." It does not appear this finding

contains factual determinations; rather, this finding reads as a decretal provision or a condition to custody more appropriately found in a permanent reunification plan. This "finding" is ultimately immaterial to the trial court's conclusion that the children were neglected.

B. Trial Court's Conclusion of Law

¶ 17 Father asserts the trial court erred in concluding the children were neglected because at the time of the hearing, there was not a substantial risk of impairment to David, Caleb, and Tina. Whether a child has been neglected is a conclusion of law, *In re Ellis*, 135 N.C. App. 338, 340, 520 S.E.2d 118, 120 (1999) (citation omitted), which we review *de novo*, *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (citation omitted).

¶ 18 Our General Statutes define a neglected juvenile as a juvenile:

> whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare . . . . In 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.

N.C. Gen. Stat. § 7B-101(15) (2019). In order for a child to be adjudicated neglected, there must 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 Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255,

258 (2003) (cleaned up). Despite the absence of a specific finding that a juvenile has been impaired or is at a substantial risk of impairment at the time of the adjudication, there is no error if the evidence would support such a finding. *In re C.C.*, 260 N.C. App. 182, 185-86, 817 S.E.2d 894, 897 (2018) (citations omitted).

¶ 19 We must consider "the conditions and the fitness of the parent to provide care *at the time of the adjudication*." *In re K.J.D.*, 203 N.C. App. 653, 660, 692 S.E.2d 437, 443 (2010) (emphasis added). This Court has held that a child may be adjudicated neglected if the parent remains incapable of providing proper care or supervision, even when the child is in some other stable placement at the time of the adjudication. *See id.* at 661, 692 S.E.2d at 444.

¶ 20 Father relies on *In re J.A.M.*, 372 N.C. 1, 822 S.E.2d 693 (2019), for the proposition that evidence "in the record must show current circumstances present a risk to the juvenile." 372 N.C. at 9, 822 S.E.2d at 698. He contends the children were not in a current state of neglect at the time of their adjudication because they lived in a safe environment with Grandmother. *J.A.M.* is not controlling because in that case, our Supreme Court considered whether the prior abuse involving other children, standing alone, could support an adjudication of current or future neglect. *Id.* at 8-11, 822 S.E.2d at 698-700.

¶ 21 Under the voluntary safety plan, the children returned to their grandparents' custody and Father was required not to contact his children. Grandmother agreed to

the plan and indicated Father was no longer welcome in her home. Despite the safety plan, there is no indication in the record that Father remedied the conditions which required its initial implementation, mainly his physical abuse of the children, substance abuse, and his inability to properly care for the children. *See, e.g., In re H.L.*, 256 N.C. App. 450, 457, 807 S.E.2d 685, 690 (2017) (holding "the trial court properly concluded that [the juvenile] was neglected because respondent-father and [juvenile's] mother had failed to remedy the conditions which required [the juvenile] to be placed with her sister in a safety plan, such that they were unable to provide [the juvenile] with proper care") (citation omitted)). In fact, Father's progress on his case plan with WCHS was "slow" and "not adequate" before his most recent assault of Caleb. Father also violated the safety plan when he returned to the grandparents' home. The trial court's conclusion that Caleb was an abused juvenile because Father "inflicted . . . serious physical injury . . . and has created . . . a substantial risk of physical injury" also incorporated factual findings of the substantial impairment present at the time of the adjudication.

¶ 22 Even if the children were safe and their placement with the grandparents was stable, at the time of the adjudication Father remained incapable of providing proper care or supervision. *K.J.D.*, 203 N.C. App. at 656, 692 S.E.2d at 441. We are satisfied the evidence supports a finding that the children were impaired or at substantial risk of impairment as a result of Father's improper care, discipline, and supervision. *See*

C.C., 260 N.C. App. at 185-86, 817 S.E.2d at 897 ("[W]here the trial court makes no finding that a juvenile has been impaired or is at substantial risk of impairment there is no error if the evidence would support such a finding.") (citation omitted)). Accordingly, we hold the evidence and findings of fact support the trial court's conclusion that the three children were neglected.

¶ 23 Father also argues the trial court committed reversible error by failing to enter a specific finding regarding the voluntary safety plan "because the children no longer suffered from some current physical, mental, or emotional impairment." The trial court's order does not explicitly reference the "safety plan." However, finding of fact 21, which Father concedes is accurate and we have held is supported by the evidence, details the ways in which Father and Grandmother did not consistently comply with the safety plan. The trial court also addressed the safety and placement of the children in findings of fact 25, 26, and 29, which Father does not challenge. Because we hold the trial court's findings of fact support its conclusion that the juveniles were neglected, the absence of a specific finding identifying the voluntary safety plan is immaterial. *See In re A.L.T.*, 241 N.C. App. 443, 451, 774 S.E.2d 316, 321 (2015) (citation omitted).

III. CONCLUSION

¶ 24 For the above reasons, we affirm the order of the trial court.

AFFIRMED.

Judges DIETZ and WOOD concur.

Report per Rule 30(e).