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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-506

No. COA21-172

Filed 21 September 2021

New Hanover County, Nos. 20JA121–22

IN THE MATTER OF: A.D.G.C. & E.S.G.C.

Appeal by Respondent-Appellant Mother from an order entered 2 December 2020 by the Honorable J.H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 11 August 2021.

Benjamin J. Kull for Respondent-Appellant Mother.

Jennifer G. Cooke for Petitioner-Appellee New Hanover County Department of Social Services.

Matthew D. Wunsche for the Guardian Ad Litem.

JACKSON, Judge.

¶ 1 This case concerns the custody of two children, Alexander and Elenore.[1] Respondent-Mother appeals from the trial court's order adjudicating her minor child, Alexander, abused, neglected, and dependent, and her minor child, Elenore, neglected and dependent. Upon review, we vacate the trial court's adjudication of Alexander and Elenore as dependent, and remand for further findings of fact. We further

[1] Pseudonyms are used in place of the children's names to protect their identities.

reverse the trial court's adjudication of Elenore as neglected.

I. Factual and Procedural Background

¶ 2 On the morning of 16 July 2020, Respondent-Mother gave birth to a son, Alexander, in her bathroom at home. Respondent-Mother left Alexander in the bathroom's toilet for several hours and attended to her daughter, Elenore, who was approximately one year old at the time. Father,[2] the father of Alexander and Elenore, left early that morning for work and did not return home until later that evening. Around 4:00 p.m., Respondent-Mother retrieved Alexander from the toilet and placed him in a plastic trash bag. She put the bag in the trunk of her car and drove to Wal-Mart to purchase groceries for Elenore. Respondent-Mother then drove to a nearby church and placed the bag containing Alexander into a trash bin in the parking lot. Alexander was awake and crying throughout the day. At approximately 5:05 p.m., Alexander was found alive in the trash bin and taken to the hospital. Alexander's identity and that of his parents were unknown at this point. The New Hanover County Department of Social Services ("DSS") assumed nonsecure custody of Alexander that night. DSS began a juvenile petition for Alexander as well. The petition for Alexander was filed on 17 July 2020.

¶ 3 On 17 July 2020, Detective H. Wooddell ("Detective Wooddell") identified

[2] Father is not a party to this appeal and this label is being used to protect his identity.

Respondent-Mother's car from church surveillance video. After locating her at home with Elenore, Detective Wooddell began interviewing Respondent-Mother, first at home and later at the police station, about the events that occurred on 16 July. After initially denying any knowledge of the baby, Respondent-Mother admitted Alexander was hers. She also admitted knowing Alexander was alive when she placed him in the trash bin as she heard him crying when she left. Respondent-Mother identified Father as the father of Alexander but told Detective Wooddell that Father had not known she was pregnant. Detective Wooddell then placed Respondent-Mother under arrest. At that time, Elenore was left without a caretaker because Father could not be located. DSS assumed emergency custody of Elenore and placed her in a foster home.

¶ 4 On 18 July 2020, DSS Social Worker M. Tilman ("Social Worker Tilman") interviewed Respondent-Mother at the New Hanover County Jail. Respondent-Mother had a flat affect and expressed no remorse when discussing Alexander. She was visibly upset when asked about Elenore and upon learning DSS had assumed nonsecure custody of Elenore, she provided contact information for Father. Respondent-Mother told Social Worker Tilman that Father did not know she was pregnant. Social Worker Tilman then tried to call Father via telephone and to locate him at home. Unable to reach Father, Social Worker Tilman began the process of filing a juvenile petition for Elenore. The petition was filed on 20 July 2020.

¶ 5 On 19 July 2020, Social Worker Tilman again tried to locate Father at home but was unsuccessful. Social Worker Tilman was able to reach Father that day by phone. Father denied having any knowledge that Respondent-Mother was pregnant.

¶ 6 On 16 November 2020, the trial court held a hearing on adjudication and disposition for both Alexander and Elenore. During adjudication, DSS presented the testimony of Detective Wooddell and Social Worker Tilman. Respondent-Mother presented the testimony of Dr. Y. Castanedo ("Dr. Castanedo"), Elenore's primary care physician, who described her observations of Elenore's early childhood development after she was born small for gestational age. Respondent-Mother also presented Elenore's medical records that document her well visits as well as her developmental delays. At the end of adjudication, the trial court found by clear and convincing evidence that DSS met its burden in establishing abuse, neglect, and dependency of Alexander, and in establishing neglect and dependency of Elenore. During disposition, DSS presented the testimony of Social Worker K. Bell who gave a status report on Alexander and Elenore, described the involvement of Father and his efforts towards reunification, and recommended Alexander and Elenore remain in their current foster care placements. The trial court followed DSS's recommendations, determining DSS should retain custody of Alexander and Elenore but directing Father to receive increased overnight visitation with Elenore and unsupervised visits with Alexander.

¶ 7 On 3 December 2020, the trial court entered its order adjudicating Alexander as abused, neglected, and dependent and Elenore as neglected and dependent. On 22 December 2020, Respondent-Mother filed timely written notice of appeal.

II. Standard of Review

¶ 8 We review adjudication orders to determine whether the trial court's findings of fact are supported by clear and convincing evidence, and whether the findings support the trial court's conclusions of law. *In re C.B.*, 245 N.C. App. 197, 199, 783 S.E.2d 206, 208 (2016). The trial court's conclusions of law are reviewed *de novo. In re K.J.D.*, 203 N.C. App. 653, 657, 692 S.E.2d 437, 441 (2010).

III. Analysis

¶ 9 Respondent-Mother argues the trial court erred in adjudicating Alexander and Elenore as dependent juveniles and in adjudicating Elenore as a neglected juvenile. First, she contends that the trial court incorrectly applied the law to the dependency adjudications by analyzing the relevant circumstances at the time of removal rather than at the time the petition was filed. Second, she argues, in the alternative, that the trial court should have considered post-petition evidence in the dependency adjudications. Third, she contends that the trial court solely relied on evidence of Alexander's abuse in order to conclude Elenore was a neglected juvenile.

¶ 10 Upon review, we conclude that the trial court erred in not considering post-petition evidence before adjudicating Alexander and Elenore dependent juveniles and

erred by relying solely on the abuse and neglect of Alexander to adjudicate Elenore a neglected juvenile.

A. Dependency Adjudication for Alexander and Elenore

¶ 11 Adjudicatory hearings on juvenile petitions are "designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition." N.C. Gen. Stat. § 7B-802 (2019). The allegations in a petition—whether a juvenile is abused, neglected, and/or dependent—must be proven by clear and convincing evidence. *Id.* § 7B-805. "Dependent juvenile" is defined by the Juvenile Code as:

> [a] juvenile in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement.

Id. § 7B-101(9). Regarding the second definition, the trial court must make findings of fact addressing "(1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements" in order to adjudicate a juvenile dependent. *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007) (quoting *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005)). Failure to do so will result in a reversal of the trial court. *Id.* "Further, a child may not be adjudicated dependent when she has at least one parent capable of providing

care or supervision." *In re E.P.-L.M.*, 272 N.C. App. 585, 597, 847 S.E.2d 427, 437 (2020).

¶ 12 The trial court adjudicated Alexander dependent under the first definition of dependent juvenile, finding "at the time of removal, [Alexander's] biological parents were unknown leaving him dependent." The trial court adjudicated Elenore dependent under the second definition, finding "parents were unable to provide care and lacked an appropriate alternative child care arrangement at the time of removal." Despite being listed under the findings of fact portion of the trial order, in substance these statements are conclusions of law and we will treat them as such. *See In re V.M.*, 273 N.C. App. 294, 298–99, 848 S.E.2d 530, 534 (2020) (treating the trial court's "finding of fact 18" as a conclusion of law where the trial court applied law to facts in finding the juvenile was neglected).

¶ 13 Generally, post-petition evidence "is not admissible during an adjudicatory hearing for abuse, neglect, or dependency." *In re V.B.*, 239 N.C. App. 340, 344, 768 S.E.2d 867, 869 (2015). This is because § 7B-802 expressly provides that "the purpose of an adjudicatory hearing is to determine only the existence or nonexistence of any of the conditions alleged in a petition." *Id.* at 344, 768 S.E.2d at 869–70 (citing N.C. Gen. Stat. § 7B-802 (2019)). However, "[o]ur Court has carved out exceptions to this general rule; for instance, when evidence is discovered after the filing of the petition that reflects a 'fixed and ongoing circumstance' rather than a 'discreet event or one-

time occurrence,' that evidence may be considered in a dependency adjudication." *In re E.P.-L.M.*, 272 N.C. App. at 597, 847 S.E.2d at 437 (quoting *In re V.B.*, 239 N.C. App. at 344, 768 S.E.2d at 870). This exception is particularly applicable to evidence discovered after the filing of the petition that documents facts and circumstances that existed *prior* to the filing of the petition. *See In re V.B.*, 239 N.C. App. at 344, 768 S.E.2d at 869–70.

¶ 14 For example, in *In re V.B.*, a juvenile petition was filed three days after the juvenile was born because the mother was a minor, did not have independent housing, and was unemployed. *Id.* at 340–41, 768 S.E.2d at 868. The father's paternity was established by DNA testing 15 days after the juvenile petition was filed and before the adjudicatory hearing occurred. *Id.* This Court reversed the trial court's adjudication of the juvenile as dependent because the court failed to make any findings that the father was unable to care for the child or arrange for alternative child care. *Id.* at 344, 768 S.E.2d at 870. In so deciding, we explained that paternity "is a fixed and ongoing circumstance" and "was extremely relevant to whether the child had *a* parent who could provide or arrange for her care and supervision." *Id.*

¶ 15 Respondent-Mother contends that the fact of Father's paternity combined with his continual and appropriate involvement with DSS since the petitions were filed reflects the kind of fixed and ongoing circumstance that should have been considered at the adjudicatory hearing. She further argues that Father has always been an able

parent and to disregard this evidence would contradict the spirit of the Juvenile Code and the definition of a dependent juvenile.

¶ 16 We agree with Respondent-Mother that the trial court should have considered post-petition evidence of Father's ability to properly care for Alexander and Elenore. Here, as in *In re V.B.*, the circumstances of Father's paternity and his ability to potentially care for Alexander and Elenore are fixed and ongoing circumstances. The tragic events which occurred at the beginning of this case rightly catalyzed quick action by DSS to assume custody of Alexander and Elenore and to file juvenile petitions. DSS, however, located Father on 19 July 2020 and he has since been highly committed to reunification with Alexander and Elenore. Thus, the trial court should have considered relevant evidence to prevent the adjudication of Alexander and Elenore as dependent if they have at least one parent capable of providing for their care.

¶ 17 Further, the trial court in its order, after finding by clear and convincing evidence that Alexander and Elenore are dependent juveniles, made the following relevant findings of fact:

> 31. [That Father] is fully cooperative and compliant with the recommended services. He consistently participates in individual sessions with Child First. He is very engaged during sessions and receptive to information that has been presented. He recognizes that both of his children have special needs that will require ongoing services and specialized care.

> 32. That [Father] has verifiable income. He works from Tuesday to Thursday and Fridays vary. He has independent housing. He resides in a two-bedroom trailer. The home is adequately furnished with working utilities. The home is safe and appropriate for unsupervised and overnight visits with the children.
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> . . .
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> 38. That [Father] identified [his paternal aunt and uncle] as a possible placement option. The Department completed an approved home study. The family is prepared to offer support to [Father] and the children during visits when needed to allow [Father] to focus on each child's needs individually until he is more comfortable providing care for both on his own.

Although these findings support the trial court's conclusion on disposition rather than adjudication, they illustrate the types of post-petition evidence that the trial court should have considered in its conclusion on adjudication.

¶ 18 As it stands, the trial court did not make any findings of fact on Father's ability (or inability) to provide for Alexander and Elenore's care or supervision or on Father's ability to furnish an alternative child care arrangement. Before adjudicating the children dependent, the only findings that the trial court made about Father were: (1) he left in the early morning hours for work on 16 July; (2) Respondent-Mother failed to inform him she was pregnant; (3) Respondent-Mother initially told DSS he worked three hours away from Wilmington, but then disclosed he works in Southport, North Carolina; (4) Social Worker Tilman unsuccessfully tried to locate him via telephone and at home on 18 July 2020; and (5) Social Worker Tilman did not locate

him at home on 19 July 2020, but was able to reach him via telephone and he denied having knowledge that Respondent-Mother was pregnant.

¶ 19 Accordingly, we vacate the trial court's adjudication of Alexander and Elenore as dependent juveniles and remand for the trial court to make findings of fact considering post-petition evidence regarding Father's ability to properly care for the children and provide an alternative child care arrangement.

B. Neglect Adjudication for Elenore

¶ 20 The Juvenile Code defines "neglected juvenile" in pertinent part 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." N.C. Gen. Stat. § 7B-101(15) (2019). "In order to adjudicate a child to be neglected, the failure to provide proper care, supervision, or discipline must result in some type of physical, mental, or emotional impairment or a substantial risk of such impairment." *In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007). "Similarly, in order for a court to find that the child resided in an injurious environment, evidence must show that the environment in which the child resided has resulted in harm to the child or a substantial risk of harm." *In re K.J.B.*, 248 N.C. App. 352, 354, 797 S.E.2d 516, 518 (2016).

¶ 21 In adjudicating Elenore neglected, the trial court stated the following:

> 23. That based on the testimony and evidence

> presented, the Court finds by clear and convincing evidence that [Elenore] is a dependent and neglected juvenile as defined by N.C.G.S. 7B 101(9)(15) in that her parents failed to provide proper care and supervision, allowed the child to live in an environment injurious to her welfare, allowed [Elenore] to live in a home where another child in that home suffered abuse at the hands of a caretaker in that home[.]

The trial court did not, however, make individualized findings to show that Elenore was not being properly cared for or living in an injurious environment. Before adjudicating Elenore as neglected, the only findings that the trial court made about Elenore were:

> 1. . . . [Elenore] is a one-year-old having a date of birth January 12, 2019. . . . [Elenore] is in the legal custody of the New Hanover County Department of Social Services pursuant to an Order for Nonsecure Custody entered on July 20, 2020.
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> 2. On July 16, 2020 [Respondent-Mother] and [Elenore] were in their home located on Carolina Beach Road in Wilmington, North Carolina. . . .
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> 3. After giving birth, [Respondent-Mother] went about her day as usual. She took a shower while [Elenore] was watching cartoons. She prepared meals for [Elenore] and spent time with her. . . .
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> 4. [Respondent-Mother] and [Elenore] travelled to Walmart in Monkey Junction to purchase groceries while [Alexander] remained in the trash bag in the trunk of the car. . . .
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> . . .
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> 12. [Respondent-Mother] threw the baby in the trash

can because she was not prepared to have another child, and she failed to inform [Father] that she was pregnant. Her daughter is developmentally delayed and could not walk. [Respondent-Mother] felt the need to focus on [Elenore].

. . .

15. . . . [Respondent-Mother] expressed no remorse for her actions and had a flat affect during her interview regarding [Alexander], however, she became visibly upset, shaking and crying when asked about [Elenore].

16. . . . Once [Respondent-Mother] realized that the Department had assumed nonsecure custody of [Elenore], she provided contact information for [Father] and disclosed that he works in Southport, North Carolina which is not three hours away from Wilmington.

. . .

19. That Attorney Jennifer Harjo moved to introduce into evidence, as *Respondent-Mother's Exhibits "1 and 3-13,"* Authenticity of New Hanover Regional Medical Center Records for [Elenore], Newborn Discharge Summary January 14, 2019, Newborn Weight Check dated January 17, 2019, Well Child Visit 0-1 month dated January 22, 2019, Well Child Visit 1 month dated February 18, 2019, Well Child Visit 2 month dated March 18, 2019, Well Child Visit 4 months dated May 22, 2019, Well Child Visit 6 months dated July 23, 2019, Well Child Visit 9 months dated October 24, 2019, Well Child Visit 12 months dated January 16, 2020, Well Child Visit 15 months dated April 22, 2020 and Well Child Visit 18 months dated July 24, 2020. No party present objected, and said records were received into evidence and considered by the Court.

20. That [Y.] Castanedo, M.D. is the primary care physician for [Elenore]. [Elenore] was small for gestational age at birth. At the well-child visits, Respondent-Mother

> completed a questionnaire regarding [Elenore]'s developmental milestones. The questionnaire is then used to produce a developmental score related to developmental milestones. Well-child visits, on average, last approximately twenty to thirty minutes. Dr. Castanedo reviews the score and relies on her personal observations of the child. [Elenore] did not allow a physical examination during each well-child visit. [Elenore] appeared healthy up until her fifteen-month well-child visit.
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> 21. On April 22, 2020, Dr. Castanedo became aware that [Elenore] was not walking independently. Respondent-Mother previously reported that [Elenore] walks in the home, however, Dr. Castanedo never witnessed [Elenore] walking. Respondent-Mother and Dr. Castanedo agreed that [Elenore] would participate in physical therapy and if she was not walking by her 18-month well-child visit, she would be referred to a neurologist.

¶ 22 Regarding the statutory definition of neglected juvenile, the trial court did not make any findings to support a conclusion that Respondent-Mother or Father did not provide proper care, supervision, or discipline or that their failure to do so resulted in physical, mental, or emotional impairment or a substantial risk of such impairment. The findings related to Elenore's medical history only show at a minimum that her primary care physician was concerned about her walking ability, but the trial court did not find that the failure of Respondent-Mother and Father to properly care for Elenore resulted in her developmental delay. Further, no evidence was offered by DSS during the adjudication proceedings to support such a finding.

Thus, the trial court would be unable to conclude that Respondent-Mother and Father failed to provide proper care and supervision to Elenore.

¶ 23 Additionally, the trial court did not make any findings to support a conclusion that Elenore lived in an environment injurious to her welfare. The findings related to Elenore's time at home and in her mother's presence on 16 July 2020 do not show that living with her parents resulted in harm or a substantial risk of harm to Elenore. Despite Respondent-Mother's actions related to Alexander on 16 July, she appeared to feed, spend time with, and care for Elenore that day. Further, DSS offered no evidence that Elenore lived in an injurious environment prior to 16 July or that she was harmed or at risk of harm prior to 16 July. Thus, the trial court would be unable to conclude that Elenore lived in an environment injurious to her welfare.

¶ 24 Our Court has previously held that it is improper to adjudicate a juvenile as neglected based solely on the fact that another child in the home was abused. *In re J.C.B.*, 233 N.C. App. 641, 644–45, 757 S.E.2d 487, 489–90 (2014); *In re S.M.L.*, 272 N.C. App. 499, 517, 846 S.E.2d 790, 801–02 (2020). Whether a juvenile "lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home" is also relevant to an adjudication of neglect. N.C. Gen. Stat. § 7B-101(15) (2019). If relying on this factor, the trial court must assess the "substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999). The

trial court must also identify other factors that suggest "the abuse or neglect will be repeated." *In re J.C.B.*, 233 N.C. App. at 644, 757 S.E.2d at 489 (2014).

¶ 25 In *In re S.M.L.*, the trial court adjudicated a brother neglected based solely on the fact that his sister was sexually abused by the mother's boyfriend. *Id.* at 515–17, 846 S.E.2d at 801–02. This Court reversed, explaining that the trial court made "no findings that this abuse had any effect on [the brother], or that there was any reason to believe [the boyfriend] may abuse [the brother] in the future." *Id.* at 516, 846 S.E.2d at 801. Instead, the trial court's only relevant findings regarding the brother were that he was a happy and healthy child. *Id.* Because the trial court "did not make any finding even of any risk of physical, mental or emotional impairment to [the brother] or the presence of other factors supporting a conclusion that he was neglected," we remanded for the trial court to make findings about the impact on the brother of the abuse of his sister. *Id.* at 517, 846 S.E.2d at 801–02.

¶ 26 Respondent-Mother contends that the trial court adjudicated Elenore as neglected based solely on the abuse and neglect of Alexander. She further argues that DSS presented no evidence that she had not been properly caring for Elenore and that the medical evidence she offered in fact demonstrates her attention to Elenore's developmental needs. In response, DSS and the Guardian ad Litem argue that the exposure of one child to the infliction of injury by a parent to another child can support the adjudication of that child as neglected. DSS and the Guardian ad

Litem rely on *In re F.C.D.*, 244 N.C. App. 243, 780 S.E.2d 214 (2015), to support this contention. In *In re F.C.D.*, this Court affirmed the adjudication of a child as neglected based on her exposure to the severe physical and emotional abuse of another child by a parent who believed the child was possessed by demons. *Id.* at 254, 780 S.E.2d at 222. Notably, the petitioner in *In re F.C.D.* offered the testimony of a licensed psychologist who described the impact that witnessing such abuse would have on a child and explained that the exposure itself could lead to the emotional impairment of the child. *Id.*

¶ 27 Ultimately, we agree with Respondent-Mother that the trial court adjudicated Elenore neglected based solely on Respondent-Mother's abuse and neglect of Alexander. Similar to the trial court in *In re S.M.L.*, the trial court here made no findings that Respondent-Mother's abuse of Alexander affected Elenore or that Respondent-Mother might abuse Elenore in the future. The evidence presented showed the opposite.

¶ 28 Unlike the adjudicatory hearing in *In re S.M.L.*, in which evidence could support a finding that the mother's neglect of her daughter posed a risk to her son, there was no evidence presented by DSS in this case that would support finding Respondent-Mother's abuse and neglect of Alexander posed a risk to Elenore. The evidence DSS presented on adjudication centered on the abuse and neglect of Alexander alone and did not address any potential risk to Elenore. In contrast,

Respondent-Mother offered Elenore's medical records and the testimony of Dr. Castanedo as evidence of her positive attention to Elenore's needs. Additionally, unlike the psychologist's testimony in *In re F.D.C.*, here, no testimony was offered to show that Elenore's presence in the home during the abuse and neglect of Alexander amounted to exposure that could result in Elenore's emotional impairment.

¶ 29 Because the trial court on remand would be unable both to support a finding of substantial risk of future abuse to Elenore and to identify other factors that suggest the abuse by Respondent-Mother would be repeated, we reverse the trial court's adjudication of Elenore as neglected.

IV. Conclusion

¶ 30 For the foregoing reasons, we vacate the trial court's order adjudicating Alexander and Elenore as dependent juveniles and remand for further proceedings. We reverse the trial court's order adjudicating Elenore as a neglected juvenile.

VACATED IN PART, REVERSED IN PART, AND REMANDED.

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).