

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

MICHELE T.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY AND J.T.,
Appellees.

No. 2 CA-JV 2016-0048
Filed October 5, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Cochise County
No. JD201400058
The Honorable Terry Bannon, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 Michele T., the mother of J.T., born in August 2015, appeals from the juvenile court's February 2016 order adjudicating J.T. dependent on grounds of neglect.¹ For the following reasons, we affirm the court's order.

¶2 A dependent child is one "whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent," A.R.S. § 8-201(15)(a)(iii),² and neglect is defined as "[t]he inability or unwillingness of a parent, guardian or custodian of a child to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare," § 8-201(25)(a). A determination of dependency requires proof by a preponderance of the evidence. A.R.S. § 8-844(C)(1). We review a dependency adjudication for an abuse of discretion, deferring to the juvenile court's ability to weigh and analyze the evidence. *Louis C. v. Dep't of Child Safety*, 237 Ariz. 484, ¶ 12, 353 P.3d 364, 368 (App. 2015). Thus, "we view the evidence in the light most favorable to sustaining the

¹The juvenile court also found J.T. dependent with respect to the father, who is not a party to this appeal.

²Portions of the definitions statute were renumbered in 2016, but the applicable text was not amended. See 2016 Ariz. Sess. Laws, ch. 300, § 1. We refer to the current version of the statute throughout.

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juvenile court's findings." *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, ¶ 21, 119 P.3d 1034, 1038 (App. 2005).

¶3 Because the Department of Child Safety (DCS) had previously established the conditions creating the dependency of J.T.'s older brother, D.T., born in May 2014, and because the juvenile court found D.T.'s history relevant to the risk of harm presented to J.T., we consider those factors on appeal. *In re Pima Cty. Juv. Dependency Action No. 96290*, 162 Ariz. 601, 604, 785 P.2d 121, 124 (App. 1990); *see also Shella H. v. Dep't of Child Safety*, 239 Ariz. 47, ¶ 16, 366 P.3d 106, 110 (App. 2016). D.T., who was the subject of the original dependency petition in this matter, was diagnosed with failure to thrive when he was one month old and with "severe malnutrition" for several months thereafter; he also suffered an "[a]sphyxiation event" while under the parents' care when he was two months old. The parents told one of D.T.'s in-home providers "not to show up unannounced again or [she would] be met with a gun." When D.T. was four months old, Michele refused to consent to his hospitalization to diagnose the cause of his failure to thrive, after which DCS removed him from her care. During a visit to the pediatrician's office around the same time, Michele's behavior was so erratic that law enforcement was called to calm her down.

¶4 DCS filed a supplemental dependency petition in August 2015, one week after J.T. was born. At a temporary custody hearing in August 2015, the DCS case manager, Jennifer Melendez, explained that the hospital had called the DCS hotline a few days after J.T. was born to report the parents were "getting agitated" and hospital personnel were worried the parents' conduct would "escalate." Evidence was also presented that Michele had told hospital personnel that she had custody of D.T., when in fact he had been placed in a foster home. Melendez further testified that the hospital had reported that J.T.'s infant safety monitor had been removed from his umbilical cord and that "the entire umbilical cord was off"; the parents reported that J.T. had removed the monitor, which hospital personnel stated was impossible. Based on the inconsistent stories regarding the monitor and umbilical cord, and ongoing concerns about the parents' ability to parent D.T., DCS

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determined J.T. was at risk if he left the hospital with the parents, and thus placed him in a licensed foster home with D.T.

¶5 At the January 2016 contested dependency hearing for J.T., Melendez testified that Michele's treating psychologist, Dr. Lilla DeLuca, had suggested Melendez request a police escort when picking J.T. up from the hospital based on the parents' conduct when D.T. had been removed from their care. Melendez also testified that Michele had diluted J.T.'s formula beyond the directed amount. There was also evidence that, during a supervised visit shortly after J.T. was born, Michele "threw the baby formula [the foster parents had sent] across the floor and said that she would not feed that to [J.T.], it is poison." Importantly, Melendez testified that not only did DCS have concerns regarding the parents' "parenting abilities" when the hospital had contacted the DCS hotline shortly after J.T. was born, but that those concerns had continued since J.T. was taken into custody, even after the parents had been provided with services.

¶6 The children's pediatrician, Dr. Eric Langerman, testified there was no "potential organic cause" to explain D.T.'s failure to thrive. Dr. Jill Plevell, who conducted a psychological evaluation of Michele in October 2014, testified that Michele was "rigid and inflexible," would "put [her] own needs before those of the child," and would not be "sensitive to the cues of the child." And although Plevell opined that "people can change," she added that "the best predictor of future behavior is past behavior." Similarly, the parent aide who had been working with the family testified that Michele was not responsive to suggestions on caring for the children, specifically those associated with feeding issues, and testified that Michele's diluting the formula was neglectful or abusive conduct. And, when asked if there were any parenting issues Michele needed to work on, the father responded, "None that come to mind," and added that although the police had been called three times regarding the parents' behavior, there was no basis for those calls.

¶7 At a permanency planning hearing for D.T., held on the day after J.T.'s dependency adjudication hearing had ended, Michele

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testified that she had fed D.T. in accordance with the doctor's instructions, that nothing she did while D.T. was in her care had caused him to be undernourished, that she would not have done anything differently, and that when D.T. was removed from her care in September 2014, he was healthy, although "a little underweight."

¶8 In its February 2016 order adjudicating J.T. dependent, the juvenile court found that Michele's "mental condition affects her ability to effectively care for [J.T.] to the point of causing harm," and noted that D.T. "was wasting away before [Michele's] eyes, yet she refused to recognize his malnourished condition as evidenced by her statement that everyone just wanted him to look like a 'blimp.'" The court further found that Michele had refused to feed D.T. formula, claiming it was too costly, had declined the pediatrician's offer of free formula, and had referred to formula as "poison," causing the court "grave concern" regarding J.T.'s "source of nutrition."

¶9 On appeal, Michele argues insufficient evidence supports the juvenile court's order adjudicating J.T. dependent; several of the court's findings were not supported by the record and were based on hearsay,³ and, the court made findings regarding her mental health based on events that had occurred in 2014 and 2015, while ignoring the remedial efforts she had made since that time.⁴

³Michele did not raise a hearsay objection to the cited portion of the testimony at the adjudication hearing, nor does she address on appeal her failure to raise this argument below. *See Starkins v. Bateman*, 150 Ariz. 537, 544, 724 P.2d 1206, 1213 (App. 1986) ("[I]f hearsay evidence is admitted without objection it becomes competent evidence admissible for all purposes."). Moreover, as DCS points out in its answering brief, Michele has failed to develop this argument on appeal, and thus has waived it. *Melissa W. v. Dep't of Child Safety*, 238 Ariz. 115, ¶ 9, 357 P.3d 150, 152-53 (App. 2015); *see also* Ariz. R. Civ. App. P. 13(a)(7)(A) (appellate brief must contain supporting legal authority); Ariz. R. P. Juv. Ct. 106(A) (Rule 13, Ariz. R. Civ. App. P., applicable to juvenile appeals).

⁴ Although Michele presented a different issue in the "Argument" portion of her opening brief, that issue does not apply

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We will not reverse a juvenile court's order for insufficient evidence unless, as a matter of law, no reasonable fact-finder could have found the evidence satisfied the applicable burden of proof. *See Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009). The juvenile court, as the trier of fact, "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004). We do not reweigh the evidence on review. *Id.* ¶ 14.

¶10 To the extent Michele asserts the juvenile court relied "almost entirely" on events that occurred with D.T., rather than with J.T., the court correctly explained why the parents' history with D.T. "and the reasons he came into DCS care and custody" were relevant to J.T., as we noted earlier in this decision. The court also found that Michele "continued to deflect blame" for D.T.'s diagnosis of "severe malnutrition" and that the parents continued "to deny their past abuse of [D.T.]," concluding there was no reason to believe the parents' "behaviors and beliefs will change with [J.T.]." The court thus determined it "need not wait until a specific injury has been inflicted on [J.T.] to make a finding of dependency," and concluded that "[t]o hold otherwise would permit an abusive or neglectful parent to defeat an allegation of dependency by the mere passage of time." *Pima Cty. No. 96290*, 162 Ariz. at 604, 785 P.2d at 124; *see also Shella H.*, 239 Ariz. 47, ¶ 16, 366 P.3d at 110.

to this case and she does not develop it in the body of her opening brief. *See Ariz. R. Civ. App. P. 13(a)*. And, to the extent Michele maintains "[t]he factual basis provided by the [juvenile] court did not include anything alleged to in the Dependency Petition," because Michele's own arguments and the record itself contradict this statement, we do not address it. Additionally, to the extent Michele argues the juvenile court "denied [her] ability to call her therapist," Dr. DeLuca, to testify about her recent remedial efforts, she does not develop this argument on appeal or direct this court to the portions of the record regarding the disclosure of Dr. DeLuca as a witness.

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¶11 The juvenile court's ruling includes its well-reasoned analysis of the evidence received, and its findings are supported by the record. We find no abuse of discretion. Accordingly, we affirm the juvenile court's order adjudicating J.T. dependent as to Michele.