

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

DANESE H.,
Appellant,

v.

ARIZONA DEPARTMENT OF ECONOMIC SECURITY, P.H., AND M.H.,
Appellees.

No. 2 CA-JV 2013-0136
Filed May 14, 2014

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

NOT FOR PUBLICATION

See Ariz. R. Civ. App. P. 28(c); Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Pima County
No. 15013400
The Honorable K.C. Stanford, Judge

AFFIRMED

COUNSEL

Sarah Michèle Martin, Tucson
Counsel for Appellant Danese H.

Thomas C. Horne, Arizona Attorney General
By Laura J. Huff, Assistant Attorney General, Tucson
Counsel for Appellee Arizona Department of Economic Security

MEMORANDUM DECISION

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

H O W A R D, Chief Judge:

¶1 Danese H. appeals from the juvenile court’s order finding her thirteen-year-old daughter P.H., her seven-year-old daughter M.H., and her eleven-year-old son R.H., are dependent children, as defined in A.R.S. § 8-201(13).¹ She argues there was insufficient evidence to support the court’s ruling and maintains her due process rights were violated because of delays in completing the adjudication hearing. For the following reasons, we affirm the court’s dependency order.

Factual and Procedural Background

¶2 Danese is the adoptive mother of the children, and also their maternal grandmother.² Child Protective Services (CPS), a division of the Arizona Department of Economic Security (ADES), removed the children from Danese’s home on January 18, 2013, based on reports that Danese had punished R. by slapping him and requiring him to hold cayenne pepper in his nose and mouth until she allowed him to spit or blow his nose, and permitted R. to physically discipline M. The reports further alleged Danese had locked M. in a dark closet for fifteen to twenty minutes for reporting this at school and had failed to protect both daughters from R.’s inappropriate sexual conduct with them. On January 24, ADES filed a dependency petition alleging the children were dependent because

¹Because R.H. has not joined in this appeal, but opposed the adjudication of dependency below, he does not appear in the caption.

²She adopted the children after her daughter’s parental rights to them were terminated.

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Danese was “unable to parent due to physical abuse,” “failing to protect [P.] and [M.] from . . . sexual abuse by R.,” and “neglect.” The petition specifically cited Danese’s alleged practice of “hit[ting] the children with her hand, a belt, a wooden spoon, a rope, and frequently, a large metal serving spoon” and her alleged failure to protect P. and M. from R.’s sexual conduct.

¶3 Danese denied the allegations and, on March 18, following an unsuccessful facilitated settlement conference, the juvenile court found good cause to extend the ninety-day time limit for the dependency adjudication by thirty days, to allow for additional discovery. The court also scheduled a contested dependency hearing to be held over four days, beginning on April 16 and ending on May 16. The hearing eventually spanned nine days, and was concluded on September 27, 2013.

¶4 In an under advisement ruling, the juvenile court found ADES had “established the grounds of the dependency petition by a preponderance of the evidence.” As evidentiary support for its ruling, the court cited forensic interviews with P. and M., in which they had separately reported the punishments described in the dependency petition, R.’s sexual conduct with each of them, and Danese’s presence in the same room with P. and R. while they were engaged in inappropriate sexual contact. The court also noted that, at a Team Decision Making meeting in January 2013, Danese had admitted learning of the sexual contact between R. and P., but characterized the contacts as experimentation instigated by P. In addition, the court cited a June 2013 report in which the Foster Care Review Board found Danese denied physical abuse of the children, minimized the girls’ reports of sexual contacts with R., and “blame[d] P. for everything related to the removal.”

¶5 Relying on *In re Pima County Dependency Action No. 93511*, 154 Ariz. 543, 744 P.2d 455 (App. 1987), and *In re Javier G.*, 40 Cal. Rptr. 3d 383 (Ct. App. 2006), the juvenile court concluded a dependency may be based on “excessive or unusual discipline” or “sexual abuse between siblings.” It found P., R., and M. dependent, pursuant to A.R.S. § 8-201(13)(a)(i) and (iii), “on the grounds of physical abuse and failure to protect,” based on Danese’s “excessive

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or unusual discipline methods” and her failure to “properly supervise” the children to prevent the sexual conduct between them.

¶6 On appeal, Danese argues the juvenile court’s adjudication of dependency was not supported by sufficient evidence. She also argues delays in completing the dependency adjudication, and the absence of written findings of “extraordinary circumstances” for some of the extensions of time required, violated Arizona law and her right to due process.

Discussion

¶7 “On review of an adjudication of dependency, we view the evidence in the light most favorable to sustaining the juvenile court’s findings. We generally will not disturb a dependency adjudication unless no reasonable evidence supports it.” *Willie G. v. Ariz. Dep’t of Econ. Sec.*, 211 Ariz. 231, ¶ 21, 119 P.3d 1034, 1038 (App. 2005) (citations omitted). But we review de novo legal issues that require the juvenile court to interpret and apply a statute or procedural rule. *Bobby G. v. Ariz. Dep’t of Econ. Sec.*, 219 Ariz. 506, ¶ 1, 200 P.3d 1003, 1004 (App. 2008); *Manuel M. v. Ariz. Dep’t of Econ. Sec.*, 218 Ariz. 205, ¶ 18, 181 P.3d 1126, 1131 (App. 2008).

Sufficiency of the Evidence

¶8 The statutory definition of a dependent child includes one “[i]n need of proper and effective parental care and control . . . who has no parent . . . willing to exercise or capable of exercising such care and control,” § 8-201(13)(a)(i), as well as one whose “home is unfit by reason of abuse, neglect, cruelty or depravity by a parent,” § 8-201(13)(a)(iii).

¶9 Danese does not dispute that the evidence cited by the juvenile court was presented at the hearing and properly considered by the court. To a large extent, she challenges the court’s resolution of disputed facts, citing her own testimony and that of the witnesses she called to testify. But 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*

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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 Danese also raises questions that might be considered mixed questions of fact and law. She asserts, for example, that the dependency adjudication “must be reversed” because “there is not one single allegation that [her] practice of occasional spanking has caused any damage or physical harm,” and, therefore, “there can be no finding of child abuse as a matter of law.” She also notes that A.R.S. § 13-403(1) provides, as a justification defense to criminal charges, that “[a] parent . . . entrusted with the care and supervision of a minor . . . may use reasonable and appropriate physical force upon the minor . . . to the extent reasonably necessary and appropriate to maintain discipline.” Citing *State v. Davis*, 148 Ariz. 391, 714 P.2d 884 (App. 1986), she contends, “Spanking is not abuse, even spanking with a spoon, unless serious injury results.”

¶11 She maintains, without citation to legal authority, that “as the physical examinations of the children revealed no injuries, none of the spankings rose to the level of abuse.” And, “[r]egarding the allegation that [she] failed to protect the children from sexual abuse,” Danese cites the hearing testimony of Dr. Paul Simpson, a psychologist who stated he “would not characterize” the conduct between the children “as sexual abuse,” but as “sexual experimentation between siblings.”

¶12 We cannot agree with Danese’s characterizations of the evidence or her statements of applicable law. “Abuse,” as defined in § 8-201(2), includes “the infliction or allowing of physical injury.” The definition does not require proof of a “serious physical injury,” which is a separately defined term, *see* § 8-201(30), and nothing in *Davis* suggests otherwise. “Physical injury” is not defined in § 8-201, but for the purpose of criminal child abuse, physical injury “means the impairment of physical condition and includes,” for example, “any skin bruising.” A.R.S. § 13-3623(F)(4); *see also State v. Albrecht*, 158 Ariz. 341, 344, 762 P.2d 628, 631 (App. 1988) (evidence of “extensive bruising” on four-year-old’s buttocks sufficient to establish child abuse beyond a reasonable doubt).

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¶13 The definition of abuse in § 8-201(2)(a) also includes “[i]nfllicting or allowing sexual abuse pursuant to [A.R.S.] § 13-1404, sexual conduct with a minor pursuant to [A.R.S.] § 13-1405, . . . [or] molestation of a child pursuant to [A.R.S.] § 13-1410.”³ As Dr. Simpson seemed to recognize during his testimony, his characterization of the children’s conduct, without reference to the statutes listed, does not determine the issue of whether Danese failed to protect the children from prohibited sexual conduct.⁴

¶14 Here, during forensic interviews, P. said that Danese had punished all three children by spanking them with a belt, a wooden spoon, a rope, and a metal spoon, and M. reported that Danese had spanked her with a wooden spoon until it broke into pieces and with a metal spoon until her “butt was ‘purple.’” P. described having had sexual intercourse with R., and M. reported, in some detail, how R. had put his finger in her “privates” while the two were riding in a car.

¶15 The nurse who conducted medical forensic examinations of the girls explained that the purpose of a medical

³Section 13-1405(A) provides, “A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.” “A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child who is under fifteen years of age.” § 13-1410(A). “‘Sexual contact’ means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact.” A.R.S. § 13-1401(2).

⁴Before answering whether he believed the children’s conduct was “consistent with some . . . sort [of] sexual abuse,” Dr. Simpson addressed the court, stating, “Your Honor, my caution would – it’s not my place to – to make an opinion, that’s solely the purview of the trier of fact.” The judge told him he could answer the question, adding, “I will give it what weight I think is appropriate.”

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forensic exam “is for overall wellness checking to make sure the child is physically okay after what they’ve disclosed [had] happened to them.” She detailed the injuries she observed in her examinations of P. and M., including scars, scrapes, and bruises. When she asked P. about six scars found during the examination, P. identified two of them as having resulted from Danese hitting her with a metal spoon and another that she said “probably” had been caused in the same way. M. had been unable to identify the origin of several small bruises, scrapes, and scars, but the nurse testified younger children commonly respond “I don’t know” – as M. had – when asked about signs of injury.⁵

¶16 M. did tell the nurse that she didn’t have any present complaints about “her privates,” but that “her hiney” had been “red and it hurt to pee with what [R.] did with his finger.” The nurse found that neither girl was suffering from gynecological injury at the time of the examination, but she also explained that vaginal penetration does not necessarily result in injury and that any such injuries would generally heal more quickly than injuries to other parts of the body.

¶17 We conclude the juvenile court’s findings and its adjudication of dependency were supported by reasonable evidence, including the evidence specifically cited in the court’s under-advisement ruling. We also conclude the court’s rulings were consistent with applicable law.

⁵Danese has failed to identify any authority supporting her suggestion that a physical injury caused by abuse must be proven by medical testimony. In addition, contrary to Danese’s assertions, the nurse did testify about the “injuries” she observed during her examinations, and nowhere in her testimony did she “specifically state[] that there was no evidence of physical abuse to either of the girls.”

Delay in Completion of the Adjudication Hearing

¶18 Danese next argues the “extreme length of the dependency proceedings in and of itself and the failure of the court to dismiss the case or order in-home intervention because of that extreme length constitute violations of Arizona law and [her] constitutional Due Process rights.” But Danese did not raise this issue or move for dismissal or change of placement on this ground in the juvenile court, and ADES argues she has waived the issue on appeal. We agree.

¶19 There is no question that the dependency adjudication hearing in this case was not completed until well after the presumptive ninety-day time limits set forth in A.R.S. § 8-842(C)⁶ and Rule 55(B), Ariz. R. P. Juv. Ct.⁷ The juvenile court first extended

⁶That section provides:

The court may continue the initial dependency hearing for good cause, but, unless the court has ordered in-home intervention, the dependency adjudication hearing shall be completed within ninety days after service of the dependency petition. The time limit for completing the dependency adjudication hearing may be extended for up to thirty days if the court finds good cause or in extraordinary cases as prescribed by the supreme court by rule.

§ 8-842(C).

⁷That rule provides:

The dependency adjudication hearing shall be completed within ninety (90) days of service of the dependency petition on the parent The court may continue a dependency adjudication hearing beyond the time prescribed by law only upon a

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those time limits by thirty days on March 18, 2013, at the request of the parties and for good cause shown, *see* § 8-842(C), and scheduled adjudication hearing dates for completion within 120 days after service of the dependency petition.⁸ The hearing was scheduled to commence on April 16, 2013.

¶20 On April 10, Danese filed a “supplemental pre-trial statement” listing eight additional witnesses and additional exhibits. ADES responded by filing its own supplement, adding two witnesses not previously disclosed. With the exception of a witness whose testimony was scheduled for May 16, ADES concluded its case on May 7, but Danese’s counsel told the juvenile court he was not prepared to begin his case that day. He also said he would need “some more time” to present evidence and asked the court to schedule three to four additional hours for the dependency hearing.

¶21 The juvenile court attempted to schedule the additional time Danese requested before May 16, but Danese’s counsel was not available on the dates suggested and asked the court to schedule a date “past the 16th.” After considering scheduling conflicts

finding of extraordinary circumstances. Extraordinary circumstances include but are not limited to acts or omissions that are unforeseen or unavoidable. Any party requesting a continuance shall file a motion for extension of time, setting forth the reasons why extraordinary circumstances exist. The motion shall be filed within five (5) days of the discovery that extraordinary circumstances exist. The court’s finding of extraordinary circumstances shall be in writing and shall set forth the factual basis for the continuance.

Ariz. R. P. Juv. Ct. 55(B).

⁸Danese was served with the dependency petition on January 29, 2013.

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expressed by counsel for various parties, the court scheduled the hearing for an additional three and a half hours on June 25. ADES pointed out that June 25 was beyond the May 29 extended deadline for completion of the adjudication hearing, and it asked the court to find extraordinary circumstances warranted the continuance. *See* Ariz. R. P. Juv. Ct. 55(B). But Danese’s counsel stated, “My client can’t agree to that.” Noting that “stretching into June to find that extra time for mom is the problem,” the court again offered available dates in May, and Danese’s counsel identified his conflicts for each of the suggested dates. The court then found extraordinary circumstances to continue the hearing beyond May 29, “given the calendars of the parties.”

¶22 On May 16, ADES reported it had been unable to subpoena its last witness, and Danese was not prepared to present evidence on that date. Danese agreed the juvenile court should schedule additional hearing time “just in case” it was needed. The first available date all counsel could agree upon was July 26. No one asked the juvenile court to find the continuance was required by extraordinary circumstances, and it did not do so.

¶23 On June 25, the state rested without presenting additional evidence, and Danese continued presenting her case. Danese was not present at the hearing on July 26, and the juvenile court excused her absence at counsel’s request. Her attorney told the court, “[W]e were not going to be able to finish today with [Danese]’s testimony. I’m going to ask for some time to put on my final witness, which would be [Danese].” It appears less than half the time allotted for that day’s hearing was spent in completing the testimony of another of Danese’s witnesses, with the rest devoted to other matters.

¶24 The juvenile court again had difficulty coordinating the calendars of the four attorneys appearing in the case; it eventually scheduled the additional time Danese had requested for September 20. Danese—who had orally requested the continuance—neither objected to the continuance nor asked the court to find it was justified by exceptional circumstances. At the close of evidence on

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September 20, the court continued the case until September 27 for closing arguments.

¶25 Danese now contends the juvenile court did not find extraordinary circumstances to continue the hearing beyond June 25, as required by Rule 55(B), and never made the written findings contemplated by that rule. She appears to argue the court committed reversible error because it did not, *sua sponte*, dismiss the dependency or order the children placed with Danese subject to “in-home intervention” rather than continue the hearing beyond 120 days. She contends she was prejudiced by the delay because she “was deprived of the right to care for and raise her children” during the adjudication process.

¶26 As Danese acknowledges, this court has held the provisions in § 8-842(C) and Rule 55(B) are directory, rather than mandatory, and their violation thus “does not automatically render void all further proceedings.” *Joshua J. v. Ariz. Dep’t of Econ. Sec.*, 230 Ariz. 417, ¶ 20, 286 P.3d 166, 172 (App. 2012); *see also Kimberly D.-D. v. Ariz. Dep’t of Econ. Sec.*, 234 Ariz. 207, ¶¶ 7-8, 320 P.3d 823, 825 (App. 2013) (applying reasoning in *Joshua J.* to hearing completed, after finding of extraordinary circumstances, 142 days after service of petition). In *Joshua J.*, we stated that, “absent waiver of the parties, the juvenile court is obligated to adhere to the deadlines found within our dependency statutes.” 230 Ariz. 417, ¶ 21, 286 P.3d at 172. But we explained a failure to meet those deadlines is “procedural error” that does not require reversal of a dependency adjudication in the absence of resulting prejudice, such as a showing “that the outcome of the dependency proceeding [probably] would have been different if there had been no delay.” *Id.* ¶¶ 21-22, 24-25.

¶27 Although we agree with ADES that Danese has failed to demonstrate the kind of prejudice contemplated in *Joshua J.*, *see id.*, we need not reach the issue of prejudice here, because, unlike the parents in *Joshua J.* and *Kimberly D.-D.*, Danese did not raise the issue in the trial court or preserve it for review. *See Kimberly D.-D.*, 234 Ariz. 207, ¶ 1, 320 P.3d at 823 (appeal from denial of motion to dismiss based on violation of § 8-842(C)); *Joshua J.*, 230 Ariz. 417, ¶ 6, 286 P.3d at 169-70 (trial court “noted and preserved for the record”

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parent's objection, on first day of hearing, based on "'right to have an adjudication hearing . . . completed within 90 days'" of service). Consequently, she has forfeited review of the issue on appeal.

¶28 This court generally does not consider objections raised for the first time on appeal. *Shawanee S. v. Ariz. Dep't of Econ. Sec.*, 234 Ariz. 174, ¶ 16, 319 P.3d 236, 241 (App. 2014) (parent who fails to object to preliminary findings of ADES's "reasonable [reunification] efforts" precluded by waiver "from challenging that finding on appeal"); *Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, n.3, 178 P.3d 511, 516 n.3 (App. 2008) (declining to address procedural defects not raised in juvenile court); *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 21, 153 P.3d 1074, 1081 (App. 2007) (failure to object to lack of detailed findings in juvenile court waived issue on appeal). And this is not a case in which "waiver of the parties" is "absent." *Joshua J.*, 230 Ariz. 417, ¶ 21, 286 P.3d at 172; *cf. In re Eddie O.*, 227 Ariz. 99, n.2, 253 P.3d 296, 300 n.2 (App. 2011) (juvenile forfeited any right to timely restoration to competence by conduct).

¶29 Here, most of the delays in completing the hearing were occasioned by continuances Danese requested after expanding her witness list—from four to twelve identified witnesses—in an untimely "supplemental" pretrial statement. And, as addressed above, on several occasions Danese requested extensions of the hearing after failing to present evidence to fill the time already allotted by the court. Based on our review of the record, Danese has clearly waived the right to raise this issue on appeal.

Disposition

¶30 For the foregoing reasons, we affirm the juvenile court's order finding P., R., and M. dependent as to Danese.