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ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-21-584

SHEILA USSERY; GERALDO QUINTONE USSERY APPELLANTS V. ARKANSAS DEPARTMENT OF HUMAN SERVICES AND MINOR CHILDREN APPELLEES	**Opinion Delivered** May 25, 2022 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. 72JV-21-446] HONORABLE DIANE WARREN, JUDGE AFFIRMED IN PART; REVERSED IN PART

ROBERT J. GLADWIN, Judge

Sheila Ussery and Geraldo Quintone Ussery appeal the Washington County Circuit Court's adjudication order finding their children dependent-neglected on the basis of the same facts as alleged in two separate cases.[1] On appeal, Sheila argues that the circuit court erred by forcing her to appear pro se during the adjudication hearing. Quintone argues that the circuit court made evidentiary errors and that the court's finding that appellee Arkansas Department of Human Services (DHS) had made reasonable efforts to prevent removal was

[1]Sheila's six biological children are involved in the instant case (CV-21-584): Sheila and Quintone are the biological parents of two children, HU (August 30, 2020) and SU (July 8, 2018); and Sheila and Benjamin Williams are the biological parents of four children, SW3 (June 13, 2014), SW2 (April 7, 2009), BW (August 26, 2006), and SW1 (August 26, 2004). Sheila's stepchildren are named in a separate case (CV-21-585) concerning AU (January 22, 2014) and IU (January 17, 2013), whose biological parents are Tiffany Strickland and Quintone, also being handed down today.

in error. Both parents argue that the circuit court erred by finding their children are dependent-neglected and were subjected to aggravated circumstances. We affirm in part and reverse in part.

I. *Petition for Dependency-Neglect*

On June 14, 2021, DHS filed two separate petitions alleging that the parties' children are dependent-neglected and seeking emergency custody and an order of protection.[2] DHS alleged that the children were at substantial risk of serious harm as a result of neglect and parental unfitness and that they had been subjected to aggravated circumstances due to chronic abuse and subjection to extreme or repeated cruelty. The attached affidavits state that on June 9, a family service worker (FSW) was assigned "a priority two for abuse/kicking a child." Sheila and Quintone were then interviewed at their home, and both denied the allegations. IU told the FSW that he felt safe in his home and got plenty to eat. Later the same day, Fayetteville Police Detective Scott O'Dell sent DHS a video showing Sheila kicking and hitting IU. Thereafter, the children were interviewed at the Children's Safety Center.

The affidavits reflect that an FSW observed the children's forensic interviews. During his interview, BW said that Quintone had hit and threatened him, and he reported that when he was eleven, Quintone "dragged [him] up the stairs and beat [him] with a thick stick" and that his mother, Sheila, knew about it. As a result, BW was bruised, and his leg

[2]DHS filed a petition in 72JV-21-446 against Quintone and Sheila, as parents of HU and SU and against "Benjermin" Williams and Sheila as parents of SW1, SW2, BW, and SW3. It also filed a petition in 72JV-21-447 against Quintone and Tiffany Strickland, as parents of AU and IU. *See Ussery v. Ark. Dep't of Hum. Servs.*, 2022 Ark. App. 251. The alleged facts in the attached affidavits are the same.

bled. He said that Sheila and Quintone "knee" IU "in the balls" as punishment. He said, "I don't know why [IU] gets punished the most. Everyone lines up until someone confesses. They will usually get whooped on their feet or they put their hands on the stair rail and get whooped with a backscratcher or a fly swatter on the butt or feet." He said, "Usually Mom gets [IU] and Quintone gets me, but my dad knows about it and was supposed to talk to Quintone because my dad doesn't like it." He said that Sheila used to hit their hands with a fly swatter, "but that doesn't hurt enough, so she moved to a stick at feet, legs, stomach, and butt" and that the "little ones" get "arms and up." He said that he has lost respect for Sheila because of her smoking and drinking and that she drinks in her room and has boxes of alcohol on her balcony and in her "mini fridge." He stated that Sheila is violent, that one month ago, IU was kicked in the middle of his chest and flew back into the wall, and that IU was "kneed in the balls" yesterday.

The FSW observed that in her interview, SW3 appeared to have been coached and that she changed some statements. For example, SW3 said she recalled IU getting hit the day before, and she quickly recanted her statement by saying it may have happened last year. She said that when they are punished, they get hit with a fork, a spoon, a spatula, a sugar spoon, or a sugar fork and that her parents do not hit that hard. When asked why she would not talk to a school counselor or a teacher if she felt unsafe, she stated that she did not know the interviewer would ask that question. In her forensic interview, SW2 said that her stepfather, Quintone, paddled her with a back scratcher and added that "it hurts but not enough to leave a mark."

When interviewed, IU said that for punishment, he is spanked with a back scratcher by both Sheila and Quintone. When asked if the spankings cause marks, IU said, "[Sheila] is not the only one that does, my dad does too." IU stated that once after being spanked by Sheila, "I used to have bruises on my bottom, it was a blister." He said it hurt to sit, that he did not tell his friends about it, and that it hurt to go down the slide at school so he went down on his front side so none of his friends would know his bottom hurt. He said that Quintone spanked him on the bottom of his feet with a back scratcher and that it caused a red mark, and his feet hurt for longer than thirty minutes. IU said that Sheila had told him not to "tell something really bad" during his interview.

Sheila was arrested and charged with second-degree endangering the welfare of a minor. DHS placed a seventy-two-hour hold on the children, and SW1, SW2, BW, and SW3 were placed with their father, Benjamin Williams, who has shared joint custody with Sheila since their divorce on March 30, 2017. The other four children were held in DHS custody, and ex parte orders of emergency custody were filed in both cases.[3] The ex parte orders also reflect that Sheila and Quintone were appointed counsel.

On June 17, a probable-cause hearing was held via Zoom. The circuit court found that probable cause still existed and that for their protection, the children should continue in DHS custody. The court found that DHS had prior contact with the family in October 2005 and had made services available to the family before the children's removal. The court found that the services did not prevent removal because the family declined services then

[3]Before the adjudication hearing began, Cassandra Harper introduced herself as a participant in the hearing and stated that she is the paternal grandmother of the Ussery children and that they had been placed with her.

moved out of the area; further, Sheila was arrested on charges of second-degree endangering the welfare of a minor. The court deemed that DHS had made reasonable efforts to prevent the need for removing the children.

II. *Adjudication Hearing*

An adjudication hearing was held via Zoom on August 23. In its opening remarks, the circuit court stated that Sheila's attorney, Lauren Ruff, was not present, "but I suspect by the time we finish taking roll, she'll be joining us." The circuit court asked Sheila if she had engaged Lauren Ruff to represent her. Sheila responded, "Yes, Your Honor." The circuit court said, "Okay. And she's occupied in another court right now, so we're just going to give her a minute to get here." After all the parties and their attorneys were identified and some preliminary matters were addressed, the circuit court stated, "Now, we still don't have Ms. Ruff. Well, we'll give her a little bit of time to connect." After a discussion regarding exhibits and other clarifications were made, the circuit court took a ten-minute recess. Thereafter, the circuit court stated,

> All right. Ladies and gentlemen, it is now 3:52 and this case was set for 3:00 o'clock, and you all have been waiting patiently and we are going to proceed unless anyone has heard anything further from Ms. Ruff. Anyone heard from her?

When no audible response was given, the circuit court instructed DHS's attorney to proceed.

Emily Black testified that she is a registered nurse with specialized training in sexual-assault exams. On June 9, she conducted a physical examination of IU, and she observed three injuries: a purple contusion, which is a bruise, on his left upper buttock, with no tenderness; a two-and-a-half-inch by two-and-a-half-inch blue-to-purple contusion, round

in shape, to his left outer thigh, with a darker purple linear color in the center of the contusion, with no tenderness; and a one inch by one inch purple contusion to his left anterior upper thigh, round in shape, with no tenderness. She said that the bruising was "not really" consistent with Mongolian spots, which are often confused with bruises. She said that Mongolian spots are usually present at birth, similar to a birth mark, and they usually tend to fade by ages two to five. She said that Mongolian spots are usually uniform in shape and color and that bruising tends to change color as it heals. She said that "yes, sometimes they could be confused, that is not what I visualized on June 9."

The photographs taken of IU by Nurse Black on June 9 were offered as exhibit 1, and the following colloquy occurred:

THE COURT: And Ms. Ussery, your attorney is not here, but do you have any objection?

SHEILA: I think my attorney is supposed to be here, but I don't know.

THE COURT: Yes, your attorney is supposed to be here. I don't know why she's not. We waited for her for fifty minutes.

When no other party had an objection to the introduction of the photographs, they were admitted.

At the conclusion of Nurse Black's cross-examination by Quintone's attorney, the court stated:

> And Ms. Ussery, Ms. Ruff is still not here. Who has Ms. Ruff's phone number? Ms. Barnes ([court personnel]), would you please try to find Ms. Ruff and see what the problem is, why she's not here?

When Quintone's counsel offered to send Ms. Ruff a text, the circuit court said, "Yes, please. See why she's not here." The court reporter offered Ms. Ruff's email address and

phone number, and the circuit court said, "Ms. Barnes, and will you please call that number? Did you get that?" Ms. Barnes agreed to call Ms. Ruff's cell number. Continuing, the circuit court said, "All right. Next witness, please, [DHS attorney]." The circuit court then denied DHS's request for Nurse Black to be excused "because I am hopeful Ms. Ruff will come forward, and she may have questions."

Fayetteville Police Detective Jesse Vermillion testified that he had interviewed Sheila and had shown her the videos made by one of her daughters. Sheila admitted to him that those videos depicted her and her son, IU, and that she was shown disciplining him. She said that she typically spanks her kids with five or six swats, that she uses a paddle or a back scratcher, and in the video, she used a long-handled scrub brush. She told him that she had kicked IU a month ago because he had kicked his brother. She said that she sometimes stands IU in the corner or makes him write sentences. She initially told him that she had nudged IU with her knee, then she later admitted that she struck IU with her knee, and she demonstrated how she had done it. Detective Vermillion said that he had observed IU's forensic interview and that IU did not make any disclosures about the incident that occurred on June 8. Detective Vermillion said that IU was asked about discipline in the home, and IU stated that "he had gotten bruises and blisters on his buttocks before—"

At that point, Quintone's counsel made a hearsay objection. The following colloquy occurred:

THE COURT:	Well, he's already said that IU disclosed receiving bruises on his buttocks, so the objection is not timely.
QUINTONE'S COUNSEL:	Well, I tried to make it, but it wouldn't go through. You couldn't hear me.

. . . .

DHS COUNSEL: . . . It's not offered for the truth of the matter asserted. It doesn't meet the definition of hearsay; it's offered to show the effect that it had on Detective Vermillion in carrying on his investigation and the effects on these children.

The court overruled the objection. DHS asked Detective Vermillion what IU had disclosed during his interview at the Children's Safety Center.

QUINTONE'S COUNSEL: Your Honor, I'm going to object again, Your Honor. That's asking for hearsay.

THE COURT: [DHS Counsel]?

DHS COUNSEL: Your Honor, I'm going to stand on my response to [Quintone's Counsel's] objection. And I would further add that any statements made by the children who are juvenile respondents as required by the juvenile code would be against their interest.

It's not ideal for a child to waver [sic] in foster care, and we are here to adjudicate the children that have been dependent neglected, not the parents. So, any such finding would be against their interest.

QUINTONE'S COUNSEL: Your Honor, it's still hearsay. It's made adverse to the interest of the parents. They're not only co-parties, that's true, but under *Cochran* and *Wilson*, these statements are clearly excluded, as well as the prior statement which was answered that he described bruises. So that's my objection: *Cochran* and *Wilson* cases, Your Honor.

THE COURT: [Quintone's Counsel], with regard to your previous objection, the Court already overruled that objection because it was not offered for the truth of the matter asserted. So that has already been determined by the Court.

With regard . . . to this question, the Court finds that the testimony is that this statement was made during an interview at the Children's Safety Center, and the Court

finds that the interview conducted in that manner is conducted without any anticipation on the part of the child that that statement would be used in the course of litigation, and that the safeguards for credibility are such that the statement is admissible because the child disclosing it would have no reason to believe that the statement is being made against the interest of the parent or himself. So, I'm going to overrule your objection.

QUINTONE'S COUNSEL: Your Honor?

THE COURT: Yes, sir?

QUINTONE'S COUNSEL: It's still hearsay. I can't cross-examine that statement.

THE COURT: Well, sir, I've made my ruling, so that's the ruling.

QUINTONE'S COUNSEL: Okay. That's my objection.

Again, DHS asked Detective Vermillion what IU had disclosed during his forensic interview, and Detective Vermillion said that IU was asked about ways he is punished for wrongdoing. IU said that one time he was spanked, that it left bruising and blistering on his buttocks, and that it was painful and difficult for him to sit down at school. IU described having to go down the slide on his knees or his feet so it would not hurt his buttocks. He also talked about once being hit in his knees with a paddle, which left a mark.

QUINTONE'S COUNSEL: For the record, Your Honor, I'm objecting to all this testimony. I don't want to have to say it every time.

THE COURT: [Counsel], I believe that your objection was raised at the commencement of this question. The question was, "What did he disclose?" And all of these statements are part of what IU disclosed, so I think that your objection continues until Detective Vermillion finishes his response to this question.

Detective Vermillion was asked if he had observed SW3's forensic interview, and he said that he thought she had described being spanked with a flip-flop sandal or a back

scratcher. He also watched BW's interview and said that BW had described being disciplined by Quintone. BW said that he was hiding in the bathroom because he was afraid and that Quintone kicked in the door. Quintone then dragged BW upstairs and beat him with a big wooden stick. He said that BW described trying to hold onto things while being dragged upstairs. BW said that he got several bruises and scratches on his leg and that one injury bled. Detective Vermillion watched an interview with SW2, who said that IU had gotten a "whooping" the day before because he was not doing his chores and that he cried. Detective Vermillion said that he interviewed SW1, who said that while IU was being disciplined by Sheila on June 8, she was in the room taking videos. SW1 showed him three videos that she had recorded and said that Sheila was mad at IU for lying and kneed him in the groin fifteen times, although SW1 recorded only one instance. SW1 said that Sheila told four of the children to "come help or she was going to kill him and go to jail." When the children went into the room, Sheila made them bend over and show IU how to correctly assume the position for being spanked. She then made IU bend over and continued to strike him on his buttocks with the long-handled scrub brush.

When DHS moved to introduce the first video, the circuit court asked Sheila if she had any objection, and Sheila responded, "I guess no objection." Before the video was played for the court, Quintone's counsel asked, "Your Honor, may I ask if Ms. Ruff got on yet?" The circuit court said, "I don't believe she has, and I was about to ask Ms. Barnes if she had any luck in reaching her. Ms. Barnes, have you been able to reach her?" Ms. Barnes said that Ms. Ruff had called her ten minutes ago and said that she would join when she could. Thereafter, DHS was instructed to play the video.

When the second video was introduced, the circuit court asked Sheila if she had any objection, and she said, "No, ma'am." After the second video was played, the third video was introduced. When asked, Sheila said, "No objection." After the third video was played, Quintone's attorney was asked to begin cross-examination.

QUINTONE'S COUNSEL: Your Honor, just to make the record clear, Detective Vermillion testified as to some statements made by various children. I wanted to make sure my objection to the hearsay applied to all of those children's statements.

THE COURT: Well, [Counsel], your objection cannot be made retroactively, so—

QUINTONE'S COUNSEL: Well, you told me I didn't need to continue to object, but I just want to make sure that was the case. I was objecting to all the—all that testimony, is what I said earlier.

THE COURT: My response to you was that—the question for Detective Vermillion was, "What did IU disclose?" In the middle of Detective Vermillion reciting what IU had disclosed, you repeated your objection. And my response was that your objection would be noted for the entirety of Detective Vermillion's response to that question.

QUINTONE'S COUNSEL: But I think you—I think you said throughout his testimony, and I did object when he was talking about what SW3 said again, and then you said, you know, basically, I didn't need to keep repeating the objection. But I want to make sure I'm objecting to all that hearsay.

THE COURT: Well, your objection cannot be retroactive, so your objection that was made timely to the testimony about disclosures from IU is certainly noted.

QUINTONE'S COUNSEL: Well, it was—it's my position that my objection was made timely as to all the kids' statements that this officer testified to. Anyway, I'll attempt to cross-examine the hearsay, Your Honor.

On cross-examination, Detective Vermillion said that he had observed the picture of IU's bruises. He also saw some markings on the baby, HU, who was sent to Arkansas Children's Hospital for an examination. He said that he is not an expert in Mongolian spots or bruising, but he saw some discoloration that was consistent with bruising, and he did not see markings on any other children. He did not take into evidence a wooden stick or a back scratcher, but he found a shower brush. When Detective Vermillion was asked about SW3's recanted statements, the following colloquy occurred:

> QUINTONE'S COUNSEL: Okay. And she also—in her recanting her statement, she also added that it might have been last year and that their mother has not hit them since last year. That's in her-
>
> THE COURT: Objection. Objection? I'm objecting, [counsel]. [Counsel], you're now leading him, so—
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> QUINTONE'S COUNSEL: It's cross-examination, Your Honor. He viewed the video.
>
> THE COURT: [Counsel], I think the line of questioning that you were going on was trying to make the argument that the juvenile had recanted certain statements. And so it would be—if you are going to make that argument, it would be particularly helpful to the Court if you would identify the statement that the juvenile made and then ask whether the juvenile recanted that particular statement and take them one at a time.

On cross-examination by the attorney ad litem, Detective Vermillion stated that Sheila had been arrested for second-degree domestic battery and second-degree endangering the welfare of a minor.

The circuit court asked Sheila if she had any question for Detective Vermilion on cross-examination, and she said, "No, Your Honor." DHS asked to replay the third video

because it had not played in its entirety the first time. Sheila was again asked if she had any objection, and she said, "No, Your Honor."

After the video was replayed, the circuit court invited DHS to call its next witness. The court then noted that "Ms. Ruff is attempting to join." Quintone's counsel asked for a brief continuance so that he and Ms. Ruff could discuss things that had "gone on so far." The court made the following comments:

> Hello, Ms. Ruff. There you are. You've managed to connect. All right. So, Ms. Ruff, let me bring you up to speed with where we are. So, we waited until 4:50 and then we commenced the hearing. And we have -- as you may recall, we have the two companion cases that we're doing the adjudication for jointly, since it's the same factual affidavit that is the basis for both cases. And we have heard the testimony of Emily Black, who is the registered nurse who specializes in sexual assault exams. And she testified about her exam of I.U. And we also heard testimony from Detective Vermillion from the Fayetteville Police Department with regard to his contact with the family and the disclosures that were made in the interviews done by the Children's Safety Center with the various children. And we have finished the cross-examination of Detective Vermillion.
>
> So that's where we are. The exhibits that have been introduced—the exhibits that were introduced were some—a packet of 12 photographs that were taken by Nurse Black of I.U. And we have admitted three videos that were—the testimony was that it was Ms. Sheila Ussery hitting IU.
>
> So that's what we've done so far. Now, [Quintone's Counsel] is asking for a brief break for you to confer with him. Any objection to that, Counsel, [attorney ad litem]?

After objections were made, the court denied Quintone's attorney's request for time to confer with Ms. Ruff:

> All right. We're going to plow on. [Quintone's Counsel], if you need to say something to Ms. Ruff, I trust you can text her. Okay. We're ready to go. Next witness, [DHS Counsel]?

Fayetteville Police Detective Scott O'Dell testified that Quintone told him that he had not seen Sheila "knee" IU, that Quintone said that they discipline the kids and

sometimes spank them on the feet and butt with a paddle, and that Quintone seemed surprised by the video he was shown. On cross-examination, Detective O'Dell said that the oldest son may be involved with the Juvenile Detention Center and that any probation involving that child was not relevant to the case he was investigating.

Sheila's attorney was then given an opportunity to question Nurse Black, who testified that she sees Mongolian spots on newborns and that throughout her training, she has learned how to differentiate injuries. She said that photographs of the children "years apart" could be used, but she did not use photographs and did not access the children's medical records.

Thereafter, Abigail Herring testified that she is an FSW investigator and had conducted the child-maltreatment investigation in this case. She said that DHS found the investigation to be true for Quintone on failure to protect and inadequate supervision and true for Sheila on failure to protect, extreme or repeated abuse with or without physical injury, and inadequate supervision. On cross-examination, she said that the findings came from their review of the videos, BW's testimony, and the pictures of IU's bruises.

Quintone testified that he lives with Sheila in Morrilton, Arkansas, and he works as an over-the-road truck driver. He said that when the children were removed from his custody, he was gone to his annual military training. He said that he and Sheila were married on August 24, 2019, and that he plans to continue his marriage. On cross-examination, he said that he believes in corporal punishment. When asked if he and Sheila "frequently or sometimes spank the children," he responded, "That's correct, sir." He said that he does not think the corporal punishment he and Sheila inflict is child abuse, that it is not child

abuse when he spanks because he does not leave any lasting marks, and that he has never left any marks on the children. When asked if Sheila had left marks, he said, "No, sir, not to my knowledge." He said that he spanks the kids with his hand or sometimes with a bath brush, and he denied using a wooden stick or any other instrument. He said that he did not feel he was guilty of failing to protect his children because he was away from home, working to provide for his family, and serving the country. When he is around, Sheila never excessively disciplines the children, and he trusts Sheila with the children. He said that by agreement, the older two Williams children were living with their father, and the younger two were living with him and Sheila when all the children were taken into custody, and there had been six children living in their home. He said that he loves his children, that all four of his children have Mongolian spots, and that he and Sheila do not drink or smoke. He said that he had disciplined BW one time for fighting and that he had spanked BW upstairs. He said that he had a conversation with Benjamin Williams about their preference for their children to be disciplined by their "actual father."

On cross-examination by Sheila's attorney, Quintone testified that BW has a FINS officer at school and that he had tried to run away from home. He said that SW1 had been in trouble at home because she was discovered having sex in Quintone and Sheila's bed, and Sheila confronted SW1 about this. On cross-examination by DHS, Quintone agreed that the video depicts abuse.

Sheila testified that the eight children involved in this case are enrolled in public school. She said that BW has been seeing a counselor for a year or more and that before this incident, BW and SW1 each had been in trouble. BW had thrown a toy at his sister and

caused her nose to bleed. He also ran away three times and is involved in a juvenile court action. She said that BW sent her a Snapchat message "about lying about stuff," and she denied kneeing BW in the groin. She said that her younger four children have Mongolian spots and that IU has Mongolian spots—one on his side and another one, "but I couldn't quite tell you exactly the location." Two pictures of her children with Mongolian spots were introduced, but neither picture was of IU. She said that doctors and teachers have never brought any concerns to her about the children's Mongolian spots. She and Quintone does not smoke, drink, or use drugs, and police did not remove any alcohol or drugs from the home. On cross-examination, she said that BW messaged her on Snapchat that he had been lying about her "doing stuff" because he was mad at her for taking his phone away. She had taken BW's phone because he thought causing his sister's nose to bleed was funny and that BW's FINS officer told her to take it. She believes that BW was lying about Quintone beating him and other allegations in his forensic interview.

III. *Adjudication Order*

The circuit court found that the children are dependent-neglected.[4] The order states:

> 8. The Court finds [DHS] has been involved with the family since at least February 2020 and that the following services, as outlined in the affidavit, were provided to the family: home visits and counseling referrals. These services did not prevent removal because the family declined services then moved out of the area. Further, [Sheila] was arrested and charged with Endangering the Welfare of Minor, due to the disclosures of physical abuse made by the children that led to [DHS's] emergency hold. The children also disclosed physical abuse by [Quintone]. These services did not prevent removal because the parents refused to participate in services. The Court finds

[4]The order quoted herein is taken from 72JV-21-446 and is included in this court's record in CV-21-584. The companion order from 72JV-21-447 is identical in all pertinent respects for the purposes of appeal and is included in this court's record in CV-21-585.

that the efforts made to prevent removal of the juveniles were reasonable based on the family and juveniles' needs.

9. The juveniles are dependent-neglected as defined in the Arkansas Juvenile Code based on neglect, abuse, and parental unfitness. The Court finds that the allegations in the petition and accompanying affidavit are substantiated by the proof today. Specifically, the Court finds that the videos introduced into evidence clearly show that [Sheila] inflicted non-accidental injuries upon [IU] by forcing him to bend over while she hit him with a hard object. [Sheila] repeatedly inflicted injury upon him with a foreign and hard object. [Sheila] abused [IU] by engaging in conduct that created a realistic and serious threat of bodily injury to [IU]. [Sheila] forced her knee in [IU's] groin such that she could have harmed his penis or testicles. The Court further finds that [Sheila's] motion of putting her knee in [IU's] groin was a forceful kick. The Court finds that the evidence does not constitute reasonable physical discipline. The discipline was not reasonable or moderate, nor was it a reasonable way to restrain the child. The Court has the unique ability to judge credibility. Based on the totality of the circumstances, the Court finds that [Sheila] was not intending to discipline this child in a moderate way. [Sheila's] actions were meant to demean, humiliate, and to shame [IU]. The Court finds that the actions by [Sheila] constitute aggravated circumstances. Asking this child to be subjected to physical attack in front of his siblings—that takes away the dignity of his person and is cruel. The Court finds that the photographs introduced into evidence today are clear and convincing evidence that this child was hit in a way that was not transient or light in nature. The videos show that there was repeated injury and physical aggression against this child. The Court believes [IU's] statement that his buttocks hurt so bad that he could not slide down the slide. There has been zero evidence presented to show that [IU] had Mongolian spots. In fact, [Sheila's] testimony was that she did not know the location of the Mongolian spots she alleged to be on [IU's] body. With respect to the Snapchat screenshot offered into evidence by parent counsel, the Court does not find it to be credible that [BW], [Sheila's] son, recanted. The Court further finds that [Quintone] contributed to the abuse and subjected the juveniles to aggravated circumstances in this case because he admitted that it was the normal form of discipline to spank these children. He admitted to using a foreign object in disciplining the children himself. The physical injury to the children was well known in the household. The Court finds [Quintone] to be not credible because he does not believe that [Sheila's] actions in the videos constitute abuse. The Court cannot trust [Quintone] because he does not know what abuse looks like. [Quintone] was a significant contributor to the abuse against the children. The Court notes that [Quintone] was the custodial parent of [IU] and that [IU] lived in the home with his father and stepmother [Sheila]. [IU] is also in the custody of [DHS]

> and is a juvenile-respondent in the companion case (72JV-21-447-8 [U] Minors).

The court found that Benjamin Williams is a fit person for custody, and SW1, SW2, SW3, and BW were placed in his custody. The court also found that the four Ussery children should remain in DHS custody. In the disposition portion of the order, the court set the goal of the case as adoption with a concurrent plan for reunification. The court did not approve the case plan presented and, among other things, ordered DHS to develop a case plan. Both Sheila and Quintone filed timely notices of appeal of the adjudication order, and this appeal followed.

IV. *Standard of Review and Applicable Law*

Dependency-neglect allegations must be proved by a preponderance of the evidence. *Ashcroft v. Ark. Dep't of Hum. Servs.*, 2010 Ark. App. 244, at 7, 374 S.W.3d 743, 747 (citing Ark. Code Ann. § 9-27-325(h)(2)(A)(ii) (Supp. 2019)). This court reviews findings in dependency-neglect proceedings de novo, but we will not reverse the circuit court's findings unless they are clearly erroneous. *Phillips v. Ark. Dep't of Hum. Servs.*, 2018 Ark. App. 463, at 11, 560 S.W.3d 499, 505. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, based on the entire evidence, is left with a definite and firm conviction that a mistake has been committed. *Id.* Adjudication hearings are held to determine whether the allegations in a petition are substantiated by the proof. Ark. Code Ann. § 9-27-327(a)(1) (Repl. 2020). The focus of an adjudication hearing is on the child, not the parent. *Id.*; *Skalski v. Ark. Dep't of Hum. Servs.*, 2020 Ark. App. 433, at 4. This court defers to the circuit court's evaluation of the credibility of witnesses. *Id.*

An adjudication order is an appealable order in a dependency-neglect proceeding. Ark. Sup. Ct. R. 6-9(a)(1)(A) (2021). In termination cases, a challenge to a finding of aggravated circumstances must be made, if at all, in an appeal from the adjudication order. *Holloway v. Ark. Dep't of Hum. Servs.*, 2015 Ark. App. 458, at 5, 468 S.W.3d 805, 808 (citing *Willingham v. Ark. Dep't of Hum. Servs.*, 2014 Ark. App. 568; *Hannah v. Ark. Dep't of Hum. Servs.*, 2013 Ark. App. 502). When a party fails to appeal from an adjudication order in which an aggravated-circumstances finding is made, he or she is precluded from asserting error with respect to that finding on appeal from an order terminating parental rights. *Id.* (citing *Anderson v. Ark. Dep't of Hum. Servs.*, 2011 Ark. App. 791, 387 S.W.3d 311; *Krass v. Ark. Dep't of Hum. Servs.*, 2009 Ark. App. 245, 306 S.W.3d 14).

V. *Right to Counsel*

Sheila contends that it was reversible error for the circuit court to force her to appear as a pro se litigant during the adjudication hearing. She argues that as a parent, she has a right to counsel in all dependency-neglect proceedings. Ark. Code Ann. § 9-27-316(h)(1)(A) and (B)(i) (Supp. 2021); *see also Briscoe v. Ark. Dep't of Hum. Servs*, 323 Ark. 4, 912 S.W.2d 425 (1996); *Basham v. Ark. Dep't of Hum. Servs.*, 2015 Ark. App. 243, 459 S.W.3d 824; *Clark v. Ark. Dep't of Hum. Servs.*, 90 Ark. App. 446, 206 S.W.3d 899 (2005). Sheila asserts that she was appointed an attorney, and she appeared with one at the probable-cause hearing. She claims that she later engaged a different attorney, but the attorney was not present when the adjudication hearing began. She argues that the circuit court acknowledged that she had representation but did not seek the attorney's whereabouts before beginning the hearing; thus, she was forced to proceed pro se. She asserts that she

was subjected to fundamentally unfair procedures and her opportunity to cross-examine witnesses was compromised. *Ark. Dep't of Hum. Servs. v. A.B.*, 374 Ark. 193, 286 S.W.3d 712 (2008).

Sheila relies on *Clark*, *supra*, wherein this court reversed the dependency-neglect adjudication order because the circuit court erred by not appointing counsel for the appellant father. We stated,

> Here, we are not analyzing the harm's effect on the entire process (which includes all subsequent review hearings and any potential termination-of-parental-rights proceedings). Rather, we are looking at the trial court's decision as it relates to the dependency-neglect adjudication alone. Having counsel present could have made a difference. Counsel could have cross-examined the witnesses. The dependency-neglect adjudication is the first step to termination of parental rights. The DHS safety plan bars appellant from the house where his children live. The consequence of the adjudication is that appellant is now a registered child abuser. These factors plainly demonstrate the gravity of the issues presented during the dependency-neglect proceeding and the harm posed by denying appellant's request for appointed counsel.

Clark, 90 Ark. App. at 460–61, 206 S.W.3d at 907. Sheila argues that the same risks described in *Clark* were present for her. She acknowledges that she had an attorney, but she claims that she was forced to proceed without one at the most critical stage of a dependency-neglect case, the adjudication stage. Ark. Code Ann. § 9-27-327(a) (the purpose of the adjudication hearing is to determine whether the allegations within the petition are true). She further contends that termination of parental rights can be based on aggravated circumstances. Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)*(a)(3)(A)* (Supp. 2021).

Sheila argues that during the time she was forced to proceed pro se, Detective Vermillion provided critical testimony. Quintone had the benefit of counsel to argue that some of the detective's testimony was based on hearsay, but she did not have that benefit. Three videos were introduced during the detective's testimony, and she claims that those

videos provided the basis for the allegations that she abused IU. The detective was released after his testimony, and she claims that it was impossible to cure any error once her attorney appeared. Sheila contends that she was subjected to fundamentally unfair procedures and denied an opportunity to cross-examine the critical law enforcement witness. *See A.B.*, *supra*.

Sheila also claims that it was not harmless error for the court to proceed without her counsel present. She asserts,

> The United States Supreme Court has found that a parent's due-process right to counsel in dependency proceedings is not absolute, but must be determined, on a case-by-case analysis, on the basis of fundamental fairness—(1) when the case presents a specially troublesome point of law and (2) when presence of counsel would have made a determinative difference. *See Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981).

Buck v. Ark. Dep't of Hum. Servs., 2018 Ark. App. 258, at 5, 548 S.W.3d 231, 234–35. Sheila contends that fundamental fairness requires reversal because the aggravated-circumstances finding was based on hearsay evidence from the lead detective as well as video evidence admitted through him. Accordingly, she argues that the evidentiary issues required knowledge of the law and the skills of a trained attorney, which she did not have when that evidence was submitted.

Sheila further argues that she did not waive her right to counsel or even indicate a desire to appear pro se. She contends that waiver of a right to counsel must be unequivocal and that the circuit court had a duty to inquire under the law. *See Bearden v. Ark. Dep't of Hum. Servs.*, 344 Ark. 317, 325, 42 S.W.3d 297, 402 (2001) (waiver of counsel is valid when (1) the request to waive the right to counsel is unequivocal and timely asserted; (2) there has been a knowing and intelligent waiver of the right to counsel; and (3) the defendant has

not engaged in conduct that would prevent the fair and orderly exposition of the issues); *Battishill v. Ark. Dep't of Hum. Servs.*, 78 Ark. App. 68, 72, 82 S.W.3d 178, 180 (2002) (holding that to effectively waive counsel, the parent must be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and that he has made his choice with his eyes open").

Sheila contends that the circuit court has the responsibility to warn the accused of the dangers and disadvantages of self-representation, and a record showing that the defendant possessed the required knowledge is required to establish the validity of a waiver. *Bledsoe v. State*, 337 Ark. 403, 406–07, 989 S.W.2d 510, 512–13 (1999); *see also Pierce v. State*, 362 Ark. 491, 209 S.W.3d 364 (2005). She argues that the circuit court failed to make the required inquiry into whether she desired to proceed pro se and also failed to ask whether she knowingly and intelligently wished to proceed with the first part of the hearing without an attorney present. Instead, the circuit court proceeded as if Sheila were pro se, inquiring whether Sheila had objections to the admission of evidence. Sheila responded at one point, "I think my attorney is supposed to be here, but I don't know." Sheila contends that it was unconscionable for the circuit court to proceed without her attorney present.

We agree that the circuit court's determination to proceed without Sheila's attorney present is inexplicable. However, we hold that this issue is not preserved for appellate review because it was not raised below, either by Sheila or her counsel. *Lancaster v. Ark. Dep't of Hum. Servs.*, 2018 Ark. App. 557; *Kohlman v. Ark. Dep't of Hum. Servs.*, 2018 Ark. App. 164, 544 S.W.3d 595. We note that Sheila was appointed an attorney by ex parte order and that she acknowledged having engaged a different attorney for the adjudication hearing.

Accordingly, there was no violation of her statutory or constitutional right to appointed counsel. Ark. Code Ann. § 9-27-316(h)(1)(C). *Bearden*, *supra*, and *Battishill*, *supra*, involved parents who asked to represent themselves in termination hearings and involved issues of appointed counsel, not privately retained counsel, as is the case here. Sheila's attorney, Ms. Ruff, appeared at the hearing and was informed that Nurse Black and Detective Vermillion had already testified and was given a summation of their testimony. Ms. Ruff was allowed an opportunity to cross-examine Nurse Black, and she did not object or raise any right-to-counsel or due-process issue. Further, Ms. Ruff's closing argument that she would have objected had she been there to do so was not an objection.

Sheila argues that to the extent there was a need for a more specific or definite statement from her to preserve the issue of her entitlement to proceed with her attorney present, the circuit court should have taken steps to remedy the error because it was "flagrant and egregious." *Baker v. Ark. Dep't of Hum. Servs.*, 2011 Ark. App. 400, at 3 (citing *Wicks v. State*, 270 Ark. 781, 786, 606 S.W.2d 366, 369–70 (1980)). Sheila contends that the circuit court caused the error by forcing her to appear pro se even though she had been appointed an attorney.

Although the circuit court's insistence in moving forward is out of the ordinary, we hold that this case does not fall under the "highly prejudicial and flagrant" exception to the contemporaneous-objection rule in *Wicks*, *supra*. When given a full and fair opportunity to object or otherwise cure any perceived defects, counsel did not object to the admission of Detective Vermillion's testimony or the videos and did not request to cross-examine him. *See, e.g.*, *Briscoe*, *supra* (finding any error to appoint counsel harmless when attorney was

eventually appointed and had an opportunity at the final hearing to challenge any of the evidence). Accordingly, we hold that the circuit court did not commit reversible error by initially proceeding without Sheila's counsel.

VI. *Sufficiency of Evidence to Support Finding of Dependency-Neglect*

Arkansas Code Annotated section 9-27-303(17)(A)(ii), (v), and (vi) (Supp. 2021) defines a "dependent-neglected juvenile" as any juvenile who is at substantial risk of serious harm as a result of abuse, neglect, or parental unfitness to the juvenile, a sibling, or another juvenile. Sheila and Quintone argue that insufficient evidence supports the dependency-neglect finding. Sheila argues that before adjudicating an "unharmed" child dependent-neglected, there must be a nexus between the harm presented by the parent to the child who was harmed and the level of risk presented by the parent to the child that was not harmed. *See Haney v. Ark. Dep't of Hum. Servs.*, 2017 Ark. App. 437, at 6, 526 S.W.3d 903, 907 (reversing a finding of dependency-neglect of newborn that was solely based on the status of older siblings); *see also Goodwin v. Ark. Dep't of Hum. Servs.*, 2014 Ark. App. 599, 445 S.W.3d 547. Sheila argues that the evidence offered did not support the conclusion that her children were at a substantial risk of serious harm as a result of her incident with IU.

In her appellate brief, Sheila's counsel acknowledges that the videos depict a "tragic event." However, Sheila argues that IU is not her child and "not a party to the instant matter."[5] She contends that the evidence was that she disciplines her other children but claims there was no evidence that she did so inappropriately or that this one incident was more than a one-time occurrence as to one child, IU. She argues that there was no evidence

[5]IU is named in the order on appeal in CV-21-585.

that HU or SU had ever been disciplined, much less abused. In the instances concerning discipline of Sheila's other two children, two of them said her discipline did not hurt badly, and no bruises resulted. She asserts that physical discipline is not abuse when a child suffers nothing more than "transient pain or minor temporary marks." Ark. Code Ann. § 9-27-303(3)(C)(iii). She contends there was no evidence that she had ever done anything other than properly discipline the children "who were parties to this matter." She claims that the hearsay testimony regarding BW's description of encounters with Quintone do not relate to her and that BW recanted. She argues that none of the evidence made the nexus between the one incident with IU and her biological children. *See Haney*, *supra*.

Quintone contends that the petition in both cases did not allege that the children's dependency-neglect was based on abuse, it alleged only "neglect and parental unfitness." However, the circuit court found that the children are dependent-neglected as a result of "neglect, abuse, and parental unfitness." He acknowledges that the petition mentions abuse in regard to aggravated circumstances, and he claims that because a parent is entitled to notice, a circuit court cannot rely on a ground not alleged in the petition; thus, he argues that the case should be reversed. *See Jackson v. Ark. Dep't of Hum. Servs.*, 2013 Ark. App. 411, at 6–7, 429 S.W.3d 276, 280 (reversing termination of parental rights when statutory ground not alleged in the petition). Pleading grounds is necessary in termination cases, and Quintone cites *Skalski*, *supra*, for the proposition that a court cannot rely on "grounds" not pleaded in an adjudication petition. In *Skalski*, this court reversed an aggravated-circumstances finding in an adjudication order because DHS had failed to allege aggravated circumstances in its petition for dependency-neglect. *Skalski*, 2020 Ark. App. 433, at 8–10.

Quintone argues that even had the circuit court not relied on "abuse," we should reverse because HU and SU were not proved to be at substantial risk of serious harm as a result of the action toward IU, other abuse, neglect, or parental unfitness. Ark. Code Ann. § 9-27-303(17)(A). He argues that other than IU's incident, evidence from the other children's interviews was that any spankings left no marks. He contends that BW mentioned one incident of discipline; however, he claims that BW is a "troubled fifteen-year-old delinquent who has thrice run away," sees a counselor, and does not live with Sheila and Quintone. He argues that BW did not testify at the hearing, and he is not Quintone's biological child. He contends that while he agreed that the videos showed abuse toward IU, there is no evidence that he had abused or ever would abuse HU or SU; therefore, they are not at risk of serious harm as a result of the acts toward other children.

Finally, Quintone makes a public-policy argument that the General Assembly did not define "dependent-neglected juvenile" as one who is at substantial risk of serious harm from a parent "as reflected by" certain acts or omissions. Instead, the statute provides that the harm must be the "result of" certain acts or omission. *See Haney*, *supra*. He contends that "result of" indicates causation. Ark. Code Ann. § 9-27-303(17)(A). He argues that DHS did not prove that HU and SU were at substantial risk of serious harm as a result of abuse, neglect, or parental unfitness.

The focus of an adjudication hearing is on the child, not the parent; at this stage of a proceeding, the Juvenile Code is concerned with whether the child is dependent-neglected. *Skalski*, 2020 Ark. App. 433, at 4. An adjudication of dependency-neglect occurs without reference to which parent committed the acts or omissions leading to the adjudication; the

juvenile is simply dependent-neglected. *Id.* A sibling of an abused child or another child in that parent's custody by law is a dependent-neglected child. Ark. Code Ann. § 9-27-303(17)(A); *Day v. Ark. Dep't of Hum. Servs.*, 2020 Ark. App. 51, 595 S.W.3d 26.

Despite Sheila's contention, sufficient evidence shows that IU's siblings are at substantial risk of serious harm as a result of Sheila's abuse of IU—those siblings live in Sheila's home and witnessed the abuse displayed on video. The record contains descriptions of the children's forensic interviews wherein they provide similar accounts of discipline that included the use of a back scratcher to hit hands, feet, and bottoms. In reviewing a dependency-neglect adjudication, we defer to the circuit court's evaluation of the credibility of the witnesses. *Skalski*, *supra*. This deference to the circuit court is even greater in cases involving child custody, as a heavier burden is placed on the circuit court to utilize to the fullest extent its powers of perception in evaluating the witnesses, their testimony, and the best interest of the children. *Id.* Further, Quintone concedes that IU, a sibling to all the children, was abused by Sheila. "Neglect" means those acts or omissions of a parent that constitute failure or refusal to prevent the abuse of the juvenile when the person knows or has reasonable cause to know the juvenile is or has been abused. Ark. Code Ann. § 9-27-303(37)(A)(i). In its petition, DHS alleged neglect as a basis for a dependency-neglect finding. Accordingly, we affirm the circuit court's dependency-neglect finding as to all the children.

VII. *Evidentiary Errors*

Quintone argues that the circuit court's evidentiary errors require reversal. First, he claims that the court abused its discretion by allowing hearsay from Detective Vermillion,

who testified about what IU had said during a forensic interview that the detective had watched. The circuit court overruled the hearsay objection, allowing the evidence "to show the effect that it had on Detective Vermillion in carrying on his investigation and the effects on these children." When the detective was again asked what IU had disclosed during the observed interview, a hearsay objection was raised. The circuit court agreed with DHS's response that the children's statements would be "against their interest." The circuit court stated,

> [T]he interview conducted in that manner is conducted without any anticipation on the part of the child that the statement would be used in the course of litigation, and that the safeguards for credibility are such that the statement is admissible because the child disclosing it would have no reason to believe that the statement is being made against the interest of the parent or himself. So, I'm going to overrule your objection.

Thereafter, Detective Vermillion testified regarding IU's statement that he had been spanked to the point of bruising and blistering and that he could not slide on his bottom.

Quintone argues that testimony about what an allegedly dependent-neglected child said in an interview to prove the truth of what he said is inadmissible hearsay. *Wilson v. Ark. Dep't of Hum. Servs.*, 2015 Ark. App. 666, at 12, 476 S.W.3d 816, 823–24; *Cochran v. Ark. Dep't of Hum. Servs.*, 43 Ark. App. 116, 117–19, 860 S.W.2d 748, 750 (1993). He contends that Detective Vermillion did not testify about how IU's statements affected his investigation or what effect that statement had on the other children. He asserts that the statements were not admissible as statements against the child's interest. *See* Ark. R. Evid. 804(a), (b)(3). Further, there was no mention of whether IU was available to testify. Finally, he claims that the circuit court's reasoning is not an exception to the hearsay rule. He argues that the evidence prejudiced him because even though the court stated that the testimony was not

for its truth, the court found that what Vermillion said that IU had said was true—"The court believes [IU's] statement that his buttocks hurt so bad that he could not slide down the slide."

We agree that Detective Vermillion's testimony about what he heard IU say in his forensic interview is not, as the circuit court ruled, a statement against interest. However, the error was harmless because Quintone concedes that IU was abused by Sheila. Further, the evidence of IU's abuse was admitted through Nurse Black's testimony, and photographs of IU's bruises were admitted in evidence. There can be no prejudice from admission of the detective's testimony if Quintone agrees that Sheila abused IU, and other evidence supports the finding of abuse. Ark. Code Ann. § 9-27-303(17)(A) ("dependent-neglected juvenile" is any juvenile who is at substantial risk of serious harm as a result of abuse to the juvenile, a sibling, or another juvenile).

Second, Quintone argues that the circuit court erred in finding that DHS provided reasonable services to prevent removal of the children. He contends that the circuit court relied on a document not in evidence when it found that DHS had been involved with the Usserys since February 2020 and that the family had declined services and moved. He argues that none of that information was introduced at the hearing and that some of it was in the affidavit attached to the petition for dependency-neglect, which was not introduced as an exhibit at the hearing. He claims that the circuit court's findings were "cut and pasted" from the probable-cause order, which was "cut and pasted" from the ex parte order. Thus, he argues, the circuit court had insufficient evidence before it to make a reasonable-services finding.

Quintone's argument is not preserved for appellate review because it was not raised below. *See Lancaster*, *supra*. Nonetheless, the Juvenile Code does not include a requirement that the circuit court find that reasonable efforts have been provided to prevent removal in order to find that the child or children are dependent-neglected. *See* Ark. Code Ann. § 9-27-303(49) (defining reasonable efforts). Further, the circuit court can dispense with the requirement of a reasonable-efforts finding when the child's safety is a concern. *See Bales v. Ark. Dep't of Hum. Servs.*, 2018 Ark. App. 351, 552 S.W.3d 497; *Walker v. Ark. Dep't of Hum. Servs.*, 2017 Ark. App. 627, 534 S.W.3d 184.

VIII. *Aggravated Circumstances*

Sheila and Quintone argue that the circuit court erred in finding that their children were subjected to aggravated circumstances.[6] Sheila contends that the DHS petition alleged that the children were "chronically abused and subjected to extreme or repeated cruelty." Ark. Code Ann. § 9-27-303(6)(A). For the same reasons Sheila argues above in regard to dependency-neglect, she contends that her children were never subjected to aggravated circumstances. She claims that DHS did not present the requisite proof that she had subjected her children to abuse and cruelty and argues that nothing in the record supports a determination that she ever subjected any child other than IU to anything beyond physical discipline that could not be considered abuse. Quintone makes a similar argument that the aggravated-circumstances finding is legally incorrect, asserting that aggravated circumstances

[6]Sheila argues that the evidence was insufficient to support a finding that HU, SU, SW1, SW2, SW3, and BW were subjected to aggravated circumstances, and Quintone argues that the finding was not supported as to HU or SU. *See Ussery v. Ark. Dep't of Hum. Servs.*, 2022 Ark. App. 251 (same argument as to AU and IU).

applies to each child individually and that no evidence establishes that he subjected his children to cruelty. Ark. Code Ann. § 9-27-303(6).

Quinton argues that it was erroneous to find aggravated circumstances because the circuit court relied on a misstatement of the evidence. He denies that "he does not believe that [Sheila's] action in the videos constitute abuse." He contends that the opposite is true because when asked whether he agreed that the abuse did, in fact, occur, he said, "In that instance, yes." He also denies that he said it was the normal form of discipline to spank the children and that corporal punishment was the mode they used. He was asked, "And do you and Sheila frequently or sometimes spank the children?" He responded, "That's correct, sir." He argues that this was not an admission that spanking is the normal form of discipline used.

He further argues that even if spanking were their normal form of discipline, it would not constitute aggravated circumstances. "Abuse" specifically excludes "physical discipline of a child when it is reasonable and moderate and is inflicted by a parent or guardian for purposes of restraining or correcting the child." Ark. Code Ann. § 9-27-303(3)(C)(i)*(a)*. He contends that the use of a foreign object—in this case, a bath brush—does not amount to abuse because the statute does not limit physical discipline to corporal punishment with "non-foreign objects." *Id.*; *see also Johnson v. Ark. Dep't of Hum. Servs.*, 2012 Ark. App. 244, 413 S.W.3d 549.

Quintone contends that the evidence does not support the circuit court's finding that physical injury to the children was well known in this household. He points out that most of the children reported no injuries, and none other than BW mentioned the incident with

Quintone. He contests the finding that he was a "significant contributor to the abuse against the children." He asserts that he was on a two-week training with the National Guard when the videos were taken. He contends that Detective Vermillion's testimony that he overheard BW's interview about one incident is not clear and convincing evidence that he was a significant contributor to abuse against his children.

Both parents argue that the aggravated-circumstances finding cannot stand because DHS failed to prove it by clear and convincing evidence as required by the Juvenile Code. Ark. Code Ann. §§ 9-27-365 (regarding no-reunification-services hearing); 9-27-341(b)(3)(B)(ix)*(b)(3)(A)* (regarding termination of parental rights). We disagree. The circuit court specifically made its aggravated-circumstances finding by a preponderance of the evidence, which is the standard of proof in dependency-neglect proceedings. Ark. Code Ann. § 9-27-325(h)(2)(A)(ii).

DHS argues that Quintone agreed that the video showed abuse, that he and Sheila "frequently and sometimes" spank the children, and that he used a bath brush with a handle to spank the children. It claims that this attitude toward corporal punishment in a home where children were abused is concerning and supports a finding of aggravated circumstances and argues that the parents are asking this court to reweigh the evidence.

"Aggravated circumstances" means:

> (A) A child has been abandoned, chronically abused, subjected to extreme or repeated cruelty, sexually abused, sexually exploited, or a determination has been or is made by a judge that there is little likelihood that services to the family will result in successful reunification;
>
> (B) A child has been removed from the custody of the parent or guardian and placed in foster care or in the custody of another person three (3) or more times in the last fifteen (15) months; or

(C) A child or a sibling has been neglected or abused such that the abuse or neglect could endanger the life of the child[.]

Ark. Code Ann. § 9-27-303(6)(A)–(C).

We agree with the parents that aggravated circumstances under Ark. Code Ann. § 9-27-303(6)(A) refers to "a child" rather than more generally to a "child or sibling." The circuit court made specific findings of aggravated circumstances based on IU's abuse. The court also made a credibility finding that BW did not recant his disclosures. However, under the statute relied on by DHS in its petition, proof as to each child suffering aggravated circumstances was lacking. Accordingly, we affirm the aggravated-circumstances finding in regard to BW and reverse the aggravated-circumstances finding as to HU, SU, SW1, SW2, and SW3.[7]

Affirmed in part; reversed in part.

KLAPPENBACH and HIXSON, JJ., agree.

Tabitha McNulty, Arkansas Commission for Parent Counsel, for separate appellant Sheila Ussery.

Brett D. Watson, Attorney at Law, PLLC, by: *Brett D. Watson*, for separate appellant Geraldo Quintone Ussery.

Andrew Firth and *Anna Imbeau*, Ark. Dep't of Human Services, Office of Chief Counsel, for appellee.

Casey D. Copeland, attorney ad litem for minor children.

[7]*See Ussery v. Ark. Dep't of Hum. Servs.*, 2022 Ark. App. 251, affirming the aggravated-circumstances finding in regard to IU and reversing as to AU.