23CA0259 Peo in Interest of CM 10-12-2023

COLORADO COURT OF APPEALS

Court of Appeals No. 23CA0259
Montezuma County District Court No. 22JV1
Honorable Douglas S. Walker, Judge
Honorable Todd Jay Plewe, Judge
Honorable Pattie P. Swift, Judge

The People of the State of Colorado,

Appellee,

In the Interest of C.M., Te.M., G.M., and Ta.M. Children,

and Concerning Ga.M. and R.M.,

Appellants.

JUDGMENT AFFIRMED

Division A
Opinion by JUSTICE MARTINEZ*
Román, C.J., and Hawthorne*, J., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced October 12, 2023

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 R.M. (father) and Ga.M. (mother) appeal the judgment adjudicating C.M., Te.M., G.M., and Ta.M. (the children) dependent and neglected, entering a disposition of no appropriate treatment plan, and terminating their parental rights. We affirm.

I. Background

¶ 2 In January 2022, the Montezuma County Department of Social Services received a report that mother had found G.M. unconscious and emergency medical services had transported him to the hospital, where it was discovered that he had a "large brain bleed." The child was then airlifted to Children's Hospital in Colorado Springs. After G.M. was examined, the child protection unit at the hospital reported to the Department that G.M. had several concerning injuries in addition to brain bleeding, which included: a skull fracture; bruising on his penis, hip, and buttock; and a "loop mark bruise" on his leg.

¶ 3 The county sheriff's office requested that the other children undergo forensic interviews. In the interviews, the children disclosed, among other things, that (1) their parents would hit or spank them with their hands, belts, and brushes, which would sometimes cause bleeding; (2) the younger children — G.M. and

Ta.M. — were restrained in their beds with a blanket and belt to prevent them from getting out of bed at night; (3) if the younger children had a toileting accident they were subjected to cold showers or required to sit outside in the snow without pants on; (4) mother forced G.M. to eat a peanut butter sandwich that she and the other children had spit in as punishment for eating out of the peanut butter jar; and (5) their parents would discipline them by requiring them to engage in exercises, such as running, jumping or doing squats.

¶ 4 Based on the suspicious nature of G.M.'s injuries and the disclosures made by the other children, the Department filed a petition in dependency and neglect. The parents denied the allegations in the petition and requested a jury trial. After the sheriff's investigation was completed, mother was charged with the crime of child abuse resulting in serious bodily injury, *see* § 18-6-401(1)(a), (7)(a)(III), C.R.S. 2023, based on the incident involving G.M. in January 2022.

¶ 5 About six months after the Department filed the petition in this case, the juvenile court held a three-day jury trial. At trial, the Department asserted that the parents had subjected the children to

a pattern of abuse and mistreatment that culminated in significant injuries to G.M. from which he would never fully recover. The Department further alleged that G.M.'s injuries were the result of significant trauma, which could not be explained by an accidental fall, and that mother, who was the only person awake in the home at the time, committed the act that caused the injuries. In contrast, the parents asserted that G.M.'s injuries were the result of a tragic, unexplained accident and that the evidence did not otherwise show that they had abused or mistreated any of their children.

¶ 6 The jury heard from several witnesses, including a doctor in the child protection unit at Children's Hospital, another doctor who conducted medical evaluations of C.M., Te.M., and Ta.M., a police detective, a first responder, and the forensic interviewer. The jury also viewed the videos of the forensic interviews. Finally, mother and father both testified at trial, but mother asserted her Fifth Amendment privilege against self-incrimination and declined to answer any questions. After hearing the evidence, the jury returned verdicts for the Department. Based on the jury's verdicts, the juvenile court adjudicated all four children dependent and neglected.

¶ 7 The Department then asked the juvenile court to find that no appropriate treatment plan could be devised for the parents with respect to C.M., G.M., and Ta.M., who were adopted, but at that time the Department did not include Te.M., who was the parents' biological child, in that request. The court held a dispositional hearing on the Department's request and granted its motion. A few weeks later, the court also determined that no appropriate treatment could be devised for the parents with respect to Te.M. About three months later, after a termination hearing, the court terminated father's and mother's parental rights to all four children.

II. Juror Challenge for Cause

¶ 8 Father first argues the trial court erred by denying a for-cause challenge to a prospective juror who he contends was biased. *See* C.R.C.P. 47(e)(1) (A prospective juror may be removed for cause based on "[t]he existence of a state of mind in the juror evincing enmity against or bias to either party."). The challenged prospective juror did not sit as part of the jury. Even if the juvenile court erred by declining to remove the prospective juror for cause, such error would not be reversible.

¶ 9 The Colorado Supreme Court recently overturned decades of cases that required automatic reversal for the erroneous denial of challenge for cause. *Laura A. Newman, LLC v. Roberts*, 2016 CO 9. Our supreme court substituted an outcome-determinative analysis, which asks whether the error substantially influenced the outcome of the case. *Id.* at ¶ 26. Generally, a party's right to an impartial jury is not adversely affected by an erroneous denial of a challenge for cause if that juror does not sit on the jury. *People v. Caswell*, 2021 COA 111, ¶ 22 (*cert. granted* June 13, 2022). We find it difficult to imagine how an aggrieved party could ever show that the erroneous denial of a challenge for cause to a prospective juror who did not sit on the jury substantially influenced the outcome of the case. Thus, there is no remedy for such error.

¶ 10 In the present case, father does not even attempt to explain how the court's putative error substantially influenced the outcome of the case. Instead, he rests on cases that have been overruled. We are obliged to follow the newly minted precedent from our supreme court; therefore, we conclude there was no reversible error.

III. Inconsistent Verdicts

¶ 11 Father next asserts that the court erred by denying his motion for a new trial under C.R.C.P. 59 based on inconsistent verdicts. We disagree.

¶ 12 We review the juvenile court's order denying a motion for a new trial under C.R.C.P. 59 for an abuse of discretion. *Rains v. Barber*, 2018 CO 61, ¶ 8. The court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or when it misapplies the law. *People in Interest of A.N-B*, 2019 COA 46, ¶ 9. However, we review de novo whether a jury verdict is inconsistent. *See People v. Zweygardt*, 2012 COA 119, ¶ 30.

¶ 13 "Appellate courts are bound by the jury's findings, and jury verdicts will not be reversed for inconsistency where the jury has been properly instructed by the trial court and the record contains sufficient competent evidence to support the finding." *Hock v. N.Y. Life Ins. Co.*, 876 P.2d 1242, 1259 (Colo. 1994). In other words, if there is any basis for the jury's verdict, we will not reverse it for inconsistency. *Sch. Dist. No. 12 v. Sec. Life of Denver Ins. Co.*, 185 P.3d 781, 787 (Colo. 2008). In making this determination, we "review the jury instructions, verdict forms, and evidence in order to

determine 'whether there is competent evidence from which the jury logically could have reached its verdicts.'" *Bohrer v. DeHart*, 961 P.2d 472, 476-77 (Colo. 1998) (quoting *Hock*, 876 P.2d at 1259).

¶ 14 The Department alleged that the children were dependent or neglected under four subsections of section 19-3-102, C.R.S. 2023:

- Subsection (1)(a): A parent subjected the child to mistreatment or abuse or suffered or allowed another to mistreat or abuse the child without taking lawful means to stop such mistreatment and abuse or prevent it from recurring.
- Subsection (1)(b): The child lacks proper parental care through the actions or omissions of the parent.
- Subsection (1)(c): The child's environment is injurious to his or her welfare.
- Subsection (1)(e): The child is without proper parental care through no fault of the parent.

On special verdict forms, the juvenile court tendered sixteen questions to the jury with respect to father; one for each of the four children under each of the four grounds described above. The questions tracked the language used in the model instruction in

CJI-Civ. 41:18 (2023). The jury answered "Yes" to each of the four questions for all four children.

¶ 15 A few weeks after trial, father filed a post-trial motion for relief asserting, among other things, that he was entitled to a new trial because the jury rendered inconsistent verdicts. The juvenile court denied father's motion, concluding that the jury could have found that father was at fault in some instances, but that he was not at fault in other instances.

¶ 16 As a preliminary matter, we address whether father properly preserved his appellate contentions. *See People in Interest of M.B.*, 2020 COA 13, ¶ 14 (noting that, in dependency and neglect cases, we do not address unpreserved claims on appeal). We conclude that, because this case involved a special verdict rather than a general verdict, father did not need to object to the alleged inconsistent verdicts at trial to preserve his appellate claim. *See In re Estate of Chavez*, 2022 COA 89M, ¶ 30. But to the extent that father now argues that the verdict forms were confusing and should have included additional interrogatories, he did not preserve that contention because he did not object to the verdict forms or tender alternative forms. *See Nichols v. Burlington N. & Santa Fe Ry. Co.*,

148 P.3d 212, 215-16 (Colo. App. 2006) (finding waiver where counsel did not object to the order of conditions on the special verdict form before that form was submitted to the jury). Thus, we do not address his argument about the verdict forms.

¶ 17 In support of his argument that the verdicts were inconsistent, father recognizes that the verdicts are not inconsistent if there is evidence in the record from which the jury could have logically reached its verdict. Yet the only argument father offers is that he was not at home at the time of the initial incident and could not be responsible for the injuries to G.M.

¶ 18 If we presume that the jury believed that father did not cause the injuries to G.M. in January 2022, as father argues, that would support the jury's conclusion that the children were without proper parental care through no fault of the parent, subsection (1)(e). Other evidence, including videos of the forensic interviews of the children, would support their conclusion that he mistreated or abused all four children on other occasions, subsection (1)(a)-(c) criteria. *See People in Interest of G.E.S.*, 2016 COA 183, ¶ 15 (noting that the fact finder can consider past, current, or prospective harm, and it may "properly consider the treatment

accorded other children in determining whether the child at issue is dependent and neglected"). Thus, we are not convinced by father's argument that the verdicts are inconsistent.

IV. Sufficiency of the Evidence

¶ 19 Mother asserts that the evidence was insufficient to support the jury's verdicts. We disagree.

A. Applicable Law and Standard of Review

¶ 20 The Department contended that the children were dependent or neglected under section 19-3-102(1)(a)-(c), which are described above, as well as subsection (1)(d). Subsection (1)(d) provides that a child is dependent or neglected if the parent fails or refuses to provide the child with proper or necessary subsistence, education, medical care, or any other care necessary for the child's health, guidance, or well-being.

¶ 21 The Department must prove the allegations to support an adjudication of dependency or neglect by a preponderance of the evidence. § 19-3-505(1), C.R.S. 2023; *People in Interest of S.G.L.*, 214 P.3d 580, 583 (Colo. App. 2009). Whether a child is dependent and neglected presents a mixed question of law and fact because it involves application of the dependency and neglect statute to the

evidentiary facts. *People in Interest of S.N. v. S.N.*, 2014 CO 64, ¶ 21.

¶ 22 In determining whether the evidence is sufficient to sustain an adjudication of dependency or neglect, we review the record in the light most favorable to the prevailing party, and we draw every inference "fairly deducible" from the evidence in favor of the jury's decision. *S.G.L.*, 214 P.3d at 583. The credibility of the witnesses and the sufficiency, probative effect, and weight of the evidence, as well as the inferences and conclusions to be drawn therefrom, are within the purview of the jury. *Id.* We will not disturb the jury's findings if the record supports them, even if reasonable people might arrive at different conclusions based on the same facts. *Id.*; *People in Interest of T.T.*, 128 P.3d 328, 331 (Colo. App. 2005).

B. Analysis

¶ 23 Viewing the evidence in the light most favorable to the Department and drawing every fairly deducible inference in favor of the jury's decision, we conclude, for the reasons described below, that the record contains sufficient evidence to support the jury's determination that the children were dependent or neglected. *See S.G.L.*, 214 P.3d at 583.

¶ 24 We begin with a discussion of whether the evidence was sufficient to justify adjudication under subsection (1)(a), focusing first on the January 2022 incident. Mother concedes that (1) G.M. suffered significant bodily injury, which led to him becoming unresponsive; and (2) father was not present in the home at the time that the child was found unresponsive, while the other three children were asleep. But she contends that, because the Department failed to present any direct evidence about what happened to G.M. to cause his injuries, the evidence was insufficient. We are not persuaded.

¶ 25 A doctor from Children's Hospital in Colorado Springs opined that the child's injuries — including a complex skull fracture, subdural and subarachnoid hemorrhages, retinal hemorrhages, and injuries to the ligaments of the entire neck — were likely the result of an "acceleration and deceleration" event, in which the head is moving back and forth. She said that G.M.'s injuries are typically observed in someone that was in a serious car accident. In contrast, she explained how each of the injuries were not likely the result of an accident such as a fall. Based on the "constellation" of

these injuries, the doctor believed that the child had suffered "abusive head trauma" resulting from "child physical abuse."

¶ 26 When asked about how G.M. was injured in January 2022, mother invoked her Fifth Amendment privilege against self-incrimination. The court then properly instructed the jury that it could draw an adverse inference from mother's refusal to answer questions. *See Neher v. Neher*, 2015 COA 103, ¶ 64 (holding that, in a civil case, an adverse inference may be drawn against a party who invokes the Fifth Amendment privilege against self-incrimination); *see also Asplin v. Mueller*, 687 P.2d 1329, 1332 (Colo. App. 1984) (noting that the court may require the party to invoke the privilege in the presence of the jury and may instruct the jurors that they can draw an adverse inference if the party chooses to invoke the Fifth Amendment). In other words, based on mother's refusal to answer, the jury could infer that mother had caused G.M.'s injuries.

¶ 27 Although we agree with mother that the Department did not present any direct evidence that mother's mistreatment or abuse of G.M. caused his injuries, the evidence, as described above, is sufficient for the jury to infer that mother caused the injuries and

for the court to adjudicate G.M. under subsection (1)(a). *See People in Interest of S.G.*, 91 P.3d 443, 452 (Colo. App. 2004) ("Circumstantial evidence enjoys the same status as direct evidence."); *see also People in Interest of M.S.H.*, 656 P.2d 1294, 1296-97 (Colo. 1983) (rejecting the parents' argument that the evidence was insufficient to terminate their parental rights because the "origin" of the child's injuries was entirely circumstantial).

¶ 28 We are not persuaded by *People in Interest of R.K.*, 31 Colo. App. 459, 505 P.2d 37 (1972), upon which mother relies. She asserts that, under *R.K.*, the Department needed to also prove that "the condition resulting from the alleged abuse is not [j]ustifiably explained." *Id.* at 462, 505 P.2d at 38. But the *R.K.* division's rationale was based on a statute that required the condition, "is not justifiably explained." That statute is no longer in effect. *See* § 22-10-1(4), C.R.S. 1969. Although a similar definition of "abuse" is in effect, § 19-1-103(1)(a)(I), C.R.S. 2023, it specifies that it applies to "part 3 of article 3 of this title 19." § 19-1-103(1)(a)(V). The subsections under which the Department alleged abuse are in part 1. Further, none of those subsections in part 1 contain the "not justifiably explained" requirement that was pivotal in *R.K.* Thus,

mother's reliance on *R.K.* is misplaced and the circumstantial evidence the Department presented was sufficient for the jury to infer that mother caused the injuries to G.M. under subsection (1)(a).

¶ 29 The Department also presented sufficient evidence to establish that C.M., Te.M., and Ta.M. were dependent and neglected under subsection (1)(a). Most importantly, the jury had the opportunity to hear the children's own statements in their forensic interviews, in which they described hitting, spanking, physical exercise as punishment, restraint, and punishment for toileting accidents. A doctor who performed examinations of these three children also testified about similar statements that the children had made to her. Although the doctor did not discover any abusive injuries on Te.M, she testified that (1) C.M. had two patterned bruises that could be from an inflicted injury and (2) Ta.M. had a loop-shaped bruise (consistent with being hit with a belt) and skin irritation on her feet that was consistent with restraint.

¶ 30 Mother relies on *People in Interest of M.A.L.*, 37 Colo. App. 307, 592 P.2d 415 (1976), to assert that the evidence was insufficient because the Department failed to establish that her actions were

unreasonable forms of discipline. In that case, the evidence showed that the children had bruising and that father had caused the bruising. *Id.* at 308, 592 P.2d at 416. The Department asserted that it was entitled to a directed verdict based on that evidence alone. *Id.*, 592 P.2d at 417. But the court determined that the jury was allowed to consider whether the punishment inflicted upon the children was reasonable and that "the [r]easonableness of that punishment is a question to be decided by the trier of fact." *Id.* at 309, 592 P.2d at 417.

¶ 31 In sum, *M.A.L.* provides that a jury can conclude that punishment was reasonable to find in favor of a parent. It does not impose a requirement for additional proof to establish subsection (1)(a).

¶ 32 Applying *M.A.L.*, we discern no error. The jury in this case heard the evidence, which included the children's own statements, physical examinations, and expert opinions, and could determine whether mother's punishment techniques were reasonable. This jury concluded that they were not. We cannot disturb that decision. *See S.G.L.*, 214 P.3d at 583; *see also People in Interest of E.S.*, 49 P.3d 1221, 1226 (Colo. App. 2002) (rejecting the parent's

assertion that the evidence was insufficient because "the jury was free to consider the size and extent of the bruising in determining whether the corporal punishment was reasonable").

¶ 33 Based on either the January 2022 incident or the other acts described above, the evidence was also sufficient for the jury to determine that all four children were in an injurious environment under subsection (1)(c). *See People in Interest of J.G.*, 2016 CO 39, ¶ 26 (noting that a child's environment is injurious to the child's welfare "when a child is in a situation that is likely harmful to that child"); *see also People in Interest of S.N.*, 2014 COA 116, ¶¶ 18-19 (allowing the fact finder to consider a parent's treatment of another child to determine whether a child's environment will be injurious to the child's welfare in the future).

¶ 34 Finally, we need not consider whether the children were also dependent and neglected under subsections (1)(b) and (1)(d). *See People in Interest of S.M-L.*, 2016 COA 173, ¶ 29, ("[S]ection 19-3-102 requires proof of only one condition for an adjudication."), *aff'd on other grounds sub nom. People in Interest of R.S. v. G.S.*, 2018 CO 31.

V. No Appropriate Treatment Plan

¶ 35 Both parents assert that the juvenile court erred when it found that no appropriate treatment plans could be devised for them. We disagree.

¶ 36 Following an adjudication, the juvenile court must hold a dispositional hearing and determine whether a treatment plan can be devised to rehabilitate a parent and reunify the family. *See* § 19-3-508(1), C.R.S. 2023. In some cases, the court may determine that a treatment plan cannot be devised "due to the unfitness of the parents as set forth in section 19-3-604(1)(b)," C.R.S. 2023. § 19-3-508(1)(e)(I). As relevant here, section 19-3-604(1)(b) provides that a parent is unfit based on (1) "[a] single incident resulting in serious bodily injury or disfigurement of the child" and (2) "serious bodily injury or death of a sibling due to proven parental abuse or neglect." § 19-3-604(1)(b)(II), (IV).

¶ 37 In concluding that a treatment plan could not be devised for C.M., G.M., and Ta.M, the juvenile court found that G.M. had sustained serious bodily injury and that mother caused the serious bodily injury. The court noted that these injuries had occurred despite the parents previously undergoing "extensive training to

become foster parents" for C.M., G.M., and Ta.M. The court therefore determined that an appropriate treatment plan could not be devised for the parents because they were unfit as to G.M. under section 19-3-604(1)(b)(II) and as to the other children under section 19-3-604(1)(b)(IV).

¶ 38 In considering whether an appropriate treatment plan could be devised for the parents with respect to Te.M., the court framed the issue as whether Te.M. was "in a different situation from his adopted siblings such that . . . a finding should not be made as to him." The court answered that question "no," noting that, although Te.M. did not have the same trauma history as the other children, it still had "great concern" for Te.M. if he was "forced to take part in a treatment plan" because of the "severity of [G.M.'s] injuries." Thus, the court also determined that no appropriate treatment plan could be devised for the parents with respect to Te.M. under section 19-3-604(1)(b)(IV).

¶ 39 Mother asserts that, because the evidence presented at the adjudicatory hearing was insufficient to establish that she had caused the serious bodily injuries, the juvenile court erred by declining to order a treatment plan. She also argues that the court

erred because it improperly considered her decision to exercise her Fifth Amendment right in deciding that any treatment plan would be futile.

¶ 40 Father maintains that the court erred because the evidence showed that he could comply with the proposed treatment plan, which required him to participate in the abuse clarification process.

¶ 41 Our analysis is guided by the supreme court's decision in *People in Interest of L.S.*, 2023 CO 3M. In *L.S.*, ¶ 24, the juvenile court granted mother's motion for a directed verdict at the dispositional hearing because the department had failed to show "that a treatment plan couldn't be devised *to address her unfitness*, as required under section 19-3-604." The supreme court disagreed, holding that, to find that no appropriate treatment plan can be devised under section 19-3-604(1)(b)(II), the department did not need to show that (1) the parent caused serious bodily injury or (2) a treatment plan can be devised to address the conduct that caused the serious bodily injury. *L.S.*, ¶ 29. In the supreme court's words, "[serious bodily injury] alone suffices." *Id.*

¶ 42 Nevertheless, the supreme court recognized that the statute did not strictly require the court to find that an appropriate

treatment plan cannot be devised based only on evidence of serious bodily injury. *Id.* at ¶ 32. Rather, the supreme court noted that, on remand, the juvenile court in the *L.S.* case could "hear further argument and accept additional evidence before deciding whether a treatment plan is possible." *Id.* In other words, the supreme court determined that the juvenile court has discretion whether to find that no appropriate treatment plan can be devised. *See id.*; *see also People in Interest of M.W.*, 2022 COA 72, ¶ 32 (noting that the juvenile court has discretion to formulate a treatment plan at the dispositional phase).

¶ 43 In this case, we first reject mother's assertion that the Department failed to prove that she had caused serious bodily injury. As to G.M., the Department did not need to prove that she caused serious bodily injury to satisfy section 19-3-604(1)(b)(II). *See L.S.*, ¶ 29. Although section 19-3-604(1)(b)(IV) does require a finding that serious bodily injury to a sibling was "due to proven parental abuse or neglect," as noted in Part IV above, the evidence was sufficient to establish that mother caused serious bodily injury.

¶ 44 Nor are we persuaded by mother and father's other assertions. Again, for the Department to satisfy subsection (II), it only had to

show that G.M. suffered serious bodily injury, which the parents concede. As to the other three children, in addition to serious bodily injury, the Department also had to show that serious bodily injury was the result of "proven parental neglect or abuse." § 19-3-604(1)(b)(IV). As mentioned above, the record supports the court's finding that mother abused G.M. and caused serious bodily injury to him. The court did not need to consider any other factors, such as whether the parents would comply in the abuse clarification process if they were given treatment plans. Thus, even assuming, without deciding, that the court abused its discretion by finding that the parents would not comply with the proposed treatment plans if given the opportunity, any error is harmless. *See* C.A.R. 35(c) ("The appellate court may disregard any error or defect not affecting the substantial rights of the parties.").

VI. Disposition

¶ 45 The judgment is affirmed.

CHIEF JUDGE ROMÁN and JUDGE HAWTHORNE concur.