

No. 1-16-0524

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re DESTINY R. and DAIJA R.,)
) Appeal from the
) Circuit Court of
(THE PEOPLE OF THE STATE OF ILLINOIS,)
) Cook County
)
)
Petitioner-Appellee,) Nos. 15 JA 705
) 15 JA 706
)
v.)
) Honorable
MARTELL R.,)
) Rena Van Tine,
) Judge Presiding.
)
Father-Respondent-Appellant.))

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's findings of abuse, neglect and dependency were not against the manifest weight of the evidence.

¶ 2 Martell R. (Martell), the father of Destiny R. (Destiny) and Daija R. (Daija), appeals from adjudication orders finding that the minors were neglected, abused and dependent. The case arose when Tanessia R. (Tanessia), Martell's estranged wife and the minors' mother, was found fatally beaten and stabbed in her apartment in Alsip, Illinois. For the reasons discussed below, we affirm.

¶ 3

BACKGROUND

¶ 4 In petitions for adjudication of wardship filed in the circuit court of Cook County on July 15, 2015, the State represented that seven-year-old Destiny and six-year-old Daija were taken into custody one day earlier. The petitions provided, in part:

"On July 13, 2015[,] mother was found stabbed and beaten to death in the family's apartment. Per a family member[,] putative father has a history of stalking mother. Family states there was a previous incident where putative father broke into mother's apartment. Family states that after mother's body was discovered putative father hid minor and minor's sibling. Family had advised mother to seek an order of protection prior to her death. Putative father is currently in police custody."

The petitions alleged neglect due to an injurious environment (705 ILCS 405/2-3(1)(b) (West 2014)), abuse due to a substantial risk of physical injury (705 ILCS 405/2-3(2)(ii) (West 2014)), and dependency because the minors were without proper care because of the physical or mental disability of their parent, guardian or custodian (705 ILCS 405/2-4(1)(b) (West 2014)).

¶ 5 In an affidavit signed and filed on July 15, 2015, Bernard Leverette (Leverette), an investigator for the Illinois Department of Children and Family Services (DCFS), stated that Martell "was taken into custody on 07/14/15 as the primary suspect" in Tanessia's murder. A temporary custody order entered on July 15, 2015, provided, in part, that the "father is currently in police custody." The order authorized the DCFS guardianship administrator to place the minors.

¶ 6 In August 2015, Martell served a subpoena on the Alsip police department, seeking documents relating to Tanessia and Tequilla R. (Tequilla), Tanessia's twin sister. The Village of

Alsip moved to quash the subpoena, arguing that Martell "is a suspect in an ongoing homicide investigation pertaining to" Tanessia's death. After a hearing, the court granted the motion to quash, stating that "there still is this ongoing investigation of a very serious crime."

¶ 7 Martell filed a motion to exclude hearsay statements at trial, contending that allegations made during the temporary custody hearing constituted "hearsay from Tanessia's relatives as well as Tanessia herself." Martell asserted that the hearsay exceptions in Rule 804 of the Illinois Rules of Evidence (Ill. R. Evid. 804) and the "Dead Man's Statute" (735 ILCS 5/8-201 (West 2014)) were inapplicable, and thus requested that the court "exclude all hearsay evidence from trial, including any alleged statements of Tanessia." The court declined to rule on Martell's motion prior to the adjudication hearing. The court subsequently denied the State's motion *in limine* for a finding that Tanessia was a party and to deem her statements admissible as statements by a party opponent under Rule 801(d)(2) (Ill. R. Evid. 801).

¶ 8 On September 16, 2015, Martell issued a subpoena seeking a copy of recorded forensic interviews of Destiny and Daija which occurred one week earlier. The State responded, in part, that tendering copies of the interviews would impede an ongoing criminal investigation. After viewing the interviews *in camera* and entering a protective order, the court turned over the disks containing the interviews to all parties of record.

¶ 9 Various witnesses testified during the multi-day adjudicatory hearing, over frequent hearsay and other objections and extensive arguments thereon. The testimony included the following. Tequilla testified that before summer 2012, Tanessia, Martell, and their daughters lived in the home of Martell's grandparents, Milton and Brenda Duffie.¹ In summer 2012, Tanessia and the girls moved into an apartment in Alsip. Martell moved into the Alsip apartment

¹ The record indicates that Milton and Brenda Duffie are Martell's biological grandparents and adoptive parents. Their surname is spelled as "Duffie" and "Duffy" in the record.

in late 2012. In late December 2014, Tanessia telephoned Tequilla. When Tequilla said "hello," Tanessia did not speak. Tequilla testified, "She was just crying. She was, Quilla, Quilla. And I'm like what's wrong, what's wrong. And she would never tell me what's wrong." Tequilla drove to Tanessia's apartment and asked Destiny and Daija to go into their bedroom. Tequilla testified that Tanessia – who was crying and angry – stated that she "went through Martell's cell phone" and viewed "a number in there repeatedly." Tanessia informed Tequilla "she was done" with her relationship with Martell. Destiny entered the room and told Tequilla that "my mom and my daddy was arguing." According to Tequilla, Destiny stated, "It's mommy's fault. She said something to my daddy, and they got into it."

¶ 10 On January 9 or 10, 2015, Tequilla observed that most of Martell's belongings had been removed from the Alsip apartment. Tanessia informed Tequilla "that she was done and that she was going to look into getting a divorce." Tequilla never saw Martell in the apartment from January 9 or 10 until May of 2015. However, on two occasions – in April 2015 and on May 12, 2015 – Tequilla met Martell at a restaurant parking lot to pick up Daija and Destiny. According to Tequilla, Martell drove a "burgundy red Astro van" each time. After Tequilla picked up the children on May 12, 2015, Destiny informed Tequilla that "momma got a new friend" named Anthony.

¶ 11 In late May 2015, Tequilla received a telephone call from Tanessia. Tanessia told Tequilla that Martell "f***ing nuted" *i.e.*, ejaculated, "all over" Tanessia's bedroom. Tequilla testified that Tanessia "was upset, screaming, and she said Martell then f***ing broke in my house. There is nut all over the bedroom." According to Tequilla, Tanessia "described that she seen [*sic*] nut all over her dresser, her bed, the floor, and the walls."

¶ 12 Tequilla testified regarding another incident on May 31, 2015. Upon entering the Alsip

apartment together, Tanessia and Tequilla heard a noise in Tanessia's bedroom. They entered the bedroom and observed Martell laying across the bed, leaning on his arm. Tequilla testified that her sister was "upset" and "was like give me my f***ing keys." Martell gave Tanessia the keys and exited the apartment. Tequilla testified she "felt worried" about her sister's safety and had advised Tanessia to change the locks and file a police report.

¶ 13 Tequilla met Anthony Harris (Harris), Tanessia's boyfriend, for the first time in late June 2015, and he attended a party at Tequilla's home on July 4, 2015. When Harris arrived at the party, Destiny and Daija ran to him and they hugged each other. According to Tequilla, her sister and Harris "was cuddled [*sic*] and like they liked each other."

¶ 14 On July 13, 2015, Tequilla telephoned Tanessia at 6:00 a.m., but she did not answer. They had not spoken since the prior evening, which was unusual because they spoke frequently every day. During her workday, Tequilla repeatedly called her sister, and she telephoned her mother after work to confirm whether she had heard from Tanessia. After returning home in the late afternoon, as Tequilla was preparing to go to Tanessia's apartment, Harris arrived at Tequilla's home appearing "worried" and "upset." The two traveled in separate vehicles to Tanessia's apartment. While driving, Tequilla called Destiny's, and then Daija's, mobile telephone. Daija answered and stated that she was at "Tavi's" home. Tavi is the daughter of Tianna Hardin (Hardin); Hardin is the wife of Martell's friend. Tequilla attempted to determine the length of time that the children had been at Tavi's home because Tanessia did not typically "leave her kids."

¶ 15 After arriving at Tanessia's apartment building, Tequilla touched Tanessia's automobile "to see if it had been driven." The hood was not warm. After looking through a window in the apartment, Tequilla viewed Tanessia's legs. Harris climbed through the window and opened the

door for Tequilla. Upon entering the bedroom, Tequilla observed her sister unclothed, with an open gash in the middle of her chest, a deep cut on her eyebrow and one side of her face "full of blood." Harris checked Tanessia's pulse, and Tequilla called 911. The police arrived shortly after Tequilla and Harris discovered Tanessia's body at 7:45 p.m. At approximately 9:30 p.m., she called Martell, who did not answer but texted, "What's up, I'm busy" a minute later. Tequilla testified that "[s]omeone called me back from his phone saying that the detectives had just picked him up."

¶ 16 When Tequilla left her sister's apartment, she called Hardin and obtained her address. Tequilla and her fiancé Mykel McGowan (McGowan) went to Hardin's house to "get the girls." Although the television and radio were playing and she viewed through the block glass windows two children running inside the home, no one answered the door. Tequilla and McGowan then went to Martell's grandparents' house looking for Destiny and Daija. Tequilla spoke with Martell's aunt, Veda Duffie (Veda), but was not able to locate the girls. Tequilla arrived at the police station at approximately 9:00 p.m. She and a detective, traveling together in a police vehicle, unsuccessfully looked for Destiny and Daija for approximately 30 to 45 minutes. Tequilla returned to the police station, and in the early morning hours of July 14, 2015, she went home. At approximately 1:00 p.m. on that date, Tequilla went to a Chicago police station after a telephone conversation with her mother informing her that the girls were "on their way" to the station. Tequilla then accompanied the girls to the Alsip police station.

¶ 17 On cross-examination, Tequilla testified that she had not contacted the police or applied for a protective order against Martell after the incident on May 31, 2015, or the earlier phone call regarding the semen incident. Tequilla denied testifying during an earlier hearing that her fiancé McGowan had threatened to blow up the house during the conversation with Veda. Tequilla

acknowledged that she was "screaming really loud" outside of the Duffies' house while standing in the middle of the street on the night of July 13, 2015. Among other things, Tequilla had screamed, "Your f***ing grandson killed my sister."

¶ 18 On re-direct examination, Tequilla testified regarding an incident that had occurred the prior day. As she drove out of the parking garage near the courthouse following her testimony, Martell was walking approximately 20 feet away. He turned toward Tequilla and "stuck up his middle finger," which Tequilla interpreted to mean "f*** you."

¶ 19 Anthony Harris testified that he met Tanessia in their workplace in 2014 and they began dating in April 2015. Harris described in detail two incidents – in June and July 2015 – when a burgundy Astro van followed him as he drove slowly on various streets after exiting Tanessia's apartment building. Discussing the events of July 13, 2015, Harris testified that he had texted Tanessia throughout the day, but she did not respond. After work, Harris went to Tanessia's apartment building and observed her parked vehicle. He knocked on her apartment door and attempted to open the door, but it was locked. After contacting Tanessia's cousin, who did not know her whereabouts, Harris went to Tequilla's home. His testimony was consistent with Tequilla's testimony regarding traveling to Tanessia's apartment and discovering her body. On cross-examination, Harris testified that he had not observed the license plate number of the burgundy van that had followed his vehicle. He never contacted 911, filed a police report, or sought an order of protection in connection with the incidents involving the van.

¶ 20 Barbara R. (Barbara), the mother of Tanessia and Tequilla, testified that in late December 2014, she received a telephone call from Tanessia. Tanessia was upset and "like hysterical" and told her mother, "Ma, ma, I'm pissed" and "[t]his mothf***a then left me again." In June 2015, Tanessia called Barbara; Tanessia "had just gotten off the phone with Martell." Barbara testified,

"[Tanessia] said that Martell said that he had told her what she was wearing, where she was sitting at in her apartment, and what she was doing, and that who was in there with her."

According to Barbara, her daughter sounded nervous and scared. Barbara told Tanessia "she needs to go to the Alsip police station and put it on paper."

¶ 21 Barbara testified that on July 13, 2015, Martell telephoned her and indicated that, as soon as it stopped raining, he would bring Destiny and Daija to Barbara's home. According to Barbara, his call was unexpected because Tanessia – not Martell – had made arrangements one day earlier to drop the children off at Barbara's home. After Tanessia's body was discovered, Barbara telephoned Martell and informed him of Tanessia's death. Barbara asked him, "What have you done to my daughter?" and Martell responded, "I ain't did nothin' to that girl" and hung up the telephone.

¶ 22 Barbara further testified that she did not see Destiny and Daija on the night of July 13, 2015. Veda initially called Barbara at approximately noon on July 14, 2015, and indicated she "had the girls," but subsequently called and stated that her sister Stacy "had the girls." Stacy brought Destiny and Daija to meet Barbara at a gas station parking lot, where they were met by Chicago police officers.

¶ 23 Approximately two weeks before her testimony at the adjudicatory hearing, Destiny and Daija asked Barbara why she was crying, and they reassured their grandmother that "it's going to be okay." Daija then asked Barbara if she knew "James." Barbara responded that she did not, and asked who James is. Barbara testified: "She said, That's my daddy's friend. And she said, They didn't see me hiding, but I was hiding on the Fourth of July. And she said, Then they had a mask, they had a gun. And I know, I know." After Barbara asked, "You know what, Daija?," Daija stopped talking. Daija later told Barbara, "My daddy came over, he told us to go into the

room. And him and my mama went into the other room. And they was in there arguing. And then she came – he came out and then we went to the gas station. And that's the last time I saw my mommy."

¶ 24 Pursuant to section 2-1102 of the Code of Civil Procedure (735 ILCS 5/2-1102 (West 2014)), the State called Martell as a witness. After answering preliminary questions, Martell invoked his Fifth Amendment right not to testify. He declined to answer questions regarding: his vehicle; his relationship with Tanessia; Harris' relationship with Tanessia and her daughters; and events on July 12 through 14, 2015. The court asked a single question: "Were you in [Tanessia's] apartment at the time that she was killed?" Martell responded, "No." After Martell's testimony, the court admitted the forensic interviews of Destiny and Daija. In their interviews, both girls stated, among other things, that their father drove a red van. The State rested, and the guardian *ad litem* (GAL) for the minors presented no witnesses.

¶ 25 Martell called Brenda Duffie (Brenda) to testify. Brenda testified that, throughout 2012 to 2015, she watched Destiny and Daija when Martell and Tanessia were working. After Martell moved back into Brenda's home in March 2015, Tanessia and the children would occasionally spend the night and would participate in Sunday dinners at her home, with Martell present. Brenda testified that the interactions between Martell and Tanessia were not tense, Tanessia did not seem scared, and Martell did not act inappropriately.

¶ 26 On July 12, 2015, Brenda witnessed Martell speaking with Tanessia as she dropped off two of Brenda's other grandchildren at her home. According to Brenda, Martell did not look angry with Tanessia, and Tanessia did not appear upset or scared. Brenda also testified that the man with Tequilla outside of Brenda's home on July 13, 2015 – presumably McGowan – stated "I'm going to [blow] this M F house up tonight." She did not see Martell make an obscene

gesture to Tequilla after the court hearing. After Brenda's testimony, Martell's counsel moved for a directed finding, which the court denied.

¶ 27 Leverette, the DCFS investigator, testified that he was assigned on July 14, 2015, to investigate an allegation of "[s]ubstantial risk of physical injury, environment injurious to health and welfare of the children." According to Leverette, "[t]here was an unfounded finding based on the father not being charged for the crime at this time." Leverette's notes from July 14, 2015, reflected that Destiny and Daija appeared to be in good health and exhibited no physical signs of abuse or neglect.

¶ 28 Martell called Hephzibah Miller (Miller), a court reporter, who testified that she had accurately transcribed proceedings held on August 12, 2015. Miller testified that, during Tequilla's testimony on that date, she denied personally threatening to blow up the Duffies' home but admitted that McGowan had.

¶ 29 Stacy Duffie (Stacy), Martell's aunt, testified that Tequilla telephoned her on the night of July 13, 2015, after discovering her sister's body. Tequilla stated, "I'm going to kill Martell. I'm going to kill that mother f***er." On the following day, Veda called Stacy and told her that Barbara and Tequilla "were hysterical and they were saying the kids were missing and to take the kids to Barbara so they can know that they're okay." Stacy indicated that she did not know if Martell was arrested but testified, "They took him to the police station."

¶ 30 Veda Duffie, Martell's aunt, testified that Martell moved into his parents' house at the "end of March, beginning of April" in 2015. She testified that Tanessia and Martell were present at her family's Easter dinner on April 4, 2015. Veda texted Tanessia because Tanessia forgot her purse at the home. Tanessia responded by text, asking Veda to give her purse to Martell to take home. Tanessia occasionally received packages at the Duffie house, which Martell took or

Tanessia picked up. Veda never observed any animosity between Martell and Tanessia. Shortly before Father's Day in 2015, Tanessia called Veda and asked for the name of a particular restaurant because she wanted to take Martell there for Father's Day.

¶ 31 Veda testified that on July 13, 2015, Tequilla threatened, "Where that mother-f**er at? I'mma blow his goddamn brains out." Veda also testified that Tequilla's fiancé stated, "I'mma blow this whole goddamn block up, and I'mma blow this mother-f***ing house up." After a call at 12:00 or 1:00 a.m. on July 14, Veda picked up Destiny and Daija from Hardin's grandmother's home and brought the children to a friend's home. Veda testified that her father (Milton Duffie) owns a red GMC Safari, which she had seen Martell drive. After certain telephone records were admitted into evidence, Martell's counsel rested.

¶ 32 During closing arguments, the State posited that Martell had engaged in threatening behavior after Tanessia began dating Harris. The State contended that Tanessia had "ignored the escalating stalking" by Martell and had disregarded the requests of her family members to contact the police. Based on Martell's alleged stalking and Tanessia's inaction, the State argued that Destiny and Daija were abused and neglected. The GAL contended, in part, that Martell's relatives had engaged in a "systematic action of trying to move the kids from one place to another place" after Tanessia's death. Martell's counsel asserted that "there's no evidence that he's ever been arrested." His counsel also noted, among other things, that DCFS had "unfounded the allegations against Martell" but "didn't unfound the allegation totally because somebody murdered Tanessia."

¶ 33 The circuit court's findings included that: Tanessia clearly knew she was being stalked and was afraid of her stalker; a reasonable parent in Tanessia's position "would have followed her family's advice and gone to the police"; Tanessia's inaction placed her at risk and "poisoned

the environment for her children as well, making them subject to terrible risks too"; Tanessia sustained many blunt force injuries; and her killing was not random or accidental, but was "personal." The court found that on May 31, 2015, Martell entered Tanessia's residence without permission and was laying in her bed. The court found Harris' testimony regarding being followed while driving to be credible, and further found that Martell "had access to and drove a red van or something strongly resembling a red Astro van such as a red GMC Safari." The court observed that Martell was "not forthcoming" and "appeared pretty cold when the maternal relatives were crying in grief over losing Tanessia." The court further found that "Martell likely did give Tequilla the finger between court dates" and exhibited no "respect or empathy for her agony of losing her twin in such a violent homicide." The court also drew an adverse inference from Martell's invocation of the Fifth Amendment and characterized his answer to the court's single question – denying that he was present when Tanessia died – to be "suspicious."

¶ 34 The court stated, "[W]hile I strongly suspect and feel that it is extremely possible that Martell killed Tanessia in a fit of jealous rage and passion, I recognize that every link in the chain of proof has not been adequately established for me to so find." The court concluded that "the overall quality, continuity and totality of the evidence is insufficient to establish by a preponderance of the evidence that the father murdered the mother."

¶ 35 In adjudication orders entered on January 6, 2016, the court found that Destiny and Daija were abused and neglected, and the abuse or neglect was inflicted by Martell. The court also found that the minors were dependent because they were without proper care because of a physical or mental disability of the parent, guardian, or custodian. After a hearing, the court entered disposition orders on January 26, 2016, finding that Martell was "unable for some reason other than financial circumstances alone to care for, protect, train or discipline" the minors.

Temporary custody was terminated, and Destiny and Daija were placed in the custody of the DCFS guardianship administrator. Martell filed this timely appeal.²

¶ 36

ANALYSIS

¶ 37 Martell contends that the circuit court's finding that his daughters were dependent was against the manifest weight of the evidence. He also asserts that testimony from Tequilla regarding Tanessia's purported statements concerning alleged stalking by Martell constituted inadmissible hearsay, and he otherwise challenges the findings of abuse and neglect.

¶ 38 Martell's arguments on appeal are limited to the adjudicatory hearing and findings. "At the adjudicatory hearing, the court shall first consider only the question whether the minor is abused, neglected or dependent." 705 ILCS 405/2-18 (West 2014). "The State bears the burden of proving neglect, dependence or abuse by a preponderance of the evidence, meaning proof that makes the condition more probable than not." *In re N.B.*, 191 Ill. 2d 338, 343 (2000).

¶ 39 Section 2-4 of the Juvenile Court Act of 1987 (Act) addresses dependency. The statute provides, in part, that "[t]hose who are dependent include any minor under 18 years of age: who is without proper care because of the physical or mental disability of his parent, guardian or custodian." 705 ILCS 405/2-4(1)(b) (West 2014). When considering an allegation of dependency, the determination of whether a minor is a dependent child focuses on the parent rather than the child. *In re Charles W.*, 2014 IL App (1st) 131281, ¶ 50; *In the Interest of J.J.*, 246 Ill. App. 3d 143, 151 (1993). Compare *In re Rayshawn H.*, 2014 IL App (1st) 132178, ¶ 24

² Rule 311(a)(5) of the Illinois Supreme Court Rules provides that "[e]xcept for good cause shown, the appellate court shall issue its decision within 150 days after the filing of the notice of appeal" in accelerated cases. Ill. S. Ct. R. 311(a)(5) (eff. Mar. 8, 2016). Due to requested extensions by all parties in the instant case, the appellant's reply brief was not filed until August 19, 2016, which is beyond the 150-day period. Since the case was not ready for disposition until such date, we find good cause for issuing our decision after the 150-day period. See *e.g.*, *In re B'yata I.*, 2013 IL App (2d) 130558, ¶ 26.

(in neglect cases, "[t]he focus of our inquiry is whether the minor is neglected, not whether the parents are neglectful"). "Specifically the focus is on whether the disability of the parent is such that it impairs the abilities necessary for the care and parenting of the minor." *J.J.*, 246 Ill. App. 3d at 151. "The circuit court's determination of dependency will not be overturned unless it is manifestly erroneous." *In re S.W.*, 342 Ill. App. 3d 445, 450 (2003). "A court's finding is against the manifest weight of the evidence if a review of the record clearly shows that the opposite result would be the proper one." *Id.*; accord *In re L.H.*, 384 Ill. App. 3d 836, 841 (2008).

¶ 40 In making its dependency finding, the court stated, in part:

"At the time the case came into the system, the mother was dead, and the father was getting investigated for her murder. Given the circumstances, DCFS would not allow the father to have any contact with the minors until after the case was in the court system. Neither parent was available to take on the full parenting responsibilities for the minors immediately after Tanessia's body was found, notwithstanding that the father likely wanted to.

Accordingly, I also entered findings on the Dependency B count as to both minors consistent with the case that supports this finding when the parents are unavailable due to the physical disability of incarceration.

I find that due to the police and DCFS intervention, the father was no more available to the children than if he had actually been under the physical disability of incarceration."

Martell contends that the circuit court "oddly suggests that the combination of police and DCFS intervention is, for purposes of the dependency statute, akin to a prison sentence," despite "absolutely no caselaw that suggests this."

¶ 41 As a threshold matter, we observe that this court has repeatedly concluded that incarceration is a basis for a dependency finding. See, e.g., *In re D.M.*, 2016 IL App (1st) 152608, ¶¶ 11, 45 (affirming dependency finding where one parent was incarcerated and the other was deceased); *In re Brandon A.*, 395 Ill. App. 3d 224, 237 (2009) (same); *In re A.D.W.*, 278 Ill. App. 3d 476, 482 (1996) (affirming dependency finding where both parents were incarcerated); *Bryant v. Lenza*, 90 Ill. App. 3d 275, 277 (1980) (affirming dependency finding where children's natural father was serving a life imprisonment sentence for his conviction of second degree murder of the children's natural mother).

¶ 42 Although we acknowledge the distinction between a lengthy incarceration and the relatively limited period spent by Martell – whether voluntarily or involuntarily – at the police station, we view the critical time frame for the purpose of the dependency analysis as when the children were taken into protective custody and the petitions for adjudication of wardship were filed. For example, in *In re S.W.*, 342 Ill. App. 3d at 447-48, the defendant-mother took her minor child to the emergency room because the minor "was out of control, would not listen, and was hitting defendant." The State filed a petition for adjudication of wardship after the mother refused to take the minor home from the hospital, and the circuit court entered an order finding no-fault dependency. *Id.* at 450, citing 705 ILCS 405/2-4(1)(c) (West 2000). On appeal, the mother argued that the dependency finding "incorrectly was based on the situation at the time the adjudication petition was filed and not the situation as it stood at the time of the adjudicatory hearing," which occurred months later. *Id.* at 451. The appellate court affirmed, concluding that the Illinois Supreme Court decision in *In re C.W.*, 199 Ill. 2d 198, 217 (2002), "suggests that evidence regarding defendant's subsequently completed services and her subsequent behavior properly was considered at the dispositional hearing, not the adjudicatory hearing." *S.W.*, 342 Ill.

App. 3d at 451-52. See also *Rayshawn H.*, 2014 IL App (1st) 132178, ¶ 37 (finding that "postpetition evidence was irrelevant to the allegations of the petition for adjudication"); *In re Kenneth D.*, 364 Ill. App. 3d 797, 805-06 (2006) (concluding that the "trial court did not abuse its discretion in finding that evidence of respondent's subsequent participation in services and subsequent remedial efforts were not relevant to the allegations in the petition that, *at the time [the minor] was taken into protective custody*, his environment was injurious and there was a substantial risk of physical injury to him" (emphasis added)). In the instant case, the record supports the circuit court's finding that each minor was without proper care during the relevant time frame because of the physical or mental disability of her parent, guardian or custodian, *i.e.*, Tanessia was deceased, and Martell was unavailable due to the investigation of Tanessia's murder.

¶ 43 Martell also contends that "the trial record is replete with references to both maternal and paternal sides of the family being ready, willing, able, and eager to take care of Daija and Destiny" and thus "[t]here was a built in care plan for these girls, if the need had arisen." "In other words," Martell contends, "the dependency statute references not only parents and guardians, but custodians, and there were plenty of relatives who would have provided Daija and Destiny with proper custodial care[.]" However, we reject Martell's reading of the dependency statute. Section 405/2-4(1)(b) of the Act provides that "[t]hose who are dependent" include a minor "who is without proper care because of the physical or mental disability of his parent, guardian or custodian." 705 ILCS 405/2-4(1)(b) (West 2014). The record is clear that the "parent, guardian or custodian" of Destiny and Daija for purposes of the dependency statute were their parents, Tanessia and Martell. See, *e.g.*, *In re Mark W.*, 383 Ill. App. 3d 572, 589 (2008) (noting that the trial court never entered an order making the maternal grandmother the legal

custodian of the minor).

¶ 44 Furthermore, we reject Martell's argument, raised for the first time in his reply brief, that the dependency statute is unconstitutionally vague as applied. " 'Constitutional challenges carry the heavy burden of successfully rebutting the strong judicial presumption that statutes are constitutional.' " *People v. Rizzo*, 2016 IL 118599, ¶ 23, citing *People v. Patterson*, 2014 IL 115102, ¶ 90. To overcome this presumption, the party challenging a statute must clearly establish that it violates the constitution. *Rizzo*, 2016 IL 118599, ¶ 23. Martell failed to raise the constitutional challenge in the circuit court, and has not provided this court with a sufficient basis for overcoming the presumption of constitutionality. See, e.g., *Forest Preserve District of DuPage County v. First National Bank of Franklin*, 2011 IL 110759, ¶ 27 (noting that "[a] party's failure to challenge the constitutionality of a statute in the circuit court normally forfeits that challenge on appeal in a civil case").

¶ 45 While we do not underestimate the public policy concerns raised by Martell, we reject his contention that "[i]f this is the standard for a finding of dependency, every child who is taken into protective custody prior to the Temporary Custody hearing is by definition dependent." Under the unique facts of this case – the minors' father being questioned by police as a suspect in the murder of the minors' mother – we cannot conclude that the finding of dependency was against the manifest weight of the evidence.

¶ 46 Martell also challenges the findings of abuse and neglect. We will not disturb the trial court's findings of abuse or neglect unless such findings are against the manifest weight of the evidence. *In re Juan M.*, 2012 IL App (1st) 113096, ¶ 49. As noted above, a "finding is against the manifest weight of the evidence only if the opposite result is clearly evident." *In re A.W.*, 231 Ill. 2d 241, 254 (2008).

¶ 47 Martell argues on appeal that the circuit court "relied heavily on the statement made by Tanessia to [Tequilla] that, 'Martell f***ing broke into my house, there is nut all over my bedroom!' " He further contends that "[t]he lack of corroboration of Tanessia's 'incredulous' utterance, and her fragile emotional state, combined with Tequilla's general credibility problems, motive to lie, and credibility specific to this statement, should lead this Court to find that Tanessia's statement is hearsay, and Tanessia's^[3] testimony as a whole lacks credibility."

¶ 48 The "standard of proof and the rules of evidence in the nature of civil proceedings" are applicable at an adjudicatory hearing. 705 ILCS 405/2-18(1) (West 2014). "The admission of evidence by the circuit court will not be reversed absent an abuse of its discretion." *A.W.*, 231 Ill. 2d at 254. Martell appears to contend that Tequilla's testimony regarding her conversation with Tanessia about the semen incident constituted inadmissible hearsay and did not qualify as an "excited utterance."

¶ 49 Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted. Ill. R. Evid. 801. Certain statements are not excluded by the hearsay rule, including an excited utterance, *i.e.*, a "statement relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition." Ill. R. Evid. 803. "For a statement to be admissible under the excited utterance exception, also known as the spontaneous-declaration exception, there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, an absence of time for the declarant to fabricate a statement, and a statement relating to the circumstances of the occurrence." *People v. DeSomer*, 2013 IL App (2d) 110663, ¶ 12.

¶ 50 Based on our review of the record, the semen incident was "sufficiently startling" to

³ We assume this reference is to Tequilla and not Tanessia.

produce Tanessia's "spontaneous and unreflecting" statements to her sister, and her statements were made within a short time period after the incident and related to the circumstances of the incident. Tanessia appears to have made the statements to Tequilla "while the excitement of the event predominated." *DeSomer*, 2013 IL App (2d) 110663, ¶ 18 (stating that "[t]he ultimate issue is whether the statement was made while the excitement of the event predominated"). Furthermore, there appears to have been "at least some other circumstantial evidence besides the 'spontaneous declaration' to corroborate the existence of the startling occurrence." *People v. M.S.*, 247 Ill. App. 3d 1074, 1089 (1993). Accord *DeSomer*, 2013 IL App (2d) 110663, ¶ 15. Discussing the corroboration for the semen incident, the court found that the "mother's excited utterance to her twin near the end of May of 2015 about Martell breaking into her house is corroborated by what Tequilla directly observed on May 31, 2015," *i.e.*, Martell's uninvited presence in Tanessia's bedroom. See also *People v. Poland*, 22 Ill. 2d 175, 183 (1961) (noting that "[i]t is sufficient if it appears inferentially that the declarant personally observed such matters and that there is nothing to make a contrary inference more probable").

¶ 51 We further note that while the circuit court believed Tequilla's testimony regarding her conversation with her sister regarding the semen incident, the court expressed a degree of skepticism regarding the substance of Tanessia's excited utterance. In its ruling during the adjudicatory hearing, the circuit court stated, in part:

"I find that the mother's twin, Tequilla, honestly testified about all of the statements the mother made to her. I make this finding notwithstanding that the mother's statement regarding Martell nutting all over the house, include the bed, dresser, floor and walls is most likely the mother's exaggeration or the mother's mistaking whatever foreign substance was in her home for semen."

The court further observed:

"Tequilla just honestly related to the best of her recollection what mom told her, including the incredulous statement of the semen being every-which-where. But just because this particular statement by the mom regarding the quantity of the semen is likely not accurate does not mean that all of her other statements can't be believed. And it also doesn't mean that Tequilla inaccurately reported what Tanessia told her. In fact, I just found the opposite to be true."

¶ 52 Even if the admission of Tequilla's testimony regarding her conversation with Tanessia regarding the semen incident constituted error, such error would be harmless. "Under the harmless error standard, if the State can sustain its burden of proof with properly admitted evidence, the error in admitting improper evidence is considered harmless." *D.M.*, 2016 IL App (1st) 152608, ¶ 31. In this case, there was other evidence of Martell's troubling behavior that supports the court's conclusions, *e.g.*, Barbara's testimony regarding Tanessia's statements concerning surveillance and/or stalking by Martell, and the testimony regarding a burgundy van following Tanessia's boyfriend.

¶ 53 Martell also contends that "Tequilla's credibility was suspect throughout her testimony." He argues that she "lied about whether her fiancé threatened to blow up the house," even when confronted with a transcript "showing her lie." Martell also asserts that she had threatened "harm to the elderly" and failed to mention the semen incident to the DCFS investigator when he asked her for examples of Martell's alleged stalking.

¶ 54 Based on our review of the record, it appears that the court thoughtfully and thoroughly assessed the testimony of Tequilla and the other witnesses. The circuit court made the following observations regarding Tequilla's testimony:

"Notwithstanding that the mother's twin, [Tequilla], was sad, angry and not objective, I find that she worked very hard to be as honest and as accurate as she could be. She did not have her head in the sand and forced herself to face the issues despite her selective recall on her fiance's role in threatening the paternal relatives.

Tequilla's anger and bias toward Martell are understandable and could arguably distort her recollection of the less material facts. However, I find that the anger, bias, and discrepancies in her testimony don't rise to the level of me being able to just blanketly set aside all of the material things that she related that were in fact credible.

[Tequilla] strikes me as the kind of person who if for one instant even suspected that the stalker and/or murderer could have been someone other than Martell, she would not have hesitated to say so. She does not come across as the kind of person who's going to risk potentially letting someone else get away with killing her twin if she remotely thought that the killer was anyone other than the father. ***

Moreover, given that Tequilla is a hundred percent sure that it was Martell who killed her twin, if she was motivated to lie or exaggerate or fill in the blanks, her testimony could easily have been much more directly damaging to Martell."

The circuit court further stated: "To a significant extent, I believe the testimony of [Tequilla], Anthony Harris, [Barbara], Brenda Faye Duffie, Stacy Duffie and Veda Duffie. I do take into account that all of their perspectives are colored by their affections for the mother and/or father and/or the minors." The court also found, however, that the "paternal relatives collectively paint

an unrealistically rosy picture of the post-marital relationship" and the "paternal family is deeply in denial that the father could ever be capable of anything so horrific as stalking or killing the mother."

¶ 55 "Because the trial court has the best opportunity to observe the demeanor and conduct of the parties and witnesses, it is in the best position to determine the credibility and weight to be given to the witnesses' testimony." *In re Stephen K.*, 373 Ill. App. 3d 7, 20 (2007). Based on our review of the record, we cannot conclude that the circuit court's findings regarding Martell's stalking and Tanessia's inaction – or the circuit court's ultimate findings of abuse and neglect – were against the manifest weight of the evidence. Finally, although his notice of appeal references the dispositional hearing, Martell does not advance any argument contesting the dispositional findings on appeal and has thus waived the issue. *L.H.*, 384 Ill. App. 3d at 843; Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (providing that points not argued in the opening appellate brief are waived).

¶ 56

CONCLUSION

¶ 57 The judgment of the circuit court of Cook County is affirmed in its entirety.

¶ 58 Affirmed.