DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JON B.,	)	1 CA-JV 09-0158
	)	
Appellant,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	
ARIZONA DEPARTMENT OF ECONOMIC SECURITY, WILLIAM B., KAITLYN B.,	)	(Not for Publication – Ariz. R.P. Juv. Ct. 103(G); ARCAP 28)
Appellees.	)	

Appeal from the Superior Court in Maricopa County

Cause No. JD17920

The Honorable Cathy M. Holt, Judge

REVERSED

David W. Bell, Attorney at Law — Mesa
Attorney for Appellant

Terry Goddard, Arizona Attorney General — Phoenix
By Stacy L. Shuman, Assistant Attorney General
Attorneys for Appellees.

B A R K E R, Judge

¶1 Appellant Jon B. ("Father") appeals the juvenile court's order terminating his parental rights to Son and Daughter. Finding error, we reverse.

Facts and Procedural History

¶2 Father and his wife ("Mother") are the biological parents of Son and Daughter. The following facts come from the evidentiary hearing on the motion to terminate Father's parental rights. In 2003 and 2004, Father and Mother engaged in a consensual sexual relationship with their neighbor Mark and his wife. In 2005, Mother and Mark started having an affair. Father knew about the affair in 2005 because he walked in on them having sex in his bedroom.

¶3 In February 2007, Son, who was six years old, told Father that Daughter, who was four years old, had no panties on and that "Mark told [him] it was okay." Son also told Father he had a "big secret" that he was "never to tell" because "[Mark] would go to jail." Son revealed that Mark masturbated in front of him and that he "saw white stuff on [Mark's] balls." Son also told Father that Mark taught him "how to play with himself." Father believed what Son told him. Father also knew that Daughter had been touching herself, but he thought it was "normal behavior [sic] children exploring themselves."

¶4 When Son told him about Mark, Father immediately called the police to report that Mark may have abused Son. Father subsequently filed a petition for an order of protection with the justice court to protect Son and Daughter from Mark. At the hearing before the justice of the peace on the petition for an order of protection, Son would not tell the court what he told Father, and Father did not tell the court everything he learned from Son. When the court denied the petition for insufficient evidence, Father said something to the effect of "if something else happens, at least I won't be held liable."

¶5 Father also took Son to Childhelp for a police interview. Son would not disclose what happened to him, and Father told the interviewer that Son could "take one fact and another fact and then come up with a whole totally different other fact." A Child Protective Services ("CPS") case worker investigated the claim in March 2007 but found insufficient evidence of abuse and did not file a dependency petition.

¶6 After Father assaulted Mother in November 2007 for sending text messages to Mark, he had "too much anger and rage and confusion" to parent and moved to Arkansas for sixteen months to work on anger management problems, leaving Son and Daughter at their maternal grandmother's

home in the Phoenix area. While living in Arkansas, Father stayed in contact with the children through telephone calls and video conferencing. Father never told Mother about the February 2007 incident and never asked Mother to keep the children away from Mark.

¶7 Shortly after Father returned to Arizona in March 2009, Son and Daughter were removed from Mother and Father's care and placed under the protection of CPS because police discovered that Mother and Mark had sexually abused the children. Mother and Mark forced Son and Daughter to perform sexual acts on one another and on them and photographed the children doing so.

¶8 The Arizona Department of Economic Security filed a petition to terminate the parental rights of both Mother and Father for willfully abusing the children or failing to protect them from abuse. Mother did not contest severance, but Father did. After an evidentiary hearing, the juvenile court found clear and convincing evidence to terminate Father's parental rights because he failed to protect his children from sexual abuse. The court also found termination was in the best interests of Son and Daughter. Father timely filed a notice of appeal.

¶9 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 8-235 (2007), 12-120.21, and -2101(B) (2003).

Discussion

¶10 We view the facts and all reasonable inferences in the light most favorable to upholding the juvenile court's order. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 13, 53 P.3d 203, 207 (App. 2002). The juvenile court properly severs parental rights when (1) clear and convincing evidence proves a statutory ground for termination and (2) when a preponderance of the evidence shows severance is in the best interests of the children. *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, 449, ¶ 12, 153 P.3d 1074, 1078 (App. 2007). We will affirm the juvenile court's order unless no reasonable evidence supports its factual findings. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, 93, ¶ 3, 210 P.3d 1263, 1264 (App. 2009).

¶11 Pursuant to A.R.S. § 8-533, termination of parental rights is appropriate when "the parent has neglected or wilfully abused a child," which "includes serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a

person was abusing or neglecting a child." A.R.S. § 8-533(B)(2) (Supp. 2009). "Abuse" means:

> Inflicting or allowing sexual abuse pursuant to § 13-1404, sexual conduct with a minor pursuant to § 13-1405, sexual assault pursuant to § 13-1406, molestation of a child pursuant to § 13-1410, commercial sexual exploitation of a minor pursuant to § 13-3552, sexual exploitation of a minor pursuant to § 13-3553, incest pursuant to § 13-3608 or child prostitution pursuant to § 13-3212.

A.R.S. § 8-201(2)(a) (Supp. 2009). Father argues clear and convincing evidence did not demonstrate that this standard was met. We agree.

¶12 The strongest evidence that Father knew of abuse, and therefore failed to protect Son and Daughter from future abuse, was the detail contained in Son's description of the event. However, the police had this identical information and failed to act. Father immediately reported to the police Son's explicit statement. The police investigated the allegation that day and wrote in the police report:

> [FATHER] ASKED HIS SON WHAT WAS OKAY. HIS SON TOLD HIM THAT IT WAS A BIG SECRET. [FATHER] ASKED HIM WHAT WAS A SECRET. [SON] TOLD HIM THAT MARK TOLD HIM NEVER TO TELL ANYONE OR HE WOULD GO TO JAIL. [FATHER] ASKED HIS SON AGAIN WHAT MARK TOLD HIM.

> [SON] TOLD HIS FATHER THAT MARK TAUGHT HIM HOW TO PLAY WITH HIMSELF. [SON] THEN TOLD HIS FATHER THAT ONE TIME MARK PLAYED WITH HIMSELF AND *"WHITE STUFF CAME OUT OF HIS BALLS AND GOT ONTO HIM."*

(Emphasis added). The police further told Father not to talk with Son about the incident and not to tell Mother of the incident.

¶13 At the Childhelp interview about two weeks later, a detective interviewed Son and Daughter, but neither child told the interviewer about any sexual abuse. The interviewer then closed the case, concluding: "I HAVE NO DISCLOSURE FROM THESE CHILDREN. I HAVE NO CRIME AT THIS TIME." The police's decision, finding "no disclosure" by the children and thus "no crime," came despite the fact that two pages earlier in the same report there is an exact recounting by Father of Son's very explicit statement that is asserted to have put Father on notice that sexual abuse occurred in the past and may occur in the future. Yet, the police found "no crime." At that stage of the investigation, all the police needed to find a crime was "reasonably trustworthy information" demonstrating probable cause that a crime (sexual abuse) was committed. *See State v. Wedding*, 171 Ariz. 399, 404, 831 P.2d 398, 403 (App. 1992) ("Probable cause to arrest exists when an officer has

reasonably trustworthy information sufficient to lead a reasonable person to believe that the offense was committed and that the person to be arrested committed it.”). Thus, the record clearly shows that the police did not consider Son’s explicit statement to Father to constitute “reasonably trustworthy evidence” of sexual abuse.

¶14 Following a suggestion by the police during the initial investigation, Father took Son and Daughter to a court hearing for an order of protection prior to the Childhelp interview. The State is critical of Father for not telling the justice of the peace the specific details concerning Son’s February 2007 disclosure. Father, however, had been told by the police not to discuss the “big secret” with Son, and Son was within hearing distance of Father during the proceeding. Father told the justice of the peace that the children would be interviewed by Childhelp in a few days. Although the justice of the peace asked Son about Mark, Son stated “[he] forgot” and subsequently did not tell the court about any abuse. In denying the petition for an order of protection, the justice of the peace told Father there was not enough evidence for him to grant the petition but told Father the police are “experts” at interviewing children about sexual abuse. He suggested Father go to the Childhelp interview

and petition for a second order of protection if the police find more evidence.

¶15 CPS also investigated the allegation of abuse in March 2007 and similarly found insufficient evidence to do anything. The CPS investigative case manager assigned to the case in March 2009 agreed there was no basis for the initial CPS investigator to file a dependency petition based on sexual abuse in March 2007. On cross-examination, Father's attorney had the following exchange with the current CPS investigator:

> Q Okay. And you said you -- well, did you review any ChildHelp records at that time?
>
> A I -- at the time I initially made contact with the family, I didn't have the police report from '07. It was just a conversation I had had with the detective.
>
> . . . .
>
> Q Okay. So I guess -- would it be fair to say that even though some type of suspected sexual abuse occurred --
>
> A Uh-huh.
>
> Q -- it didn't rise to the level where a dependency should be filed?
>
> A Not with respect to sexual abuse, no.

¶16 The current CPS investigator did not review the police report but spoke with the detective on the case and learned about the February 2007 statement Son made to Father. As noted, that statement is the critical evidence in this case, but both CPS investigators concluded there was no basis to file a dependency petition because there was insufficient evidence of sexual abuse. Based on the same information, however, the State sought to sever, and the juvenile court did sever Father's parental rights for failing to protect Son and Daughter from sexual abuse. At the hearing, the current CPS investigator answered questions regarding Father's knowledge of the sexual abuse:

> Q What is the evidence that [Father] knew about the sexual abuse?
>
> A His son's disclosure to him.
>
> Q And that was in February '07?
>
> A Either end of January or beginning of February, yes.

¶17 It is inconsistent for the juvenile court to find the February 2007 incident as clear and convincing evidence that Father inappropriately failed to protect Son and Daughter from Mark when CPS admitted it had no good faith basis to file a dependency action based on sexual abuse, and when the police did not have probable cause to arrest Mark for sexual abuse. Clear and convincing evidence is a

higher standard of proof than probable cause used to arrest. *See In re Maricopa County Juv. Action No. JS-5894*, 145 Ariz. 405, 409-10, 701 P.2d 1213, 1217-18 (App. 1985) (stating clear and convincing evidence is a higher burden of proof than probable cause); *Simpson v. Owens*, 207 Ariz. 261, 270-74, ¶¶ 31, 39, 85 P.3d 478, 487-91 (App. 2004) (analyzing standards of proof and inferring probable cause is a lower burden of proof than clear and convincing evidence).

¶18 On this record, when (1) the police could not find probable cause that Mark abused Son, (2) CPS found insufficient evidence to file a dependency petition, and (3) there was no evidence to indicate any other sexual abuse from February 2007 until Father left for Arkansas in November 2007, the clear and convincing standard for severance has not been met. Father was not alleged to have committed the abuse – he was alleged to have failed to do exactly what two government agencies concluded they had insufficient evidence to do. It was understandable for Father to rely on the expertise of the police and CPS when both government bodies determined there was insufficient evidence that Mark sexually abused the children in February 2007. Father's statement that he "[wouldn't] be held liable" if something else happened to Son and Daughter was

made after the police failed to arrest Mark and the justice court denied Father's request for an order of protection. In the context of what had just happened, the statement can be viewed as Father's frustration with the government system designed to protect his children. Similarly, Father's statement to the Childhelp interviewer that Son could have fabricated the story is understandable given that two government agencies did not find sufficient evidence of sexual abuse. The actions of the police and the justice court could have reasonably led Father to doubt Son's statement. In any event, neither statement by Father is sufficient, alone or with the other evidence, to provide clear and convincing evidence necessary for severance.

¶19 Additionally, Father stayed in close contact with Son and Daughter while he lived in Arkansas. He returned to Arizona to spend Christmas with the children, purchased two web cameras and video conferenced with the children, called them about once or twice a week, and mailed them birthday cards. Other than the facts in the timeframe near February 2007, there is no evidence that Son or Daughter told Father they were being abused or that Father knew, or should have known, abuse was occurring while he lived in Arkansas.

¶20 While we are required to view the evidence in the light most favorable to the judgment of the court, *Jesus M.*, 203 Ariz. at 282, ¶ 13, 53 P.3d at 207, and do not re-weigh the evidence, *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, 81, ¶ 13, 107 P.3d 923, 927 (App. 2005), the evidence here must nonetheless be sufficient to meet the standard of clear and convincing evidence that Father failed to protect his children from sexual abuse. As stated above, that standard was not met.

Conclusion

¶21 For the above-stated reasons, we reverse the juvenile court's order terminating Father's parental rights.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
_____
PETER B. SWANN, Judge