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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



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FILED: 04/29/10
PHILIP G. URRY, CLERK
BY: JT

KRISTI A.,) 1 CA-JV 09-0207
)
Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) Ariz. R.P. Juv. Ct. 103(G);
SECURITY, TEHYA H., DAKOTA H.,) ARCAP 28)
)
Appellees.)
)

Appeal from the Superior Court in Mohave County

Cause No. JD2008-0022

The Honorable Richard Weiss, Judge

AFFIRMED

Jill L. Evans, Mohave County Appellate Defender
by Diane S. McCoy, Deputy Appellate Defender
Attorneys for Appellant

Kingman

Terry Goddard, Attorney General
by Kathleen Skinner, Assistant Attorney General
Attorneys for Arizona Department of Economic Security

Mesa

W I N T H R O P, Judge

¶1 Kristi A. ("Mother") appeals from an order terminating
her parental rights pursuant to Arizona Revised Statutes

("A.R.S.") sections 8-533(B)(2) and 8-533(B)(8)(a) (Supp. 2009).
For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Mother has two biological children from a previous marriage, an eleven-year-old son ("Son") and a ten-year-old daughter ("Daughter"). In April 2008, Child Protective Services ("CPS"), a branch of the Arizona Department of Economic Security ("ADES"), received a report that Mother's current husband ("Husband"), the children's stepfather, had burned Son with cigarettes and refused to allow the children into the home when they returned from school. The report was accompanied by allegations of emotional abuse and domestic violence in the home.¹ CPS removed the children from the home and placed them with their maternal grandparents, where they remained through the severance hearing.

¶3 On April 25, ADES filed a dependency petition alleging, primarily, that Mother had failed to protect the children from Husband's physical abuse. At the time, Mother was also briefly incarcerated for failing to appear on charges of issuing a bad check and possession of drug paraphernalia.

¹ Mother and Husband had a history of domestic violence, including a November 2007 incident where Husband withheld the keys to the family car, "head butt[ed]" Mother, held her down, punched her, tossed her around the room, and pulled her hair. At the severance hearing, when presented with the police report from the incident, Mother testified that the police report was inaccurate - that Husband did not punch her or pull her hair.

Mother denied the allegations in the dependency petition, but submitted the matter to the court. The court found the children dependent as to Mother.

¶4 Following the children's removal, ADES instituted a family reunification case plan,² offering Mother and Husband parenting classes, random urinalysis testing, a substance abuse assessment and treatment, domestic violence counseling, mental health services, a psychological evaluation, rent assistance and budgeting services from Catholic Charities, visitation, and transportation.

¶5 In early July 2008, Mother and Husband participated in psychological evaluations. Mother's evaluation revealed depression and anxiety, elevated antisocial conduct, and denial of both her psychological state and a potential marijuana abuse problem. The evaluating doctor explained that "people with depressive disorders have trouble focusing . . . on things in their life, specifically for this case, . . . the children's needs." He also expressed concerns about Mother's codependent traits and their impact on the children. The doctor did, however, testify that all of Mother's diagnoses would be

² In November 2008, CPS changed the case plan to severance and adoption, after Mother and Husband briefly ceased participating in services and moved out of Mohave County, to Holbrook, Arizona.

"amenable to being conquered[,]" with commitment and appropriate treatment.

¶6 Husband's assessment revealed alcohol dependence and marijuana use, as well as a bipolar disorder. The doctor noted "evidence of antisocial and borderline personality traits, the characteristics of which include impulsivity and irresponsibility[,]" as well as "irritability and aggressiveness [that] could lend itself to physical and emotional abuse of a child." Ultimately, the doctor reported that, even with the case plan's proposed interventions, Husband's ability to discharge parental responsibilities would be "highly questionable" due to the fact that "[h]e has a chronic mental condition" exacerbated by continued alcohol use, and "[h]e has an underlying personality disorder that will continue to be there even with the provision of specialized services."

¶7 With the exception of parenting classes, Mother complied with her case plan. Her counselors reported that she was improving and learning to set boundaries with Husband. Husband, however, was non-compliant.

¶8 Although domestic violence incidents appear to have ceased after November 2008,³ control issues continued to plague

³ In November 2008, seven months into the children's out-of-home placement, police arrested Husband after he pushed Mother down a short flight of stairs and held his hand over her mouth, leaving a contusion on the left side of her head and swelling on

Mother and Husband's relationship, usually in the form of Husband restricting Mother's access to the telephone or car. At the severance hearing, Mother's father ("Grandfather"), case manager, and the doctor who conducted the couple's psychological evaluations, expressed concern about Mother's minimization of Husband's behavior and doubts about her prognosis for parenting as long as Husband remained in her life. Son also testified to being afraid of Husband.

¶9 After a three-day hearing, the juvenile court severed Mother's parental rights. Mother timely appealed, and we have jurisdiction pursuant to A.R.S. §§ 8-235 (2007), 12-120.21(A)(1) (2003), and -2101(B) (2003).

ANALYSIS

¶10 Mother argues that the evidence does not support the juvenile court's findings that she failed to protect her children from neglect, see A.R.S. § 8-533(B)(2), and that she substantially neglected or willfully refused to remedy the circumstances that caused the children to remain in an out-of-home placement for a period of nine months or longer, see A.R.S. § 8-533(B)(8)(a). She also argues ineffective assistance of trial counsel.

her nose. Husband eventually pleaded guilty to aggravated domestic violence and served four months in jail.

1. Section 8-533(B)(2)

¶11 To justify termination of parental rights, the juvenile court must find, by clear and convincing evidence, at least one of the statutory grounds set forth in A.R.S. § 8-533. A.R.S. § 8-537(B) (2006); *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 12, 995 P.2d 682, 685 (2000). Under any of the § 8-533 grounds, the court must also consider the best interests of the children.⁴ A.R.S. § 8-533(B); *Michael J.*, 196 Ariz. at 249, ¶ 12, 995 P.2d at 685. Here, the juvenile court found two statutory grounds: (1) that Mother failed to protect the children from abuse or neglect under A.R.S. § 8-533(B)(2), and (2) that Mother substantially neglected to remedy the problem that caused the out-of-home placement under A.R.S. § 8-533(B)(8)(a).

¶12 Following closing arguments, the court assessed the case, finding "credibility issues" and observing Mother to be "a minimizer, a person in denial, an enabler, and one with avoidance as to certain questions." The court explained "that there is ample evidence in this file that [Husband] is not [a] hypothetical threat to these children," but "is a verifiable, demonstrated threat to these children's well-being." We agree, and begin by addressing the juvenile court's finding that Mother

⁴ Mother does not challenge the juvenile court's best interests finding.

failed to protect the children from abuse. See A.R.S. § 8-533(B)(2).

¶13 The juvenile court, "as the trier of fact in a termination proceeding, is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002). We therefore accept the juvenile court's findings of fact "unless no reasonable evidence supports those findings[.]" *Id.* We will affirm a severance order unless it is clearly erroneous. *Id.*; *Audra T. v. Ariz. Dep't Econ. Sec.*, 194 Ariz. 376, 377, ¶ 2, 982 P.2d 1290, 1291 (App. 1998).

¶14 First, Mother asserts the court improperly considered testimony that Husband burned Son with cigarettes, because the testimony "consisted solely of the child's statements that the incident had happened" and was not corroborated by a medical diagnosis. Son testified that Husband flicked cigarettes at him while the family lived in Washington and that the marks on his arms were the result of cigarette burns. Both the CPS case manager and Grandfather testified to seeing burn marks on Son's arms, thus corroborating Son's testimony. Despite Mother's argument to the contrary, a medical diagnosis was not required. Witnesses may testify in the form of opinions or inferences rationally based on the perception of the witness and helpful to

an understanding of the witness's testimony or the determination of a fact in issue. *State v. Tiscareno*, 190 Ariz. 542, 544, 950 P.2d 1163, 1165 (App. 1997) (noting, "A person does not have to be a medical expert to testify that her own nose has been broken"); see Ariz. R. Evid. 701. Further, the credibility of witnesses is a trial court determination that we need not disturb.

¶15 Mother also argues that the court mistakenly relied on a dated psychological evaluation. See *In re Maricopa County, Juvenile Action No. JS-378*, 21 Ariz. App. 202, 206, 517 P.2d 1095, 1099 (1974) ("neither this court nor the juvenile court could make such inferences which were vital to the proof of [Mother's] case" from a psychological evaluation conducted over one year before severance). The case Mother cites is distinguishable from the present case for several reasons. First, the ground for severance in the cited case was mental illness, not neglect. *Id.* Accordingly, the psychological evaluation was of utmost, if not sole, importance. More important, the court did not find the dated evaluation invalid *per se*, rather, it found the juvenile court needed to support its conclusions with additional evidence. *Id.* In the present case, the juvenile court lists Mother's psychological evaluation as only one of several factors contributing to its decision.

Because the trial court did not solely rely on the psychiatric evaluation, it was not error for the court to consider it.

¶16 Next, Mother argues the court failed to consider her progress in the CPS-recommended services, and Husband's progress in counseling following his release from jail. As the State notes, however, participation and progress in services are not required elements under A.R.S. § 8-533(B)(2). Instead, the court was concerned with whether Mother was capable of acknowledging and acting upon the danger Husband posed to her children. Despite Mother's compliance with recommended services, the court properly considered her ability to protect the children from harm.

¶17 This case ultimately hinged on credibility determinations, and the court found Mother less credible than others. Mother's testimony indicated an unwillingness to acknowledge Husband's past abuse of the children and the potential for future violence. Despite Son's testimony that he was afraid of Husband, that Husband flicked cigarettes on him when the family lived in Washington, that Husband hit him in the arms and stomach more recently, and that he had observed Husband hitting Mother, Mother maintained the belief that Husband never physically abused either of the children. In fact, Mother attributed Son's fear of Husband to Grandfather's "coaching" and suggested Son was lying. Daughter's statements to the case

manager corroborated Son's testimony, however, and the record is replete with evidence supporting the juvenile court's conclusions. We affirm the court's ruling.

2. *Section 8-533(B)(8)(a)*

¶18 If sufficient evidence supports any one of the statutory grounds upon which the juvenile court ordered severance, we "need not address claims pertaining to the other grounds." *Jesus M.*, 203 Ariz. at 280, ¶ 3, 53 P.3d at 205; see *Michael J.*, 196 Ariz. at 251, ¶ 27, 995 P.2d at 687. Having found that there was sufficient evidence to support the juvenile court's § 8-533(B)(2) finding, we will not address the court's § 8-533(B)(8)(a) findings.

3. *Ineffective Assistance of Counsel*

¶19 Mother claims for the first time on appeal that her trial counsel was ineffective because he failed to object to the admission of hearsay evidence, medical opinions, and psychological evidence. We assume, without deciding, that the law permits relief for ineffective assistance of counsel in severance proceedings and apply the criminal standard to ineffective assistance of counsel claims. *John M. v. Arizona Dep't of Econ. Sec.*, 217 Ariz. 320, 324, 325, ¶¶ 14, 17, 173 P.3d 1021, 1025, 1026 (App. 2007); see *Strickland v. Washington*, 466 U.S. 668 (1984).

¶20 To prevail on her claim of ineffective assistance of counsel, Mother must show that counsel's actions were professionally unreasonable and that such action prejudiced her. *Strickland*, 466 U.S. at 688, 691-92. Thus, we will not reverse the juvenile court's termination order unless Mother can demonstrate both that counsel's performance was "sufficient to 'undermine confidence in the outcome' of the severance proceeding and give rise to a reasonable probability that, but for counsel's errors, the result would have been different." *John M.*, 217 Ariz. at 325, ¶ 18, 173 P.3d at 1026 (citation omitted). "That appellate counsel now disagrees with [trial counsel's] strategy or claims errors in trial tactics is not enough to support a finding that the trial lawyer's conduct was incompetent." *State v. Pereida*, 170 Ariz. 450, 454, 825 P.2d 975, 979 (App. 1992) (citation omitted).

¶21 First, Mother claims that her trial counsel should have objected to the hearsay statements of the children, particularly concerning Son's abuse allegations, because they "lacked sufficient indicia of reliability."⁵ In a termination proceeding, "[t]he out of court statements or nonverbal conduct

⁵ Mother fails to cite to what she considers the objectionable parts of the record. Because her trial attorney objected to the case manager's testimony regarding an outburst that occurred prior to the children's removal from the home, Mother cannot claim that her counsel did not object to any of the children's hearsay statements.

of a minor regarding acts of abuse or neglect perpetrated on him are admissible for all purposes . . . if the time, content and circumstances of such statement . . . provide sufficient indication of its reliability." A.R.S. § 8-237 (2007). Son's testimony that Husband burnt his arms with cigarettes and punched him was not hearsay. Son's hearing testimony supported both the case manager and Grandfather's hearsay testimony, as did the fact that both the case manager and Grandfather personally observed burn marks on Son's arms. Further, Daughter's statement to the case manager that Husband "did not hit her often," but "did hit her brother and mother," corroborated the hearsay testimony. We reject Mother's contention that the children's hearsay statements "lacked sufficient indicia of reliability."

¶22 Next, Mother argues her attorney should have objected to the case manager's testimony describing marks she observed on Son's arms and Mother's mental health, because the case manager was not a qualified medical expert. The case manager was not testifying as an expert, rather, she offered her opinions as a lay witness with two years' experience as a CPS specialist. As explained *supra*, a lay witness may offer opinion testimony "rationally based on the perception of the witness and . . . helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Ariz. R. Evid. 701. Her

testimony was based on her own observations and experience and the attorney's failure to object to its admission was not necessarily unreasonable.

¶23 Mother also argues that trial counsel should have objected to the admission of Mother's psychological evaluation. Contrary to Mother's belief, the date of the evaluation, in and of itself, does not make it inadmissible. See *In re Maricopa County, Juvenile Action No. JS-378*, 21 Ariz. App. at 206, 517 P.2d at 1099. As previously discussed, the psychological evaluation's conclusions were supported by other evidence and counsel's failure to object did not necessarily indicate incompetence.

¶24 Even supposing trial counsel's performance fell below an objective standard of reasonableness, the record abounds with evidence that Mother was, as the court described, "a minimizer, a person in denial, [and] an enabler," unable to protect her children. She has failed to show that she was prejudiced by her trial counsel's inaction.

CONCLUSION

¶25 For the foregoing reasons, we affirm the juvenile court's order severing Mother's parental rights.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
MAURICE PORTLEY, Presiding Judge

_____/S/_____
MARGARET H. DOWNIE, Judge