FILED BY CLERK
SEP 14 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JAIME O., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, SKYLA O.-S., and STEFEN S., Appellees.	2 CA-JV 2012-0023 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 16102100

Honorable Leslie Miller, Judge

AFFIRMED

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V Á S Q U E Z, Presiding Judge.

¶1 Jaime O. appeals from the juvenile court's order severing his parental rights to his children Skyla, born in August 2007, and Stefen, born in October 2009. He contends the court's order is not supported by the evidence and the court erred in denying his motion for mistrial. He also maintains he lacked notice of "what would cause termination" of his parental rights and received ineffective assistance of counsel. Finding no error, we affirm.

¶2 We view the facts in the light most favorable to sustaining the juvenile court's order. *See Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 928 (App. 2005). Child Protective Services (CPS) removed Stefen and Skyla from the custody of their mother, Lisa, Jamie's wife, in October 2009 after Stefen was born with signs of exposure to alcohol, and CPS received reports that Lisa had been drinking alcohol and had attempted suicide, while pregnant. It was also reported that Lisa had gone to the emergency room with a blood alcohol concentration of .225 within days of Stefen's birth and that Jaime and Lisa had engaged in domestic violence in Skyla's presence. CPS placed the children with Jaime, but required him to live apart from Lisa and that her visits with the children be supervised by CPS-approved supervisors.

¶3 The children were adjudicated dependent in December 2009 after Jaime admitted the allegations in an amended dependency petition, including that he had "underestimated [Lisa's] alcohol and mental health issues which have impaired her ability to safely parent" and had "allowed her to care for the children while he was at work" despite these problems. He also admitted the couple had "a history of domestic violence, including physical altercations." In February 2010, the children were removed

from Jaime's care after he allowed Lisa to have contact with the children without CPS-approved supervision, left them with caregivers who had not been approved by CPS, and otherwise failed to comply with his case plan.

¶4 Following a dependency review hearing in May 2011, the juvenile court directed the Arizona Department of Economic Security (ADES) to file a motion to terminate the parents' rights. ADES filed its motion shortly thereafter, seeking to terminate Jaime's parental rights pursuant to A.R.S. § 8-533(B)(2), (B)(3), and (B)(8)(c), on the grounds of abuse or neglect, mental illness or chronic substance abuse, and length of time in court-ordered, out-of-home care. During the contested severance hearing, ADES moved to withdraw the allegation of mental illness or chronic substance abuse, and the court granted that motion. After the thirteen-day hearing, the court terminated Jaime's parental rights in March 2012, concluding ADES had proven the remaining alleged grounds by clear and convincing evidence and had established by a preponderance of the evidence that severance was in the children's best interests.

¶5 On appeal, in several related claims, Jaime maintains the juvenile court's conclusion that ADES had proven the neglect and length-of-time, in-care grounds for termination by clear and convincing evidence was contrary to the evidence presented at the severance hearing. We will not disturb the court's severance order unless the factual findings upon which it is based "are clearly erroneous, that is, unless there is no reasonable evidence to support them." *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 2, 982 P.2d 1290, 1291 (App. 1998).

¶6 Jaime first argues the only evidence presented at the hearing as to abuse or neglect of the children related to the mother's actions, which he maintains cannot serve as the basis for terminating his parental rights. Section 8-533(B)(2), however, provides that a parent's rights may be terminated not only when the parent himself "has neglected or willfully abused a child," but also when "the parent knew or reasonably should have known that a person was abusing or neglecting a child." Jaime does not dispute that Lisa abused and neglected the children,[1] nor does he explain how the evidence did not establish sufficiently that he failed to protect the children from her actions. Indeed, ADES presented substantial evidence that Jaime continued to permit Lisa to have contact with the children without appropriate supervision and outside of CPS's recommendations. And although Lisa testified that Jaime eventually told her he would leave her if she began drinking again, she also testified that the first time he took that position was in 2011 after the severance proceeding had commenced—more than fifteen months after the children had been removed from his care. In view of this evidence, we cannot say the court's ruling was clearly erroneous. *See Audra T.*, 194 Ariz. 376, ¶ 2, 982 P.2d at 1291.

¶7 Likewise, the evidence supports the juvenile court's determination that ADES sustained its burden of proving the children had been in court-ordered, out-of-

[1]Jaime argues, based on *In re Pima Cnty. Juv. Severance Action No. S-120171*, 183 Ariz. 546, 905 P.2d 555 (App. 1995), that "the mother's use of alcohol to excess during the last stage of her pregnancy with Stef[e]n does not provide a basis as a matter of law for the severance of [his] rights." But, that case addressed whether a parent's actions in regard solely to an unborn child could serve as the basis for terminating a parent's rights, 183 Ariz. at 549, 905 P.2d at 558, and the allegations against Lisa in this case were based on more than the fact that she drank alcohol while pregnant.

home care for fifteen months or longer and that Jaime had been "unable to remedy the circumstances" causing that placement. Section 8-533(B)(8) focuses on the circumstances that caused the children to be placed in court-ordered care out of the home and caused the children to remain there at the time of severance hearing. *In re Maricopa Cnty. Juv. Action No. JS-8441*, 175 Ariz. 463, 467-68, 857 P.2d 1317, 1321-22 (App. 1993), *abrogated on other grounds by Kent K. v. Bobby M.*, 210 Ariz. 279, 110 P.3d 1013 (2005). As in *Maricopa Cnty. No. JS-8441*, the cause of the children's out-of-home placement here was that they continued to be dependent children because they had no parent who was willing or capable of exercising "proper and effective parental care and control." A.R.S. § 8-201(13)(a)(i). Even accepting that Lisa's mental illness and substance abuse problems were the predominate issues in the dependency, the fact remains, as the court found, that Jaime has not been able to provide appropriate parental care and control. In addition to allowing Lisa to have contact with the children, Jaime allowed his adult daughter to take the children to daycare when he was supposed to do so, and the family's caseworker had ongoing concerns about both parents' ability to appropriately parent. For example, the caseworker reported "splitting" behavior by Jaime in which he would provide conflicting reports to different providers. The caseworker and Jaime's therapists reported concerns that Jaime was not benefiting from services or making progress quickly enough. At best, Jaime's arguments as to the length-of-time, in-care ground are essentially a request that we reweigh the evidence presented below, which we will not do, even if we might have reached a different conclusion. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 12, 53 P.3d 203, 207 (App. 2002).

¶8 Jaime also contends that by "treat[ing] reunification with the parents as a package deal rather than evaluating the parent's suitability individually," ADES violated his parental rights. And, he asserts, the "requirements of the parent's case plan were so vague that it created an impossibility of performance or insufficient notice of what would cause termination of parental rights," particularly in relation to his efforts to reconcile with Lisa. He alleges that his parental rights were severed solely because of Lisa's "decline in mental health and the fact that [he] tried to reconcile his marriage without notice from the caseworker that this action could cause him to lose his children and [that] if the parents were presently living together their fate would be mutually decided." But, as described above, evidence at the severance hearing suggested there were continuing concerns not only about Lisa's behavior, but also about Jaime's failure to benefit from services.

¶9 Jaime next asserts the juvenile court erred in not declaring a mistrial after it became clear that the family's caseworker had spoken outside of court with one of the family's service providers, who was expected to testify, about Lisa's testimony at the severance hearing. Rule 615, Ariz. R. Evid., provides: "At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." This rule was invoked on the first day of the severance hearing, and the caseworker acknowledged she had been admonished in accordance with the rule that "witnesses were not to speak about the case."

¶10 Testimony presented to the juvenile court when it questioned the caseworker on the tenth day of the severance hearing showed that, despite this

instruction, the caseworker had spoken with the service provider about Lisa's testimony because "it seemed like the mother was confused by some things that she said in her testimony." Their discussion centered mainly on misunderstandings by Lisa about who had referred her to certain services. The caseworker testified she had not spoken with the service provider about the family's visits with her or about her role, but admitted she had asked about Skyla's "tantruming" because Lisa had testified she was engaging in that behavior only at the end of visits. Jaime moved for a mistrial, and the court denied the motion. We review the court's ruling for an abuse of discretion and resulting prejudice. *See Kosidlo v. Kosidlo*, 125 Ariz. 32, 35, 607 P.2d 15, 18 (App. 1979) (wrongful failure to exclude witness does not require reversal unless prejudicial), *disapproved in part on other grounds*, 125 Ariz. 18, 607 P.2d 1 (1979); *cf. State v. Gulbrandson*, 184 Ariz. 46, 63, 906 P.2d 579, 596 (1995) ("Reversal on appeal [under Rule 9.3, Ariz. R. Crim. P.,] is proper only where defendant shows an abuse of discretion by the trial court and resulting prejudice to defendant.").

¶11 The purpose of the witness sequestration rule is to prevent "fabrication, inaccuracy, and collusion." Fed. R. Evid. 615 advisory committee note; *see Kosidlo*, 125 Ariz. at 35, 607 P.2d at 18 ("The source of our Rule 615[, Ariz. R. Evid.,] is the counterpart federal rule."). Jaime did not establish before the juvenile court that any of the consequences the rule was designed to prevent had occurred as a result of the conversation between the caseworker and service provider. Indeed, the service provider's testimony was generally positive and supportive of reunification of the family.

Nothing in the record suggests that the caseworker's admittedly inappropriate comments changed the service provider's testimony or otherwise prejudiced Jaime.

¶12 Finally, Jaime claims he received ineffective assistance of counsel. In *John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, ¶¶ 11-12, 173 P.3d 1021, 1024 (App. 2007), this court noted that Arizona law has not squarely addressed whether "ineffective assistance of counsel [can] justify reversal of a juvenile court's order terminating parental rights." And, because we concluded John had not established prejudice as a result of counsel's allegedly deficient performance, we did not answer the question in that case either. *Id.* ¶ 18. Likewise here, resolution of that question is unnecessary because Jaime has failed to show that counsel's performance was deficient. *Cf. Strickland v. Washington*, 466 U.S. 668, 690 (1984); *John M.*, 217 Ariz. 320, ¶ 17, 173 P.3d at 1026 (assuming arguendo that *Strickland* standard applied in severance proceedings).

¶13 Jaime points to the following actions by counsel as deficient: (1) failing to issue a subpoena for his presence at the ninth day of the severance hearing, (2) not calling "all of the relative witnesses listed in [Jaime's] pretrial statement" to testify, (3) not allowing Jaime to testify, and (4) not seeking the appointment of a guardian ad litem for Jaime. As to Jaime's first claim, the record shows that on the ninth day of the severance hearing Lisa informed Jaime's counsel that Jaime would not appear because his employer had required him to be under subpoena in order to excuse him from the day of work. Counsel expressed concern that the court might enter a default judgment against Jaime based on his failure to appear and stated she was afraid that she might have unknowingly missed a message from him. But, she made clear she had not been aware a subpoena was

required for Jaime to attend the hearing. Jaime has presented nothing to suggest that counsel had been informed of the need for a subpoena, *cf. State v. Jenkins*, 193 Ariz. 115, ¶ 15, 970 P.2d 947, 952 (App. 1998) (defendant must do more than contradict what record clearly shows), and we cannot say Jaime has established counsel's performance was deficient because she failed to secure a subpoena that she was unaware was necessary.

¶14 We likewise reject Jaime's remaining claims because they are purely speculative and unsupported by anything in the record before us. *Cf. State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) (to warrant evidentiary hearing, ineffective assistance of counsel claim "must consist of more than conclusory assertions"); *cf. also State v. McDaniel*, 136 Ariz. 188, 198, 665 P.2d 70, 80 (1983) (claimant bears burden of establishing ineffective assistance of counsel and "[p]roof of ineffectiveness must be a demonstrable reality rather than a matter of speculation"). Jaime has only vaguely outlined what he anticipated the testimony of the "relative witnesses" would have been, and he did not move pursuant to Rule 46(E), Ariz. R. P. Juv. Ct., to present evidence on that issue to the juvenile court in the first instance. Additionally, he does not point to anything in the record to support his allegation that counsel somehow wrongfully deprived him of the right to testify. Given the scant record before us with respect to these claims and Jaime's failure to present these issues to the juvenile court in the first instance so that a further record could be developed, we cannot say Jaime has established that counsel's performance at the severance hearing was deficient and prejudical. *Cf. McDaniel*, 136 Ariz. at 198, 665 P.2d at 80.

¶15 For the reasons stated, the juvenile court's order terminating Jaime's parental rights to Skyla and Stefen is affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge