IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

STEVEN E.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY, S.E., A.E., S.-E., AND M.E.,
Appellees.

No. 2 CA-JV 2015-0221
Filed June 15, 2016

Appeal from the Superior Court in Pima County
No. JD199736
The Honorable Geoffrey L. Ferlan, Judge Pro Tempore

AFFIRMED

COUNSEL

Domingo DeGrazia, Tucson
Counsel for Appellant

Mark Brnovich, Arizona Attorney General
By Laura J. Huff, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

E S P I N O S A, Judge:

¶1 Steven E. appeals from the juvenile court's order terminating his parental rights to his children, S.E., A.E., S.-E., and M.E., on the grounds of abuse and length of time in court-ordered, out-of-home care, pursuant to A.R.S. § 8-533(B)(2) and (B)(8)(c). We affirm for the reasons stated below.

¶2 The history of this case is set forth in the juvenile court's nine-page under-advisement ruling, which it entered in November 2015 after a severance hearing that took place over twelve days between March 2015 and September 2015. Briefly, the record and the evidence before us, viewed in the light most favorable to sustaining the ruling, *see Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 20, 995 P.2d 682, 686 (2000), establish the following. In November 2011, the Department of Child Safety (DCS)[1] removed

[1] The children were taken into care by Child Protective Services (CPS), formerly a division of the Arizona Department of Economic Security (ADES) and ADES filed the initial dependency petition. Effective May 29, 2014, the Arizona legislature repealed the statutory authorization for CPS and for ADES's administration of child welfare and placement services under title 8 and transferred powers, duties, and purposes previously assigned to those entities to the newly established DCS. *See* 2014 Ariz. Sess. Laws 2d Spec. Sess., ch. 1, §§ 6, 20, 54. Accordingly, DCS has been substituted for ADES in this matter. *See* Ariz. R. Civ. App. P. 27(c). For simplicity, our references to DCS in this decision encompass both ADES and former CPS.

then five-year-old S.E., four-year-old A.E., and two-year-old S.–E. from the custody of their parents, Steven E. and Marissa E., based on its investigation of reports that Steven had sexually abused A.E.; physically abused A.E. and S.E. by spanking them, hitting them with a belt, a shoe or a sandal, and choking them; and neglected all three children. DCS filed a dependency petition and at the end of November, after Marissa admitted to amended allegations in the petition and Steven pled no contest to the allegations, the juvenile court adjudicated the children dependent.

¶3 DCS learned in May 2013, that Marissa had given birth to M.E. in February, but had been hiding the birth from DCS. The agency removed M.E. from the home and filed a dependency petition. M.E. was adjudicated dependent in November 2013 following a contested hearing.

¶4 The family was provided a variety of services. However, because of the parents' lack of progress and only partial compliance with the case plan, in December 2014 the juvenile court changed the plan goal to severance and adoption. DCS then filed a motion to terminate the parents' rights based on abuse and length of time in court-ordered, out-of-home care (fifteen months or longer). *See* § 8-533(B)(2), (B)(8)(c). The court granted the motion and terminated the parents' rights in November 2015. This appeal followed.

¶5 Steven first contends the juvenile court committed "fundamental error" in terminating his rights on the ground of abuse by considering the opinion of a witness "not qualified as an expert," that there had been such abuse. He argues this was improper given that "the basis for th[at] opinion . . . was the preponderance level determination upon the finding of a dependency." The witness, Victoria Cannon, a child and family therapist, licensed clinical social worker, and clinical supervisor, appears to have testified as a highly qualified lay witness as to various matters within her experience rather than an expert after Steven objected to her qualifications under *Daubert v. Merrell Dow*

Pharmaceuticals, *Inc.*, 509 U.S. 579 (1993), and Rule 702, Ariz. R. Evid.[2] *See also State v. Romero*, 239 Ariz. 6, ¶ 12, 365 P.3d 358, 361 (2016). As we understand his argument, it is that Cannon was not qualified to testify that the children had been abused. Additionally, he argues the court erred in relying on Cannon's testimony because she had relied on initial DCS reports, and the allegations in those reports as well as the dependency petition "were only found true by a preponderance of the evidence." Consequently, he claims, the court necessarily erred in finding clear and convincing evidence he had abused a child.

¶6 First, Steven cites no legal authority to support his claim that DCS must provide expert testimony to establish whether a child has been abused. In addition, although he objected to her testifying as to certain matters as an expert, he did not raise below the same argument he is raising on appeal. We therefore summarily reject the argument as having been insufficiently argued and waived. *See* Ariz. R. Civ. App. P. 13(a)(7) (brief shall contain arguments with appropriate citations to authorities, statutes, and references to the record relied upon); Ariz. R. P. Juv. Ct. 106(A) (Rule 13 generally applicable to juvenile appeals); *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62, 211 P.3d 1272 (App. 2009) (unsupported arguments may be deemed waived); *see also Frank R. v. Mother Goose Adoptions*, 239 Ariz. 184,

[2]After objecting, Steven's counsel stated, "The witness can certainly testify as to what she's done with the family and . . . her opinions, based on her experience . . . so I don't see where the qualification as an expert witness is necessary under the circumstances." Cannon continued to testify and the juvenile court reserved the question of whether she was qualified to testify in the area of child and family therapy, and infant mental health. The issue does not appear to have come up again but, in any event, Cannon clearly met requirements for qualifying as an expert under Rule 702. *See* Ariz. R. Evid. 702; *State v. Foshay*, No. 2 CA-CR 2014-0252, ¶ 6, 2016 WL 1158118 (Ariz. Ct. App. Mar. 23, 2016) (to qualify as expert, witness need only possess skill and knowledge superior to general public).

¶¶ 5-56, 367 P.3d 88, 105 (App. 2016) (party waives arguments made for first time on appeal).

¶7 In any event, the portion of the record Steven refers us to shows that Cannon was asked what she understood to be the nature of the allegations of abuse, not whether, in her opinion, there had been such abuse. She testified she understood Steven reportedly had sexually abused A.E. and had physically abused A.E. and S.E. That distinction was made clear later during her testimony when Steven objected; the court clarified that Cannon was referring to reported abuse, not abuse that she had witnessed or otherwise knew had occurred. Moreover, Cannon testified that the basis for her understanding of the nature of the allegations was not just the DCS reports but therapy with A.E. as well.[3] We see no error in terms of the propriety of Cannon's testimony or the court's reliance on that testimony.

¶8 Second, the juvenile court had before it ample evidence from various sources, including the testimony of multiple witnesses over the twelve-day hearing and reports that were admitted as exhibits, supporting the finding that A.E. and S.E. had been physically abused. In its under-advisement ruling, the court specifically identified significant portions of the record upon which it had relied, and we presume it considered other evidence that it did not specifically mention. *See Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 18, 97 P.3d 876, 880-81 (App. 2004) (reviewing court presumes trial court considered evidence presented). The court expressly considered the motion to terminate Steven's parental rights under the correct burden of proof, finding DCS had sustained that burden by presenting clear-and-convincing evidence of the statutory ground for termination. *See* A.R.S. §§ 8–533(B), 8–537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). That similar evidence was introduced during the dependency hearing, which was subject to a lesser burden of proof, *see* A.R.S. § 8-844(C), did not make it

[3]For example, Cannon testified about her therapy sessions with A.E., who displayed sexual and violent themes during play therapy and expressed fear that her father would hit her with a belt.

improper for the court to consider it, together with the evidence at the severance hearing. It was for the juvenile court, not this court, to determine how much weight to give that evidence and to assess it under the proper standard. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002).

¶9 Steven next contends the juvenile court committed "fundamental error" and abused its discretion by terminating his parental rights on the ground of length of time in court-ordered care. He argues the record does not "sufficiently support[]" the court's finding that there is a substantial likelihood that he will not be capable of exercising proper and effective parental care and control in the near future. And he again argues the court relied on DCS reports presented in the dependency adjudication and that this was improper because of the difference in the burden of proof in severances and dependency proceedings.

¶10 Because we have rejected Steven's challenge to the juvenile court's finding of abuse as a ground for terminating his parental rights pursuant to § 8-533(B)(2), we need not decide whether there was sufficient evidence to terminate his rights under § 8-533(B)(8)(c). *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 27, 995 P.2d 682, 687 (2000) (appellate court need not address other statutory grounds for terminating parent's rights if there is sufficient evidence of one ground). And in any event, the suggestion that the court erred by considering reports from the dependency proceeding, which was governed by a different burden of proof, is without merit for the reasons we stated with respect to the same argument raised above.

¶11 Additionally, Steven is essentially asking this court to reweigh the evidence, which we will not do. *See Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 14, 100 P.3d 943, 947 (App. 2004). We accept the juvenile court's factual findings "unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous." *Jesus M.*, 203 Ariz. 278, ¶ 4, 53 P.3d at 205. The record here contains ample evidence to support the court's thorough factual findings on this ground for terminating Steven's parental rights, and "little would be gained by our further

'rehashing the trial court's correct ruling' in our decision." *Id.* ¶ 16, *quoting State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶12 Finally, Steven contends the record does not support the juvenile court's finding that termination of his parental rights was in the children's best interests. He claims the court "failed to take into full account the father's relationship with his children and the children's relationship with their father." He also stresses the importance of the biological connection that existed. Again, Steven asks us to reweigh the evidence, and we decline to do so. *Oscar O.*, 209 Ariz. 332, ¶ 14, 100 P.3d at 947. Rather, we summarily reject Steven's cursory argument in light of the reasonable evidence in the record that supports the court's finding.

¶13 For the reasons stated, the juvenile court's order terminating Steven's parental rights to his children S.E., A.E., S.-E., and M.E. is affirmed.