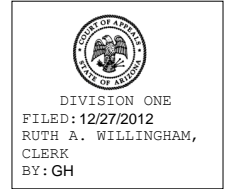


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

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



SCOTTIE H.,) No. 1 CA-JV 12-0127
)
Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) Ariz. R.P. Juv. Ct. 103(G);
SECURITY, D.H.,) ARCAP 28)
)
Appellees.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD19366

The Honorable Roger L. Hartsell, Judge Pro Tempore

AFFIRMED

John L. Popilek, P.C. Scottsdale
By John L. Popilek
Attorneys for Appellant, Scottie H.

Thomas C. Horne, Arizona Attorney General Tucson
By Erika Z. Alfred, Assistant Attorney General
Attorneys for Appellee, Arizona Department of Economic Security

K E S S L E R, Judge

¶1 Scottie H. ("Father") appeals the juvenile court's order severing his parental rights to his son, D.H.¹ Father's rights were severed on multiple statutory grounds including: abandonment pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(1) (Supp. 2012),² wilful abuse pursuant to subsection (B)(2), and out-of-home placement pursuant to subsections (B)(8)(a), (b), and (c). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 D.H., born September 27, 2009, is the son of Father and Jesse H. ("Mother").³ Mother also has two other children: H.P. and D.G.⁴ L.G. is D.G.'s father.

¶3 L.G. noticed bruises on H.P.'s arm when he picked up H.P. and D.G. for a visit. According to L.G, when he asked H.P. about her bruises, "the room went real quiet. And then she looked at me, looked at [Father], looked back at me and looked

¹ We have amended the caption of this matter to protect the privacy of several minors and to remove parties from the proceedings below who are not parties to this appeal. All parties shall use this amended caption in further pleadings on appeal.

² We cite to the current version of the statute when no revisions material to this decision have occurred.

³ Jesse's name was spelled several different ways in the proceedings below. For clarity we use the spelling that the juvenile court used in its final order.

⁴ Neither H.P., D.G., or Mother are parties to this appeal.

sort of scared and then that was it." Over the next couple days L.G. photographed the bruises on H.P. and D.G. L.G. took the children to the hospital and thereafter H.P. told L.G. that Father had hit her and D.G. L.G. also filed a report with the Arizona Department of Economic Security ("ADES") Child Protective Services ("CPS").

¶4 The two children reported to the CPS interviewer that H.P.'s bruises were caused by Father. H.P. reported that Father frequently disciplined her and D.G. by using a belt and punching them with a closed fist. She also stated that Father disciplined D.H. with his closed fist. H.P. told the CPS interviewer that Father told her not to tell anyone how she was injured. H.P. expressed fear of Father and indicated that Mother was aware of the abuse but did not intervene.

¶5 CPS took custody of D.H. and H.P. In July 2010, ADES filed a dependency petition alleging that D.H. and H.P. were both dependent as to Mother and Father due to abuse and neglect.

¶6 At the preliminary protective hearing Father agreed to participate in services including a psychological consultation and counseling to facilitate family reunification.⁵

¶7 In April 2011, CPS filed a motion to terminate both parents' parental rights to D.H. The motion alleged severance was warranted on the statutory bases of abandonment, wilful abuse, and out-of-home placement for six or more months. Thereafter, the motion was twice amended to include additional statutory grounds for severance: out-of-home placement for nine months and fifteen months.

¶8 At trial, L.G. testified that H.P. told him that the bruises were from when Father hit her and D.G.

¶9 D.G.'s paternal grandmother ("Grandmother") testified that she was visiting her son L.G. when he picked up the children, and she too saw the bruises on the children. She testified that H.P. was hesitant and afraid when she told Grandmother that "[Father] would poke her . . . when she did something wrong" and that "he would spank [D.H.] when he cried and that he had hit [Mother] a few times." Grandmother did not

⁵ According to the juvenile court's later findings regarding ADES's reasonable efforts to finalize the permanency plan, Father was also offered a "[s]elf-[r]eferral" "for individual counseling, and anger management/domestic violence services." According to ADES's motion for termination of parental rights, Father was offered "counseling (individual and for marriage/domestic violence)."

remember H.P. saying how often it happened or giving any specifics, but only that "[Father] poked her when he got mad or when she did something wrong."

¶10 The CPS case manager testified that Father was non-compliant with services designed to help him remedy physical abuse. She opined that based on Father's non-compliance, children left in Father's care would be at substantial risk of harm. She formed this opinion because "there was no real compliance with a behavioral change regarding the domestic violence piece or the anger piece or the physical abuse piece that should have been addressed . . . in individual therapy." The CPS case manager testified that Father had never admitted to anyone that he had in fact physically abused the children. She explained that based on her experience, a parent's acknowledgement of domestic violence or physical abuse was important to allow therapy to succeed.⁶

¶11 The CPS case manager testified that even though Father attended couples counseling which was designed for him and Mother, "there was no insight, there was no acknowledgement of

⁶ The CPS case manager's opinion that counseling was ineffective because Father would not admit to committing the abuse that caused the children to be removed from his care is not based upon any evidence, expert or otherwise, in the record and appears to be mere speculation. Father's records from Southwest Behavioral Health Services reflect that Father was successfully participating and benefitting from counseling, and the records make no mention that counseling was not effective because Father's unwillingness to admit to the alleged abuse.

what was going on in the home." She testified that the records from Southwest Behavioral Health Services show that one of Father's counselors "call[ed] [Father's] attention to the fact that [Father] appear[ed] to be just [] going through the hoops."⁷ In the case manager's opinion Father had made no progress on the issue of abuse in part because Father had not admitted the abuse.

¶12 H.P.'s therapist at A New Leaf testified that H.P. told her that she was afraid of Father because he was mean to her and that Father "punched [her] in the stomach, flicked [her] in the mouth, and hit [her]."

¶13 After almost one year of therapy, H.P.'s "acting-out behaviors" increased and her therapist referred H.P. for a psychiatric evaluation. H.P.'s therapist testified that H.P. was diagnosed by a psychiatrist with physical abuse of a child, post-traumatic stress disorder ("PTSD"), and oppositional defiant disorder.⁸ As a result of the diagnoses, the therapist "increased [H.P.'s] therapy sessions back to the recommendation

⁷ Based on our review of the record, we do not find support for the CPS case manager's testimony that Father had not complied with services intended to address physical abuse and domestic violence. According to the records from Southwest Behavioral Health Services, Father regularly attended counseling, was gaining insight, and making progress.

⁸ The records from A New Leaf, containing the psychiatric report, were marked for identification, but not admitted as evidence at trial.

for weekly therapy sessions," and H.P. was prescribed Zoloft, which according to the therapist "is a medication that's typically prescribed for depression" and "can also be prescribed for symptoms of PTSD."

¶14 Although Father objected to the therapist's testimony regarding H.P.'s diagnoses, the court permitted H.P.'s therapist to testify about H.P.'s prognosis and treatment plan. The therapist also testified that she did not make the PTSD diagnosis, but that her opinions were based on her education, her responsibility to identify "symptom clusters" and "either update the diagnosis or make a referral for a psychiatric evaluation," as well as her research, knowledge of PTSD, and experience.

¶15 Father moved to strike the therapist's testimony regarding psychiatric or psychological diagnoses arguing that H.P.'s therapist was unqualified to make the PTSD diagnosis. In response, ADES asserted that H.P.'s therapist did not claim to diagnose H.P., but only to have treated her based on the psychiatrist's diagnoses. The juvenile court took the matter under advisement and determined that H.P.'s therapist was competent to testify based on her training and experience.

¶16 After a nine-day trial, the juvenile court issued a twenty-four page minute entry detailing the court's findings and terminating Father's rights to D.H. on each of the statutory

grounds alleged in the motion for termination of parental rights.

¶17 In July 2012, the juvenile court made findings of fact and conclusions of law and entered a final order severing Father's parental rights.

¶18 Specifically, the court found that clear and convincing evidence supported a finding that Father abandoned D.H. "by failing to provide reasonable support, maintaining regular contact with the child and providing normal supervision," and that he "willfully abused a child and/or children" because he "physically abused the children . . . causing them serious physical and emotional injury." The court explained that "[H.P.] was diagnosed with and suffers from [PTSD] due to the abuse."⁹

¶19 In addition, the juvenile court found that a preponderance of the evidence supported a finding that severance was in D.H.'s best interest because he is "adoptable and adoption will provide [him] with permanency and stability," D.H. "will be harmed and suffer a detriment, if the parental rights are not terminated," and Father "physically abused the children and the children remain at risk of harm from [Father]."

⁹ In addition, the court determined that clear and convincing evidence supported the other alleged statutory bases for severance.

¶20 Father appealed. We have jurisdiction pursuant to A.R.S. §§ 8-235(A) (2007), 12-120.21(A)(1) (2003), and -2101(A), (B) (Supp. 2012).

ISSUES ON APPEAL

¶21 Father asserts that the juvenile court abused its discretion by: (1) failing to permit Father to cross-examine Mother regarding L.G.'s racial bias; (2) permitting H.P.'s therapist to testify about treatment for PTSD; and (3) severing Father's parental rights despite insufficient evidence.

DISCUSSION

I. Cross-examination of Mother regarding L.G.'s racial bias

¶22 Father maintains that the alleged physical abuse was discovered by L.G. and "there was reason to believe that [L.G.] did not approve of the biracial nature of [Mother's] marriage to Father." Father asserts that the juvenile court did not permit him to demonstrate L.G.'s racial bias and denied him "the opportunity to explore [L.G.'s] motive or bias with [Mother] or other witnesses."¹⁰ Specifically, Father contends the court abused its discretion by sustaining a hearsay objection during his cross-examination of Mother because the testimony did not fall within the hearsay rule:

[Father]: I'd like to talk to you a little more about [L.G.]. Has he ever

¹⁰ Father does not identify any witness testimony other than Mother's during which his cross-examination was limited.

made racial comments to you?

[Mother]: Yes.

* * *

[Father]: Specifically, what has he said?

* * *

[State]: Objection; hearsay.

[Court]: That would be sustained.

[Father]: Your Honor, it goes to the credibility of a prior witness in the case. And he's--we actually asked him if he made those statements and he denied it, so this would be impeachment.

¶23 Father maintains that he "was not seeking admission of any of [L.G.'s] statements to prove the 'truth of the matter asserted,' i.e., that African-American men are 'violent' or any other racial stereotype held by [L.G.]." Alternatively, Father maintains that even if the testimony was hearsay, it falls within the state-of-mind exception under Arizona Rule of Evidence 803(3).

¶24 The State argues that the hearsay was properly excluded because "[t]he statement was offered to prove the truth

of the matter asserted or, that [L.G.] did not want his son raised by a black man.”¹¹

¶25 “We deferentially review a trial court’s evidentiary rulings; we affirm unless we find (1) clear abuse of discretion or legal error and (2) prejudice.” *Gasiorowski v. Hose*, 182 Ariz. 376, 382, 897 P.2d 678, 684 (App. 1994). “Exclusion of evidence, though improper, is not grounds for reversal if ‘in all probability its admission would not have changed the result.’” *Id.* (quoting *Graham v. Vegetable Oil Prods. Co.*, 1 Ariz. App. 237, 243, 401 P.2d 242, 248 (1965)); see also *Gordon v. Liguori*, 182 Ariz. 232, 235, 895 P.2d 523, 526 (App. 1995) (“The trial court’s rulings regarding admission or exclusion of evidence will not be disturbed on appeal absent a clear abuse of discretion and resulting prejudice.”).

¶26 Here, we need not decide whether Father waived his argument or whether the juvenile court erred in excluding the testimony as inadmissible hearsay because Father has failed to demonstrate prejudice. Father asserts that L.G.’s comments to which Mother may have testified at trial would have shown L.G.’s

¹¹ The State also argues that Father has waived his claim because below Father asserted that such testimony went “to the credibility of a prior witness” and was impeachment evidence, whereas on appeal Father asserts that it was error to exclude the testimony because it was relevant to L.G.’s bias or motive. The State asserts that Father’s objection on the “ground that the statement was admissible impeachment evidence does not preserve his objection on the ground that the statement[] was relevant to bias or motive.”

racial animus and his motive to falsely testify. Although the court found L.G. to be a credible witness, there was other competent evidence of abuse, apart from L.G.'s testimony, upon which the court based its severance determination. See *infra* ¶ 32. Thus, even assuming the evidence was improperly excluded, inclusion of the evidence would not have changed the outcome of trial.

II. Testimony about treatment for PTSD

¶27 Father maintains that the juvenile court abused its discretion by permitting H.P.'s therapist to testify about PTSD when there was no foundation for H.P.'s initial diagnosis of the disorder.¹² He argues the therapist was simply acting as a conduit for the testimony of another expert. Father asserts that the therapist was not qualified to testify about diagnoses and that testifying about treating H.P. for PTSD "assumed [] expert fact[s] not in evidence." He also maintains that because there was no direct evidence that he abused H.P., the juvenile court had to rely on circumstantial evidence including the PTSD

¹² The CPS case manager also testified that H.P. was diagnosed with PTSD and that she believed the cause of the PTSD was the injuries Father inflicted that resulted in the children's removal. However, there is no expert evidence to establish that the alleged abuse was the cause of H.P.'s alleged PTSD or to substantiate the CPS case manager's belief as to this fact. Father objected to the testimony on several grounds including that the CPS case manager lacked expertise regarding cause and effect. The court however, found she was "competent to testify [on] physical abuse of children."

diagnosis testimony from the therapist in order to find severance appropriate. The State argues that the juvenile court did not abuse its discretion in determining that H.P.'s therapist qualified as an expert witness for the purpose of testifying about treating H.P. for PTSD. The State asserts that as a part of treating H.P., H.P.'s therapist considered H.P.'s PTSD symptoms and formed an opinion of H.P.'s prognosis in order to plan future treatment. Thus, the State maintains that pursuant to Arizona Rule of Evidence 702, H.P.'s therapist was qualified as an expert for treating PTSD and to testify about the psychiatrist's diagnoses because the therapist was aware of and could reasonably rely on the diagnoses.

¶28 As discussed above at ¶¶ 25-26, even if it was error to permit the therapist to testify regarding the PTSD diagnosis, there was other evidence of abuse to support the juvenile court's determination that severance of Father's parental rights to D.H. was warranted. Although the court found the therapist to be a credible witness and stated that H.P.'s PTSD was a result of the physical abuse, the statements about abuse made by H.P. and D.G. and the evidence of their injuries, is sufficient to find severance under A.R.S. § 8-533(B)(2). See *infra* Section III. Thus, the admission of such evidence, even if erroneous, did not prejudice Father such that the outcome of trial would have been different.

III. Sufficiency of the evidence of abuse

¶29 Father maintains that there was insufficient evidence to sever his parental rights based on any of the alleged statutory bases.

¶30 If the juvenile court finds at least one statutory ground in A.R.S. § 8-533(B) proven by clear and convincing evidence, and that a preponderance of the evidence establishes that severance is in the best interest of the child, it may terminate parental rights. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 12, 995 P.2d 682, 685 (2000). This Court "accept[s] the juvenile court's findings of fact unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002) (stating juvenile court is in the best position to weigh evidence, observe parties, judge credibility of witnesses, and make fact-findings).

¶31 Section 8-533(B)(2) permits severance if "the parent has neglected or wilfully abused a child. This abuse 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." Section 8-201(2) (Supp. 2012) defines "Abuse" in relevant part as "the infliction or allowing of physical injury."

¶32 Here the evidence of the children's bruises, including the photographs depicting the bruises, supports a determination that H.P. and D.G. were physically injured. H.P.'s and D.G.'s statements about Father's abuse support a determination that Father wilfully abused them. In addition, H.P.'s statements that Father also hit D.H. support the juvenile court's determination that D.H. was at risk for future abuse.

¶33 The court may terminate parental rights to a child who has not been abused or neglected upon proof that the child's parents abused or neglected another child, *Linda V. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 76, 79, ¶ 14, 117 P.3d 795, 798 (App. 2005), provided that there is a nexus "between the abuse or neglect committed on the child who was abused [] and the risk that such abuse would occur to a different child [] to whom parental rights [are] being severed," *id.* at 80 n.3, ¶ 17, 117 P.3d at 799 n.3.

¶34 The CPS case manager testified that D.H. would be at risk if returned to an abusive home because he was unable to protect himself or report abuse because he was too young. The evidence that Father inflicted physical injury to H.P. and D.G., and also hit D.H., provides a sufficient nexus to determine that D.H. was at future risk for abuse.

¶35 Father's arguments that no one had ever noted any abuse to D.H. or reported any abuse and there was no evidence of

physical abuse to D.H. are unpersuasive in light of H.P.'s statements that Father previously hit D.H. Likewise, his argument that injuries from the alleged physical abuse of H.P. consisted exclusively of bruises for which medical treatment was not necessary is inapposite because proving the necessity of medical treatment is not required for severance of parental rights under A.R.S. § 8-533(B)(2).

¶136 In sum, we cannot say that severance based on abuse was clearly erroneous. See *Jesus M.*, 203 Ariz. at 280, ¶ 4, 53 P.3d at 205. Thus, there is sufficient evidence to support the juvenile court's severance determination.¹³

CONCLUSION

¶1 For the foregoing reasons, we affirm the juvenile court's severance of Father's parental rights.

/s/

DONN KESSLER, Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Presiding Judge

/s/

ANDREW W. GOULD, Judge

¹³ Because we determine severance was appropriate based on A.R.S. § 8-533(B)(2), we need not discuss the other grounds for severance. See *Michael J.*, 196 Ariz. at 251, ¶ 27, 995 P.2d at 687.