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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 5/16/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LEANNA S.,) 1 CA-JV 12-0255
)
Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) Ariz. R.P. Juv. Ct. 103(G);
SECURITY, J.S.,) ARCAP 28)
)
Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause Nos. JD17200
JS9877

The Honorable Margaret R. Mahoney, Judge

AFFIRMED

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Attorney for Appellant

Scottsdale

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By Erika Z. Alfred, Assistant Attorney General
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Security

Tucson

W I N T H R O P, Chief Judge

¶1 Leanna S. ("Appellant") appeals the juvenile court's
order denying her Rule 60(c) motion for relief from the court's

order severing her parental rights to J.S.¹ See Ariz. R. Civ. P. 60(c). Appellant argues the juvenile court erred in holding that (1) her Rule 60(c) motion was time-barred and (2) the failure of the Arizona Department of Economic Security ("ADES") to disclose documents before her severance trial did not deny her a fair trial. For the reasons that follow, we affirm.

BACKGROUND²

¶2 Appellant is the biological mother of C.R. and J.S., and Darrell S. ("Father") is the biological father of J.S. In September 2008, C.R., J.S.'s older sister, was removed from Appellant's custody and placed in the temporary physical custody of ADES. ADES filed a dependency petition, alleging that C.R. was dependent as to her parents.

¶3 Later, a pediatrician who evaluated C.R. and a psychologist who evaluated Appellant expressed concern for J.S.'s safety. Consequently, in May 2010, the juvenile court ordered an investigation into J.S.'s welfare. ADES ultimately took custody of J.S. and filed a dependency petition, alleging Appellant and Father had physically abused and neglected J.S.

¹ We have amended the caption to delete the name of the minor child.

² We generally view the evidence in the light most favorable to sustaining the juvenile court's decision. See *Daou v. Harris*, 139 Ariz. 353, 360, 678 P.2d 934, 941 (1984); *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, 82, ¶ 13, 107 P.3d 923, 928 (App. 2005).

¶4 ADES later filed petitions to terminate Appellant's parental rights to C.R. and J.S., and Father's parental rights to J.S. The juvenile court conducted contested hearings on the dependency and severance petitions in August and September 2011. The day before C.R.'s eighteenth birthday, the juvenile court denied the State's petition to terminate Appellant's parental rights to C.R.³ Later, in a minute entry order filed January 30, 2012, the court found that Appellant and Father had "neglected and willfully abused" J.S., see A.R.S. § 8-533(B)(2) (West 2013),⁴ and terminated their parental rights as to her. Appellant and Father each filed a timely notice of appeal from the court's severance order.

¶5 In the meantime, Appellant had filed a civil action in federal district court against numerous defendants, including ADES. In that case, ADES disclosed two documents, a September 2008 "Clinical Formulation" assessment of C.R. and an October 2008 "Child Safety Assessment" of C.R. conducted by Child Protective Services ("CPS"), which Appellant alleged ADES had not previously disclosed in the severance matter.

³ C.R. appealed the order denying the petition to terminate Appellant's parental rights to her, but this court affirmed the order. See *C.R. v. Ariz. Dep't of Econ. Sec.*, 1 CA-JV 12-0028, 2013 WL 1442320 (Ariz. App. Apr. 9, 2013) (mem. decision).

⁴ We cite the current version of the statutes if no revisions material to our decision have since occurred.

¶16 On June 28, 2012, Appellant filed a motion in this court entitled "Rule 60(c)(5) and (6) Motion [for] Relief from January 27, 2012 Order of the Court and Request for New Trial." Appellant alleged ADES had committed fraud for not disclosing the "Clinical Formulation" and "Child Safety Assessment" of C.R.⁵

¶17 On August 6, 2012, Appellant filed a motion in this court to remand her pending severance appeal to the juvenile court for the purpose of allowing the juvenile court to decide her Rule 60(c) motion. This court granted her motion, stayed the appeal, and revested jurisdiction in the juvenile court for the purpose of deciding Appellant's Rule 60(c) motion.

¶18 In a minute entry order dated October 29, 2012, the juvenile court denied Appellant's Rule 60(c) motion, after finding that the motion was substantively a Rule 60(c)(3) motion and thus was untimely under Rule 46(E) of the Arizona Rules of Procedure for the Juvenile Court. The court also found that, even had Appellant's motion been timely filed, Appellant had not shown fraud, misrepresentation, or misconduct and could not prevail on the merits. Appellant filed a notice of appeal from the juvenile court's order.⁶

⁵ In late September 2012, Appellant filed a supplement to her motion to set aside the judgment, raising an additional alleged discovery violation concerning a supplemental police report.

⁶ Father did not file a Rule 60(c) motion or join in Appellant's motion, but he filed a notice of appeal from the

¶9 On February 5, 2013, this court decided the underlying appeal, affirming the severance. See *Darrell S. v. Ariz. Dep't of Econ. Sec.*, 1 CA-JV 12-0029, 2013 WL 440624 (Ariz. App. Feb. 5, 2013) (mem. decision). In its decision, this court did not address the juvenile court's order denying Appellant's Rule 60(c) motion because the appeal on the merits of the severance order was reinstated in this court by order before the juvenile court could issue its order addressing the Rule 60(c) motion (and the numerous other related motions and supplemental filings placed before the court on remand). See *id.* at *4, ¶ 24.

¶10 Because a question then existed whether the juvenile court had jurisdiction to issue its October 29, 2012 order denying Appellant's Rule 60(c) motion, see *Budreau v. Budreau*, 134 Ariz. 539, 541, 658 P.2d 192, 194 (App. 1982), we suspended Appellant's appeal of the order denying her motion and revested jurisdiction in the juvenile court to again consider and rule on that motion. See Ariz. R.P. Juv. Ct. 103(C). On remand, the juvenile court issued an order substantively identical to the October 29 order, and Appellant's appeal was reinstated before this court. We have jurisdiction over Appellant's timely appeal pursuant to A.R.S. §§ 12-2101(A)(2) and 8-235(A). See also Ariz. R.P. Juv. Ct. 103(A).

court's order denying Appellant's Rule 60(c) motion. Father's appeal was dismissed on January 28, 2013, and he is not a party to this appeal.

ANALYSIS

¶11 Appellant argues the juvenile court erred in holding that her Rule 60(c) motion was time-barred by Rule 46(E) of the Arizona Rules of Procedure for the Juvenile Court because it was more properly characterized as a Rule 60(c)(3) motion rather than a Rule 60(c)(6) motion.⁷ We disagree.

¶12 We review the denial of Appellant's Rule 60(c) motion for an abuse of discretion. See *City of Phoenix v. Geyler*, 144 Ariz. 323, 328, 697 P.2d 1073, 1078 (1985); *Birt v. Birt*, 208 Ariz. 546, 549, ¶ 9, 96 P.3d 544, 547 (App. 2004).

¶13 In the juvenile court, a motion to set aside a judgment must

conform to the requirements of Rule 60(c), Ariz. R. Civ. P., except that the motion shall be filed within six (6) months of the final judgment, order or proceeding unless the moving party alleges grounds pursuant to Rule 60(c)(1)(2) or (3), in which case the motion shall be filed within three (3) months of the final judgment.

Ariz. R.P. Juv. Ct. 46(E).

¶14 Rule 60(c) provides the bases under which a court may relieve a party of a final judgment or order. Clause (3) allows relief for reasons of "fraud (whether heretofore denominated

⁷ Appellant makes no argument on appeal in support of the application of clause (5) of Rule 60(c). Consequently, she has waived any argument regarding that clause. See *Jones v. Burk*, 164 Ariz. 595, 597, 795 P.2d 238, 240 (App. 1990) (stating that issues not clearly raised and argued in a party's appellate brief are waived).

intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." Ariz. R. Civ. P. 60(c)(3). Clause (6) provides for relief for "any other reason justifying relief from the operation of the judgment." Ariz. R. Civ. P. 60(c)(6).

¶15 "As used in [Rule 60(c)(3)], misconduct has been interpreted to include discovery violations, even when such violations stem from accidental or inadvertent failures to disclose material evidence." *Norwest Bank (Minnesota), N.A. v. Symington*, 197 Ariz. 181, 186, ¶ 19, 3 P.3d 1101, 1106 (App. 2000) (citations omitted). Accordingly, claims of discovery violations fall within the ambit of Rule 60(c)(3).

¶16 In this case, Appellant's sole claim for relief as articulated in her Rule 60(c) motion was that ADES had committed misconduct or fraud by failing to disclose certain evidence. Thus, Appellant's Rule 60(c) motion fell squarely under Rule 60(c)(3). Further, although Appellant's Rule 60(c) motion cited clauses (5) and (6) of the rule, Appellant cannot rely on clause (6) given that the actual substance of her claim alleged only grounds under clause (3). See *Panzino v. City of Phoenix*, 196 Ariz. 442, 445, ¶ 6, 999 P.2d 198, 201 (2000) (recognizing that, to obtain relief under Rule 60(c)(6), a party must show that the reason for setting aside the judgment or order is not premised on a ground contained in the five preceding clauses of Rule 60(c)); accord *Fry v. Garcia*, 213 Ariz. 70, 73 n.3, ¶ 13, 138

P.3d 1197, 1200 n.3 (App. 2006) (citing *Birt*, 208 Ariz. at 551, ¶ 22, 96 P.3d at 549). Accordingly, the juvenile court properly construed Appellant's Rule 60(c) motion as a Rule 60(c)(3) motion.

¶17 Because Appellant's Rule 60(c) motion fell under clause (3) of the rule, Appellant had three months from the time of the court's severance order to submit her motion. See Ariz. R.P. Juv. Ct. 46(E). Appellant, however, filed her motion on June 28, 2012, almost five months after the severance order was filed on January 30, 2012. Consequently, the juvenile court did not err in concluding that Appellant's Rule 60(c) motion was time-barred.

¶18 We recognize that in *Amanti Electric, Inc. v. Engineered Structures, Inc.*, 229 Ariz. 430, 433, ¶ 10, 276 P.3d 499, 502 (App. 2012), this court held that even if relief might have been available under one of the first five clauses of Rule 60(c) except that the motion is untimely, relief can still be granted under Rule 60(c)(6) "if the motion also raises exceptional additional circumstances that convince the court the movant should be granted relief in the interest of justice." We find no such exceptional circumstances here. Appellant failed to show fraud, misrepresentation, or misconduct such that she could prevail on the merits. Appellant argues she was denied due process and a fair trial by ADES's failure to properly

disclose certain documents and she had no duty to find the missing documents herself. She further claims the undisclosed documents "could have had an impact on [her] defense," and she was prejudiced by the withholding of these documents because it limited her ability to impeach ADES's witnesses and produce evidence on her own behalf. Even assuming without deciding that Appellant has not waived her due process argument by raising it for the first time on appeal, we disagree.

¶19 Pursuant to Rule 44(A), Ariz. R.P. Juv. Ct., "[a]ll information which is not privileged shall be disclosed." However, evidence that is not disclosed may in some cases be cumulative, insignificant, or of marginal relevance. See *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 924 (1st Cir. 1988). Consequently, "before retrial is mandated under Rule 60(b)(3) [the federal analogue to Rule 60(c)(3)] in consequence of discovery misconduct, the challenged behavior must *substantially* have interfered with the aggrieved party's ability fully and fairly to prepare for and proceed at trial." *Id.* (emphasis in original); accord *Norwest Bank*, 197 Ariz. at 187, ¶ 23, 3 P.3d at 1107. The burden is on the moving party to demonstrate substantial interference by a preponderance of the evidence. *Norwest Bank*, 197 Ariz. at 187, ¶ 23, 3 P.3d at 1107; see also *Panzino*, 196 Ariz. at 445, ¶ 6, 999 P.2d at 201 (stating that, to obtain relief under Rule 60(c)(6), a party must show the

courts' "systemic commitment to finality of judgments is outweighed by 'extraordinary circumstances of hardship or injustice'" (citation omitted). We will not reverse an order based on harmless error. See *State v. Guerra*, 161 Ariz. 289, 297, 778 P.2d 1185, 1193 (1989).

¶20 In this case, the record supports the juvenile court's conclusion that any discovery violations were harmless and did not substantially interfere with Appellant's ability to prepare for trial. In her opening brief, Appellant identifies no material and otherwise undisclosed evidence she would have obtained from the missing documentation had she received it before trial, and she fails to explain how any discovery violations interfered with her ability to prepare for trial. Consequently, she fails to demonstrate that the juvenile court abused its discretion in finding that any discovery violation did not prejudice her.

¶21 Furthermore, in her Rule 60(c) motion, Appellant argued that the Rapid Response "Clinical Formulation" and "Child Safety Assessment" of C.R. "contradict[ed] any statement [C.R.] allegedly made almost three years later to a third party that she and [J.S.] were physically abused . . . [and] challeng[ed] the credibility of the statements . . . relied upon by the Court." However, ADES did not dispute at the evidentiary hearings that C.R. initially did not disclose the abuse, and

Appellant was able to litigate the credibility of C.R.'s statements. Appellant fails to assert how she would have further impeached C.R. when the issue of the timing of C.R.'s initial abuse disclosure was not really a fact in dispute at trial.

¶22 Moreover, in its ruling on Appellant's Rule 60(c) motion, the juvenile court recognized "it was an acknowledged, uncontroverted fact in evidence" that C.R. did not initially disclose any physical or sexual abuse, and the court noted it "understood this and considered it in evaluating the evidence and the credibility of the witnesses."⁸ Thus, the juvenile court did not abuse its discretion in determining that this discovery violation did not prejudice Appellant.⁹

¶23 As for the police report, Appellant again fails to specify on appeal how any failure to disclose the report substantially interfered with her ability to prepare for and proceed at trial. Moreover, as the juvenile court found, the CPS case notes disclosed before trial by ADES "referenced the

⁸ The juvenile court also found that CPS reports repeatedly referenced the Rapid Response "Clinical Formulation" assessment and findings made in the assessment, and the fact that C.R. participated in the assessment was not concealed from Appellant.

⁹ Further, as we have previously recognized, the evidence supports the juvenile court's finding that Appellant willfully abused J.S., and that J.S. immediately reported the abuse when she was removed and before interacting with C.R. See *Darrell S.*, 1 CA-JV 12-0029, 2013 WL 440624, at *5-6, ¶¶ 32, 35-36.

particulars of the interview, such as its date and time, the name of the police detective, the name of the police department, the police departmental report number and the phone number for the detective." The court further found that Appellant "was on clear notice that the interview existed" and she had all necessary details to pursue information related to the report, but "failed to follow-up on the disclosed details of [C.R.'s] interview," including contacting the police department and interviewing the police detective. Finally, the court noted that its severance ruling had been "based on the sum of all the evidence provided," and "would not have been different even considering the information contained in [the] report." Given the juvenile court's findings and Appellant's failure to provide no more than mere speculation as to how she was harmed, we conclude that the juvenile court did not abuse its discretion when it found Appellant could not prevail on the merits.

CONCLUSION

¶24 The juvenile court's order denying Appellant's Rule 60(c) motion is affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
JON W. THOMPSON, Presiding Judge

_____/S/_____
DONN KESSLER, Judge