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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

SHAWN N., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, S.N., D.N., L.N.,
Appellees.

No. 1 CA-JV 15-0361
FILED 7-14-2016

Appeal from the Superior Court in Mohave County
No. L8015JD201407030
The Honorable Douglas Camacho, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Erika A. Arlington Esq. PC, Flagstaff
Erika A. Arlington
Counsel for Appellant

Arizona Attorney General's Office, Mesa
By Nicholas Chapman-Hushek
Counsel for Appellee

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Andrew W. Gould and Judge Kent E. Cattani joined.

H O W E, Judge:

¶1 Shawn N. (“Father”) appeals the juvenile court’s order terminating his parental rights to his three children, born March 2006, July 2007, and May 2011. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In April 2013, the Department of Child Safety (“Department”) took custody of the children, but they were later returned to Father and Melissa B.’s (“Mother”)¹ care in August 2013 after the parents had completed the recommended services. In December 2014, however, the police were called to Father and Mother’s home for a domestic disturbance. The police arrested Father and Mother because they both had outstanding failure-to-comply warrants. Because no one was available to take care of their three children, the Department took custody.

¶3 When a Department investigator visited Father in jail, he was “in and out of consciousness and tossing around on his cot.” Father told the investigator that he had drunk a 40-ounce beer. Meanwhile, a case manager went to the couple’s home, noting it was “filthy.” A day after visiting the couple’s home, the Department petitioned for dependency, alleging, as relevant, that Father was neglecting the children by engaging in domestic violence with Mother and by abusing methamphetamines. The Department recommended that Father engage in mental health assessments and follow all recommendations, maintain appropriate housing, attend parenting classes and learn new parenting techniques, engage in domestic violence counseling, complete substance and alcohol abuse treatment programs, and have supervised visits with his children.

¶4 The juvenile court set the preliminary protective conference hearing for December 22 and advised Father that failing to appear without

¹ The juvenile court also terminated Mother’s parental rights to the children, but she is not a party to this appeal.

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good cause could result in a finding that he waived his legal rights and admitted the petition's allegations. The order also advised Father that if he failed to appear without good cause, the hearing could go forward and result in termination of his parental rights.

¶5 On December 22, Father did not appear at the hearing and the court entered an order finding that Father had waived his rights. The court adopted the case plan of severance and adoption. The court's order admonished Father that his failure to attend any future hearings without good cause could result in a waiver of his legal rights and that he could be deemed to have admitted the petition's allegations.

¶6 In January 2015, the Department petitioned for termination of Father's parental rights. The Department alleged that Father neglected the children and that he was unable to discharge his parental responsibilities. The Department also alleged that the children had previously been removed from his care. The Department noted that it had made diligent efforts to provide appropriate reunification services, and that pursuant to court order, the children had been returned to their parents' care, but within eighteen months of returning, the children had once again been removed in December 2014.

¶7 The Department notified Father of the date of the initial termination hearing and stated that his failure to appear could result in a waiver of his legal rights and admission of the petition's allegations. The notice also stated that Father's failure to appear without good cause could result in the termination of his parental rights based upon the record and the evidence presented to the juvenile court.

¶8 At the initial termination hearing, Father denied the allegations in the petition and asked for a trial. The juvenile court set a pretrial conference for June 2 and the trial for July 15. The court "admonished" Father but advised him that his rights had not been severed. Nevertheless, Father did not appear on June 2, and the children's attorney requested findings that Father had waived his legal rights and admitted the petition's allegations. The court held that Father had defaulted, finding that he waived his legal rights by missing the pretrial conference, and the court vacated the trial and set a termination hearing.

¶9 At the termination hearing, Father moved to set aside the default finding, arguing that he had the wrong date for the pretrial conference. The court denied the motion, finding that Father had been properly advised of the conference at the prior hearing and through written

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notice. After opening statements, the Department moved to admit the latest court report and the dependency and termination petitions. The court asked Father whether he had any objections; he responded no. The court admitted both petitions and the July 6 court report.

¶10 Father's case manager testified that the children were previously removed from Father and Mother's care in April 2013 and were later returned to their care in August 2013, but had again been removed and found dependent in December 2014. The juvenile court terminated Father's parental rights on the grounds of chronic substance abuse and prior removal. As relevant, the court found that the children were previously in an out-of-home placement pursuant to court order, the Department made diligent efforts to provide the parents with appropriate reunification services, the children were subsequently returned to the parents' care, but within eighteen months, the children were removed and returned to an out-of-home placement.

¶11 The juvenile court entered a final judgement, but included neglect as a ground for termination. Father timely appealed. Upon motion, however, this Court suspended the appeal and revested jurisdiction in the juvenile court to correct its termination order. After the juvenile court issued its amended order removing neglect as a ground for termination, the appeal proceeded.

DISCUSSION

¶12 Father argues that insufficient evidence supports termination of his parental rights because the juvenile court erroneously "created" and "admitted its own exhibits," which included the petitions for dependency and termination and the July 6 court report. Father contends that without these "exhibits," insufficient evidence supported termination. Father has waived this argument because when the State moved to admit the documents during the evidentiary hearing, he expressly stated that he did not object. *See Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, 452 ¶ 21, 153 P.3d 1074, 1081 (App. 2007) (holding that parent waived argument that juvenile court failed to make individualized findings as to the grounds for termination by failing to object in juvenile court).

¶13 Waiver notwithstanding, the petitions and July 6 report had been previously filed with the juvenile court and the petitions were served on Father before the termination hearing. Therefore, these documents were already part of the record the court could consider in conducting the termination hearing. *See Adrian E. v. Ariz. Dept. of Econ. Sec.*, 215 Ariz. 96,

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102-03 ¶ 23, 158 P.3d 225, 231-32 (App. 2007); Ariz. R. P. Juv. Ct. 64(C) (requiring notice to parent that the court can proceed with adjudication of termination “based upon the record and evidence presented” if parent fails to appear without good cause); *see also* Ariz. R. P. Juv. Ct. 65(C)(6)(c), 66(D)(2). Further, at the termination hearing, the court admitted the documents into evidence. After stating that no one had “submitted” the exhibits, the court directed the clerk to copy the documents already in the record and mark them as the admitted exhibits. Consequently, all the documents were part of the record and admitted into evidence without objection, and the juvenile court did not err in considering them.

¶14 Father argues, however, that the evidence nonetheless was insufficient to support the court’s termination of his parental rights. We review a juvenile court’s termination order for an abuse of discretion. *E.R. v. Dep’t of Child Safety*, 237 Ariz. 56, 58 ¶ 9, 344 P.3d 842, 844 (App. 2015). We accept the juvenile court’s findings of fact unless no reasonable evidence supports those findings and will affirm a severance order unless it is clearly erroneous. *Bobby G. v. Ariz. Dep’t of Econ. Sec.*, 219 Ariz. 506, 508 ¶ 1, 200 P.3d 1003, 1005 (App. 2008). Moreover, if a parent fails to appear at the initial termination hearing, the parent’s failure to appear “constitute[s] a waiver of rights and an admission to the allegations contained in the termination motion or petition.” Ariz. R. P. Juv. Ct. 65(C)(6)(c). Because the evidence supports the juvenile court’s order, the court did not err in terminating Father’s parental rights.

¶15 As pertinent here, to terminate parental rights on the ground of prior removal, the juvenile court must find by clear and convincing evidence that (1) the children were previously cared for in an out-of-home placement under court order, (2) the agency responsible for the children’s care made diligent efforts to provide appropriate reunification services, and (3) the children were subsequently returned to their parents’ care, but were removed within eighteen months of being returned. A.R.S. § 8-533(B)(11).

¶16 Here, the record supports termination on the ground of prior removal. In April 2013, the children were placed in an out-of-home placement. *See* A.R.S. § 8-533(B)(11)(a). During that time, the Department made diligent efforts to provide appropriate reunification services to Father. *See* A.R.S. § 8-533(B)(11)(b). Then, pursuant to a juvenile court order, the children were returned to their parents’ care in August 2013. *See* A.R.S. § 8-533(B)(11)(c). However, less than eighteen months later, they were once again removed from their parents’ care. *See* A.R.S. § 8-533(B)(11)(d). Accordingly, the juvenile court properly found that a

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statutory ground for termination had been established. Having reached this conclusion, we need not consider the remaining ground upon which Father's parental rights were terminated.² See *Raymond F. v. Ariz. Dep't of Econ. Sec.*, 224 Ariz. 373, 376 ¶ 14, 231 P.3d 377, 380 (App. 2010).

¶17 Father next argues that he received ineffective assistance of counsel when his trial attorney failed to object to alleged hearsay statements Father's case manager made during the case manager's testimony. Arizona courts have not explicitly decided whether a claim of ineffective assistance of counsel may justify relief in a termination proceeding. See *John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, 322-23 ¶¶ 8-12, 173 P.3d 1021, 1023-24 (App. 2007). However, for the purpose of this case, we need not determine whether Arizona recognizes ineffective assistance of counsel as a separate ground for relief, see *id.* at 325 ¶ 17, 173 P.3d at 1026, because whether to object was a tactical decision on trial counsel's part and does not establish that counsel was ineffective.

¶18 To present a colorable claim of ineffective assistance of counsel, Father must show that (1) "counsel's representation fell below prevailing professional norms" and (2) "a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been different." *Id.* at 322-23 ¶ 8, 173 P.3d at 1023-24. "Disagreements as to trial strategy . . . will not support a claim of ineffective assistance of counsel as long as the challenged conduct could have some reasoned basis." *State v. Meeker*, 143 Ariz. 256, 260, 693 P.2d 911, 915 (1984). "[W]e must presume counsel's conduct falls within the wide range of reasonable professional assistance that might be considered sound trial strategy." *State v. Denz*, 232 Ariz. 441, 444 ¶ 7, 306 P.3d 98, 101 (App. 2013). Counsel's tactical decisions generally do not support a claim of ineffective assistance. See *State v. Moreno*, 153 Ariz. 67, 69-70, 734 P.2d 609, 611-12 (App. 1986) (discussing tactical decisions by counsel involving objections and witnesses). Because whether to object was a tactical decision and the record does not suggest that counsel's performance "was deficient under prevailing professional norms," *State v. Bennett*, 213 Ariz. 562, 567 ¶ 21, 146 P.3d 63, 68 (2006), Father's argument of ineffective assistance of counsel fails.

² Father argues that the juvenile court erred in terminating his parental rights on the ground of neglect. But after this Court stayed the appeal, the juvenile court amended its order removing neglect as a ground for termination.

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CONCLUSION

¶19 For the foregoing reasons, we affirm.



Ruth A. Willingham · Clerk of the Court
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