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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

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VITELIA M., *Appellant*,

*v.*

DEPARTMENT OF CHILD SAFETY, C.M., E.M., S.M., *Appellees*.

No. 1 CA-JV 21-0184  
FILED 11-30-2021

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Appeal from the Superior Court in Maricopa County  
No. JS20652  
JD39709  
The Honorable Christopher Whitten, Judge

**AFFIRMED**

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COUNSEL

David W. Bell Attorney at Law, Higley  
By David W. Bell  
*Counsel for Appellant*

Arizona Attorney General's Office, Phoenix  
By Doriane Neaverth  
*Counsel for Appellee*

**MEMORANDUM DECISION**

Judge Brian Y. Furuya delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Michael J. Brown joined.

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**FURUYA**, Judge:

¶1 Vitelia M. (“Mother”) appeals the superior court’s order terminating her parental rights to her three children—C.M, E.M., and S.M.<sup>1</sup> For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY**

¶2 In May 2020, Mother gave birth to S.M., who was born healthy and without complications. At two months’ old, however, S.M. convulsed and was transported to Phoenix Children’s Hospital, where medical providers discovered numerous, life-threatening injuries indicative of abusive trauma. Those injuries included bruises and abrasions, mouth injuries, extensive brain and retinal hemorrhages, and fractures to her skull, ribs, and legs. Additionally, S.M. was severely malnourished.

¶3 Because Mother gave providers no plausible explanation for S.M.’s injuries, the Department of Child Safety (“DCS”) took temporary custody of all three of Mother’s children and filed a dependency petition. S.M.’s condition eventually improved, though her injuries resulted in blindness and developmental delays. She also required feeding therapy.

¶4 Meanwhile, Phoenix Police interviewed Mother, who confirmed she had been S.M.’s sole caregiver since birth. Mother admitted to forcing S.M. to eat, accounting for some of her injuries. When asked how S.M. received her remaining injuries, Mother offered only three possibilities: (1) she had fallen to the bathroom floor while holding S.M., (2) she had dropped S.M. onto the carpet while trying to place her into her crib, and (3) S.M. had fallen off the couch while unbuckled in her car seat. She denied any other accidents or falls.

¶5 As part of the dependency, Mother completed a psychological evaluation. The evaluating psychologist observed Mother was

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<sup>1</sup> It appears from the record Mother may have other children, but they are not the subject of the instant appeal.

VITELIA M. v. DCS et al.  
Decision of the Court

“significantly anxious, guarded, vague, [and] evasive,” and she “minimized her mental[-]health symptoms and functioning difficulties.” Mother told the psychologist that she was “stressed out emotionally” and depressed after S.M.’s birth. When asked about S.M.’s injuries, Mother stated, “I think it may have been me inflicting them.” The psychologist ultimately diagnosed Mother with post-traumatic stress disorder and an unspecified personality disorder with dependent and borderline traits. The psychologist gave Mother a guarded prognosis of her ability to parent in the future and opined that without significant progress in therapy, Mother would continue to be unable to properly parent.

¶6 Despite Mother’s disclosures to the psychologist, she maintained to DCS that she did not cause S.M.’s injuries and had no idea how they happened. Ultimately, all three children were adjudicated dependent as to Mother. And DCS thereafter filed a petition to terminate Mother’s parental rights to the children due to abuse. *See* Ariz. Rev. Stat. (“A.R.S.”) § 8-533(B)(2).

¶7 Five months later, the superior court held a four-day combined dependency and termination hearing. At trial, Mother testified about the incidents she had previously relayed to police and another incident in which she said she fell on top of S.M. while the infant was lying on a mattress on the floor. Medical professionals, however, testified that Mother’s explanations could not have accounted for all of S.M.’s injuries, which were severe and extensive. Several professionals testified that S.M.’s injuries resulted from more than one occasion of nonaccidental trauma, during which the abuser likely squeezed and violently shook the infant and impacted her head with an object at least twice. Witnesses also testified that then two-year-old E.M. and six-year-old C.M. would be at risk of harm if returned to Mother’s care.

¶8 E.M.’s father was also part of the proceedings. On the third day of trial, the court dismissed the termination motion as to him, and then discussed the father’s decision to plead no contest to the dependency petition:

THE FATHER: So . . . if I -- agree to the no contest, then . . . I have the chance to find my kids . . . when I get out [of jail]?

THE COURT: Yep.

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VITELIA M. v. DCS et al.  
Decision of the Court

THE COURT: Right now the plan would be for you to be reunified with [E.M.] after your release from prison. . . . [I]t may not stay that way forever. . . . [I]f you draw a big number, they may move to terminate again. But right now the plan would be for you to be reunified.

THE FATHER: All right.

THE COURT: Okay?

THE FATHER: Okay. . . . I have a question, Your Honor.

THE COURT: Yeah. Yeah, go ahead.

THE FATHER: Well, what about [C.M.]?

THE COURT: Yeah, [C.M.] is not your child, so we're going to proceed with the termination as to [him].

THE FATHER: So . . . when I get out, I can fight [to have] him back?

THE COURT: No. I mean, not . . . legally. . . . [H]e would be with whoever adopts him. If that person who adopts him wants you to be part of his life, you would be. But you wouldn't have the rights that a parent would have.

THE FATHER: All right.

THE COURT: You wouldn't have those anyway, though. I mean, you're not a biological parent.

¶9 After this exchange, the court adjudicated E.M. dependent as to E.M.'s father and then continued to hear evidence on DCS's termination motion as to Mother. Ultimately, the court terminated Mother's parental rights to all three children. Mother timely appealed, and we have jurisdiction pursuant to A.R.S. § 8-235(A).

## DISCUSSION

¶10 On appeal, Mother asserts the court violated her due process rights because its comments to E.M.'s father that the case "was going to 'proceed with the termination'" as to C.M., that C.M. "would be with

VITELIA M. v. DCS et al.  
Decision of the Court

whoever adopts him,” and that “if that person who adopts him wants [E.M.’s father] to be a part of his life, [he] would be” suggested the court was biased and had decided before it heard all the evidence that it would terminate Mother’s parental rights.

¶11 We review constitutional claims de novo. *Brenda D. v. DCS*, 243 Ariz. 437, 442, ¶ 15 (2018) (citation omitted). However, when a parent fails to object to an alleged due process violation in superior court, her claim is reviewed for fundamental error. *Id.* at 447, ¶ 37. Fundamental error is that which goes “to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.” *Ruben M. v. Ariz. Dep’t of Econ. Sec.*, 230 Ariz. 236, 239, ¶¶ 15–16 (App. 2012) (citing *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005)).

¶12 Under fundamental error review, appellant “bears the burden to establish that (1) error exists, (2) the error is fundamental, and (3) the error caused her prejudice.” *Brenda D.*, 243 Ariz. at 447–48, ¶ 38 (citing *State v. Bearup*, 221 Ariz. 163, 168, ¶ 21 (2009)). An appellant “must affirmatively prove prejudice and cannot merely rely upon speculation.” *Id.* at 448, ¶ 38 (internal quotation marks omitted). To prove prejudice, an appellant “must show that a reasonable fact-finder could have reached a different result.” *Id.*

¶13 Because Mother did not object to the court’s statements during trial, we review her claim only for fundamental error. When taken in context, the court’s comments to E.M.’s father do not amount to fundamental error. The court made the statements after it dismissed the termination motion as to E.M.’s father and while the father was deciding whether to contest dependency allegations. The statements were in response to the father’s questions about his future rights to C.M., who is not his biological child. Taking them in order and in context, the court’s statement that it was going to “proceed with the termination” as to C.M. meant only that the termination proceedings would continue as to Mother and C.M.

¶14 Next, when E.M.’s father asked the court if he could fight to get C.M. back, the question suggested he wanted to know whether he could make any claim to C.M. if Mother’s parental rights were terminated. Accordingly, the court told E.M.’s father that, under that scenario, he would have no legal rights to C.M. and could only be part of C.M.’s life “if [the] person who adopts him want[ed] [him] to be.” Because the court was merely responding to the father’s questions about future possibilities,

VITELIA M. v. DCS et al.  
Decision of the Court

Mother has failed to demonstrate error. Indeed, Mother describes the statements as a “single instance of perceived impartiality or bias,” which is insufficient to demonstrate actual bias. *See Hourani v. Benson Hosp.*, 211 Ariz. 427, 434, ¶ 23 (App. 2005) (explaining a party must demonstrate bias by showing the decision maker’s mind is “irrevocably closed on the particular issues being decided”) (internal quotation marks omitted); *Pavlik v. Chinle Unified Sch. Dist. No. 24*, 195 Ariz. 148, 152 (App. 1999) (explaining actual bias must be shown; mere speculation is insufficient) (citations omitted).

¶15 Moreover, even assuming, *arguendo*, the court somehow committed fundamental error, Mother does not demonstrate prejudice. Mother asserts the court’s statements “suggested” it had predetermined an unfavorable outcome for her, but suggestion alone is only speculation. Moreover, ample evidence supports the court’s finding that Mother abused S.M. or failed to protect her from abuse. Contrary to Mother’s contention, the court specified it “based its ruling on a thorough review of the evidence, testimony, the pleadings, case history and applicable law,” and it found DCS had proven the allegations in the termination petition by clear and convincing evidence. Finally, Mother suggests that based on the evidence offered at trial, she would likely not prevail if given a second opportunity, further undermining her claim she suffered prejudice.

CONCLUSION

¶16 For the foregoing reasons, we affirm the order terminating Mother’s parental rights.



AMY M. WOOD • Clerk of the Court  
FILED: AA