

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: G.M.
 S.M.

C.A. Nos. 14AP0040
 14AP0041

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE Nos. 2014 JUV-C 000708
 2014 JUV-C 000707

DECISION AND JOURNAL ENTRY

Dated: February 19, 2015

HENSAL, Presiding Judge.

{¶1} Appellant, Chantra M. (“Mother”), appeals from a judgment of the Wayne County Court of Common Pleas, Juvenile Division, that adjudicated two of her minor children abused, neglected, and dependent children and placed them in the permanent custody of Wayne County Children Services Board (“CSB”). This Court affirms the judgment insofar as it adjudicated the children but reverses the disposition of permanent custody because the trial court held both hearings on the same day without Mother’s consent. *See* Juv.R. 34(A).

I.

{¶2} Mother is the natural mother of four children. Although all four children were parties to the proceedings in the trial court, only the older two are at issue in this appeal: G.M., born September 10, 2008; and S.M., born August 7, 2009. The father of these children has been incarcerated since before this case began and is not a party to the appeal.

{¶3} G.M. and S.M. were removed from Mother's custody during a prior case in 2011, but the record includes only select documents from that case. For example, the record includes a judgment from the 2011 case that adjudicated the children based on the parties' "stipulat[ion] to the facts of the complaint[,]" but that complaint is not included in the record in this case, nor is the case plan that the parties signed.

{¶4} The record does include testimony about the 2011 case, including that the children were removed from the home in 2011 because Mother had been locking them in their bedroom and the condition of the home was extremely cluttered and unsanitary. CSB took photographs of the condition of the home in 2011 that were also admitted as exhibits in this case. After remaining in CSB care for approximately two years, the children were returned to Mother's custody under an order of protective supervision. The trial court terminated protective supervision and closed that case in August 2013.

{¶5} CSB received a new referral about this family during March 2014. The children, then four and five years old, had been found wandering on a highway overpass, without shoes and dressed in their pajamas. When a caseworker responded to the home, she spoke to Mother and the children and observed that the children were filthy and the home was deplorable. Photographs taken at that time depicted the condition of the home to be far worse than it was when CSB photographed it in 2011.

{¶6} The police removed the children from the home pursuant to Juvenile Rule 6 and CSB apparently filed complaints in the juvenile court during March 2014, but those cases were later dismissed because the proceedings did not move forward in a timely matter. No documentation from the March 2014 cases was introduced into the record in this case, however. Again, this Court must emphasize that its review is necessarily limited to the record in this case.

{¶7} On June 25, 2014, CSB filed the complaints in this case, seeking an initial disposition of permanent custody of both children. The complaints further alleged that the children had climbed through their bedroom window to seek food because they were hungry and the door to their bedroom was blocked shut by a refrigerator. They were found wandering on a highway overpass without adult supervision. CSB further asserted that the condition of the home was deplorable. The complaint pertaining to G.M. also alleged that she had been sexually assaulted by Mother's husband, who lived in the home and is the father of Mother's younger children.

{¶8} The trial court issued a summons to all parties that the hearing on adjudication and disposition would be held on September 3 and September 4, 2014. No one disputes that Mother was served with that summons. On the morning of September 3, 2014, the adjudicatory hearing commenced.

{¶9} Mother was not present at the beginning of the hearing. After waiting almost an hour and Mother still did not appear, her trial counsel requested permission to withdraw. He stated on the record that he did not know where Mother was and that he had made several unsuccessful attempts to meet with her prior to the hearing.

{¶10} Counsel explained that he had made numerous attempts to contact Mother via telephone, by sending letters, and by visiting her home. Although he had twice made telephone contact with her and scheduled appointments to meet, Mother did not appear for the appointments and counsel had been unable to discuss how to respond to CSB's complaint on Mother's behalf. The trial court granted Mother's trial counsel permission to withdraw.

{¶11} At the conclusion of the adjudicatory hearing, the trial court announced from the bench that it adjudicated both children abused, neglected, and dependent children. It further

stated that it adjudicated G.M. to be sexually abused. After announcing the adjudications from the bench, the trial court proceeded immediately to the dispositional hearing, which, in this case, was a hearing on CSB's request for permanent custody as the initial disposition of the children. Following the dispositional hearing, the trial court entered judgment that adjudicated G.M. and S.M. abused under Ohio Revised Code Section 2151.031(B), neglected under Section 2151.03(A)(2), and dependent under Section 2151.04(C) and further adjudicated G.M. as sexually abused under Section 2151.031(A). In that same judgment, the trial court also entered a dispositional order that placed both children in the permanent custody of CSB. Mother appeals and raises three assignments of error.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED BY PROCEEDINGS DIRECTLY TO DISPOSITION FROM ADJUDICATION WITHOUT ALLOWING FOR THE REQUIRED BIFURCATION OF THE PROCEEDINGS.

{¶12} Mother argues that the trial court violated Juvenile Rule 34(A) because it held the dispositional hearing immediately after the adjudicatory hearing without her consent. In relevant part, Juvenile Rule 34(A) provides:

The dispositional hearing for an adjudicated abused, neglected, or dependent child shall be held at least one day * * * after the adjudicatory hearing is held. The dispositional hearing may be held immediately after the adjudicatory hearing if * * * all parties consent to the dispositional hearing being held immediately after the adjudicatory hearing.

{¶13} No one disputes that Mother did not explicitly consent to having the dispositional hearing held immediately after the adjudicatory hearing. Moreover, the record reflects that Mother did not appear at the adjudicatory hearing, her trial counsel appeared but moved to withdraw at the beginning of the hearing, and the trial court granted him permission to withdraw.

Consequently, the adjudicatory and dispositional hearings proceeded without Mother appearing in person or through counsel.

{¶14} Although CSB argues on appeal that Mother had notice that the adjudicatory and dispositional hearing would be held on the same day, the record reflects otherwise. The parties were summoned to appear for the hearing on adjudication and disposition “on Wednesday, September 3, 2014 at 8:30 am and Thursday, September 4, 2014 at 8:30 am[.]” The notice could be read to mean that the hearings would be held on two separate days, as required by Juvenile Rule 34(A), and did not serve to notify the parties that both hearings would be held on September 3.

{¶15} The circumstances of this case are similar to those in *In re W.C.*, 12th Dist. Preble No. CA2012-05-007, 2013-Ohio-153, in which the trial court conducted the adjudicatory and dispositional hearings on the same day without the consent of the parties. The father was not present at the hearing and the trial court permitted his court-appointed counsel to withdraw. In addition to other errors in the proceedings, because the trial court did not obtain the father’s consent before proceeding immediately to disposition, the dispositional order of temporary custody was reversed. We agree that, based on the facts of that case, proceeding immediately to the hearing on disposition after the adjudicatory hearing, without first obtaining consent, violated Juvenile Rule 34(A) and hence, constituted reversible error.

{¶16} Although this case involves circumstances similar to those in *In re W.C.*, CSB argues that Mother cannot complain about the trial court conducting both hearings on the same day without her explicit consent because she failed to preserve this issue for appellate review by failing to timely raise it in the trial court, and/or she implicitly consented to proceeding to disposition immediately after adjudication. We disagree.

{¶17} CSB cites no authority to support its argument, but this Court recognizes that, in *In re R.R.*, 2d Dist. Montgomery No. 2305, 2014-Ohio-5579, ¶ 51-53, the Second District Court of Appeals held that the express consent of the parties was not necessary to satisfy the requirements of Juvenile Rule 34(A) because their consent was implied by the facts of that case. Although the court concluded that the parties' consent was implied by the circumstances, it reasoned the issue as if the party had forfeited the alleged error by failing to timely raise it during the hearing. Specifically, all parties were present at the beginning of the adjudicatory hearing, as well as at a prior hearing, when the magistrate discussed holding the dispositional hearing immediately after adjudication. Because no party objected to that procedure when they had the opportunity to do so, the appellate court concluded that the parties had implicitly consented to holding both hearings on the same day. *Id.*

{¶18} Even if this Court accepts the reasoning of the Second District in *In re R.R.*, the facts of this case are significantly different. Mother, here, was not present at the hearing, she was not represented by counsel, and it cannot be fairly said that she had been given notice of the trial court's intention to proceed immediately to disposition after adjudication on the first of two dates listed in the notice. Therefore, we do not find that she consented to having the disposition hearing without waiting until at least the following day, as required by Juvenile Rule 34(A).

{¶19} CSB's argument that Mother failed to preserve this issue by raising a timely objection in the trial court relies on a criminal case in which the defendant appeared and was represented by counsel during his trial when he failed to raise a timely objection to the alleged error he later raised on appeal. *See State v. Williams*, 51 Ohio St.2d 112, 117 (1977). The notion that a party may waive or forfeit an alleged error by failing to timely raise the issue in the trial court presumes that the party had the opportunity to do so. *State v. Am. Bail Bond Agency*, 129

Ohio App.3d 708, 716 (10th Dist.1998). The “general rule” requires that the party “could have” but did not call the alleged error to the attention of the trial court at a time that it could have been avoided or corrected. *State v. Childs*, 14 Ohio St.2d 56 (1968), paragraph three of the syllabus.

{¶20} The doctrine of waiver or forfeiture should not apply here because Mother was not present at the hearing and/or represented by counsel and had no opportunity to raise an objection when the trial court proceeded to hold the dispositional hearing on the same day. *See, e.g., State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, ¶ 18. Even if she voluntarily chose not to appear for the adjudicatory hearing, which she had notice would be held on September 3, 2014, she had no opportunity to decide whether to appear for disposition because she had no prior notice that the trial court would conduct the dispositional hearing that same day.

{¶21} Furthermore, a juvenile court’s initial dispositional order in an abuse, neglect, and/or dependency case, such as in *In re R.R.*, typically places the child in the temporary custody of the agency, which does not terminate parental rights. In this case, the trial court’s failure to comply with the consent requirement of Juvenile Rule 34(A) had far more significant implications on Mother’s due process and parental rights because the dispositional hearing resulted in the termination of Mother’s parental rights. This Court has repeatedly held that termination of parental rights is “the family law equivalent of the death penalty” and, for that reason, parents “must be afforded every procedural and substantive protection the law allows.” *See, e.g., In re S.R.*, 9th Dist. Summit No. 27209, 2014-Ohio-2749, ¶ 36, quoting *In re Hayes*, 79 Ohio St.3d 46, 48 (1997).

{¶22} In this case, Mother was not afforded the procedural protection explicitly afforded by Juvenile Rule 34(A) because she did not consent to the permanent custody hearing proceeding on September 3 rather than on September 4. Because the trial court violated Juvenile Rule 34(A)

by conducting the permanent custody hearing immediately after the adjudicatory hearing without obtaining Mother's consent, Mother's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED BY ALLOWING HEARSAY TESTIMONY AT BOTH THE ADJUDICATORY PHASE AND THE PERMANENT CUSTODY PHASE OF THE TRIAL.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED BY ALLOWING HEARSAY TESTIMONY BY A SOCIAL WORKER AS WELL AS CONSIDERING TESTIMONY BY THE SOCIAL WORKER AS A BASIS FOR A FINDING OF SEXUAL ABUSE PURSUANT TO O.R.C. 2151.031(A).

{¶23} Mother's second and third assignments of error are that the trial court erred in admitting inadmissible hearsay testimony at both the adjudicatory and dispositional hearings. Because this Court has reversed the permanent custody decision based on Mother's first assignment of error, we will address these assignments of error only insofar as they challenge evidence that was presented at the adjudicatory hearing.

{¶24} In contrast to Mother's lack of opportunity to oppose the disposition of her children, the record reflects that she had an adequate opportunity to attend the adjudicatory hearing and defend against CSB's allegations, but she failed to do so. Mother received notice from the trial court that the adjudicatory hearing would commence on September 3, 2014. Her trial counsel also informed the court that he had mailed letters to Mother, at the address where he knew she resided, to remind her about the hearing, but that he had received no response from her. He was not able to offer any explanation for Mother's failure to appear.

{¶25} Mother does not argue that the trial court erred by permitting her trial counsel to withdraw or by proceeding with the adjudicatory hearing without her, nor does she suggest that her trial counsel was ineffective for withdrawing and/or failing to request a continuance. Mother

did not communicate to trial counsel or the trial court that she had a problem that prevented her from attending the hearing.

{¶26} Mother had the opportunity to appear and defend against CSB's evidence of abuse, neglect, and dependency at a time when any error in the admission of evidence could have been addressed and/or remedied by the trial court. Mother did not appear at the hearing or otherwise attempt to defend herself against CSB's evidence. Because Mother did not appear in person or through counsel, no objection was raised to the admission any of CSB's evidence against her. Instead, Mother attempts to challenge the admissibility of the evidence for the first time on appeal. Given Mother's failure to raise a timely objection, this Court concludes that she forfeited any challenge on appeal to the evidence admitted against her. *See, e.g., State v. Tibbetts*, 92 Ohio St.3d 146, 161 (2001).

{¶27} Although forfeiture does not extinguish a claim of plain error, Mother has not argued that the admission of this evidence constituted plain error. "[T]his Court will not construct a claim of plain error on behalf of an appellant who fails to raise such an argument in her brief." *State v. White*, 9th Dist. Summit Nos. 23955 & 23959, 2008-Ohio-2432, ¶ 33. Therefore, Mother's second and third assignments of error are overruled.

III.

{¶28} Mother's first assignment of error is sustained. Her second and third assignments of error are overruled. The judgment of the Wayne County Court of Common Pleas, Juvenile Division, is affirmed in part, reversed in part, and the cause remanded for proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

JENNIFER HENSAL
FOR THE COURT

MOORE, J.
CONCURS.

CARR, J.
CONCURRING.

{¶29} I write separately to express my concern that there may have been other procedural irregularities in the trial court that were not raised on appeal and, therefore, were not addressed in the majority opinion. For example, Mother did not assign error to the trial court granting her trial counsel permission to withdraw or to trial counsel's failure to request a continuance of the adjudicatory hearing. Appellate counsel would not be inclined to raise either challenge, because, after allowing trial counsel to withdraw, the trial court appointed the same attorney to represent Mother on appeal. Although the record does not suggest that trial counsel acted inappropriately, the better practice would have been for the trial court to appoint a different attorney to represent Mother on appeal.

APPEARANCES:

CONRAD G. OLSON, Attorney at Law, for Appellant.

DANIEL R. LUTZ, Prosecuting Attorney, and MELODY L. BRIAND, Assistant Prosecuting Attorney, for Appellee.

NIKKI REED, Guardian ad Litem.