Opinion issued May 3, 2012

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00018-CV

CHRISTOPHER DURAN, Appellant

V.

LESLIE ANN SMITH, Appellee

On Appeal from the 245th District Court
Harris County, Texas
Trial Court Cause No. 2008-75793

MEMORANDUM OPINION

Appellant, Christopher Duran, challenges the trial court's judgment, entered after a bench trial, in favor of appellee, Leslie Ann Smith, in Duran's suit against

Smith seeking appointment as the sole managing conservator of Duran and Smith's minor child. In three issues, Duran contends that he received ineffective assistance of counsel,[1] the trial court erred in admitting into evidence two police reports containing hearsay, and the trial court abused its discretion in granting Smith sole managing conservatorship, awarding Smith attorney's fees and costs, and finding Duran in contempt of the trial court's orders.

We affirm.

Background

In his petition for divorce from Smith, Duran sought to be appointed sole managing conservator of their minor child. The trial court conducted a bench trial during which it heard the testimony of Duran, Smith, and several other witnesses presented by both parties. After trial, the trial court entered a final decree of divorce in which it dissolved Duran and Smith's marriage, appointed Smith sole managing conservator with possession of the child "at all times," and appointed Duran possessory conservator, subject to the conditions set forth in a commitment order, which the trial court incorporated into the decree. The trial court denied Duran access to the child and required him, in its commitment order, to complete a drug rehabilitation program, an anger management and batterer's intervention and prevention program, and a psychological evaluation. The trial court stated that,

[1] *See* U.S. CONST. amends. VI, XIV.

upon fulfillment of these terms, it would conduct a review hearing to determine whether Duran should be granted access to the child. The trial court further ordered Duran to pay child support and the attorney's fees of Smith and the ad litem.

Sole Managing Conservatorship

In his third issue, Duran argues that the trial court abused its discretion in appointing Smith sole managing conservator of the child because the evidence demonstrated that Smith was an "unfit parent and an incompetent role model," the trial court was "unduly swayed and prejudiced" by Duran's "refusal to abide by certain court . . . orders of visitation," and the trial court's decision was based upon its consideration of inadmissible hearsay and exhibits. Within this issue, Duran asserts that the trial court abused its discretion in entering an order of contempt against him, ordering that he be confined, requiring that he complete "rehabilitative programs," and assessing "all attorney's fees and costs" against him.

Although Duran attempts to raise four separate sub-issues within his third issue, Duran's briefing on these sub-issues is limited to approximately one and one-half pages of argument. Within this argument pertaining to the third issue, Duran does not provide a single citation to the record. Thus, Duran does not address, in any specific detail, the testimony of six separate witnesses that the trial court heard over the two-day bench trial. In regard to the sub-issue of contempt,

Duran's only argument is that there were "great ambiguous allegations" and "no one seemed to understand what the specific rules and orders of the court on the child visitation were." In regard to his attorney's-fees challenge, Duran does not include a single sentence pertaining to this legal issue. The only issue even arguably preserved in Duran's third issue is his complaint that the trial court abused its discretion in appointing Smith sole managing conservator. Accordingly, we hold that Duran has waived all other sub-issues for our review. *See* TEX. R. APP. P. 38.1(i).

In determining issues of conservatorship, "[t]he best interest of the child shall always be the primary consideration" of the trial court. TEX. FAM. CODE ANN. § 153.002 (Vernon 2008); *In re K.R.P.*, 80 S.W.3d 669, 674 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). Trial courts have wide discretion with respect to custody, control, possession, support, and visitation matters. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982); *In re K.R.P.*, 80 S.W.3d at 674. Thus, we review a trial court's decision on custody for abuse of discretion. *Turner v. Turner*, 47 S.W.3d 761, 763 (Tex. App.—Houston [1st Dist.] 2001, no pet.). A trial court abuses its discretion when it acts arbitrarily or unreasonably, or without reference to any guiding rules or principles. *Id*.

Under an abuse-of-discretion standard, legal and factual insufficiency are not independent grounds of error, but rather are relevant factors in assessing

whether the trial court abused its discretion. *Bush v. Bush*, 336 S.W.3d 722, 729 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *Stamper v. Knox*, 254 S.W.3d 537, 542 (Tex. App.—Houston [1st Dist.] 2008, no pet.). Within this standard, we determine whether the trial court (1) had sufficient information on which to exercise its discretion, i.e., we conduct the applicable sufficiency review, and (2) erred in its application of discretion. *Stamper*, 254 S.W.3d at 542.

In a legal-sufficiency review, we consider all of the evidence in the light most favorable to the verdict and indulge every reasonable inference that would support it. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). We consider evidence favorable to the finding if a reasonable fact finder could and disregard evidence contrary to the finding unless a reasonable fact finder could not. *Id*. at 827; *Brown v. Brown*, 236 S.W.3d 343, 348 (Tex. App.—Houston [1st Dist.] 2007, no pet.). The fact finder is the sole judge of the credibility of the witnesses and the weight to give their testimony. *Bush*, 336 S.W.3d at 729. The final test is "whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller*, 168 S.W.3d at 822.

In a factual-sufficiency review, we consider all the evidence supporting and contradicting the finding. *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989). We set aside the finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *See Cain v.*

Bain, 709 S.W.2d 175, 176 (Tex. 1986). In regard to whether the trial court abused its discretion, we determine whether, based on the elicited evidence, the trial court made a reasonable decision. *Stamper*, 254 S.W.3d at 542.

Smith testified that Duran was physically and mentally abusive to her and he subjected her to continuous harassment. She explained that she had sought the assistance of law enforcement authorities in response to Duran's physical abuse and his refusal to abide by court orders. Smith noted a specific incident of assault when she and Duran, who had previously been convicted of the misdemeanor offenses of harassment and assault, were exchanging their child. Duran had pulled on her shoulder in a manner that required her to seek treatment at a hospital. And their child was present and witnessed Duran abusing Smith. Moreover, Duran, in violation of prior court orders, had denied her visitation with the child on several occasions. Smith further noted that Duran had a sporadic employment history and provided no financial support. Smith denied ever abusing the child and stated that she had a job and an apartment in which she and the child could live. She stated that she loved her child and wanted conservatorship of the child. Additionally, Smith presented the testimony of a police officer who confirmed that Duran had previously denied Smith access to the child in violation of court orders.

Duran disputed Smith's testimony regarding his work history and his physical and mental abuse of Smith. And Duran presented testimony concerning

Smith's employment history, lifestyle choices, and substance abuse, all of which the trial court could have considered in determining whose appointment would be in the best interest of the child. Duran also presented the testimony of witnesses that characterized him as a loving and attentive father. Finally, Duran presented the testimony of a witness who stated that, after being returned by her mother following a visitation, the child had an abrasion on her face and the child reported that Smith had hit her. However, Smith's counsel and the ad litem elicited conflicting testimony regarding whether there were any injuries to the child following the alleged incident, and Smith denied Duran's allegations that she had abused the child during this incident.

The trial court was the sole judge of the credibility of the witnesses and was free to credit Smith's testimony on conflicting matters. *Bush*, 336 S.W.3d at 729. In regard to Duran's conduct, the trial court was also free to believe Smith's testimony that Duran was abusive and had deliberately disregarded court orders to provide Smith with access to the child. The trial court was also free to consider the testimony of the witnesses and documentation indicating that Duran, contrary to court orders, continually denied Smith access to the child. Duran, on cross-examination, admitted to denying Smith access, although he testified to various reasons for denying such access. Duran's testimony during the ad litem's cross-examination could also have caused the trial court concern over Duran's

willingness to comply with any future orders regarding custody of the child. We conclude that Smith presented legally- and factually-sufficient evidence from which the trial court, acting as fact finder, could have found that appointing Smith as sole managing conservator was in the best interest of the child. Accordingly, we hold that the trial court did not abuse its discretion in appointing Smith as sole managing conservator.

We overrule Duran's third issue.

Ineffective Assistance

In his first issue, Duran argues that he received ineffective assistance of counsel because his trial counsel did not make an opening statement, prepare his witnesses, object to leading questions, object to hearsay evidence or certain exhibits, object to the introduction of a drug report or the temporary orders, object to the introduction of various e-mails, object to a police officer "testifying from the stand and actually reading from an offense report made by another police officer," offer any rebuttal witnesses, object to the evidence on attorney's fees, ask any questions of the ad litem regarding her attorney's fees, or make a final argument. Duran also complains that the trial court had to instruct his trial counsel not to discuss the case with the witnesses.

In response to Duran's ineffective-assistance claim, Smith first argues that there is no right to effective assistance of ounsel in "matters of child custody." We

acknowledge that other Texas courts of appeals have concluded that, at least in the general sense, the right to effective assistance of counsel does not extend to conservatorship proceedings. *See In re G.J.P.*, 314 S.W.3d 217, 222–23 (Tex. App.—Texarkana 2010, pet. denied) (stating that Texas courts had not previously addressed whether "the recognized right to effective assistance of counsel for cases involving the termination or severance of parental rights also extend[s] to cases in which only conservatorship is decided"; further stating that "main rationale for importing the right to effective assistance of counsel into" civil parental-rights termination proceedings "does not exist in a case where the severance" of parental right "is not implicated"); *In re A.J.M.*, No. 05–10–00920–CV, 2011 WL 2207103, at *1 (Tex. App.—Dallas June 8, 2011, no pet.) (mem. op.) (stating that appellant cited no authority, and court was aware of none, that recognized right of effective assistance on issues of conservatorship during divorce proceedings,); *In re M.J.*, No. 09–09–00355–CV, 2010 WL 3042438, at *4 (Tex. App.—Beaumont Aug. 5, 2010, no pet.) (mem. op.) (stating that in context of divorce proceedings that resulted in award of "standard visitation" to father, court, in "absence of a constitutional or statutory provision granting a right to appointed counsel," declined to recognize "a right to effective assistance of counsel to a dispute resolving the division of possession between joint managing conservators"); *In re V.N.S.*, No. 13-07-00046-CV, 2008 WL 2744659, at *5 (Tex. App.—Corpus

Christi July 3, 2008, no pet.) (mem. op.) (stating that, in context of proceedings to modify parental rights, parent had "no constitutionally protected right to effective assistance of counsel"); *see also In re A.D.A.*, 287 S.W.3d 382, 390 (Tex. App.—Texarkana 2009, no pet.) (stating that even if father had standing to raise ineffective assistance of counsel claim regarding child's attorney ad litem in conservatorship proceeding, father failed to make any showing of harm).

Here, Duran complains of an order and decree in which he was found to have committed criminal contempt. Pursuant to the decree and commitment order, he was committed to the Harris County Jail for a significant period of confinement, and, after his eventual release from confinement, he was ordered to complete, among other things, an in-patient drug rehabilitation program. He was also denied any access to his child. The trial court further ordered that it would conduct a review hearing to consider whether Duran should be granted any access to the child only after he had fulfilled several conditions. Since neither party has made any meaningful effort to discuss the case law and statutes relevant to our analysis of whether the right to effective assistance of counsel applies in the instant case, and since the record amply demonstrates that any such claim would fail, we assume without deciding that such a claim may be brought.

Proving ineffective assistance of counsel requires a showing that (1) counsel made errors so serious that counsel was not functioning as "counsel" guaranteed by

the Sixth Amendment and (2) the deficient performance of counsel prejudiced the defense in a manner "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *In re H.R.M.*, 209 S.W.3d 105, 111 (Tex. 2006) (citing S*trickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); *In re M.S.*, 115 S.W.3d 534, 545 (Tex. 2003)). In adopting the *Strickland* test for parental-rights termination cases, the Texas Supreme Court has explained that, "taking into account all of the circumstances surrounding the case," a court "must primarily focus on whether counsel performed in a reasonably effective manner." *In re M.S.*, 115 S.W.3d at 545. A court "must give great deference to counsel's performance, indulging a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, including the possibility that counsel's actions are strategic." *Id*. Challenged conduct constitutes ineffective assistance only when it is "so outrageous that no competent attorney would have engaged in it." *Id*.

The record demonstrates that Duran's counsel engaged in extensive and detailed examinations and cross-examinations, as applicable, of the witnesses. Duran's counsel presented his client's testimony, as well as the testimony of three other witnesses, in support of Duran's request that he be appointed the child's sole managing conservator. During the bench trial, neither Duran's nor Smith's counsel made formal opening statements or closing arguments, and there is no

indication in the record as to why each party elected not to make formal statements or arguments. The record further reflects that all trial counsel asked leading questions during the proceedings, and the trial court warned both Duran's and Smith's counsel's regarding the use of leading questions.

Duran offers no explanation as to why the trial court would not have been entitled to consider its own temporary orders and Duran's alleged violation of those orders in awarding conservatorship. Duran also offers no explanation as to why the telephone conversations and e-mails containing his statements and admitted into evidence would have been inadmissible had his trial counsel objected. Duran's counsel may have simply chosen not to object to the admission of many of the admitted exhibits because he determined that the exhibits ultimately would have been ruled admissible had any challenges been asserted.

In regard to the testimony of Houston Police Department Officer M. Moses, he explained that he responded to a call for assistance regarding "interference with child custody" on July 5, 2009. Although Moses agreed that he was not the initial responding officer and did not prepare the offense report, Moses explained that he went to the scene because Duran had requested that the responding officer summon a supervisor. Moses reviewed the offense report and testified that it contained a true and accurate representation of what occurred at the scene. Duran does not challenge Moses's ability to testify as to what he actually observed at the scene,

and the record indicates that Moses's testimony was cumulative of much of the information contained within the offense report. Moses's testimony also reflects that he personally spoke with Duran after receiving the call for assistance and he worked with Duran to resolve the situation. Ultimately, Moses informed Duran that the officers would not arrest Smith in response to his allegations that Smith had outstanding warrants for her arrest. Moses also informed Duran that the child custody order granting Smith access to the child appeared to be valid and Duran should provide Smith with custody of the child. Moses explained that after Duran had refused to turn the child over to Smith, he called the Harris County District Attorney's office to see if the State would accept criminal charges against Duran for interference with child custody. Duran's counsel likely had no basis on which to object to Moses's testimony concerning the basic facts of the incident, and he may have determined that it would have been less damaging to allow the admission of the offense report into evidence rather than requiring more live testimony.

Officer Moses also testified concerning another police offense report prepared on July 19, 2009 in response to a similar incident in which he was not directly involved. However, this second incident was discussed only briefly during the trial, and Duran's counsel could have determined that any objection to this second report would simply have resulted in Smith presenting more detailed and damaging evidence from a second police officer.

In regard to the presentation of witnesses, although the record reveals that Duran's trial counsel did not have his witnesses immediately available upon the commencement of testimony, the record further reveals that Duran's counsel, after examining Smith, presented the testimony of several witnesses who offered testimony favorable to Duran's efforts to obtain conservatorship. Duran does not assert that he was precluded from offering the testimony of any additional, specific witnesses, and he does not identify any rebuttal witnesses that he contends should have testified. Nor does Duran identify any topics on which rebuttal testimony would have been helpful.

Finally, in regard to attorney's fees, Duran does not contend that the fees testified to by both Smith's counsel and the ad litem were unreasonable or excessive. Duran also does not identify on what basis his counsel should have objected to their testimony regarding attorney's fees. The record reflects that Smith's counsel testified to incurring $14,000 in attorney's fees and the ad litem testified that she was owed an outstanding balance of $8,000 in attorney's fees. Duran's counsel may have determined that the amounts testified to by both counsel were reasonable and supported by the evidence. We note that Duran's counsel was also permitted to offer his testimony in support of his request for attorney's fees, which totaled approximately $10,000, and neither Smith's counsel nor the ad litem objected to the testimony.

In sum, we conclude that Duran has not demonstrated that his counsel provided ineffective assistance. Considering the circumstances surrounding the case, none of Duran's complaints, "individually or combined, overcomes the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *In re H.R.M.*, 209 S.W.3d at 111. Moreover, Duran has not demonstrated that his counsel's alleged failures to present additional witnesses and exhibits, make objections to leading questions or hearsay, or make an opening statement and closing argument "prejudiced the case, deprived him of a fair trial, or produced an unreliable result." *Id.* Accordingly, we hold that, even assuming that Duran is entitled to make a claim of ineffective assistance of counsel, he has not shown that he received such ineffective assistance.

We overrule Duran's first issue.

Hearsay

In his second issue, Duran argues that the trial court erred in admitting into evidence the July 5, 2009 and July 19, 2009 police offense reports concerning the two instances in which police officers responded to the custody dispute between Duran and Smith.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005). To obtain reversal of a judgment based on error in the admission or exclusion of evidence, an

appellant must show that the trial court's ruling was in error and the error (1) probably caused the rendition of an improper judgment or (2) probably prevented the appellant from properly presenting the case to the court of appeals. TEX. R. APP. P. 44.1. In determining if the excluded evidence probably resulted in the rendition of an improper judgment, we review the entire record, and, "[t]ypically, a successful challenge to a trial court's evidentiary rulings requires the complaining party to demonstrate that the judgment turns on the particular evidence excluded or admitted." *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001). Ordinarily, we will not reverse a judgment because a trial court erroneously excluded evidence when the evidence in question is cumulative and not controlling on a material issue dispositive to the case. *Id*.

The July 5, 2009 offense report contains information cumulative of Moses's direct testimony. The report also contains a summary of Smith's and Duran's statements that they provided to the police officers at the scene. Both Duran and Smith also testified concerning Duran's refusal to provide Smith access to the child. The July 19, 2009 report is labeled a "supplemental" report and contains a very brief summary of Smith's allegations that she was being denied access to the child contrary to the terms of a court order. Much of the information contained in both of these reports was cumulative of Officer Moses's testimony and of the testimony presented by both Duran and Smith. The reports themselves were

discussed only briefly on the record. We conclude that, to the extent the trial court erred in admitting any portions of these reports, such error did not probably cause the rendition of an improper judgment or prevent Duran from properly presenting the case to this Court. *See* TEX. R. APP. P. 44.1. Accordingly, we hold that any error in the admission of the reports did not constitute reversible error.

We overrule Duran's second issue.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Massengale, and Huddle.