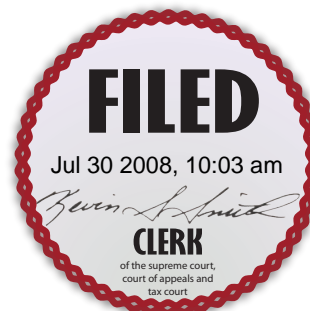


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

LILABERDIA BATTIES

Batties & Associates
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

BARRY A. CHAMBERS

Indiana Department of Child Services
Indianapolis, Indiana

DEBORAH S. BURKE

Department of Child Services
Grant County Office
Marion, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF Y.O., D.N., & C.O.,)
Children in Need of Services,)

S.N., mother,)

Appellant-Respondent,)

vs.)

No. 49A02-0801-JV-67

MARION COUNTY DEPARTMENT OF)
CHILD SERVICES,)

Appellee-Petitioner,)

and)

CHILD ADVOCATES, INC.,)

Appellee/Guardian Ad Litem.)

APPEAL FROM THE MARION SUPERIOR COURT – JUVENILE DIVISION

The Honorable, Marilyn Moores, Judge
The Honorable Scott Stowers, Magistrate
Cause No. 49D09-0708-JC-35333-35335

July 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Seneca N. (“Mother”) appeals from the juvenile court’s determination that her minor children, Y.O., D.N., and C.O., are Children in Need of Services (“CHINS”). Specifically, she contends that her children’s out-of-court statements were not supported by sufficient indications of reliability and that the trial court violated her rights under the Indiana and United States Constitutions by holding the child hearsay hearing and CHINS fact-finding hearing close in time on the same day. Concluding that the trial court did not abuse its discretion in finding that her children’s out-of-court statements were supported by sufficient indications of reliability and that she invited any error relating to the hearing procedure, we affirm.

Facts and Procedural History

Mother is the mother of Y.O., born September 24, 1997, D.N., born January 3, 1999, and C.O., born March 11, 2001.¹ In August 2007, Mother was arrested for a probation violation and left the children in the care of a friend. On August 21, 2007, the Marion County Department of Child Services (“MCDCS”) received a report regarding the children, who were without a legal guardian because Mother was in jail. Family Case Manager Glynn Allen (“FCM Allen”) went to the older children’s school and spoke with

¹ The children’s fathers are not parties to this appeal. Y.O. and C.O. have the same alleged father.

the school's social worker. While FCM Allen was at the school, Tommy Dorsey, Mother's ex-husband, arrived to pick up Y.O. and D.N. FCM Allen informed Dorsey that the children would not be released to his care because he is not their father and that the children were in the care of the MCDCS. With the assistance of law enforcement, FCM Allen then went to Dorsey's home and took C.O. into custody.

After retrieving the children, FCM Allen and another professional from Youth Emergency Services interviewed each child individually. During these interviews, each child was asked whether he or she knew the difference between a truth and a lie, Tr. p. 26, 31, 33. FCM Allen also tested their understanding of the difference between truths and lies. *Id.* at 27, 31, 33.

During her interview, Y.O. revealed that she and her siblings had been living with Dorsey until he kicked them out and they began staying with one of Mother's friends. *Id.* at 28. Y.O. informed FCM Allen that she had seen Dorsey pull a gun on Mother and run over Mother's feet with his car. *Id.* at 30. Y.O. told FCM Allen that Mother had smoked "weed" in her presence. *Id.* at 29. Additionally, Y.O. said that Dorsey had struck her once with a belt. *Id.* at 30. During D.N.'s interview, she confirmed that their family had lived with Dorsey until he kicked them out. *Id.* at 31. They then went to live with one of Mother's friends. *Id.* D.N. told FCM Allen that Dorsey ran over Mother's foot with his car and that police had been called to their home several times due to arguments between Mother and Dorsey. *Id.* at 31-32. D.N. also informed FCM Allen that Mother and Dorsey smoked marijuana. *Id.* at 32. Finally, six-year-old C.O. had difficulty breathing during her interview and so, other than communicating her confusion about the purpose

of the interview and that she was not afraid of Mother, she did not provide any additional information to her interviewers. *Id.* at 33.²

The MCDCS filed a request for permission to file a CHINS petition, which was granted, and subsequently filed a petition alleging that Y.O., D.N., and C.O. are CHINS. The MCDCS later filed a petition for a child hearsay hearing to determine the admissibility of the children's out-of-court statements during their interviews. The trial court conducted a pretrial hearing, and the parties and the court discussed scheduling constraints and that October 17, 2007, was the last available permissible day under Indiana statute for the court to hold the CHINS fact-finding hearing. *Id.* at 10. The court then scheduled the child hearsay hearing for October 12, 2007, and the CHINS fact-finding hearing for October 17, 2007. *Id.*

Counsel for the parties appeared for the child hearsay hearing on October 12, although Mother did not appear. *Id.* at 13. Counsel informed the court that Mother's attorney had not received all of the necessary discovery materials. *Id.* at 13-14. With the statutory deadline in mind, counsel for both parties approved holding the child hearsay hearing and the CHINS fact-finding hearing on the same day. *Id.* at 15. The following exchange occurred:

THE COURT: The attorneys are not troubled by me having a child hearsay hearing and a fact finding on the same date as long as they're two separate hearings is that, did I get that correct?

MCDCS: That's correct your honor. Two distinct separate hearings, yes.

[MOTHER'S COUNSEL]: That's right your honor.

² C.O. apparently suffers from an ailment that requires her to occasionally use a breathing machine.

Id. at 16. The trial court then rescheduled the child hearsay hearing for October 17, 2007, before the CHINS fact-finding hearing. *Id.* at 17.

On October 17, the trial court conducted both hearings. At the beginning of the child hearsay hearing, the parties stipulated that the children were unavailable to testify because “it would be traumatic and detrimental to them to testify.” *Id.* at 20. One witness, FCM Allen, testified during the child hearsay hearing. He testified to the contents of the children’s statements made during their interviews and the circumstances surrounding their interviews. After vigorous cross-examination by Mother’s attorney and closing arguments from both sides, the trial court held that the children’s out-of-court statements provided sufficient indications of reliability and were therefore admissible during the CHINS fact-finding hearing. *Id.* at 65.

After issuing its ruling on the child hearsay matter, the trial court expressed concern about holding the CHINS fact-finding hearing immediately thereafter and gave Mother the opportunity to have more time to prepare for the fact-finding hearing. *Id.* at 66. Mother, by counsel, declined, however:

THE COURT: [S]o you don’t object to fact finding now rather th[a]n some date in the future is that correct?

[MOTHER’S COUNSEL]: Correct your honor.

THE COURT: All right so that’s not an issue.

Id. at 67. The court proceeded to conduct the CHINS fact-finding hearing, initially refusing to incorporate evidence from the child hearsay hearing. *Id.* at 68. However, after FCM Allen began his testimony, Mother’s counsel withdrew any objection to incorporating evidence from the child hearsay hearing into the CHINS fact-finding

hearing. The trial court confirmed that the parties wished to incorporate the evidence from the child hearsay hearing as follows:

THE COURT: All right so parties agree to incorporate the evidence from the child hearsay hearing into the fact finding proper is that correct?

MCDCS: That's fine with me.

[MOTHER'S COUNSEL]: Yes, yes.

Id. at 71. After incorporating FCM Allen's earlier testimony and hearing the testimony of several more witnesses, the trial court determined that Y.O., D.N., and C.O. are CHINS. Mother now appeals.

Discussion and Decision

Mother raises two issues on appeal. First, she contends that her children's out-of-court statements were not supported by sufficient indications of reliability and were therefore inadmissible in the CHINS hearing pursuant to Indiana Code § 31-34-13-3. Thus, she argues that the evidence is insufficient to support the children's CHINS adjudications. Second, she contends that the trial court violated her rights under the Indiana and United States Constitutions by holding the child hearsay hearing and CHINS fact-finding hearing close in time on the same day.

The MCDCS has the burden of proving by a preponderance of the evidence that a child is a CHINS. *See* Ind. Code § 31-34-12-3; *In re M.W.*, 869 N.E.2d 1267, 1270 (Ind. Ct. App. 2007). When determining whether sufficient evidence exists in support of a CHINS determination, we consider only the evidence favorable to the judgment and the reasonable inferences raised by that evidence. *Id.* This Court will not reweigh the evidence or judge witnesses' credibility. *Id.* Here, the trial court made specific findings

and conclusions of law in its order adjudicating Y.O., D.N., and C.O. to be CHINS. Appellant's App. 82-86. Where a trial court enters specific findings and conclusions thereon, we apply a two-tiered standard of review. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). First, we determine whether the evidence supports the findings, and, second, we examine whether the findings support the judgment. *Id.* We will set aside the trial court's judgment only if it is clearly erroneous. *Id.*

I. Admission of Evidence

A. Sufficient Indications of Reliability

Mother contends that the trial court abused its discretion in allowing testimony by FCM Allen during the CHINS fact-finding hearing regarding out-of-court statements made by the children. We review a trial court's admission of evidence for an abuse of discretion. *In re Paternity of H.R.M.*, 864 N.E.2d 442, 445 (Ind. Ct. App. 2007). A trial court abuses its discretion when its decision is against the logic and effect of the facts and circumstances before the court. *Id.*

The admission of out-of-court statements by children who are the subject of CHINS proceedings is governed by statute. Indiana Code § 31-34-13-2 provides:

A statement or videotape that:

(1) is made by a child who at the time of the statement or videotape:

(A) is less than fourteen (14) years of age; . . .

(2) concerns an act that is a material element in determining whether a child is a child in need of services;

(3) is not otherwise admissible in evidence under statute or court rule; is admissible in evidence in an action described in section 1 of this chapter if the requirements of section 3 of this chapter are met.

Indiana Code § 31-34-13-3 further provides:

A statement or videotape described in section 2 of this chapter is admissible in evidence in an action to determine whether a child or a whole or half blood sibling of the child is a child in need of services if, after notice to the parties of a hearing and of their right to be present:

- (1) the court finds that the time, content, and circumstances of the statement or videotape and any other evidence provide sufficient indications of reliability; and
- (2) the child:

(C) is found by the court to be unavailable as a witness because:

- (i) a psychiatrist, physician, or psychologist has certified that the child's participation in the proceeding creates a substantial likelihood of emotional or mental harm to the child[.]

Neither party disputes that the children are all under the age of fourteen, that the out-of-court statements pertained to matters relevant to the CHINS proceeding, that the statements are not otherwise admissible, and that the parties received notice of the hearing and their right to be present. Further, the parties stipulated that the children were all unavailable as witnesses due to a substantial likelihood of emotional or mental harm. Tr. p. 20-21. Thus, the only issue before the trial court at the child hearsay hearing was whether “the time, content, and circumstances of the statement[s] . . . provide sufficient indications of reliability.” Ind. Code § 31-34-13-3(1); Tr. p. 21.

Here, the trial court found that the time, content, and circumstances of the children's statements provided sufficient indications of reliability. Tr. p. 65; Appellant's App. p. 68. The court explained:

I am going to find that the time[,], content[, and] circumstances do bare [sic] sufficient reliability uh, the content particularly um, the witness testified that uh, the children were asked question[s] and they were not

leading questions um, they seem to indicate the difference between a truth and a lie uh, time I suppose it['s] probably the weakest of the three factors because there seems to be a discrepancy in the tenses of one of the statements uh, the statement regarding mother's uh, suspected drug usage whether it was uses or used uh, but none the less the total circumstances I find um, there is sufficient indication of reliability

Tr. p. 65. Mother's challenge to the trial court's finding in this regard focuses upon slight inconsistencies in the children's statements to FCM Allen and FCM Allen's confusion at the child hearsay hearing regarding certain details of the children's statements. She also questions the techniques used to interview the children. During the child hearsay hearing, FCM Allen testified about the circumstances surrounding his interviews with the children and the content of the interviews. Specifically, he testified that the interviews occurred shortly after all of the children had been taken into custody by the MCDCS and that the interviews were conducted individually. He began each interview with a simple test to determine whether the children understood the difference between a truth and a lie, and, once he was satisfied that they did, he asked them a series of questions about their home life and Mother. He also testified that he knew of no reason why the children would make up stories about Mother and Dorsey. *Id.* at 34-35. On cross-examination, FCM Allen expressed confusion about some of the details of the children's interviews and acknowledged discrepancies between his notes of the interviews and his preliminary written inquiry. *Id.* at 57-61. The trial court heard all of this evidence, and it was in the best position to judge the credibility of the witness. *A.F v. Marion County Office of Family & Children*, 762 N.E.2d 1244, 1250 (Ind. Ct. App. 2002), *trans. denied*. We cannot say that the trial court abused its discretion in finding that the children's out-of-

court statements were admissible because the requirements of Indiana Code § 31-34-13-3(1) were met.

B. Sufficiency of Evidence to Support CHINS Adjudication

The juvenile court found that Y.O., D.N., and C.O. were CHINS pursuant to Indiana Code § 31-34-1-1, which provides as follows:

A child is a child in need of services if before the child becomes eighteen (18) years of age:

(1) the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision; and

(2) the child needs care, treatment or rehabilitation that the child:

(A) is not receiving; and

(B) is unlikely to be provided or accepted without the coercive intervention of the court.

Mother does not specifically challenge the trial court's findings on any of these factors. Rather, her argument is simply that the trial court abused its discretion in considering evidence of the children's out-of-court statements and that, without this evidence, the evidence does not support their CHINS adjudications. We have already determined that the trial court did not abuse its discretion in allowing testimony regarding the children's out-of-court statements. Thus, Mother's argument fails. The trial court did not clearly err in determining that Y.O., D.N., and C.O. are CHINS.

II. Constitutional Claims

Mother also contends that the trial court violated her rights under the Indiana and United States Constitutions by holding the child hearsay hearing and CHINS fact-finding

hearing close in time on the same day. The MCDCS responds by pointing out that Mother does not develop this argument, Appellee's Br. p. 7, and that, in any event, "the trial court was aware of the procedural requirement in the child hearsay statute for separate hearings and reminded the parties of that requirement several times on the record," *id.* at 8-9 (citing Tr. p. 8-10, 15-16, 65-67), and held the two distinct hearings on the same afternoon only after repeated assurances from both parties that they did not object to the procedure, *id.* at 16, 67.

To the extent that Mother now argues that the procedure employed for the two hearings violated her Constitutional rights, her argument is waived. Mother did not object to the timing of the hearings to the trial court; instead, she agreed to the scheduling of the hearings on the same afternoon. Tr. p. 16, 66-67. A party may not raise an issue for the first time on appeal. *Troxel v. Troxel*, 737 N.E.2d 745, 752 (Ind. 2000), *reh'g denied*; *In re A.P.*, 882 N.E.2d 799, 805 (Ind. Ct. App. 2008) (father whose parental rights were terminated could not raise due process arguments on appeal because he did not raise them at trial), *reh'g denied*. In addition, Mother invited the error, if any, about which she now complains. Invited errors "are errors committed or invited by a party or that are the natural consequence of a party's own neglect or misconduct." *In re Adoption of Infants H.*, 878 N.E.2d 331, 344 (Ind. Ct. App. 2007). A party that invites error may not take advantage of the alleged error. *Id.* Therefore, we will not review such claims from a party who invited the alleged error. *Id.*

Mother's counsel was present at every hearing during which this issue was discussed, and Mother's counsel expressly agreed to the scheduling of the child hearsay

hearing on the same afternoon as the CHINS fact-finding hearing. Tr. p. 16, 66-67. Further, Mother's counsel agreed that testimony from the child hearsay hearing should be incorporated into the CHINS fact-finding hearing. *Id.* at 71. Mother cannot now claim error.

Affirmed.

KIRSCH, J., and CRONE, J., concur.