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IN THE
COURT OF APPEALS OF INDIANA

In the Matter of the Involuntary Termination of the Parent-Child Relationship of: St.I. and A.P. (Minor Children),

and

S.I., Jr. (Father),

Appellant-Respondent,

v.

The Indiana Department of Child Services,

Appellee-Petitioner.

October 30, 2020

Court of Appeals Case No. 20A-JT-453

Appeal from the Morgan Superior Court

The Honorable Peter R. Foley, Judge

Trial Court Cause No. 55D01-1908-JT-329
55D01-1908-JT-330

Tavitas, Judge.

Case Summary

[1] S.I., Jr. ("Father"), pro se, appeals the termination of his parental rights to St.I. and A.P. ("the Children"). We affirm.

Issues

[2] S.I. raises five issues on appeal, which we consolidate and restate as follows:

I. Whether DCS presented sufficient evidence to support the termination of Father's parental rights.

II. Whether the trial court erred in admitting and excluding certain evidence.

Facts

[3] In June 2011, M.P. ("Mother") gave birth to B.P., a child with special needs. Mother subsequently began a relationship with Father, who "demonstrated extreme hostility, hatred, and cruelty towards B.P." and "often texted Mother about killing [B.P.]." Father's App. Vol. II p. 21. Mother and Father never married and are the biological parents of the Children: St.I., who was born in April 2014, and A.P., who was born in October 2017.[1]

[1] Mother has consented to the adoption of the Children and is not a party to this appeal.

[4] In approximately 2016, the Morgan County Office of the Department of Child Services ("DCS") investigated "[m]ultiple unsubstantiated reports related to neglect and physical abuse allegations" regarding Mother and Father. Tr. Vol. II p. 160. On November 26, 2016, five-year-old B.P. died as a result of a homicide.[2] Mother subsequently failed to comply with a safety plan that sought to bar Father's access to St.I. On December 2, 2016, DCS removed St.I. from Father's and Mother's care and placed St.I. with his maternal grandmother. At the time of removal, St.I. was a "tiny, non-verbal, frustrated child." Tr. Vol. III p. 20.

[5] On December 5, 2016, DCS filed a Child in Need of Services ("CHINS") petition regarding St.I. and cited B.P.'s suspicious death and the ongoing criminal investigations of Mother and Father. On June 23, 2017, the State charged Father and Mother with criminal offenses related to B.P.'s death. Father and Mother have been incarcerated since that date.

[6] On August 14, 2017, Mother and Father admitted that they could not meet St.I.'s needs due to their incarcerations. The trial court adjudicated St.I. as a CHINS. The trial court entered a dispositional order and required Father, inter alia, to: (1) participate in services, including fatherhood engagement programming and therapy; and (2) execute all releases necessary to allow DCS

[2] Father and Mother were subsequently charged with related criminal offenses.

to monitor his progress with services. Father participated in fatherhood engagement programming in the Morgan County Jail.

[7] While Mother was incarcerated, Mother gave birth to A.P. in October 2017.[3] Within days, A.P. was placed with T.V. ("Paternal Aunt"), where A.P. has remained. On October 25, 2017, DCS filed a CHINS petition as to A.P., citing Mother's and Father's incarcerations. The trial court adjudicated A.P. as a CHINS on December 21, 2017, based on Mother's and Father's admissions that they could not meet A.P.'s basic needs due to their incarcerations.

[8] In May 2018, a jury convicted Father of conspiracy to commit murder resulting in B.P.'s death, a Level 1 felony. Father is serving a thirty-nine-year sentence in the Department of Correction ("DOC") and will not be released from prison before September 2046.[4]

[9] Before Father's scheduled transfer to a DOC facility, DCS facilitated—at Father's request—a supervised visit for Father and St.I. at the Morgan County Jail on September 2, 2018. At the end of the visit, then-four-year-old St.I became despondent, had "a full blown meltdown[,]" regressed to being nonverbal, slept heavily, and required a great deal of emotional support. Tr.

[3] DNA testing revealed Father to be A.P.'s biological father during the CHINS pendency.

[4] Mother was convicted of neglect of a dependent, a Level 1 felony, and is serving a thirty-six-year sentence in the DOC.

Vol. II p. 181. Father was subsequently transferred to a DOC facility. Father refused to sign a release that would have granted DCS access to information regarding Father's participation in programming at DOC.

[10] On November 5, 2018, and November 14, 2018, Father moved for visitation with St.I. DCS opposed visits between Father and either of the Children in the DOC. After hearings, the trial court denied Father's motions for visitation. Father did not appeal the denial of his request for additional visitation during the CHINS proceedings. On March 25, 2019, and April 12, 2019, Father again filed motions for visitation with the Children. On June 3, 2019, the trial court denied Father's motions for visitation. Again, Father did not appeal.

[11] On June 17, 2019, this Court affirmed Father's criminal conviction for conspiracy to commit murder. S.*I. v. State*, No. 18A-CR-1751 (Ind. Ct. App. June 17, 2019). On August 26, 2019, DCS filed a petition to terminate Father's parental rights. The trial court conducted a fact-finding hearing on November 12, 2019. At the outset, Father sought leave to proceed pro se, which the trial court granted. Father's appointed counsel moved to withdraw, which was also granted. On November 13, 2019, Father requested a subpoena, wherein Father sought to compel five-year-old St.I. to testify at the fact-finding hearing, which the trial court denied. The trial court then continued the matter to afford Father time to prepare.

[12] The trial court held another fact-finding hearing on January 3, 2020. Among the testifying witnesses was Kelly Gilkerson, whom both DCS and Father called to testify.[5] Gilkerson testified that she had provided play therapy services to St.I. since October 2019 and that St.I. came to her with an initial diagnosis of adjustment disorder. Gilkerson also shared her conclusions about St.I.'s needs and progress based on Gilkerson's observations during play therapy sessions. Father objected to Gilkerson's testimony regarding the diagnosis and challenged Gilkerson's testimony as improper expert testimony that was not known to Father before the fact-finding hearing. The trial court overruled Father's objection.

[13] During the presentation of evidence regarding the best interests of the Child, Father moved for a continuance to allow then-five-year-old St.I. to appear in court to testify. DCS objected.[6] The trial court deemed the five-year-old Child to be an incompetent witness and refused Father's request to call St.I. as a witness, stating:

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[5] DCS included Gilkerson's name on in its witness list in advance of the fact-finding hearing.

[6] The bases for DCS's objection were: (1) St.I.'s extremely youthful age and unlikelihood to yield probative evidence regarding what was in St.I.'s best interests; (2) the testimony of other witnesses was inadequate to establish St.I.'s competence to testify; (3) St.I. "would be unduly traumatized by needing to testify in a courtroom setting while testifying and confronting [F]ather"; and (4) "the possibility of getting relevant testimony that would be helpful in the case is absolutely outweighed by the trauma the child would experience in this case." Tr. Vol. II p. 229.

> THE COURT: . . . The context of this is . . . what's the best interest of the child. And the Court may even be able to assume that most children would want to be with their parent they knew as their parent. But [Father] has offered no other probative value to the testimony that would . . . outweigh . . . the likely trauma and distress [that testifying] would cause the child. So the Motion is denied.

Tr. Vol. II pp. 230-31. Father did not make an offer of proof.

[14] Also, during the fact-finding hearing, DCS asked the trial court to take judicial notice of Father's criminal cause relating to B.P.'s death, related DCS exhibits, and appellate decisions. Father did not object. In response, Father called his wife, J.C., to offer rebuttal testimony regarding alleged fundamental error that occurred during his criminal trial. DCS objected on the basis that Father sought to re-litigate the issues of his criminal trial. The trial court sustained DCS's objection and excluded J.C.'s testimony. Father did not make an offer of proof. Subsequently, over DCS's objection, the trial court admitted Father's Indiana Trial Rule 60 motion, filed in the criminal court, regarding the same error that Father intended to elicit from his wife. On January 11, 2020, the trial court entered an order with findings of fact and conclusions thereon and terminated Father's parental rights to the Children. Father now appeals.

Analysis

[15] Father appeals from the termination of his parental rights. When reviewing the termination of parental rights, we do not reweigh the evidence or judge witness

credibility. *In re I.A.,* 934 N.E.2d 1127, 1132 (Ind. Ct. App. 2010). We consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id.* We must also give "due regard" to the trial court's unique opportunity to judge the credibility of the witnesses. *Id.* (quoting Ind. Trial Rule 52(A)).

[16] Pursuant to Indiana Code Section 31-35-2-8(c): "The trial court shall enter findings of fact that support the entry of the conclusions required by subsections (a) and (b)." Here, the trial court granted DCS's petition to terminate Father's parental rights and entered findings of fact and conclusions thereon. When reviewing findings of fact and conclusions thereon entered in a case involving a termination of parental rights, we apply a two-tiered standard of review. First, we determine whether the evidence supports the findings, and second, we determine whether the findings support the judgment. *I.A.*, 934 N.E.2d at 1132. We will set aside the trial court's judgment only if it is clearly erroneous. *Id.* A judgment is clearly erroneous if the findings do not support the trial court's conclusions or the conclusions do not support the judgment. *Id.*

[17] Indiana Code Section 31-35-2-8(a) provides that "if the court finds that the allegations in a petition described in [Indiana Code Section 31-35-2-4] are true, the court shall terminate the parent-child relationship." Indiana Code Section 31-35-2-4(b)(2) provides that a petition to terminate a parent-child relationship involving a child in need of services must allege, in part:

(A) that one (1) of the following is true:

> (i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied.
>
> (ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.
>
> (iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services;

(B) that termination is in the best interests of the child; and

(C) that there is a satisfactory plan for the care and treatment of the child.

DCS must establish these allegations by clear and convincing evidence. *In re V.A.*, 51 N.E.3d 1140, 1144 (Ind. 2016).

I. Unchallenged Findings and Conclusions

[18] We initially note that Father challenges only the trial court's findings 10(B), 10(E), and 10(H) as clearly erroneous.[7] Father has, thereby, waived any

[7] Father argues that finding 10(B), regarding Father's visitation with St.I. in jail ("jail visit") "erroneously stat[es] that St[.I.] was 'traumatized'" and is "a dishonest finding clearly contrary to the evidence[.]" Father's Br. p. 10. Father challenges Finding 10(E), regarding Father's failure to comply with a prior court order

arguments relating to the unchallenged findings. *See In re S.S.*, 120 N.E.3d 605, 614 n.2 (Ind. Ct. App. 2019) (explaining that this Court will accept unchallenged trial court findings as true). The findings Father does challenge, even if they were erroneous, do not affect the conclusions of the trial court regarding the termination of Father's parental rights.

[19] Father also fails to challenge the trial court's conclusions that: (1) there is a reasonable probability that the conditions that resulted in the Children's removal or the reasons for placement outside the home of the parents will not be remedied; (2) there is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the Children; (3) termination of Father's parental rights is in the best interests of the Children; and (4) a satisfactory plan for the care and treatment of the Children.[8] To the extent Father argues that the trial court's conclusions are clearly erroneous, Father has waived those arguments by his failure to make a cogent argument thereon. Runkel v. Miami Cty. Dep't of Child Servs., 875 N.E.2d 369, 373 (Ind. Ct. App. 2007), *trans. denied* (citing Ind. Appellate Rule 46(A)(8)(a)).

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requiring Father to execute a disclosure regarding services, as "blatantly disingenuous and a bridge too far" and maintains that "DCS . . . provided no services whatsoever to [Father] during the relevant timeframe." *Id*. at 12. Lastly, regarding Finding 10(H), Father contends that the trial court "misstate[d] [Father]'s true intent to offer [his wife, J.C.]'s testimony as a collateral attack [on his convictions] in the wrong forum. . . ." *Id*. at 11.

[8] As Indiana Code Section 31-35-2-4(b)(2)(B) is written in the disjunctive, DCS only needed to prove either that continuation of the parent-child relationship poses a threat to the well-being of the Children *or* that the reasons that resulted in the Children's placement outside the home will not be remedied.

[20] Even if Father could prevail in demonstrating clear error regarding findings 10(B), 10(E), and 10(H), it is undisputed that DCS presented sufficient evidence to support the trial court's conclusions. Accordingly, Father cannot establish that the statutory requirements for the termination of his parental rights were not met. For this reason, we do not address the merits of Father's specific challenges to findings 10(B), 10(E), and 10(H).

II. Orders on Visitation

[21] Father asserts that the trial court's order on visitation in the CHINS proceedings and orders denying Father's motions for visitation are effectively no contact orders or orders of protection, which fail to meet statutory requirements therefor. Father's Br. p. 8. This novel[9] argument is waived because Father asserts it for the first time on appeal and in the termination of parental rights case, rather than the CHINS matter. *See In re B.R.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007) (failure to raise an issue below constitutes waiver of that issue on appeal). Moreover, the record reveals that, during the separate CHINS action, the trial court denied Father's motions for visitation on various occasions. In each instance, Father failed to appeal. The trial court's denial of Father's requests for visitation have no bearing upon the underlying petition to terminate Father's parental rights and, moreover, were waived for appellate

[9] Father cites no authority and we have found no legal support for Father's contention that, in denying visitation to Father, the trial court was bound to satisfy statutory requirements applicable to orders for protection or no-contact orders.

review. *See Cavens v. Zaberdac,* 849 N.E.2d 526, 533 (Ind. 2006) ("Issues not raised at the trial court are waived on appeal. In order to properly preserve an issue on appeal, a party must, at a minimum, 'show that it gave the trial court a bona fide opportunity to pass upon the merits of the claim before seeking an opinion on appeal.'") (citations omitted).

III. Admission and Exclusion of Evidence

[22] Father argues that the trial court abused its discretion in admitting and excluding certain evidence. The admission of evidence is entrusted to the sound discretion of the trial court. *In re S.L.H.S.*, 885 N.E.2d 603, 614 (Ind. Ct. App. 2008). Evidentiary rulings of a trial court are afforded great deference on appeal and are overturned only upon a showing of an abuse of discretion. *Id.* We will find an abuse of discretion if the trial court's decision is against the logic and the effect of the facts and circumstances before the court. *Id.*

[23] Not all trial court error is reversible error. *In re Termination of Parent-Child Relationship of E.T.*, 808 N.E.2d 639, 645 (Ind. 2004) (citing Ind. Trial Rule 61). Indiana Trial Rule 61 provides that we must "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Our Supreme Court has held that "[t]he improper admission of evidence is harmless error when the judgment is supported by substantial independent evidence to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the judgment." *E.T.*, 808 N.E.2d at 645-46.

[24] "It is well settled that an offer of proof is required to preserve an error in the exclusion of a witness' testimony." *Dowdell v. State*, 720 N.E.2d 1146, 1150 (Ind. 1999). "An offer of proof allows the trial and appellate courts to determine the admissibility of the testimony and the potential for prejudice if it is excluded." *See id.*

A. Gilkerson's Testimony

[25] Father argues that the trial court "abused its discretion by admitting . . . expert medical diagnosis testimony that had not been disclosed to [Father] prior to the termination hearing at issue"; and that Gilkerson's diagnosis testimony was "clearly inadmissible and erroneously admitted[.]" Father's Br. p. 15. The State countered that Gilkerson was not testifying as an expert witness, but rather, as a service provider, who provided therapy to St.I., recorded her observations during treatment sessions, and tendered recommendations based thereon.

[26] "Invited error, which is based on the legal principle of estoppel, forbids a party from taking 'advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct.'" *Durden v. State*, 99 N.E.3d 645, 651 (Ind. 2018) (quoting *Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005) ("A party may not invite error, then later argue that the error supports reversal, because error invited by the complaining party is not reversible error.")).

[27] Prior to the admission of Gilkerson's testimony at the fact-finding hearing, Father was aware that Gilkerson was one of St.I.'s service providers. Father was also aware that Gilkerson developed a professional opinion regarding St.I.'s mental state during her provision of therapy services to St.I. The record here reveals that Gilkerson's professional opinion first came to light during a CHINS hearing. Father attended and was represented by counsel at the December 13, 2018 CHINS hearing. During the hearing, DCS witnesses cited Gilkerson's provision of play therapy services in their discussion of St.I.'s emotional health in their opposition to Father's exercise of parenting time with St.I. At the end of the hearing, the trial court ordered Gilkerson to tender her professional opinion regarding the appropriateness of visitation. In response to the trial court's order, Gilkerson submitted a Letter outlining her professional opinion on January 4, 2019. Thus, well in advance of the January 2020 fact-finding hearing, Father was aware that Gilkerson provided therapy services to St.I. and reached professional conclusions based on her treatment observations. Father had occasion to both investigate and prepare to challenge Gilkerson's professional opinions before the termination proceedings commenced.

[28] Father's failure to investigate Gilkerson's professional opinions regarding St.I.'s therapy invited the error he now alleges. The record is clear that Gilkerson's role as St.I.'s play therapist was known to Father; Father possessed the Letter; and DCS and Father named Gilkerson on their respective witness lists.

Father's ignorance of Gilkerson's professional observations, diagnoses, and conclusions is an error attributable to Father and not to the trial court.

B. J.C.'s Testimony

[29] Father argues the trial court abused its discretion when it excluded J.C.'s testimony. DCS counters: "Father cannot show any harm or prejudice because [he] got what he wanted—the admission of evidence of what he believed to be fundamental error in his criminal trial. And this served the same purpose of [J.C.]'s testimony . . . which Father believed would undercut his criminal conviction." DCS's Br. p. 32 (citation omitted). DCS is referring to the Trial Rule 60(B) motion Father filed in criminal court. We agree with DCS's contention.

[30] The record reveals that, after the trial court excluded J.C.'s testimony regarding alleged fundamental error that occurred during Father's criminal trial, Father introduced the Indiana Trial Rule 60 motion that Father filed in the criminal court. Father argued: "I believe there's direct evidence within that thirty-five page [Trial Rule 60(B)] Motion filing that substantiates fraud on and by the [criminal] Court. And I believe that's a Constitutional Violation, that resulted in my conviction . . . . Tr. Vol. III p. 29. Father argued below that both J.C.'s testimony and Father's Rule 60 motion detailed the alleged fundamental error that Father claims occurred at his criminal trial.

[31] We initially note that J.C.'s testimony was irrelevant to the termination of parental rights proceedings. Father may not collaterally attack a criminal conviction in termination of parental rights proceedings. Moreover, although the trial court excluded J.C.'s testimony, the trial court took judicial notice of Father's Rule 60 motion, over DCS's objection. Thus, other properly-admitted evidence served the purpose that J.C.'s excluded testimony would have served. Accordingly, any error from the exclusion of J.C.'s testimony was harmless. Further still, Father has not demonstrated that the exclusion of J.C.'s testimony affected Father's substantial rights in any way. *See* T.R. 61 (proving that this Court must "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties"). No reversible error resulted from the exclusion of J.C.'s testimony.

C. St.I.'s Testimony

[32] Lastly, Father argues that the trial court abused its discretion in excluding St.I. from testifying at the fact-finding hearing. Father argues that "no properly admitted evidence or finding of fact supported [St.I.]'s incompetency or that [St.I.] was an emotionally endangered witness[.]" Father's Br. p. 16.

[33] Father is entitled to represent himself in legal proceedings. As a pro se litigant, however, Father is held to the same standards as a trained attorney and is afforded no inherent leniency simply by virtue of being self-represented. *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014). The record reveals that, after the trial court deemed St.I. to be an incompetent witness and excluded

St.I.'s testimony, Father failed to make an offer of proof. Father, thereby, failed to preserve any error from the exclusion of St.I.'s testimony and has waived any claim of error therefrom. *See id.* ("Dowdell's failure to make an offer of proof waives any error in the exclusion of these witnesses."). Moreover, error—if any—from the exclusion of St.I.'s testimony was harmless, where substantial independent evidence supported the termination of Father's parental rights. We find no reversible error from the exclusion of St.I.'s testimony.

Conclusion

[34] Sufficient evidence supports the termination of Father's parental rights. The trial court did not err in admitting Gilkerson's testimony. No reversible error arises from the exclusion of J.C.'s or St.I.'s testimony. We affirm.

[35] Affirmed.

Kirsch, J., and Pyle, J., concur.