ATTORNEY FOR APPELLANT:

VICTORIA L. BAILEY
Gilroy Kammen & Hill
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

TOBY GILL
MCDCS – Legal Division
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE INVOLUNTARY TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF C.T., AND I.M-T., MINOR CHILDREN, AND THEIR FATHER WAYNE TURNER,	)	
WAYNE TURNER,	)	
Appellant-Respondent,	)	
vs.	)	No. 49A02-0612-JV-1167
MARION COUNTY DEPARMENT OF CHILD SERVICES,	)	
Appellee-Petitioner,	)	
and,	)	
CHILD ADVOCATES, INC.,	)	
Co-Appellee (Guardian Ad Litem).	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Deborah Shook, Commissioner
The Honorable Cale J. Bradford, Judge
Cause No. 49D09-0409-JT-274

November 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Wayne Turner appeals the termination of his parental rights to C.T. and I.M. We affirm.

Issue

Turner raises one issue, which we restate as whether the trial court improperly considered a racial comment he made.

Facts

In 2001, Turner's children, C.T., born on May 25, 1993, and I.M., born on April 15, 1998, were alleged to be children in need of services ("CHINS") and removed from their mother's custody.[1] In August 2002, they were placed in Turner's custody. At that time, Debbie Vann provided childcare for C.T. and I.M. Vann was a therapeutic foster care provider, and on June 18, 2003, she and Turner executed a handwritten notarized document in which Turner gave Vann guardianship of C.T. and I.M. Shortly thereafter,

[1] The children's mother is not a party to this appeal.

Turner called Vann's house and talked to the children. After the phone call, the children were "petrified and scared." Tr. p. 423. I.M. defecated in his pants and C.T. made allegations of sexual abuse against Turner. Vann reported C.T.'s allegations to the Marion County Office of Family and Children, now the Marion County Department of Child Services ("DCS").

On June 26, 2003, the children again were alleged to be CHINS. Turner moved to Florida, and from June 2003 to February 2004, his contact with the DCS was sporadic. In 2004, after returning from Florida, Turner submitted to a parenting assessment, drug screens, and psychosexual evaluation. At a hearing after the psychosexual evaluation was completed, Turner threw the report in the trash and indicated that he was not going to participate in any more services and that it "was a wasted effort." Tr. p. 568. In September 2004, the DCS filed a petition to terminate Turner's parental rights.

When Turner returned from Florida, he lived at a friend's trailer, at a mission, at a motel, and most recently Turner resided in a one-room apartment with his girlfriend. As of August 25, 2006, Turner had been employed by Indy Drum for one year. However, from 2003 to 2005, Turner did not have a steady employment history.

The trial court conducted a termination hearing on October 27, 2005, June 8, 2006, and August 25, 2006. On October 4, 2006, the trial court issued an order terminating Turner's parental rights. The order provided in part:

> 3. There is a reasonable probability that the conditions that resulted in [I.M. and C.T.'s] removal from, and continued placement outside, the care and custody of Wayne Turner will not be remedied.

> 4. There is a reasonable probability that the continuation of the parent-child relationship between [I.M. and C.T. and Turner] poses a threat to their well-being.
>
> 5. Termination of the parent-child relationship between [I.M. and C.T] and their alleged father, Wayne Turner, is in their best interests.
>
> [6]. The plan of the Marion County Office of Family and Children for the care and treatment of [I.M. and C.T.], termination of parental rights and adoption, is acceptable and satisfactory.

App. p. 18. Turner now appeals.

Analysis

Turner argues that the trial court improperly considered a statement he made to a home based counselor. In reviewing the termination of one's parental rights, we will not set aside a trial court's judgment unless it is clearly erroneous. Castro v. State Office of Family & Children, 842 N.E.2d 367, 372 (Ind. Ct. App. 2006), trans. denied. Where, as here, the trial court issues findings and conclusions, we first determine whether the evidence supports the findings, and then we determine whether the findings support the judgment. 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. (quoting Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005)). When reviewing a termination of parental rights, we neither reweigh the evidence nor judge the credibility of witnesses. Id. Instead, we consider only the evidence and reasonable inferences drawn therefrom that are most favorable to the judgment. Id.

Indiana Code Section 31-35-2-4(b)(2) provides that a CHINS petition must allege that:

> (A) one (1) of the following exists:
>
> > (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;
> >
> > (ii) a court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made; or
> >
> > (iii) after July 1, 1999, the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two (22) months;
>
> (B) there is a reasonable probability that:
>
> > (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
> >
> > (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;
>
> (C) termination is in the best interests of the child; and
>
> (D) there is a satisfactory plan for the care and treatment of the child.

If the trial court finds that the allegations in a petition are true, it shall terminate the parent-child relationship. See Ind. Code § 31-35-2-8(a). The DCS must prove these allegations by clear and convincing evidence. Bester, 839 N.E.2d at 148. "Clear and convincing evidence need not reveal that the continued custody of the parents is wholly

inadequate for the child's very survival. Rather, it is sufficient to show by clear and convincing evidence that the child's emotional and physical development are threatened by the respondent parent's custody." Id. (quotations and citations omitted).

Turner appears to take issue with the trial court's finding number 10, which states, "Morita Nave-Ferrell established phone contact with Wayne Turner on or about August 7, 2001. During this conversation, Wayne Turner threatened to physically abuse [C.T.], referred to African Americans as monkeys and stated he did not like Hoosiers." App. p. 10. Turner contends that under the First Amendment to the United States Constitution and Article I, Section 9 of the Indiana Constitution he had the right to make the statement about African Americans and that it was improper for the trial court to base the termination of his parental rights on the racially based statement.

Assuming, without deciding, that the trial court improperly relied on this evidence, we conclude that any error in relying on Turner's statement is harmless. According to the Indiana Trial Rules:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting relief under a motion to correct errors or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order or for reversal on appeal, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Ind. Trial Rule 61; see also Ind. Appellate Rule 66(A). Further, "To the extent that the judgment is based on erroneous findings, those findings are superfluous and are not fatal

to the judgment if the remaining valid findings and conclusions support the judgment." Lasater v. Lasater, 809 N.E.2d 380, 397 (Ind. Ct. App. 2004).

Turner's statement was made during the first CHINS proceeding. Therefore, even after he made the statement, the children were returned to his custody for approximately a year. It was only after he relinquished guardianship to Vann and C.T. made allegations of sexual abuse against him that another CHINS petition was filed that Turner's parental rights eventually were terminated. Because the children were returned to Turner's custody after he made the statement, we cannot conclude that his statement had a significant impact on the trial court's decision to terminate his parental rights.

Further, the finding at issue is one of sixty findings issued by the trial court. Also, the transcript of the three-day hearing is over six hundred pages, and Ferrell's testimony regarding Turner's statement was limited to just one page. Thus, although the trial court included a reference to Turner's statement in its findings, we conclude it had very little impact on the trial court's decision.

Moreover, even when not considering this finding, there is overwhelming evidence to support the trial court's termination of Turner's parental rights. Regarding the conclusion that the conditions resulting in the removal of the children from Turner's custody will not be remedied, in the more than three years from the time the children were removed to the time of the final hearing, Turner had not secured suitable housing for the children. Although he had the same job for the past year, his employment history prior to that was unsteady. Further, this case involved allegations of physical and sexual

abuse, and Turner had not fully participated in the services provided by the DCS. He even told the case manager it "was a wasted effort." Tr. p. 568.

As for the conclusion that there was a reasonable probability that the continuation of the parent-child relationship between Turner and the children posed a threat to their well-being, there is overwhelming evidence that the children were very afraid of Turner and did not want to be reunited with him. Numerous witnesses testified to the children's negative reactions upon seeing or talking to Turner. Both children indicated that they wanted to be adopted. Moreover, witnesses testified that it would be "harmful" for the children for their relationship with Turner to continue. See Tr. pp. 517-18, 493-94.

With regard to the children's best interests, witness after witness testified that termination was in the children's best interests. Further, significant evidence as to the current placement of the children and their opportunities for adoption was presented to the trial court.

Based on the overwhelming evidence in this case, we conclude that the trial court's finding regarding the racial statement made by Turner is superfluous and that any error in considering it is harmless. The trial court properly terminated Turner's parental rights.

Conclusion

Any error in the admission or consideration of evidence relating to Turner's racially based statement was harmless. We affirm.

Affirmed.

KIRSCH, J., and ROBB, J., concur.