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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000070-ME

D.W. APPELLANT

v. APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 10-AD-00010

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY AND C.D.W. (THE INFANT) APPELLEES

AND NO. 2011-CA-000071-ME

D.W. APPELLANT

v. APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 10-AD-00011

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY AND S.D.W. (THE INFANT) APPELLEES

AND NO. 2011-CA-000072-ME

D.W. APPELLANT

v. APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 10-AD-00012

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY AND N.E.W. (THE INFANT) APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

ACREE, JUDGE: This is an appeal from the Grant Circuit Court's order terminating the parental rights of appellant, D.W., with regard to his three children: C.D.W. born December 19, 2000, S.D.W. born December 28, 2001, and N.E.W. born January 13, 2004. For the following reasons, we affirm.

Facts and Procedure

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

D.W. and B.H. are the children's natural father and mother, respectively. The Cabinet for Health and Family Services first became involved with the family in 2006 when both D.W. and B.H. were arrested for violating their respective probations and paroles. D.W. was on parole from a thirty-five year sentence stemming from several felony convictions in the late 1980s and early 1990s. In August 2006, D.W.'s parole officer arrested D.W. and sought to revoke his probation and parole due to his use and possession of alcohol. However, D.W. stipulated to the violation and, in lieu of revoking his probation, the parole officer imposed sanctions upon D.W., requiring him to attend parenting and anger management classes, and Alcoholic Anonymous/Narcotics Anonymous (AA/NA).

As a consequence of both parents being arrested, on August 3, 2006, the Cabinet removed the children from the home, placed them temporarily with relatives, and filed a neglect petition against D.W. and B.H. in Grant District Court. On October 2, 2006, the district court adjudicated C.D.W., S.D.W., and N.E.W. neglected children, and granted D.W.'s cousin, Susan Marksberry, temporary custody. The district court determined D.W. had an alcohol problem, suspected domestic violence in the home, and suspected D.W. gave alcohol to the children. The district court ordered both D.W. and B.H. to attend and complete drug and alcohol treatment.

The children remained in Marksberry's care more than a year until October 19, 2007. On that date, in response to a custody action filed by D.W. in

Grant Circuit Court, the circuit court restored custody of the children to D.W.[2] after determining that D.W. had completed the parenting, anger management, and AA/NA classes required by his parole officer and the district court.

D.W. retained custody of the children for approximately five months. It was then that police officers had responded to D.W.'s home due to a domestic dispute between D.W. and his step-daughter.[3] D.W. was reportedly verbally and physically abusive to the children by yelling, cursing, and flicking the children with his fingers and putting cigarette butts in their food. D.W. was arrested in Pendleton County on charges of alcohol intoxication. On April 4, 2008, the Cabinet again removed C.D.W., S.D.W., and N.E.W. from D.W.'s care and filed a second neglect petition against D.W. in Grant District Court. On April 8, 2008, D.W. stipulated to neglect.

Following the removal of the children, the district court initially granted temporary custody of the children to Hilda McClure, the children's paternal grandmother. From April 2008 through June 2008, while the children were in McClure's care, D.W. received supervised visits with the children at McClure's home. McClure reported D.W. was not staying for the full visitation period, but instead was leaving half to two-thirds of the way through each visit. In June 2008, D.W.'s supervised visits were moved to the Cabinet offices.

[2] B.H. has not seen the children since October 2007.

[3] D.W. by this time was married, though not to B.H.

On July 15, 2008, the district court granted D.W. unsupervised visitations. However, throughout the summer and fall of 2008, D.W. failed to show up for fourteen scheduled visitations between July and December 2008.

In late July 2008, McClure notified the Cabinet that she could no longer care for the children due to personal medical issues; she also reported that S.D.W., still only seven years old, was "acting out" sexually. As a result, the Cabinet again placed the children with Susan Marksberry and, because D.W. had missed several visits with the children, his visitations were once again supervised.

The time with Marksberry was short-lived; on September 8, 2008, the district court committed the children to the Cabinet, and the children were placed in foster care. While in foster care, D.W. continued supervised visits with the children until November 8, 2008 when the district court granted D.W. unsupervised weekend visits. In January 2009, the children reported that they did not take baths, change clothes, or use toothbrushes during their weekend visits with D.W. On January 9, 2009, Tracie Hudson, the children's case worker, conducted a home visit at the foster home. When D.W. arrived at the foster home to pick up the children for their weekend visitation, Hudson reported D.W. smelled of alcohol, and his eyes were red and bloodshot.

In response to D.W.'s conduct, the district court conducted a review hearing on February 23, 2009. At the conclusion of the hearing, the district court determined that D.W. had problems with housing stability and alcohol; D.W. allegedly attended AA regularly but had failed to submit proof of attendance to the

Court; D.W.'s housing situation was tenuous and the future of his current residence was in jeopardy; D.W. had attempted to comply with the Cabinet's and the court's requirements; the children loved D.W. and had no issues being with him; and the children, who were now ages 8, 6, and 5, had been shuttled from home to home due to D.W.'s instability and the children's misbehavior.

The district court ordered that the children remain in foster care and set a review for June 30, 2009, to determine if D.W. was sufficiently stable to care for the children and to determine what course of conduct was in the children's best interest. In the meantime, D.W. was granted supervised visits with the children from January 2009 until May 2009. On May 26, 2009, D.W. was granted unsupervised weekend visitations provided he successfully completed a breathalyzer administered by the Kentucky State Police prior to picking up the children.

On June 29, 2009, before he was to attend the review hearing, D.W. went to the emergency room at St. Elizabeth Hospital complaining of dizziness, disorientation, chest tightness, and shortness of breath. The emergency room physician diagnosed D.W. with significant hypertension, chest pain, alcohol abuse, and alcohol withdrawal. Additionally, D.W. admitted to hospital staff he drank a pint of vodka every other day and reported his last drink was on June 28, 2009. While in the hospital, the children visited D.W. and, during the visit, C.D.W. informed D.W. the children's foster parents wanted to adopt them.

C.D.W.'s news upset D.W. and on July 4, 2009, he left the hospital against medical advice. Upon leaving, D.W. purchased a large quantity of alcohol and retired to his home. From July 2009 until September 1, 2009, D.W. refused to leave his home, quit his job, did not visit or contact the children, and did not contact or report to his parole officer or the Cabinet. Consequently, D.W.'s parole officer again took action to revoke D.W.'s parole. On September 1, 2009, D.W. was arrested. He remained incarcerated until November 23, 2009.

Because D.W. missed the June 30, 2009 review hearing, the district court had re-scheduled the hearing for August 11, 2009. D.W. was notified of the new hearing date but, for the reason stated above, he failed to appear. The district court adopted the Cabinet' report which, among other things, required D.W. to contact the Cabinet to re-establish visitation with the children. D.W. failed to do so.

Following his release from incarceration for his parole violation, D.W. requested a review hearing which was granted and the hearing was scheduled for December 1, 2009. At the hearing, the Cabinet recommended changing the children's goal from reunification to adoption. The district court adopted the Cabinet' recommendation, and ordered D.W. not to have contact with the children. The Cabinet also informed D.W. and the court it planned to move forward with termination of D.W.'s parental rights.

On April 1, 2010, the Cabinet filed a petition for involuntary termination of D.W.'s parental rights. After being served with the Cabinet's

termination petition, D.W. again chose not to meet with his parole officer. As a result, a warrant for D.W.'s arrest was issued on April 20, 2010. On June 17, 2010, law enforcement arrested D.W. pursuant to the warrant and shortly thereafter the parole board revoked D.W.'s parole. On August 5, 2010, the parole board recommended D.W. serve 18 months before coming back before the parole board. D.W.'s earliest possible release date is February 12, 2012.

In response to the Cabinet's termination petition, the circuit court held a trial conducted on three non-consecutive days, October 13, 2010, October 27, 2010 and November 23, 2010. Subsequently, on December 14, 2010, the circuit court entered findings of fact and conclusions of law, and an order terminating D.W.'s parental rights as to all three children.[4]

The circuit court determined: the children were abused and neglected as defined in KRS 600.020(1); termination of D.W.'s parental rights was in the children's best interest; D.W., for a period of not less than six (6) months, continuously or repeatedly failed, refused to provide, or was incapable of providing essential parental care for the children and there was no reasonable expectation of improvement in parental care and protection; D.W., for reasons other than poverty alone, had continuously and repeatedly failed to provide or was incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the children's well-being and there is no reasonable

[4] The circuit court's December 14, 2010 order also terminated B.H.'s parental rights to the children. However, B.H. did not appeal the circuit court's order, is not a party to this appeal, and, therefore, is not currently before this Court.

expectation of significant improvement in the parental conduct in the immediately foreseeable future, considering the age of the child; and D.W. abandoned the children for a period of no less than ninety days. D.W. timely appealed the judgment.

Sufficiency of the Evidence

D.W. first contends there was not substantial evidence in the record to support the circuit court's findings of fact and ultimate conclusion terminating his parental rights. We disagree.

The circuit court retains broad discretion in concluding whether children fall within the abused or neglected standard, and whether such abuse or neglect warrants termination. *Cabinet for Health and Family Services v. J.A.A.*, 275 S.W.3d 214, 220 (Ky. App. 2008). Accordingly, the circuit court's decision terminating a person's parental rights will only be reversed if it is clearly erroneous; that is, there is no substantial, clear, and convincing evidence to support it. KRS 625.090(1); *Cabinet for Health and Family Services v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010) (noting the appellate court will not interfere with the trial court's findings "unless the record is devoid of substantial evidence to support them"). "Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinary prudent-minded people." *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 117 (Ky. App. 1998) (citing *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934)).

KRS 625.090 sets forth the grounds for the involuntary termination of parental rights. Specifically,

> KRS 625.090 provides that parental rights may be involuntarily terminated only if, based on clear and convincing evidence, a circuit court finds: (1) that the child is abused or neglected as defined in KRS 600.020(1); (2) that termination is in the child's best interests; and (3) the existence of one or more of ten specific grounds set out in KRS 625.090(2).

M.B. v. D.W., 236 S.W.3d 31, 34 (Ky. App. 2007); KRS 625.090(1)(a), (1)(b), (2).

With respect to the first element, in the absence of the parent's conviction on a criminal charge of physical or sexual abuse of the child, the circuit court must either: (1) find that a court of competent jurisdiction has previously determined the children are abused or neglected children, or (2) conclude itself the children are abused or neglected children. KRS 625.090(1)(a)1 and 2. Here, in both 2006 and 2008, the Grant District Court concluded that C.D.W., S.D.W., and N.E.W. were neglected children, as defined in KRS 600.020(1). In fact, in 2008, D.W. stipulated to neglect. The children's juvenile records, which reference the district court's findings of neglect, were admitted into evidence and relied upon by the circuit court in its December 14, 2010 order terminating D.W.'s parental rights. Further, the circuit court concluded, based on the testimony presented during trial on the Cabinet' termination petition, that the children were neglected children. D.W. does not dispute the circuit court's determination. The circuit court's finding that C.D.W., S.D.W., and N.E.W. are neglected children is supported by substantial, clear, and convincing evidence.

Next, the second element requires a finding that termination of parental rights would be in the children's best interest. KRS 625.090(1)(b); *J.A.A.*, 275 S.W.3d at 221. In the course of making this determination, the circuit court is obligated to take the following factors into consideration:

> (a) Mental illness as defined by KRS 202A.011(9), or mental retardation as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;
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> (b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;
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> (c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;
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> (d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child;
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> (e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and
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> (f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

KRS 625.090(3). In its December 14, 2010 order, the circuit court made the following findings with respect to the children's best interest:

> 12. [D.W.] executed numerous case plans, safety plans and prevention plans, yet he failed to complete them. He remains unable to parent today due to the poor choices he has made which led to his current incarceration.
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> 13. It is not in the best interest of the children to be forced to languish in foster care until such time as [D.W.] is released once again from prison, works his treatment plan, becomes sober and enters alcohol treatment. These children have been removed from the care of [D.W. and B.H.] in 2006 and then from the care of [D.W.] in 2008. [B.H. and D.W.] have had their chances to become appropriate parents; but failed to avail themselves of the numerous opportunities given to them.
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> . . . .
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> 16. [B.H. and D.W.] have failed to pay their court ordered child support. D.W. has a child support arrearage of $4,456.53. . . . [D.W.] alleged he was unaware that he was ordered to pay child support, but he knew his children were in foster care and that he was not paying to support them.
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> 17. The [Cabinet] has attempted to render services either directly or by referral in an effort to keep the family together including working with the family while the children were placed in foster care and while they were placed in multiple relative placements.
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> 18. The [Cabinet] has offered this family services for approximately four years. This court finds that [B.H. and D.W.] have failed to make any sustained effort or adjustment in their circumstances, conduct, or conditions to make it in the children's best interest to return them to the home of [D.W. or B.H.] within a reasonable period of time, considering the age of the children. While the parents did complete some services; it was apparent they had not made the significant lifestyle changes required as

> [B.H.] has failed to maintain contact with the children and [D.W.] made poor lifestyle choices; he went on a three month binge because of something he alleges his child said and violated the terms of his parole. He is now incarcerated and incapable of parenting the children.
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> 19. The children are special needs children and have made much improvement since they entered foster care. [N.E.W.] receives speech therapy weekly at Children's Hospital and at school. [N.E.W.] also receives physical therapy and occupational therapy. [S.D.W.] also participates in intensive speech therapy for her speech delays and she has made substantial improvement since she entered foster care. [C.D.W.] continues with mental health counseling and medication management due to his aggressive outbursts when he entered foster care. He is now thriving. The foster parents have met the special needs of the children and they have made substantial improvements while in foster care, and are expected to make more improvements upon termination of parental rights.
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> 20. Termination of parental rights is in the best interest of the children, [C.D.W., S.D.W., and N.E.W.] and the [Cabinet] has facilities available to accept the care, custody and control of them and is the agency best qualified to receive custody.[5]

Over the course of the three-day trial, the Cabinet presented sufficient evidence supporting the circuit court's finding that termination of D.W.'s parental rights would be in the children's best interest considered in light of the factors in KRS 625.090(3). Subsection (b) of KRS 625.090(3) requires the district court to consider the parents' acts of neglect; as previously noted, the district court concluded twice previously that C.D.W., S.D.W., and N.E.W. were neglected children. Subsection (c) deals with the Cabinet's efforts at reunification; the record

[5] While the circuit court failed to specifically cite KRS 625.090(3), its findings of fact reference each applicable factor enumerated in that provision.

is replete with evidence that the Cabinet undertook extensive efforts to reunite the children with D.W. Specifically, the family's case worker, Tracie Hudson, testified that the Cabinet had been working with D.W. since 2006, and offered D.W. several services in an attempt to provide him with the skills needed to properly parent the children, including: family counseling, parenting classes, anger management, substance abuse assessment, random drug screens, substance abuse counseling, AA/NA, treatment planning conferences, and psychological evaluations. Hudson also testified concerning the Cabinet's efforts and the numerous case plans implemented by the Cabinet in an attempt to reunite D.W. with the children.

Subsection (d) focuses on the parent's "efforts and adjustments . . . to make it in the child's best interest to return him to his home within a reasonable period of time[.]" Hudson testified that, while D.W. made some progress and completed some services offered, he did not ultimately meet the goals necessary to justify reunification. Additionally, the district court's February 23, 2009 order indicated that while D.W. had attempted to comply with the Cabinet' requests, he was not yet stable enough to care for the children. Hudson also testified that D.W. failed to make any significant lifestyle changes. Particularly, the children were originally removed from the home in 2006 due to D.W.'s arrest for possession of alcohol and allegations of domestic violence. D.W. re-obtained custody of the children in October 2007 only to lose custody in April 2008, again, due to charges of alcohol intoxication and claims of domestic violence. Further, in July 2009, after learning

the children's foster parents wanted to adopt them, D.W. testified he went on a three-month drinking binge, resulting again in the revocation of his parole. As of the time of trial, D.W. was incarcerated, without employment, and suffering from alcohol abuse and withdrawal, evidencing D.W.'s failure to adjust his conduct and circumstances to make it in the children's best interest to return to his care.

Subsection (e) requires consideration of physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered[.]" Hudson testified the children had been in the same foster home since their removal from D.W. in 2008, they were doing very well in the foster home, and their behavior had improved significantly. Hudson explained that all three children had special needs and, while in foster care, the children were receiving a variety of services and their needs were being met.

Subsection (f) addresses the parent's efforts to pay for the substitute support his children are receiving. The circuit court concluded that D.W. failed to pay his court-ordered child support resulting in a $4,456.33 arrearage. D.W. claims the circuit court's finding is clearly erroneous because, as of March 10, 2010, D.W. had no child support arrearage. The evidence presented during trial, however, established that D.W. regularly paid child support from November 2008 through July 2009. However, D.W. paid no child support from August 2009 through February 2010, resulting in a $3,236.00 arrearage. In February 2010, the Grant County Child Support office intercepted D.W.'s tax return, which satisfied the arrearage in full. However, D.W. again failed to pay child support from March

2010 through October 2010, resulting in the $4,456.33 child support arrearage as of the time of trial. Hence, substantial evidence exists to support the circuit court's finding that D.W. failed to pay his court-ordered child support.

While D.W. may dispute the circuit court's findings, when conflicting testimony is presented, we may not substitute our judgment for that of the circuit court. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967). Based upon the foregoing, the circuit court's conclusion that termination of D.W.'s parental rights was in the children's best interest is supported by substantial, clear, and convincing evidence.

Finally, the circuit court may not terminate D.W.'s parental rights unless it finds by clear and convincing evidence the existence of one or more of the conditions set forth in KRS 625.090(2), including:

> (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
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> . . . .
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> (e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child;
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> . . .
>
> (g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the

> parent's conduct in the immediately foreseeable future, considering the age of the child[.]

KRS 625.090(2). In its December 14, 2010 order, the circuit court concluded the grounds enumerated in subsections (a), (e), and (g) were present. We agree.

Regarding subsection (a), the circuit court determined that D.W. abandoned the children for a period of at least ninety days. While Kentucky jurisprudence fails to specifically define the term "abandonment" as applied in termination proceedings, this Court has previously explained that "abandonment is demonstrated by facts or circumstances that evince a settled purpose to forego all parental duties and relinquish all parental claims to the child." *S.B.B. v. J.W.B.*, 304 S.W.3d 712, 716 (Ky. App. 2010) (citing *O.S. v. C.F.*, 655 S.W.2d 32, 34 (Ky. App. 1983)). Hudson testified that D.W. had not seen the children since late June 2009. D.W. himself testified that he last saw the children in late June 2009 when the children's custodian took them to visit him in the hospital. Then, as a result of C.D.W.'s alleged adoption announcement, D.W. left the hospital against medical advice and proceeded to engage in a three-month drinking binge. During this time, he refused to contact his parole officer, the Cabinet or his children. In D.W.'s own words, "I quit, I gave up . . . I lost it . . . I didn't [care] at the moment about nothing . . . I didn't care about my people, I don't care about my truck, I didn't care about my kids, I didn't care about nothing. . . ." Thereafter, because D.W. failed to report to his parole officer, his parole was revoked resulting in his arrest on September 1, 2009. D.W. remained incarcerated until November 23, 2009. While

"incarceration for an isolated criminal offense may not constitute abandonment justifying termination of parental rights, [it] is a factor to be considered." *Cabinet for Human Resources v. Rogeski*, 909 S.W.2d 660, 661 (Ky. 1995). In sum, D.W. chose to drink from July 4, 2009, to September 1, 2009, rather than visit his children or report to his parole officer. By virtue of this choice, D.W. was incarcerated from September 1, 2009, until November 23, 2009. At no point from July 2009 until November 23, 2009, did D.W. attempt to contact the children. D.W.'s actions evince his decision to forego all parental duties and claims during this time period. Accordingly, substantial, clear, and convincing evidence supports the circuit court's finding that D.W. abandoned his children from July 2009 through November 23, 2009, a period of not less than ninety days.

D.W.'s claim that, while he has not seen his children since late June 2009, he did not voluntarily abandon his children because the district court's August 11, 2009 order prohibited him from having contact with them. We find D.W.'s claim disingenuous, because that order simply prohibited D.W. from seeing the children *until* he contacted the Cabinet's case worker. Thus, by simply contacting the Cabinet, D.W. could have restored visitation and had contact with his children. He failed to do so. We therefore are unpersuaded by D.W.'s claim that he did not voluntarily abandon his children.

We also believe there was substantial, clear and convincing evidence that for a period of not less than six (6) months, D.W. continuously or repeatedly failed or refused to provide, or has been substantially incapable of providing, essential

parental care and protection for the children and that there is no reasonable expectation of improvement in D.W.'s parental care and protection, considering children's ages. KRS 625.090(2)(e). Case worker Hudson testified that D.W. has not had custody of the children since April 2008 and, since that time, D.W. has violated his parole and been incarcerated on two separate occasions. D.W. remains incarcerated today with the earliest possible release date not occurring until February 2012. Hudson also testified that D.W. failed to demonstrate parenting abilities during visitation, failed to complete his case plan and required therapy, and attempted to pick up his children for a weekend visitation smelling of alcohol. The evidence at trial further established that D.W. went on a drinking binge from July 4, 2009, through September 1, 2009, and, while he has attended AA/NA, he continues to suffer from problems with alcohol and alcohol withdrawal. Hudson explained that D.W. failed to consistently visit his children in the summer and fall of 2008 and has not seen the children at all since late June 2009. There was also evidence concerning D.W.'s failure to consistently pay child support. Finally, Hudson testified that D.W.'s repeated pattern of parole violations resulting in incarceration coupled with his lack of employment, unstable housing, and continued abuse of alcohol demonstrated a lack of "reasonable expectation of improvement in [D.W.'s] parental care" of the children. KRE 625.0910(2)(e).

Substantial, clear and convincing evidence supports the circuit court's conclusion that D.W., for reasons other than poverty alone, continuously or repeatedly failed to provide, or is incapable of providing, essential food, clothing,

shelter, medical care, or education necessary for the children's well-being, and there is no reasonable expectation of significant improvement in D.W.'s conduct. KRS 625.090(2)(g). The same evidence discussed above supports this factor. In addition to that evidence, Hudson testified that when D.W. re-obtained custody of the children in October 2007, he failed to take C.D.W. to required counseling resulting in the termination of those services for the child. Hudson also testified that D.W. failed to attend and complete family counseling and therapy, and D.W. was returning the children from weekend visitations without baths and wearing the same clothing. Additionally, the evidence at trial established that D.W. has failed to maintain stable housing, living in eleven different places since 2006. The evidence also revealed that the children have lived with four different guardians since 2006 and have been bounced around from one custodial home to the next. The evidence further established that D.W. is currently incarcerated, unemployed, and not paying child support. Accordingly, we find substantial, clear, and convincing evidence supports the circuit court's conclusion that the grounds set forth in KRS 625.090(3)(a), (e), and (g) were present.

Because substantial, clear, and convincing evidence supports the circuit court's findings with respect to all three elements set forth in KRS 625.090, the circuit court did not err in terminating D.W.'s personal rights.

Evidentiary Issues

D.W. next asserts the circuit court committed reversible error when it admitted evidence that was hearsay, unauthenticated, and highly prejudicial in violation of Kentucky Rules of Evidence (KRE) 803, 902, and 403, respectively. Following a careful review, we find D.W.'s arguments lack merit.

In reviewing a trial court's evidentiary ruling, we apply an abuse of discretion standard. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

D.W. first contends the circuit court abused its discretion by admitting his prior felony convictions into evidence. Specifically, D.W. argues his prior felony convictions are irrelevant and highly prejudicial in violation of KRE 401 and 403, respectively, because they did not involve violence or abuse, and they all occurred between 1986 and 1991, prior to the birth of C.D.W., his first child. Further, D.W. asserts KRE 609(b) renders his prior felony convictions inadmissible because more than ten years has elapsed since the date of the convictions. In response, the Cabinet contends D.W.'s felony convictions are relevant because D.W. remains incarcerated today by virtue of his prior felony convictions, and no prejudice attached by virtue of the admission of the convictions.

Evidence is relevant if it has any tendency to make a fact more or less likely than it would be without the evidence. KRE 401; *Emberton v. GMRI, Inc.*,

299 S.W.3d 565, 577 (Ky. 2009) ("Evidence is relevant if it has any tendency to render the existence of any consequential fact more or less probable, however slight the tendency may be."). Here, D.W. was sentenced to 35 years in prison resulting from several felony convictions in 1986-1991. On February 10, 1998, D.W. was granted parole. However, since that time, D.W. has violated his parole and had it revoked on three separate occasions: August 2006, September 1, 2009, and June 17, 2010. The first parole violation in 2006 resulted in the Cabinet's first removal of the children from D.W.'s care. The latter two violations resulted in D.W.'s incarceration for approximately three months in 2009, and again in June 2010; D.W. remains incarcerated today. At trial, the Cabinet admitted D.W.'s prior felony convictions into evidence for the purpose of establishing D.W. was on parole from those convictions and, as a result of violating that parole, D.W. was then and is now incarcerated. Hence, D.W.'s multiple violations of his parole, which resulted from the felony convictions at issue, are relevant as to whether the children are neglected, and to D.W.'s ability to provide proper parental care to the children.[6]

With respect to D.W.'s KRE 403 and 609(b) arguments, D.W. failed to raise these issues before the trial court. While D.W. identifies where at trial he

[6] D.W. agrees that the fact that he was on parole was relevant, but asserts his criminal convictions for which he was on parole were not. As a result, he agreed to stipulate to the fact that he was on parole, rendering moot the Cabinet's need to introduce his prior felony convictions. However, our Supreme Court has clearly determined "the prosecution is permitted to prove its case by competent evidence of its own choosing and the defendant may not stipulate away the parts of the case that he does not want the [fact finder] to see." *Johnson v. Commonwealth*, 105 S.W.3d 430, 439 (Ky. 2005) (quoting *Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998)).

objected to the admission of his prior felony convictions, D.W. only objected to the documents on relevancy grounds. It is well-established that the parties must precisely preserve and identify in the trial court the errors to be reviewed by the appellate court. *Carrier v. Commonwealth*, 142 S.W.3d 670, 676-77 (Ky. 2004); *see also Little v. Whitehouse*, 384 S.W.2d 503, 504 (Ky. 1964) ("[A] party is not entitled to raise an error on appeal if he has not called the error to the attention of the trial court and given that court an opportunity to correct it."). Because D.W. failed to raise these grounds in the circuit court, we will not address the merits of his KRE 403 and 609(b) arguments.

D.W. next contends the circuit court abused its discretion when it admitted into evidence N.E.W.'s school records, which were contained in the Cabinet' case file. The records at issue include a psycho-educational assessment of N.E.W. completed by a certified school psychologist, an occupational therapy evaluation dated 5/24/2010, a speech language pathology report dated 4/23/2010, and a physical therapy evaluation dated 3/23/2010.[7] Specifically, D.W. asserts these records constitute unauthenticated and inadmissible hearsay and were not admissible simply by virtue of being included in the Cabinet' case file. In response, the Cabinet asserts the records at issue were properly admitted into evidence pursuant to KRE 803(6) and/or KRE 803(8).

Without addressing the admissibility of the records at issue, we are compelled to point out that the "[a]dmission of incompetent evidence in a bench

[7] All of the evaluations and assessments were completed by the Grant County School District.

trial can be viewed as harmless error, but only if the trial judge did not base his decision on that evidence or *if there was other competent evidence to prove the matter in issue*." *Prater v. Cabinet for Human Resources*, 954 S.W.2d 954, 959 (Ky. 1999) (citations omitted) (emphasis supplied). D.W. asserts the circuit court relied upon N.E.W.'s inadmissible school records in making the following finding:

> The children are special needs children and have made much improvement since they entered foster care. [N.E.W.] receives speech therapy weekly at Children's Hospital and at school. [N.E.W.] also receives physical therapy and occupational therapy. [S.D.W.] also participates in intensive speech therapy for her speech delays and has made substantial improvements since she entered foster care. [C.D.W.] continues with mental health counseling and medication management due to his aggressive outbursts when he entered foster care. He is now thriving. The foster parents have met the special needs of the children and they have made substantial improvements while in foster care, and are expected to make more improvements upon termination of parental rights.

At trial, the children's juvenile records were admitted into evidence and, included in those records was the Grant District Court's February 23, 2009 order which contained the following information:[8]

> 9. Currently, the children are in foster care with the Neals. [C.D.W], the oldest child, had and has extensive problems. He has a learning disability, he is ADHD, is currently medicated and he is involved in counseling. [S.D.W.] also has problems. She has a learning disability and is involved in Speech Therapy. [N.E.W.], the youngest child, has a tremendous amount of issues. He may have "fetal alcohol syndrome". He has special needs with his speech. He has learning disabilities.

[8] D.W. objected to the children's juvenile records but specifically admitted that the "court entries come in" and the "court orders come in".

> Medical visits are routine and the child has a temper issue.
>
> 10. While in foster care, all of the above problems are being addressed by the foster parents. All evidence seems to suggest that the children are thriving in their current environment. Among other things, the foster parents work extensively with the children with homework, counseling, and go to church on a regular basis.

Accordingly, we find that, even if the circuit court abused its discretion in admitting N.E.W.'s school records, the error was harmless because other competent evidence existed in the record supporting the circuit court's factual finding. *Prater,* 954 S.W.2d at 959.

Finally, D.W. takes issue with Hudson's testimony that the children's foster parents, who expressed an interest in adopting the children, were equipped to meet the children's needs. D.W. contends Hudson's testimony on this issue was both irrelevant and highly prejudicial resulting in reversible error. As explained in detail above, in evaluating the best interest of the children, the circuit court is required to consider the "physical, emotional, and mental health of the child and *the prospects for the improvement of the child's welfare if termination is ordered*." KRS 625.090(3)(e) (emphasis supplied). Hudson's testimony concerning the children's well-being while in foster care and the resources offered by the foster parents, which may in turn improve the children's welfare if they remain in the foster parents' care, is clearly relevant to this inquiry. Further, while the testimony provided may be prejudicial to D.W., *see Gell v. Town of Aulander*, 252 F.R.D.

297, 306 (E.D.N.C. 2008) ("All relevant evidence is 'prejudicial'[.]"), D.W. has failed to demonstrate that the probative value of the evidence is *substantially outweighed* by its prejudicial effect. KRE 403 (emphasis supplied). Accordingly, D.W.'s contention is without merit.

Conclusion

Substantial, clear, and convincing evidence supports the circuit court's findings of fact and ultimate decision to terminate D.W.'s parental rights. Additionally, we find no abuse of discretion in the circuit court's evidentiary rulings. The Grant Circuit Court's order terminating D.W.'s parental rights is affirmed.

ALL CONCUR.

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