IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-683

Filed 19 March 2024

Franklin County, Nos. 20JT55, 20JT56

IN THE MATTER OF:

E.G.C.,

P.K.C.

Appeal by respondent-appellant from order entered 1 May 2023 by Judge Caroline S. Burnette in Franklin County District Court. Heard in the Court of Appeals 20 February 2024.

Batten Law Firm, P.C., by Holly W. Batten, for petitioner-appellee Franklin County Department of Social Services.

Wendy Sotolongo the Parent Defender, by Deputy Parent Defender Annick Lenoir-Peek, for respondent-appellant-mother.

Administrative Office of the Courts, by Matthew D. Wunsche, as Guardian ad Litem, for guardians.

GORE, Judge.

Respondent-mother appeals the order terminating her parental rights of Perry and Eva.[1] Respondent-father's parental rights were also terminated, but respondent-

[1] Pseudonyms used to protect the identity of the individuals.

father did not seek appeal, accordingly, we only consider respondent-mother's appeal. Respondent-mother makes multiple arguments regarding the admission of certain testimony, and the evidence the trial court relied upon in its findings of facts and conclusions of law. She also argues the trial court erred in determining grounds existed to terminate her parental rights under sections 7B-1111(a)(1), (2). Upon review of the briefs and the record, we affirm.

I.

Franklin County Department of Social Services ("DSS") filed petitions for neglect and dependency and removed Eva and Perry from the home in September 2020. The children were adjudicated neglected due to domestic violence and substance abuse with both parents. Respondent-mother was complying with her Out of Home Family Service Agreement and making great strides with her recovery plan through the programs offered in Franklin County. On 8 April 2021, the trial court agreed to allow respondent-mother to begin a trial placement in the home with Eva and Perry. Respondent-father has drug and alcohol abuse issues and had not made strides in his case plan. He was incarcerated for assault on a female and was not following his service agreement, nor maintaining contact with the children through supervised visitations.

Respondent-mother would drive to Georgia to visit her two older children every other weekend. Respondent-mother took Eva and Perry with her, and they stayed in a hotel. Respondent-father would also come to Georgia despite the orders for him to

only have supervised visitation with DSS. On 8 August 2021, respondent-mother drove off a 75-foot embankment with Perry in the car after visiting a friend's house and leaving in the middle of the night. The car went into the water, but both respondent-mother, and Perry were rescued from the vehicle. Respondent-mother admitted during testimony that she was intoxicated. Reports suggested that Perry may have been unbuckled in the backseat, that an adult male was in the car, that the mother was unclothed from the waist down, and that Perry made statements about what respondent-mother said suggesting she wanted to die and had intentionally driven off the embankment. Respondent-mother was charged with felony first-degree cruelty to children, misdemeanor driving under the influence, and misdemeanor driving under the influence—endangering a child under the age of fourteen. The children were taken back into DSS custody.

Respondent-mother entered a substance abuse treatment center in Florida and completed it in twenty-eight days. Respondent-mother soon contacted respondent-father again, and they were both arrested in Raleigh for trespassing after becoming highly intoxicated. Respondent-mother then enrolled in another substance abuse program in Wilmington, North Carolina. While in Wilmington, respondent-mother became pregnant and gave birth to twins whose father is respondent-father. Respondent-mother was living with respondent-father at the time.

Meanwhile, Perry began exhibiting extreme behaviors after the crash. He met with his trauma therapist, Keshawn McCloud, who is licensed in trauma therapy.

After meeting with Perry, McCloud diagnosed Perry with Post-Traumatic Stress Disorder ("PTSD") because of the flashbacks he was having from the crash. Perry made multiple comments such as, "Mommy . . . drove the car into water. Mommy . . . was praying we go to heaven. The black man told her to stop." Perry became afraid of riding in cars at night and taking baths or being in water. Perry would have his preschool classmates role play the crash and would tell one to be his mother "with no pants on" and others to be the police and the ambulance driver. His aggressive behavior resulted in his removal from multiple day cares because he was throwing things and exhibiting verbal aggressions towards classmates and teachers.

After the car wreck, the district court changed Eva and Perry's primary permanent plan to adoption and their secondary plan to reunification efforts; the primary permanent plan eventually became adoption with a secondary permanent plan of guardianship. DSS did not allow respondent-mother to communicate directly with the children due to Perry's PTSD. The trial court ultimately suspended visitation between respondent-mother and the children and told DSS to initiate termination proceedings.

On 4 May 2022, DSS filed a petition for termination of parental rights of Eva and Perry against both respondent-mother and respondent-father. The district court conducted termination hearings on 24 January 2023, 1 February 2023, and 12 April 2023. Respondent-mother admitted she had recent contact with respondent-father during the February hearing of the termination proceedings. On 1 May 2023, the

district court entered an Order terminating the parental rights of both respondent-mother and respondent-father. Respondent-mother entered a timely notice of appeal and amended notice of appeal on 8 May 2023 and 18 May 2023.

II.

Respondent-mother appeals of right pursuant to section 7B-1001(a)(7). Respondent-mother argues the admission of certain statements made by Perry to his therapist were inadmissible hearsay and prejudicial. She also argues the trial court erroneously admitted bodycam recordings that lacked a proper foundation, and that the questions that elicited respondent-mother's Fifth Amendment protections should be disregarded. These arguments challenge the admissibility of evidence upon which the trial court relied in its findings of fact in the Order. Further, respondent-mother specifically challenges multiple findings of fact in the trial court's order and the grounds for termination during adjudication. We consider each argument in turn under the appropriate standard of review.

A.

Respondent-mother first challenges the admission of multiple statements by Perry to his trauma therapist. Respondent-mother objected to these statements on general hearsay grounds. The trial court admitted the statements under the medical diagnosis or treatment exception. We review the admissibility of out-of-court statements under the North Carolina Rules of Evidence 803(4) exception de novo. *State v. Corbett*, 376 N.C. 799, 811 (2021).

Respondent-mother specifically argues the statements were not admitted for substantive purposes under the medical diagnosis or treatment exception. While it appears the trial court also had this perception of the hearsay exception, if the statements did fall within the medical diagnosis or treatment exception, then the statements become admissible as an exception to hearsay. This exception differs from nonhearsay that appears to be hearsay but is admitted not for its truth, but rather for its effect, or knowledge, etc. *Compare State v. Thomas*, 350 N.C. 315, 339 (1999) ("[O]ut of court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay."), *with State v. Smith*, 315 N.C. 76, 83 (1985) ("However, statements which otherwise would be deemed hearsay are not excluded by the rule if they are found to fall within one of the exceptions provided in Rule 803 . . . ."). Respondent-mother also argues some of the questioning involved double hearsay. However, respondent-mother's objection to double hearsay for the first time on appeal is not preserved for our review. *See Best v. Staton*, 271 N.C. App. 181, 185 (2020) (discussing how the wife's argument on appeal differed from what she objected to at trial and resulted in a failure to preserve the argument for review).

The medical diagnosis or treatment exception under Rule 803(4) of the North Carolina Rules of Evidence allows statements into evidence that would otherwise be excepted under Rule 802. *See* N.C. R. Evid. 802 ("Hearsay is not admissible except as provided by statute or by these rules."). Under Rule 803(4), "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or

present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are "not excluded by the hearsay rule." N.C. R. Evid. 803(4). Our Supreme Court created a two-part test to determine when this exception applies.

> First, the trial court must determine that the declarant intended to make the statements at issue in order to obtain medical diagnosis or treatment. The trial court may consider all objective circumstances of record in determining whether the declarant possessed the requisite intent. Second, the trial court must determine that the declarant's statements were reasonably pertinent to medical diagnosis or treatment.

State v. Hinnant, 351 N.C. 277, 289 (2000). Some factors that prove helpful in determining whether a child's statements are reliable under the first part of the test include: "(1) whether some adult explained to the child the need for treatment and the importance of truthfulness; (2) with whom, and under what circumstances, the declarant was speaking, and (3) the surrounding circumstances, including the setting of the interview and the nature of the questioning." *Corbett*, 376 N.C. at 812–13 (internal quotation marks and citation omitted). Further, "[s]tatements made to an individual other than a medical doctor may constitute statements made for the purpose of medical diagnosis or treatment." *State v. Crumbley*, 135 N.C. App. 59, 63 (1999).

In the present case, Perry made multiple statements to his trauma therapist after the incident on 8 August 2021 in which respondent-mother drove her car off a 75-foot embankment into water with Perry in the car. They were rescued and Perry

suffered no physical injuries, but his aggression in preschool increased dramatically (throwing objects at school, verbal and physical aggression with teachers and peers), he became fearful of riding in a vehicle at night, and he was very fearful to take baths because of the water. It was in this context that he went to see the trauma therapist, whom he'd previously seen for other issues after the domestic violence he witnessed in his home. The trauma therapist was assessing Perry based upon the car accident and through the assessment diagnosed him with PTSD.

Considering the *Hinnant* two-part test and applying it to the present case, the objective purpose of Perry sharing these statements to the trauma therapist was to process the flashbacks, aggression, fear of riding in a vehicle at night, and fear of taking a bath, so he did not continue to role-play the accident at his preschool. In this context, the trauma therapist was able to diagnose him with PTSD, provide coping techniques to help him take a bath and ride in a vehicle at night, and also recommended further therapy beyond her services. The trauma therapist explained this therapy and the additional services she referred him to were to help him continue functioning, stay in school, and become stable.

The testimony in the record along with the statements made by Perry all demonstrate the purpose behind the treatment was pertinent to that treatment. Perry's statements to the therapist directed the therapist's diagnosis of Perry; the statements provided the therapist with direction to refer him to further services to help him stop acting out in school (he was terminated from three schools due to the

aggressive behavior); and the statements guided the therapist to provide coping techniques to help Perry function and to stabilize him. Therefore, Perry's statements to the trauma therapist were properly excepted under the Rule 803(4) exception and were substantively admissible. Additionally, the trial court's findings of fact 29 and 30 were supported by the competent evidence brought in through Perry's statements and through respondent mother's testimony.

B.

Respondent-mother argues the admission of the body-camera recordings from the August 2021 car accident was improper for lack of a proper foundation. Yet, at trial, respondent-mother argued against the admission of the body-camera recordings because it was hearsay. Respondent-mother did not specify what type of hearsay other than to say it was "hearsay, unless . . . it's a record of the Georgia police," and the trial court suggested it could be party-opponent statements. After discussion about whether respondent-mother saw the back of her head in the recording, defense counsel renewed his previous objection. Based upon the record, respondent-mother did not preserve an objection for lack of foundation to admit the recording. Accordingly, we will not consider this for the first time on appeal. *See State v. Bursell*, 372 N.C. 196, 200 (2019) (discussing what defendant specifically objected to at trial and how it differed to what was argued on appeal and determining this distinction had the effect of waiving what was argued on appeal).

Respondent-mother also argues the findings of fact listed under finding of fact 16 that are based upon her Fifth Amendment protection against self-incrimination should have been disregarded because she was a compelled witness. She relies upon *In re L.C.* to prove "all the attempted elicitation of statements by the DSS and GAL attorney" after she pleaded the fifth, "should be disregarded." 253 N.C. App. 67 (2017). We disagree.

In *In re L.C.*, the witness was a compelled witness, as opposed to a voluntary witness, who answered some questions by DSS prior to invoking her Fifth Amendment right against self-incrimination. *Id.* at 73. DSS argued the witness had opened the door and could no longer invoke her Fifth Amendment protection, the trial court agreed and required the compelled witness to answer the questions she had previously avoided by invoking the Fifth Amendment. *Id.* at 75. This Court determined the witness was "deprived of her constitutional right against self-incrimination when the trial court ordered her to answer the question[.]" *Id.* at 78.

In re L.C. is distinguishable from the present case, because in the present case the trial court never required respondent-mother to answer questions to which she pleaded the fifth. Rather, the trial court allowed her to protect herself against self-incrimination each time. However, precedent is clear that "[w]hen the privilege is invoked in a civil case, the finder of fact in a civil cause may use a witness' invocation of [her] [F]ifth [A]mendment privilege against self-incrimination to infer that [her] truthful testimony would have been unfavorable to [her]." *Id.* at 73 (quoting *In re*

Estate of Trogdon, 330 N.C. 143, 152 (1991)) (internal quotation marks omitted). Therefore, although respondent-mother was allowed to invoke her Fifth Amendment privilege when she was a compelled witness, the trial court was also allowed to infer that her responses to her Fifth Amendment shield would have been "unfavorable to her." *Id.* The trial court's multiple inferred findings of fact under finding of fact 16 were proper.

C.

Respondent-mother specifically challenges findings of fact 4, 5, 10, 16, subparts of 16, 19, 24, 25, and 27. "[W]e limit our review of challenged findings to those that are necessary to support the district court's determination" of the existence of a ground for termination. *In re A.R.A.*, 373 N.C. 190, 195 (2019). Challenged findings of fact are reviewed to determine whether there is "clear, cogent, and convincing evidence" to support the findings. *In re T.N.H.*, 372 N.C. 403, 406 (2019).

Respondent-mother challenges finding of fact 4 because there is no record evidence of the children's birth certificates. Respondent-mother also states she does not challenge the fact that respondent-father is Eva and Perry's father. There are multiple references in the record that establish respondent-father as their father. We agree that the birth certificates are missing from the record and will disregard that portion of the finding. The portion of the finding that acknowledges respondent-father as Eva and Perry's father is supported by competent evidence.

Respondent-mother challenges portions of finding of fact 5. Respondent-mother claims the statements about substance use disorder in Granville County are unsubstantiated, and the statement that the mother was driving under the influence with both incidents in July 2020 and August 2020 was unsubstantiated. However, a review of the petition and the facts respondent-mother stipulated to, demonstrate the trial court had competent evidence to support the concise statements made in finding of fact 5. The finding of fact can be read as combining the driving while under the influence with the domestic violence rather than two incidents of driving while under the influence. Additionally, the portion referring to Granville County includes reports of substance abuse and domestic violence when read as a whole, rather than parsed out sentence by sentence. Further, the social worker testified that the original issues that brought the children into custody involved: "domestic violence, substance abuse, and improper supervision." Therefore, there is evidence in the record to support finding of fact 5.

Respondent-mother challenges finding of fact 16, and more specifically all its subparts. As previously discussed, the trial court could infer from the questions asked that respondent-mother invoking her Fifth Amendment protection was to protect her from an answer that was unfavorable to her. Further there is evidence from Perry's statements made to his therapist that also supported these inferences. Respondent-mother admitted that she saw respondent-father when they were in Georgia, and that he was around the children. Respondent-mother argues that the

statements made by Perry could have been within a different context or that she stopped before the car rolled down the embankment. Although there may be evidence to the contrary, it is the role of the trial court, as "the trier of fact" to resolve "contradictions and discrepancies." *See In re J.T.C.*, 273 N.C. App. 66, 70 (2020), *aff'd*, 376 N.C. 642 (2021). Further, there is evidence within the Juvenile Order in the record that suggests Perry was unrestrained when the incident occurred, and once again contrary testimony to this fact is resolved by the trier of fact. Additionally, the Permanency Planning Orders include evidence that supports the findings of fact in the subparts of finding of fact 16. Accordingly, there is evidence in the record to support the findings of fact subparts within finding of fact 16.

Respondent-mother also challenges finding of fact 24. She argues the trial court improperly suggested she maintains contact with respondent-father. She argues her testimony demonstrates she last had contact with him in January 2023. However, she also testified that she had contact with him "yesterday" in another portion of her testimony during the February termination hearing. Accordingly, there is evidence in the record to support finding of fact 24 that she has maintained contact with respondent-father. As previously stated, we only consider the challenged findings of fact that are necessary to support the ground for termination, which in this case is neglect, pursuant to section 7B-1111(a)(1).

D.

Respondent-mother argues the trial court erroneously determined a ground existed to terminate her parental rights under section 7B-1111(a)(1) for neglect. We review the findings of fact in the trial court's order to determine whether there is "clear, convincing, and cogent evidence" to support the findings and whether those findings in turn support the trial court's conclusions of law. *In re A.R.A.*, 373 N.C. at 194. Unchallenged findings of fact are deemed "binding on appeal." *Id.* at 195. "If either of the grounds is supported by findings of fact based on clear, cogent and convincing evidence, the order appealed from should be affirmed." *In re T.N.H.*, 372 N.C. at 412 (cleaned up).

Neglect is a ground for termination of parental rights under section 7B-1111(a)(1) and is defined in section 7B-101(15). Under section 7B-101(15), a neglected juvenile is one "whose parent . . . does not provide proper care, supervision, or discipline," or "[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2023).

> To reach the legal conclusion of neglect, the trial court must determine neglect exists at the time of the termination of parental rights proceeding. The trial court must consider evidence of changed conditions following the adjudication and must evaluate the probability of repetition of neglect. Where the evidence shows a likelihood of repetition of neglect, the trial court may reach a conclusion of neglect under N.C.G.S. § 7B–1111(a)(1).
>
> Relevant to the determination of probability of repetition of neglect is whether the parent has made any meaningful progress in eliminating the conditions that led to the removal of the children. That a parent provides love and affection to a child does not prevent a finding of neglect. Neglect exists where the parent has failed in the past to meet

> the child's physical and economic needs and it appears that the parent will not, or cannot, correct those inadequate conditions within a reasonable time.

In re J.H.K., 215 N.C. App. 364, 368–69 (2011) (cleaned up).

In the present case, the trial court made the following findings of fact that relate to a determination of neglect:

> 4. [T]he juveniles' father is identified as [respondent-father].
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> 5. The Department initially became involved with the juveniles on July 15, 2020 and again on August 1, 2020, received two separate reports that the mother was driving while under the influence in her car with all four of her children and domestic violence. On September 15, 2020, a social worker went to the home. The door was open yet no one answered the door. With the assistance of law enforcement, the social worker entered the home and found [Perry] naked on the floor and [Eva] in her crib crying. The bedroom door was locked. Respondent father did not open the door for thirty minutes. The parents had CPS history in Granville County for domestic violence and substance use disorder. The parents also had law enforcement history due to being drunk and arguing in the presence of the children.
> . . .
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> 9. The juveniles were adjudicated neglected on February 25, 2021. The mother, on record, stipulated that the facts alleged in the petition were true and supported the finding that the juveniles were neglected. The father was incarcerated at the time of the hearing but stipulated through counsel that he had no objection to the court proceeding to adjudication. Disposition was continued until March 25, 2021. Disposition was continued again at the mother's request to April 29, 2021.
> . . .
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> 11. At the April 29, 2021 disposition, the court allowed th[e] juveniles to begin a trial home placement with the mother.

12. The disposition provide[d] that the mother was required to continue to comply with her Out of Home Family Services agreement. Part of the agreement required that she maintain sobriety and drug treatment.

13. The mother was tackling the goals on her Out of Home Family services agreement with great success. She was attending substance use disorder therapy, attending extra classes, providing drug screens that did not have substances in them. She was even asked to be a mentor to others in her class by her provider.

14. Unfortunately, on August 8, 2021, the juveniles were unfortunately returned to the custody of the Department after the mother and [Perry] were involved in a car accident in the wee morning hours of August 8, 2021.

15. The mother was sworn in after being called by the Department to testify. She was also called as a witness by her attorney. She wanted to testify. The mother also invoked her Fifth Amendment right against self-incrimination. The mother was advised by her attorney that the court could infer that her truthful testimony would not be favorable to her if she invoked her right not to testify.

16. The mother's truthful testimony, had she not invoked her right against self-incrimination would have been unfavorable to her; therefore, the [c]ourt infers that the following facts are admitted based upon her invocation of her Fifth Amendment right against self-incrimination:

> a. The mother went to Georgia on August 6, 2021 to see her oldest girls. She drove with her mother to Georgia.
>
> b. Around 8:00 p.m. on August 8, 2021, she left the hotel and took [Perry] with her. [Eva] and her mother were asleep.
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> c. The mother went to the store then went to her friend, [Jennifer Smith]'s house.[2] She took [Perry] with her and took him inside.

[2] Pseudonym used to protect the identity of the individual.

d. The mother left [Jennifer]'s home at approximately 3:00 a.m. A male named [Trent Wilson][3] left with her. The mother took [Perry] when she left but did not buckle him in his car seat.

e. The mother drove off [a] 75-foot embankment with the child in the back of the car unbuckled.

f. The mother told [Perry] that they were going to play with Jesus and the angels.

g. The mother attempted to commit suicide.

h. Mr. [Wilson] was able to get out of the car when he realized what was going on.

i. The mother admitted that she was drunk. Mr. [Wilson] asked her to slow down and stop but she ignored his requests.

j. The car was submerged in water.

k. When law enforcement found the mother, she had absolutely zero clothes on from the waist down.

l. The mother tried to kick the windows out of the patrol car.

m. The mother was arrested on several charges including child neglect and driving while impaired which are pending at this time.

n. Despite the mother's case plan where she was to not have [respondent-father] around the children, [respondent-father] regularly went with the mother on her trips to Georgia and had regular contact with [Eva] and [Perry].

. . .

21. The mother sought treatment in Port St. Lucie, Florida after the August 8, 2021 accident. She was there for twenty-eight days and discharged.

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[3] Pseudonym used to protect the identity of the individual.

22. Even after receiving treatment, the mother reunited with [respondent-father] and got drunk and was arrested in Raleigh, North Carolina.

23. The mother then went to Springbrook in Raleigh, North Carolina for a week then started treatment at Launch Pad in Wilmington, North Carolina.

24. Shortly after beginning her treatment at Launch Pad, the mother became pregnant with twins. The father of those children [is] [respondent-father]. She gave birth to them [in] October 2022. [Respondent-father] was living with her when she gave birth to the twins despite the fact she knew she need[ed] to remain away from him due to their history of domestic violence and substance use disorder. The mother continues to have contact with [respondent-father]. He is currently in a residential treatment facility.

. . .

26. The mother has been clean and sober since November 3, 2021. Her twins were taken into nonsecure custody in New Hanover County and are now in a trial home placement with her.

. . .

28. [Eva] and [Perry] have been in the custody of the Department since September, 2020.

29. After they returned to the custody of the Department in August, 2021, [Perry] ha[d] some extreme behavioral issues which his therapist attributes to the August, 2021 wreck. [Perry] does not want to be in a car at night. [Perry] is afraid of taking a bath or being in water. During free play at school, [Perry] re-enacts the wreck asking his classmates to be his mother with "no pants on", the police and the ambulance driver.

30. [Perry's] therapist is Keshawn McCloud. Ms. McCloud started seeing [Perry] prior to his removal from his mother and shortly after the trial home placement. [Perry] had complex trauma due to his exposure to domestic violence and his separation from his mother. From April, 2021 until August, 2021, Ms. McCloud saw [Perry] five (5) times.

31. In August, 2021 Ms. McCloud changed [Perry's] diagnosis to Post-Traumatic Stress Disorder. [Perry] was exhibiting flashbacks from the

> accident. He would say, "Mommy . . . drove the car into the water. Mommy . . . was praying we go to heaven. The black man told her to stop."
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> 32. [Perry] is six years old and in the first grade. The accident occurred when he was four. [Perry] was asked to leave multiple day cares due to his disruptions in day care due to his flashbacks. [Perry] has been threatened to be kicked out of kindergarten due to his behaviors and disruptions.
>
> 33. [Perry] exhibits extreme aggressive behaviors. He throws things, has verbal aggressions. [Perry's] behaviors are so severe and extreme that he must be served within the school setting for him to be able to attend school. [Perry] struggles with being in the car at night.
> . . .
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> 36. Ms. McCloud has employed the services of an agency that can provide a psychiatrist and family centered treatment to [Perry] three days per week in his school setting.
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> 37. [Perry] receives individualized therapy five days per week. He has been receiving this since March, 2022.
> . . .
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> 44. Visits were ceased with the mother; however, the mother has never petitioned the court to reinstate those visits despite her success in her treatment in New Hanover County.

These findings taken together support the trial court's conclusion of neglect and the likely repetition of future neglect. Accordingly, we determine the trial court did not err by concluding a ground for termination existed under section 7B-1111(a)(1). Having determined the trial court's findings of fact support the conclusion of neglect as a ground for termination, we do not consider the additional grounds for termination.

III.

For the foregoing reasons, we affirm the trial court's order terminating the parental rights of respondent-mother.

AFFIRMED.

Judges ZACHARY and GRIFFIN concur.

Report per Rule 30(e).