Opinion issued January 13, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00415-CV

IN THE INTEREST OF B.H., A CHILD

On Appeal from the 306th District Court
Galveston County, Texas
Trial Court Case No. 08CP0096

MEMORANDUM OPINION ON REHEARING

This is a parental termination case. After a jury trial, J.H.'s parental rights to B.H. were terminated. *See* TEX. FAM. CODE ANN. § 161.001 (Vernon Supp. 2010). In three issues, J.H., to whom this opinion refers as the "father," contends that the evidence was legally and factually insufficient to support the jury's verdict of termination.

This Court issued an opinion in which we held that the father had not preserved error for appeal. The father filed a motion for en banc reconsideration, directing our attention to his statement of appellate points. We grant rehearing on our own motion, withdraw our opinion and judgment issued November 10, 2010, and issue the following in their stead. In light of the memorandum opinion on rehearing, the father's motion for en banc reconsideration is moot, and we dismiss it.

Because we conclude that the evidence, including extensive evidence that the father killed B.H.'s infant brother, was legally and factually sufficient to support the jury's verdict, we affirm.

I. Background

Appellant J.H. is the biological father of his daughter, B.H., and a son, J.H., Jr. The biological mother of both children is J.T. Collectively, this opinion refers to J.H. and J.T. as the "parents" and to B.H. and J.H., Jr. as the "children." The parents and their children shared a bedroom. The children's maternal grandmother testified that appellant was a good father who fed B.H. and played with her. She also said that she had known the father to be violent and to question whether he was baby J.H., Jr.'s biological father.

One evening around 9:00 p.m., B.H.'s paternal grandparents took her to their house for an overnight visit. For the rest of the night, six-week-old J.H., Jr. was

alone with his parents in their bedroom. The maternal grandmother testified that she left for work the next morning around 5:30 a.m. When she left, she noticed that the parents' bedroom door was closed, and she saw the father looking out a window in the closet. When the parents awoke, they found their son lying dead in his crib. The mother's sister, who slept in the adjoining bedroom, overheard their excited conversation, went into their bedroom, and then called the police. The maternal grandmother received a call at work and immediately returned home.

Detective C. Beyer and Officers A. Trentman and M. Trevino of the League City Police Department responded to the home. Detective Beyer testified that he saw the deceased infant, who had a fresh-looking cut above his eye in the shape of a half-crescent. He looked at the bedroom and noticed that inside the crib were numerous stuffed animals, a baby bottle, plush blankets, and a standard-sized pillow on which he saw a small spot of blood. Initially, Beyer did not believe there was any reason to suspect homicide. The parents consented to a search of the bedroom. Officers found 0.12 grams of marijuana hidden in the crib. They found no blood on the carpet or the walls. There was no blood on the father.

Later that day, the father gave a recorded statement to police. He said that the mother fed and cared for the baby around 5:00 or 5:30 a.m. In a second recorded statement, the father said that he fed and cared for the baby. He also told a third version about what happened during the early morning that day: that he

woke up, propped a bottle in the crib for the baby to drink, and went back to sleep. However, the father consistently said that nobody else entered their bedroom between approximately 5:00 a.m. and 10:30 a.m. that day. He also admitted that he smoked marijuana the previous night, a fact that he never recanted. The father's recorded statements were shown to the jury. When the father was called to testify, he denied using methamphetamines the night before the baby's death, but he otherwise asserted his Fifth Amendment right to remain silent in response to every other question that was posed to him. The maternal grandmother testified that the father had told her that he thought the baby suffocated and that he did not "do it."

The medical examiner conducted an autopsy, which showed that the baby had several fractured ribs (some of which were fractured two to three days before the baby's death), a fractured spinal column, injuries to his head, swelling of the brain, internal hemorrhaging, and bruises on his torso and thigh. Some bruises appeared to be two to three days old. The baby was in a clean, dry diaper and had no food in his stomach. Based on his evaluation of the nature of the injuries, the medical examiner concluded that the baby's death was a homicide, caused by excessive trauma. At trial, the medical examiner testified that the injuries were most consistent with "vigorous shaking" and possibly consistent with some other blunt force trauma. For example, as to the internal bleeding in the baby's abdomen, the medical examiner testified, "This is bleeding by shaking or being

hit." He also testified that babies' bones do not break easily, that there was no evidence of brittle bone disease, that the injuries could not have been caused by falling down stairs, by CPR, or during childbirth. The medical examiner opined that the baby likely died within three hours after being shaken.

By the time of the baby's funeral, the father was a suspect in the murder of his son. D.M., a co-worker of the maternal grandmother, attended the baby's funeral. When D.M. saw the father standing alone by his son's casket, she went to him to offer support. She testified that the father repeatedly said, "It's my fault. I did it." Believing that the baby died from sudden infant death syndrome, she tried to reassure him that it was not his fault and to explain what she knew about crib death. League City police officers arrested the father at the funeral on outstanding warrants. A week later, the maternal grandmother told D.M. that the baby had been murdered, and D.M. reported what the father said at the funeral.

The father was deported to Mexico before he was indicted for capital murder. After the deportation, the father contacted the maternal grandmother both from Mexico and from another location in Texas. She testified that the father said he feared for his life due to prevalent gang violence in Mexico and wanted to come back. The father also communicated with his own parents.

The father was charged with capital murder, rearrested in Harris County, and transferred to Galveston County jail. While in jail, he befriended another inmate,

Christopher Altizer, who exercised with him in the prison yard on a regular basis. Altizer testified that the father told him he was a member of the Houstone gang. As to the baby's death, Altizer testified that he overheard the father say "something along the lines that his baby mama did it." Altizer also testified that the father "said that he was on drugs and that his baby wouldn't stop crying, so he hit it." He testified that the father told him he was high on methamphetamines at the time of the baby's death. Altizer was in jail at the time for sexual assault of a child, and he pleaded guilty to indecency with a child. He testified that his plea bargain preceded his disclosure of the father's statement and that he received no deal or consideration in exchange for his testimony.

The Department of Family and Protective Services sought termination of both parents' rights to their daughter B.H. The mother relinquished her parental rights, but the father did not. The Department did not offer any services to the father and did not contemplate family reunification as a disposition of B.H.'s case. By the time of trial, B.H. had been living with her maternal grandparents for more than a year, and the grandparents had intervened in the termination suit because they wished to adopt her. In addition to the previously mentioned witnesses, the jury heard testimony from three employees of Children's Protective Services, investigator Karen Coblentz, investigative supervisor Cheryl Bourda, and conservatorship worker Jack Lawrence. Coblentz testified that CPS had received a

referral regarding B.H. the month before the baby died. An anonymous caller informed CPS that while B.H. was in the care of her father and maternal uncle, she was found hungry and crying in her crib, in dirty clothes with a diaper full of feces while the father and the uncle smoked marijuana. B.H. was 16 months old at the time. Coblentz also testified that the mother's sister, D.C., who lived in the same house with her three children, had prior CPS cases of her own. Bourda testified from an affidavit by David Henry, a CPS investigator whom she supervised and who could not be present at trial. She testified that the father told Henry that he might have dropped the baby, he might have shaken the baby to wake him up, and he might have used full hand thrusts while performing CPR on the baby. Lawrence testified that he was familiar with B.H.'s circumstances. He thought it would endanger B.H. to return to her father, who had been indicted for capital murder and that it would further endanger B.H. emotionally for her father to have killed her brother and to have illegal drugs in her bedroom. He testified that he believed it was in B.H.'s best interest for the father's paternal rights to be terminated and for her maternal grandparents to adopt her.

The jury was instructed on two predicate endangerment elements and the best interest of the child. The jury concluded that the father's parental rights should be terminated.

II. Preservation of error

The father's trial counsel timely filed a notice of appeal, and his appointed appellate counsel filed a statement of points, which included his challenge to the legal and factual sufficiency of the evidence. Therefore, we conclude that the father has preserved error, and we will address the merits of this case. *See* TEX. FAM. CODE ANN. § 263.405(b) (Vernon 2008); *In re J.H.G.*, 302 S.W.3d 304, 306 (Tex. 2010).

III. Sufficiency of the evidence

A. Standards of review

In proceedings to terminate the parent-child relationship brought under Texas Family Code section 161.001, DFPS must establish one or more of the acts or omissions enumerated under section 161.001(1) and that termination is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001 (Vernon 2009). Both elements must be established, and termination may not be based solely on the best interest of the child as determined by the trier of fact. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). A trial court's decision to terminate parental rights must be supported by clear and convincing evidence. *In re J.F.C.*, 96 S.W.3d 256, 263–64 (Tex. 2002); *In re V.V.*, No. 01-08-00345-CV, 2010 WL 2991241, at *4 (Tex. App.—Houston [1st Dist.] July 29, 2010, pet. denied) (en banc). "'Clear and convincing evidence' means the measure or degree of proof

that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE ANN. § 101.007 (Vernon 2008).

"[I]n conducting a legal sufficiency review in a termination-of-parental-rights case, we must determine whether the evidence, viewed in the light most favorable to the finding, is such that the fact finder could reasonably have formed a firm belief or conviction about the truth of the matter on which the State bore the burden of proof." *Cervantes-Peterson v. Tex. Dep't of Family & Protective Servs.*, 221 S.W.3d 244, 249 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (en banc) (citing *J.F.C.*, 96 S.W.3d at 266). "In viewing the evidence in the light most favorable to the judgment, we 'must assume that the fact finder resolved disputed facts in favor of its finding if a reasonable fact finder could [have done] so,' and we 'should disregard all evidence that a reasonable fact finder could have disbelieved or found to have been incredible.'" *Id*. (citing *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005)).

"In conducting a factual sufficiency review in a termination-of-parental-rights case, we must determine whether, considering the entire record, including both evidence supporting and evidence contradicting the finding, a fact finder reasonably could have formed a firm conviction or belief about the truth of the matter on which the State bore [the] burden of proof." *Id*. (citing *J.P.B.*, 180

S.W.3d at 573; *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002)). "We should consider whether the disputed evidence is such that a reasonable fact finder could not have resolved the disputed evidence in favor of its finding." *Id.* (citing *J.F.C.*, 96 S.W.3d at 266–67). "'If, in light of the entire record, the disputed evidence that a reasonable fact finder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient.'" *Id.* (quoting *J.F.C.*, 96 S.W.3d at 266).

B. Predicate grounds for termination

The Department sought termination of the father's parental rights under paragraphs D and E of section 161.001(1), both of which describe acts of endangerment. The jury answered "yes" to the sole question posed to it, "Should the parental rights of the father . . . be terminated as to the child [B.H.]." In its final order of termination, the trial court expressly found both statutory provisions were met. The court found that the father knowingly placed or knowingly allowed B.H. to remain in conditions or surroundings which endanger the physical or emotional well-being of B.H. The court also found that the father engaged in conduct or knowingly placed B.H. with persons who engaged in conduct which endangers the physical or emotional well-being of B.H. *See* TEX. FAM. CODE ANN. § 161.001(1)(D), (E). In his first and second issues, the father challenges the

sufficiency of the evidence of these two findings. However, "[o]nly one predicate finding under section 161.001(1) is necessary to support a judgment of termination when there is also a finding that termination is in the child's best interest." *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003). Accordingly, we will focus our analysis on subsection (E), under which a parent endangers his child if he has "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child." *See* TEX. FAM. CODE ANN. § 161.001(1)(E).

"To endanger" means to expose a child to loss or injury or to jeopardize a child's emotional or physical health. *Walker v. Tex. Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 616 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *Robinson v. Tex. Dep't of Protective & Regulatory Servs.*, 89 S.W.3d 679, 686 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (citing *Boyd*, 727 S.W.2d at 533). The term means "more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment." *Boyd*, 727 S.W.2d at 533. "Rather, 'endanger' means to expose to loss or injury; to jeopardize." *Id.* at 534. Endangerment may be inferred from parental misconduct. *Id.* The relevant inquiry is whether evidence exists that a parental course of conduct endangered the child's physical or emotional well-being. The conduct does not have to occur in the presence of the child, be directed toward the child, or cause the child injury.

Walker, 312 S.W.3d at 616–17. The conduct may occur before the child's birth and both before and after the child has been removed by the Department. *Id.* at 617.

1. Legal sufficiency

In arguing that the evidence was legally and factually insufficient to support endangerment under section 161.001(1)(E), the father argues that endangerment cannot be based on a single act or omission, like the baby's death, and that the relevant time frame for determining endangerment is before B.H. was removed. At trial, the Department introduced evidence that the father had committed acts of violence, engaged in criminal conduct, and used illegal drugs.

First, a parent's abusive and violent criminal conduct can endanger the well-being of a child, even if such conduct is directed toward a person other than the child. *Jordan v. Dossey*, No. 01-09-00618-CV, 2010 WL 1948280, at *20 (Tex. App.—Houston [1st Dist.] May 13, 2010, pet. filed). Evidence that a person has engaged in abusive conduct in the past permits an inference that the person will continue violent behavior in the future. *Id.*; *accord Walker*, 312 S.W.3d at 617. Most of the testimony at trial centered on the violent death of baby J.H., Jr., who was alone in a room with only the parents the night that he died. The medical examiner testified that his autopsy showed evidence that the baby had non-accidental injuries that preceded his death by several days. Altizer testified that the

father confessed to having punched and killed his son. D.M. testified that the father repeatedly said, "I did it. It's my fault," at his son's funeral. In addition, the maternal grandmother testified that she had known the father to be violent, and Altizer testified that the father told him he belonged to the notorious Houstone gang. Based on this evidence, the jury could have formed a firm belief or conviction that the father had a history of violent and abusive conduct.

Second, because children need stability and permanence, "conduct that subjects a child to life of uncertainty and instability endangers the child's physical and emotional well-being." *Jordan*, 2010 WL 1948280, at *19. Thus, intentional criminal conduct that exposes a parent to incarceration is relevant to a factfinder's determination of endangerment. *See Boyd*, 727 S.W.2d at 533; *Avery v. State*, 963 S.W.2d 550, 553 (Tex. App.—Houston [1st Dist.] 1997, no writ); *see also In re J.T.G.*, 121 S.W.3d 117, 133 (Tex. App.—Fort Worth 2003, no pet.); *In re S.F.*, 32 S.W.3d 318, 322 (Tex. App.—San Antonio 2000, no pet.). At trial, the Department introduced evidence that the father had been charged with capital murder in relation to the baby's death, and that he had possessed and used illegal drugs.

Third, because it exposes the child to the possibility that the parent may be impaired or imprisoned, illegal drug use may support termination under section 161.001(1)(E). *Walker*, 312 S.W.3d at 617–18; *see Vasquez v. Tex. Dep't*

of Protective & Regulatory Servs., 190 S.W.3d 189, 195–96 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (terminating parental rights despite there being no direct evidence of parent's continued drug use actually injuring child). Evidence of narcotics use and its effect on a parent's life and ability to parent may establish that the parent has engaged in an endangering course of conduct. *Walker*, 312 S.W.3d at 618. In his police interview, the father admitted that he smoked marijuana the night before the baby died and that he kept marijuana in the room he shared with his young children. Altizer testified that the father told him he was high on methamphetamines when he killed the baby. And Coblentz testified that the Department had received an earlier report that the father was neglecting B.H. while smoking marijuana.

Viewing the evidence in the light most favorable to the verdict, we conclude that the jury could have formed a firm belief or conviction that the father had engaged in conduct that endangers the physical or emotional well-being of the B.H.

2. Factual sufficiency

As to the factual sufficiency of the evidence, we must consider whether the disputed evidence is such that the jury could not have resolved that disputed evidence in favor of its finding. *See J.F.C.*, 96 S.W.3d at 266. The father points to

conflicts in the evidence and the absence of evidence to support his argument that the evidence is insufficient to support termination on this ground.

With respect to the death of his son, the father points to his statement to Altizer implicating the mother in the baby's death and his repeated denials of having harmed his son in the recorded interviews he gave to police investigators. However, at trial he invoked his right to remain silent when asked a series of questions about what happened to the baby and about his drug use. The Department points out that in a civil case, a jury may make reasonable inferences from a party's assertion of the privilege against self-incrimination. *See Lozano v. Lozano*, 52 S.W.3d 141, 150 (Tex. 2001); *In re C.J.F.*, 134 S.W.3d 343, 352–53 (Tex. App.—Amarillo 2003, pet. denied) (applying *Lozano* in parental-rights-termination case).

The father also argues that the maternal grandmother testified that he was a good parent to B.H. because he fed her and played with her, that there was no evidence that he was in an abusive relationship with the mother, and that there was no evidence that his parenting skills were impaired by his use of marijuana.

It was within the jury's province to resolve conflicts in the evidence, and in light of the entire record, we cannot say that the evidence emphasized by the father on appeal is so significant that a jury could not reasonably have formed a firm

belief or conviction that the father engaged in a course of conduct that endangered B.H. *See J.F.C.*, 96 S.W.3d at 266.

Accordingly, we conclude that the evidence was legally and factually sufficient to support the jury's finding that the father endangered B.H. *See* TEX. FAM. CODE ANN. § 161.001(1)(E). We overrule the father's second issue, and in light of this disposition, we need not address his first issue, regarding endangerment under section 161.001(1)(D). *See A.V.*, 113 S.W.3d at 362. ("Only one predicate finding under section 161.001(1) is necessary to support a judgment of termination when there is also a finding that termination is in the child's best interest.").

C. Best interest of the child

In his third issue, the father contends that the evidence was legally and factually insufficient to support the jury's conclusion that termination was in B.H.'s best interest because the maternal grandmother testified that he was a good father and because the baby died in the maternal grandparents' home and, therefore they were, at least in part, responsible for his death.

In determining whether sufficient evidence showed that termination of the father's parental rights was in the children's best interest, we may consider several factors including (1) the children's desires, (2) the current and future physical and emotional needs of the children, (3) the current and future physical danger to the

children, (4) the parental abilities of the person seeking custody, (5) whether programs are available to assist the person seeking custody in promoting the best interests of the children, (6) plans for the children by the person seeking custody, (7) the stability of the home, (8) acts or omissions of the parent that may indicate that the parent-child relationship is not proper, and (9) any excuse for acts or omissions of the parent. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976); *V.V.*, 2010 WL 2991241, at *7. The *Holley* factors are not exhaustive, and there is no requirement that DFPS prove all factors as a condition precedent to parental termination. *See In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002). "Undisputed evidence of just one factor may be sufficient in a particular case to support a finding that termination is in the best interest of the child, but the presence of scant evidence relevant to each *Holley* factor will not support such a finding." *Id.* Moreover, there is a strong presumption that the best interest of the child is served by keeping custody in the natural parent. *Id.*

There was evidence at trial to support findings of emotional and physical danger to the child now and in the future, as well as acts or omissions of the father indicating the existing parent-child relationship is not proper. *See Holley*, 544 S.W.2d at 371–72. CPS worker Jack Lawrence testified by affidavit that he was familiar with B.H. and that she would be physically and emotionally endangered if she returned to her father, who had been indicted for the capital murder of her

brother. He also testified that it would endanger her for her father to have illegal drugs in her bedroom. He also believed it was in B.H.'s best interest for her father's paternal rights to be terminated and for her maternal grandparents to adopt her. In addition, for nearly a year and a half before trial, the father made no attempt to regain contact with B.H. He did not contact the Department to inquire about her well-being.

Morever, there was evidence at trial about the the parental abilities of the individuals seeking custody and their plans for the child. *See Holley*, 544 S.W.2d at 371–72. At the time of trial, B.H. was in the care of her maternal grandparents. The maternal grandmother testified that she wanted to adopt B.H. and that she thought that termination of the father's parental rights was in B.H.'s best interest. She said that her adult children and her other grandchildren no longer lived with her and would not live with her in the future. She testified that she would abide by any court order requiring her to keep the mother away from B.H. She testified that she plans for B.H. to get an education, go to college, and "be what she wants to be."

The father's argument that B.H.'s adoption by her maternal grandparents is not in her best interest because they bear some responsibility for the baby's death is unpersuasive in light of the evidence from which a reasonable jury could have concluded either that the father killed his son or that he failed to protect him. *See*

City of Keller v. Wilson, 168 S.W.3d 802, 819 (Tex. 2005) (holding that jury is sole judge of credibility of witnesses and resolves conflicting evidence). Having reviewed all the evidence, we conclude that the jury could have formed a firm belief or conviction that termination of the father's parental rights was in B.H.'s best interest. *See id.* In addition, we conclude that any contrary or disputed evidence was not so significant as to outweigh such a conclusion. We hold that the evidence is legally and factually sufficient to support the jury's verdict, and we overrule the father's third issue.

CONCLUSION

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Chief Justice Radack and Justices Massengale and Nuchia.*

* The Honorable Sam Nuchia, Senior Justice, Court of Appeals for the First District of Texas, participating by assignment.