Opinion issued October 25, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00346-CV

IN THE INTEREST OF G.P., A CHILD

On Appeal from the 306th District Court
Galveston County, Texas
Trial Court Case No. 15-CP-0051

MEMORANDUM OPINION

In this accelerated appeal,[1] appellant, C.C., challenges the trial court's order, entered after a jury trial, terminating his parental rights to his minor child, G.P.[2] In his third issue, C.C. contends that the evidence is legally and factually insufficient

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1 *See* TEX. FAM. CODE ANN. § 263.405(a) (Vernon 2014); TEX. R. APP. P. 28.4.

2 The mother of G.P. does not appeal the termination of her parental rights.

to support the jury's findings that he knowingly placed G.P., or knowingly allowed her to remain, in conditions or surroundings that endangered her physical or emotional well-being;[3] he engaged, or knowingly placed G.P. with persons who engaged, in conduct that endangered her physical or emotional well-being;[4] he failed to comply with the provisions of a court order that specifically established the actions necessary for him to obtain the return of G.P.;[5] he used a controlled substance[6] in a manner that endangered the health or safety of G.P. and failed to complete a court-ordered substance abuse treatment program or, after the completion of the program, continued to abuse a controlled substance;[7] and the termination of the parent-child relationship was in G.P.'s best interest.[8] In his first and second issues, C.C. contends that he was denied effective assistance of counsel and the trial court erred in admitting certain evidence.

We affirm.

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3 *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D) (Vernon Supp. 2016).

4 *See id.* § 161.001(b)(1)(E).

5 *See id.* § 161.001(b)(1)(O).

6 *See* TEX. HEALTH & SAFETY CODE ANN. § 481.002(5) (Vernon Supp. 2016) (defining "[c]ontrolled substance" (internal quotations omitted)).

7 *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(P).

8 *See id.* § 161.001(b)(2).

Background

On April 13, 2015, the Texas Department of Family and Protective Services ("DFPS") filed a petition seeking managing conservatorship and termination of C.C.'s parental rights to his minor child, G.P.

At trial, Galveston County Sheriff's Office ("GCSO") Deputy L. Scarbrough testified that in April 2015, he was dispatched to C.C.'s home because C.C. wanted to evict Sherry Reames, his female roommate and G.P.'s babysitter.[9] C.C. was "very angry" with Reames because she had allowed G.P. to go to a baseball game with his ex-girlfriend, Donna Meguess. Scarbrough noted that C.C. was "yelling" and having difficulty controlling his anger.

After Deputy Scarbrough had given C.C. "civil advice" and left the home, he returned later that same day because C.C. and Reames engaged in another verbal dispute about Reames moving out of the home. This time, however, Reames asserted that C.C. had "threatened" to "kick her ass," while holding a pipe in his hand. Scarbrough arrested C.C. for "assault by threat."[10]

While Deputy Scarbrough was at C.C.'s home, a neighbor told him that G.P., who was ten years old at the time, was at another neighbor's home asserting that

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9 Deputy Scarbrough noted that Reames had been living with C.C. in exchange for her babysitting services. On the day that he was dispatched to C.C.'s home, C.C. was returning to the home after having been in jail.

10 *See* TEX. PENAL CODE ANN. § 22.01(a)(2) (Vernon Supp. 2016) (misdemeanor offense).

C.C. had "assaulted her and slapped her on top of [her] head, causing lumps on her head." After Scarbrough learned that another law enforcement officer had actually "felt lumps" on the top of G.P.'s head, he contacted DFPS.

Deputy Scarbrough further testified that a sexual offense occurred in January 2015, involving G.P. as the complainant and Joseph Claude David, Jr. as the defendant.[11] Immediately after the incident, Scarbrough had allowed G.P. to sleep in the backseat of his patrol car while he waited for DFPS to arrive at the scene because law enforcement officers had been unable to contact C.C. and "[n]o one knew where he was." When C.C. did eventually arrive, he was unaware that the sexual offense had occurred.

GCSO Deputy D. Bouse testified that on April 11, 2015, G.P., as she sat in the backseat of Bouse's patrol car, told Bouse that "she had been hit [o]n the head" by C.C. and "she had a knot on her head" as a result. When Bouse felt G.P.'s head, she found "a raised portion" about the size of "half" of "a boiled egg." G.P. told Bouse that she had gone to a baseball game with a family friend and after C.C. had come to pick her up, he "struck her [o]n the head" with his "open hand." When

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[11] The trial court admitted evidence of David's criminal record, revealing that on February 10, 2016, he was convicted of committing the offense of indecency with a child and sentenced to confinement for two years. *See id.* § 21.11(a)(1), (d) (Vernon 2011) (second-degree felony offense). In that case, the indictment alleged that David, "with the intent to arouse or gratify the sexual desire of [himself], intentionally or knowingly engage[d] in sexual contact with [G.P.] by touching the genitals of [G.P.], a child younger than 17 years of age." *See id.* § 21.11(a)(1).

Bouse asked her how many times C.C. had hit her, G.P. stated "a lot." G.P. also reported to Bouse that she was hungry.

GCSO Sergeant B. Balchunas testified that he conducted the subsequent investigation of G.P.'s allegation of physical abuse against C.C.[12] He noted that Deputy Scarbrough had responded to a call regarding C.C.'s desire to evict Reames from his home.[13] When Scarbrough informed C.C. that he would have to use a "civil process" to evict Reames, C.C. became upset. After Scarbrough left the home, C.C. "be[came] real hostile toward [Reames] and threaten[ed]" to hit her by "pick[ing] up a pipe."[14] When Scarbrough subsequently returned to the home, he arrested C.C. for "assault by threat."[15]

As part of Sergeant Balchunas's investigation, G.P. participated in a videotaped forensic interview through the Child's Advocacy Center ("CAC"). After G.P.'s interview, Balchunas became aware that G.P. had made an additional allegation of sexual abuse against C.C. He also noted that during her interview, G.P.

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12 Sergeant Balchunas did not personally see "any red marks" or bruises on G.P. because he was not present when law enforcement officers initially spoke with her.

13 Sergeant Balchunas noted that C.C. and G.P. lived together in a "trailer," and the trial court admitted into evidence photographs of the home.

14 Sergeant Balchunas also noted that C.C. had, in the past, verbally threatened his ex-girlfriend, Meguess, and a landlord friend.

15 *See id.* § 22.01(a)(2).

stated that she did not want to see C.C. again, he was "a very bad man," and she was afraid of him.

Sergeant Balchunas also conducted a consensual, noncustodial videotaped interview of C.C. C.C. stated that on the day that the alleged physical abuse occurred, Reames had told him that G.P. was at a baseball game with his ex-girlfriend, Meguess. C.C. admitted that this upset him and he "struck" G.P. with his hands in order to "get her attention."[16] Balchunas opined that C.C was not remorseful about his actions and that by striking G.P. on her head, C.C. had engaged in conduct constituting "more than corporal punishment." Balchunas did note that C.C. had denied G.P.'s allegation of sexual abuse, stating that he had not "touch[ed]" G.P. and "[h]e would never do anything to that effect."

Sergeant Balchunas further testified that when he spoke with Reames, she "made it clear" that she did not believe that G.P. should be living with C.C. Reames reported that C.C. had sexually abused G.P., noting that once, while she was in C.C.'s home and G.P. was upstairs in the loft, she heard G.P. say to C.C., "No, stop," and C.C. responded, "No, you stop." (Internal quotations omitted.) When G.P. subsequently came downstairs, she was "very emotional, very upset" and told Reames that C.C. had "touched her and put his finger down in her vaginal area." Additionally, Reames's son, Stetson McNemar, told Sergeant Balchunas that G.P.,

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[16] According to C.C., he did not "hit [G.P.] real hard."

while upset, told him that C.C. had "touched" her. (Internal quotations omitted.) And it was obvious to McNemar that she was "referring to down in her vaginal area."[17]

In regard to C.C.'s criminal history, Sergeant Balchunas noted that C.C. was an admitted member of "a gang," the "Dead Men." And McNemar told Balchunas that C.C. would often return to his home at "odd hours" and on occasion he would, after being outside in his car, come back inside the home, "appear[ing] to be under the influence of something," possibly methamphetamine. C.C. had also admitted to McNemar that he would "do[] some slinging," meaning that he "participat[ed] in narcotics."

Cheryl McCarty, a CAC forensic interviewer, testified that she interviewed G.P. in April 2015.[18] During her interview, G.P. stated that C.C. had hit her, she was afraid of him, she was glad that he had been incarcerated, and she did not want to see him again. G.P. believed that C.C. is a "bad person." And G.P. disclosed to McCarty that C.C. had touched her vagina and she had told him to "stop."

During McCarty's testimony, the trial court admitted into evidence State's Exhibit 39, the CAC's videotaped forensic interview of G.P., who was ten years old

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17 McNemar also told Sergeant Balchunas that while he was living with C.C., he bought food for G.P. with his own money because "there w[ere] very little resources in the [home's] refrigerator -- no milk, no food."

18 McCarty had previously interviewed G.P. in January 2015 after David had sexually touched G.P. in her "vagina area."

at the time.[19] G.P. stated that she had been living in an "R.V.," a recreational vehicle, with C.C., her father, Reames, her babysitter, and Reames's son. G.P. explained that Reames babysat her "all [of] the time," including when C.C. was working or sleeping,[20] and she slept upstairs with Reames because she was afraid of C.C. When G.P. would get in trouble at home, C.C. would yell "fuck" and "shit" and call her a "slut."[21]

G.P. further explained that she had knowledge about cocaine and marijuana. She had seen marijuana in C.C.'s home and noted that he stored, in certain cabinets in the home, his marijuana, which he kept in either a "baggie" or a "pipe." C.C. smoked his marijuana "like a cigarette," or with the pipe, "almost anywhere," including in front of G.P. When asked whether any other person had ever smoked marijuana in C.C.'s home, G.P. stated that "some of [C.C.'s] friends [had] c[o]me over."

In regard to her allegation of physical abuse against C.C., G.P. stated that in 2015, about a week after Easter, C.C. had hit her after she had attended a baseball game with C.C.'s ex-girlfriend. She explained that when C.C. came to pick her up, she ran to his truck. On the drive home, C.C. started hitting her on head with his

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19 At trial, G.P. was eleven years old.

20 G.P. noted that C.C. did not have a set work schedule.

21 G.P. further noted that she had previously told people that she was "happy" when C.C. had been previously incarcerated.

open hands. Although she could not say how many times he had hit her, he hit her on the right-side of her head toward the back.[22] G.P. noted that she had three "knot[s]" or "bump[s]" on her head and it "hurt" afterward.

In regard to her allegation of sexual abuse against C.C., G.P. stated that while C.C. was "sleeping up[stairs] . . . with [her]," he touched her with his hand under her clothes, and she told him to "stop." This was the first time that such an incident had occurred, and C.C. had never touched her anywhere else.

Finally, during her interview, G.P. stated: "[M]y dad is a bad person. A really bad person." And while crying, she asked McCarty whether she had to ever see C.C. again. Further, G.P. specifically stated that she did not want to see C.C. again. She is afraid of him because he yells at her and is "mean."

Megan Myers, C.C.'s other daughter, testified that when she was sixteen years old, she moved to Texas to live with C.C. for one year.[23] While Myers lived with C.C., he was "very controlling," and if she "didn't do something [that] he wanted [her] to do, [they] would start fighting." Specifically, C.C. would hit Myers with his "open hand" or "take his belt off and whoop [her] with" it. C.C. had hit Myers with his belt about three times. Eventually, they began to physically fight each other.

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22 G.P. noted that C.C. had hit her "once or twice" before. And she had previously seen C.C. hit two other people, who were injured as a result of C.C.'s actions.

23 C.C. obtained custody of G.P. about three months after Myers began living with him. At the time that Myers moved out of C.C.'s home, G.P. was about four years old.

C.C. would push Myers and "wrestle" her. Their altercations occurred about every three days, with Myers sustaining bruises as a result. Myers also noted that C.C. had told her that when her mother was pregnant with her, he had "punched her [mother] in the stomach a couple of times" in the hopes that she would have a miscarriage. And while living with C.C., Myers felt that her "physical safety and well-being w[ere] in jeopardy" and she "might be sexually assaulted."

Myers further testified that she had seen C.C. smoke marijuana and drink alcohol, and he had allowed her, when she was sixteen years old, to smoke marijuana and drink alcohol with him. She also saw C.C. become violent with other people, including G.P.'s mother. During one altercation at which Myers was present, G.P.'s mother "busted" C.C.'s lip, and he responded by "smack[ing] her pretty hard." Myers had heard about C.C.'s involvement in "a gang," and she opined that it would be in G.P.'s best interest not to be returned to C.C.'s home.

Kim Wiseburn, a DFPS program director, testified that on April 11, 2015, DFPS received a referral, alleging that C.C. had "struck" G.P. on her head. At the time of the referral, law enforcement officers were arresting C.C. for making a "terroristic threat."[24] When DFPS officials initially spoke with G.P., she stated that C.C. had hit her on the head while they were in his car. G.P. also reported narcotics

[24] *See id.* § 22.07(a)(2), (c) (Vernon 2011) (misdemeanor offense).

use by C.C. and the location in the home of the pipe that C.C. used to smoke marijuana.

DFPS caseworker Amy Banks testified that after DFPS removed G.P. from C.C.'s home in April 2015, C.C. signed a Family Service Plan ("FSP") which required him to perform a variety of tasks and services.[25] Although he had the responsibility of providing verification of the completion of his tasks and services, C.C., at the time of trial, had not completed any of the requirements of his FSP.[26] Banks acknowledged that C.C. had been confined for the majority of the time that the instant case was pending, but she also noted that some of the services under his FSP could have been accomplished while he was confined.

Banks also testified that in December 2015, while she visited C.C. at the Galveston County Jail, he told her that he had "choked out his [previous] CPS caseworker in court and [he] was not afraid to do it again." When Banks asked C.C. "why he was so proud to talk . . . about choking out a . . . caseworker," he replied, "Fuck you. Get out. Don't come back. I don't want to ever see you again. You can talk to my lawyer from this point out." (Internal quotations omitted.)

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25 The trial court admitted into evidence the FSP signed by C.C.

26 For instance, C.C. never participated in a drug test, and he admitted to using marijuana. C.C. also did not maintain contact with Banks, provide verification of employment or any pay stubs, complete a psychological assessment, or provide proof of payment for utilities services.

Banks opined that reunification of G.P. with C.C. was not desirable because of C.C.'s confinement based on allegations of "child endangerment" and "inappropriate sexual contact with a minor," his failure to comply with his FSP, and the fact that G.P. was afraid of him. At the time of trial, C.C. had been confined in the Galveston County Jail since approximately May 2015. And Banks did not know when he would be released. As she noted, DFPS "can't [simply] return [G.P.] to the Galveston County Jail to live with" C.C.

Banks further opined that termination of C.C.'s parental rights was in G.P.'s best interest because C.C. had an "extensive history of family violence as a perpetrator," had "continu[ously] . . . put [G.P.] in danger by leaving her with whoever he want[ed] to whenever he fe[lt] like it," and did not have "any protective capacities." Moreover, she stated that by leaving G.P. with "whoever he want[ed] to leave her with," including individuals whose last names he did not know, he had "subjected [G.P.] to sexual abuse and [narcotics] use" and "exposed her to drug paraphernalia."

In regard to the living conditions in C.C.'s home prior to his confinement, Banks opined that the environment was not safe for G.P. because of the amount of debris in the home, the actual state of the living quarters, the number of individuals living in the home, and the individuals who frequented the home. According to Banks, G.P. "deserve[d] to live in a home where she [would be] nurtured, a home

where there's caring and stability," without fear. Further, C.C. had endangered G.P. in the past by "engag[ing] in conduct or allow[ing] [G.P.] to remain in conditions or surroundings which ha[d] endangered her emotional and physical well-being."

In regard to G.P., Banks noted that she has a speech impairment of which C.C. had been made aware several years prior. However, Banks had not seen any documentation indicating that G.P. had received speech therapy or "Early Childhood Intervention" while living with C.C. At the time of trial, G.P. was in individual therapy and completing voice exercises with her foster parents. She was "happy" with her foster parents, although the placement is only temporary. G.P. has made two friends, attends slumber parties and school lock-ins, and goes roller skating. And she is "coming into her own person," "starting not to be scared anymore." Banks clarified that DFPS intends to approve the adoption of G.P. by her older sister, Myers. And DFPS, at the time of trial, was working to approve Myers's home.

C.C. testified that on April 11, 2015, he went to the baseball game to pick up G.P., who was with his ex-girlfriend, Meguess. At that time, he was "out of [his] mind," "panicked," and "scared" because he initially did not know G.P.'s location. However, once C.C. found G.P., he went from being "frightened and panicked" to "upset." He admitted to yelling at and "slapp[ing]" G.P., demonstrating that he hit her "multiple times on both sides of [her] head with his hand."

According to C.C., G.P. was "in trouble" because she was not where she was supposed to be and did not have his permission to be with Meguess. C.C. opined that "slapping" G.P. several times on her head was an appropriate punishment for her actions, and he had previously disciplined her with corporal punishment.[27] When C.C. had previously disciplined G.P., he had "ben[t]" her "over the bunk bed" and "spank[ed]" her with his hand. And when she received poor grades in school, he took "everything" that she owned to a "pawn shop for nine weeks."

C.C. also noted that he had been "arrested about three times right before" April 11, 2015. One arrest was for not "paying [traffic] tickets." The second was for making a "terroristic threat."[28] And the third was for committing a "verbal assault." He was "locked up for 22 and a half hours" each time that he was arrested.

In regard to his arrest for making a "terroristic threat," C.C. explained that he and Reames had a verbal altercation while he was holding "truck parts in [his] hand." He told Reames that he would "whoop her ass" if she "[s]wore falsely against [him]." At trial, C.C. noted that he had also told Reames that he would "whoop[]" "her ass . . . when [he] g[o]t out" of jail, if she did not "tell the truth" in the instant case. C.C. noted that when he was arrested on the first and second occasions, he left G.P.

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27 C.C. also used corporal punishment on Myers, admittedly "whoop[ing]" her with a belt "[a] couple of times" and "wrestl[ing] her down."

28 *See id.* § 22.07(a)(2), (c) (misdemeanor offense).

in the care of Cheryl Stone, but she was not with Stone when he went to pick her up after his second arrest. When he was arrested on the third occasion, he left G.P. in the care of DFPS.

In 2003, C.C. was convicted of committing the offense of "assault causing bodily injury" against a woman who used "hard drugs" and with whom he was in a relationship.[29] Also in 2003, he was arrested for the offense of "assault causing bodily injury" at a bar while he was carrying "drug paraphernalia."[30] In 2004, C.C. was convicted of committing the offense of "assault causing bodily injury" against G.P.'s mother.[31] Further, he had been incarcerated for two years after he was convicted of committing the offense of unauthorized use of a motor vehicle.[32] At some point, C.C. was convicted of committing the offense of criminal mischief.[33] And in 2010, he was convicted of committing the offense of possession of

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29 The trial court admitted evidence of C.C.'s criminal record, revealing that on March 17, 2003, he was convicted of committing the offense of assault-family violence and sentenced to seventy days confinement. *See id.* § 22.01(a) (misdemeanor offense); *see also* TEX. FAM. CODE ANN. § 71.004(1) (Vernon Supp. 2016) (family violence).

30 *See* TEX. PENAL CODE ANN. § 22.01(a) (misdemeanor offense).

31 *See id.*

32 *See id.* § 31.07(a)–(b) (Vernon 2011) (state-jail felony offense). C.C. noted that although he was convicted of committing the offense of unauthorized use of a motor vehicle, he had actually been "stealing cars."

33 *See id.* § 28.03(a) (Vernon Supp. 2016).

marijuana.[34] Moreover, on another occasion, G.P.'s mother had a "protective order . . . in place" against C.C., as did his ex-wife.

When asked how many times he had been "arrested in [his] life," C.C. responded: "A hundred, 200" times.[35] He admitted that each time, he had been "physically taken [away] by law enforcement [officers] for [at least] some period of time." Law enforcement officers had also been dispatched to C.C.'s home "quite a few times," i.e., "more than [he] c[ould] count on [his] fingers." And he admitted that he was previously a member of the "Dead Men."[36] Finally, C.C. noted that he was incarcerated at the time of G.P.'s birth.

Further, C.C. noted that when he had previously become angry, his usual response was to engage physically with other people. For instance, when G.P. was eight years old, he "almost killed" a man in her presence by "almost" beating him "to death." And on December 31, 2014, he engaged in a physical fight with the son of his ex-girlfriend, Meguess. This scared G.P. "out of [her] mind," and law enforcement officers were dispatched to his home. Although C.C. was not arrested

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34 The trial court admitted evidence of C.C.'s criminal record, revealing that on August 13, 2010, he was convicted of committing the offense of possession of marijuana and sentenced to ten days confinement. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.121(a), (b)(1) (Vernon 2010) (misdemeanor offense).

35 C.C. had been "in and out with the police" since he was thirteen years old.

36 C.C. characterized the "Dead Men" as a "motorcycle club," but he admitted that some of its members had engaged in criminal activity.

at the time, he was "blood[ied]" as a result of the fight. When asked "[h]ow many physical fights or . . . altercations" he had been involved in, C.C. stated:

> When I was hanging out with the hippies down at the Mansfield Dam in Austin, you know, got into a couple of scuffles with some hippies. You know, a couple of family violences. Making noise -- working in my -- in the garage or in my shed and -- all hours of the night, neighbors come out and want to yell at me . . . .

And "[a] lot of people" consider him to be "intimidating."

At the time of his testimony, C.C. had been living in the Galveston County Jail for more than eleven months while awaiting trial for the offenses of indecency with a child[37] and injury to a child,[38] both related to incidents involving G.P.[39] He did deny "molest[ing]" and "injur[ing]" G.P., but stated that he wanted DFPS to continue to care for G.P. until the resolution of his pending criminal charges because he did not have any "other options."

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37 *See* TEX. PENAL CODE ANN. § 21.11(a)(1), (d) (second-degree felony offense); *see also id.* § 12.33(a)–(b) (Vernon 2011) (second-degree felony offense "punished by imprisonment in the Texas Department of Criminal Justice for any term of not more than 20 years or less than 2 years" and "a fine not to exceed $10,000").

38 *See id.* § 22.04(a)(3), (f) (Vernon Supp. 2016) (third-degree felony offense); *see also id.* § 12.34(a)–(b) (Vernon 2011) (third-degree felony offense "punished by imprisonment in the Texas Department of Criminal Justice for any term of not more than 10 years or less than 2 years" and "a fine not to exceed $10,000").

39 The trial court admitted into evidence the indictments for the offenses of (1) indecency with a child, alleging that C.C. "with the intent to arouse or gratify the sexual desire of [himself], intentionally or knowingly engage[d] in sexual contact with [G.P.] by touching the genitals of [G.P.], a child younger than 17 years of age," and (2) injury to a child, alleging that C.C. "intentionally or knowingly cause[d] bodily injury to [G.P.], a child 14 years or younger, by hitting [her] [o]n the head." *See id.* §§ 21.11(a)(1), 22.04(a)(3).

In regard to his use of narcotics, C.C. admitted to smoking marijuana and that he had not hidden his marijuana use from G.P. When asked whether he had smoked marijuana in G.P.'s presence, he admitted to having done so while she was outside the home playing. When G.P. was inside the home, C.C. would go outside to smoke his marijuana. He also admitted to smoking marijuana in front of Myers and that he had smoked marijuana *with* Myers while she had lived with him.

C.C. further testified that at the time that DFPS obtained custody of G.P., he and G.P. had been living for about six months in a "5th wheel" trailer. Reames and her son had been staying in the home with them for only a few days. And the new living arrangement was "something that [they] were going to try out." C.C. had not met Reames before she moved into his home, and he was unaware of Reames's criminal history. The trailer, in which all four lived, had three beds and only one enclosed bedroom, and it was about "80 [to] 83-foot" in size. Reames slept in the same bed as G.P.

Prior to living in the "5th wheel" trailer, C.C. and G.P., in 2014, had lived with his ex-girlfriend, Meguess, with a woman named "Pam" for "a couple of weeks," and with "Steve,"[40] whose home C.C. described as an "on-and-off

[40] C.C. did not know Steve's last name or his criminal history. David also lived with Steve at the time.

construction" site.[41] Also in 2014, C.C. and G.P. lived with Jason Armstrong for a few months and in Missouri. While in Missouri, C.C. and G.P. lived in an apartment with C.C.'s ex-wife until he frightened her and "[s]he put a protective order on [him]." Before living in that apartment, C.C. and G.P. lived with the son of his ex-wife, and they "camped out in Tent City" for a period of time.[42]

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41 The trial court admitted into evidence photographs of Steve's home, and C.C. conceded that it was not an appropriate place for G.P. to live. He also noted that while he and G.P. were living with Steve, law enforcement officers had been dispatched to the home regarding an assault.

GCSO Officer K. Freeman testified that she was dispatched to Steve's home after a physical altercation between Steve and David. Freeman noted that the home consisted of "several structures on the property. There was a main structure. . . . And then there were several structures that were on the property that were also utilized by other tenants as their dwelling." The condition of the home was "deplorable," and it was "very unsafe to walk around." Freeman observed "holes" in the floor and "[e]xposed metal" underneath her feet. Freeman explained:

> There were areas -- especially in the backyard -- that looked like they were -- whatever they could find to cover up a hole or some kind of safety concern. They would stack plywood, plastic, chicken wire; and you could see at some point, people were falling through the floor or -- there were issues with the floor. . . . There w[as] -- a lot of junk on the side of the house leading back towards those other enclosed areas or other building[s]. . . . [T]here was a wire mattress or box spring that was on the side of the house. Inside the main structure, there was plywood . . . on top of plywood . . . pretty much everywhere in the house. . . . [T]here was dirt everywhere. There was trash everywhere. It was . . . not clean.

If Freeman had known at the time that a child was living at the home, she would have called DFPS because of the condition of the property.

42 C.C. also noted that in November 2010, when he and G.P. were renting a room in a trailer, he had to call for emergency assistance because the owner of the trailer "pulled a gun" on him and G.P. while they were in the bedroom of the trailer. After they arrived, law enforcement officers "kicked" him and G.P. out of the trailer while

In regard to the individuals who had previously cared for G.P., C.C. noted that he was not always at home when G.P. returned from school, and he had had "quite a few" people watching her, including: Carly Berkemeier, a temporary live-in babysitter, who stole his truck and his tools; "Pam"; "Sherry"; "Hope"; "Cindy"; "Becky"; "Ms. Barbara"; "Melinda"; Sherry Johnson; "Scary Sherry," a member of the "Dead Men"; Steve; and Meguess. C.C. described "Pam, Sherry, Cindy, Becky, and Barbara" as "party girls," stating that "they liked to drink" and he "couldn't trust them [to care for G.P.] for long periods of time." With only a few exceptions, C.C. could not identify the last names of G.P.'s babysitters, and he noted that he found individuals to care for G.P. through his "biker club."

C.C. admitted that David, whom he had allowed to live with him and watch G.P. for a period of time, had been convicted of committing the offense of indecency with G.P. as the complainant. He explained that he was not aware that David, who had watched G.P. for a period of nine months, had a history as a "previous sex offender." C.C. noted that he had David watch G.P. because C.C. was working in the Woodlands "all night." And when G.P. called for emergency assistance in regard to the sexual offense, law enforcement officers stayed with her while attempting to

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it was "pouring down rain," and he had to walk a mile and a half to Armstrong's house.

contact C.C. for about "five to six hours" before he returned home.[43] Later, while C.C. was confined in the Galveston County Jail, he tried to "hunt[] . . . down" David, who was also incarcerated, and "kill him." C.C. explained that after the sexual offense, G.P. "changed" in "some ways" and developed anger issues.

In regard to his employment status prior to his confinement, C.C. explained that although he had not had one steady employer, he had worked in construction his entire life. Most recently, he had worked in the Woodlands as a subcontractor at a Nestlé's Tollhouse Coffee Shop. The job required him to work at night, it lasted for about three months, and he was paid about $9,000. C.C. had previously earned about $10,000 for working during the day at a residential house for about four or five months. In 2014, he earned $12 per hour working for a general contractor "on and off." C.C. had also worked as a subcontractor for American Drywall, and at times he had worked "odd jobs," i.e., "mowing grass, fixing cabinets here and there," and "work[ing] in flowerbeds." At some point, he worked "day and night" on a bank in Atascocita, and he "didn't [go] home for three days." C.C. was typically paid for his work "in cash," and he did not believe that he should be required to pay taxes.

Sufficiency of the Evidence

In his third issue, C.C. argues that the trial court erred in terminating his parental rights to G.P. because the evidence is legally and factually insufficient to

[43] C.C. explained that his cellular telephone did not ring at the time.

support the jury's findings that he engaged, or knowingly placed G.P. with persons who engaged, in conduct that endangered her physical or emotional well-being and termination of the parent-child relationship was in G.P.'s best interest.[44] *See* TEX. FAM. CODE ANN. §§ 161.001(b)(1)(E), (b)(2) (Vernon Supp. 2016).

A parent's right to "the companionship, care, custody, and management" of his child is a constitutional interest "far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758–59, 102 S. Ct. 1388, 1397 (1982) (internal quotations omitted). The United States Supreme Court has emphasized that "the interest of [a] parent[] in the care, custody, and control of [his] child[] . . . is perhaps the oldest of the fundamental liberty interests recognized by th[e] Court." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060 (2000). Likewise, the Texas Supreme Court has concluded that "[t]his natural parental right" is "essential," "a basic civil right of man," and "far more precious than property rights." *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) (internal quotations omitted). Consequently, "[w]e strictly construe involuntary termination statutes in favor of the parent." *In re E.N.C.*, 384 S.W.3d 796, 802 (Tex. 2012).

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[44] Because of our disposition of this portion of C.C.'s third issue, we need not address C.C.'s additional legal and factual sufficiency arguments concerning the jury's findings under Family Code sections 161.001(b)(1)(D), (O), and (P). *See* TEX. R. APP. P. 47.1; *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003); *Walker v. Tex. Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 618 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

Because termination of parental rights "is complete, final, irrevocable and divests for all time that natural right . . . , the evidence in support of termination must be clear and convincing before a court may involuntarily terminate a parent's rights." *Holick*, 685 S.W.2d at 20. Clear and convincing evidence is "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 2014); *see also In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002). Because the standard of proof is "clear and convincing," the Texas Supreme Court has held that the traditional legal and factual standards of review are inadequate. *In re J.F.C.*, 96 S.W.3d at 264–68.

In 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 DFPS bore the burden of proof. *Id.* In viewing the evidence in the light most favorable to the finding, we "must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so," and we "should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (internal quotations omitted). However, this does not mean that we must disregard all evidence that does not support the

finding. *In re J.F.C.*, 96 S.W.3d at 266. Because of the heightened standard, we must also be mindful of any undisputed evidence contrary to the finding and consider that evidence in our analysis. *Id.* If we determine that no reasonable trier of fact could form a firm belief or conviction that the matter that must be proven is true, we must hold the evidence to be legally insufficient and render judgment in favor of the parent. *Id.*

In conducting a factual-sufficiency review in a termination-of-parental-rights case, we must determine whether, considering the entire record, including evidence both supporting and contradicting the finding, a fact finder reasonably could have formed a firm conviction or belief about the truth of the matter on which DFPS bore the burden of proof. *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. *In re J.F.C.*, 96 S.W.3d at 266–67. "If, in light of the entire record, the disputed evidence that a reasonable factfinder 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." *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (internal quotations omitted).

In order to terminate the parent-child relationship under Family Code section 161.001, DFPS must establish, by clear and convincing evidence, one or more of the

acts or omissions enumerated under Texas Family Code section 161.001(b)(1) and that termination is in the best interest of the child. *See* TEX. FAM. CODE ANN. § 161.001(b). 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. *Id.*; *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). Notably though, "[o]nly one predicate finding under section 161.001[(b)(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).

Endangering Conduct

C.C. argues that the evidence is legally and factually insufficient to support termination of his parental rights to G.P. under section 161.001(b)(1)(E) because he engaged in "assaultive conduct" prior to obtaining custody of G.P. and had not repeated the conduct; any "assaultive conduct" that he had engaged in after obtaining custody of G.P. was "a result of self-defense, either of himself or G.P."; he did not know about David's criminal history; and although a grand jury had indicted him for the offenses of indecency with a child and injury to a child, he had "denied those accusations."

A trial court may order termination of the parent-child relationship if it finds by clear and convincing evidence that the parent 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." TEX. FAM. CODE ANN. § 161.001(b)(1)(E). Within the context of subsection E, endangerment encompasses "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. Instead, endanger means to expose the child to loss or injury or to jeopardize her emotional or physical health. *Id.*; *Walker v. Tex. Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 616–17 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

It is not necessary to establish that a parent intended to endanger his child in order to support termination of the parent-child relationship. *See In re M.C.*, 917 S.W.2d 268, 270 (Tex. 1996). However, termination under subsection E requires "more than a single act or omission; a voluntary, deliberate, and conscious course of conduct by the parent is required." *In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.); *see also In re J.W.*, 152 S.W.3d 200, 205 (Tex. App.—Dallas 2004, pet. denied). The specific danger to the child's well-being may be inferred from parental misconduct standing alone, even if the conduct is not directed at the child and she suffered no actual injury. *See Boyd*, 727 S.W.2d at 533; *In re R.W.*, 129 S.W.3d 732, 738 (Tex. App.—Fort Worth 2004, pet. denied). And courts may consider parental conduct that did not occur in the child's presence, including conduct before the child's birth or after she was removed from a parent's care by

DFPS. *In re A.A.M.*, 464 S.W.3d 421, 426 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *Walker*, 312 S.W.3d at 617.

Here, DFPS obtained custody of G.P. because of an allegation that C.C. had "struck" her on the head. And McCarty testified that in April 2015, G.P. told her that C.C. had hit her on the head while they were in his car. Deputy Bouse similarly testified that on April 11, 2015, G.P. told her that after she had gone to a baseball game with a family friend, and after C.C. had come to pick her up, he "struck her [o]n the head" with his "open hand." G.P. stated that "she had a knot on her head" as a result, and when Bouse felt G.P.'s head, she found "a raised portion" about the size of "half" of "a boiled egg." Although G.P. could not tell Bouse exactly how many times that C.C. had hit her, she stated that it was "a lot."

In the CAC's videotaped forensic interview, G.P. stated that in 2015, about a week after Easter, C.C. had hit her after he had picked her up from a baseball game. As C.C. and G.P. were driving home, C.C. started hitting her on the head with his open hands. G.P. indicated that he had hit her on the right-side of her head, toward the back. G.P.'s head "hurt" afterwards, and she had three "knot[s]" or "bump[s]" on her head as a result. G.P. also noted that C.C. had hit her "once or twice" before and she was afraid of him.

At trial, C.C. readily admitted to yelling at and "slapp[ing]" G.P. after he had picked her up from the baseball game.[45] And he demonstrated that he had hit G.P. "multiple times on both sides of [her] head with his hand." C.C. opined that "slapping" G.P. several times was appropriate punishment, and he noted that he had previously disciplined her by using corporal punishment.

Direct physical abuse is clearly conduct that endangers a child. *See In re I.J.A.*, No. 04-09-00787-CV, 2010 WL 2403728, at *4 (Tex. App.—San Antonio June 16, 2010, no pet.) (mem. op.) ("The evidence of direct physical abuse would be sufficient to support the trial court's finding that [the mother] engaged in conduct that endangered the children's physical or emotional well-being."); *In re L.E.M.*, No. 02-11-00505-CV, 2012 WL 4936607, at *14 (Tex. App.—Fort Worth Oct. 18, 2012, no pet.) (mem. op.) (children's statements of physical abuse by parents sufficient to support endangerment finding); *In re J.C.*, 151 S.W.3d 284, 288–89 (Tex. App.—Texarkana 2004, no pet.) (evidence of direct physical abuse of child by parent).

Additionally, Myers, C.C.'s other daughter, testified that while she and G.P. lived with C.C., Myers and C.C. would physically fight each other. C.C. would hit Myers with an "open hand" or "take his belt off and whoop [her] with it." C.C.

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[45] Further, during his consensual, noncustodial videotaped interview with Sergeant Balchunas, C.C. admitted to striking G.P. on her head, and he stated that he had done so to "get her attention." Balchunas opined that G.P. was not remorseful about his actions, and by striking G.P. on her head, C.C. had engaged in conduct constituting "more than corporal punishment."

would also push Myers and "wrestle" her. Their altercations occurred about every three days, with Myers sustaining bruises as a result. Myers also noted that during the time that she lived with C.C., she felt that her "physical safety and well-being w[ere] in jeopardy." Notably, a parent's abuse of another child is conduct that supports a finding of endangerment. *See In re I.G.*, 383 S.W.3d 763, 770 (Tex. App.—Amarillo 2012, no pet.); *Jordan v. Dossey*, 325 S.W.3d 700, 724 (Tex. App.—Houston [1st Dist.] 2010, pet. denied); *see also In re N.R.*, 101 S.W.3d 771, 777 (Tex. App.—Texarkana 2003, no pet.) (father's other daughter testified about physical abuse inflicted upon her).

Further, there is ample evidence in the record concerning C.C.'s overall propensity for violence. On the same day that C.C. hit G.P., Deputy Scarbrough was dispatched to C.C.'s home because of a dispute between C.C. and Reames. Scarbrough testified that C.C. was "very angry" and "yelling," and he noted that Reames told him that C.C. had "threatened" to "kick her ass" while holding a pipe in his hand. Scarbrough arrested C.C. for "assault by threat."[46]

Myers also testified that she had witnessed an altercation between C.C. and G.P.'s mother. She saw C.C. "smack[]" G.P.'s mother "pretty hard" after she had "busted" his lip. And Myers noted that C.C. had told her that when her mother was

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[46] *See* TEX. PENAL CODE ANN. § 22.01(a)(2) (misdemeanor offense). Other witnesses, including C.C., testified that he was arrested for making a "terroristic threat." *See id.* § 22.07(a)(2), (c) (misdemeanor offense).

pregnant with her, he had "punched her [mother] in the stomach a couple of times" in the hopes that she would have a miscarriage.

Moreover, DFPS caseworker Banks testified that in December 2015, while she visited C.C. at the Galveston County Jail, he told her that he had "choked out his [previous] CPS caseworker in court and [he] was not afraid to do it again." And Banks noted that DFPS was seeking termination of the parent-child relationship in part because G.P. feared C.C. and he had an "extensive history of family violence as a perpetrator."

Further, C.C. admitted that he had been arrested for making a "terroristic threat"[47] and committing a "verbal assault" prior to DFPS obtaining custody of G.P. in April 2015. In regard to his arrest for making a "terroristic threat," C.C. explained that he and Reames had a verbal altercation while he held "truck parts in [his] hand." And he told Reames that he would "whoop her ass." He subsequently told Reames that if she did not "tell the truth" in the instant case, he would "whoop[]" "her ass . . . when [he] g[ot] out" of jail.

C.C. also admitted that in 2003, he was convicted of committing the offense of "assault causing bodily injury" against a woman with whom he was in a relationship.[48] He was arrested at a bar for the offense of "assault causing bodily

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47 *See id.* § 22.07(a)(2), (c) (misdemeanor offense).

48 C.C.'s criminal record reveals that on March 17, 2003, he was convicted of committing the offense of assault-family violence and sentenced to seventy days

injury" while carrying "drug paraphernalia."[49] In 2004, C.C. was convicted of committing the offense of "assault causing bodily injury" against G.P.'s mother.[50] And both G.P.'s mother and C.C.'s ex-wife had previously obtained "protective order[s]" against him.[51]

Further, C.C. testified that when he had previously become angry, his usual response was to engage physically with other people. For instance, when G.P. was eight years old, he "almost killed" a man in her presence by "almost" beating him "to death." And on December 31, 2014, he engaged in a physical fight with the son of his ex-girlfriend, Meguess. This scared G.P. "out of [her] mind," and law enforcement officers were dispatched to his home. When asked "[h]ow many physical fights or . . . altercations" he had been in, C.C. stated:

> When I was hanging out with the hippies down at the Mansfield Dam in Austin, you know, got into a couple of scuffles with some hippies. You know, a couple of family violences. Making noise -- working in my -- in the garage or in my shed and -- all hours of the night, neighbors come out and want to yell at me . . . .

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confinement. *See id.* § 22.01(a) (misdemeanor offense); *see also* TEX. FAM. CODE ANN. § 71.004(1) (family violence).

49 *See* TEX. PENAL CODE ANN. § 22.01(a) (misdemeanor offense).

50 *See id.*

51 C.C. noted that his ex-wife "put a protective order on [him]" after he had frightened her.

And "[a] lot of people" consider him to be "intimidating." Finally, C.C. testified that while confined in the Galveston County Jail, he had been trying to "hunt[] . . . down" David, who was also incarcerated, to "kill him."

A parent's abusive or violent conduct can produce an environment that endangers a child's well-being. *In re J.I.T.P.*, 99 S.W.3d 841, 845 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *In re B.R.*, 822 S.W.2d 103, 106 (Tex. App.—Tyler 1991, writ denied); *see also Walker*, 312 S.W.3d at 617 ("[V]iolent criminal conduct by a parent can . . . endanger[] the well-being of a child."). And domestic violence, want of self-control, and a propensity for violence may all be considered as evidence of endangerment. *In re J.I.T.P.*, 99 S.W.3d at 845; *In re B.J.B.*, 546 S.W.2d 674, 677 (Tex. App.—Texarkana 1977, writ ref'd n.r.e.) (considering father's lack of self-control and propensity for violence and aggression); *see also In re L.E.S.*, 471 S.W.3d 915, 923–24 (Tex. App.—Texarkana 2015, no pet.) (fact finder could consider history of abuse between mother and father). Further, evidence that a parent has engaged in abusive or violent conduct in the past permits an inference that he will continue his violent behavior in the future. *Jordan*, 325 S.W.3d at 724; *see also Schaban-Maurer v. Maurer-Schaban*, 238 S.W.3d 815, 824 (Tex. App.—Fort Worth 2007, no pet.) ("[T]rial courts [have] relied on evidence of past violence as an indicator of future behavior in parental termination and child custody cases.").

We further note that the use of illegal narcotics and its effect on an individual's ability to parent may constitute an endangering course of conduct. *In re J.O.A.*, 283 S.W.3d 336, 345–46 (Tex. 2009); *In re A.A.M.*, 464 S.W.3d at 426–27. Illegal narcotics use creates the possibility that a parent will be impaired or imprisoned, and thus, incapable of parenting, thereby supporting termination of parental rights. *In re A.A.M.*, 464 S.W.3d at 426; *Walker*, 312 S.W.3d at 617–18; *see also In re M.R.R.*, No. 10-15-00303-CV, 2016 WL 192583, at *5 (Tex. App.—Waco Jan. 14, 2016, no pet.) (mem. op.) ("A parent's continued drug use demonstrates an inability to provide for the child's emotional and physical needs and to provide a stable environment for the child.").

Wiseburn testified that when DFPS officials initially spoke with G.P., she reported narcotics use by C.C. And during the CAC's videotaped forensic interview, G.P. noted that C.C. stored his marijuana, which he kept in either a "baggie" or a "pipe," in certain cabinets in the home. He smoked his marijuana "like a cigarette," or with the pipe, "almost anywhere," including in front of G.P. G.P. also reported that "some of [C.C.'s] friends" smoked marijuana at his home.

Myers testified that she had seen C.C. smoke marijuana when she had lived with him. And he had allowed her, when she was sixteen years old, to smoke marijuana *with* him. Further, Sergeant Balchunas testified that McNemar, Reames's son who had lived with C.C. and G.P. for a period of time, told him that C.C. would

often return home at "odd hours." And on occasion, C.C. would, after being outside in his car, come back inside the home, "appear[ing] to be under the influence of something," possibly methamphetamine. C.C. had also admitted to McNemar that he would "do[] some slinging," meaning that he "participat[ed] in narcotics."

Moreover, C.C. admitted to smoking marijuana and that he had not hidden it from G.P. C.C. also admitted to smoking marijuana while G.P. was outside the home playing, smoking marijuana in front of Myers, and smoking marijuana *with* Myers when she was sixteen years old.[52]

Here, the jury could have reasonably found that C.C.'s continued narcotics use and admitted past narcotics use *with* his then sixteen-year-old daughter constituted a continuing course of conduct that subjected G.P. to a life of uncertainty and instability endangering her physical and emotional well-being. *See In re A.A.M.*, 464 S.W.3d at 426–27 ("[T]he trial court reasonably could have concluded that the [parent's] continued pattern of drug use, even after [DFPS]'s involvement, displayed a voluntary, deliberate, continued, and conscious course of endangering conduct . . . ."); *Walker*, 312 S.W.3d at 617–18 ("Evidence of narcotics use and its

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[52] C.C.'s criminal record reveals that on August 13, 2010, he was convicted of committing the offense of possession of marijuana and sentenced to ten days confinement. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.121(a), (b)(1) (misdemeanor offense).

effect on a parent's life and ability to parent may establish that the parent has engaged in an endangering course of conduct.").

Additionally, we note that "[a]s a general rule, conduct that subjects a child to a life of uncertainty and instability endangers the physical and emotional well-being of [that] child." *In re R.W.*, 129 S.W.3d at 739. And "evidence of criminal conduct, convictions, or imprisonment is relevant to a review of whether a parent engaged in a course of conduct that endangered the well-being of [a] child." *In re S.R.*, 452 S.W.3d 351, 360–61 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *see also In re A.A.M.*, 464 S.W.3d at 426–27 (criminal offenses "significantly harm the parenting relationship" and "can constitute endangerment even if the criminal conduct transpires outside the child's presence"). Although incarceration alone will not support termination of parental rights, evidence of criminal conduct, convictions, and imprisonment may support a finding of endangerment. *In re T.M.*, No. 14-14-00948-CV, 2015 WL 1778949, at *4 (Tex. App.—Houston [14th Dist.] Apr. 16, 2015, no pet.) (mem. op.); *see also In re A.A.M.*, 464 S.W.3d at 426–27 (recognizing parent's imprisonment demonstrated deliberate course of conduct qualifying as endangering conduct). If the imprisonment of the parent reflects a voluntary, deliberate, and conscious course of conduct, it qualifies as conduct that endangers the child. *See Walker*, 312 S.W.3d at 617; *see also In re S.D.*, 980 S.W.2d 758, 763 (Tex. App.—San Antonio 1998, pet. denied) ("An environment which

routinely subjects a child to the probability that she will be left alone because her parents are once again jailed . . . endangers both the physical and emotional well-being of a child.").

In regard to his criminal history, C.C., as previously noted, testified that on multiple occasions he had been convicted of, or arrested for, committing the offenses of "assault causing bodily injury"[53] and possession of marijuana.[54] C.C. also was incarcerated for two years after he was convicted of committing the offense of unauthorized use of a motor vehicle.[55] Further, at some point, C.C. was convicted of committing the offense of criminal mischief.[56] And he was incarcerated at the time of G.P.'s birth.

When asked how many times had he been "arrested in [his] life," C.C. responded: "A hundred, 200" times. He admitted that each time, he had been "physically taken [away] by law enforcement [officers] for [at least] some period of

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53 C.C.'s criminal record reveals that on March 17, 2003, he was convicted of committing the offense of assault-family violence and sentenced to seventy days confinement. *See* TEX. PENAL CODE ANN. § 22.01(a) (misdemeanor offense); *see also* TEX. FAM. CODE ANN. § 71.004(1) (family violence).

54 C.C.'s criminal record reveals that on August 13, 2010, he was convicted of committing the offense of possession of marijuana and sentenced to ten days confinement. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.121(a), (b)(1) (misdemeanor offense).

55 *See* TEX. PENAL CODE ANN. § 31.07(a)–(b) (state-jail felony offense). Although C.C. was convicted of committing the offense of unauthorized use of a motor vehicle, he stated that he had actually been "stealing cars."

56 *See id.* § 28.03(a).

time." In fact, on the day that DFPS obtained custody of G.P., C.C. was arrested for making a "terroristic threat."[57]

According to C.C., he had been "in and out with the police" since he was thirteen years old. Law enforcement officers had been dispatched to his home "quite a few times," i.e., "more than [he] c[ould] count on [his] fingers." And at the time of trial, C.C. was under indictment for the offenses of indecency with a child and injury to a child,[58] and he had been confined in the Galveston County Jail for more than eleven months.[59] *See Walker*, 312 S.W.3d at 617 ("Conduct that routinely subjects a child to the probability that the child will be left alone because a parent is jailed endangers both the physical and emotional well-being of the child."); *In re S.M.L.*, 171 S.W.3d 472, 479 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (incarcerated parent's absence from child's daily life and inability to support child

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57 *See id.* § 22.07(a)(2), (c) (misdemeanor offense). Although C.C. testified that he was arrested for making a "terroristic threat," Deputy Scarbrough testified that he arrested C.C. for "assault by threat." *See id.* § 22.01(a)(2). Scarbrough also noted that on the day that he was dispatched to C.C.'s home, C.C. was returning to the home after having been in jail.

58 The two indictments admitted into evidence alleged that (1) C.C. "with the intent to arouse or gratify the sexual desire of [himself], intentionally or knowingly engage[d] in sexual contact with [G.P.] by touching the genitals of [G.P.], a child younger than 17 years of age," and (2) C.C. "intentionally or knowingly cause[d] bodily injury to [G.P.], a child 14 years or younger, by hitting [her] [o]n the head." *See id.* §§ 21.11(a)(1) (second-degree felony offense), 22.04(a)(3) (third-degree felony offense).

59 Banks testified that C.C. had been confined in the Galveston County Jail since approximately May 2015.

contribute to course of endangering conduct and parent's repeated commission of criminal acts subjecting him to possibility of incarceration negatively impact child's emotional well-being); *see also In re T.G.R.-M.*, 404 S.W.3d 7, 14–15 (Tex. App.—Houston [1st Dist.] 2013, no pet.) ("Although charges stemming from the[] two arrests were ultimately dismissed, each time the mother was jailed, she was absent from [child]'s life and was not able to provide for [child]'s physical and emotional needs.").

Although C.C. asserts that the "assaultive conduct" in which he has engaged occurred prior to him obtaining custody of G.P., or prior to her birth, "courts look to what [a] parent did both before and after the child's birth to determine whether termination [of parental rights] is necessary." *In re D.M.*, 58 S.W.3d 801, 812 (Tex. App.—Fort Worth 2001, no pet.); *see also Walker*, 312 S.W.3d at 617 (offenses occurring before child born still considered as part of voluntary, deliberate, and conscious course of conduct having effect of endangering child); *In re M.R.J.M.*, 280 S.W.3d 494, 502 (Tex. App.—Fort Worth 2009, no pet.) (fact finder "may infer from past conduct . . . that similar conduct will recur"). And the record stands contrary to C.C.'s assertion that his "assaultive conduct" had not been repeated.

Further, to the extent that C.C. asserts that any "assaultive conduct" in which he has engaged after obtaining custody of G.P. was the "result of self-defense, either of himself or G.P.," we note that the jury, as the fact finder, is the sole arbiter in

"assessing the credibility and demeanor of [the] witnesses" and was free to disregard C.C.'s testimony on such issues as self-defense. *In re H.R.M.*, 209 S.W.3d at 109 (internal quotations omitted); *see also In re A.B.*, 437 S.W.3d 498, 503 (Tex. 2014) (fact finder had "full opportunity to observe witness testimony first-hand" and was "sole arbiter when assessing the credibility and demeanor of witnesses"); *In re J.H.*, No. 2-09-367-CV, 2010 WL 3618712, at *11 (Tex. App.—Fort Worth Sept. 16, 2010, no pet.) (mem. op.) (jury free to disbelieve parent's "self-defense testimony"). And whether C.C. acted in "self-defense" when he engaged in any "assaultive conduct" is not determinative of the endangerment issue. *See In re M.R.J.M.*, 280 S.W.3d at 501–05 (evidence sufficient to support endangerment finding despite father's contention he hit mother in self-defense); *see also In re M.R.G.L.*, No. 13-13-00392-CV, 2014 WL 70618, at *4–5 (Tex. App.—Corpus Christi Jan. 9, 2014, no pet.) (mem. op.) (evidence sufficient regarding endangerment where mother "stabbed" father in self-defense); *In re K.A.F.*, No. 05-12-01582-CV, 2013 WL 3024864, at *6, *9–12 (Tex. App.—Dallas June 14, 2013, no pet.) (mem. op.) (evidence sufficient to show mother engaged in endangering conduct despite her contention she "cut" father's neck in self-defense).

Additionally, although C.C. asserts that he, at trial, "denied th[e] accusations" of injury to a child and indecency with a child, he readily admitted to "slapp[ing]" G.P. several times on the head and demonstrated in court that he hit her "multiple

times on both sides of [her] head with his hand."[60] And although C.C. denied "molest[ing]" G.P., the jury, as the fact finder, was not required to accept his testimony and could have resolved any disputed evidence against him. *See In re H.R.M.*, 209 S.W.3d at 108; *In re G.M.G.*, 444 S.W.3d 46, 60 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (fact finder "free to make its own credibility assessments, resolve conflicts in the testimony, and decide what weight to give the witnesses' testimony"); *see also In re I.A.M.*, No. 04-16-00095-CV, 2016 WL 4208126, at *6 (Tex. App.—San Antonio Aug. 10, 2016, no pet. h.) (mem. op.) (although father disputed abuse allegations, fact finder not required to accept his testimony); *In re A.B.*, 412 S.W.3d 588, 600 (Tex. App.—Fort Worth 2013) (fact finder "free to disregard [f]ather's testimony and [m]other's report to the hospital"), *aff'd*, 437 S.W.3d 498 (Tex. 2014).

Viewing the evidence in the light most favorable to the jury's finding, we conclude that the jury could have formed a firm belief or conviction that C.C. engaged, or knowingly placed G.P. with persons who engaged, in conduct that endangered her physical and emotional well-being. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E). And, viewing the evidence in a neutral light, we conclude that

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60 *See id.* § 22.04(a)(3) ("[A] person commits [the] offense [of injury to a child] if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child . . . bodily injury."); *see also id.* § 1.07(a)(8) (Vernon Supp. 2016) (defining "[b]odily injury" (internal quotations omitted)).

a reasonable fact finder could have formed a firm belief or conviction that C.C. engaged, or knowingly placed G.P. with persons who engaged, in conduct that endangered her physical and emotional well-being. *See id.*; *cf. Walker*, 312 S.W.3d at 616–18.

Accordingly, we hold that the evidence is legally and factually sufficient to support the jury's finding that C.C. engaged, or knowingly placed G.P. with persons who engaged, in conduct that endangered her physical or emotional well-being. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E).

Best Interest of Child

C.C. also argues that the evidence is legally and factually insufficient to support the jury's finding that termination of his parental rights was in G.P.'s best interest because he does not have "an 'extensive' history as a perpetrator of family violence," he did not "endanger[] G.P. by leaving her with babysitters," he only exposed G.P. to his marijuana use, G.P.'s "living arrangements" with her foster parents are only temporary, and G.P. "didn't really get into specifics as to why" she did not want to return to C.C.'s home.

In determining whether the termination of C.C.'s parental rights is in G.P.'s best interest, we may consider several factors, including: (1) the child's desires; (2) the current and future physical and emotional needs of the child; (3) the current and future physical danger to the child; (4) the parental abilities of the parties seeking

custody; (5) whether programs are available to assist those parties; (6) plans for the child by the parties seeking custody; (7) the stability of the proposed placement; (8) the parent's acts or omissions that may indicate that the parent-child relationship is not proper; and (9) any excuse for the parent's acts or omissions. *See Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976); *In re L.M.*, 104 S.W.3d 642, 647 (Tex. App.—Houston [1st Dist.] 2003, no pet.). The *Holley* factors are not exhaustive, and there is no requirement that DFPS prove all factors as a condition precedent to the termination of parental rights. *See In re C.H.*, 89 S.W.3d at 27.

In regard to G.P.'s desires, she, in the CAC's videotaped forensic interview, disclosed that she was afraid of C.C. and did not want to see him again. She also stated: "My dad is a bad person. A really bad person." And while crying, she asked McCarty, the interviewer, whether she ever had to see C.C. again. Further, G.P. noted that she had previously told people that she was "happy" when C.C. had been incarcerated in the past.

DFPS caseworker Banks similarly testified that G.P. was afraid of C.C. And McCarty noted that G.P. told her that C.C. was a "bad person," she was afraid of him, she was glad that he had been incarcerated, and she did not want to see him again. *See C.H. v. Dep't of Family & Protective Servs.*, Nos. 01-11-00385-CV, 01-11-00454-CV, 01-11-00455-CV, 2012 WL 586972, at *9 (Tex. App.—Houston [1st Dist.] Feb. 23, 2012, pet. denied) (mem. op.) (children expressed fear of mother

and desire not to return to her); *In re C.M.C.*, 273 S.W.3d 862, 876 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (child afraid of mother, hated her, and did not want to return to live with her).

In regard to G.P.'s current and future physical and emotional needs, Banks testified that G.P. has a speech impairment and she had not seen any documentation indicating that G.P. had received speech therapy or "Early Childhood Intervention" while living with C.C. Currently, G.P. is in individual therapy and completes voice exercise with her foster parents. Banks also opined that G.P. "deserve[d] to live in a home where she [would be] nurtured, a home where there's caring and stability," without fear. G.P. is "happy" with her foster parents, has made friends, attends slumber parties and school lock-ins, and goes roller skating. She is "coming into her own person" and "starting not to be scared anymore." *See* TEX. FAM. CODE ANN. § 263.307(b)(5) (Vernon Supp. 2016) (considering whether "child is fearful of living in or returning to [her] home"); *In re K.C.*, 219 S.W.3d 924, 931 (Tex. App.—Dallas 2007, no pet.) (child's need for stable, permanent home paramount consideration in best interest determination); *Adams v. Tex. Dep't of Family & Protective Servs.*, 236 S.W.3d 271, 280 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (relying on evidence "it would be in the children's best interest to be raised in a consistent, stable, and nurturing environment" and noting "[b]oth children have unique emotional issues"); *see also In re A.M.*, 495 S.W.3d 573, 2016 WL 4055030, at *6

(Tex. App.—Houston [1st Dist.] July 28, 2016, pet. filed) (foster parents provided stable home where children received counseling and thriving).

Banks further testified that C.C. has an "extensive history of family violence as a perpetrator," "continu[ously] . . . put [G.P.] in danger by leaving her with whoever he want[ed] to whenever he fe[lt] like it," and did not have "any protective capacities." And by leaving G.P. with "whoever he want[ed] to leave her with," including individuals whose last names he did not know, C.C. had "subjected [G.P.] to sexual abuse and [narcotics] use" and "exposed her to drug paraphernalia." C.C. even admitted that since the sexual offense that occurred in January 2015 and involved David as the defendant, G.P. had "changed" in "some ways" and developed anger issues. *Adams*, 236 S.W.3d at 280 (parent's history of failing to provide children with stable and nurturing environment demonstrates termination of parental rights in best interest of children); *see also In re B.J.*, No. 01-15-00886-CV, 2016 WL 1389054, at *10–11 (Tex. App.—Houston [1st Dist.] Apr. 7, 2016, no pet.) (mem. op.) (noting mother did not demonstrate she could provide safe and stable home).

In regard to the current and future physical danger to G.P., Wiseburn testified that DFPS obtained custody of G.P. based on an allegation that C.C. had "struck" G.P. on her head. When DFPS officials initially spoke with G.P., she stated that C.C. had hit her on her head while they were in his car. G.P. also reported narcotics

use by C.C. and the location in the home of the pipe that C.C. used to smoke marijuana.

In the CAC's videotaped forensic interview, G.P. stated that when she would get in trouble at home, C.C. would yell "fuck" and "shit" and call her a "slut." She had seen marijuana in C.C.'s home and noted that he stored his marijuana, which he kept in either a "baggie" or a "pipe," in certain cabinets in the home. And he smoked his marijuana "almost anywhere," including in front of her. C.C.'s friends had also come to his home to smoke marijuana. *See* TEX. FAM. CODE ANN. § 263.307(b)(8) (considering "history of substance abuse by the child's family"); *In re S.B.*, 207 S.W.3d 877, 887 (Tex. App.—Fort Worth 2006, no pet.) (parent's narcotics use considered in determining emotional and physical danger to children in present and future); *see also In re T.L.S.*, No. 01-12-00434-CV, 2012 WL 6213515, at *6 (Tex. App.—Houston [1st Dist.] Dec. 13, 2012, no pet.) (mem. op.) (considering parent's use of narcotics and refusal to take court-ordered narcotics test when analyzing present and future emotional and physical danger to children).

In regard to her allegation of physical abuse, G.P., in the CAC's videotaped forensic interview, stated that in 2015, about a week after Easter, C.C. had "hit" her after she had attended a baseball game with C.C.'s ex-girlfriend. After C.C. picked her up, he started hitting her on the head with his open hands. Although G.P. could not say how many times C.C. had hit her, she noted that she had three "knot[s]" or

"bump[s]" on her head and it "hurt" afterwards. G.P. also noted that C.C. had hit her "once or twice" before.[61] *See* TEX. FAM. CODE ANN. § 263.307(b)(3), (7), (12)(D), (E) (considering "magnitude, frequency, and circumstances of the harm to the child," "history of abusive or assaultive conduct by the child's family," ability to provide "a safe physical home environment," and "protection from repeated exposure to violence").

Further, G.P. disclosed that C.C. had also, while sleeping with her upstairs, touched her with his hand under her clothes. And G.P. stated that C.C. is "[a] really bad person," yells at her, and is "mean," and she did not want to see him again.

As previously noted, Banks testified that C.C. had an "extensive history of family violence as a perpetrator," had "continu[ously] . . . put [G.P.] in danger by leaving her with whoever he want[ed] to whenever he fe[lt] life it," and did not have "any protective capabilities." His previous actions had "subjected [G.P.] to sexual abuse and [narcotics] use" and "exposed her to drug paraphernalia." Banks also noted that the living conditions in C.C.'s home, prior to his confinement, were not safe for G.P. because of the amount of debris in the home, the actual state of the

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[61] Myers, C.C.'s other daughter, similarly testified that C.C. would hit her with an "open hand." He would also "take his belt off and whoop [her] with" it, physically fight with Myers, and push and "wrestle" her. Myers sustained bruises as a result of her altercations with C.C., and she felt that her "physical safety and well-being w[ere] in jeopardy" while she lived with C.C.

living quarters, the number of individuals living in the home, and the individuals who frequented the home.

Moreover, C.C.'s testimony reveals that he has a significant criminal history, a propensity for violence, and has engaged in a continuous use of narcotics. *See id.* § 263.307(b)(3), (7), (8), (12); *In re B.J.*, 2016 WL 1389054, at *11–12 (considering mother's criminal record and narcotics use in assessing "present and future emotional and physical danger to the children"); *In re T.L.S.*, 2012 WL 6213515, at *6 (parent's criminal history considered in determining "present and future emotional and physical danger to the children"); *In re A.M.*, 385 S.W.3d 74, 82 (Tex. App.—Waco 2012, pet. denied) ("[E]vidence of past misconduct or neglect can be used to measure a parent's future conduct.").

In regard to the living arrangements in his home, C.C. testified that at the time DFPS obtained custody of G.P., they were living with Reames and her son, whom they had just met, in a "5th wheel" trailer. The trailer, in which all four lived, had three beds, had only one enclosed bedroom, and was about "80 [to] 83-foot" in size. Reames slept in the same bed as G.P. Prior to living in the trailer, C.C.'s and G.P.'s home environment was unstable and chaotic, with the two of them living in at least seven different places and two different states during 2014. In fact, C.C. described one home in which he and G.P. lived as an "on-and-off construction" site. *See* TEX.

FAM. CODE ANN. § 263.307(b)(12)(D) (considering parent's ability to provide "a safe physical home environment").

Further, C.C. testified that he was not always home when G.P. returned from school, and he listed at least twelve different individuals as G.P.'s caretakers—some of whom he described as "party girls" who "liked to drink," and the majority of whom he could not identify their last names.[62] C.C. also admitted that G.P. was sexually abused by David, who had watched G.P. for a nine-month period and had lived with C.C. and G.P. for a period of time. *See id.* § 263.307(b)(3), (7), (12)(C), (D).

In regard to the programs available to assist C.C., Banks testified that although C.C. signed a FSP, he had not completed any of its requirements. *See In re J.-M.A.Y.*, Nos. 01-15-00469-CV, 01-15-00589-CV, 2015 WL 6755595, at *7 (Tex. App.—Houston [1st Dist.] Nov. 5, 2015, pet. abated) (mem. op.) ("[A] factfinder may infer from a parent's failure to take the initiative to complete the services required to regain possession of [his] child[] that []he does not have the ability to motivate [him]self to seek out available resources needed now or in the future."); *In re T.L.S.*, 2012 WL 6213515, at *7 (considering whether parent completed all services under FSP in determining best interest).

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62 Another temporary live-in babysitter stole C.C.'s truck and tools. And C.C. noted that he found individuals to care for G.P. through his "biker club."

In regard to the stability of C.C.'s home, we note that in addition to the above detailed evidence, C.C. testified that in 2010, when he and G.P. were renting a room in a trailer, he had to call for emergency assistance because the owner of the trailer "pulled a gun" on him and G.P. while they were in the bedroom of the trailer. In 2014, while in Missouri, C.C. and G.P. had lived in an apartment with C.C.'s ex-wife until he frightened her and "[s]he put a protective order on [him]." And C.C. and G.P. had "camped out in Tent City" for a period of time. Notably, at the time of trial, C.C. resided in the Galveston County Jail, where he had been confined for more than eleven months. *In re K.C.*, 219 S.W.3d at 931 (child's need for stable, permanent home paramount consideration in best interest determination); *see also* TEX. FAM. CODE ANN. § 263.307(a) ("[T]he prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest.").

Additionally, although Banks testified that G.P.'s current placement is only temporary, DFPS intends to have G.P. adopted by her older sister, Myers. And at the time of trial, DFPS was working on having Myers's home approved. *See Dupree v. Tex. Dep't of Protective & Regulatory Servs.*, 907 S.W.2d 81, 87 (Tex. App.—Dallas 1995, no writ) ("The goal of establishing a stable, permanent home for a child is a compelling interest . . . .").

Further, Banks testified that G.P. is "happy" with her foster parents, has made friends, and participates in social activities. She is "coming into her own person"

and "starting not to be scared anymore." *See In re B.J.*, 2016 WL 1389054, at *13 (children doing well in their placements and noting positive improvements since entering foster home); *In re T.A.S.*, No. 05-15-01101-CV, 2016 WL 279385, at *6 (Tex. App.—Dallas Jan. 22, 2016, no pet.) (mem. op.) (considering children's improvement in foster care and noting they had "stabilized and [were] functioning well in . . . foster home"). "[A] lack of . . . definitive plans for permanent placement and adoption" is not a dispositive factor. *In re C.H.*, 89 S.W.3d at 28; *see also In re E.C.R.*, 402 S.W.3d 239, 250 (Tex. 2013).

In regard to acts or omissions that may indicate that the parent-child relationship is not proper, a parent's use of narcotics, inability to provide a stable home, and failure to comply with his FSP support a finding that termination is in the best interest of the child. *In re S.B.*, 207 S.W.3d at 887–88. As discussed above, there is ample evidence that C.C has continuously used narcotics, is unable to provide a stable and permanent home for G.P., and has failed to comply with his FSP.

Viewing the evidence in the light most favorable to the jury's finding, we conclude that the jury could have formed a firm belief or conviction that termination of C.C.'s parental rights is in G.P.'s best interest. *See* TEX. FAM. CODE ANN. § 161.001(b)(2). And, viewing the evidence in a neutral light, we conclude that a reasonable fact finder could have formed a firm belief or conviction that termination

of C.C.'s parental rights is in G.P.'s best interest. *See id.* We further note that the jury could have reconciled any disputed evidence in favor of finding that termination of C.C.'s parental rights is in G.P.'s best interest, or any disputed evidence was not so significant that a fact finder could not have reasonably formed a firm belief or conviction that termination is in G.P.'s best interest.

Accordingly, we hold that the evidence is legally and factually sufficient to support the jury's finding that termination of C.C.'s parental rights is in G.P.'s best interest.

We overrule C.C.'s third issue.

Ineffective Assistance of Counsel

In his first issue, C.C. argues that his trial counsel provided him with ineffective assistance because she did not subpoena witnesses to testify "regarding [his] excellent parenting skills"; "file a Motion in Limine to ask the [trial] [c]ourt to conduct a hearing outside the presence of the jury . . . prior to [G.P.'s] hearsay statement . . . coming into evidence"; subpoena G.P.; object to the admission of State's Exhibit 39, the CAC's videotaped forensic interview of G.P., "on the basis that [DFPS] was not providing the child for cross[-]examination purposes"; "cross examine DFPS on [a] prior inconsistent statement"; question Myers, Wiseburn, or Banks "regarding all of the referrals made to DFPS . . . in which the dispositions by DFPS were determined to be either 'ruled out,' or 'unable to determine'"; "object to

numerous hearsay statements" or move to strike certain hearsay statements after the trial court sustained her objections; consult with C.C. before agreeing to allow Myers to testify via electronic means, namely "SKYPE";[63] object to the trial court's charge to the jury and "request a conservatorship instruction . . . even though C.C. testified that he wanted DFPS to keep his child until he was out of jail"; move to continue the proceedings until after his pending criminal charges were resolved; object to the admission of State's Exhibit 27 and State's Exhibits 40–67; and object to "the State's and Ad Litem's improper [jury] argument."

Texas provides a statutory right to counsel for indigent persons in termination-of-parental-rights cases. *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003); *see* TEX. FAM. CODE ANN. § 107.013(a)(1) (Vernon Supp. 2016). And the Texas Supreme Court has held that this right to counsel "embodies the right to effective counsel." *In re M.S.*, 115 S.W.3d at 544. To evaluate claims of ineffective assistance in termination-of-parental-rights cases, the supreme court has adopted the ineffective-assistance standard applied in criminal cases and set forth by the United

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63 SKYPE "is a free or low-cost service that allows individuals to complete voice and video conferences through televisions, telephones, computers, or other mobile communication devices that are equipped with a 'webcam' and an internet connection." *In re M.J.C.B.*, No. 11-14-00140-CV, 2014 WL 6433378, at *2 n.2 (Tex. App.—Eastland Nov. 14, 2014, no pet.) (mem. op.); *see also Rivera v. State*, 381 S.W.3d 710, 711 n.2 (Tex. App.—Beaumont 2012, pet. ref'd) (defining SKYPE as "a proprietary internet-based computer software system that provides two-way visual and voice communication").

States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *See In re M.S.*, 115 S.W.3d at 544–45; *see also Walker*, 312 S.W.3d at 622–23. Thus, proving ineffective assistance of counsel requires a showing that (1) counsel's performance was deficient, i.e., "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment," and (2) the deficient performance of counsel prejudiced the defense in a manner "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *In re M.S.*, 115 S.W.3d at 545 (quoting *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2052); *see also In re H.R.M.*, 209 S.W.3d at 111; *Walker*, 312 S.W.3d at 622.

To establish an ineffective-assistance-of-counsel claim, a party must successfully show both prongs of the *Strickland* test. *In re M.S.*, 115 S.W.3d at 545; *Walker*, 312 S.W.3d at 622–23; *see also In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009). And a party's failure to satisfy one prong negates the court's need to consider the other prong. *See Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

In adopting the *Strickland* test in termination-of-parental-rights cases, the Texas Supreme Court has explained that, "tak[ing] into account all of the circumstances surrounding the case," a court "must primarily focus on whether counsel performed in a reasonably effective manner." *In re M.S.*, 115 S.W.3d at 545 (internal quotations omitted); *see also Walker*, 312 S.W.3d at 622. A court "must give great deference to counsel's performance, indulging a strong presumption that

counsel's conduct falls within the wide range of reasonable professional assistance, including the possibility that counsel's actions are strategic." *In re M.S.*, 115 S.W.3d at 545; *Walker*, 312 S.W.3d at 622. When the record is silent concerning the reasons for counsel's actions, we may not speculate to find trial counsel ineffective. *Walker*, 312 S.W.3d at 623. Challenged conduct constitutes ineffective assistance only when it is "so outrageous that no competent attorney would have engaged in it." *In re M.S.*, 115 S.W.3d at 545; *Walker*, 312 S.W.3d at 622. Notably, without testimony from trial counsel, we must presume that counsel had a plausible reason for her conduct. *In re K.H.M.*, 181 S.W.3d 1, 7 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

In addition to showing trial counsel's deficient performance, reviewing courts must determine whether there is a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different, i.e., a party's parental rights would not have been terminated. *In re M.S.*, 115 S.W.3d at 550; *see also Medellin v. Tex. Dep't of Family & Protective Servs.*, No. 03-11-00558-CV, 2012 WL 4466511, at *5 (Tex. App.—Austin Sept. 26, 2012, pet. denied) (mem. op.) (father must show "reasonable probability that his parental rights would not have been terminated"). In this context, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068; *P.W. v. Dep't of Family & Protective Servs.*, 403 S.W.3d 471,

476 (Tex. App.—Houston [1st Dist.] 2013, pet. dism'd w.o.j.). A party must show that trial counsel's deficient performance prejudiced the defense. *In re J.O.A.*, 283 S.W.3d at 344 (quoting *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064).

C.C. presented his ineffective-assistance-of-counsel claim to the trial court in his First Amended Motion for New Trial, which was overruled by operation of law. *See* TEX. R. CIV. P. 329b(c). We, therefore, analyze his issue under an abuse-of-discretion standard as a challenge to the denial of his motion.[64] *Walker*, 312 S.W.3d at 623; *see also In re N.L.T.*, 420 S.W.3d 469, 473 (Tex. App.—Dallas 2014, pet. denied); *Biagas v. State*, 177 S.W.3d 161, 170 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd). We view the evidence in the light most favorable to the trial court's ruling and uphold the trial court's ruling if it is within the zone of reasonable disagreement. *See Walker*, 312 S.W.3d at 623; *see also Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004); *In re N.L.T.*, 420 S.W.3d at 473. We do not substitute our judgment for that of the trial court, but rather decide whether the trial court's decision was arbitrary or unreasonable. *See Walker*, 312 S.W.3d at 623; *see also Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007); *In re N.L.T.*, 420 S.W.3d at 473; *Biagas*, 177 S.W.3d at 170. A trial court abuses its discretion in

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64 This standard of review applies regardless of whether the motion for new trial was denied by an express ruling or overruled by operation of law. *Cano v. State*, 361 S.W.3d 252, 255 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling. *Webb*, 232 S.W.3d at 112.

In regard to the prejudice prong of the *Strickland* test, C.C. asserts in his brief that his trial counsel's deficient performance "prejudiced [his] case." However, his discussion of prejudice ends there.

Texas Rule of Appellate Procedure 38.1(i) requires an appellant's brief to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). Conclusory statements are simply not enough. *Izen v. Comm'n for Lawyer Discipline*, 322 S.W.3d 308, 321–22 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (brief containing "conclusory statements, unsupported by legal citations" and no "clear argument" inadequate (internal quotations omitted)); *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 128 (Tex. App.—Houston [1st Dist.] 2002, pet. denied); (holding complaint waived where brief contained "conclusory statements, unsupported by legal citations"); *Sullivan v. Bickel & Brewer*, 943 S.W.2d 477, 486 (Tex. App.—Dallas 1995, writ denied) (points not supported by argument and authority waived).

If a party fails to advance a viable argument on appeal with citations to appropriate authority, an appellate court is not required to independently review the record and applicable law to determine whether the alleged error occurred. *Happy*

Harbor Methodist Home, Inc. v. Cowins, 903 S.W.2d 884, 886 (Tex. App.—Houston [1st Dist.] 1995, no writ) ("We will not do the job of the advocate."). And a party who fails to adequately brief a complaint waives his issue on appeal. *Washington v. Bank of N.Y.*, 362 S.W.3d 853, 854–55 (Tex. App.—Dallas 2012, no pet.); *see also Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284–85 (Tex. 1994).

Here, C.C. does not provide the Court with any argument, analysis, or citation to proper legal authority, regarding whether there is a reasonable probability that, but for his trial counsel's deficient performance, the result of the proceeding would have been different, i.e., his parental rights would not have been terminated. *See In re M.S.*, 115 S.W.3d at 550; *Medellin*, 2012 WL 4466511, at *5. Instead, he summarily concludes that he was "prejudiced." *See, e.g.*, *L.F. v. Dep't of Family & Protective Servs.*, Nos. 01-10-01148-CV, 01-10-01149-CV, 2012 WL 1564547, at *12–14 (Tex. App.—Houston [1st Dist.] May 3, 2012, pet. denied) (mem. op.) (overruling mother's ineffective-assistance claim where she did not explain how counsel's actions prejudiced her case); *In re C.W., Jr.*, No. 14-09-00306-CV, 2009 WL 4694946, at *3 (Tex. App.—Houston [14th Dist.] Dec. 10, 2009, no pet.) (mem. op.) (mother waived ineffective-assistance claim where she made "broad conclusory assertions that her trial counsel's performance was deficient" and "failed to advance any argument showing that she was harmed by the[] alleged deficiencies").

Accordingly, we hold that C.C. has waived his ineffective-assistance-of-counsel complaint on appeal.[65]

We overrule C.C.'s first issue.

Admission of Evidence

In his second issue, C.C. argues that the trial court erred in admitting certain evidence of his conduct, which occurred prior to G.P.'s birth or to him obtaining custody of G.P.,[66] because "DFPS did not plead that there had been a material change in circumstances since the last order" and it did not "use any other language that would imply that [it] would be using the same conduct against him"; State's Exhibits 30a–e, photographs of C.C.'s tattoos, and State's Exhibits 63–67, "bloody" photographs of Steve and David after a fight, because they were irrelevant, highly prejudicial, and designed to inflame the jury; State's Exhibits 37 and 38, the

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65 Because of our disposition of this issue, we need not address whether C.C.'s trial counsel's performance was deficient. *See Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069 (1984); *In re M.S.*, 115 S.W.3d 534, 545 (Tex. 2003); *Walker*, 312 S.W.3d at 622–23; *see also In re J.R.*, No. 04-14-00788-CV, 2015 WL 2124801, at *2 (Tex. App.—San Antonio May 6, 2015, no pet.) (mem. op.) (appellate court need not decide whether trial counsel's performance deficient where father did not establish "but for counsel's performance, the outcome of the termination proceeding would have been different").

66 Such evidence of "[p]rior conduct" purportedly includes State's Exhibit 21, reflecting "a family violence assault in 2002 against an ex-girlfriend"; State's Exhibits 13 and 14, reflecting "allegations of violation[s] of a protective order . . . against G.P.'s mother from 2005"; "testimony about a 2004 assault against G.P.'s mother"; and "testimony [elicited by DFPS] from C.C. about an assault against a man, which happened prior to G.P.'s birth."

indictment and judgment of conviction of David, because they were irrelevant and designed to inflame the jury; State's Exhibit 24, a posting on C.C.'s "Facebook page,"[67] because it was improperly authenticated, highly prejudicial, designed to inflame the jury, and "C.C. did not post the message"; the "SKYPE testimony" of Myers because all parties did not agree to allow testimony by such electronic means and Myers was not deposed prior to trial; State's Exhibit 39, the CAC's videotaped forensic interview of G.P., and "other hearsay statements of G.P." made by Wiseburn, McCarty, and Deputy Scarbrough because the trial court did not hold a "mandatory hearing outside the presence of the jury to determine whether or not [G.P.'s] statements were reliable," there is no evidence "as to why G.P. was not in court to testify," there is no evidence that "it would be against her welfare to testify" or to suggest "any indicia of reliability," and the interviewer's questions to G.P. were "calculated to elicit certain statements."

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005). A trial court abuses

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67 "Facebook" is a "social networking website[]" that "allow[s] users to establish an online account, create a profile, and then invite others to access that profile as a 'friend.'" *Campbell v. State*, 382 S.W.3d 545, 550 (Tex. App.—Austin 2012, no pet.); *see also Tienda v. State*, 358 S.W.3d 633, 634 n.3 (Tex. Crim. App. 2012) ("Social networking websites such as . . . Facebook 'typically allow users to customize their own personal webpages (often known as profiles), post photographs or videos, add music, or write a journal or blog that is published to the online world.'" (quoting John S. Wilson, Comment, *MySpace, Your Space or Our Space? New Frontiers in Electronic Evidence*, 86 OR. L. REV. 1201, 1220 (2007))).

its discretion when it acts without reference to any guiding rules and principles or in a way that is arbitrary and unreasonable. *U-Haul Int'l., Inc. v. Waldrip*, 380 S.W.3d 118, 132 (Tex. 2012); *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). Notably, a party complaining of error in the admission of evidence must also show that the trial court's error probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1); *U-Haul Int'l., Inc.*, 380 S.W.3d at 132 (reversal only appropriate where error harmful); *Fairmont Supply Co. v. Hooks Indus., Inc.*, 177 S.W.3d 529, 532 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). Specifically, "[w]e review the entire record, and require the complaining party to demonstrate that the judgment turns on the particular evidence admitted." *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004). In other words, if the erroneously admitted evidence was crucial to a key issue, the error was likely harmful. *Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 873 (Tex. 2008).

However, the erroneous admission of evidence is harmless if the evidence is merely cumulative of evidence admitted elsewhere at trial or if the rest of the evidence is so one-sided that the error likely made no difference in the judgment. *Id.*; *Nissan Motor Co.*, 145 S.W.3d at 144. "Application of this rule requires an assessment of whether the subsequently admitted evidence is sufficiently similar to the objected-to evidence so as to render admission of the objected-to evidence

harmless." *In re E.A.K.*, 192 S.W.3d 133, 148 (Tex. App.—Houston [14th Dist.] 2006, pet. denied.).

"Prior [C]onduct" Evidence and State's Exhibits 24, 30a–e, 37–38, and 63–67

As previously noted, Texas Rule of Appellate Procedure 38.1(i) requires an appellant's brief to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). Plainly stated, conclusory statements will not suffice. *Izen*, 322 S.W.3d at 321–22 (brief containing "conclusory statements, unsupported by legal citations" and no "clear argument" inadequate (internal quotations omitted)); *Tesoro Petroleum Corp.*, 106 S.W.3d at 128 (holding complaint waived where brief contained "conclusory statements, unsupported by legal citations"); *Sullivan*, 943 S.W.2d at 486 (points not supported by argument and authority waived). Where a party fails to advance a viable argument on appeal with citations to appropriate authority, an appellate court is not required to independently review the record and applicable law to determine whether the alleged error occurred. *Happy Harbor*, 903 S.W.2d at 886; *see also In re A.D.A.*, 287 S.W.3d 382, 390 (Tex. App.—Texarkana 2009, no pet.) ("It is not the proper role of th[e] Court to create arguments for an appellant—we will not do the job of the advocate.").

Here, in addition to establishing that the trial court erred in admitting the evidence of his "[p]rior conduct" and State's Exhibits 24, 30a–e, 37–38, and 63–67,

C.C. was required to prove that the trial court's error probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1); *U-Haul Int'l., Inc.*, 380 S.W.3d at 132 (reversal only appropriate where error harmful); *Fairmont Supply Co.*, 177 S.W.3d at 532. Notably, however, C.C., in discussing the purportedly erroneous admission of the above evidence, merely asserts, without explanation, analysis, or citation to appropriate legal authority, that "[t]he erroneous admission of th[e] evidence was harmful error and probably caused the rendition of an improper judgment." This is not sufficient. *See* TEX. R. APP. P. 38.1(i); *see, e.g.*, *In re Estate of Minton*, No. 13-12-00026-CV, 2014 WL 354527, at *9 (Tex. App.—Corpus Christi Jan. 30, 2014, pet. denied) (mem. op.) (complaint trial court erred in admitting exhibit waived where appellant made "conclusory statement that the trial court's errors 'resulted in prejudice to [him] and caused the rendition of an improper judgment'").

A party who fails to adequately brief a complaint waives his issue on appeal. *Washington*, 362 S.W.3d at 854–55; *see also Fredonia State Bank*, 881 S.W.2d at 284–85. Accordingly, we hold that C.C. has waived his complaint regarding the admission of the evidence of his "[p]rior conduct" and State's Exhibits 24, 30a–e, 37–38, and 63–67.

SKYPE testimony

C.C. also argues that the trial court erred in allowing Myers to testify by electronic means, namely SKYPE, because all parties did not agree to allow testimony by such means, Myers was not "deposed prior to the commencement of trial," and the admission of Myers's testimony was "harmful, prejudicial, and a violation of C.C.'s due process rights."[68] More specifically, C.C. argues that the admission of Myers's SKYPE testimony led to the rendition of an improper judgment because she testified about C.C.'s "gang affiliation" and his "selling [of] drugs," "continuous fight[ing]" with Myers, and "assault[ing]" of G.P.'s mother.

Assuming that the trial court erred in admitting Myers's SKYPE testimony, we consider whether C.C. established that any such error probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1); *U-Haul Int'l., Inc.*, 380 S.W.3d at 132 (reversal only appropriate when error harmful); *Fairmont Supply Co.*, 177 S.W.3d at 532. To establish harm, C.C. must demonstrate that the complained-of evidence was both controlling on a material issue and not cumulative of other evidence. *Williams Distrib. Co. v. Franklin*, 898 S.W.2d 816, 817 (Tex.

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[68] Although C.C. asserts that the admission of Myers's SKYPE testimony violated his "due process rights," he has presented no discussion or analysis related to this argument and has, therefore, waived it. *See* TEX. R. APP. P. 38.1(i); *see, e.g., Schied v. Merritt*, No. 01-15-00466-CV, 2016 WL 3751619, at *5–6 (Tex. App.—Houston [1st Dist.] July 12, 2016, no pet.) (mem. op.) (holding due-process arguments waived because brief "d[id] not contain a clear and concise due process argument, with appropriate citations to supporting legal authority and the record").

1995); *In re E.A.K.*, 192 S.W.3d at 148. Error in the admission of evidence is generally deemed harmless if the same or similar evidence is subsequently introduced without objection. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 907 (Tex. 2004); *In re E.A.K.*, 192 S.W.3d at 148.

In regard to C.C.'s alleged involvement in selling narcotics, Myers testified, "[S]ometimes when I would go to school, people would tell me, 'Yeah. I s[aw] your dad's truck in the parking lot. He was out there selling crack'; but I never physically s[aw] anything." However, the trial court sustained C.C.'s hearsay objection to this portion of Myers's testimony. And when Myers was subsequently asked whether she had ever questioned C.C. about his "selling [of] drugs," she responded, "No." And she stated that she had never seen C.C. "leave [the home] in the middle of the night."

Sergeant Balchunas testified, without objection, that during his interview, McNemar, Reames's son who lived with C.C. and G.P. for a period of time, reported that C.C. had admitted that he had engaged in "some slinging," meaning that he "participat[ed] in narcotics." Accordingly, we conclude that Myers's testimony about C.C.'s selling narcotics was not harmful. *See Nissan Motor Co.*, 145 S.W.3d at 144 (complaining party must demonstrate judgment turns on particular evidence admitted and erroneous admission of evidence harmless where evidence cumulative of evidence admitted elsewhere at trial); *see also In re Z.W.*, No. 10-16-00015-CV,

2016 WL 3896491, at *5 (Tex. App.—Waco July 13, 2016, no pet.) (mem. op.) (admission of testimony not harmful where "testimony was a very small portion of the record").

In regard to the fighting that occurred between Myers and C.C., Myers testified that if she "didn't do something [that C.C.] wanted [her] to do, [they] would start fighting." C.C. would hit Myers with an "open hand" and "take his belt off and whoop" her with it. Myers further testified that C.C. had hit her with his belt about three times, and eventually they began to physically fight each other. C.C. would also push or "wrestle" her. And their altercations occurred about every three days, with Myers sustaining bruises as a result. Further, Myers felt that her "physical safety and well-being w[ere] in jeopardy" while she lived with C.C.

We note, however, that C.C.'s trial counsel also questioned Myers about the physical altercations that occurred between her and C.C. When she asked whether C.C. "would hit [her] with his open hand" and whether she and C.C. "both did some fussing and fighting with one another," Myers responded, "Yes." Also, C.C. himself testified that he used corporal punishment on Myers, "took a belt to [her]" "[a] couple of times," "wrestl[ed] her to the ground," "whooped her with [a] belt," and "spanked her." C.C. explained: "The first time . . . [Myers] stayed out," he told her to "'[b]end over the couch.' And she [said], 'No. I'm too big." And [he] said, 'No, you're not. You want to play, you're going to pay.' [He] said, 'How you want to

do this? You want to do this the easy way or the hard way?' So she chose the hard way. So [he] wrestled her down -- no bruises, no blood -- and [he] took the belt and [he] spanked her." Accordingly, we conclude that Myers's testimony about the fighting that occurred between her and C.C. was not harmful. *See Nissan Motor Co.*, 145 S.W.3d at 144.

In regard to "the assault that C.C. perpetrated against G.P.'s mother," Myers testified that she had previously seen C.C. and G.P.'s mother "interact" and witnessed a single interaction in a car that "made [her] very scared." Myers explained:

> I remember that we was with [G.P.'s] mother and [C.C.] had asked her about food -- the food stamps card and she admitted that she got rid of it for crack and [C.C.] had gotten very upset about it. . . . And when she couldn't get it back, they got into a really bad fight; and she busted his lip pretty bad where it bled and he turned around and smacked her pretty hard. And then we got out of the vehicle and started walking down the highway, but nothing else happened between the two.

However, C.C. himself also testified to an "assault" involving G.P.'s mother, stating that he had been "charged" for "assaulting" her "one time." Accordingly, we conclude that Myers's testimony about "the assault that C.C. perpetrated against G.P.'s mother" was not harmful. *See Nissan Motor Co.*, 145 S.W.3d at 144; *see also In re Z.W.*, 2016 WL 3896491, at *5.

Finally, in regard to C.C.'s "gang affiliation," C.C. does not direct us to any portion of the record containing the complained-of testimony by Myers. *See* TEX.

R. APP. P. 38.1(i). Nevertheless, we note that when Myers was asked whether she had "ever talk[ed] to [C.C.] about him being involved in a gang," she responded, "I heard a little bit. He told me a little bit, but he would never tell me a whole lot. So any kind of activities or how he got into it, I don't know about."

Sergeant Balchunas, however, also testified, without objection, that C.C. was a member of "a gang," the "Dead Men," which was known as "an outlaw motorcycle gang." And C.C. himself, when asked whether he "ha[d] a gang affiliation with the Dead M[e]n's Gang club," replied, "Yes." C.C. further testified that he was "a member of that gang." And although C.C. testified that the "Dead Men" did not consider themselves to be "a gang," but rather a "motorcycle club," he did admit to being a member of the "Dead Men." Further, C.C. noted that the "Dead Men" were "a branch off the Banditos" and "[s]ome of the members w[ere] involved in criminal activity." Accordingly, we conclude that Myers's testimony about C.C.'s "gang affiliation" was not harmful. *See Nissan Motor Co.*, 145 S.W.3d at 144.

Based on the foregoing, considering the entire record and assuming that the trial court erred in admitting Myers's SKYPE testimony, we hold that Myers's testimony about C.C.'s "gang affiliation" and his "selling [of] drugs," "fight[ing]" with Myers, and "assault[ing]" of G.P.'s mother probably did not cause the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1).

CAC's Videotaped Forensic Interview

C.C. argues that the trial court erred in admitting into evidence State's Exhibit 39, the CAC's videotaped forensic interview of G.P., because the court did not "hold[] [a] mandatory hearing outside the presence of the jury to determine whether or not [G.P.'s] statements were reliable," "the interviewer . . . us[ed] leading questions to elicit certain statements," and the interview contained a "reference to an earlier sexual abuse [incident] that was not relevant." *See* TEX. FAM. CODE ANN. §§ 104.002, 104.006 (Vernon 2014). C.C. further argues that because the CAC's videotaped forensic interview of G.P. was "crucial to a key issue," its admission "caused the rendition of an improper judgment." *See* TEX. R. APP. P. 44.1(a)(1).

Initially, we note that in support of his argument, C.C. relies on Family Code sections 104.002 and 104.006. However, at trial, C.C. only objected to the admission of the videotaped forensic interview on the basis of section 104.002. Specifically, his trial counsel stated, "I would like to object on th[e] grounds that it does not meet the requirements of 104 *as the statements involved . . . were geared toward eliciting statements from the child*." (Emphasis added.) *Compare* TEX. FAM. CODE ANN. § 104.002(4) ("[T]he recording of an oral statement of [a] child recorded prior to [a] proceeding is admissible into evidence if . . . the statement was not made in response to questioning calculated to lead the child to make a particular statement . . . ."), *with*

id. § 104.006 (statement admissible if, *inter alia*, trial court "finds that the time, content, and circumstances of the statement provide sufficient indications of the statement's reliability and: (1) the child testifies or is available to testify at the proceeding in court or in any other manner provided for by law; or (2) the court determines that the use of the statement in lieu of the child's testimony is necessary to protect the welfare of the child"); *see also In re S.H.*, No. 10-02-086-CV, 2004 WL 254011, at *3 (Tex. App.—Waco Feb. 11, 2004, no pet.) (mem. op.) (distinguishing Family Code sections 104.002 and 104.006).

To preserve a complaint for appellate review, the complaining party must make a timely objection, request, or motion with sufficient specificity and obtain a ruling on the objection, request, or motion. TEX. R. APP. P. 33.1(a). A specific objection enables a trial court to understand the precise complaint and make an informed ruling, and it affords the offering party an opportunity to remedy the defect, if possible. *McKinney v. Nat'l Union Fire Ins. Co.*, 772 S.W.2d 72, 74 (Tex. 1989). Further, any complaint made on appeal must comport with the objection raised in the trial court. *Religious of Sacred Heart of Tex. v. City of Hous.*, 836 S.W.2d 606, 614 (Tex. 1992); *Hawkins v. Herrera*, 296 S.W.3d 366, 370 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (refusing to address objections not raised in trial court); *Hous. R.E. Income Props. XV, Ltd. v. Waller Cty. Appraisal Dist.*, 123 S.W.3d 859, 862–63 (Tex. App.—Houston [1st Dist.] 2003, no pet.) ("An objection at trial not

comporting with the complaint on appeal presents nothing for appellate review."). Because C.C., in the trial court, did not object to the admission of the CAC's videotaped forensic interview of G.P. based on Family Code section 104.006, we will not consider his arguments related to it on appeal. *See, e.g.*, *In re R.R.*, No. 01-10-01069-CV, 2011 WL 5026229, at *4 (Tex. App.—Houston [1st Dist.] Oct. 20, 2011, pet. denied) (mem op.) (considering only contentions on appeal "that comport with the objections made at trial").

Family Code section 104.002 provides:

> If a child 12 years of age or younger is alleged in a suit under this title to have been abused, the recording of an oral statement of the child recorded prior to the proceeding is admissible into evidence if:
>
> (1) no attorney for a party was present when the statement was made;
>
> (2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
>
> (3) the recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;
>
> (4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;
>
> (5) each voice on the recording is identified;
>
> (6) the person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party; and

(7) each party is afforded an opportunity to view the recording before it is offered into evidence.

TEX. FAM. CODE ANN. § 104.002. Although "[a]ll seven procedural safeguards must be present before [a] court can admit [a] videotape into evidence," C.C. only complains that the questions the interviewer, McCarty, asked G.P. were "calculated to elicit certain statements." *See id.* § 104.002(4); *Parsons v. Parsons*, 722 S.W.2d 751, 753–54 (Tex. App.—Houston [14th Dist.] 1986, no writ).

Few courts have addressed the admissibility of a videotape under section 104.002, or its predecessor statute, where one party has sought to exclude the videotape because of improper questioning. *See In re W.S.*, 899 S.W.2d 772, 778–79 (Tex. App.—Fort Worth 1995, no writ). In *Ochs v. Martinez*, a case relied on by C.C., the jury viewed a videotaped interview by a social worker of a four and one-half-year-old child about sexual abuse by the child's stepfather. 789 S.W.2d 949, 950–52 (Tex. App.—San Antonio 1990, writ denied). On appeal, the mother challenged the admissibility of the videotape on the ground that the social worker, while interviewing the child, "used leading questions prohibited by . . . statute." *Id.* at 951 (argument based on predecessor statute to Family Code section 104.002).

The father, relying on "common law authority" and "treatises," argued that "some leading questions are permissible when examining children." *Id.* at 955. However, the court disagreed, noting that the legislature, in enacting section 104.002(4), had "abrogated the common law rule insofar as the uncross-examined

videotaped testimony of children under the age of 12 [was] concerned." *Id.* at 955–56 (discussing predecessor statute to section 104.002(4)). And because the social worker had asked the child "leading questions which suggested a response," the court held that the trial court erred in admitting the videotaped interview. *Id.* at 956. In reaching its holding, the court explained that under the statute "questions directed to a child must be open ended and not suggestive of a response" and the high number of "yes" and "no" responses given by the child during the interview supported the conclusion that the questions asked by the social worker were in fact leading. *Id.* (internal quotations omitted).

Here, C.C. does not specify which of McCarty's questions were leading, and he does not direct us to any portion of State's Exhibit 39, the CAC's videotaped forensic interview of G.P., where McCarty used a leading-question structure. *See* TEX. R. APP. P. 38.1(i) (brief must "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"); *In re W.S.*, 899 S.W.2d at 779 (parents "failed to specify which questions may have been leading"). And our review of the CAC's videotaped forensic interview of G.P. shows that the questions were open-ended and did not suggest a response. *See In re W.S.*, 899 S.W.2d at 779; *see also Ochs*, 789 S.W.2d at 956 (leading questions suggest a response); *James v. Tex. Dep't of Human Servs.*, 836 S.W.2d 236, 240–41 (Tex. App.—Texarkana 1992, no writ) (videotape should have been excluded where

"question was calculated to lead the children to a particular statement"). In fact, G.P. answered most of McCarty's questions with a substantive response. *See In re W.S.*, 899 S.W.2d at 779; *cf. Richardson v. Green*, 677 S.W.2d 497, 501 (Tex. 1984) (child merely responded to leading questions); *Ochs*, 789 S.W.2d at 956 (noting frequent "yes" or "no" answers by child indicative of leading questions (internal quotations omitted)). And McCarty did not give "approving, affectionate pats in response to desired answers," nor did she "refus[e] to accept undesired answers" while conducting G.P.'s interview. *Cf. James*, 836 S.W.2d at 240–41. Moreover, although McCarty did have G.P. look at a diagram of a "naked body" during the interview, this fact is not determinative of the leading-question analysis. *See In re W.S.*, 899 S.W.2d at 781–82 (holding questions not leading despite fact that interviewer used dolls).

Accordingly, we hold that the trial court did not err in admitting State's Exhibit 39, the CAC's videotaped forensic interview of G.P., into evidence.

We note that C.C., in regard to State's Exhibit 39, also argues that the trial court erred in admitting the CAC's videotaped forensic interview of G.P. because it contained an irrelevant "reference" to the sexual offense against G.P. by David. However, even were we to assume that the trial court erred in admitting the CAC's videotaped forensic interview of G.P. on this ground, we note that there is ample other evidence in the record, including C.C.'s own testimony about David's sexual

offense against G.P. Accordingly, we conclude that the reference to David's sexual offense was not harmful. *See Nissan Motor Co.*, 145 S.W.3d at 144.

Other Hearsay Statements

C.C. also contends that the trial court erred in admitting certain "hearsay" testimony of Wiseburn, McCarty, and Deputy Scarbrough. In particular, C.C. complains that Wiseburn, a DFPS program director, testified that "G.P. reported [to DFPS officials] that C.C. struck her in the head in the car," "G.P. identified cocaine, heroin, and marijuana as drugs used by C.C.," and "G.P. saw a pipe in [C.C.'s] house." In regard to McCarty, C.C. complains that she testified that "G.P. indicated [to McCarty] that it was [G.P.'s] vagina that had been touched by C.C." And, C.C. complains that Scarbrough testified that "a neighbor had told him that G.P. had told the neighbor that C.C. assaulted G.P. by slapping her on the head, causing lumps on it."

As previously noted, erroneously admitted evidence is harmless if the evidence is merely cumulative. *See Nissan Motor Co.*, 145 S.W.3d at 144. Accordingly, even were we to assume that the trial court erred in admitting the above "hearsay" testimony of Wiseburn, McCarty, and Deputy Scarbrough, we hold that any such error was harmless. *See id.*; *see also* TEX. R. APP. P. 44.1(a)(1).

We overrule C.C.'s second issue.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Keyes, and Brown.

Keyes, J., concurring in the judgment only, without separate opinion.