

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-23-00050-CV

IN THE INTEREST OF S.C.

**On Appeal from the County Court at Law
Orange County, Texas
Trial Cause No. C200555-D**

MEMORANDUM OPINION

Father appeals the termination of his parental rights to his daughter, Sally.¹ In three appellate points, he contends 1) the trial court failed to follow the law of the case in conducting the trial on remand; 2) denied him due process of law during the hearing on remand by requiring Father to participate by videoconference (Zoom) rather than making the arrangements required so that he could be there in person;

¹ We refer to Appellant as “Father,” and to the child by a pseudonym to protect their identities. We refer to Sally’s mother as “Mother,” and to her foster families as foster families for the same reason. *See* Tex. Fam. Code Ann. § 109.002(d); Tex. R. App. P. 9.8(b)(2).

and 3) the evidence admitted before the jury in the hearing on remand provides legally insufficient support for the jury's endangerment finding.² Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E). Father did not appeal the portion of the trial court's order naming Sally's then current foster family as her managing conservator and did not challenge the factual sufficiency of the evidence, only its legal sufficiency. Father also did not appeal the finding that it is in Sally's best interest that his rights be terminated. Finding no reversible error, we affirm the trial court's order of termination.

I. Background

By the time Sally was born in August 2018, Father had been incarcerated for several months.³ During Father's imprisonment, he was not involved in Sally's life, and Mother was Sally's caregiver.

In 2020, Mother's drug use came to the attention of the Texas Department of Family and Protective Services (the Department). The Department therefore

² See *In re S.C.*, No. 09-21-00325-CV, 2022 Tex. App. LEXIS 2263, at *52 (Tex. App.—Beaumont April 7, 2022, no pet.) (mem. op.) (concluding that “Father was denied procedural due process, as he was denied a meaningful opportunity to participate in the proceedings until the time of trial”).

³ Father was convicted of being a felon in possession of a firearm and was sentenced to six years in the Institutional Division of the Texas Department of Criminal Justice. Father has previous convictions for felony theft, felony possession of a controlled substance, and evading arrest, for which he was sentenced to community supervision, and also received sentences of sixteen months and two years, respectively, in a state jail. Some of his sentences were served concurrently.

removed Sally from Mother's care and placed Sally with different relatives before eventually placing her in a foster home ("Foster Family One"). When allegations of inappropriate behavior were made against Sally's initial foster home, the Department placed Sally in a second foster home ("Foster Family Two"), where she remained at least until the December 2022 retrial. Although family reunification was the Department's initial goal, it appeared unlikely to succeed; the Department therefore sought to terminate the parental rights of both Mother and Father pursuant to multiple sections of the Family Code, including the endangerment sections. Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E).

Following a bench trial conducted in 2021, the trial court terminated the parental rights of both Mother and Father. Mother did not appeal that order, but Father did. In the previous appeal, we reversed the trial court's order of termination as to Father and remanded the case to the trial court. *See In re S.C.*, No. 09-21-00325-CV, 2022 Tex. App. LEXIS 2263 (Tex. App.—Beaumont April 7, 2022, no pet.) (mem. op.). Upon retrial to a jury, Father's parental rights were again terminated, and he has once again appealed.

As noted above, Father was incarcerated when the case was retried in December 2022. Because Father was in prison, the trial court issued a bench warrant ordering the local sheriff's office to produce Father for trial. Despite the bench warrant, the sheriff could not transport Father to court until mid-December 2022,

although jury selection was held on December 6, 2022. Between December 12, when the first witness testified, and December 16, Father appeared remotely via zoom. Father's attorney only filed one written motion seeking to continue the trial, filed on December 5, 2022, which was the date set for the trial to begin. The sum and substance of that motion was that counsel had been ill for three weeks, her paralegal was hospitalized, and there were outstanding discovery requests—all of which she claimed hindering her ability to prepare for trial. The motion did not complain that Father's rights were impaired because he would not be present in-person for all pretrial hearings and all of the trial. The court noted that the dismissal date on this case was December 14, 2022. The written motion was heard and denied by the court on December 5, 2022.

Jury selection was moved to December 6, 2022. At that time, counsel for Father urged the court to delay the trial until Father could be physically present in the courtroom, claiming his absence will constitute a violation of his right to "due process." During the jury selection process, Father was not present at all. The evidence began on December 12, 2022. On December 12 and 13, 2022, Father participated in the trial via zoom, with telephone access to his attorney through the prison library. Father was present in the courtroom for the remaining days of the trial: December 16, 19, 20, 28, 29, 30, 2022, January 9, 10, 11 and 12, 2023. The jury returned a verdict on January 12, 2023.

Because much of the trial record addresses matters not directly relevant to Father's appeal, we limit our background information to the evidence pertinent to the issues Father raises in his appeal.

A. Father's Testimony

Father acknowledged his criminal history, which includes convictions for drug possession, evading arrest, and being a felon in possession of a firearm. His most recent arrest occurred in March of 2018 when Mother was pregnant with Sally.

He admitted his use of illegal drugs, including marijuana, methamphetamine, and other substances. He further acknowledged that he and Mother used methamphetamine together while he was on parole and that Mother was arrested and imprisoned for possessing methamphetamine. It was during Mother's jail term that she told Father she was pregnant with Sally. Despite Father's past decisions, Father testified that during his most recent incarceration, he obtained his G.E.D., is taking parenting classes, and is training to become a commercial truck driver. He testified he made these efforts because fatherhood gave him an incentive to change his life.

Father testified he wanted Sally to be placed with his brother, but to also have contact with Foster Families One and Two. In the past, Father had requested that Sally be placed with Foster Family One. When asked a hypothetical question about leaving Sally with Foster Family Two if she were "most comfortable" there, Father replied, "She's four years old. She can get comfortable somewhere else real quick."

He expressly denied any plan to have Sally placed with his brother so that she could then be placed with Foster Family One, denied having been offered any sort of bribe to place Sally with a particular caregiver, and further denied knowing that a close relative of Foster Family One was paying for his attorney.

B. The Department's Position

The record shows the Department removed Sally from Foster Family One after receiving reports that inappropriate behavior was occurring in that home. In this hearing, the Department's witnesses, Sally's conservatorship supervisor and her guardian ad litem, expressed opinions that Father wanted to retain his parental rights so that Sally could be returned to Foster Family One and removed from her then-current placement with Foster Family Two, which would not be protective of the child.

II. Analysis

Ordinarily, when a party presents multiple issues to reverse a judgment in an appeal, we address the issue that would afford the party the greatest relief before addressing issues that would result in a decision requiring the case to be reversed and remanded for a new trial. *See United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 483 (Tex. 2017). For that reason, we initially turn our attention to Father's legal insufficiency arguments, for if required to sustain those complaints we would be required to render judgment in Father's favor. *Id.*

A. Legally Sufficient Evidence

The decision to terminate parental rights must be supported by clear and convincing evidence. Tex. Fam. Code Ann. § 161.001(b). Under the Family Code, “[c]lear and convincing evidence’ means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.” *Id.* § 101.007; *In re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005) (citations omitted). The movant must show that the parent committed one or more predicate acts or omissions and that termination is in the child’s best interest. *See* Tex. Fam. Code Ann. § 161.001(b)(1), (2); *In re J.L.*, 163 S.W.3d at 84. In reviewing the legal sufficiency of the evidence in a parental rights termination case, we must consider all the evidence in the light most favorable to the finding to determine whether a reasonable factfinder could have formed a firm belief or conviction that the finding was true. *In re J.O.A.*, 283 S.W.3d 336, 344-45 (Tex. 2009) (quoting *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002)).

The jury found by clear and convincing evidence that Father’s acts or omissions had resulted in both condition endangerment and conduct endangerment. Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E). Viewing the evidence in the light most favorable to the verdict, we overrule Father’s arguments as to both condition endangerment and conduct endangerment for the reasons explained below.

1. Condition Endangerment

The jury's finding of condition endangerment indicated that Father "knowingly placed or knowingly allowed" Sally to remain in conditions or surroundings which endangered Sally's physical or emotional wellbeing. Tex. Fam. Code Ann. § 161.001(b)(1)(D).

In his testimony, Father admitted that he and Mother sometimes used methamphetamine together before Father's most recent arrest and imprisonment. Although he did not specify that he and Mother used methamphetamine together while Mother was pregnant with Sally, the jury could make reasonable inferences from the evidence of drug use and to find that Father and Mother knowingly used methamphetamine together while Sally was in utero. *See S.S. v. Tex. Dep't of Fam. & Protective Servs.*, No. 03-21-00695-CV, 2022 Tex. App. LEXIS 4662, at **36-37 (Tex. App.—Austin July 8, 2022, pet. denied) (holding that a jury may make reasonable inferences from the evidence). Exposing Sally prenatally to illegal drugs constitutes evidence of condition endangerment and authorized the jury to find against Father on this ground.

2. Conduct Endangerment

A finding of conduct endangerment may be based on evidence that Father "engaged in conduct . . . which endangers [Sally's] physical or emotional wellbeing[.]" Tex. Fam. Code Ann. § 161.001(b)(1)(E). "Conduct" includes acts or

omission, and it is not necessary that the conduct be directed at the child or that any injury result from the conduct. *See Tex. Dep't of Human Services v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). Subjecting a child to a life of uncertainty and instability endangers a child's physical and emotional well-being. *See In re R.W.*, 129 S.W.3d 732, 739 (Tex. App.—Fort Worth 2004, pet. denied).

By his own testimony, Father knowingly committed crimes that led to his imprisonment. Because the jury could reasonably conclude that Father's history, which shows Father has been convicted and sentenced to prison for committing at least three felonies, caused Sally a life of uncertainty and instability due to his unavailability to care for Sally in Mother's absence. The evidence, when viewed in the light most favorable to the verdict, supports the finding that Father's conduct endangered Sally. *See In re E.S.T.*, No. 01-22-00404-CV, 2022 Tex. App. LEXIS 8555, at **33-34 (Tex. App.—Houston [1st Dist.] no pet.) (mem. op.).

We overrule this point.

B. Due Process of Law

In his brief, Father contends that he was denied due process of law because the trial court denied him a continuance and denied him a “meaningful opportunity to participate in the second trial.” He asserts that his remote attendance during the first few days of trial was not a “meaningful opportunity,” and argues that the trial court should have delayed the pretrial, jury selection and trial when it became

apparent that the Sheriff would not timely transport him to Orange County to personally appear for those matters.

1. Failure To Grant Continuance

A trial court's ruling on a motion for continuance is reviewed for an abuse of discretion. *In re E.G.P.*, No. 09-22-00330-CV, 2023 Tex. App. LEXIS 4197, at **15-16 (Tex. App.—Beaumont June 15, 2023, no pet. h.). A trial court abuses its discretion when it acts without regard to any guiding rules or principles, or stated another way, when the trial court's actions are arbitrary or unreasonable. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985), *cert. denied*, 476 U.S. 1159 (1986) (citations omitted). *In re J.S.S.*, 594 S.W.3d 493, 500 (Tex. App.—Waco 2019) (pet. denied).

Father's written motion for continuance expressly requested a continuance of the trial for reasons involving late discovery responses and a claimed illness of Father's attorney. Yet on appeal, Father argues he was entitled to a continuance because he wanted to be physically present for the entire trial but was required to participate in the trial by videoconference for two days.

Rule 251 of the Rules of Civil Procedure provides that a motion “for continuance shall be heard before the defendant files his defense, nor shall any continuance be granted except for sufficient cause supported by affidavit, or by consent of the parties, or by operation of law.” Tex. R. Civ. P. 251. First, we note

that Father didn't comply with this rule as to the complaint that he raised in his brief—that he was required to participate in the trial by Zoom. Second, even though Father's attorney told the trial court on the first day of the trial that she was having problems staying linked up through Zoom, the trial court offered to resolve that issue. And after that, Father's attorney never lodged any further objection to proceeding by Zoom.

When, as here, a party's motion for continuance is not in writing and not supported by affidavit, we will presume no abuse of discretion occurred when the oral motion for continuance is denied. *See Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986); *Clarke v. Tetra Techs.*, No. 09-20-00240-CV, 2022 Tex. App. LEXIS 5233, at *10 (Tex. App.—Beaumont July 28, 2022, no pet.). Moreover, there is not even any oral motion to continue on the first day of the trial. Instead, what the record shows is a complaint about a problem that morning with Zoom, a problem the trial court apparently resolved. The argument Father raises in his brief, which asserts the trial court denied a motion to continue because Father wanted to participate in the trial in person, is not the argument that Father raised in his written motion for continuance, filed on December 5, 2022. In that motion, Father's attorney represented Father needed additional discovery, unstated and undescribed medical issues that involved the intervenors, a respiratory infection that Father's attorney was

suffering, and a surgery that Father's attorney had scheduled. The motion wasn't filed until the day before first day of trial.

Because Father's argument that he was entitled to participate in the trial in person doesn't comport with the argument he raised in his written motion, he did not preserve it for the purposes of his appeal. Tex. R. Civ. P. 251; Tex. R. App. P. 38.1(f).

2. Due Process Claim

Father's counsel learned that Father would not be transported from Childress, Texas, to Orange in time for the jury selection and trial to begin. Father's counsel made an oral request to delay the pretrial and trial until Father could be present in the courtroom. To address the problem, the trial court arranged for Father to appear by videoconference through the use of the "Zoom" procedures approved by the Texas Supreme Court, and took breaks to allow Father's counsel to use the telephone to speak with her client between witnesses. Father was in the prison library in Childress, and Father's attorney left the courtroom when they used the phone. The record shows the trial of the case needed to commence on or before December 14, 2022, or it would be dismissed.

Father's counsel objected that she didn't think Father's "due process rights are being honored when he's not able to meaningfully participate in his defense." Under the circumstances, the trial court would have understood this complaint to

raise an objection to the requirement that Father was being required to participate in a trial in Orange, Texas, from his location in Childress, Texas, over the telecommunication's platform used by the court, Zoom, rather than in person.

Yet, after Father's counsel raised this complaint, which appears centered to some extent on problems she was having in using Zoom that morning, the trial court suggested that the court would endeavor to make sure that the two were linked up together on Zoom while in court. The trial court also assured Father's counsel the court would take breaks after each witness was passed so that counsel could confer with Father in private from the library on her phone. Father's attorney did not object to going forward with the trial on that basis.

We disagree with Father that he did not have a meaningful opportunity to participate in the proceedings. He had an attorney who appeared in the trial on his behalf. He participated in the trial by Zoom and in person. He does not complain that the trial court did not follow the procedures approved by the Texas Supreme Court for conducting proceedings through the use of a platform like Zoom.

Our sister court of appeals recently considered and rejected a similar argument in *E.N. v. Tex. Dep't of Family & Protective Servs.*, No. 03-21-00014-CV, 2021 Tex. App. LEXIS 4831, at *4 (Tex. App.—Austin June 17, 2021, no pet.) (mem. op.). In *E.N.*, as here, an incarcerated father unsuccessfully contended that a remote jury trial violated his due process rights. *Id.*, at **4-5. In affirming the trial court's adverse

ruling, the Austin court noted that due process is measured by a “flexible standard” that depends ‘on the practical requirements of the circumstances.’” *Id.* (citations omitted). The *E.N.* court further noted that when conducting a due process analysis, it was appropriate to weigh “(1) the private interests at stake; (2) the risk of an erroneous deprivation through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id.* (citations omitted). Balancing the interests of Father, Sally, and the Department, in light of the “practical requirements of the circumstances,” – conducting court proceedings involving an incarcerated party – we conclude that due process did not require Father’s personal attendance during all stages of the trial. *Id.*, at *15.

Although *E.N.* addressed the need for remote proceedings primarily occasioned by the Covid-19 pandemic, *E.N.*, like Father, was imprisoned at a remote location that made his attendance at the trial impractical, at best. In our case, the motion for bench warrant was not heard until the week before trial and the court was faced with a dismissal deadline of December 14, 2022. In addition, we must consider the best interests of Sally, who is entitled to a swift resolution within the bounds of the constitution, of the termination determination. We conclude that, as in *E.N.*, Father’s due process rights were not violated by his remote attendance. An

incarcerated person does not have an absolute right to appear in person at every court proceeding. *See In re Z.L.T.*, 124 S.W.3d 163, 165 (Tex. 2003).

We overrule this point.

C. The Law of The Case

“Because application of the law of the case doctrine is discretionary,” we review complaints regarding its application under an abuse of discretion standard. *See Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 717 (Tex. 2003); *see also Woods v. VanDevender*, 296 S.W.3d 275, 279 (Tex. App.—Beaumont 2009, pet. denied).

A trial court abuses its discretion if its decision is arbitrary, unreasonable, or made without reference to guiding rules or principles. *Smith v. Karanja*, 546 S.W.3d 734, 737 (Tex. App.—Houston [1st Dist.] 2018, no pet.). Under an abuse of discretion standard, we may not interfere with the trial court’s decision “so long as some evidence of a substantive and probative character supports it and the ruling comports with the law.” *In re C.M.G.*, 339 S.W.3d 317, 319 (Tex. App.—Amarillo 2011, no pet.).

The law of the case doctrine states that “a court of appeals is ordinarily bound by its initial decision if there is a subsequent appeal in the same case.” *Briscoe*, 102 S.W.3d at 716. Its application is confined to issues of law, not fact, and is “within the discretion of the court, depending on the particular circumstances surrounding that case.” *Id.*

Father contends that the law of the case precluded the trial court from submitting condition and conduct endangerment to the jury. We disagree.

When a case is tried on the merits and then reversed on appeal, the remand is generally unlimited in scope unless it clearly appears from the decision that a limited remand was intended by the appellate court. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986). The first order of termination was based on Section Q and best interest, only, and we reversed and remanded the order terminating Father’s parental rights because the trial court failed to admonish Father of his right to counsel and to appoint an attorney to represent him in stages of the proceeding that we concluded resulted in a violation of Father’s right to due process. *In re S.C.*, 2022 Tex. App. LEXIS 2263, at *58; Tex. Fam. Code Ann. § 161.001(Q). In our previous opinion reversing the ruling terminating Father’s parental rights under Section Q, however, we did not limit the scope of the issues to be decided on remand to Section Q. We did not expressly reverse that portion of the trial court’s order stating that “all relief requested in this case and not expressly granted is denied[.]”⁴ That does not mean that as to Father, we affirmed any other parts of the trial order.

⁴ This wording is frequently known as a Mother Hubbard clause. *See In re M.T.R.*, 579 S.W.3d 548, 563, (Tex. App.—Houston [14th Dist.] 2019, pet. denied).

When interpreting previous opinions, we consider both the mandate and the opinion, itself. *See Hudson*, 711 S.W.2d at 630 (citations omitted). Our mandate in the 2021 remand and in the 2022 corrected judgment reads as follows:

Having considered this cause on appeal, THE NINTH COURT OF APPEALS concludes that the judgment of the trial court should be reversed and the cause remanded to the trial court. IT IS THEREFORE ORDERED the judgment of the trial court is reversed. The cause is remanded to the trial court for further proceedings consistent with this Court's opinion.

...

The Department is exempt from court costs. See Tex. Hum. Res. Code section 40.062. D.C. established indigence. Accordingly, all costs of appeal are assessed against the incurring party.

...

REVERSED AND REMANDED

Neither the mandate, nor the opinion, contains an instruction that limited the retrial to Section (Q). Therefore, as to Father, the remand was “unlimited in scope and the cause” and reopened the case on remand as to Father in its entirety. *Id.*

We overrule this point, also.

III. Conclusion

Because the record before us reveals no reversible error, we affirm the trial court's order terminating Father's parental rights to Sally.

AFFIRMED.

JAY WRIGHT
Justice

Submitted on June 13, 2023
Opinion Delivered August 11, 2023

Before Golemon, C.J., Horton and Wright, JJ.