IN THE
TENTH COURT OF APPEALS

No. 10-15-00271-CV

IN THE INTEREST OF S.W., A CHILD

From the 335th District Court
Burleson County, Texas
Trial Court No. 27,785

MEMORANDUM OPINION

Kenneta W. appeals from a judgment that terminated the parent-child relationship between her and her child, S.W. TEX. FAM. CODE ANN. § 161.001 (West 2008). Kenneta complains that the trial court abused its discretion in submitting an erroneous definition of the term "endangerment" in the jury charge and that the evidence was factually insufficient for the jury to have found that she committed two predicate acts to support the termination. Because we find no reversible error, we affirm the judgment of the trial court.

Jury Charge Error

In her first issue, Kenneta complains that the trial court's definition of

"endangerment" included in the jury charge was erroneous because it constituted a comment on the weight of the evidence and was too vague to be helpful to the jury. The definition submitted to the jury was as follows:

> For the purpose of termination of parental rights, in order for parental conduct to constitute "endangerment" of child's well-being, conduct need not be directed at the child and the child need not actually suffer injury, but rather, "endanger" means to expose to loss or injury, to jeopardize; the specific danger to the child's well-being need not be established as an independent proposition, but may be inferred from parental misconduct.
>
> Additionally, unlawful conduct by persons who live with the child or with whom the child must associate with on a regular basis may serve as evidence of the child's conditions or surroundings for purposes of section 161.001(1)(D).
>
> A parent's criminal activity, despite knowledge that parental rights are in jeopardy, may also serve as evidence of "voluntary, deliberate, and conscious conduct" that supports a finding of endangerment under section 161.001(1)(E).

At the charge conference, Kenneta made the following objection to the definition in the proposed charge:

> The only objection on the Respondent's part would be on Page 6 of the charge, definition No. 2, an objection to the second and third paragraphs of that on the basis that they go beyond and expand upon the Family Code definition of endangerment.

The State argues that Kenneta did not properly preserve the objections regarding the comment on the weight of the evidence and vagueness and that her objection at trial did not comport with her objections she now raises in this appeal. The failure to raise a complaint at trial to a jury charge waives review of that complaint on appeal. TEX. R.

CIV. P. 274; TEX. R. APP. P. 33.1; *In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003). To the degree that Kenneta complains that the instruction constituted a comment on the weight of the evidence or was too vague to be helpful to the jury, we find that those complaints were not presented to the trial court and were therefore waived.

Kenneta also argues that the definition of endangerment was erroneously expansive. We will consider this complaint to the degree that it was preserved by the objection actually made to the trial court. The standard for review of a jury charge is abuse of discretion, and an abuse of discretion occurs only when the trial court acts without reference to any guiding principles. *Texas Dept. of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). A trial court must submit "such instructions and definitions as shall be proper to enable the jury to render a verdict." TEX. R. CIV. P. 277. This rule affords the trial court considerable discretion in deciding what instructions are necessary and proper in submitting issues to the jury. *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 451 (Tex. 1997). For an instruction to be proper, it must (1) assist the jury, (2) accurately state the law, and (3) find support in the pleadings and the evidence. *In re K.M.B.*, 91 S.W.3d 18, 27 (Tex. App.—Fort Worth 2002, no pet.).

Kenneta does not argue that the instruction was an inaccurate statement of the law or that the instruction given did not find support in the pleadings or evidence. Kenneta argues only that, while legally accurate, the definitions in the second and third paragraphs of the instruction given are not especially helpful to a jury. We disagree.

The instructions were helpful for the jury to understand that a parent's knowing allowance of a child to remain in conditions or surroundings and a parent's criminal activity before and after the removal from the parents may be considered as to whether or not a child has been endangered. Given the broad latitude that trial courts have in giving jury instructions, we cannot say that the instruction was erroneously expansive. Therefore, we find that the trial court did not act without any regard to guiding principles in deciding that the instruction regarding endangerment was necessary and proper. *In re K.M.B.*, 91 S.W.3d at 27. We overrule issue one.

Factual Sufficiency

In her second issue, Kenneta complains that the evidence was factually insufficient for the jury to have found that she committed the predicate acts in section 161.001(1)(D) & (E) of the Family Code. *See* TEX. FAM. CODE ANN. § 161.001(1)(D), (E). Kenneta does not challenge the sufficiency of the evidence regarding the best interest finding.

To terminate the parent-child relationship, there must be clear and convincing evidence that the parent committed one or more of the acts specifically set forth in Family Code section 161.001(1) and that termination is in the child's best interest. *See* TEX. FAM. CODE ANN. §§ 161.001(1), (2), 161.206(a). Evidence is clear and convincing if it "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. Due process demands this

heightened standard because of the fundamental interests at issue. *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002).

In this case, the jury found clear and convincing evidence that Kenneta (1) knowingly placed or allowed the child to remain in conditions or surroundings that endangered the physical or emotional well-being of the child, a violation of section 161.001(1)(D) of the Family Code, and (2) engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangered the physical or emotional well-being of the child, a violation of section 161.001(1)(E) of the Family Code. *See* TEX. FAM. CODE ANN. § 161.001(1)(D) & (E).

Only one ground under section 161.001(1) is necessary to support a judgment in a parental-rights termination case. *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003). Therefore, when termination is based on multiple grounds under section 161.001(1), as it was here, we must affirm the termination order if the evidence is sufficient to support any one of the grounds found by the jury when the best interest finding is not at issue. *Id*.

Both subsections (D) and (E) of section 161.001(1) require proof of endangerment, which means exposing a child to loss or injury or jeopardizing a child's emotional or physical health. *Texas Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). With respect to subsection (E), the endangerment must be the direct result of the parent's conduct and must be the result of a conscious course of conduct rather than a

single act or omission. *In re A.S.*, 261 S.W.3d 76, 83 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); *In re J.W.*, 152 S.W.3d 200, 205 (Tex. App.—Dallas 2004, pet. denied). Subsection (D), on the other hand, permits termination based on a single act or omission. *Jordan v. Dossey*, 325 S.W.3d 700, 721 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). Although an endangerment finding requires more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment, it is not necessary that the parent's conduct be directed at the child or that the child actually suffer injury; rather, it is sufficient if the conduct endangers the emotional well-being of the child. *See In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009); *Boyd*, 727 S.W.2d at 533. Additionally, "[d]omestic violence, want of self-control, and propensity for violence may be considered as evidence of endangerment." *In re J.I.T.P.*, 99 S.W.3d 841, 845 (Tex. App.—Houston [14th Dist.] 2003, no pet.). As a general principle, conduct that subjects a child to a life of uncertainty and instability endangers the child's physical and emotional well-being. *In re R.W.*, 129 S.W.3d 732, 739 (Tex. App.—Fort Worth 2004, pet. denied).

In reviewing the factual sufficiency of the evidence, we must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing. *In re J.F.C.*, 96 S.W.3d at 266. We are required to consider the disputed evidence and determine whether a reasonable factfinder could have resolved that evidence in favor of the finding. *Id*. "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." *Id.*

In assessing the sufficiency of the evidence under the foregoing standard, we cannot weigh witness-credibility issues that depend on the appearance and demeanor of the witnesses, for that is the factfinder's exclusive province. Instead, we defer to the factfinder's credibility determinations as long as they are not unreasonable. *In re J.P.B.*, 180 S.W.3d 570, 573-74 (Tex. 2005).

Relevant Facts

Kenneta, then twenty years old, was living in a hotel room with Carlos, a man who was twenty-eight years older than her. Kenneta's 14 year old sister and S.W. were also living in the same room. Kenneta went to the office at the hotel and asked to use the phone to contact law enforcement because she was a victim of domestic violence and Carlos would not allow her to contact anyone. The police were called and came to the room while Carlos was gone. There was food all over the floor and a liquid had been slung all over a mirror. Kenneta said that Carlos had thrown the food down so that she could not eat it while he was gone. S.W. was two months old at the time. When the officer arrived, S.W. was lying on his stomach in only a diaper on a bed with the air conditioner blowing directly on him. The officer that investigated stated that it looked like he was kicking out like he was "panicking almost" and was "struggling to

breathe" because of the cold air blowing in his face. S.W. was unable to turn his head on his own. The officer took S.W. and wrapped him in a blanket and laid him down on his side away from the blowing air.

Based on the officer's conversation with Kenneta and the condition of the hotel room, the officer took Kenneta, her sister, and S.W. to a health resource center, which was going to arrange for them to go to a shelter. Kenneta did not choose to stay at the shelter but returned to the hotel room after about an hour even though she knew that the Department would be called if she returned. Kenneta denied that she had told the clerk that she had been abused or that there had been any violence between Carlos and her other than a food fight that night.

Carlos had been arrested twice prior to that time for assaulting Kenneta, although he contended that she was actually the aggressor on those occasions. Carlos testified that he had told the Department that Kenneta had anger issues that occurred every two or three weeks, which would become physical at times with him having to restrain her. These incidents had been ongoing throughout their relationship. Carlos had called the police after one such incident a month prior to the jury trial. The Department believed that Kenneta was pending criminal assault charges for the altercation with Carlos at the time of trial, but Kenneta denied that charges were pending.

Kenneta had been arrested on multiple occasions for assaultive behavior before

and after S.W.'s removal and was on probation for misdemeanor theft at the time of the jury trial. Kenneta had spent several weeks in jail in the fall of 2014 for assaultive behavior for which she was sentenced to deferred adjudication community supervision for an altercation with Carlos listed as the victim. Kenneta claimed that the argument was actually with Carlos's granddaughter who Kenneta claimed had pulled a knife on her. Kenneta had not been complying with the terms of her theft probation at the time of trial and had not sought their permission to move out of state prior to moving to Missouri with Carlos. Kenneta claimed that all of the arrests for the assaults had been dismissed.

Kenneta primarily relied on Carlos for her lodging and expenses. Prior to the time of S.W.'s removal, they had been living in hotels because they had been evicted for not paying rent. Carlos paid the rent on their apartment in Missouri and Kenneta conceded that she was unable to support herself without Carlos's income. Kenneta stated that if she had remained in Texas when Carlos moved to Missouri she would have been homeless. At the time of trial, Kenneta and Carlos had an apartment in Missouri which they claimed had a room for S.W.

By considering all of the disputed evidence and deferring to the jury's credibility determinations, we find that a reasonable factfinder could have resolved the evidence in favor of the finding that Kenneta had knowingly placed or allowed S.W. to remain in conditions or surroundings that endangered his physical or emotional well-being, and

engaged in conduct or knowingly placed S.W. with persons who engaged in conduct that endangered his physical or emotional well-being. TEX. FAM. CODE ANN. § 161.001(1)(D) & (E). Therefore, the evidence was factually sufficient to support the jury's findings. We overrule issue two.

Conclusion

Having found no reversible error, we affirm the judgment of the trial court.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed January 7, 2016
[CV06]