TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00271-CV

J. C.-O., Appellant

v.

Texas Department of Family and Protective Services, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 353RD JUDICIAL DISTRICT
NO. D-1-FM-14-006936, HONORABLE GISELA D. TRIANA, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellant J.C.-O. ("Jim") appeals from the trial court's final order terminating his parental rights to his child, C.A. ("Christina").[1] *See* Tex. Fam. Code § 161.001. Christina is Jim's child with E.A. ("Ellen"). Following a jury trial, the trial court rendered judgment in accordance with the jury's findings by clear and convincing evidence that statutory grounds for terminating Jim's parental rights existed and that termination was in the child's best interest.[2] *See id.* §§ 160.001(b)(1)(D), (E), (2). Jim asserts that (1) he received ineffective assistance of counsel because his trial attorney did not preserve error by including points in the motion for new trial that the two statutory grounds for termination were not supported by factually sufficient evidence, (2) the

[1] To preserve the parties' privacy and for convenience, we refer to the child and her parents by fictitious names. *See* Tex. Fam. Code § 109.002(d); Tex. R. App. P. 9.8.

[2] The jury found at trial that Ellen signed an affidavit of relinquishment of parental rights and that it was in Christina's best interest to terminate Ellen's parental rights. Ellen's parental rights are not at issue in this appeal.

evidence is legally and factually insufficient to support the jury's verdict that Jim knowingly placed or allowed Christina to remain in an environment that endangers her, (3) the evidence is factually insufficient to support the jury's verdict that Jim knowingly engaged in conduct or knowingly placed Christina with persons who engaged in conduct that endangers her, and (4) if we reverse the termination order, then we should also reverse the trial court's appointment of the Department as sole managing conservator. We will affirm because the evidence is factually sufficient to support the jury's verdict that Jim knowingly engaged in conduct that endangers Christina.

BACKGROUND

The Department became involved with Jim and Ellen when Christina was approximately three weeks old. Christina was born in November 2014.[3] For approximately the first two weeks after Christina's birth, Ellen and Christina lived with Ellen's parents. Then Ellen and Christina moved in with Jim. On December 7, 2014, Jim and Ellen attended church together with the baby. Ellen, who has been diagnosed with bipolar disorder and who admittedly abuses methamphetamine, cocaine, and alcohol, testified that she became "overwhelmed" by her feelings during the service. Jim testified that about halfway through the service, Ellen told him that she was hearing voices and she was uncomfortable and wanted to leave. After they left the service, Ellen

[3] The facts recited herein are taken from the testimony and exhibits presented at trial. We have considered the entire record, but because this is a memorandum opinion affirming the trial court's termination order, we will detail the evidence only to the extent necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.4; *In re A.B.* ("*A.B. II*"), 437 S.W.3d 498, 505, 507 (Tex. 2014) (holding that court of appeals need not detail the evidence supporting its decision when affirming termination findings on factual-sufficiency grounds).

asked Jim to take her and Christina to the police station. Jim testified that she was screaming at him in the parking lot to take them there and that he thought the police could provide a temporary order for him to take care of the child. Although when they first arrived at the police station, Ellen told the responding patrol officer that she wanted to sign the baby over to Jim (whose name was not on Christina's birth certificate), the officer testified that after she and Jim were separated, Ellen told the officer she felt "she was being pressured." The officer also testified that it was difficult to have a conversation with Ellen because she was "[v]ery erratic" and "[a] lot of her mannerisms were those of a narcotics user."

Jim testified that he left Ellen and Christina at the police station because the police officer told him that Christina would not be released to him since his name was not on her birth certificate, and then the officer escorted him out of the police station. The police officer testified that Jim did not stay very long at the station, and in his opinion, Jim did not want to be there, but the officer could not recall whether Jim had asked to stay at the station. Ellen ultimately left Christina at the police station, and the Department took custody of the baby. Jim testified that he waited nearby, hoping that Ellen would call him for a ride so that he could find out what happened, but Ellen did not call him until the next day.

The next day, December 8, a Department employee spoke with Jim. The Department supervisor who testified at trial agreed that Jim expressed an interest in beginning services offered by the Department right away, stating "[h]e was cooperative from the 8th, when we spoke with him." On that same day, the Department filed its original petition seeking termination of Ellen's parental

rights and of Jim's rights, if he was determined to be Christina's father. The trial court later determined that Jim is Christina's biological father.

After the emergency removal hearing on December 8, Jim was ordered to begin participating in services, including a psychological evaluation, a drug and alcohol evaluation, random drug testing, and protective parenting classes. As the case progressed, Jim was later ordered to participate in basic parenting classes and individual therapy, and in February 2015, he and Ellen were ordered to participate in couples counseling "if they are a couple." By October 2015, however, the trial court ordered Ellen to stay 200 yards or more away from Jim. In December 2015, the trial court signed an order granting an extension of the case's dismissal date until June 11, 2016.

There was a four-day jury trial that began on February 23, 2016. In addition to evidence about Ellen's substance-abuse issues and domestic violence between Ellen and Jim, which we discuss in more detail below as it is relevant to Jim's issues on appeal, the jury heard evidence related to Christina's placement with a foster family and progress after the Department removed her. The family's caseworker testified that the Department's post-termination plan for Christina was for her to be adopted by the foster parents whom she had been placed with since December 7, 2014.

The jury returned a unanimous verdict that Jim's parental rights should be terminated as to Christina. The trial court ordered termination of Jim's parental rights based on the jury's finding by clear and convincing evidence that termination was in Christina's best interest and that Jim had committed the following statutory grounds for termination: (1) he knowingly placed or allowed Christina to remain in conditions or surroundings that endanger her physical or emotional well-being and (2) he engaged in conduct or knowingly placed Christina with persons who engaged

in conduct that endangers her physical or emotional well-being. *See id.* § 161.001(b)(1)(D), (E), (2). This appeal followed.

ANALYSIS

On appeal, Jim contends that he received ineffective assistance of counsel because his trial attorney did not preserve error by including points in the motion for new trial asserting that the two statutory grounds for termination were not supported by factually sufficient evidence. Jim also challenges the sufficiency of the evidence supporting the two statutory grounds. He asserts that the evidence is legally and factually insufficient to support the jury's verdict that Jim knowingly placed or allowed Christina to remain in an environment that endangered her. *See id.* § 161.001(b)(1)(D). Regarding subsection (E), Jim argues only that the evidence is factually insufficient to support the jury's verdict that he knowingly engaged in conduct or knowingly placed Christina with persons who engaged in conduct that endangered her. *See id.* § 161.001(b)(1)(E). Jim does not challenge the jury's verdict that termination is in Christina's best interest. *See id.* § 161.001(b)(2).

When seeking termination of parental rights, the Department bears the burden of proving one of the predicate grounds in Section 161.001, *see id.* § 161.001(b)(1) (listing grounds), and that termination is in the child's best interest, *see id.* § 161.001(b)(2). We must uphold the judgment if the evidence supports any one of the Section 161.001(b)(1) grounds when there has also been a finding that termination is in the child's best interest. *See In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003). In this case, we will focus our analysis on whether the evidence is factually sufficient to support the jury's verdict that Jim knowingly engaged in conduct or knowingly placed Christina

with persons who engaged in conduct that endangered her (the statutory ground established in Subsection (E)).[4]

Standard of review

Due process requires courts to apply the clear-and-convincing-evidence burden of proof in parental-termination cases. *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002); *see* Tex. Fam. Code § 161.206(a). The Family Code and the Texas Supreme Court define "clear and convincing evidence" as "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 § 101.007; *see also In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002). In a factual-sufficiency review, we review the record to determine whether "the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations." *In re C.H.*, 89 S.W.3d at 25.

We review all of the evidence in a neutral light and give "due consideration to evidence that the factfinder could reasonably have found to be clear and convincing." *In re J.F.C.*,

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[4] Jim's appellate counsel argues that the failure of Jim's appointed trial counsel to preserve this issue by presenting it in Jim's motion for new trial means that Jim received ineffective assistance of counsel. When reviewing the effectiveness of counsel in a termination proceeding, we follow the two-prong test set forth in *Strickland v. Washington*, which requires an appellant to show by a preponderance of the evidence that (1) his counsel's performance was deficient and (2) the appellant was prejudiced by that deficient performance. *See In re M.S.*, 115 S.W.3d 534, 545 (Tex. 2003) (adopting *Strickland* test and citing *Strickland*, 466 U.S. 668, 687 (1984)). While not every failure to preserve factual-sufficiency issues rises to the level of ineffective assistance, the *Strickland* test requires us to analyze whether Jim was prejudiced by his counsel's failure to preserve the factual-sufficiency issue. *Id.* at 549. In addition, if counsel's failure to preserve the complaint is unjustified, due process requires that we review the factual-sufficiency issue. *Id.* We will turn directly to the merits of the factual-sufficiency issue without addressing whether counsel's performance was deficient. *See* Tex. R. App. P. 47.1 (courts of appeal must hand down written opinions that are as brief as practicable but that address every issue raised and necessary to final disposition of appeal).

96 S.W.3d at 266. While we must undertake "an exacting review of the entire record with a healthy regard for the constitutional interests at stake," *In re C.H.*, 89 S.W.3d at 26, we nevertheless must still provide due deference to the factfinder's decisions. *In re A.B.* ("*A.B. II*"), 437 S.W.3d 498, 503 (Tex. 2014). The factfinder, who has "full opportunity to observe witness testimony firsthand, is the sole arbiter when assessing the credibility and demeanor of witnesses." *Id.* We must consider whether the disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding. *In re J.F.C.*, 96 S.W.3d at 266. We may conclude that the evidence is factually insufficient only 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 about the truth of the Department's allegations. *Id.*

Conduct endangering the child

Subsection (E) requires proof of child endangerment, and it focuses on the parent's actions or failure to act, as opposed to the child's environment. *Compare* Tex. Fam. Code § 161.001(b)(1)(E) (focusing on parent's endangering conduct or knowing placement of child with persons who engaged in endangering conduct) *with id.* § 161.001(b)(1)(D) (focusing on endangering environment in which parent knowingly placed child or knowingly allowed child to remain). "'Endanger' means 'to expose to loss or injury; to jeopardize.'" *In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996) (quoting *Texas Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987)). The endangering conduct need not be directed at the child nor must the child actually suffer injury. *Boyd*, 727 S.W.2d at 533. The conduct need not occur in the child's presence, and it may occur before the

child's birth. *Walker v. Texas Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 617 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

The jury instructions included this definition of endangerment. In addition, we note that the endangering conduct may occur both before and after the child has been removed by the Department. *Id.* Termination based on Subsection (E) requires more than a single act or omission; "the statute requires a voluntary, deliberate, and conscious course of conduct by the parent." *In re M.E.-M.N.*, 342 S.W.3d 254, 262 (Tex. App.—Fort Worth 2011, pet. denied). The specific danger to the child's well-being may be inferred from the parent's misconduct standing alone. *In re A.B.*, 412 S.W.3d 588, 599 (Tex. App.—Fort Worth 2013) ("*A.B. I*") (on reh'g en banc) (per curiam), *aff'd*, 437 S.W.3d 498 (Tex. 2014). "[A] parent's conduct that 'subjects a child to a life of uncertainty and instability' endangers the child's physical and emotional well-being." *Id.* (quoting *In re R.W.*, 129 S.W.3d 732, 739 (Tex. App.—Fort Worth 2004, pet. denied)). We may also consider a parent's mental state when determining whether a child is endangered "if that mental state allows the parent to engage in conduct that jeopardizes the physical or emotional well-being of the child." *In re M.E.-M.N.*, 342 S.W.3d at 262. We must determine whether evidence exists that the endangerment of the child's well-being is "the direct result of the parent's conduct, including acts, omissions, or failures to act." *Id.*

Having reviewed the entire record, we first consider the evidence supporting the jury's termination finding. The Department and the attorney ad litem focus on the evidence of Jim's continued abusive relationship with Ellen and his admissions of enabling her substance abuse both before and after Christina's birth. The record includes significant evidence regarding:

- the volatile nature of Jim's "on-again, off-again" relationship with Ellen, including more than 15 incidents of domestic violence by Ellen against him;

- Jim's enabling of Ellen's substance-abuse problem, including giving her money for drugs throughout their relationship, driving her to locations where he knew she bought drugs, and picking her up from a drug-rehabilitation program on at least 3 separate occasions before she had completed the rehab program;

- Jim's continuation of his and Ellen's relationship until shortly before trial despite the Department's warnings that a continued relationship with Ellen put his relationship with Christina in jeopardy;

- Jim's failure to inform his therapist of the continuation of his and Ellen's relationship;

- Jim's efforts to persuade the Department he was no longer seeing Ellen, despite evidence to the contrary; and

- Jim's allowing Ellen and another friend of his to inject methamphetamine at his home shortly before trial.

Jim testified that he knew about Ellen's drug use from the first day that he met her because she used drugs that day. He testified that he would pick her up and let her stay at his house for a few days at a time and that this had happened about 15 times over the course of the case after the Department had removed Christina. Jim also admitted that Ellen attacked him, hitting or kicking him, on at least 15 different occasions when he had picked her up to give her a ride. He also testified that Ellen burned his eye with a cigarette butt. He testified that up until the month before trial he continued to pick her up when she called because she would tell him she was stranded and had no place else to go.

Ellen testified that Jim "didn't have the drugs, but he provided me with everything I needed to get the drugs: The money, the ride, the place to do the drugs, the utensils to do the drugs, so on and so forth." She also testified that after he would take her to get drugs and she got high, they would have sex. Ellen admitted that she hits Jim, but she also testified that Jim physically assaulted her several times and she never reported it to the police.

The jury heard evidence of two incidents that happened the month before trial. On January 19, 2016, Jim picked Ellen up from a rehabilitation center before she had completed her treatment there. He took her to his house because she wanted to take a shower. They had sex shortly after, and the evidence is disputed regarding whether that sex was consensual. Ellen alleges that Jim sexually assaulted her both that day and the next day. Jim denied sexually assaulting Ellen, but he admitted that he has had sex with her many times when she was intoxicated by drugs or alcohol. On January 20, 2016, Jim drove Ellen to a different rehabilitation center to get a referral to another center for help for her addiction and mental-health issues. However, she decided she did not want to wait at the rehabilitation center, and after that, Jim took her directly to a liquor store to get alcohol. Ellen testified that after she drank the liquor, she immediately wanted drugs. Jim testified that after they purchased the alcohol, they picked up a mutual friend, Norman; took Norman to his apartment to get some items; took Norman to the pawnshop to pawn the items; and then all went to Jim's home. Jim admitted that he allowed Norman and Ellen to use methamphetamine in his garage and went for a walk while they were using. When he got back, Norman was gone, Ellen had broken the window of Jim's truck (she admitted to doing it at trial), and then she assaulted him. The police were called, and Ellen was arrested for assault and family violence.

To support his position that the evidence is factually insufficient to support a finding under Subsection (E), Jim focuses on his testimony at trial that he was determined to end his relationship with Ellen after she was arrested for assault family violence on January 20, 2016. Jim testified that he is in love with Ellen, but that he is not going to continue to be in love with her anymore after the last incident when she broke his window and attacked him. However, the jury also heard extensive evidence about the "on-again, off-again" nature of Jim and Ellen's relationship.

Jim testified that he and Ellen became engaged to be married after Christina was removed from their care. He stated that the engagement lasted about three to four months during the pendency of the CPS case, from about February 2015 until April or May 2015, but Ellen sold her engagement ring to get money for drugs and they broke off their engagement. The Department caseworker who had the case from April 2015 until December 2015 testified that although Jim's attorney told her in May 2015 that Jim and Ellen were not together anymore and that Jim regularly told her that he was no longer with Ellen, the caseworker continued to see them together at visits at the CPS office and at court hearings. She also saw the June 2015 police report, which documented an incident involving a disturbance at Jim's apartment between Ellen and Jim.[5]

The caseworker continued to have "major concerns" about Ellen and about Jim's relationship with her. Then in November 2015, she "caught them together" at Jim's house, after Jim

[5] The Round Rock police officer who responded to the call testified at trial that the apartment complex's management had called in the disturbance. Ellen and Jim were arguing, and Ellen was throwing things and had destroyed some of Jim's property. The police officer did a family-violence investigation because Ellen had some bruises and scratches, but she claimed that they were from being restrained when she had been arrested the week before. The apartment complex's management and Jim both wanted Ellen to leave, but she refused, so the police officer arrested her for criminal trespass.

had obtained a "stay away" order against Ellen. The caseworker recorded her interaction with Ellen and Jim on her cell phone, and this video was admitted into evidence. On the video, Ellen denies knowledge of the stay-away order, and Jim acknowledged that he had picked Ellen up and brought her to his house. The caseworker informed Jim that the Department did not think his relationship with Ellen was in Christina's best interest, especially now that she knew he had not been truthful about it.

Jim's therapist testified that his involvement with Ellen was a risk factor that created a concern about his ability to protectively parent Christina. The therapist testified that she and Jim discussed the importance of his not being involved with Ellen because that would affect his chances of having custody of Christina. The therapist also testified that Jim never told her that he was or had been engaged to Ellen during his therapy, which lasted from April to August 2015. He also never told her that Ellen assaulted him at all, much less that she frequently assaulted him. The therapist further testified that at the time she discharged Jim from treatment in August 2015, Jim told her that he had no involvement of any kind with Ellen and that if Ellen asked him for help, he would say no. Jim admitted that he never told the therapist that he was continuing to pick Ellen up to give her rides and that he would let her stay at his house for a few days at a time during his therapy. There was additional evidence in the record suggesting that Jim and Ellen's on-again, off-again abusive relationship was ongoing while Jim was in therapy, including the Round Rock police officer's testimony that he had responded to a disturbance call in June 2015 involving Jim and Ellen. Finally, Jim never told the therapist that he had picked Ellen up from drug rehabilitation several times before she successfully completed her treatment program, that he provided Ellen with the money to buy

drugs, or that he took her to buy drugs. The therapist expressed concern that these enabling behaviors were not disclosed to her.

Jim also emphasizes that he completed all the services the Department provided to him and that he tested negative for drugs during the pendency of the case. The Department does not dispute that he tested negative for drugs, and his caseworker testified that the Department does not have any concerns that Jim has substance-abuse issues. However, the Department disputes that Jim successfully completed his services, pointing to the caseworker's testimony that he was dishonest about his relationship with Ellen and his enabling of Ellen's substance abuse.

To prove endangerment, the Department had to show "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. "Stability and permanence are paramount in the upbringing of children." *In re M.E.-M.N.*, 342 S.W.3d at 263. One of the Department's caseworkers testified that the Department cannot safely return a child to a home where there are people using drugs and violence occurring in the home. Drug use and its effect on a parent's ability to parent may establish an endangering course of conduct. *Id.* In this case, the jury had evidence before it that Jim continued to enable Ellen's drug use after Christina's removal, which raises doubt about his ability to be a protective parent. Moreover, "[a] parent's abusive or violent conduct can produce a home 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.) (citing *In re B.R.*, 822 S.W.2d 103, 106 (Tex. App.—Tyler 1991, writ denied)). Domestic violence and lack of self control may be considered as evidence of endangerment. *E.g.*, *id.*; *see also Sylvia M. v. Dallas Cty. Welfare Unit*, 771 S.W.2d 198, 201, 204

(Tex. App.—Dallas 1989, no writ) (considering "volatile and chaotic" marriage, altercation during pregnancy, and mother's repeated reconciliation with abusive spouse). In this case, Jim's continued relationship with Ellen, which was admittedly abusive, also raises doubt about his ability to be a protective parent. The jury could have also considered Jim's mental state and his seeming inability to permanently end his relationship with Ellen as endangering Christina. *Cf. In re J.I.T.P.*, 99 S.W.3d at 845 (considering mother's desire to hurt herself and history of noncompliance with medication schedule as factors endangering child's well-being).

Taking all of the evidence into account, the jury could have considered the domestic violence between Ellen and Jim, Jim's enabling of Ellen's drug abuse during the pendency of this case, and the volatile nature of their ongoing relationship, especially given the close proximity to the trial of the January 2016 incident resulting in Ellen's arrest for assault family violence, as evidence that Jim engaged in a course of conduct that endangered Christina. *Cf. id.* at 844-45 (holding sufficient evidence of endangerment existed when parents admitted to ongoing domestic violence, including an incident shortly before trial); *In re M.E.-M.N.*, 342 S.W.3d at 263-64 (explaining that "[a] parent's decision to engage in illegal drug use during the pendency of a termination suit, when the parent is at risk of losing a child, supports a finding that the parent engaged in conduct that endangered the child's physical or emotional well-being"). Although Jim claims that he will not continue his relationship with Ellen, the evidence before the jury raises doubt about his ability to change. As the factfinder, the jury was entitled to believe or disbelieve Jim's testimony. *See In re U.P.*, 105 S.W.3d 222, 236 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (holding that

factfinder was entitled to disbelieve appellant father's claim that he stopped providing drugs to child's mother after learning mother was pregnant).

Giving due deference, as we must, to the decisions of the factfinder, who is the sole arbiter when assessing the credibility and demeanor of witnesses, *A.B. II*, 437 S.W.3d at 503, we conclude that a reasonable factfinder could have resolved the disputed evidence at trial in favor of its finding, *see In re J.F.C.*, 96 S.W.3d at 266. Accordingly, in light of the entire record, we conclude that there is no disputed evidence that a reasonable factfinder could not have credited in favor of the finding that is so significant that a factfinder could not reasonably have formed a firm belief or conviction about the truth of the Department's allegations. *See id.* As a result, we also conclude that Jim was not prejudiced by his counsel's failure to preserve this issue for appeal. *See In re M.S.*, 115 S.W.3d at 549-50 (requiring appellate courts to conduct review for harm as if factual sufficiency had been preserved).

Having determined that factually sufficient evidence supports the trial court's termination finding based on Subsection (E) and that Jim therefore was not harmed by his counsel's failure to preserve this issue for appeal, we overrule Jim's first and fourth issues. We must uphold the judgment if the evidence supports any one of the Section 161.001(b)(1) grounds and there has also been a finding that termination is in the child's best interest. *See In re A.V.*, 113 S.W.3d at 362. Accordingly, we need not reach Jim's other issues. *See* Tex. R. App. P. 47.1 (courts of appeal must hand down written opinions that are as brief as practicable but that address every issue raised and necessary to final disposition of appeal).

CONCLUSION

Having concluded that sufficient evidence supports the trial court's finding that Jim engaged in conduct that endangers Christina's physical or emotional well-being, we affirm the trial court's order of termination.

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Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Affirmed

Filed: October 14, 2016