TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00431-CV

S. B., Appellant

v.

Texas Department of Family and Protective Services, Appellee

FROM THE DISTRICT COURT OF WILLIAMSON COUNTY, 425TH JUDICIAL DISTRICT NO. 16-0065-CPS425, HONORABLE BETSY F. LAMBETH, JUDGE PRESIDING

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

A unanimous jury found that the parental rights of appellant S. B. ("Susan") should be terminated. The trial court entered an order terminating her parental rights to her son "Charles," who was almost three at the time of trial,[1] and Susan appealed. We reverse the trial court's order and remand for further proceedings.

Peremptory Challenges

In her first issue, Susan complains that the trial court committed reversible error when it gave a total of eight peremptory strikes to the parties aligned against her—the Texas Department of Family and Protective Services, Charles's attorney ad litem, and intervenor "Mary." Because we agree, we need not address Susan's second error complaining about closing arguments.

[1] We will refer to the child and his family members by aliases. *See* Tex. R. App. P. 9.8 (related to protection of minor's identity in cases involving termination of parental rights).

Standard of Review

In a civil case tried in a district court, each party is entitled to six peremptory challenges. Tex. R. Civ. P. 233. If there are multiple parties, the trial court must decide before peremptory challenges are exercised whether the litigants aligned on the same side are antagonistic with respect to issues that will be submitted to the jury. *Id.* If one of the litigants makes a motion before peremptory challenges are exercised, the trial court must "equalize the number of peremptory challenges so that no litigant or side is given an unfair advantage as a result of the alignment of the litigants and the award of peremptory challenges." *Id.* Thus, the trial court must determine whether the litigants aligned on one side are antagonistic to each other as to fact issues for the jury; if not, it should give each side the same number of challenges. *Garcia v. Central Power & Light Co.*, 704 S.W.2d 734, 736 (Tex. 1986); *Van Allen v. Blackledge*, 35 S.W.3d 61, 64 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Whether aligned parties are antagonistic to each other is a question of law that must be determined after voir dire and before the parties exercise their strikes, based upon information taken from the pleadings, pretrial discovery, voir dire, and other information brought to the court's attention. *Garcia*, 704 S.W.2d at 736-37; *In re M.N.G.*, 147 S.W.3d 521, 531 (Tex. App.—Fort Worth 2004, pet. denied). If the record supports a conclusion of antagonism between parties on one side, the trial court must exercise its discretion and determine how to allocate strikes among the parties. *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 919 (Tex. 1979); *Moore v. Altra Energy Techs., Inc.*, 321 S.W.3d 727, 741 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

If we determine that the trial court erred in concluding that there was antagonism or in how it allocated the parties' peremptory challenges, we must then determine, based on an

examination of the entire record, whether that error resulted in a "materially unfair" trial. *Garcia*, 704 S.W.2d at 737; *In re M.N.G.*, 147 S.W.3d at 533; *Van Allen*, 35 S.W.3d at 66. "When the trial is hotly contested and the evidence sharply conflicting, the error results in a materially unfair trial without showing more." *Garcia*, 704 S.W.2d at 737; *see Lopez v. Foremost Paving, Inc.*, 709 S.W.2d 643, 644 (Tex. 1986); *Van Allen*, 35 S.W.3d at 66. We also consider the number of jury questions, whether the verdict was unanimous, and whether there was a motion for summary judgment or motion for instructed verdict. *Lopez*, 709 S.W.2d at 645 ("[T]he fact that the jury was deadlocked at one point shows that the jury believed there was a sharp conflict in the evidence and that the trial was seriously contested."); *Dunn*, 592 S.W.2d at 921.

Was there antagonism?

Aside from pleadings filed by the Department and Susan, the only other relevant document on file is Mary's petition in intervention, in which she sought to be named sole managing conservator, asserting that Susan had engaged in a history of domestic violence and had abused or neglected Charles, but did not pray for termination of Susan's parental rights. In the first pretrial hearing, Susan raised the subject of jury strikes, arguing that the Department, Mary, and Charles's attorney ad litem were aligned and should share their strikes. The attorney ad litem said, "I would disagree with some of the alignment is there [sic]. So I would think that we would each have a few that we could do ourselves." The Department's attorney said, "I feel like my position is not [aligned] with [Mary's]. I don't know—I can foresee having differing avenues or viewpoints with [Charles's attorney ad litem], but I can understand the mother's concern; but [Mary] has not even requested termination in her petition. I don't—I don't think that we would be [aligned]." After the hearing,

Susan filed a motion asking the trial court to grant six strikes total to the Department, Mary, and the attorney ad litem, asserting that there was no antagonism between those parties. In a second pretrial hearing, the Department stated that although Mary had not requested termination and had responded in discovery "that she was hoping that [Susan] and her could work it out in the custody agreement," she had come to "share some sentiments of termination; and so I would just defer to the court on strikes." The trial court said it would take the matter under advisement.

The day of trial, before the potential jurors were called in for voir dire, the trial court said it had decided to give Susan six strikes, while "the ad litem, CPS, and the intervenor will share eight. If you think that you cannot agree on your eight, then I would give the ad litem and CPS four and the intervenor four." The court and the attorneys moved on to discuss how much time each party would have to present their case. Asked whether she would need additional time to present her case after the Department and Susan presented their witnesses, Mary responded, "I think my case pretty much tracks the same facts and witnesses as—as the case in chief," and later clarified that she might have three additional witnesses if those individuals were not called by the Department or Susan. The attorney ad litem answered the same question by saying she might need an additional day or two, depending on whether all of her witnesses were called during the other parties' presentations. During that discussion, the Department said, "I would note that for the purposes of strike, I would agree that our aim is the same. But I think for presentation of the case, it is wholly different," and went on to explain that the Department's case had to do with "the services that [Susan] completed and didn't complete," whereas Mary and the attorney ad litem had "a whole different angle" to present. Susan then said, "We raised an oral motion to equalize the strikes. And you've denied that

motion, correct?" The trial court responded, "I granted it in part. I've equalized the strikes from the standpoint of these folks don't get six each." Shortly before voir dire, Susan re-urged her motion, asserting that the other three parties were "clearly aligned." The trial court denied Susan's request.

The Department's voir dire began with questions about how the panelists felt about the Department. It explained its conservatorship process and service plans, stated that it was seeking the termination of Susan's parental rights, and asked for the panelists' thoughts on what makes a good parent and whether birth parents were preferable to adoptive parents. As to best interest, the Department said that "another attorney is going to tell you about 'best interest.'" In her voir dire, Mary explained her situation as an intervenor and asked about the panelists' experiences with the Department, the foster-care system, and the adoption process. She also asked what made someone a good parent and whether the panelists thought a non-relative could be good parent. Mary asked the panelists about abuse or neglect and substance abuse, either their own or in others. Finally, she asked whether any panelists could never terminate parental rights. The attorney ad litem then explained her role as guardian and attorney ad litem, saying her task was to conduct an investigation and advocate for Charles. She asked the panelists what factors should be considered in looking at best interest and in assessing the best placement for a child and asked how the panelists felt about marihuana use by a parent. The clerk's record contains one "Jury Panel" sheet for "State, Ad Litem, [Mary]," showing their eight strikes. It is unclear whether the attorney ad litem determined her own four strikes or worked with the Department and Mary, but there were no duplicate strikes made, and the record includes indications that the parties conferred about their objections to some panelists.

We cannot conclude that the record before the trial court at the time it allocated strikes supports a conclusion that there was any antagonism between the Department, Mary, and the

attorney ad litem. The Department and Mary agreed that they were aligned in seeking termination of Susan's parental rights. Although the attorney ad litem asserted at one point that she had a "different angle" and asked for a few strikes of her own, she did not explain how her view of Charles's best interest was in any way antagonistic to the Department or Mary. *Cf. In re P.A.*, No. 02-03-00277-CV, 2004 WL 2365039, at *2-3 (Tex. App.—Fort Worth Oct. 21, 2004, pet. denied) (mem. op.) (discussing evidence of possible antagonism between attorney ad litem and Department). We conclude, as a matter of law, that the record does not contain evidence of antagonism between the attorney ad litem, Mary, or the Department on any issue submitted to the jury. *See Dunn*, 592 S.W.2d at 918, 921 ("antagonism must exist on an issue of fact that will be submitted to the jury, not on a matter that constitutes a pure question of law," and review of trial court's decision is done "from the perspective of the trial judge as of the time he makes his determination"). The trial court therefore erred in allocating an additional two strikes to the parties aligned against Susan.[2]

Was the trial materially unfair?

Because there was no evidence that could support the allocation of additional strikes to the parties aligned against Susan, our next step is to examine the entire record to determine if the error resulted in a materially unfair trial. *See Garcia*, 704 S.W.2d at 737. In making that determination, we apply a "relaxed" harmless-error analysis. *Dunn*, 592 S.W.2d at 921. "When the

[2] The Department asserts that Susan has a "mistaken belief that the trial court did not equalize the strikes." However, the court was authorized to "equalize" strikes by allocating additional strikes only if there was antagonism among the parties on one side. *See Garcia v. Central Power & Light Co.*, 704 S.W.2d 734, 736 (Tex. 1986) ("If no antagonism exists, each side must receive the same number of strikes."). Further, a party who preserved error need not identify which objectionable jurors heard the case. *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 5 (Tex. 1986).

trial is hotly contested and the evidence sharply conflicting, the error results in a materially unfair trial without showing more."[3] *Garcia*, 704 S.W.2d at 737 (citing *Dunn*, 592 S.W.2d at 921).

The jury was asked whether termination was in Charles's best interest and whether Susan had committed any of the following acts, which amount to grounds for termination:

> knowingly placed or allowed Charles to remain in conditions or surroundings that posed a danger to his physical or emotional well-being;
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> engaged in conduct or knowingly placed Charles with someone who engaged in conduct that endangered his emotional or physical well-being;
>
> failed to comply with a court order that established the steps Susan had to take to regain custody of Charles after he was taken into the Department's conservatorship for at least nine months due to Susan's abuse or neglect;
> used a controlled substance in a manner that endangered Charles's health or safety and either did not complete a court-ordered rehabilitation program or continued to abuse the substance after completing such a program;

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[3] As noted by our sister court:

> [M]ost, if not all, errors evaluated under *Dunn's* reversible-error test have led to reversal. This trend appears to follow from the test's exclusive focus on whether the trial was "hotly contested" and the evidence "sharply conflicting," rather than on the extent to which an unfair advantage was actually created by the allocation of challenges. Consider, for instance, the scarce number of cases that actually reach a jury verdict that are not "hotly contested." And, of course, if the evidence were anything other than "sharply conflicting," the central issue on appeal would not likely be a remand point such as allocation of peremptory challenges but probably a rendition point such as legal sufficiency of the evidence. Thus, the *Dunn* test, which began as a "relaxed" harmless-error rule, has become a virtual rule of automatic reversal.

Pojar v. Cifre, 199 S.W.3d 317, 332-33 (Tex. App.—Corpus Christi 2006, pet. denied) (footnote omitted). Although we agree that the case law flowing from *Garcia* seems to "overlook[] the considerations of fairness articulated" in *Dunn* and its predecessors, *id.* at 333, we must analyze the issue as instructed to do so by the supreme court.

> constructively abandoned the child, who has been in the Department's care for at least six months, and the Department made reasonable efforts to reunite Susan and Charles, Susan had not regularly visited or maintained significant contact with Charles, and Susan had shown an inability to provide Charles with a safe environment; or
>
> has a mental or emotional illness or deficiency that rendered Susan unable to provide for Charles and will continue to make her unable to provide for him until he is at least eighteen.

See Tex. Fam. Code §§ 161.001(b)(1)(D), (E), (N), (O), (P), (2), .003(a). As briefly explained below, based on this record—the jury heard eight days of testimony from seventeen witnesses—we cannot conclude that the issues were not hotly contested or that the evidence relevant to the questions asked of the jury was not sharply conflicting. *See Garcia*, 704 S.W.2d at 737.

The Department filed its petition seeking conservatorship in mid-May 2016, based on allegations from early May that Susan was using illegal drugs, leaving Charles in the care of Mary, Susan's ex-girlfriend with whom she had lived since before Charles's birth in August 2014, and "Alice," Susan's mother; and that Susan was erratic and combative with Mary and Alice. In her trial testimony, Susan admitted to using methamphetamine weekly for one-and-one-half to two months starting in about March 2016, just before the Department initiated this proceeding. She denied using illegal drugs when Charles was present but admitted that she would usually be gone "a day or two" when she used them. The evidence was that Susan left Charles with Mary and Alice when she was not present or was unable to care for him. Although the Department notes that Alice had physical limitations and had been diagnosed with major depressive disorder, in an investigation conducted a year before filing its petition, the Department had concluded that she was capable of

caring for Charles for short periods of time. Further, she rarely cared for him alone.[4] Susan testified that she had taken several kinds of pain medications for a number of years, largely related to chronic pancreatitis and repeated bouts of C. difficile.[5] She testified about the medications and explained that she tried to avoid taking them when Charles was in her sole care.[6] She also testified that she was speaking to a specialist about alternatives to pain medications in the future.

In early June 2016, Susan was arrested for driving while intoxicated and possession of marihuana. Susan testified that her impairment was due to prescription medications, admitting that she drove after being discharged from a hospital despite a warning that she should not drive but explaining that the reason she was driving was that Mary had called to tell her that Charles was in the hospital. In July 2016, a mental-health and substance-abuse assessment diagnosed Susan with severe cannabis use disorder, severe "amphetamine-type substance use disorder," and severe opioid use disorder. That assessment stated she was using marihuana and oxycodone daily and had last used methamphetamine in early May 2016. Medical records from January 31, 2017 indicate that Susan was admitted to a hospital briefly because she had sores consistent with methamphetamine

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[4] Much of the evidence the Department cites in its brief, attempting to show that the evidence was not sharply conflicting, relates to incidents that occurred in early May 2016 (Susan's use of methamphetamine, her alleged suicide attempt, and a fight she had with Alice), just after the Department received the first report about Susan's drug use and before the Department filed its petition for conservatorship.

[5] C. difficile or C. diff is a bacteria that kills good bacteria in the patient's colon and "gut," and the disease resulted in Susan's being hospitalized multiple times. At the time of trial, Susan had applied for disability, her application had been denied, and she was appealing that denial.

[6] Although the Department highlights that Charles was "born testing positive for prescription medication," Mary and Susan testified that it was prescribed pain medication and that Susan cut back on the amount she was taking at the end of the pregnancy. They also agreed that Charles's birth was a difficult one, resulting in a brief stay in the Neonatal Intensive Care Unit.

use and that she tested positive for amphetamine, cannabinoids, and opiates; Susan denied using methamphetamine but admitted to using marihuana and prescription pain medications.

During the pendency of this proceeding, Susan completed an intensive outpatient treatment program, and she admitted to relapsing once in mid-January 2017, when she smoked marihuana after getting into a fight with Mary. Susan's therapist explained that relapse is a part of the process when recovering from addiction. There was conflicting evidence about whether Susan had refused to complete a second treatment program or whether she was able to find a program that she could afford and that would allow her to continue to take her prescription pain medications.

The Department's records show that throughout the proceeding, Susan tested negative for any drugs four times, tested positive for opiate medications on three occasions, and tested positive for marihuana once in February 2017. On ten occasions, Susan refused, failed to appear, or did not comply with the test requirements, resulting in no drug test being performed, and Susan testified that some of the missed tests were due to her being ill or hospitalized.

As for Susan's mental health and stability, there was testimony that Susan twice attempted or at least contemplated suicide—once in early May 2016 and once before Charles was born. Susan, on the other hand, testified that she had only once considered suicide—in May 2016—and that she made sure that Charles was safe by leaving him with Mary and Alice. Susan and Lauren Bryant, a case manager with Bluebonnet Trails Community Mental Health/Mental Retardation Center, testified that Susan had been seeing Bryant since October 2016. Bryant assists Susan in "coping with substance abuse issues," and she testified that Susan had made good progress. Susan had also seen a therapist through Bluebonnet Trails for some amount of time—it was unclear when Susan stopped seeing the therapist. Susan testified that she continued to see Bryant "for

individual therapy," and although the Department notes in its brief that "it turned out that Ms. Bryant was just a case manager," attempting to minimize Bryant's ability to assist Susan with her addiction and mental-health issues, Bryant testified that "[c]ase management is going to be more so working on coping skills and resources, and individual counseling is going to be primary just processing and just talking about what's going on." There was also disagreement between Susan and the Department about whether Susan had been told to seek other mental-health evaluations or services, and the parties disputed whether Susan was engaged in a twelve-step or similar program.

Mary and Susan testified that in mid-January 2017, they got into a fight while Susan was holding Charles, presenting drastically different versions of how that fight occurred but both agreeing that Charles was not injured in the fight. The parties also disputed whether Susan was staying at Mary's house at the time and whether Mary had allowed Susan to be there in violation of the Department's safety plan. The Department terminated Susan's visits in February 2017, after Susan self-reported having used marihuana following the fight and her Department-ordered drug-test results showed marihuana use, and the parties disputed whether Susan had since then attempted to contact the Department to learn about how Charles was doing. There were further disputes about the stability of Susan's current living arrangements and her family support system.

It is true that a review of voir dire does not show issues related to prejudice on the part of the empaneled jurors and that the jury returned a unanimous verdict in favor of termination. However, we cannot conclude from a review of the entire record that the evidence was not sharply disputed on the issues submitted to the jury.[7] *See, e.g.*, *Pojar v. Cifre*, 199 S.W.3d 317, 332 n.5

[7] We reach this conclusion before even turning to the issues tied solely to best interest.

(Tex. App.—Corpus Christi 2006, pet. denied) (listing cases reversing under *Garcia*); *In re M.N.G.*, 147 S.W.3d at 533 (affirming termination despite strike-allocation error where no indication of prejudice in voir dire and mother admitted to endangering conduct and unstable present living conditions, contesting only whether she could care for child in future). Furthermore, it appears that the parties aligned against Susan coordinated the exercise of their strikes and did not have any double strikes, which is evidence that they used their "ostensibly antagonistic positions unfairly." *See Lopez*, 709 S.W.2d at 645; *In re M.N.G.*, 147 S.W.3d at 532; *Van Allen*, 35 S.W.3d at 65. We recognize that this was a lengthy trial and that the stakes are exceedingly high to the individuals involved. However, under the clear language of *Garcia*, we have no choice but to reverse the trial court's order of termination and remand the cause for further proceedings.

Conclusion

We sustain Susan's first issue on appeal. Due to our resolution of that issue, we need not consider her second issue. We reverse the order of termination and remand the cause to the trial court for further proceedings.

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David Puryear, Justice

Before Justices Puryear, Field, and Bourland

Reversed and Remanded

Filed: December 22, 2017