NO. 12-16-00327-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN THE INTEREST OF G.H., JR., A CHILD	***§***	***APPEAL FROM THE 145TH***
	§	***JUDICIAL DISTRICT COURT***
	§	***NACOGDOCHES COUNTY, TEXAS***

MEMORANDUM OPINION

G.H., Sr. appeals the termination of his parental rights. In four issues, he challenges the trial court's termination order. We affirm.

BACKGROUND

G.H., Sr. and A.R.W.[1] are the parents of G.H., Jr. On January 4, 2016, the Department of Family and Protective Services (the Department) filed an original petition for protection of G.H., Jr., for conservatorship, and for termination of G.H., Sr.'s and A.R.W.'s parental rights. The Department was appointed temporary managing conservator of the child, and the parents were granted limited access to, and possession of, the child.

At the conclusion of the trial on the merits, the jury found, by clear and convincing evidence, that G.H., Sr.'s parental rights should be terminated. The trial court found, by clear and convincing evidence, that G.H., Sr. had engaged in one or more of the acts or omissions necessary to support termination of his parental rights under subsections (D), (E), (N), and (O) of Texas Family Code Section 161.001(b)(1). The trial court also found that termination of the parent-child relationship between G.H., Sr. and G.H., Jr. was in the child's best interest. Based

[1] The mother's parental rights were not terminated in this proceeding. In the order of termination as to the mother, the trial court appointed the Department as permanent managing conservator of the child. A.R.W. was appointed as possessory conservator of the child.

on these findings, the trial court ordered that the parent-child relationship between G.H., Sr. and G.H., Jr. be terminated. This appeal followed.

SUFFICIENCY OF THE EVIDENCE

In his first issue, G.H., Sr. argues that the evidence is legally insufficient to support the jury's finding that his parental rights to G.H., Jr. should be terminated under subsections (D), (E), (N), and (O) of Texas Family Code section 161.001(b)(1). A no evidence complaint is preserved through one of the following: (1) a motion for instructed verdict; (2) a motion for judgment notwithstanding the verdict; (3) an objection to the submission of the issue to the jury; (4) a motion to disregard the jury's answer to a vital fact issue; or (5) a motion for new trial. ***T.O. Stanley Boot Co., Inc. v. Bank of El Paso***, 847 S.W.2d 218, 220 (Tex. 1992); *see also* ***In re D.J.J.***, 178 S.W.3d 424, 426-27 (Tex. App.—Fort Worth 2005, no pet.). G.H., Sr. did not make an objection to the submission of the issue to the jury, file a postverdict motion to preserve his legal sufficiency complaint, or file a motion for new trial. Therefore, G.H., Sr. has waived his complaint about the legal sufficiency of the evidence to support the jury's findings. *See* ***In re D.J.J.***, 178 S.W.3d at 426-27.

Also, G.H., Sr. contends that the evidence is factually insufficient to support the jury's findings that his parental rights to G.H., Jr. should be terminated under subsections (D), (E), (N), and (O) of Texas Family Code section 161.001(b)(1). A point in a motion for new trial is a prerequisite to a complaint of factual insufficiency of the evidence to support a jury finding. TEX. R. CIV. P. 324(b)(2); ***In re A.J.L.***, 136 S.W.3d 293, 301 (Tex. App.—Fort Worth 2004, no pet); *see also* ***In re M.S.***, 115 S.W.3d 534, 547 (Tex. 2003) (applying Texas Rule of Civil Procedure 324(b)(2) requiring motion for new trial to preserve complaint of factual sufficiency to support jury finding in parental termination cases). G.H., Sr. did not file a motion for new trial. Therefore, he has waived his complaint about the factual sufficiency of the evidence to support the jury's findings. *See* ***In re A.J.L.***, 136 S.W.3d at 301; ***In re D.J.J.***, 178 S.W.3d at 426-27. Accordingly, we overrule G.H., Sr.'s first issue.[2]

[2] G.H., Sr. makes no claim that failure to preserve error was unjustifiable or the result of ineffective assistance of counsel. *See* ***In re J.P.B.***, 180 S.W.3d 570, 575 (Tex. 2005). Nor, on appeal, does G.H., Sr. challenge the sufficiency of the evidence to support the jury's finding that termination of his parental rights was in the best interest of the child.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his second issue, G.H., Sr. argues that his trial counsel rendered ineffective assistance of counsel. He also contends that his trial counsel's performance was so deficient that he was denied any meaningful assistance of counsel, triggering a presumption that prejudice must be presumed.

Standard of Review

An indigent parent is entitled to appointed counsel in a termination of parental rights case, and that statutory right "embodies the right to effective counsel." ***In re B.G.***, 317 S.W.3d 250, 253–54 (Tex. 2010). Ineffective assistance claims must be firmly founded in the record, and the record must affirmatively show the alleged ineffectiveness. ***In re L.C.W.***, 411 S.W.3d 116, 127 (Tex. App.—El Paso 2013, no pet.); *see also* ***Walker v. Tex. Dep't of Family & Protective Servs.***, 312 S.W.3d 608, 622–23 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). When the record is silent concerning the reasons for counsel's actions, the reviewing court will not engage in speculation to find ineffective assistance of counsel, and the appellant bears the burden of overcoming the presumption that, under the circumstances, the challenged conduct might be considered sound trial strategy. ***In re L.C.W.***, 411 S.W.3d at 127.

In reviewing claims of ineffective assistance of counsel, we consider all circumstances surrounding the case and apply the Supreme Court's two pronged test used in ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). ***In re M.S.***, 115 S.W.3d at 545. Under ***Strickland's*** first prong, the parent must show that counsel's performance was deficient. *See* ***id.*** (citing ***Strickland***, 466 U.S. at 687, 104 S. Ct. at 2064). This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***In re J.O.A.***, 283 S.W.3d 336, 342 (Tex. 2009). Under the second prong, the parent must show that the deficient performance prejudiced the defense. *See* ***In re M.S.***, 115 S.W.3d at 545. This requires a showing that counsel's errors were so serious as to deprive the parent of a fair trial, a trial whose result is reliable. *See* ***In re J.O.A.***, 283 S.W.3d at 342. To establish prejudice, the parent must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***In re V.V.***, 349 S.W.3d 548, 559 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068.

In conducting our review, we "must primarily focus on whether counsel performed in a reasonably effective manner." ***In re H.R.M.***, 209 S.W.3d 105, 111 (Tex. 2006). We give great deference to counsel's performance, "indulging a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, including the possibility that counsel's actions are strategic." ***Id.*** Challenged conduct constitutes ineffective assistance only when it is "so outrageous that no competent attorney would have engaged in it." ***Id.*** To be successful in his ineffective assistance of counsel claim, G.H., Sr. must show that counsel's representation fell below an objective standard of reasonableness. *See* ***Strickland***, 466 U.S. at 688, 104 S. Ct. at 2064; *see also* ***In re L.D.G.***, No. 12-11-00005-CV, 2012 WL 171888, at *1 (Tex. App.—Tyler Jan. 18, 2012, no pet.) (mem. op.). Failure to satisfy ***Strickland's*** requirements defeats an ineffectiveness challenge. *See* ***Walker***, 312 S.W.3d at 623.

Analysis

In his brief, G.H., Sr. argues that his trial counsel failed to (1) strike a juror for cause or use one of his preemptory strikes to remove the potential juror; (2) object to, and exclude, inadmissible and prejudicial jury argument by the Department; (3) present a defense including failing to solicit any additional witnesses, and failing to elicit testimony on direct examination regarding specific allegations of the conduct leading to the Department's investigation and G.H., Sr.'s alcohol abuse; and (4) provide any substantive closing argument and waiving opening argument. Based on these factors, he also contends that he was constructively denied counsel because trial counsel entirely failed to subject the Department's case to meaningful adversarial testing. *See* ***United States v. Cronic***, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). More specifically, he argues that we presume error and ignore the second prong of ***Strickland***. We decline to do so.

In ***Cronic***, the United States Supreme Court identified three situations implicating the right to counsel that involved circumstances so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. ***Bell v. Cone***, 535 U.S 685, 695, 122 S. Ct. 1843, 1850, 152 L. Ed. 2d 914 (2002) (quoting ***Cronic***, 466 U.S. at 658–59, 104 S. Ct. at 2046-47). These three situations occur when (1) the accused is denied the presence of counsel at a critical stage of his trial, (2) counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, or (3) circumstances at trial are such that, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent

one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. ***Cronic***, 466 U.S. at 659-60, 104 S. Ct. at 2047.

G.H., Sr. contends that ***Cronic*** applies because his trial counsel's performance "did not simply consist of errors, omissions or poor trial strategy, but was so patently deficient" that he was denied meaningful assistance of counsel. Thus, he argues that he does not need to prove prejudice. However, the differences in the ***Strickland*** and ***Cronic*** standards are not of degree, but of kind. ***Bell***, 535 U.S. at 697, 122 S Ct. at 1851. In other words, the standards distinguish between shoddy representation and no defense at all. ***Childress v. Johnson***, 103 F.3d 1221, 1229 (5th Cir. 1997). "[B]ad lawyering, regardless of how bad, does not support" applying the ***Cronic*** standard. *See* ***McInerney v. Puckett***, 919 F.2d 350, 353 (5th Cir. 1990). Accordingly, prejudice will be presumed only when the accused can establish that counsel was not merely incompetent but inert. ***Childress***, 103 F.3d at 1228. Here, G.H., Sr. does not complain that he was denied counsel at a critical stage of his trial or that his trial counsel was inert. Because G.H., Sr. also complains of his trial counsel's alleged errors, omissions, or strategic decisions in his defense, i.e., incompetence, we decline to apply the ***Cronic*** standard to this case.

Moreover, it is G.H., Sr.'s burden to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *See* ***Strickland***, 466 U.S. at 689, 104 S. Ct. at 2065; ***Tong v. State***, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *See* ***Thompson v. State***, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). But G.H., Sr. did not file a motion for new trial and call his trial counsel as a witness to explain his reasoning for failing to strike a juror, object to the Department's jury argument, provide additional witnesses, elicit testimony, or provide substantive closing argument. *See* ***Bone v. State***, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002) (stating that defense counsel should be given opportunity to explain actions before being condemned as unprofessional and incompetent); *see also* ***Anderson v. State***, 193 S.W.3d 34, 39 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (holding that because appellant did not call his trial counsel during motion for new trial hearing to give reasons for failure to investigate or present mitigating evidence, record does not support ineffective assistance claim). When, as here, the record fails to show why counsel did not strike a juror, object to the Department's jury

argument, provide additional witnesses, elicit testimony, or provide substantive closing argument, we cannot conclude that counsel's performance was deficient. *See* ***Jackson v. State***, 877 S.W.2d 768, 771-72 (Tex. Crim. App. 1994). Because the record does not show deficient performance, we conclude that G.H., Sr. has failed to meet the first prong of the ***Strickland*** test. *See* ***id.***

G.H., Sr. also fails to show that, but for counsel's allegedly unprofessional errors, the result of the proceeding would have been different. *See* ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068; ***Tong***, 25 S.W.3d at 712. He fails to explain how striking one juror, objecting to the Department's jury argument, or providing a longer closing argument could have changed the outcome of this case. He also fails to identify additional witnesses that his trial counsel should have solicited at trial, and does not speculate about what testimony they could have provided or how any such testimony would have assisted in his defense. *See* ***Kelly v. State***, 463 S.W.3d 256, 264 (Tex. App.—Texarkana 2015, no pet.). Because G.H., Sr. failed to show that the result of the proceeding would have been different if his trial counsel had struck a juror, objected to the Department's jury argument, provided additional witnesses, elicited testimony, or provided a more substantive closing argument, he has failed to meet the second prong of the ***Strickland*** test. *See* ***Strickland***, 466 U.S. at 694, 104 S .Ct. at 2068; ***Tong***, 25 S.W.3d at 712. Therefore, even if he had met the first prong of ***Strickland***, he still could not prevail. We overrule G.H., Sr.'s second issue on appeal.

EXCULPATORY EVIDENCE

In his third issue, G.H., Sr. contends that new and exculpatory evidence exists that should be explored and considered by additional medical professionals as well as the trier of fact. He attaches an exhibit to his brief that, he said, provides a "colorable" explanation for the incident that led to the Department's investigation, i.e., a diagnosis of sleepwalking disorder. He also argues that a new trial should be granted so that he can be examined by a specialist who then may provide relevant evidence on the Department's basis for removal of the child.

Applicable Law

Rule 38.1 of the Texas Rules of Appellate Procedure sets forth what must be included in an appellant's brief. *See* TEX. R. APP. P. 38.1. Rule 38.1(i) requires that an appellant's brief "contain a clear and concise argument for the contentions made, with appropriate citations to

authorities and to the record." TEX. R. APP. P. 38.1(i). The appellate court has no duty to brief issues for an appellant. ***Huey v. Huey***, 200 S.W.3d 851, 854 (Tex. App.—Dallas 2006, no pet.). The failure to provide appropriate record citations or a substantive analysis waives an appellate issue. ***WorldPeace v. Comm'n for Lawyer Discipline***, 183 S.W.3d 451, 460 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (holding that failure to offer argument, citations to record, or citations to authority waives issue on appeal); ***Med. Specialist Group, P.A. v. Radiology Assocs., L.L.P.***, 171 S.W.3d 727, 732 (Tex. App.—Corpus Christi 2005, pet. denied) (same); *see also* ***Fredonia State Bank v. Gen. Am. Life Ins. Co.***, 881 S.W.2d 279, 284–85 (Tex. 1994) (holding appellate court has discretion to deem issues waived due to inadequate briefing). References to sweeping statements of general law are rarely appropriate. ***Bolling v. Farmers Branch Ind. Sch. Dist.***, 315 S.W.3d 893, 896 (Tex. App.—Dallas 2010, no pet.). Appellate courts must construe briefing requirements reasonably and liberally, but a party asserting error on appeal still must put forth some specific argument and analysis showing that the record and the law support its contentions. ***San Saba Energy, L.P. v. Crawford***, 171 S.W.3d 323, 338 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

An appellate court has no duty—or even right—to perform an independent review of the record and applicable law to determine whether there was error. ***Valadez v. Avitia***, 238 S.W.3d 843, 845 (Tex. App.—El Paso 2007, no pet.). Were we to do so, we would be abandoning our role as neutral adjudicators and become an advocate for that party. ***Id.***

Analysis

Here, G.H., Sr. presents a brief conclusory argument for his third issue in his brief. This argument consists of one paragraph. He does not provide any citations to the record, any substantive legal analysis, or any citations to authority in support of this complaint. G.H., Sr. does not refer to, or provide any, legal authority or analysis to support his claim. *See* ***Sweed v. City of El Paso***, 195 S.W.3d 784, 786 (Tex. App.—El Paso 2006, no pet.) (stating that "merely uttering brief conclusory statements" is not a discussion of the facts and authorities relied upon contemplated by Rule 38). In the absence of any legal analysis, citations to the record, and citations to appropriate authorities, G.H., Sr. presents nothing for our review regarding his third issue. *See* ***WorldPeace***, 183 S.W.3d at 460; ***Med. Specialist Group***, 171 S.W.3d at 732.

Moreover, documents attached to a brief as an exhibit or appendix, but not appearing in the record, cannot be considered by the appellate court for any purpose other than determining its

own jurisdiction. ***Sabine Offshore Serv., Inc. v. City of Port Arthur***, 595 S.W.2d 840, 841 (Tex. 1979) (orig. proceeding) (per curiam); ***Warriner v. Warriner***, 394 S.W.3d 240, 254 (Tex. App.–El Paso 2012, no pet.). Therefore, we cannot consider the exhibit attached to G.H., Sr.'s brief.

Accordingly, we overrule G.H., Sr.'s third issue.

EQUAL PROTECTION CLAUSE

In his fourth issue, G.H., Sr. argues that the Department violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it treated him unfairly, and with bias and prejudice as compared to a similarly situated individual, the child's mother. He contends that despite overwhelming evidence to support termination of the mother's parental rights, the Department argued that the mother's parental rights not be terminated and that she be appointed as possessory conservator of the child. He also argues that the jury's findings were inconsistent with the undisputed findings surrounding the mother's parental rights.

As a predicate to presenting a complaint on appeal, the complaining party must have preserved the error at trial by a proper request, objection, or motion stating the grounds for the ruling that the party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, and then securing a ruling on the request, objection, or motion. *See* TEX. R. APP. P. 33.1(a)(1)(A), (2); ***K.M. v. Tex. Dep't of Family & Protective Servs.***, 388 S.W.3d 396, 405 (Tex. App.—El Paso 2012, no pet.). Appellate review of potentially reversible error in a parental termination case never presented to a trial court undermines the legislature's dual intent to ensure finality in these cases and expedite their resolution. ***In re B.L.D.***, 113 S.W.3d 340, 353 (Tex. 2003). Further, any alleged constitutional violations must also be raised in the trial court for them to be preserved for appellate review. ***In re L.M.I.***, 119 S.W.3d 707, 710-11 (Tex. 2003) (holding terminated father waived due process argument by failing to raise it at the trial court); *see also* ***In re B.L.D.***, 113 S.W.3d at 349-55 (discussing preservation of error in termination cases).

G.H., Sr. did not complain to the trial court that the Department violated the Equal Protection Clause and, therefore, this issue is not preserved for appellate review. Consequently,

he waived his fourth issue on this basis. *See* TEX. R. APP. P. 33.1(a)(1)(A), (2).[3] Accordingly, we overrule G.H., Sr.'s fourth issue.

DISPOSITION

Having overruled all of G.H., Sr.'s issues, we ***affirm*** the trial court's judgment.

BRIAN HOYLE
Justice

Opinion delivered June 7, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

[3] Regarding G.H., Sr.'s fourth issue, we note that a parent's own conduct, behavior, and circumstances determine whether his parental rights should be terminated. *See* ***C.V. v. Tex. Dep't of Family and Protective Servs.***, 408 S.W.3d 495, 506 (Tex. App.—El Paso 2013, no pet.); ***In re K.R.M.***, No. 07-13-00429-CV, 2014 WL 1023812, at *3 (Tex. App.—Amarillo Mar. 17, 2014, no pet.) (mem. op.). That the jury may have been willing to give the mother a second chance does not require a finding that G.H., Sr.'s parental rights should not be terminated. *See* ***C.V.***. 408 S.W.3d at 506.

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JUNE 7, 2017

NO. 12-16-00327-CV

IN THE INTEREST OF G.H., JR., A CHILD

Appeal from the 145th District Court
of Nacogdoches County, Texas (Tr.Ct.No. C1631537)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.