MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In re the Termination of the Parent-Child Relationship of H.H. (Minor Child) and

V.H. (Mother) and S.H. (Father),

Appellants-Respondents,

v.

Indiana Department of Child Services,

Appellee-Petitioner.

February 17, 2022

Court of Appeals Case No. 21A-JT-1771

Appeal from the Tippecanoe Superior Court

The Honorable Faith A. Graham, Judge

Trial Court Cause No. 79D03-2102-JT-11

Mathias, Judge.

[1] V.H. ("Mother") and S.H. ("Father") appeal the trial court's termination of their parental rights over their minor son, H.H. ("Child"). Mother and Father raise the following three issues for our review:

1. Whether the trial court abused its discretion when it admitted certain evidence against Mother.

2. Whether the Indiana Department of Child Services ("DCS") presented sufficient evidence to support the termination of Mother's parental rights.

3. Whether the trial court committed fundamental error when it held the last day of the termination hearing without Father being present in person and without securing a personal waiver from Father of his presence.

[2] We affirm.

Facts and Procedural History

[3] In 1999, Mother gave birth to M.H. In 2005, Mother got "drunk and struck [M.H.] on the head with a pipe." Ex. Vol. 4 p. 153. Mother had "a long history of alcoholism and neglect as to the needs of [M.H.]" as well as domestic violence in the home. *Id.* Mother was convicted of Class C felony neglect of a dependent. Meanwhile, M.H.'s father[1] was incarcerated in Kentucky. DCS filed

[1] M.H.'s father is not Child's father.

a petition alleging M.H. to be a Child in Need of Services ("CHINS"). In May 2007, Mother agreed to voluntarily terminate her parental rights as to M.H.

[4] In October 2007, Mother gave birth to B.H.[2] In April 2009, Lafayette Police Department officers responded to a call that Mother was intoxicated and dropping B.H. Officers arrived at the scene and "found Mother outside passed out lying on top of [B.H.]" *Id.* at 170. B.H. "was crying, her sparse clothing was wet[,] and her body was cold to the touch." *Id.* B.H. was taken to the hospital and treated for hypothermia. A liter of cherry vodka was found in B.H.'s stroller and Mother was unable to walk unassisted. Mother was again convicted of Class C felony neglect of a dependent. DCS filed a petition alleging that B.H. was a CHINS, and, in 2010, the trial court terminated Mother's parental rights as to B.H.

[5] Mother and Father are the parents of Child, who was born in August 2016. Child was born with Hirschsprung's Disease, a rare disorder associated with the absence of normal nerve cells in the rectum and anus, which operates as a "functional type of obstruction" of the bowels. Tr. Vol. 2 p. 66. This required Child to have a "surgical . . . repair" shortly after birth. However, his condition is "a permanent, anatomical disruption" and "a lifelong condition," and it requires constant monitoring of his diet. *Id.*

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[2] B.H.'s father committed suicide after relapsing on methamphetamine.

[6] In May 2017, DCS removed Child from Mother's care after law enforcement officers found Mother "severely intoxicated" in her home with Child. Ex. Vol. 8 at 158. Law enforcement officers determined that Mother's blood alcohol content was .305. Child had last eaten at 8:00 a.m. that day and officers arrived at 6:00 p.m. At the time, Father was incarcerated. The trial court adjudicated Child to be CHINS. That CHINS proceeding resulted in Child's reunification with Mother in June 2018.

[7] Less than one month later, DCS again filed a petition alleging Child to be a CHINS. DCS alleged that Mother had again neglected Child after becoming impaired due to alcohol abuse. Father was on work release at the time and unable to care for Child. The trial court again adjudicated Child to be a CHINS and ordered Mother and Father to participate in services.

[8] In December 2018, Mother began a substance abuse assessment and disclosed a history of substance abuse beginning at age fifteen. However, she showed up at the assessment under the influence and did not complete the assessment. It was recommended that Mother complete an intensive outpatient program with recovery coach services, but Mother did not complete that program or services.

[9] Mother participated in numerous drug screens during the CHINS proceeding. While she had stretches of sobriety, she failed several drug screens in 2018 and 2019, and she relapsed into alcohol use in 2019, 2020, and 2021. In March 2019, Mother was discharged from substance abuse treatment due to nonattendance.

[10] In August 2019, Mother met with Ashley Belcher for individual therapy, and Belcher recommended weekly appointments. However, Mother failed to consistently attend those appointments. After Mother relapsed in October 2020, Belcher attempted to work with Mother on a relapse prevention plan, but Mother never completed it.

[11] Mother was evicted from her home around June 2019, and around that time she began to live with her boyfriend, Phil Whitlock. Child was in foster care at this time. Mother did not disclose to DCS that she was living with Whitlock, and, thus, DCS had not done a background check on him. Later, there were unsubstantiated reports that Whitlock had harmed Child during unsupervised visitation with Mother, which Mother and Whitlock denied. In July 2020, DCS received a report that another of Mother's acquaintances, Harold Mueller, had "touched [Child] inappropriately." Tr. Vol. 2 p. 158. Mother acknowledged that Mueller "should not be trusted." *Id.*

[12] Around December 2020 or January 2021, Mother and Whitlock separated, and Whitlock moved out of the residence. Around that same time, Mother sent a text message "about blowing her brains out" and left a lengthy voicemail for DCS employees in which Mother expressed that she would harm herself. Mother's App. Vol. 2 p. 21. Mother then missed four scheduled visits with Child and failed to maintain regular contact DCS. On January 21, DCS and law enforcement officers visited Mother. She appeared "shaky and weak," and two prescription pill bottles were observed near her. *Id.*

[13] Child was diagnosed with post-traumatic stress disorder ("PTSD"). Mother did not "believe" the diagnosis. Tr. Vol. 2 p. 118. Instead, she believed Child's therapists "put [the idea] into his head." *Id.*

[14] Throughout the CHINS proceedings, Mother was not consistent with visitations with Child. Around April 2019, Mother progressed from supervised visits to home visits. However, again, Mother had not disclosed that Whitlock was also residing at her residence, and, thereafter, Child began to exhibit negative behavior during visitations with Mother. In particular, Child was "confused and scared about visits. He has had increased nightmares. He has had toileting accidents. He's been . . . acting out sexually . . . ." *Id.* at 131–32. Child's "stressors increase[d] during parenting time," which caused his "symptoms of . . . PTSD . . . to go up . . . and intensify." *Id.* at 130. Child's therapist observed that Child had more frequent nightmares and stress following visits in which Whitlock was present. Child's therapist concluded that Mother "was not able to connect with [Child's] experience," and Child's therapist "was concerned about [Child's] safety and well-being." *Id.* at 131.

[15] In August 2020, Mother was on semi-supervised, in-home visitation. During those visits, Mother failed to follow Child's dietary needs consistently. In October, Mother relapsed and missed several visits with Child, and Child's mental health again began to decline. In February 2021, DCS returned Mother's visits to supervised visits.

[16] Importantly, Father has been on work release or incarcerated through all relevant proceedings. He has not completed any services toward reunification with Child.

[17] In February 2021, DCS filed its petition to terminate Mother's and Father's parental rights as to Child. On the first day of the fact-finding hearing, in April, Father appeared by counsel but not in person. His counsel informed the court that Father had no objection to proceeding against Mother that day. On the second day of the fact-finding hearing in early May, Father initially appeared telephonically, but shortly after the hearing began he requested to "disconnect" and have his counsel "finish . . . on this today." *Id.* at 73. The trial court granted his request. At the beginning of the third and last day of the fact-finding hearing in late May, the trial court noted that Father had not appeared in person or remotely but instead was represented only by counsel. The court recalled that Father had ended his participation at the second day of the hearing by stating to the court that he "did not wish . . . to fully participate in the termination proceeding" and instead wished to "rely[] on his attorney to represent him." *Id.* at 87. The court asked Father's counsel if that recollection "is . . . correct" and if Father's counsel was "ready to proceed . . . today on behalf of [F]ather[.]" *Id.* Father's counsel responded, "Yes, your Honor. I spoke to him earlier this week regarding that." *Id.*

[18] The court then proceeded to hold the third day of the fact-finding hearing. Thereafter, the court entered extensive findings of fact and conclusions thereon

terminating Mother's and Father's parental rights as to Child. This appeal ensued.

Discussion and Decision

Issue One: Admission of Evidence

[19] First, Mother argues that the trial court abused its discretion in the admission of certain evidence against her. As our supreme court has made clear:

> Trial courts have broad discretion whether to admit or exclude evidence. Appellate courts generally review decisions to admit evidence for abuse of discretion. An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights.

In re K.R., 154 N.E.3d 818, 820 (Ind. 2020) (citations and quotation marks omitted).

[20] Mother asserts that the trial court abused its discretion when it admitted, over her objection, evidence of Mother's prior termination proceedings and her criminal history. Specifically, relying on criminal cases, Mother asserts that that evidence was not relevant to the instant termination proceedings because the incidents described were remote in time. She further asserts that any relevance was substantially outweighed by the danger of unfair prejudice against her.

[21] We have long held that a parent's prior criminal acts and history of neglect is relevant evidence in a termination proceeding. As we have explained:

A trial court should judge a parent's fitness to care for her children as of the time of the termination proceeding, taking into consideration evidence of changed conditions. *J.K.C. v. Fountain County Dep't of Pub. Welfare*, 470 N.E.2d 88, 90 (Ind. Ct. App. 1984). However, recognizing the permanent effect of termination, this court has stated that the trial court must also evaluate the parent's habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation of the children. *Id.* (citing *Matter of Perkins*, 170 Ind. App. 171, 352 N.E.2d 502 (1976)). Based on that rule, trial courts have properly considered evidence of a parent's prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support and lack of adequate housing and employment. *See Matter of Danforth*, 542 N.E.2d 1330, 1330 (Ind. 1989); *Matter of M.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*; *Odom v. Allen County Dep't of Pub. Welfare*, 582 N.E.2d 393, 396 (Ind. Ct. App. 1991); *J.K.C.*, 470 N.E.2d at 91–92.

In a related context, we have held that evidence of a parent's prior involvement with [DCS] regarding four of her other children, including CHINS petitions filed on behalf of those children, was admissible in a CHINS proceeding as character evidence under Indiana Evidence Rule 405. *Matter of J.L.V. Jr.*, 667 N.E.2d 186, 191 (Ind. Ct. App. 1996). That rule provides in pertinent part:

> (b) Specific Instances of Conduct. In cases in which *character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct*.

Ind. Evid. Rule 405(b) (emphasis added). Rule 405 applies when a person's character is a material fact that determines the parties' rights and liabilities under the substantive law. *J.L.V.*, 667

N.E.2d at 190. In holding that a parent's character is at issue in a CHINS proceeding, we stated:

> [A] parent's past, present and future ability to provide sufficient care for his or her child forms the basis for a CHINS adjudication and . . . the parent's character is an integral part of assessing that ability.

Id.

> Given the nature of the [termination] inquiry, a parent's character is also an integral factor in assessing a parent's fitness and in determining the child's best interest . . . .

In re D.G., 702 N.E.2d 777, 779–80 (Ind. Ct. App. 1998); *see also* Ind. Code § 31-34-12-5 (providing that evidence of prior acts or omissions by a parent is admissible in CHINS proceedings to show a likelihood that the act or omission of a parent is responsible for the child's current condition); *In re Eq. W.*, 124 N.E.3d 1201, 1210–11 (Ind. 2019) (agreeing "with the State's general position that past acts by parents can be relevant to new CHINS filings involving the same parents and children").

[22] Thus, as a matter of law the evidence of Mother's prior terminations and her criminal history was relevant and admissible evidence. Mother's argument that the incidents described in that evidence were remote in time go to the weight of that evidence, not to its admissibility. Therefore, we cannot say that the trial court abused its discretion when it admitted the evidence of Mother's prior terminations and her criminal history against her.

Issue Two: Sufficiency of the Evidence Against Mother

[23] We next consider Mother's argument that DCS failed to present sufficient evidence to show that the termination of her parental rights as to Child was in Child's best interests. We affirm a trial court's termination decision unless it is clearly erroneous, which occurs only when the court's findings of fact do not support its legal conclusions or the legal conclusions do not support the ultimate decision. *In re Ma. H.*, 134 N.E.3d 41, 45 (Ind. 2019). We do not reweigh the evidence or judge witness credibility, and we consider only the evidence and reasonable inferences that support the court's judgment. *Id.* "Parents have a fundamental right to raise their children—but this right is not absolute." *Id.*

[24] Mother argues that DCS's evidence concerning her alcohol abuse issue was not a sufficient basis for terminating her parental rights because she had stretches of sobriety between relapses. First, this argument is a request for this court to reweigh the evidence, which we will not do. Mother emphasizes her periods of sobriety, but the evidence before the trial court readily demonstrated her lifelong—and ongoing—alcohol abuse. Indeed, her alcohol abuse contributed to her two prior terminations, criminal charges, both of the CHINS proceedings with Child, and the instant termination proceedings.

[25] Second, DCS presented ample evidence of termination of Mother's parental rights was in Child's best interests. "A determination of the best interests of the [child] should not be based merely on the factors identified by the DCS, but instead should be based on the totality of the circumstances." *Lang v. Starke*

Cnty. Off. of Fam. & Child., 861 N.E.2d 366, 373 (Ind. Ct. App. 2007), *trans. denied*. "A parent's historical inability to provide a suitable environment along with the parent's current inability to do the same supports a finding that termination of parental rights is in the best interests of the [child]." *Id.*

[26] Throughout DCS's involvement, Mother has struggled with alcohol abuse and completing services. She did not consistently follow Child's dietary needs. Mother did not accept Child's PTSD diagnosis. Child's therapist testified that Mother "was not able to connect with [Child's] experience[s]" when Child was adversely affected by Whitlock during visitations. Tr. Vol. 2 p. 131. Child's therapist further testified that she was concerned for Child's safety while he was in Mother's care. And Mother does not challenge DCS's adoption plan for Child or Child's relationship with his foster parents. We conclude that DCS presented sufficient evidence to show that the termination of Mother's parental rights is in Child's best interests.

Issue Three: Fundamental Error

[27] Last, we address Father's only argument on appeal, namely, whether the trial court erred when it held the third day of the fact-finding hearing without Father present in person and without securing a personal waiver on the record from Father before proceeding in his absence. Because Father's counsel did not object to proceeding without Father on the third day of the hearing, Father has not preserved this issue for appellate review. Nonetheless, Father asserts that the trial court's decision to proceed was fundamental error. Fundamental error is an "extremely narrow" exception to waiver "and encompasses only errors so

blatant that the trial judge should have acted independently to correct the situation." *Cardosi v. State*, 128 N.E.3d 1277, 1285 (Ind. 2019).

[28] Father cannot demonstrate fundamental error. Indeed, in his argument on this issue, he cites no authority for his assertion that he has a constitutional right to be present in person at a hearing on the involuntary termination of parental rights. He further cites no authority for his assertion that the trial court was required to secure a personal waiver on the record from him before proceeding in his absence at such a hearing. In other words, Father's fundamental-error argument asks this Court to establish a new rule of law. Whatever the merits of that position might be, we cannot say that the trial court should have anticipated such a decision and *sua sponte* acted accordingly to avoid error. In other words, we will not find fundamental error on Father's novel arguments.

[29] Moreover, at the commencement of the third day of the hearing, the trial court did inquire about Father's wishes to proceed with Father's counsel and relied on the representations of Father's counsel. Specifically, the trial court noted that Father had not appeared in person or remotely but instead was represented only by his counsel. The court recalled that Father had ended his participation during the second day of the hearing by stating to the court that he "did not wish . . . to fully participate in the termination proceeding" and instead wished to "rely[] on his attorney to represent him." Tr. Vol. 2 at 87. The court then asked Father's counsel if that recollection was "correct" and if Father's counsel was "ready to proceed . . . today on behalf of [F]ather[.]" *Id.* Father's counsel

responded, "Yes, your Honor. I spoke to him earlier this week regarding that." *Id.*

[30] Thus, the trial court expressly asked Father's counsel if it was Father's wish to proceed only by counsel and without being present in person, and Father's counsel represented to the court that it was. The trial court did not commit fundamental error when it relied on Father's counsel's representation. We therefore affirm the trial court's termination of Father's parental rights as to Child.

Conclusion

[31] In sum, we affirm the trial court's termination of Mother's and Father's parental rights.

Bailey, J., and Altice, J., concur.