

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of: A.M., S.M.,
An.M. and E.M. (Minor
Children)

W.M. (Father),
Appellant,

v.

Indiana Department of Child
Services,
Appellee.

September 22, 2022

Court of Appeals Case No.
22A-JC-668

Appeal from the Tippecanoe
Superior Court

The Honorable Tricia L.
Thompson, Juvenile Magistrate

Trial Court Cause Nos.
79D03-2107-JC-100
79D03-2107-JC-101
79D03-2107-JC-102
79D03-2107-JC-103

Brown, Judge.

- [1] W.M. (“Father”) appeals the determination that his children are children in need of services (“CHINS”). We affirm.

Facts and Procedural History

- [2] Father and D.M. (“Mother”) are the parents of A.M., S.M., An.M. and E.M.¹ Father and Mother were married in 2004. Mother filed a petition for dissolution in October 2017, and a decree of dissolution was entered in January 2020. The decree awarded Mother primary physical custody of the children and awarded Father parenting time.
- [3] On July 20, 2021, the Indiana Department of Child Services (“DCS”) filed a petition alleging the children were CHINS. DCS alleged it received a report that the children were victims of neglect, Father was unable to care for them due to his level of intoxication, and Mother has had to pick up the children during Father’s parenting time on several occasions due to his intoxication.
- [4] On September 16, 2021, DCS filed a “Petition for Hearing to Introduce Child’s Statement/Videotape Pursuant to I.C. 31-34-13 et. seq.” Appellant’s Appendix Volume II at 84. DCS argued that A.M. stated to Family Case Manager Caitlyn Jackson (“FCM Jackson”) that: the last time the children were with him, Father was really drunk; A.M. does not feel safe at Father’s home and

¹ The children were born between February 2010 and January 2013.

does not want to visit; Father tried to block the front door so the children could not leave and has taken A.M.'s phone in the past and smashed it; and A.M. saw Father being arrested and Father yelled obscenities at him. The petition also stated "[A.M.] is scheduled for a Hearsay evaluation with Dr. Robin Kohli on Sept. 16, 2021." *Id.* at 86.

[5] On September 24, 2021, the court held a hearing at which Father was present with his attorney. DCS's counsel stated the parties agreed that A.M. should not be required to testify, that his statements should be admitted, and that DCS and police officers should be allowed to testify as to what he told them. He indicated that, in speaking with Father's counsel, DCS had reached a stipulation. Father's counsel stated "we would agree that the child should not have to testify . . . and that the police officers and the DCS caseworkers can summarize what the child said, however that would be subject to cross examination."² Transcript Volume II at 4. The court asked the parties to prepare a written stipulation and went off the record. The court resumed the proceeding and stated it had a written stipulation. The parties' written Stipulation on Child Hearsay stated in part:

- 1) The parties agree that the child [A.M.] should not be required to testify and that any statements [A.M.] has made in regards to the case should be allowed to be entered into evidence through testimony of the person [A.M.] made the disclosures to.

² Father's counsel also asked the court to interview the child in chambers, but later withdrew the request.

2) The Parties further agree that child hearsay testimony will be limited to statements and information conveyed by the child directly to the witness that is testifying.

3) The list of individuals that the parties are agreeing to allow to testify in regards to [A.M.'s] statements are as follows:

- FCM Fitzsimmons
- FCMS Jackson
- Police Officers [A.M.] spoke to
- CASA
- Service Providers
- School personnel
- Any other individuals subsequently discovered

Appellant's Appendix Volume II at 82.³

[6] On October 27 and November 12, 2021, the court held a factfinding hearing at which it heard testimony from, among others, West Lafayette Police Officer Uriah Crawford, FCM Jackson, Family Case Manager Tanda Fitzsimmons ("FCM Fitzsimmons"), Father, and Mother.

[7] On December 28, 2021, the court issued an order which found the children were CHINS and provided:

Court specifically finds as follows: Law enforcement officers were dispatched to Father's home on May 8, 2021 at approximately 11:00 p.m. after a child called 911 and reported that Father was drunk.

³ The written stipulation was signed by counsel for Father, Mother, DCS, and CASA.

When Officer Crawford arrived, the door opened, and a frightened [A.M.] (11 years old) ran out the door. [A.M.] was shaking and out of breath. Father was observed inside the house, sitting on a bench. [A.M.] told Father that he called the police because Father was drunk. Officer Crawford asked Father to step outside and speak with him, but Father ignored him and went down the hall calling to the other children. Father became angry and yelled at Officer Crawford to get out of the house. Officer Crawford observed that Father was intoxicated. Father had slurred speech and red and watery eyes. He was highly volatile and irrational. Father gave incoherent responses to Officer Crawford and did not engage in meaningful conversation. Officer Crawford could detect the odor of alcohol even through his face mask. Father was not arrested, but the children left Father's home and returned to Mother's care.

DCS received a report about the incident on May 9, 2021 and assessed the children's safety at Mother's home. During the interview, [A.M.] told DCS that Father was very intoxicated and took [A.M.]'s phone so that [A.M.] could not call 911. Father threw the phone and blocked the doors. [A.M.] and [S.M.] indicated they did not feel safe with Father. All four children could identify signs of intoxication. During other conversations with FCM Fitzsimmons, [A.M.] discussed Father drank on other occasions while the children were at Father's home and that Father drives after he has been drinking. [A.M.] said that Father yelled at him, struck him with a belt, and took his phone so he could not call for help. [A.M.] later told FCM Fitzsimmons that he wanted to end his life because he was afraid to go to Father's home. Father acknowledged that [A.M.] previously wrapped a curtain around his neck in January of 2021.

Family Preservation services for Mother and the children were put in place through Lifeline in July of 2021. It was recommended that Mother participate in case management to address financial independence and transportation and the Seeking Safety curriculum to address domestic violence and substance abuse. Mother also started individual therapy to address trauma from ongoing domestic violence and to process her thoughts and feelings. Mother is cooperative with

services. Mother wants to participate in services but is concerned she cannot afford services without assistance from DCS. Mother is unemployed but would like to find work. She receives child support from Father but indicated that he stops paying support when he gets mad. Father denied that it was a suicide attempt and indicated it was “trauma.”

Services for the children included establishing a safety plan, therapy for the older two children, and case management for [A.M.]. [A.M.] participates in trauma focused cognitive behavioral therapy once a week to identify trauma and manage his thoughts and feelings. [A.M.] identified being hit by a belt by Father, seeing his sister hit on the head, and seeing Mother yelled at and hit as traumas. [A.M.] also expressed concern about Father’s alcohol use and anger. [A.M.’s] therapist noted that [A.M.] flinches when someone moves quickly. She recommended continued therapy for [A.M.].

Father was added to the Family Preservation services referral in August of 2021. Father did not complete his intake until September 24, 2021. It was recommended for Father to participate in case management to address appropriate discipline and co-parenting. Father told providers that he drinks alcohol recreationally and not when the children are present, however, he admitted at the Fact-Finding Hearing that he had been drinking when police arrived in May of 2021. Father admitted his children are triggered when they see alcohol in the home, but he did not commit to stop drinking. Father indicates that he has not had alcohol since DCS became involved in May of 2021.

There have been nine DCS assessments for this family since 2017. The first assessment in 2017 was substantiated against Father for neglect as Father was intoxicated and battered Mother in the presence of all four children. All four children indicated that Father had a drinking problem and they did not feel safe with Father. The current investigation was also substantiated but the other seven assessments were unsubstantiated. The unsubstantiated reports all involved issues of Father’s drinking. One investigation in December of 2020 also included [A.M.’s] suicidal ideations. Throughout the assessments, the

children informed the investigators of Father's drinking issues and that they did not feel safe when Father is drinking. Father denied any issues with alcohol and denied any assistance is needed. During the [sic] some of the investigations, including the May 2021 investigation, Father denied drinking even though law enforcement officers observed indications that he was intoxicated. Further, during the most recent assessment, Mother had to pick the children up early from a visit with Father a second time due to his intoxication.

Prior to DCS involvement, Father attended inpatient treatment on two occasions to address his drinking issues. Father indicated that treatment was not voluntary and that Mother forced him to go both times. Mother indicates that Father continued to drink excessively after his treatment. Father also attended AA meetings in 2017. Father was later convicted of Operating a Vehicle While Intoxicated (OWI) in 2018. While he was on probation, he admitted a violation for testing .05 BAC at approximately 9:00 a.m. on the Ignition Interlock device. Father has not participated in any alcohol treatment since his OWI.

Father has a conviction for Domestic Battery, Class A Misdemeanor, from 2018. Mother was the victim. Father participated in Character Restoration after the conviction, but he did not complete the program. Mother indicates that Father continues to have anger issues when drinking.

Mother was convicted of OWI in 2020. Mother admits she was court ordered not to drink but that she drank a few times last summer. Mother has a pending petition to revoke her probation.

Father's use of alcohol and his anger issues have caused trauma to the children. All four children said they do not feel safe when Father is drinking. Prior to DCS involvement, Mother admits she had to pick the children up early from Father due to his drinking on eight to nine occasions. She had to pick them up early again after DCS involvement. Mother and the children also rely on calls to police to protect the children when Father is drinking. Despite Father's continued drinking and the fear of [sic] her children, Mother took no

action in the divorce case to limit Father's parenting time with the children and she gave him additional parenting time. Further, prior to DCS involvement, the children's trauma was not being addressed by parents with services for themselves or for the children. [A.M.] has expressed suicidal thoughts and Mother admits he has needed therapy since parents' divorce, but neither parent sought therapy for him. Mother admits she needs services but cannot provide them without DCS. Father denies his drinking is an issue or that he needs help addressing his issues.

Mother and Father argue that a court order in the divorce case can address the issues without the need for a CHINS case. The divorce court, however, already ordered parents not to drink while they were in possession of the children. Father violated this court order on multiple occasions and Mother did not return to court to address his violations. Further, both parents continued to drink in violation of court orders in their criminal cases. Father has also continued to drink after multiple attempts to treat his substance abuse and he has not sought treatment since 2018. Father needs court intervention along with services provided to address his substance abuse and anger issues. Mother and the children need services to address the trauma caused by Father's drinking and anger.

Id. at 72-74. The court ordered Father to complete diagnostic, medication, and substance use disorder evaluations, participate in domestic violence and family preservation services and home-based case management and individual counseling as recommended, submit to oral, urine, and hair drug screens as requested, and participate in supervised visitation as agreed upon by the parties.

Discussion

[8] Father asserts that DCS did not present sufficient evidence to support the finding the children are CHINS. He argues: "DCS never proved how [his]

action of consuming alcohol in one isolated incident, child hearsay statements by A.M. endangered the children in this case.” Appellant’s Brief at 16. He argues the evidence “is that [he] did consume alcohol on May 8, 2021, but the fact that he yelled at a law enforcement is irrelevant to a CHINS finding,” he and Mother “had been divorced since 2017,” and he “had no direct contact with his ex-wife due to a protective order for two years.” *Id.* at 17. He contends none of the previous assessments were substantiated and there was no testimony about trauma to the children. Father also challenges the stipulation regarding A.M.’s statements, arguing that his “due process rights were clearly violated,” DCS gave him “no notice that additional hearsay as to police officers, state DCS workers, [and] school personnel would be admitted into evidence,” his “substantial rights were violated because DCS only gave him notice of specific statements in the hearsay petition and then expanded to include virtually everyone who could be a witness without amending the Petition or notice to [him],” and “[t]his expansive language and stipulation clearly exceeds the contemplation of 31-34-13-3.”⁴ *Id.* at 20.

⁴ Ind. Code § 31-34-13-2 provides that a statement or videotape made by a child who is less than fourteen years of age is admissible as evidence in certain actions if certain requirements are met, and Ind. Code § 31-34-13-3, known as the child hearsay statute, lists those requirements. *See In re A.M.*, 121 N.E.3d 556, 560 (Ind. Ct. App. 2019), *trans. denied*. Ind. Code § 31-34-13-3 provides in part that a statement or videotape is admissible in an action to determine whether a child or a sibling of the child is a CHINS if, after notice to the parties of a hearing and of their right to be present, the court finds the time, content, and circumstances of the statement provide sufficient indications of reliability and the child testifies at the proceedings, was available for face-to-face cross-examination when the statement or videotape was made, or is found by the court to be unavailable as a witness because a psychiatrist, physician, or psychologist has certified that the child’s participation in the proceeding creates a substantial likelihood of emotional or mental harm to the child, a physician has certified that the child cannot participate in the proceeding for medical reasons, or the court has determined that the child is incapable of understanding the nature and obligation of an oath.

[9] In reviewing a trial court’s determination that a child is in need of services, we do not reweigh the evidence or judge the credibility of witnesses and consider only the evidence which supports the court’s decision and reasonable inferences drawn therefrom. *In re S.D.*, 2 N.E.3d 1283, 1286-1287 (Ind. 2014), *reh’g denied*. We apply the two-tiered standard of whether the evidence supports the findings and whether the findings support the judgment. *Id.* at 1287. We will reverse a CHINS determination only if it was clearly erroneous. *In re D.J.*, 68 N.E.3d 574, 578 (Ind. 2017). A decision is clearly erroneous if the record facts do not support the findings or if it applies the wrong legal standard to properly found facts. *Id.* Ind. Code § 31-34-1-1 provides:

A child is a child in need of services if before the child becomes eighteen (18) years of age:

(1) the child’s physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child’s parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision:

(A) when the parent, guardian, or custodian is financially able to do so; or

(B) due to the failure, refusal, or inability of the parent, guardian, or custodian to seek financial or other reasonable means to do so; and

(2) the child needs care, treatment, or rehabilitation that:

(A) the child is not receiving; and

(B) is unlikely to be provided or accepted without the coercive intervention of the court.

The statute does not require a court to wait until a tragedy occurs to intervene. *In re A.H.*, 913 N.E.2d 303, 306 (Ind. Ct. App. 2009). Rather, a child is a CHINS when the child is endangered by parental action or inaction. *Id.* The admission of evidence is entrusted to the trial court’s sound discretion, and we reverse only if we conclude the admission affected a party’s substantial rights. *A.M.*, 121 N.E.3d at 559. Due process is essentially the opportunity to be heard at a meaningful time and in a meaningful manner, and in determining whether a litigant received proper process, we balance the private interests affected by the proceeding, the risk of error created by the chosen procedure, and the governmental interest supporting use of the challenged procedure. *See In re A.H.*, 992 N.E.2d 960, 966 (Ind. Ct. App. 2013), *trans. denied.*

[10] As for the parties’ stipulation, the record reveals that DCS filed a petition on September 16, 2021, requesting a hearing to determine the admissibility of certain statements and that the court held a hearing on September 24, 2021, at which Father was present with his attorney. DCS’s counsel indicated the parties agreed that A.M. should not be required to testify and that A.M.’s statements should be admitted into evidence. Father’s counsel stated “we would agree that the child should not have to testify . . . and that the police officers and the DCS caseworkers can summarize what the child said.” Transcript Volume II at 4. The court asked the parties to prepare a written stipulation and went off the record. The parties produced a written stipulation which provided that “any statements [A.M.] has made in regards to the case should be allowed to be entered into evidence through testimony of the person

[A.M.] made the disclosures to” and provided a “list of individuals that the parties are agreeing to allow to testify.” Appellant’s Appendix Volume II at 82. While DCS’s petition referred to statements made by A.M. to FCM Jackson, the parties’ stipulation specifically referenced statements made by A.M. to other individuals as well, and we note the parties entered the stipulation on September 24, 2021, well before the factfinding hearing on October 27 and November 12, 2021. Father does not assert that he challenged the parties’ stipulation below. Father was able to cross-examine the witnesses who testified regarding the statements made by A.M. Also, we cannot say that Father was not afforded a meaningful opportunity to be heard with respect to DCS’s petition and the parties’ stipulation. Father has not established that his substantial rights were violated or that reversal on this basis is required.

[11] To the extent Father does not challenge the trial court’s findings of fact, the unchallenged facts stand as proven. *See In re B.R.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007) (failure to challenge findings by the trial court resulted in waiver of the argument that the findings were clearly erroneous), *trans. denied*.

[12] The trial court’s findings are supported by the evidence. Officer Crawford testified regarding the May 8, 2021 incident and that A.M. looked terrified and Father, who was caring for the children, was intoxicated and irate. FCM Jackson testified that A.M. told her that Father was very intoxicated, took the children’s phone so they could not call 911, and blocked the door so they could not leave. A.M. told her that he was scared and did not feel safe with Father, Father threw his phone, and he saw Father being arrested. Kelly Greene, a

therapist with Lifeline Youth and Family Services, testified that she provided therapy for A.M. and S.M., that she and A.M. had been working through trauma-focused cognitive behavioral therapy, and that A.M. discussed seeing Mother being hit and yelled at, seeing his sister hit in the head, and being hit with a belt by Father. She testified that “any time that someone, it doesn’t necessarily have to be [Father], but anyone around [A.M.] moves quickly he flinches, um, thinking he is going to get hit.” *Id.* at 46. She indicated that she worked with Mother regarding the trauma resulting from the continued domestic violence. When asked on cross-examination “[a]re you aware of the fact that there was a protective order entered at the time of their separation and that [Father] has no contact with her . . . during that two-year period and they continue to not have contact,” Greene replied “Mh-hm,” and when asked “when you say continuing domestic violence, there really has been nothing that has happened since their separation,” she answered that Mother has “reported that during drop-offs with the kids . . . he’ll make gestures out the car window towards her, and we . . . look at that as continued domestic violence because he is still making gestures towards her.” *Id.* at 47-48. She indicated that, according to Mother, Father “will throw up the middle finger.” *Id.* at 52.

[13] FCM Fitzsimmons testified that DCS had previous involvement with the family, there had been a total of nine assessments since 2017, and “the one in 2017 was substantiated and then there were seven others since then that were not substantiated up until this last one in May, that was substantiated.” *Id.* at 59. She indicated all the reports related to Father’s abuse and alcoholism. She

testified that A.M. stated that, when he is at Father’s home and Father has been drinking, Father becomes very angry, and sometimes Father drives the children while under the influence. She testified “he did tell me that there was one time when he came home that he just felt like he should just die and that he wanted to end his own life.” *Id.* at 60. FCM Fitzsimmons also indicated Father’s prior criminal history included domestic violence and drinking while driving.⁵

[14] Mother testified as to three prior failed attempts at treatment by Father dating back to 2012. When asked, “[a]side from May 8th, . . . have there been any times prior to that that you’ve had to go pick the kids up from [Father’s] visitation due to him being intoxicated,” Mother replied affirmatively and that she picked them up eight or nine times. *Id.* at 170.

[15] DCS presented evidence regarding Father’s alcohol consumption and behaviors while the children were in his care. The court was able to consider the evidence and Father’s actions, omissions, and ability to provide for and protect the children. We conclude the trial court’s judgment is not clearly erroneous.⁶

⁵ The court admitted a charging information filed on September 13, 2017, alleging Father committed domestic battery and a chronological case summary indicating Father pled guilty to domestic battery as a class A misdemeanor. It also admitted information filed on January 29, 2018, alleging Father committed operating a vehicle while intoxicated endangering a person and a chronological case summary indicating Father pled guilty to operating a vehicle while intoxicated endangering a person as a class A misdemeanor.

⁶ To the extent Father challenges his counsel’s performance in signing the stipulation and not objecting to the admission of DCS reports regarding previous assessments, the Indiana Supreme Court has stated, in the termination of parental rights context, that where parents claim on appeal that their lawyer underperformed, “we deem the focus of the inquiry to be whether it appears that the parents received a fundamentally fair trial whose facts demonstrate an accurate determination” and “[t]he question is not whether the lawyer might have objected to this or that, but whether the lawyer’s overall performance was so defective that the appellate court cannot say with confidence that the conditions leading to the removal of the children from parental care

[16] For the foregoing reasons, we affirm the trial court.

[17] Affirmed.

Altice, J., and Tavitas, J., concur.

are unlikely to be remedied and that termination is in the child's best interest." *Baker v. Marion Cnty. Off. of Fam. & Child*, 810 N.E.2d 1035, 1041 (Ind. 2004). The court admitted testimony regarding DCS's prior involvement with the family and the extent to which previous claims had been substantiated, and we cannot say that an objection to the admission of the challenged reports would have resulted in a different outcome. Further, Father was present at the hearing at which his counsel stated that he agreed that A.M. should not be required to testify and stipulated to the admission of A.M.'s statements to FCM Fitzsimmons, FCM Jackson, and the service providers. We cannot say in light of the record that the overall performance of Father's counsel resulted in an unfair proceeding or incorrect outcome.