

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of B.W., Child
Alleged to be a Child In Need of
Services;

L.W. (Father),
Appellant-Respondent,

v.

Indiana Department of Child
Services,

Appellee-Petitioner,

and

Child Advocates, Inc.,

May 11, 2021

Court of Appeals Case No.
20A-JC-2358

Appeal from the Marion Superior
Court

The Honorable Marilyn A.
Moores, Judge

Trial Court Cause No.
49D09-2002-JC-616

Najam, Judge.

Statement of the Case

[1] L.W. (“Father”) appeals the trial court’s adjudication of his minor child B.W. (“Child”) as a child in need of services (“CHINS”). He presents two issues for our review:

1. Whether the trial court abused its discretion when it denied his motion to continue the factfinding hearing.
2. Whether the trial court erred when it adjudicated Child to be a CHINS.

[2] We affirm.

Facts and Procedural History

[3] B.P. (“Mother”), now deceased, had two children by two different fathers in 2011 and 2012. In 2014, Mother married Father, and they had one child together, Child, born May 20, 2017. Mother and Father separated in late 2018. After their separation, Mother would, on occasion, take Child to visit Father. At some point, Mother began a relationship with D.G. Mother and D.G.

began living together in Indianapolis, and they had a child together in September 2019.¹

[4] On February 15, 2020, the Indiana Department of Child Services (“DCS”) received a report that Mother had attempted suicide, was hospitalized, and was not expected to survive her injuries. In addition, Mother’s two eldest children, who had been living with Mother and D.G., reported that they had “witness[ed] ongoing arguing and fighting” between Mother and D.G. in the home. Appellant’s App. Vol. 2 at 25. Accordingly, on February 24, DCS filed a petition alleging that all of the children, including Child, were CHINS. Father’s whereabouts were unknown at the time. The trial court held an initial hearing and ordered that all of the children, including Child, be placed with Mother’s mother, T.M. (“Grandmother”). The court also scheduled a pretrial conference for March 19.

[5] At some point, Father contacted Grandmother over Facebook, and Grandmother gave Father the contact information for DCS family case manager (“FCM”) Melissa Jones. In early March, Father emailed FCM Jones, and on March 31, DCS was able to serve Father notice of the CHINS proceeding. In the meantime, due to the Covid-19 emergency, the trial court was forced to postpone the initial hearing and factfinding hearing several times during the spring and summer of 2020. On July 21, DCS filed with the trial court an affidavit requesting that the court order supervised visitation between

¹ D.G. is also the father of Mother’s child born in 2012.

Father and Child on the condition that Father submit to a drug screen. And on July 22, DCS filed with the trial court a request that the court appoint Father counsel. The court did not rule on either request.

[6] At an October 1 hearing, held virtually due to the ongoing Covid-19 emergency, Father appeared and requested counsel. The trial court found Father to be indigent and appointed him counsel. The court also ordered supervised visitation for Father with Child. On November 6, Father moved for a continuance of the November 9 factfinding hearing, which the court denied. Father did not appear at the hearing, but his counsel participated. Father's counsel gave no reason for Father's failure to appear.

[7] At the factfinding hearing, FCM Jones testified that: Father is "really hard to get a hold of" and "takes days at a time for him to reach out" to her; she had asked him to submit to a drug screen "due to the information from [Grandmother]," and because "all the fathers [in this proceeding] had submitted to screens"; Father had not submitted to a drug screen; she asked him to participate in parenting services through Father's Engagement, but no one at Father's Engagement had "been able to get a hold of [Father]"; Father had been attending supervised visits with Child twice per week "for about a month" and had only missed one visit; and a recent visit to evaluate Father's home had been canceled because Father's visitation time with Child "got pushed back." Tr. at 43-44. Jones testified that she was concerned about allegations of domestic abuse and drug abuse by Father. She was concerned for Child's safety with Father due to his alleged drug abuse. She recommended parenting skills classes

with Father's Engagement, drug screens, and supervised visitation for Father "[b]ecause [DCS has] no information on him. We don't know anything about his parenting skills. We don't know about his drug use. We know nothing about him at this time." *Id.* at 45.

[8] Grandmother also testified at the hearing. Child and Child's siblings have been placed with her since February 24, 2020. Grandmother testified that: Father was "very violent" with Mother during their marriage from 2014 to 2018; she had seen Mother with "black eyes," that Mother said were caused by Father; in 2015, Grandmother saw that a bathroom door at Mother's house was "broken in half" and there were holes punched in the wall; and, after Father and Mother separated, Child never spent the night with Father. *Id.* at 33-34. Grandmother testified that she feared for Child's safety if she were to live with Father. She was "afraid that [Father] would be abusive to other women in front of [Child]" and that he would be "neglectful." *Id.* at 37. Mother had told Grandmother that Father abused methamphetamine, and Grandmother was fearful that Father would do drugs in front of Child. At one point during Grandmother's testimony, she testified to things Mother's children had told her. The trial court sustained that objection to Grandmother's hearsay testimony.

[9] At the conclusion of the hearing, the trial court stated as follows:

the Court finds that [Child] is a child in need of services for the reasons that Father has had contact with DCS since March of 2020 but has not requested parenting time until the hearing in October. [B]ased on [Grandmother's testimony], . . . Father at least committed domestic battery on Mother and used methamphetamine. The Department of Child Services has

attempted to engage him, the fail[ure] to appear for Father's Engagement, [he] has not done a drug screen as requested by DCS, and he has already missed one parenting time session. For that reason, the Court believes that [Child's] physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of [Father] to supply the child with necessary food, clothing, shelter, medical care, education, and supervision . . . due to the failure, refusal, or inability of the parent, guardian, custodian to seek financial or other means to do so. And the Child needs care, treatment, or rehabilitation that the child is not receiving and is unlikely to be provided without the coercive intervention of the Court. [Child] is a very young child and who just turned three. She is a child of impressionable years and is in need of a parent who can regularly support her, is actually engaged enough to have an interaction with the child, and that despite offers of services, the only service of which [Father] has availed himself is very recently parenting time with the child.

Id. at 54. This appeal ensued.

Discussion and Decision

Issue One: Motion to Continue

[10] Father contends that the trial court abused its discretion when it denied his November 6 motion to continue the factfinding hearing. “Generally speaking, a trial court’s decision to grant or deny a motion to continue is subject to abuse of discretion review.” *C.C. v. Ind. Dep’t of Child Servs. (In re K. W.)*, 12 N.E.3d 241, 243-44 (Ind. 2014). An abuse of discretion may be found in the denial of a motion for a continuance when the moving party has shown good cause for granting the motion, but no abuse of discretion will be found when the moving

party has not demonstrated that he or she was prejudiced by the denial. *Id.* at 244.

[11] Father has not included his motion to continue in his appendix on appeal, nor does Father state the reason he gave the trial court in support of his motion.² Father did not appear at the factfinding hearing, but his counsel “renew[ed]” the motion to continue without giving any reason for the motion. Tr. at 15. To the extent Father now claims on appeal that his motion to continue was due to the Covid-19 emergency or an alleged inability to prepare for the hearing, Father does not direct us to anything showing that he stated those reasons to the trial court in support of his motion. Trial Rule 53.5 provides that, “[u]pon motion, trial may be postponed or continued in the discretion of the court, and shall be allowed upon a showing of good cause established by affidavit or other evidence.” We hold that Father did not show good cause why the trial court should have granted his motion to continue, and the trial court did not abuse its discretion when it denied the motion. *See In re K.W.*, 12 N.E.3d at 244.

² At the conclusion of the factfinding hearing, Father’s counsel stated as follows:

[Father] emailed me Friday afternoon indicating that he had a new phone. I replied Friday to request that he provide that number for me so that I could speak with him over the weekend. I also forwarded the invitation for today’s hearing to the email address that he [used to contact] me. I don’t have any other information as to why he is not present other than that he did express that he had lost his phone for a period of time[.]

Tr. at 55.

Issue Two: CHINS Adjudication

- [12] Father also contends that DCS failed to present sufficient evidence to prove that Child is a CHINS. Our Supreme Court has set out our standard of review.

When reviewing a trial court's CHINS determination, we do not reweigh evidence or judge witness credibility. *In re S.D.*, 2 N.E.3d 1283, 1286 (Ind. 2014). "Instead, we consider only the evidence that supports the trial court's decision and [the] reasonable inferences drawn therefrom." *Id.* at 1287 (citation, brackets, and internal quotation marks omitted). When a trial court supplements a CHINS judgment with findings of fact and conclusions of law, we apply a two-tiered standard of review. We consider, first, "whether the evidence supports the findings" and, second, "whether the findings support the judgment." *Id.* (citation omitted). We will reverse a CHINS determination only if it was clearly erroneous. *In re K.D.*, 962 N.E.2d 1249, 1253 (Ind. 2012). 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." *Yanoff v. Muncy*, 688 N.E.2d 1259, 1262 (Ind. 1997) (citation omitted).

Gr. J. v. Ind. Dep't of Child Servs. (In re D.J.), 68 N.E.3d 574, 577-78 (Ind. 2017) (alteration in original).

- [13] DCS alleged that Child is a CHINS pursuant to Indiana Code Section 31-34-1-1, which provides that a child is a child in need of services if, before the child becomes eighteen 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; 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.

[14] Our Supreme Court has interpreted that statute to require “three basic elements: that the parent’s actions or inactions have seriously endangered the child, that the child’s needs are unmet, and (perhaps most critically) that those needs are unlikely to be met without State coercion.” *In re S.D.*, 2 N.E.3d at 1287. “A CHINS adjudication focuses on the condition of the child.” *N.L. v. Ind. Dep’t of Child Servs. (In re N.E.)*, 919 N.E.2d 102, 105 (Ind. 2010).

[15] Father contends that “DCS wholly failed to present admissible, non-hearsay evidence” at the factfinding hearing and, therefore, presented insufficient evidence to support the CHINS adjudication. Appellant’s Br. at 26. In particular, he states as follows:

According no weight to the Findings that erroneously relied upon hearsay and innuendo, and given that DCS case manager Jones repeatedly testified that[,] *other than the allegations (hearsay and innuendo) from [Grandmother]*, there was no information about [Father’s] abilities to parent [Child]. Here, the Court wholly lacked evidence to support the necessity of court intervention for [Child], and there was an absence of any evidence that [Father] was not an appropriate parent for [Child’s] placement. The Juvenile Court’s CHINS adjudication does not rest on adherence to federal or state constitutional or case law, thereby requiring reversal of the Juvenile Court’s CHINS determination.

Appellant’s Br. at 39 (emphasis added).

[16] Father is correct that the trial court relied on Grandmother's testimony, which included both Grandmother's own observations and Mother's out-of-court statements, in support of its findings. However, Father did not make contemporaneous hearsay objections to any of the testimony upon which the trial court relied. As a result, Father cannot now complain that the court erred when it relied on that testimony. *See Brown v. State*, 783 N.E.2d 1121, 1125 (Ind. 2003) (holding contemporaneous objection required to preserve admission of evidence issue for appeal). Father did object to Grandmother's testimony regarding what Mother's children had told her, and the trial court sustained that objection and did not refer to any of that testimony in its findings. Father made no objections to Grandmother's testimony that he had given Mother black eyes, had broken the bathroom door, had punched holes in the walls, and had used methamphetamine. Finally, while Father had notice of the hearing, he failed to appear and offer any evidence on his behalf. The court cannot be faulted for having made a CHINS finding based upon the only evidence available rather than upon conjecture about other evidence Father might have introduced. Thus, the trial court did not abuse its discretion when it relied on that testimony in support of its findings.³

[17] We agree with Father that the trial court erroneously found that Father had attended only two supervised visitation appointments with Child. Jones

³ In its closing argument, DCS asked the trial court to rule that Grandmother's testimony about things Mother, who was deceased, had told her was an exception to the hearsay rule under Indiana Evidence Rule 804. In light of Father's failure to object to that testimony, we need not address Father's contention that Evidence Rule 804 is inapplicable to the hearsay testimony.

testified that Father had two visitations per week, had been attending those for “about a month,” and had only missed one appointment. Tr. at 44. In light of the evidence and other findings, however, a single erroneous finding does not require reversal. See *Kanach v. Rogers*, 742 N.E.2d 987, 989 (Ind. Ct. App. 2001).

[18] DCS presented evidence that Father has a history of domestic violence and drug abuse. Jones testified that someone from Father’s Engagement had tried to get in touch with Father but was unable to do so. Jones also testified that Father had not submitted to the requested drug screen. Finally, Jones was unable to visit Father’s home because of a change in his visitation schedule. (Contrary to Father’s assertion on appeal, Jones’ testimony does not indicate whether Father was at fault for the change in schedule.) Father does not challenge that evidence. Accordingly, Father has not shown that the evidence is insufficient to support the CHINS adjudication.

[19] Father is correct that, when determining whether a Child is a CHINS, courts “should consider the family’s condition not just when the case was filed, but also when it is heard.” *In re D.J.*, 68 N.E.3d at 580 (citation omitted). “Doing so avoids punishing parents for past mistakes *when they have already corrected them.*” *Id.* at 581 (emphasis added). Thus, in a CHINS case, we give special consideration to a family’s current conditions.

[20] Here, DCS gave Father the opportunity to demonstrate that he is living drug-free and has sufficient parenting skills by submitting to a drug screen and participating in Father’s Engagement, but Father did not participate in services

other than in supervised visits. Father's failure to participate in services means there is nothing to show that Father has corrected his past mistakes of domestic violence and drug abuse. Father's lack of cooperation with DCS highlights his inability or refusal to properly care for Child. *See M.W.B. v. Ind. Dep't of Child Servs. (In re K.B.)*, 24 N.E.3d 997, 1007 (Ind. Ct. App. 2015). Moreover, Father had an opportunity to testify, but failed to appear at the factfinding hearing without explanation.

[21] In sum, Jones testified that she was concerned for Child's safety if she were to be placed with Father given his history of domestic violence and drug abuse and Father's failure to engage in services. Jones also testified that court intervention was necessary to keep Child safe. Grandmother testified that Child has never spent the night with Father since he and Mother separated in late 2018, and, due to Father's refusal to engage in services, DCS simply has no current information about him or his ability to parent Child. We cannot say that the trial court's adjudication of Child as a CHINS was clearly erroneous.

[22] Affirmed.

Pyle, J., and Tavitas, J., concur.