Affirmed and Opinion Filed June 10, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01536-CV

IN THE INTEREST OF A.P., M.P., N.J., F.J., AND A.J., CHILDREN,

On Appeal from the County Court
Kaufman County, Texas
Trial Court Cause No. 100802CC

MEMORANDUM OPINION

Before Justices Osborne, Partida-Kipness, and Pedersen, III
Opinion by Justice Partida-Kipness

Mother appeals the termination of her parental rights to her five children following a jury trial. In nine issues, Mother complains of jury charge error, ineffective assistance of counsel, the Department's services and visitation plan, the trial court's response to a jury's note during deliberations, the admission of live testimony of the oldest daughters, A.P. and M.P, concerning the sexual abuse they suffered at the hands of Mother's long-term, live-in boyfriend Mark,[1] and the sufficiency of the evidence to support the jury's findings that Mother violated several

[1] We use pseudonyms or initials to refer to the children, parents, and other family members involved in this case. *See* TEX. FAM. CODE § 109.002(d); TEX. R. APP. P. 9.8(b)(2).

subsections of section 161.001(b)(1) of the family code. We overrule Mother's issues, modify the termination order to remove the finding that Mother violated section 161.001(b)(1)(K), and affirm the termination order as modified.

BACKGROUND

The underlying termination involved Mother, her five children, and three fathers. The children are A.P. and M.P. (the Older Girls), N.J. (the youngest daughter), and F.J. and A.J. (the boys). The father of the Older Girls, Dirk, was named permanent managing conservator of the Older Girls. The parental rights of the other two fathers involved in the case were terminated. The Texas Department of Family and Protective Services ("Department") was named the permanent managing conservator of N.J. and the boys. Only Mother appeals. Mark is the father of F.J. and A.J., and he signed N.J.'s birth certificate even though he is not N.J.'s father. Mark is the father at the center of the termination case because he and Mother lived together for years, and the Department removed the children in September 2018 following the Older Girls' outcry of sexual abuse by Mark during the previous four to five years.

The termination case was tried to a jury over four consecutive days in September 2019. The trial record contains extensive testimony concerning the circumstances leading up to the termination of Mother's parental rights. It is unnecessary to set out these personal facts in detail because Mother failed to preserve

eight of her issues for review, but we summarize the facts below to the extent needed to place the present dispute in context.

Mark moved in with Mother, the Older Girls, and N.J. in January 2014. Mark and Mother did not marry. They did, however, conceive and have the boys, F.J. and A.J. The evidence showed that the children lived with their Mother and Mark in a home that was unclean, without consistent running water, and without furniture. They slept on the floor together as a family in a boy, girl, boy, girl formation. The Older Girls were responsible for taking care of N.J. and the boys; feeding them, changing diapers, and dealing with emotional outbursts. Mark also expected the Older Girls to clean the house and cook, and he did not approve of the Older Girls having school books and Chromebooks from school at home. The floor in the home where they slept was filthy, moldy, wet, and roach-infested.

Mother admitted at trial that the children witnessed physically violent and verbally abusive arguments between her and Mark. She also admitted that she knew that Mark watched pornographic videos in the house where the children could see them. She also caught Mark masturbating in public at their automotive repair shop about four months before their separation. M.P. testified that she had seen Mark hit Mother a couple of times. The Older Girls testified that they would try to keep the younger children away from the violence because they worried for the younger children's safety.

In August 2018, Mother and Mark were involved in a fight in front of the children in which Mark tried to strangle Mother. Mother kicked Mark out of the house and, the same day, discovered that Mark had been watching pornographic videos with N.J., who was five years old at the time. After confronting Mark and then obtaining money from him, Mother took the children with her to Kansas. They stayed in Kansas for a month, but then Mother decided to return to Texas. She testified that she returned to get a common-law divorce and sell the mobile home.

When the Older Girls realized they were returning to Texas, they told Mother that Mark had been sexually abusing them for years. The Older Girls testified that they had been sexually abused by Mark for four or five years. Both girls testified that Mark had abused them vaginally, anally, digitally, and orally.

A.P. was sixteen at the time of trial. She testified that Mark forced her to watch pornography with him. She also testified that Mark had anal sex with her at least 100 times, vaginal sex with her about 100 times, and oral sex "even more" times. A.P. told the jury there were red flags Mother should have seen to know that Mark was abusing A.P., including Mark asking every month about A.P.'s menstruation. The Department investigator testified that the Older Girls told her that Mark determined how the chores would be apportioned and would choose who would stay back during the weekend errands based on which girl was menstruating. He would ask Mother which girl was menstruating and ask that the girl who was not menstruating be the one to stay at home with him.

M.P. was almost fourteen at the time of trial. She testified that Mark abused her for about four years and the abuse occurred every Sunday. M.P. also testified that she did not really think Mother had the skills to protect her.

Belen Fuentes, a Department caseworker, related that through her interactions with the Older Girls and N.J., she "became aware" that N.J. watched pornography with Mark when they were alone at times. Fuentes believes that N.J. suffered "some type of sexual abuse."

Department caseworkers, CASA representatives, and the Older Girls' therapist testified that the children were all happy and thriving in their current placements. The Older Girls testified that they were happy living with their dad and did not want to have contact with Mother. They also testified that they felt the younger children were doing well living away from Mother. The Department investigator, Department caseworker, and CASA representatives expressed concern that Mother seemed removed from the children during visits, was not bonded with the children, and did not have a typical response of consoling the children. They noted the boys were not very connected to Mother. The consensus among the Department's witnesses was that Mother was not capable of protecting her children and that termination was in each child's best interest. One Department caseworker and the CASA supervisor, as well as the Older Girls, told the jury they found it difficult to understand how Mother had missed the red flags about Mark's abuse of the Older Girls and N.J.

After removing the children in September 2018, the Department filed a petition to terminate Mother's parental rights to her children. The Department also created a service plan for Mother, which the Department contends Mother did not complete. The Department ultimately took the petition to trial. After a four-day trial, the jury found by clear and convincing evidence that grounds for terminating Mother's parental rights existed and that termination of Mother's parental rights was in the children's best interest. On December 17, 2019, the trial court signed an Order of Termination. In the Order of Termination, the trial court made findings in accordance with the verdict and terminated the parent-child relationship between Mother and the children on the grounds that Mother had:

> (1) knowingly placed or knowingly allowed the children to remain in conditions or surroundings that endangered their physical or emotional well-being;
>
> (2) engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered the children's physical or emotional well-being;
>
> (3) executed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by Chapter 162 of the family code;
>
> (4) constructively abandoned the children who have been in the permanent or temporary managing conservatorship of the Department for not less than six months and the Department has made reasonable efforts to return the children to Mother, she has not regularly visited or maintained significant contact with the children, and she has demonstrated an inability to provide the children with a safe environment; and
>
> (5) failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the children's return after they had been in the permanent or temporary managing

> conservatorship of the Department for not less than nine months as a result of their removal for abuse or neglect.

See TEX. FAM. CODE §§ 161.001(b)(1)(D), (E), (K), (N), and (O). This appeal followed.

ANALYSIS

Mother brings nine issues on appeal. We affirm the trial court's judgment because we conclude that Mother failed to preserve eight of her nine issues for appeal and she may not complain about retained counsel's alleged ineffectiveness. We will address each issue in turn.

A. Issue One – Live Testimony of the Older Girls

In her first issue, Mother complains that the trial court allowed the Older Girls to testify in person at trial about the sexual abuse they suffered. We review the trial court's decision to admit or exclude witness testimony for an abuse of discretion. *Owens–Corning Fiberglas Corp. v. Wasiak*, 972 S.W.2d 35, 43 (Tex. 1998) (admission or exclusion of evidence is within the trial court's discretion); *Calderon v. Tex. Dep't of Family & Protective Servs.*, No. 03-09-00257-CV, 2010 WL 2330372, at *6 (Tex. App.—Austin June 11, 2010, no pet.) (mem. op.). We must uphold a trial court's evidentiary ruling if there is any legitimate basis for it. *Wasiak*, 972 S.W.2d at 43. To obtain reversal on appeal, Mother must show that the trial court's ruling was in error and that the error was calculated to cause and probably did cause the rendition of an improper judgment. *Id.*; *Loving v. Fed. Nat'l Mortg. Ass'n*, No. 05-15-00624-CV, 2016 WL 3517643, at *2 (Tex. App.—Dallas June 24,

2016, no pet.) (mem. op.). In conducting this harm analysis, we review the entire record. *Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000); *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 754 (Tex. 1995). The erroneous admission is harmless if the evidence is merely cumulative of evidence admitted elsewhere at trial. *Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004). Whether the erroneous admission of evidence is harmful is a matter of judgment rather than a precise measurement. *Id.* We may also consider the amount of emphasis placed on the erroneous evidence. *Id.*; *In re A.M.*, No. 09-19-00075-CV, 2019 WL 4064579, at *10 (Tex. App.—Beaumont Aug. 29, 2019, pet. denied) (mem. op.).

Mother did not object to the admission of the testimony of the Older Girls at trial, or to the manner or substance of their testimony. By failing to object, Mother failed to preserve her complaint for appellate review. TEX. R. APP. P. 33.1. We overrule Mother's first issue.

B. Issue Two – Trial Judge's Response to Jury Note

During deliberations, the jury submitted a written note to the trial judge, signed by the presiding juror, which read:

> If [Mother] has/is a possessory conservator, what rights will she have, what will that look like, what kind of limitations would that be?

The trial judge declined to answer the question and, instead, referred the jury back to the charge and the instructions by writing back "You have received all of the law

from the Court at this time." Mother's counsel stated he had no objections to the judge's written response.

In her second issue, Mother complains that the judge's response to the jury's note constituted an abuse of discretion because the note showed the jury was confused or concerned about the effect of the verdict. When a trial judge refuses to answer a jury note or refers the jury back to the charge, that decision is reviewed for an abuse of discretion. *See Allaben v. State*, 418 S.W.2d 517, 521 (Tex. Crim. App. 1967) (recognizing that a trial court has discretion to refuse to answer the jury by referring jurors to the court's charge when it deems the jury's questions to be improper); *Washington v. State*, No. 02-13-00050-CR, 2015 WL 601857, at *7–8 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.) (mem. op., not designated for publication) (trial court was within its discretion to refer the jury to the court's charge and did not commit reversible error by declining to further instruct the jury in response to jury's note).

Mother did not object to the trial judge's response to the jury's note. She has, therefore, failed to preserve error on this issue. TEX. R. APP. P. 33.1 (objection is "a prerequisite to presenting a complaint for appellate review"); *Morin-Spatz v. Spatz*, No. 05-00-01580-CV, 2002 WL 576513, at *5 (Tex. App.—Dallas Apr. 18, 2002, no pet.) (mem. op.) (appellate complaint regarding trial court's response to jury's note was not preserved because of appellant's failure to object in trial court). We overrule Mother's second issue.

C. Issue Three – Charge Error

In her third issue, Mother complains that each ground for termination was included in a single question in the charge. In the charge, the trial court instructed the jury that to terminate the parent-child relationship of Mother, Mark, or the other fathers as to the children, it must be proven by clear and convincing evidence that termination is in the best interest of the child and at least one of a list of five possible events occurred. The list was comprised of the verbatim provisions of subsections (D), (E), (K), (N), and (O) of section 161.001(b)(1) of the family code. These instructions were followed by Question No. 1, which asked whether the parent-child relationship between Mother and the children should be terminated. Each child was then listed on a separate line, and the jury was given the choice to answer "yes" or "no" as to each child. The jury answered "yes" for each child. Mother argues the jury should have been given a separate instruction and question as to each alleged ground of termination for each individual child.

We review challenges to the jury charge under an abuse of discretion standard. *Texas Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). In all jury cases, the trial court shall, whenever feasible, submit the cause upon broad form questions. TEX. R. CIV. P. 277. The Texas Supreme Court has sanctioned broad form submission in parental termination cases. *See Texas Dep't of Human Servs*., 802 S.W.2d at 649 (controlling question is whether the parent–child relationship should

be terminated, not what specific family code ground or grounds jury relied on to affirmatively answer questions posed).

Here, Mother made no objections to the jury charge. She, therefore, did not preserve this issue for review. TEX. R. APP. P. 33.1; TEX. R. CIV. P. 272, 274; *In re B.L.D.*, 113 S.W.3d 340, 349–50 (Tex. 2003) (parent waived charge complaint that separate statutory grounds for terminating parental rights should not have been submitted within a single broad-form question by failing to object to charge on those grounds); *In re E.M.*, 494 S.W.3d 209, 228 (Tex. App.—Waco 2015, pet. denied) (complaining of broad form submission in objections to proposed judgment did not preserve error); *In re J.W.*, 113 S.W.3d 605, 613 (Tex. App.—Dallas 2003, pet. denied). We overrule Mother's third issue.

D. Issues Four, Five, Seven, and Nine – Sufficiency of the Evidence

Mother also challenges the sufficiency of the evidence to support the jury's findings that she violated subsections (D), (E), (I)[2], and (N) of section 161.001(b)(1) of the family code. As with her first three issues, Mother failed to preserve error on her sufficiency challenges because she failed to take any of the steps in the trial court necessary to do so. *See, e.g., In re M.M.*, No. 05-19-00329-CV, 2019 WL 4302255, at *6 (Tex. App.—Dallas Sept. 11, 2019, pet. denied) (mem. op.) (overruling section 161.001 sufficiency of the evidence issues based on lack of preservation where

[2] The jury was not asked to decide whether Mother violated subsection (I). Mother's seventh issue, therefore, presents nothing for review.

Father did not file a new trial motion or use any procedure recognized as preserving legal sufficiency points).

Factual sufficiency issues must be preserved by new trial motion. TEX. R. CIV. P. 324(b)(2); *In re A.R.M.*, 593 S.W.3d 358, 362, n.1 (Tex. App.—Dallas 2018, pet. denied) (mem. op.) (applying Rule 324 in a parental termination case). The clerk's record does not contain a new trial motion, nor does the computer generated docket sheet indicate that any such motion was filed. Mother did not preserve a factual sufficiency argument.

A legal sufficiency argument can be preserved by: (i) a motion for instructed verdict, (ii) a motion for judgment notwithstanding the verdict, (iii) an objection to a jury question's submission, (iv) a motion to disregard a jury's answer to a vital fact issue, or (v) a new trial motion. *In re A.H.J.*, No. 05-15-00501-CV, 2015 WL 5866256, at *10 (Tex. App.—Dallas Oct. 8, 2015, pet. denied) (mem. op.). Here, nothing in the record indicates that Mother made any of these motions or objections. Accordingly, Mother did not preserve a legal sufficiency argument. *See id.* (applying ordinary preservation rules to legal sufficiency challenge in a parental termination case); *see also In re M.M.*, 2019 WL 4302255, at *6.

We note the Texas Supreme Court has held that due process demands we review the evidence supporting predicate statutory findings under grounds (D) and (E) when they are challenged on appeal, even if the evidence is sufficient to support termination under another ground, because termination of parental rights under these

grounds "may have implications for ... parental rights to other children." *In re N.G.*, 577 S.W.3d 230, 234, 235 (Tex. 2019) (per curiam). That rule, however, "presupposes that the appellant has preserved the issues for appeal in the first instance." *In re D.T.*, 593 S.W.3d 437, 439, n. 3 (Tex. App.—Texarkana 2019, no pet.) (emphasizing that the *N.G.* court stated that the rule applies "[w]hen a parent has presented the issue on appeal") (quoting *In re N.G.*, 577 S.W.3d at 234). Moreover, the rule "does not eliminate[ ] the long-established requirement of error preservation of legal and factual sufficiency issues in parental-rights termination cases decided by a jury." *In re D.T.*, 593 S.W.3d at 439, n. 3 (citing *In re S.C.*, No. 02-18-00422-CV, 2019 WL 2455612, at *4, n.2 (Tex. App.—Fort Worth June 13, 2019, pets. denied) (mem. op.)); *In re D.C.*, No. 05-19-01217-CV, 2020 WL 1042692, at *7 (Tex. App.—Dallas Mar. 4, 2020, no pet.) (mem. op.) (declining to review Mother's factual sufficiency challenges to jury's endangerment findings under subsections (D) and (E) for lack of preservation but reviewing the legal sufficiency challenges to those findings per *N.G.* "[b]ecause Mother preserved her legal sufficiency challenges to the (D) and (E) findings"); *see also In re A.H.J.*, 2015 WL 5866256, at *10 (applying ordinary preservation rules to legal sufficiency challenge in a parental termination case)

Therefore, although Mother challenges the sufficiency of the evidence supporting the jury's predicate statutory findings on grounds (D) and (E), we need

not review the evidence supporting those findings because Mother did not preserve error. *See In re D.C.*, 2020 WL 1042692, at *7.

Mother did not preserve her challenges to the legal and factual sufficiency of the evidence because she did not make a motion for new trial or any other motion or objection in the trial court that would preserve those challenges. Accordingly, we overrule issues four, five, seven, and nine.

E. Issue Six – Ineffective Assistance of Counsel

In her sixth issue, Mother contends she was denied a fair trial because of her counsel's ineffective representation. Specifically, she complains that her trial counsel committed the following errors during his representation of her: made only two objections during the week-long trial, introduced only two exhibits for Mother, failed to introduce evidence to substantiate Mother's claim that she returned to Mark's home in Texas in September 2018 with the children based on express instructions from law enforcement, allowed "a parade of hearsay evidence, leading questions, speculation, and incompetent law testimony on expert topics to go unchallenged," failed to object to the jury charge, and failed to introduce exculpatory evidence.

"In Texas, there is a statutory right to counsel for indigent persons in parental-rights termination cases." *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003) (citing TEX. FAM. CODE § 107.013(a)(1)). This statutory right to appointed counsel necessarily "embodies the right to effective counsel" and, a parent may, therefore, challenge a

termination order on the ground that court-appointed counsel rendered ineffective assistance. *Id.* at 544–45; *In re J.O.A.*, 283 S.W.3d 336, 341 (Tex. 2009); *In re A.F.*, No. 05-17-00392-CV, 2017 WL 4116945, at *3 (Tex. App.—Dallas Sept. 18, 2017, no pet.) (mem. op.); *In re Z.C.*, No. 12-15-00279-CV, 2016 WL 1730740, at *2 (Tex. App.—Tyler Apr. 29, 2016, no pet.) (mem. op.).

However, a parent who hires her own attorney in a parental termination action cannot raise an ineffective assistance of counsel challenge to the termination order. *See, e.g.*, *In re D.T.*, 593 S.W.3d at 439–40 (collecting cases); *but see In re E.R.W.*, 528 S.W.3d 251, 261 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (extending section 107.013 to apply to retained counsel). Because Mother's counsel was retained, she may not assert a claim for ineffective assistance of counsel. *See In re D.T.*, 593 S.W.3d at 439–40; *see also In re C.J.G.*, No. 04-19-00237-CV, 2019 WL 5580253, at *6 (Tex. App.—San Antonio Oct. 30, 2019, no pet.) (rejecting *E.R.W.* and overruling ineffective assistance of counsel claim as it pertains to his retained counsel). Accordingly, we overrule Mother's sixth issue alleging ineffective assistance of counsel.

F. Issue Eight – The Department's Services and Visitation Plan

In her eighth issue, Mother complains that decisions of Department personnel deprived her of the statutory protections of sections 263.102(a)(4) and 263.102(a)(7) of the family code. Mother alleges that she was denied the opportunity to engage in family counseling with the children and was given no meaningful opportunity to

reunify with the children. She claims that "lay personnel" in the Department determined that Mother had not made sufficient therapeutic progress to justify reunification efforts and, by doing so, Mother's relationship with the children deteriorated and their lives in their foster homes became the new status quo. The provisions of the family code cited by Mother require the Department's service plan to "(4) state appropriate deadlines;" and "(7) state the actions and responsibilities that are necessary for the child's parents to take to achieve the plan goal during the period of the service plan and the assistance to be provided to the parents by the department or other agency toward meeting that goal." TEX. FAM. CODE §§ 263.102(a)(4), (7).

As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion, and the trial court either ruled or refused to rule on the subject. TEX. R. APP. P. 33.1(a). This preservation requirement applies to assertions that the Texas Family Code is unconstitutional as applied. *In re L.M.I.*, 119 S.W.3d 707, 710–11 (Tex. 2003); *In re C.R.P.*, 192 S.W.3d 823, 826–27 (Tex. App.—Fort Worth 2006, no pet.). Here, there is nothing in the record demonstrating that Mother raised this challenge in the trial court. Mother, therefore, failed to preserve this complaint for appellate review. We overrule her eighth issue.

G. Modification of the Termination Order

In its brief, the Department states Mother did not execute an affidavit of voluntary relinquishment and, therefore, the order should be reformed to reflect that the evidence was insufficient as to subsection (K). After reviewing the record, we agree and conclude it is necessary to modify the Order of Termination on this issue alone.

CONCLUSION

Mother is not entitled to bring an ineffective assistance of counsel claim as to her retained counsel, and Mother failed to preserve error as to her remaining appellate issues. Accordingly, we overrule each of the issues presented by Mother. We modify that portion of the Order of Termination finding that Mother executed an unrevoked or irrevocable affidavit of relinquishment of parental rights, strike paragraph 6.2.3 from the Order of Termination, and otherwise affirm the judgment as modified. *See* TEX. R. APP. P. 43.2(b).

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF A.P., M.P., N.J., F.J., AND A.J., CHILDREN,	On Appeal from the County Court, Kaufman County, Texas Trial Court Cause No. 100802CC.
No. 05-19-01536-CV V.	Opinion delivered by Justice Partida-Kipness. Justices Osborne and Pedersen, III participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

> Paragraph 6.2.3 is struck from the December 17, 2019 Order of Termination.

It is **ORDERED** that, as modified, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee recover its costs of this appeal from appellant.

Judgment entered this 10th day of June, 2020.