TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00900-CV

C. H., Appellant

v.

Texas Department of Family and Protective Services, Appellee

FROM THE 126TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-FM-18-004919, THE HONORABLE JAN SOIFER, JUDGE PRESIDING

MEMORANDUM OPINION

After the jury determined that appellant C.H.'s parental rights to his children should be terminated, the trial court signed a final decree to that effect.[1] On appeal, C.H. raises one issue, arguing that the trial court abused its discretion in limiting his cross-examination of a caseworker employed by the Texas Department of Family and Protective Services. We will affirm the final decree of termination.

DISCUSSION[2]

Caseworker Laura Pender testified about the reasons for the children's removal; her work with the family; her interactions with C.H. and his behavior during the pendency of the

[1] We refer to appellant by his initials and to the children by aliases. *See* Tex. Fam. Code § 109.002(d); Tex. R. App. P. 9.8. The parental rights of the children's mother were also terminated, but she has not appealed.

[2] Because we need not delve into the underlying facts of the case for our analysis, we will limit our recitation to the relevant portions of the record.

proceeding; his progress, or lack thereof, in meeting the requirements that might have allowed him to regain custody; and the children's foster placement and progress in that home. When asked during direct examination what it would mean for the children if the Department were to be appointed managing conservator, leaving C.H.'s parental rights intact and appointing him possessory conservator with ongoing supervised visitation, Pender answered:

> The children would be a ward of the State. They would never have a permanent home because their current placement would have to remain licensed for 18 years, and it's uncertain if they would be able to do that. The children could be separated. They could have many moves. I have cases that I work currently where I have [Permanent Managing Conservatorship] kids that are in the sole managing conservatorship of the State, and they are frequently moved all over the state of Texas. They would always for the rest of their life have caseworkers in their life, caseworkers having to go to their school, which would be intrusive, and talking to their teachers.
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> They would never have a real sense of normalcy or permanent home because they would forever be in the State's care. The State is designed to be a temporary conservator, not permanent; and we don't do a very good job as being a sole managing conservator. We're more designed to be a temporary. And statistics show that children that are aged out of care don't do well in life in all aspects. They don't bond well with people. They may not trust others and may not have, like, as many successes as they could if they were in a permanent home.

The Department asked, "So they would spend their childhood being foster kids," and Pender answered, "Yes."

During C.H.'s cross-examination of Pender, the following exchange took place:

> Q. I would like to start briefly by talking about a legal point that you had made with regard to—I believe your testimony was that if the Department was made permanent managing conservator, which would be a situation where the Department would be permanent and then [C.H.] might potentially be named possessory conservator and might still have modest visitation rights, I think your

testimony was a concern that if that were to happen, then the children would, for the rest of their childhood, be wards of the State, et cetera.

A. Yes.

Q. Isn't it also correct, though, under the Family Code, that when foster children have been living with a foster placement for 12 months, that that placement—those people have standing to bring their own family law claim to become—

A. I don't know.

Q. Okay. You don't disagree with that point?

A. I don't know.

Q. Okay. If that were the case, which, I mean—

[Department]: I'm going to object to any speculation; and this calls for a legal conclusion.

THE COURT: Sustained.

C.H. asked Pender about other cases in which she had been involved where a child was left in foster care after a parent's rights were not terminated. She said she did not know about such a situation and that although she did not think a foster family could obtain permanent managing conservatorship, she did not know.

Later, when the parties discussed the jury charge, C.H. sought to ask the jury whether the children's foster mother should be appointed as a managing conservator. The Department objected, noting that the foster parents were present only as witnesses, were not represented by counsel, and had not been consulted about the issue. The Department argued that if C.H.'s rights were not terminated and the Department was appointed permanent managing

conservator, the children could not be adopted and would remain in foster care unless and until someone filed a motion to modify and showed a change in circumstances, a task the Department described as "a huge legal burden." C.H. stated that Pender, testifying "with a sound of great certainty," gave the jury "the impression that there's a false dichotomy between termination and adoption or perpetual ward of the state. There's plenty of middle ground, and they need to understand that." He asserted that Pender's testimony was inaccurate because it "characterized that [the children] would be wards of the state for the rest of their childhood" and that such a situation "would be tumultuous inevitably," when in fact the foster parents could seek managing conservatorship. The Department asserted that even if Pender had testified inaccurately, the time to question her about that was "while she was on the witness stand," and C.H. responded that he had been "instructed to stop questioning her about issues of law" or about facts that were "premised on an issue of law." The trial court refused C.H.'s requested jury question.

In closing argument, C.H. explained at some length that if he were to be appointed possessory conservator and the Department were to be appointed managing conservator, the children would most likely remain in their current foster placement. He discussed this as the "middle ground," saying that he was "confused by not only the content, but the fervency, the heat and the passion with which my colleagues are saying that the children would be in limbo if anything other than termination occurred."

The Department responded to C.H.'s "middle ground" argument, saying:

> [C.H.] wants these kids to wait longer. He wants you to leave them in foster care so he can maintain the status quo; see them for two hours a week. He doesn't have to support them. He doesn't provide anything for them. He shows up to the visits and he gets to see his kids for two hours a week, and he knows that he'll get to see them for two hours a week. That is what's in the best interest of [C.H.]. That's a good option for [C.H.]. Unfortunately for [C.H.], that is not what you're deciding today. . . .

> You heard Ms. Pender's testimony. If the State of Texas is your permanent parent, . . . children know these court hearings exist, and their whole life and schedule could change and be uprooted at every hearing when people ask for different things. They have an attorney that goes to their school, their home, visits with their teachers, their doctors. Everybody knows they're foster kids because a caseworker shows up at their school because . . . that's CPS's duty. . . .
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> [The children] have a chance to be normal children who are not in foster care, who have—who have parents who are their legal parents. . . . They have a chance to have a stable, safe, and loving environment, and it's your job to give them that chance. We're asking that you terminate [C.H.]'s rights so that they can be adopted. . . . [T]his is about making sure they are secure, safe, and loved. That they do not come back into foster care again.

C.H. argues that the trial court's limiting his questioning of Pender after her statement on direct examination that the children would "never" have a permanent home or sense of stability gave the jury "a misleading picture" about the children's situation in the event C.H.'s rights were not terminated. However, C.H. did not make an offer of proof as to what Pender's testimony would have been and thus did not preserve any error related to the trial court's sustaining the Department's objection. *See* Tex. R. Evid. 103; *Gunn v. McCoy*, 554 S.W.3d 645, 666 (Tex. 2018) ("If a court ruling excludes evidence, a party must preserve error by filing an offer of proof informing the court of the substance of the excluded evidence."); *McKinnon v. Wallin*, No. 03-17-00592-CV, 2018 WL 3849399, at *4 (Tex. App.—Austin Aug. 14, 2018, pet. denied) (mem. op.) ("As to McKinnon's complaint that he was not allowed to cross-examine appellees' witnesses, he has failed to preserve this complaint for our review because he did not make an offer of proof concerning the substance of what the excluded testimony would have been."). As we have explained,

> While the reviewing court may sometimes be able to discern from the record the general nature of the evidence and the propriety of the trial court's ruling, we cannot, without an offer of proof, determine whether exclusion of the evidence was harmful. Thus, when evidence is excluded by the trial court, the proponent of the evidence must preserve the evidence in the record in order to complain of the exclusion on appeal. If the party fails to make an offer of proof, it must introduce the excluded testimony into the record by a formal bill of exception. Failure to demonstrate the substance of the excluded evidence through an offer of proof or bill of exception results in waiver of any error in its exclusion.

B.O. v. Texas Dep't of Family & Protective Servs., No. 03-12-00676-CV, 2013 WL 1567452, at *3 (Tex. App.—Austin Apr. 12, 2013, no pet.) (mem. op.) (citations omitted). C.H. thus waived any error in the trial court's limiting his cross-examination of Pender.

Even if error was preserved, however, C.H. has not shown that reversal is required. "Cross-examination is a safeguard essential to a fair trial and a cornerstone in the quest for truth"; "the right to cross-examine a witness is a substantial one, and it is error to so restrict it as to prevent the cross-examining party from going fully into all matters connected with the examination in chief"; and "[d]ue process requires an opportunity to confront and cross-examine adverse witnesses." *Davidson v. Great Nat'l Life Ins.*, 737 S.W.2d 312, 314 (Tex. 1987) (cleaned up). However, even if a trial court erroneously limits cross-examination, we will not reverse unless the error "probably caused the rendition of an improper judgment" or "probably prevented the appellant from properly presenting the case" to this Court. Tex. R. App. P. 44.1(a); *see Davidson*, 737 S.W.2d at 314 (citing predecessor to rule 44.1(a)).

It appears that C.H. wanted to elicit testimony from Pender about whether the foster parents could later seek to be named managing conservators in place of the Department, thereby giving the children stability while still preserving C.H.'s rights as a possessory conservator. However, Pender testified elsewhere that she did not know if a foster family could obtain permanent managing conservatorship. Further, even if that was a possibility, as noted by

the Department, such an action would require the foster parents to decide to take that step, to weigh whether to hire an attorney, and to file a motion to modify, and the Department did not know whether "anyone's talked to [the foster mother] about that or if she's thought about the legal—those types of legal options." To the extent that C.H. sought from Pender testimony about that hypothetical situation, the trial court would not have erred in limiting him from asking her to speculate, and we note that C.H. described that hypothetical outcome in his closing remarks when he argued in favor of a "middle ground" of allowing him to retain his rights while keeping the children in their current foster placement.

We cannot hold on this record that the trial court abused its discretion in limiting the questions C.H. sought to ask during his cross-examination of Pender. *See Harris County v. Inter Nos, Ltd*., 199 S.W.3d 363, 368 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("The trial court has broad discretion about the extent of cross-examination allowed."); *Lopez v. State*, No. 12-02-00380-CV, 2003 WL 23015072, at *4 (Tex. App.—Tyler Dec. 23, 2003, pet. denied) (mem. op.) (no abuse of discretion to limit cross-examination); *cf. Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (in criminal context, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant"). We overrule C.H.'s issue on appeal.

CONCLUSION

Having overruled C.H.'s sole appellate issue, we affirm the trial court's final decree of termination.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Baker and Triana

Affirmed

Filed: May 28, 2020