# Fourth Court of Appeals
## San Antonio, Texas

## MEMORANDUM OPINION

No. 04-20-00042-CV

**IN THE INTEREST OF M.X.R.** and M.S.R., Children

From the 49th Judicial District Court, Webb County, Texas
Trial Court No. 2018-FLD-000964-D1
Honorable Selina Nava Mireles, Judge Presiding[1]

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: May 27, 2020

AFFIRMED

After a jury found by clear and convincing evidence (1) three of the statutory predicate grounds for termination and (2) termination is in the best interest of the children, the trial court signed an order terminating appellant Stephanie's rights to her children, M.X.R. and M.S.R. We affirm the trial court's termination order.

### Background

The Texas Department of Family and Protective Services ("the Department") removed the children from Stephanie's care after then five-month-old M.S.R. was admitted to the hospital with unexplained head trauma on May 10, 2018. Stephanie told M.S.R.'s treating physicians that M.S.R., who was not up to date on her vaccinations, had begun exhibiting cough, decreased

[1] Presiding by assignment.

appetite, and subjective fever on May 7. When M.S.R. began rolling her eyes back into her head on May 10, Stephanie took her to the emergency department at Doctors Hospital of Laredo, where she presented with pneumonia, seizures, and a 104-degree fever. On the same date, M.S.R. was transferred to Driscoll Children's Hospital in Corpus Christi, where she was treated by pediatric intensive care unit physician Dr. Kevin Schooler.

In videotaped deposition testimony played at trial, Dr. Schooler testified M.S.R. was diagnosed with seizures and hypoxic-ischemic encephalopathy, which is brain damage resulting from lack of oxygen or blood flow to the brain. M.S.R.'s "significant" and permanent brain damage was caused by bilateral subdural hematomas, although M.S.R. did not have any facial bruising or abnormal fractures. The damage to M.S.R.'s brain left her unable to swallow, necessitating a permanent gastric feeding tube. Because of the nature of M.S.R.'s injuries, her case was referred to the Child Abuse Resource and Evaluation Team team to investigate potential nonaccidental trauma and consider referral to the Department and law enforcement. Dr. Schooler explained: "Bilateral subdural hematomas in children less than two years of age is most consistent with . . . nonaccidental trauma."

M.S.R.'s case was referred to law enforcement and to the Department. A Laredo Police Department detective testified Stephanie was charged with abandoning and endangering a child and criminal negligence, which charges were pending at the time of trial. The Department investigator received a report of abuse and neglect indicating concerns of physical abuse, medical neglect, and neglectful supervision of M.S.R. The investigator interviewed Stephanie, who alleged M.S.R. fell and hit her head on two occasions. Neither the investigator nor the Department caseworker found those allegations credible, and Stephanie later recanted them. Stephanie reported to the investigator that her children's father, Cesar, had struck her on the mouth in the children's presence after Stephanie ran over his foot with her vehicle. After that incident, which took place

on April 29, 2018, Stephanie and Cesar separated and Cesar ceased living with Stephanie and the children.

The Department caseworker assigned to the case from its inception testified she prepared a family service plan for Stephanie, which Stephanie signed on June 28, 2018. The family service plan required Stephanie to maintain a safe and stable home, submit to a psycho-social and psychological evaluation, complete parenting classes, refrain from engaging in any criminal activity, submit to random drug testing, attend individual and family therapy, and maintain communication with the Department. The Department caseworker testified Stephanie was "noncompliant" with individual therapy, failed to submit to three random drug tests, and failed to complete court-mandated substance abuse classes. Stephanie also failed to maintain a safe and stable home environment, failed to provide an address for the caseworker to conduct a home assessment, "skipped out" on a lease after failing to pay rent for two months, lied to the caseworker about her employment at a call center, and failed to maintain communication with the caseworker during the month prior to trial. According to the Department caseworker, neither Stephanie nor Cesar demonstrated positive improvement, a stable home environment, stable employment, or an ability to care for their children.

At the time of trial in October 2019, M.X.R. was two years and ten months old and M.S.R. was one year and ten months old. The children were placed with related foster families in San Antonio. M.X.R. is not fully verbal and has developmental delays that will require speech and occupational therapy. M.S.R. requires 24/7 medical attention, a permanent feeding tube, occupational and physical therapy, and speech therapy. M.S.R. continues to have seizures, is developmentally delayed, will never be fully functioning, may never be able to eat normally, and will always require 24/7 nursing.

M.S.R.'s foster mother is a pediatric registered nurse who has almost twenty years of experience specializing in medically dependent children. The foster mother testified that during Stephanie's visits with the children, Stephanie appeared bonded with the children but struggled to handle both M.X.R. and M.S.R. at the same time and repeatedly sought guidance from the foster mother. The foster mother testified M.S.R. "is the princess of the house . . . and we love her very much." The foster family is "just here to take care of [M.S.R.], you know, as long as we can."

Cesar did not appear at trial. Stephanie appeared with counsel and testified. Stephanie admitted she lied when she told the Department that M.S.R. had twice fallen and hit her head. Stephanie testified she did not hurt M.S.R. and has "no idea" how M.S.R. actually was injured. Stephanie testified there was domestic violence in her relationship with Cesar, but she and Cesar have not been in a relationship since the April 29, 2018 incident. Stephanie admitted she tested positive for cocaine twice while the case was pending but claimed she has never used cocaine or other drugs. Stephanie moved to San Antonio in June 2019 to be closer to her children but later returned to Laredo, where she is currently living with her mother. Stephanie testified she "would learn" how to care for M.S.R.'s special needs if M.S.R. were returned to her care.

At the conclusion of trial, the jury found by clear and convincing evidence: (1) Stephanie knowingly placed or allowed the children to remain in conditions or surroundings that endanger their physical or emotional well-being; (2) Stephanie engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangers their physical or emotional well-being; (3) Stephanie failed to comply with the family service plan; and (4) termination of the parent-child relationship is in the children's best interest. Based on the jury's findings, the trial court entered an order terminating Stephanie's and Cesar's rights to both children. Stephanie, but not Cesar, appeals.

**Legal and Factual Sufficiency of the Evidence**

To terminate parental rights, the Department has the burden to prove by clear and convincing evidence: (1) one of the predicate grounds in subsection 161.001(b)(1), and (2) termination is in the best interest of the child. TEX. FAM. CODE ANN. §§ 161.001(b), 161.206(a); *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003). In issues one through four and six, Stephanie argues the evidence is legally and factually insufficient to support the jury's predicate statutory and best interest findings.

To preserve a legal sufficiency challenge following a jury trial, a party must first raise the issue with the trial court in: (1) a motion for instructed verdict, (2) a motion for judgment notwithstanding the verdict, (3) an objection to submission of the question to the jury, (4) a motion to disregard the jury's answer to a vital fact question, or (5) a motion for new trial. *In re D.T.*, 593 S.W.3d 437, 439 (Tex. App.—Texarkana 2019, pet. filed); *In re J.A.V.*, No. 04-19-00455-CV, 2019 WL 6887709, at *1 (Tex. App.—San Antonio Dec. 18, 2019, pet. denied) (mem. op.) (citing *In re A.L.*, 486 S.W.3d 129, 130 (Tex. App.—Texarkana 2016, no pet.)). To preserve a factual sufficiency challenge following a jury trial, a party must file a motion for new trial in the trial court. *J.A.V.*, 2019 WL 6887709, at *2 (citing TEX. R. CIV. P. 324(b)(2), (3); *A.L.*, 486 S.W.3d at 130; *In re A.J.L.*, 136 S.W.3d 293, 301 (Tex. App.—Fort Worth 2004, no pet.)).

Stephanie 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, Stephanie's first through fourth and sixth issues are overruled.[2]

[2] The supreme court has held 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. *In re N.G.*, 577 S.W.3d 230, 235 (Tex. 2019) (per curiam). This rule, however, "does not eliminate[ ] the long-established requirement of error preservation of legal and factual sufficiency issues in parental-

**Due Process**

In her fifth issue, Stephanie argues she was denied procedural and substantive due process because the Department failed to comply with Family Code section 263.102. Stephanie argues section 263.102 required the Department "to inform [Stephanie] what steps were necessary for return of her children," but the Department instead told her "'there was nothing she could do' to regain possession of her children because the Department had decided to terminate her parental rights since February 2019."

Section 263.102 lists the necessary contents of a family service plan, including a statement advising the parent: "If you are unwilling or unable to provide your child with a safe environment, your parental and custodial duties and rights may be restricted or terminated or your child may not be returned to you." TEX. FAM. CODE ANN. § 263.102(b) (emphasis omitted). Stephanie does not argue the family service plan prepared for her by the Department lacks any of the necessary contents listed in section 263.102, nor does she dispute that the plan was written "in a manner that is clear and understandable to [her] in order to facilitate [her] ability to follow the requirements of the service plan." *See id.* § 263.102(d).

Stephanie argues the Department admitted she complied with the family service plan but decided to seek termination of her rights anyway. To the contrary, the Department caseworker testified Stephanie failed to comply with several requirements of the family service plan. Stephanie

rights termination cases decided by a jury." *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.)). Therefore, although Stephanie 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 Stephanie did not preserve error. *See id.* Nevertheless, we note the record contains substantial evidence demonstrating M.S.R. sustained nonaccidental head trauma while in Stephanie's care, Stephanie could not explain how M.S.R. sustained her injuries, and Stephanie failed to seek medical attention for M.S.R. for three days after she began showing symptoms of injury. *See In re L.W.*, No. 01-18-01025, 2019 WL 1523124, at *11 (Tex. App.—Houston [1st Dist.] Apr. 9, 2019, pet. denied) (mem. op.) (holding abuse or violence by a parent directed toward one child in the presence of another child supports termination of parental rights to both children under grounds (D) and (E)).

also argues the Department advised her "'there was nothing she could do' to regain possession of her children." However, Stephanie actually testified the Department caseworker told her "[t]he same thing that she would always tell me, that it was not her decision to return my children, that everything was going to be decided here, that there was nothing she could do to help me." *See id.* § 263.102(b) (requiring family service plans to advise parents that unwillingness or inability to comply with the plan may result in termination). There is no evidence in the record that the Department ever advised Stephanie that her compliance with the family service plan was either optional or futile.

For these reasons, we conclude Stephanie has not demonstrated the Department failed to comply with Family Code section 263.102 or that she was denied procedural and substantive due process. Stephanie's fifth issue, therefore, is overruled.

**Jury Charge Error**

In her seventh issue, Stephanie argues the trial court erred in failing to submit a question to the jury regarding whether she substantially complied with the family service plan. In order to preserve a complaint regarding alleged error in the jury charge, a party must timely object to the alleged error and obtain a ruling in the trial court. *In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003). Failure to object to the charge before it is read to the jury waives the complaint. *Id.* (citing TEX. R. APP. P. 33.1(a)(1); TEX. R. CIV. P. 274).

Here, Stephanie did not request a question regarding substantial compliance with the family service plan, nor did she object to the charge on this basis. Rather, when asked whether he had any objections to the charge, Stephanie's counsel stated: "The only objection I have . . . [is] that we should have a conservative [*sic*] question as afforded by Section 105.002 of the family code, Subsection C1, which basically says that in a jury trial, a party is entitled to a just verdict by a jury on the issue of conservatorship." Family Code section 105.002 does not address substantial

compliance with a family service plan. *See* TEX. FAM. CODE ANN. § 105.002. Therefore, by failing to object to the jury charge on this basis, Stephanie waived her complaint, and we overrule her seventh issue. *See B.L.D.*, 113 S.W.3d at 349.

**Admission of Evidence**

In her eighth issue, Stephanie argues the trial court abused its discretion by admitting hearsay evidence over her objections. We review the trial court's rulings on the admissibility of evidence for abuse of discretion. *In re A.A.T.*, No. 04-16-00344-CV, 2016 WL 7448370, at *4 (Tex. App.—San Antonio Dec. 28, 2016, no pet.) (mem. op.) (citing *Gharda USA, Inc. v. Control Solutions, Inc.*, 464 S.W.3d 338, 347 (Tex. 2015); *Ford Motor Co. v. Aguiniga*, 9 S.W.3d 252, 262 (Tex. App.—San Antonio 1999, pet. denied)). The trial court does not abuse its discretion unless it acts arbitrarily, unreasonably, or without reference to any guiding rules or principles. *Id.* (citing *In re R.O.C.*, 131 S.W.3d 129, 134 (Tex. App.—San Antonio 2004, no pet.)).

Stephanie first argues the trial court erred in admitting drug test results and the guardian ad litem's report and recommendation because both contain hearsay statements that Stephanie twice tested positive for cocaine during the pendency of this case. Stephanie herself testified, without objection, that she twice tested positive for cocaine. "Any error in the admission of evidence is harmless where the same evidence comes in elsewhere without objection." *In re D.M.L.*, No. 04-12-00297-CV, 2012 WL 5354927, at *4 (Tex. App.—San Antonio Oct. 31, 2012, no pet.) (mem. op.) (citing *Richardson v. Green*, 677 S.W.2d 497, 501 (Tex. 1984)). Therefore, assuming the trial court should have excluded this evidence, any error in its admission was harmless.

Stephanie also argues the trial court erred in permitting the Department caseworker to testify that Stephanie's counselor's report stated Stephanie was "noncompliant" with individual therapy. Although Stephanie objected to this testimony, she did not object to following exchange:

> Q. [by counsel for the children] And do you know if [Stephanie] successfully completed her service for individual treatment in family therapy with [the counselor]?
>
> A. [by the Department caseworker] No, she did not.
>
> Q. And how do you know that?
>
> A. [The counselor] provided a letter of recommendation and she stated [i]n her letter that she did not complete her services.

Again, even assuming it was error to admit testimony regarding the contents of the counselor's report, any error is harmless because the same evidence came in elsewhere without objection. *Id.* For these reasons, we overrule Stephanie's eighth issue.

**Cumulative Error**

In her ninth and final issue, Stephanie argues the "combination of errors and improprieties" she complains of in her first eight issues "mandate[s] reversal or a new trial." Because we overrule Stephanie's first eight issues, we have no basis to sustain her ninth issue, and it is overruled.

**Conclusion**

Having overruled each of Stephanie's issues, we affirm the trial court's order of termination.

Sandee Bryan Marion, Chief Justice