NOTICE

Decision filed 06/21/13. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2013 IL App (5th) 130044-U

NO. 5-13-0044

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

In re Z.J.F., a Minor	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Williamson County.
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 11-JA-32
	)	
Jonathan F.,	)	Honorable
	)	James R. Moore,
Respondent-Appellant).	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's finding of depravity was supported by the record and not against the manifest weight of the evidence.

¶ 2 Respondent-appellant, Jonathan F., appeals the order of the circuit court of Williamson County terminating his parental rights and appointing a guardian with power to consent to adopt. In his appeal, appellant argues that (1) his due process rights were violated and the agency acting on behalf of the State made no attempt to facilitate his reunification with his minor child and (2) the circuit court's finding of parental unfitness was against the manifest weight of the evidence. For the reasons stated below, we affirm.

¶ 3 FACTS

¶ 4 In May 2011, the State's Attorney for Williamson County filed a petition for adjudication of wardship for Z.J.F., a minor child born on May 23, 2011. The petition

alleged numerous grounds for neglect against Z.J.F.'s mother, Holli F., and one ground against appellant. At the time of filing, appellant was incarcerated in the Williamson County jail on theft and burglary charges. At a shelter care hearing, the court entered an order granting temporary custody of Z.J.F. to the Department of Children and Family Services (DCFS), ordered that DCFS file a 45-day case plan by July 15, 2011, and that visitation of both parents with the minor child be at the discretion of DCFS. The plan was not filed. On July 28, 2011, the circuit court held an adjudicatory hearing at which neither respondent parent appeared. Appellant at the time was in the Massac County jail, having been sentenced to the Department of Corrections. The court entered a default judgment finding that Z.J.F. was an abused or neglected child in an injurious environment pursuant to section 2-3(1)(b) of the Juvenile Court Act of 1987 (705 ILCS 405/2-3(1)(b) (West 2010)) and that the abuse or neglect was inflicted by the mother. A dispositional report was filed by Lutheran Social Services of Illinois, the purchaser of services in this matter, and a dispositional hearing was held in September 2011, at which appellant appeared and the mother did not. At that hearing, the court found appellant was "unfit to care for, protect, train, educate, supervise, or discipline *** [Z.J.F.] and placement with him is contrary to the health, safety and best interests of [Z.J.F.] because [appellant] is incarcerated." Subsequent to this hearing, the guardian *ad litem* filed a motion to restrict visitation, which was ordered by the circuit court in October 2011, prohibiting visitation during the period of appellant's incarceration.

¶ 5 In March 2012, the State filed a motion for termination of parental rights and appointment of guardian with power to consent for adoption. The petition alleged that appellant was unfit due to a failure to maintain a reasonable degree of interest, concern, or responsibility as to Z.J.F.'s welfare pursuant to section 1(D)(b) of the Adoption Act (750 ILCS 50/1(D)(b) (West 2010)), that Z.J.F. was in the temporary custody of DCFS, and that appellant was incarcerated. The petition also alleged that prior to incarceration, appellant

had little or no contact with Z.J.F. and provided little or no support. In May 2012, a permanency hearing was held in which the mother's parental rights to Z.J.F. were terminated, and in September of that year, the State amended the motion for termination of parental rights. This amendment added a ground of depravity based upon appellant having been convicted of three felonies under the laws of the State of Illinois, with at least one of the convictions taking place within five years of the filing of the motion to terminate parental rights pursuant to section 1(D)(i) of the Adoption Act (750 ILCS 50/1(D)(i) (West 2010)). Attached to the motion were certified copies of four felony convictions.

¶ 6 In November of 2012, a hearing was held on the State's amended motion to terminate parental rights. At this hearing, the State called appellant as its only witness, and the court took judicial notice of appellant's felony convictions. After a brief recess, the circuit court rendered its decision that appellant was unfit based on the ground of depravity. The court then proceeded to the second-stage best-interest hearing, after which the court determined that it was in Z.J.F.'s best interests to have appellant's parental rights terminated and appointed a guardian with power to consent to adopt. Appellant timely appealed.

¶ 7 ANALYSIS

¶ 8 Initially, appellant argues that his due process rights were violated due to the State failing to attempt to facilitate reunification with Z.J.F., and, accordingly, his liberty interest was violated. The State argues in its brief to this court that appellant has no due process right to DCFS assistance and, due to the finding of the court based specifically on depravity, any DCFS failure had no material impact on the result as it was not relevant to the court's finding. In its brief and oral argument, the State conceded that a liberty interest of a parent was involved and that appellant, in light of his liberty interest, had probably met the burden of rebutting the presumption of depravity. The State further argued, however, that appellant's continuing criminal activity and his underlying and pervasive drug involvement formed a

sufficient basis for the trial court's finding that, contrary to appellant's allegations, the trial court's finding of depravity was not against the manifest weight of the evidence. We agree.

¶ 9 In the short course of time, appellant has been convicted of attempted burglary, burglary, and possession of methamphetamine precursor, and one of the above felonies was committed within five years of the birth of Z.J.F. This is not contested by appellant. Further, a juvenile adjudication of delinquency based on the burglary was brought out by the State, admittedly not as a basis for the finding of depravity as to convictions alone, but to illustrate continuing failure to complete and adhere to drug counseling and treatment. While appellant argued that he had established a record as a model prisoner, had engaged in the storybook program while incarcerated, and had exhibited exemplary conduct in the care of his father, as well as winning transfer to a minimum security facility, the State argued that these points did not defeat the finding of depravity. The State argued that there was no admission by appellant of a drug problem, no effective intention to deal with that problem, and a long pattern of recurring conduct linked with drug use. The Stated noted that although the crimes for which appellant was convicted were nonviolent crimes, they were not victimless crimes. The State also argues that the determination of depravity, in light of the rebutted presumption, is appropriately a decision of the circuit court. Specifically, the court found as follows:

> "5. [Appellant] is the legal father of [Z.J.F.] and he is incarcerated in the Illinois Department of Correction with a pending out date of November 2013. The [c]ourt upon hearing the evidence and considering the 4 convictions for [f]elonies with at least one being within five years of the filing of the [p]etition to [t]erminate [p]arental [r]ights hereby declares the [appellant] to be depraved per the definition in the statute. [750 ILCS 50/1D(i)]. [Appellant] has shown a pattern of drug use including recreational use, street drugs, binging on drug use. A pattern of criminal

> activity coupled with drug use showing a pattern of disregard for moral society and a failure to willingly conform or understand morality. Therefore, the court finds that by clear and convincing evidence [appellant] to be an unfit person to have [Z.J.F.] for the following reasons as alleged in the State's motion for termination of parental rights and as set forth in 705 ILCS 405/2-29 and in the Illinois Adoption Act, 750 ILDS 50/1D."

After our examination of the record and in light of the uncontested existence of the felony convictions, their timing, and the pervasive history of drugs, we cannot say that the determination by the circuit court was against the manifest weight of the evidence. See *In re April C.*, 345 Ill. App. 3d 872, 889, 803 N.E.2d 933, 947-48 (2004); see also *In re A.M.*, 358 Ill. App. 3d 247, 831 N.E.2d 648 (2005). We defer to the factual finding of the circuit court and determine it was not against the manifest weight of the evidence. *In re A.M.*, 358 Ill. App. 3d at 252-54, 831 N.E.2d at 653-55.

¶ 10 Since the finding of the circuit court was based exclusively on the depravity allegation and we affirm on that basis, we do not reach the issues raised by appellant as to the failure of DCFS or its designees to provide service plans, visitation, and other rehabilitative services.

¶ 11 For the reasons stated above, we affirm the judgment of the circuit court of Williamson County.

¶ 12 Affirmed.