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August 28, 2019
Carla Bender
4th District Appellate
Court, IL

2019 IL App (4th) 190213-U

NOS. 4-19-0213, 4-19-0215, 4-19-0217 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re Ani. K., a Minor	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Sangamon County
Petitioner-Appellee,	)	No. 17JA41
v. (No. 4-19-0213)	)	
Antonio K.,	)	
Respondent-Appellant).	)	
	)	
----------	)	
In re Ant. K, a Minor	)	No. 17JA42
	)	
(The People of the State of Illinois,	)	
Petitioner-Appellee,	)	
v. (No. 4-19-0215)	)	
Antonio K.,	)	
Respondent-Appellant).	)	
	)	
----------	)	
In re Av. K., a Minor	)	No. 17JA43
	)	
(The People of the State of Illinois,	)	
Petitioner-Appellee,	)	
v. (No. 4-19-0217)	)	Honorable
Antonio K.,	)	Karen S. Tharp,
Respondent-Appellant).	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding (1) respondent's claim concerning the

trial court's denial of his motion for a directed finding was not subject to review and (2) the trial court's finding respondent was unfit was not against the manifest weight of the evidence.

¶ 2 Respondent father, Antonio K., appeals from the trial court's orders terminating his parental rights to Ani. K. (born July 18, 2013), Ant. K. (born December 23, 2014), and Av. K. (born January 5, 2016). On appeal, respondent argues (1) the court erred in denying his motion for a directed finding and (2) the court's finding he was an unfit parent was against the manifest weight of the evidence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In September 2018, the State filed motions to terminate respondent's parental rights to Ani. K., Ant. K. and Av. K., which it later supplemented. In its supplemental motions to terminate respondent's parental rights, the State alleged respondent was an unfit parent as he (1) failed to maintain a reasonable degree of interest, concern, or responsibility as to the minors' welfare (750 ILCS 50/1(D)(b) (West 2016)); (2) failed to make reasonable efforts to correct the conditions that were the basis for the removal of the minors within the nine-month period following the adjudications of neglected, namely June 7, 2017, to March 7, 2018 (*id.* § 1(D)(m)(i)); and (3) failed to make reasonable progress toward the return of the minors to his custody within the nine-month period following the adjudications of neglected, namely June 7, 2017, to March 7, 2018 (*id.* § 1(D)(m)(ii)). The State further alleged it was in the minors' best interests to terminate respondent's parental rights and appoint the Department of Children and Family Services (DCFS) as guardian with the power to consent to adoption.

¶ 5 In November 2018, the trial court commenced a fitness hearing. At the State's request and over no objection, the court took judicial notice of (1) its June 7, 2017, order

adjudicating the minors neglected; and (2) respondent's pending felony case, Sangamon County case No. 17-CF-556. The State elicited testimony concerning respondent's fitness from the minors' caseworkers, Tieshah Hawkins and Lisa Brocco-Tabora.

¶ 6 Hawkins testified she served as the minors' caseworker from March 2017, when the minors came into DCFS care, to May 2018. During that time, Hawkins also served as the caseworker to the minors' siblings, S.S. (born August 19, 2004), T.S. (born August 13, 2005), Ti. F. (April 12, 2007), and Ta. F. (born November 19, 2008). The minors and their siblings came into DCFS care after their mother, Megan J., violated a safety plan by allowing respondent to be around the children. The safety plan was in place due to allegations suggesting respondent sexually abused "some" of the children.

¶ 7 During her involvement, Hawkins prepared a service plan for respondent. Hawkins could not recall the date the service plan was created but believed it to be around April 2017. Hawkins could not recall the exact dates the service plan covered. Hawkins gave a copy of the service plan to respondent.

¶ 8 Hawkins testified the service plan recommended the following services for respondent: (1) cooperation, (2) visitation, (3) parenting, (4) a substance-abuse assessment, and (5) a sexual-abuse assessment. Hawkins did not recall if the service plan recommended mental-health services. Hawkins testified she explained to respondent what he needed to do to complete services and she made the necessary service referrals. Hawkins acknowledged, however, she did not make a referral for a sexual-abuse assessment.

¶ 9 In the first few months after the service plan was created, respondent (1) contacted Hawkins approximately twice a month, and (2) completed a substance-abuse

assessment. While the substance-abuse assessment recommended inpatient counseling, respondent refused to enroll in such counseling because of his work schedule. Respondent never completed substance-abuse treatment.

¶ 10 Hawkins testified respondent was arrested and incarcerated on charges of "predatory sexual assault or abuse" in May 2017 and a no-contact order was entered in his criminal case preventing respondent from communicating with the minors. Respondent remained incarcerated throughout Hawkins involvement with the minors' case.

¶ 11 Hawkins testified respondent's contact with her decreased after his incarceration—he would communicate with her about once every two months. Hawkins recalled contacting respondent by telephone three times. During those calls, Hawkins would review respondent's required services. Hawkins did not visit respondent in jail.

¶ 12 Hawkins testified respondent seemed willing to participate in services while incarcerated. On one occasion, respondent indicated someone had told him of the possibility of programs being available to him in the jail to complete services. Hawkins believed the programs related to mental-health services. Hawkins issued a referral for counseling prior to ending her involvement with the case but was not aware if respondent had started counseling. Hawkins was not sure why she did not make a counseling referral sooner. Hawkins testified she did not make a referral for a sexual-abuse assessment as no provider would visit the jail.

¶ 13 Throughout her involvement, Hawkins conducted several administrative case reviews. Respondent did not attend the reviews. Hawkins did not recall if respondent rated satisfactory or unsatisfactory during a May 2017 review. Hawkins believed respondent "could have likely been unsatisfactory" during a September 2017 review because "he would have been

incarcerated, so we were at a hold with engaging any services." Hawkins testified respondent rated unsatisfactory during December 2017 and May 2018 reviews. Hawkins testified respondent did not make any progress on his service plan after he was incarcerated.

¶ 14 Hawkins testified at no point during her involvement was she close to placing the minors in respondent's care.

¶ 15 Brocco-Tabora testified she became the caseworker for the minors and their siblings in July 2018. Prior to that time, a caseworker named Tiffany served as the caseworker for a period of two months. After becoming the minors' caseworker, Brocco-Tabora spoke with the prior caseworker and her supervisor about referrals for respondent and reviewed the case file. Brocco-Tabora testified the necessary referrals had been made prior to her involvement.

¶ 16 Brocco-Tabora testified the service plan recommended the following services for respondent: (1) visitation, (2) mental-health counseling, (3) parenting, (4) a substance-abuse assessment, and (5) a sexual-abuse assessment. Brocco-Tabora did not go over the service plan with respondent but did discuss services with him.

¶ 17 Brocco-Tabora testified respondent was and remained incarcerated throughout her involvement. Brocco-Tabora also testified a no-contact order was and remained in place throughout her involvement. Brocco-Tabora testified she heard through the minors' foster parent that respondent had sent cards and letters to the minors.

¶ 18 Brocco-Tabora testified she spoke with respondent about once a month. She did not recall respondent reaching out to her to talk. When Brocco-Tabora spoke with respondent, respondent expressed interest in the outcome of the minors' case. She did not recall if respondent expressed interest in engaging in services.

¶ 19 Respondent had a mental-health assessment completed while incarcerated. Brocco-Tabora testified the assessment was completed prior to her assignment to the minors' case. Respondent was attending counseling.

¶ 20 Respondent had not completed the recommended substance-abuse treatment.

¶ 21 Brocco-Tabora believed the sexual-abuse assessment was not available to respondent as a provider would not go to the jail.

¶ 22 In September 2018, Brocco-Tabora held an administrative case review. Respondent rated unsatisfactory as he had not completed services.

¶ 23 Brocco-Tabora testified at no point during her involvement was she close to placing the minors in respondent's care.

¶ 24 Following this evidence, respondent moved for a directed finding. The trial court recessed before hearing argument on respondent's motion.

¶ 25 In January 2019, the trial court continued the fitness hearing. In support of his motion for a directed finding, respondent argued: "I think looking at this in the light most favorable to the petitioner, it's obvious that neither one of [the State's] witnesses was sufficient to meet the burden that the State has." Following arguments, the court denied respondent's motion for a directed verdict, stating: "So based upon the evidence that I have at this time, given the standard that I use to view the evidence in light most favorable at this time to the [S]tate, even just given those things I find that there is sufficient evidence to proceed forward with this case." We note the court in reaching its decision acknowledged neither of the State's witnesses testified well.

¶ 26 Following the denial of his motion for a directed finding, respondent elected to

testify. Respondent testified his service plan recommended the following services: (1) visitation, (2) a mental-health assessment, and (3) a substance-abuse assessment. Respondent testified his service plan did not recommend a sexual-abuse assessment.

¶ 27 In the first few months after the service plan was created, respondent worked with Hawkins to complete his services. Respondent testified every Sunday between February 17 and May 17, 2017, he attended supervised visitation with the minors. Respondent testified he approached an agency for a walk-in, mental-health assessment but the agency told him he could not get an assessment without a referral. Respondent completed the substance-abuse assessment, which recommended inpatient counseling. Respondent testified he requested outpatient counseling to avoid conflicts with his work but DCFS later told him he needed to do inpatient. Respondent testified he did not understand why DCFS wanted him to do inpatient when DCFS had previously allowed him to do outpatient when he was "drinking more." Respondent testified he interviewed and was accepted for outpatient counseling. He testified he was to start counseling days after he was arrested.

¶ 28 Respondent initially testified he spoke to Hawkins approximately three times a month after his incarceration. Respondent later testified he spoke with Hawkins "once probably two months or something like that." Respondent testified he spoke with Brocco-Tabora twice during a six-month period.

¶ 29 Following arguments, the trial court found respondent unfit for failing to (1) maintain a reasonable degree of interest, concern, or responsibility as to the minors' welfare, and (2) make reasonable progress toward the return of the minors to his custody within the nine-month period following the adjudications of neglected. The court entered written orders

providing the same.

¶ 30 After finding respondent unfit, the trial court commenced a best-interest hearing. The State again presented testimony from Brocco-Tabora.

¶ 31 Brocco-Tabora testified the minors had been placed with Katrina Caldwell, an older daughter of respondent, and her husband since March 2017. All three were making progress and appeared happy. The minors were bonded with their foster parents and called Katrina, "mom." The minors attended school and were thriving. The placement was meeting the minors' educational, social, and medical needs. The minors resided in a five-bedroom home. The foster parents expressed interest in adopting the minors.

¶ 32 Respondent last visited with the minors in May 2017. Brocco-Tabora believed the minors were not bonded to respondent. She acknowledged she had never seen the minors and respondent interact. She also acknowledged hearing respondent communicated with the minors through telephone calls and letters.

¶ 33 Brocco-Tabora opined it would be in the minors' best interests to terminate respondent's parental rights. Following Brocco-Tabora's testimony, the trial court recessed.

¶ 34 In March 2019, the trial court continued the best-interest hearing. Respondent did not present any evidence. Based on the evidence presented, the court, after considering the statutory best-interest factors found in section 1-3(4.05) of the Juvenile Court Act of 1987 (705 ILCS 405/1-3(4.05) (West 2016)), found it was in each of the minor's best interests to terminate respondent's parental rights. The court entered written orders terminating respondent's parental rights to the minors.

¶ 35 This appeal followed.

¶ 36 II. ANALYSIS

¶ 37 On appeal, respondent argues (1) the trial court erred in denying his motion for a directed finding and (2) the court's finding he was an unfit parent was against the manifest weight of the evidence.

¶ 38 A. Denial of Respondent's Motion for a Directed Finding

¶ 39 Respondent contends the trial court erred in denying his motion for a directed finding. Specifically, respondent complains (1) the State failed to present a *prima facie* case of parental unfitness and (2) the court used the wrong standard when weighing the evidence.

¶ 40 Section 2-1110 of the Code of Civil Procedure (735 ILCS 5/2-1110 (West 2016)) provides a mechanism whereby a defendant in a non-jury case can move to find in his or her favor at the close of a plaintiff's case. In ruling on a section 2-1110 motion, a trial court "must engage in a two-prong analysis." *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 275, 786 N.E.2d 139, 148 (2003). "First, the court must determine, as a matter of law, whether the plaintiff has presented a *prima facie* case *** by proffering at least some evidence on every element essential to the plaintiff's underlying cause of action." (Internal quotations omitted.) *Id.* If the court determines the plaintiff has presented a *prima facie* case, the court must then weight all the evidence, including any evidence favorable to the defendant, determine the credibility of the witnesses, and draw reasonable inferences therefrom—"the court is not to view the evidence in the light most favorable to the plaintiff." *Id.* at 276; 735 ILCS 5/2-1110 (West 2016) ("In ruling on the motion the court shall weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence."). "After weighing the quality of all of the evidence, *** the court should determine, applying the standard of proof required for the

underlying cause, whether sufficient evidence remains to establish the plaintiff's *prima facie* case." *Cryns*, 203 Ill. 2d at 276.

¶ 41 We conclude respondent's claim is not subject to review. First, the denial of his motion for a directed finding merged into the final judgment terminating his parental rights to the minors. See *Taylor v. Board of Education of City of Chicago*, 2014 IL App (1st) 123744, ¶ 32, 10 N.E.3d 383 (finding the denial of the defendant's motion for a directed verdict merged into the final judgment following a trial on the merits). Second, respondent "waived" any argument concerning the sufficiency of the State's evidence by producing evidence—his testimony—following the denial of his motion for a directed finding. See 735 ILCS 5/2-1110 (West 2016) ("If the ruling on the motion is adverse to the defendant, the defendant may proceed to adduce evidence in support of his or her defense, in which event the motion is waived."); *In re L.M.*, 205 Ill. App. 3d 497, 513, 563 N.E.2d 999, 1009 (1990) ("The State correctly points out that by producing evidence following the denial of the motion, respondent father has waived the issue for purposes of appeal."). Third, respondent is estopped from arguing the trial court applied the wrong standard when weighing the evidence as he specifically requested the court to apply such a standard. *In re Detention of Swope*, 213 Ill. 2d 210, 217, 821 N.E.2d 283, 287 (2004) ("[A] party cannot complain of error which that party induced the court to make or to which that party consented.").

¶ 42 B. Unfitness Finding

¶ 43 Respondent contends the trial court's finding he was an unfit parent was against the manifest weight of the evidence.

¶ 44 In a proceeding to terminate a respondent's parental rights, the State must prove

unfitness by clear and convincing evidence. *In re Donald A.G.*, 221 Ill. 2d 234, 244, 850 N.E.2d 172, 177-78 (2006). A trial court's finding of parental unfitness will not be disturbed on appeal unless it is against the manifest weight of the evidence. *In re N.T.*, 2015 IL App (1st) 142391, ¶ 27, 31 N.E.3d 254. "A court's decision regarding a parent's fitness is against the manifest weight of the evidence only where the opposite conclusion is clearly apparent." (Internal quotation marks omitted.) *In re M.I.*, 2016 IL 120232, ¶ 21, 77 N.E.3d 69.

¶ 45 In this case, the trial court found respondent to be an unfit parent in part because he failed to make reasonable progress toward the return of the minors to his custody within the nine-month period following the adjudications of neglected (750 ILCS 50/1(D)(m)(ii) (West 2016)). See *id.* ¶ 43 ("A parent's rights may be terminated if even a single alleged ground for unfitness is supported by clear and convincing evidence." (Internal quotation marks omitted.)). "We have held that 'reasonable progress' is an 'objective standard' and that a parent has made reasonable progress when 'the progress being made by a parent to comply with directives given for the return of the child is sufficiently demonstrable and of such a quality that the court, in the *near future*, will be able to order the child returned to parental custody.' (Emphasis in original.)" *In re F.P.*, 2014 IL App (4th) 140360, ¶ 88, 19 N.E.3d 227 (quoting *In re L.L.S.*, 218 Ill. App. 3d 444, 461, 577 N.E.2d 1375, 1382 (1991)).

¶ 46 We initially reject respondent's argument suggesting the State failed to establish the exact nine-month period in question. The State's petition alleged it was seeking termination based on respondent's failure to make reasonable progress toward the return of the minors to his custody within the nine-month period following the adjudications of neglected, namely June 7, 2017, to March 7, 2018. At the State's request and over no objection, the trial court took judicial

notice of its June 7, 2017, order adjudicating the minors neglected. The court then heard testimony concerning respondent's actions following the minors' adjudications.

¶ 47 Respondent further suggests he made reasonable progress during the relevant period as he engaged in any services available to him while he was incarcerated. Our supreme court has ruled "time spent incarcerated is included in the nine-month period during which reasonable progress must be made." *In re J.L.*, 236 Ill. 2d 329, 343, 924 N.E.2d 961, 969 (2010). When reviewing the evidence presented at the fitness hearing, it is unclear to us the trial court would have been able to return the minors to respondent's custody *in the near future* given his incarceration and outstanding services. Even if respondent was released from custody, he would, at a minimum, have to reengage in visitations, complete substance-abuse treatment, and complete parenting services. Respondent's reliance on *In re Keyon R.*, 2017 IL App (2d) 160657, ¶ 30, 73 N.E.3d 616, is unpersuasive as in that case the respondent "was *never* assessed for services and was *never* given a service plan." (Emphasis in original.) Based on the evidence presented in this case, we cannot say the trial court's finding respondent was an unfit parent by failing to make reasonable progress toward the return of the minors to his custody within the nine-month period following the adjudications of neglected was against the manifest weight of the evidence.

¶ 48 As a final matter, we note the Illinois Department of Corrections' website indicates respondent was later convicted of two counts of predatory criminal sexual assault in case No. 17-CF-556 and sentenced to two terms of 25 years' imprisonment. See https://www2.illinois.gov/idoc/Offender/Pages/InmateSearch.aspx (last visited August 15, 2019).

¶ 49 III. CONCLUSION

¶ 50 We affirm the trial court's judgment.

¶ 51 Affirmed.