NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

IN THE MATTER OF A.V.K.J., C.L.T.B., JR., C.K.H.B., II and M.H., Alleged Deprived Children:

ASHLEY FRASER,

Appellant,

vs.

STATE OF OKLAHOMA,

Appellee.

Case No. 119,616

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE CASSANDRA WILLIAMS, TRIAL JUDGE

AFFIRMED

Christian Henry
Oklahoma City, Oklahoma — For Appellant

Jaclyn Rivera
ASSISTANT DISTRICT ATTORNEY
Oklahoma City, Oklahoma — For Appellee

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Ashley Fraser appeals the trial court's order, entered after jury verdict, terminating her parental rights as to four of her minor children, C.B. Jr. (b. 2009), C.B. II (b. 2010), M.H. (b. 2013), and A.J. (b. 2019). Ms. Fraser argues on appeal that the trial court erred (1) in failing to apply the heightened standard of review required by federal law as to certain elements of her case; (2) by allowing

the introduction of certain criminal convictions and arrest details. She also argues that the evidence was insufficient to support termination in two respects. After a careful review of the record, we affirm the order terminating Ms. Fraser's parental rights.

BACKGROUND

Although Ms. Fraser has a considerable history with child-welfare services, dating back to 2002, when her now-adult son was taken into state custody, the course of the present litigation began in 2019, when she gave birth to A.J. Shortly after birth, A.J. showed serious withdrawal symptoms and tested positive for opiates. The state took A.J. into custody from the hospital.

On July 12, 2019, the state filed its petition on behalf of A.J. to adjudicate A.J. as deprived and to terminate Ms. Fraser's parental rights, alleging substance abuse, physical abuse, lack of adequate care, threat of harm, and mental health. A.J. was adjudicated as deprived, by Ms. Fraser's stipulation, on September 19, 2019. The other three children involved in this case had been previously adjudicated deprived and were in the present custody of their father, Chadwick Bowen. Ms. Fraser was only permitted supervised visitation with the children, but after DHS became aware that Mr. Bowen was allowing Ms. Fraser unsupervised visitation with the three children, they were taken back into DHS custody. In an amended petition, the state then sought to terminate Ms. Fraser's parental rights as to all four children for failure to correct conditions of the previous deprived adjudications.

A six-day jury trial concerning all children began on April 14, 2021. The jury returned a verdict recommending termination of mother's parental rights for failing to correct conditions of a previous deprived adjudication.[1] The trial court issued an order terminating mother's parental rights on April 23, 2021. Ms. Fraser appeals.

STANDARD OF REVIEW

"Our review on appeal must find the presence of clear and convincing evidence to support the trial court's decision. We must canvass the record to determine whether the evidence is such that a fact-finder could reasonably form a firm belief or conviction that the grounds for termination were proven. Our appellate review does not require a re-weighing of the evidence presented at trial." *In re C.D.P.F.*, 2010 OK 81, ¶ 6, 243 P.3d 21, 24 (internal citations omitted).[2]

We will review the trial court's admission of evidence for abuse of discretion. *Myers v. Missouri Pacific R. Co.*, 2002 OK 60, ¶ 36, 52 P.3d 1014.

---

[1] Ms. Fraser fired her counsel after the first day of trial and subsequently proceeded *pro se*, with her prior attorney serving as "back-up counsel"—that is not serving as Ms. Fraser's attorney per se, but by being available for any questions Ms. Fraser might have.

[2] We note there is significant tension in the standard of review in child-termination cases as developed by the Oklahoma Supreme Court since *In re S.B.C.*, 2002 OK 83, 64 P.3d 1080. We are asked to determine whether the evidence "is such" that a reasonable person could have believed the grounds for termination were proved by clear-and-convincing evidence. Yet, we are not to weigh evidence. We submit that it is not possible in close cases to comply with both of these commands simultaneously. In order to determine whether the state's evidence was clear and convincing, any reviewer of the record must determine how much evidence there is on each side and the degree to which that evidence is convincing. This inherently involves ascribing weight to evidence. However, because the evidence for termination in this case, as discussed below, was rather overwhelming, we have no occasion to explore this tension further here.

ANALYSIS

Indian Child Welfare Act

Ms. Fraser first urges that the trial court's failure to apply the Indian Child Welfare Act's (ICWA) "beyond a reasonable doubt" burden of proof to this case—which is required as to certain elements when a termination case involves an Indian child, 25 U.S.C. § 1912(f)—violated her right to equal protection of the laws. Her argument is misguided.

ICWA applies only to Indian children, as defined by 25 U.S.C. § 1903(4). Ms. Fraser makes no argument, on appeal or below, that any of the children involved in this case are Indian children. Rather, her argument appears to be that because ICWA applies to Indian children, it must also apply to non-Indian children. However, if Ms. Fraser's concerns regarding the constitutionality of ICWA are well founded,[3] it is clear that the proper remedy would be to strike down the offending portions of the law as unconstitutional. Ms. Fraser cites to no authority suggesting that it would be appropriate to instead apply ICWA across the board—to every proceeding concerning every child in every state of

---

[3] Ms. Fraser acknowledges that this Court has previously rejected her claim regarding the applicability of ICWA to non-Indian children on its merits. *See Matter of M.K.*, 1998 OK CIV APP 118, 964 P.2d 241. In that case, a non-Indian father appealed the termination of his parental rights on the basis that the trial court should have applied the ICWA standard of proof on the basis of equal protection guarantees. *Id.* at ¶ 1. This court applied the U.S. Supreme Court's test as stated in *Morton v. Mancari*, 417 U.S. 535, 555 (1974), to determine that ICWA's heightened burden of proof as applied to Indian children alone passed constitutional muster because it was rationally tied to Congress's interest in protecting Indian families. *Id.* at ¶¶ 7-9. Thus, this Court held that ICWA's heightened burden does not violate equal protection guarantees for non-Indian parents. *Id.* at ¶ 9. For the reasons stated, we do not reach the question. Related questions are currently pending before the United States Supreme Court in four consolidated cases. *See Haaland v. Brackeen*, 142 S. Ct. 1205, 212 L. Ed. 2d 215 (2022) (granting certiorari to review a 5th Circuit opinion that invalidated ICWA in part, on equal protection grounds).

the Union. If ICWA in fact violates the equal protection provision, the appropriate remedy must be to not apply the law *at all*, rather than to apply the law everywhere. Thus, whether or not ICWA's provisions violate equal protection,[4] the state's burden of proof in this case would not change. We decline the invitation to review the constitutionality of ICWA when the result of our analysis would make no difference to this case. *Oklahoma Indep. Petroleum Ass'n v. Potts*, 2018 OK 24, ¶ 14, 414 P.3d 351, 365–66 ("As a matter of prudence, we have also always adhered to the practice of declining to opine on questions of constitutionality unless absolutely necessary. This canon of constitutional avoidance represents the judiciary's long-standing recognition of the need to defer to the constitutional judgments of our co-equal branches." (footnote omitted)).

Dismissed Charges

Ms. Fraser next alleges that the trial court erred in admitting evidence of criminal charges. Ms. Fraser pled guilty to each of the three charges at issue and entered mental health court. After completing the requirements of mental health court, the charges were dismissed per the plea agreements. Ms. Fraser argues that any evidence of such charges was irrelevant and prejudicial to the point of constituting reversible error.

---

[4] Related questions are currently pending before the United States Supreme Court in four consolidated cases. *See Haaland v. Brackeen*, 142 S. Ct. 1205, 212 L. Ed. 2d 215 (2022) (granting certiorari to review a fractured 5th Circuit opinion that partially invalidated ICWA on equal protection and other grounds).

Ms. Fraser objects, on appeal for the first time, to the reference to these three criminal actions as included in Jury Instruction No. 8, the "Statement of the Case." The charges in question, as listed in the petition, concerned violations of: (1) 47 O.S. § 11-902(A)(1-4), "actual physical control,"[5] in which mother completed mental health court; (2) 63 O.S. § 2-401-1-420, possession of methamphetamine within 1,000 feet of a park,[6] in which mother completed mental health court; and (3) 21 O.S. § 843.5(C)-(D) child neglect,[7] in which mother completed mental health court. Evidence of these same charges, Ms. Fraser emphasizes, was far more prejudicial than probative.

As the state points out, the termination of parental rights requires that the State show: (1) the children have been adjudicated deprived, (2) that the child or the child's sibling has been previously adjudicated deprived, (3) that the parent was given the opportunity to correct the conditions causing deprivation and failed to do so, and, finally, (4) that termination of parental rights is in the best interest of the child or children. *See* 10A O.S.2011, § 1-4-904.

The three oldest children in this case—C.B. Jr, C.B. II, and M.H.—were first removed from mother's care in 2013 and adjudicated as deprived based on

---

[5] Title 47 O.S. § 11-902(A)(1-4) prohibits a person to drive, or be in "actual physical control" of a vehicle while having a blood alcohol concentration of 0.08 or above, a schedule I controlled substance, or any intoxicating substance. "Actual physical control" is defined as "existing or present bodily restraint, directing influence, domination or regulation of any automobile, while under the influence of intoxicating liquor." *Hughes v. State*, 1975 OK CR 83, ¶ 5, 535 P.2d 1023 (citation omitted).

[6] Title 63 O.S. § 2-401-4-420 includes both the Precursor Substances Act and the Trafficking in Illegal Drugs Act.

[7] Title 21 O.S. § 843.5(C)-(D) lists the fines and penalties for child neglect.

lack of parental care and guardianship, substance abuse, mental health, and physical abuse. The criminal charges and the underlying behaviors therein, the State argues, are directly related to the grounds on which the children had been adjudicated deprived, as well as demonstrating that mother had not corrected those same conditions. The state additionally reasons that although the charges were dismissed, mother initially pled guilty to those charges before those charges were dismissed, and only after mother completed the Performance Contract and Treatment plan through mental health court. These charges, the state argues, are important for two reasons: (1) the underlying conduct demonstrates a failure to correct conditions, and (2) that the programs offered through mental health court illustrate the services made available to mother, thus giving mother an opportunity to correct conditions.

A recent Oklahoma Supreme Court case found that pending criminal cases were inadmissible as evidence in a parental rights termination trial. *Matter of K.H.*, 2021 OK 33, ___ P.3d ___. In that case, the state brought a termination of parental rights action against a father and mother for heinous and shocking abuse warranting immediate termination. *Id.* ¶ 9. During the trial, the court allowed information of pending criminal charges of child abuse against the parents into evidence. *Id.* ¶ 13. After their rights were terminated, the parents appealed, arguing that the trial court abused its discretion because the admission of evidence of pending criminal charges was neither relevant nor probative. *Id.* The Supreme Court ruled that the charges were irrelevant and that

the risk of unfair prejudice substantially outweighed the probative value of the pending charges. *Id.* ¶¶ 34-43. [8]

In this case, the state argues that admission of the charges was necessary to show that mother was given the opportunity to correct the conditions that led to the children being adjudicated deprived. Further, the state argues that the Supreme Court's holding in *M.K.* is distinct from those of this case. Most notably, the state in *M.K.* sought to introduce pending criminal charges against the parents, whereas the state here introduced dismissed charges, wherein mother pled guilty in order to gain access to services.

The test for relevance is whether the evidence has any "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 12 O.S.2011, § 2401. Ms. Fraser's guilty plea and the dismissal of the charge upon completion of mental health court go to two elements necessary for the state's case. The arrest for driving under the influence, physical abuse, and possession of drugs all relate to the grounds on which the children were adjudicated deprived, and that evidence is relevant here.

[8] The state offered the pending criminal charges into evidence to show that the elements for termination of parental rights were met. *Id.* ¶¶ 34-39. The Court reasoned that a deprivation adjudication required a showing that the trial court "performed its statutory duty to adjudicate the children deprived as to each parent, either prior to trial or before submitting the parental rights termination determination to the jury." *Id.* ¶ 35. Likewise, the court noted that the state mixed its legal opinion that the parents committed the crime of child abuse with its opinion that the parents abused the children as defined by the parental rights termination statutes. *Id.* ¶ 37.

Relevant evidence, of course, can still be excluded if that evidence is unfairly prejudicial. The trial court can exclude evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise." 12 O.S.2011, § 2403. Though the charges would surely cast Ms. Fraser in a bad light, this does not in and of itself make any prejudice *unfair.* Ms. Fraser consistently and repeatedly denied the underlying wrongdoing, and emphasized that she was seeking access to services provided by mental health court. The jury was repeatedly made aware of the Ms. Fraser's insistence that she did not commit the underlying crimes of which she entered a guilty plea, as well as the services rendered to Ms. Fraser for her mental health. We cannot therefore conclude that the trial court erred by allowing evidence of these charges into evidence.

Infant Death Investigation

Ms. Fraser additionally objects to the state referencing the death of an infant in her care in the state's petition. That section of the petition reads, "[T]hat mother is currently under investigation for the death of her seven (7) month old niece while in her care..." (Record Vol. II, pg. 458). However, that language does not appear in the statement of the case in the jury instructions and was specifically excised by the state from the final petition in order to keep it out of the jury instructions and away from the jury. After testimony revealed that mother was not under investigation for the infant's death, the state moved to amend the petition to remove that language. The court granted the motion and

the "statement of the case" was modified accordingly. (Transcript Vol. V, pg. 275). The trial court did not err in this regard.

The infant death was discussed twice in testimony, but only mother herself addressed the issue directly. A Child Protective Services worker testified that he contacted mother in relation to an abuse allegation pertaining to the then-living infant, but never testified that the infant subsequently died. (Transcript Vol. II, pg. 165). It was Ms. Fraser herself who introduced testimony as to the child's death when she called herself to testify, and offered to "clarify" the situation. (Transcript Vol. V, pg. 205). The trial court attempted to warn her that she might not wish to open that door, but she did not heed the trial court's advice, and told her side of the story. The only possible prejudicial information that the jury could have heard came at Ms. Fraser's own insistence. We cannot find she was unfairly prejudiced by her own testimony.

Officer Testimony and Video

Ms. Fraser next argues that the trial court abused its discretion by allowing a police officer's testimony and video recording of her January 2021 arrest for driving under the influence to be admitted into evidence. Ms. Fraser argues that the testimony and the video are irrelevant as to her fitness as a parent, as well as being prejudicial. The state counters that the officer's testimony and body camera footage were both relevant to show that she had not corrected grounds of substance abuse, and that the testimony and bodycam footage were not unfairly prejudicial.

Substance abuse was one of the grounds on which the state sought to terminate her parental rights. Ms. Fraser taking her prescription medications before attempting to drive her car in an impaired state four months prior to trial is clearly relevant to show that she had not corrected her substance abuse problems. However, we must address whether the introduction of this evidence risked unfair prejudice.

We first note that Ms. Fraser initially introduced the January 2021 arrest when she indicated that the arrest was the only DUI arrest that resulted in a criminal charge. (Transcript Vol. I, pg. 167). Ms. Fraser testified that she had worked a twelve-hour shift and pulled her car into a gas station because she was tired, before the police surrounded her car. *Id.* The officer called by the state testified that he responded to a call about someone driving erratically in a car matching the same description as her car, and finding her asleep in her car at a gas station. (Transcript Vol. IV, pg. 174-175). The officer further testified to putting Ms. Fraser through a field sobriety test, as well as her slurring her speech and being generally drowsy in demeanor. (Transcript Vol. IV, pg. 175-178). The state also played the officer's bodycam footage for the jury, which displayed the field sobriety test as well as Ms. Fraser's demeanor.

The officer's testimony was appropriate as both a means of impeaching her testimony that she pulled over because she was "tired," as opposed to being impaired from ingesting prescription drugs, as well as a competent witness to testify to Ms. Fraser's continuing failure to correct her substance abuse issues. Though the pending charge is similar to the charges disallowed by *K.H.*, it is

clear that the events leading to this charge are more relevant to the state's case than the charges admitted in *K.H.*[9] Here, the state was required to show that substance abuse grounds had not been corrected, and thus the circumstances surrounding the charge and arrest were relevant for this purpose. The trial court also admonished the jurors that they were to consider the testimony and video only so far as to "consider whether or not the mother had failed to correct the conditions that led to a previous adjudication." (Transcript Vol. IV, pg. 173). For these reasons, the trial court did not abuse its discretion by admitting that evidence.

Burden of Proof — Threat of Harm and Best Interest

Ms. Fraser's final proposition of error on appeal is whether the state failed to show by clear-and-convincing evidence that the children were under "threat of harm,"[10] or that the termination of her parental rights was in the children's best interests. Ms. Fraser urges this court that the verdict was rendered on account of the state calling on a "hodge podge testimony of several workers to proffer their 'opinion' as to what they think is in the best interest of Appellant Ms. Fraser's children." Ms. Fraser takes specific umbrage at the "threat of harm"

---

[9] There, the state sought to enter pending criminal charges against the parents to establish that the children were deprived, a designation properly made by the trial court rather than the jury. *Matter of K.H.*, 2021 OK 33, ¶ 35, ___ P.3d ___.

[10] We note here that the jury was not charged with determining whether the condition of "threat of harm" was corrected, as only "lack of proper parental care and guardianship," "substance abuse," and "mental health" appear on the mother's verdict form as conditions that had not been corrected. (R. 507-510.) The jury checked all three boxes as to all three children. Nevertheless, we respond to Ms. Fraser's allegation that the evidence, as a general matter, was insufficient.

finding. In Ms. Fraser's view, the state offered little more than evidence of a "spanking," and acting "erratically" and "sleepy." *Id.*

The state produced evidence that the youngest child, A.J., was born with numerous medical complications related to being exposed to opiates in utero. Similarly, the state produced witnesses that testified that C.B. Jr. tested positive for marijuana at birth and M.H. was also born with opiates in her system. DHS's involvement with mother related to substance abuse and mental health concerns was a pattern that went beyond C.B. Jr.'s, and C.B. II's births all the way to A.J.'s birth in 2019.

The state also produced testimony from multiple social workers and the father of several of the children at issue stating that Ms. Fraser left prescription pill bottles throughout the house and sometimes on the floor. Ms. Fraser's child neglect charge stipulated that she left one of her sons home alone for several hours during which time he ingested Dayquil. (State's Exhibit 4). Ms. Fraser also testified that she "whipped" one of her children as a disciplinary measure.[11]

The state also produced witnesses that testified that Ms. Fraser was having unsupervised visits with several of her children in February and April 2020, one instance of which she attempted to evade Child Protective Services by driving off with her children in the car. (Transcript Vol. II, 139-146). The state also produced witnesses who testified that when the children were in her custody, her prescription drugs would often sedate her for hours on end, leaving the children

---

[11] The transcript is unclear whether mother disciplined her son with a broom or a stick.

unattended. (Transcript Vol. III, 54-72). Throughout all of these episodes, the state's witnesses independently and consistently testified that Ms. Fraser's behavior was erratic and that she had difficulty taking responsibility for her actions and in acknowledging that she had any problems to be remedied in the first place.

Canvassing the entire record, including the transcripts of six days of trial, it is clear that Ms. Fraser's behavior consistently placed the children in potentially harmful situations. What is more, the quantity of services made available to Ms. Fraser and in which she engaged—on and off—over a period of nearly two decades demonstrates a pattern of behavior that is not likely to be remedied. The jury heard ample evidence to conclude that the children lacked proper guardianship under Ms. Fraser's care and that it was in the best interests of the children that Ms. Fraser's parental rights be terminated.

AFFIRMED.

WISEMAN, P.J., and BARNES, J. (sitting by designation), concur.

July 28, 2022