IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

IN THE MATTER OF Z.M., an Alleged Deprived Child:

MISTI MAPP,

Appellant,

vs.

STATE OF OKLAHOMA,

Appellee.

Case No. 121,300

APPEAL FROM THE DISTRICT COURT OF
TULSA COUNTY, OKLAHOMA

HONORABLE CHARLES KEVIN MORRISON, TRIAL JUDGE

AFFIRMED

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For Appellee

OPINION BY STACIE L. HIXON, JUDGE:

¶1 Misti Mapp (Mother) appeals the trial court's April 20, 2023 order terminating her rights to her minor child, Z.M. Mother contends State failed to present clear and convincing evidence at trial to support the grounds for termination and the jury's finding that termination was in Z.M.'s best interests. In view of the record and applicable law, we affirm the order.

BACKGROUND

¶2 Mother has had an addiction to methamphetamine (meth) for nearly 25 years. She had previously made contact with the child welfare system with her older son before Z.M.'s birth. When Mother found out she was pregnant with Z.M. in 2016, her older son was placed in a guardianship with a relative, and she entered a rehabilitation facility. After completing in-patient treatment, she lived at Amy's House, which was similar to a sober living house, for a period of time.

¶3 Z.M. was born in January 2017. About a year later, Mother began receiving family centered services from the Department of Human Services (DHS) due to safety concerns of domestic violence, substance abuse, unstable or unsafe home, and

inappropriate care givers. Despite Mother previously receiving these services, Z.M. was placed in DHS custody in December 2019, when she was around three years old, after Mother was asked to leave a Catholic Charities residential program due to concerns about her meth use, positive urinalysis (UA) test results, and erratic behavior. Shortly thereafter, Z.M. was adjudicated deprived on the grounds of: possessing/using illegal drugs/addiction, neglect, leaving child with inappropriate caregivers, threat of harm, and failure to provide a safe and stable home. An Individualized Service Plan (ISP) was entered, which required Mother to complete certain tasks, such as a parenting class and submitting to random UAs.

¶4 As will be detailed below, after a span of over two years and after entering several in-patient rehabilitation facilities, Mother was doing well and was participating in Family Treatment Court (FTC). In June 2022, she was allowed to have trial reunification with Z.M. The first few months appeared to go well. However, despite Mother's efforts to thwart DHS workers from making unannounced visits, they learned her progress was unraveling. In November 2022, Mother submitted a UA positive for meth. An unannounced visit revealed her home was in disarray with vaping and smoking devices, along with over-the-counter medication, left within Z.M.'s reach. DHS eventually determined Mother had been dishonest with them about her boyfriend, Jesse Ward, living in the home.[1] This was

[1] Ward is not Z.M.'s father.

particularly concerning because Ward also had substance abuse issues; had been recently released from jail; and had previously beaten Mother, blackened her eye, and busted out glass in the home. After ending trial reunification in December 2022, DHS learned Mother had coached Z.M. to not tell DHS workers Ward was living with them. Z.M. reported that Ward was sometimes responsible for watching her. Z.M. also told workers Ward had hit her twice, leaving a bruise on her arm, because she would not eat a particular food. Z.M. also reported that Ward frequently yelled at her, and she did not like him.

¶5 State filed a motion to terminate that same month, seeking termination of Mother's rights under 10A O.S.2021, § 1-4-904(B)(5) for failure to correct the conditions of possessing/using illegal drugs/addiction, neglect, leaving child with inappropriate caregivers, and failure to provide a safe and stable home, after having been given at least three months to do so. State also sought termination under section 1-4-904(B)(17) for the length of time Z.M. was in foster care. After State filed its motion, Mother missed several UAs and submitted a UA positive for meth. She also flunked out of FTC. While awaiting trial, she no-showed approximately 14 UAs and expressed a desire to raise Z.M. together with Ward.

¶6 A jury trial was held April 10-12th, 2023, resulting in verdicts terminating Mother's rights on the grounds asserted in State's motion. The trial court's order terminating rights was filed on April 20, 2023. Mother appeals.

STANDARD OF REVIEW

¶7 In parental termination cases, State bears the burden to show by clear and convincing evidence that the section 1-4-904 requirements have been met, including that the child's best interests are served by the termination of parental rights. *In the Matter of C.M.*, 2018 OK 93, ¶ 19, 432 P.3d 763. Clear and convincing evidence is the degree of proof which produces a firm belief or conviction as to the truth of the allegation in the mind of the trier of fact. *Id.* This Court's duty on appeal is to 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. *In the Matter of B.K.*, 2017 OK 58, ¶ 35, 398 P.3d 323. When determining whether such evidence exists in the record, we review *de novo*. *See In the Matter of C.M.*, 2018 OK 93, ¶ 19. However, in making this determination, "this Court does not re-weigh the evidence. . . ." *In the Matter of L.M.A.*, 2020 OK 63, ¶ 38, 466 P.3d 559. *See also In the Matter of: M.R.*, 2024 OK 28, ¶ 8, __ P.3d __; *In the Matter of B.K.*, 2017 OK 58, ¶ 35. A jury who observes the witnesses and hears their testimony firsthand is in the best position to judge credibility and determine the appropriate weight to be given such evidence. *In the Matter of B.K.*, 2017 OK 58, ¶ 36.[2]

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[2] Unlike in the Dissent, we see no "significant tension" between the Supreme Court's instructions to conduct *de novo* review when determining whether "the evidence is such that a fact finder could reasonably form a firm belief or conviction that the grounds for termination were proven," *without* weighing the evidence. We take the Court's instructions simply to mean that it is our duty to canvass the record to determine whether clear and convincing evidence was

ANALYSIS

¶8 Preliminarily, we note State filed a waiver of its right to file a brief in this case pursuant to Okla. Sup. Ct. R. 1.10(a)(5). It is not the best practice for State to forgo filing a brief, and thus, its opportunity to inform the Court of argument in support of its position. Reversal, however, is never automatic on a party's failure to file an answer brief. *Enochs v. Martin Properties, Inc.*, 1997 OK 132, ¶ 6, 954 P.2d 124; *Hamid v. Sew Original*, 1982 OK 46, ¶ 7, 645 P.2d 496. Rather, a decision on appeal is presumably correct unless the record shows otherwise. *In the Matter of Baby Girl L.*, 2002 OK 9, ¶ 50, 51 P.3d 544; *Enochs*, 1997 OK 132, ¶ 6. When the record presented fails to support the error alleged in the appellant's brief, the trial court's decision cannot be disturbed, even though appellee did not file an answer brief. *See Enochs*, 1997 OK 132, ¶ 6; *Hamid*, 1982 OK 46, ¶ 7 (finding where the record presented did not support the error alleged in appellant's brief, the trial court's judgment "cannot be disturbed[,]" despite the lack of an answer brief).

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presented at trial to support the prerequisites of termination challenged on appeal. If we find such evidence exists in the record, our inquiry ends. We do not consider or weigh any conflicts in the evidence in making this determination. To do otherwise would result in us impermissibly reweighing the evidence and would inherently require us to make credibility determinations, usurping the fact finder's role. Not only does our view comport with and reconcile the Supreme Court's plain directives, but our view follows how the Court has conducted its analysis in similar cases. *See e.g.*, *In the Matter of J.L.O.*, 2018 OK 77, ¶ 32, 428 P.3d 881 (discussing only State's evidence when reviewing whether record contained clear and convincing evidence to support termination); *In the Matter of C.M.*, 2018 OK 93, ¶¶ 19-25 (same); *In the Matter of C.D.P.F.*, 2010 OK 81, ¶¶ 7-11, 243 P.3d 21 (finding State presented clear and convincing evidence to support the ground for termination, despite noting that certain evidence presented at trial was favorable to mother).

¶9 Moreover, when a parent challenges the sufficiency of the evidence to support termination of parental rights, our standard of review requires us to "canvass the record" to determine if the evidence is such that the jury could reasonably form a firm believe or conviction that the grounds for termination were proven. *In the Matter of B.K.*, 2017 OK 58, ¶ 35. We are unable to abdicate this duty merely because State did not file a brief.

¶10 With that introduction, we turn to Mother's arguments on appeal. She argues State failed to present clear and convincing evidence to support termination under sections 1-4-904(B)(5) and (B)(17) and that termination was in Z.M.'s best interests. As discussed below, the record does not support these alleged errors.

¶11 Under section 1-4-904, to terminate parental rights, State must prove: 1) the child has been adjudicated to be deprived, and 2) termination is in the child's best interests.[3] State must also prove at least one ground for termination listed in section 1-4-904(B). As noted, State sought termination under both sections 1-4-904(B)(5) and (B)(17), though either ground alone was sufficient to terminate Mother's rights. *See In the Matter of E.J.T.*, 2024 OK 14, ¶ 15, __ P.3d __ (citing section 1-4-904(B)).

1. Termination under section 1-4-904(B)(5)

¶12 Under section 1-4-904(B)(5), termination is proper based on a finding that "the parent has failed to correct the condition[s] which led to the deprived

[3] Mother does not dispute Z.M. was adjudicated deprived.

adjudication of the child," and "the parent has been given at least three (3) months to correct the condition[s][.]" The jury found Mother failed to timely correct the following conditions that led to Z.M.'s deprived adjudication: possessing/using illegal drugs/addiction, neglect, leaving child with inappropriate caregivers, threat of harm, and failure to provide a safe and stable home.[4]

¶13 At trial, DHS Worker Crystal Ruff testified she was assigned to this case in August 2020, after Z.M. had been in DHS custody for approximately eight months. Ruff testified that Mother was referred to Centers for Therapeutic Interventions (CTI) twice but was discharged both times due to her lack of engagement. Mother also went to in-patient services at 12 and 12 but left before ever starting services. Ruff testified that Mother frequently denied or downplayed her drug usage, though at times admitted she was struggling, particularly by being around others who were using drugs, including her father. Accordingly, Ruff spoke with her about receiving in-patient services so that she would not be around others' influence, but Mother feared in-patient treatment.[5]

¶14 Moreover, Ruff became concerned about domestic violence in Mother's home. When visiting, Ruff observed that glass was broken out of the sliding glass door. Mother reported that Ward, then her alleged ex-boyfriend, had broken the door

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[4] Though the jury found Mother failed to correct the five conditions listed in State's motion to terminate, the failure to correct just one condition was sufficient to terminate.

[5] It is unclear from the record whether Mother also received in-patient treatment at Palmer.

frame to her front door. Mother also spoke about her turbulent and sometimes violent relationship with Ward. Ruff explained to Mother that Ward was not a safe person for Z.M. to be around and would be an inappropriate caregiver if the child was returned to her. Additionally, Mother was not honest about the different people coming in and out of her home and the different places she was staying. Ruff observed people in Mother's home who had not been background checked, which caused concern. At one point, she told Ruff someone had stolen her wallet, and she had to call the police due to an occurrence of domestic violence.

¶15 Accordingly, Mother was referred for services at Domestic Violence Intervention Services (DVIS), which along with the referrals to parenting classes would have assisted her with correcting the condition of inappropriate caregivers. Mother did not complete the parenting classes or the DVIS program at the time Ruff was the caseworker, though Ruff acknowledged some of Mother's services had been affected by Covid-19 protocols. Given that situation and Mother and Z.M.'s close relationship, Ruff believed Mother was a good candidate for FTC, which provides a significantly higher level of support than DHS gives in a typical case. Regardless, Ruff testified that during the time she had the case, there remained concerns that Mother had not corrected the conditions, particularly substance abuse, safe and stable home, and inappropriate caregivers, and thus, Z.M. could not be safely returned to her.

¶16 The referral to FTC was made in February or March 2021, but there was delay with Mother entering the program because she would not return necessary phone calls. Mother was eventually set to enter the program several months later in July 2021. The supervisor of FTC, Hayley Garrison, testified that on the date Mother was scheduled to sign into the program, Mother did not show up to court, though they spoke on the phone. Mother was extremely emotional and reported that Ward, then her boyfriend, severely injured her. Mother sent Garrison pictures of her injures, one of which was admitted into evidence, depicting extensive bruising to both eyes (one eye was completed blackened) and other injuries to her face. Mother also disclosed that she and Ward used drugs together. Garrison explained to Mother that Ward was not a safe person to be around. She signed-in to FTC court the next month.

¶17 Initially, Mother had problems making all of her out-patient appointments with CTI and submitting her UAs. The Uas she took were positive for meth. The FTC team quickly decided Mother needed a higher level of treatment, and she went to an in-patient facility in August 2021. Overall, Mother did well after completing in-patient treatment. She did relapse twice within 90 days after in-patient treatment, as shown by positive Uas, but was able to reengage in the program. After completing treatment, Mother lived in a sober living home from September 2021 until March 2022. She also obtained employment as a Peer Recovery Specialist, though the FTC

team was concerned about her taking on this role. It was a high stress job that involved working with people actively using drugs, which could be triggering. Eventually, after being in FTC for almost a year, Mother was set to graduate from the program later in the year.

¶18 In view of her progress, trial reunification commenced in June 2022. The initial three months of trial reunification appeared to go well. Unbeknownst to DHS at the time, Ward was released from jail on August 25, 2022, a date which Mother specifically recalled at trial. Mother's DHS worker assigned to the case during the time of trial reunification until September 2022, Kierra Cain, testified Mother also lost her job and seemed flustered and overwhelmed. Mother began struggling to stay in compliance with the requirements of her FTC treatment program, and her treatment providers reported she was not consistently attending her appointments, despite Mother being unemployed. Cain testified that she was not able to do unannounced visits at Mother's home during this time partly because there was a "guard dog" in the front yard, making it impossible to walk to the front door.

¶19 Julia Evans subsequently became Mother's DHS worker in September 2022 and made contact with Mother. Evans explained to Mother the importance of being able to conduct unannounced visits, but Mother was displeased with the plan for such visits and made several excuses about why they could not occur. When Evans attempted to make an unannounced visit about two weeks later, she was unable to

make contact with anyone in the home due to an aggressive pit bull housed behind a large fence. In October 2022, Evans was finally able to make an unannounced visit and found the home in disarray, reeking of dog urine. Evans grew concerned about Mother's discipline of the child when Z.M. reported Mother had spanked her for letting the dog out. Mother gave a conflicting story, stating she had spanked Z.M. because she had hit her in the mouth and told her she wanted to return to her foster mother. Evans testified that although spanking is legal in Oklahoma, physical punishment of Z.M. was not allowed per DHS policy because the child was in its custody. Evans had conversations with Mother about these discipline issues, along with other safety issues, including the dog and others living in the home, as Mother's roommate who had been approved to live with her was moving out. Despite these concerns, Z.M. remained in the home.

¶20 In November 2022, more serious concerns arose when Mother missed a UA and then submitted one positive for meth. Evans made another unannounced visit to the home. During this visit, Mother denied relapsing and said she was participating in a drug study but was unsure what the drug was and knew nothing about it. If true, her participation in this study was not recommended by her FTC team and showed questionable judgment. Meanwhile, the previous conditions of the home, including dog urine, were still present and concerning. There were also

multiple smoking items, including vapes and vape juices, on the coffee table in the living room and a bottle of Ibuprofen beside Z.M.'s bed, all within the child's reach.

¶21 It was even more concerning, however, that Evans observed men's clothes in the closet and a photo of Mother with a man (later determined to be Ward) in her bedroom. Evans also located a man's wallet containing Ward's ID. However, at that time Evans was unaware of who Ward was and made a safety plan for Mother, which included not allowing unapproved people in the home. Shortly after the visit, Evans learned who Ward was and sought direction from her supervisor about ending trial reunification. Evans then contacted Mother, who said Ward was living in another county at a sober living facility and had just left his wallet there. Evans also spoke with Z.M. who said Ward had not been in the home. During conversations with her FTC team, Mother attempted to minimize the domestic violence Ward had committed against her by changing her story that Ward had inflicted her previous injuries, to contending they had been abusive to each other. Mother also changed her story about their relationship, initially stating Ward was not living with her, then admitting to being friends, and finally admitting they were in a relationship.

¶22 Shortly thereafter in December 2022, Z.M. was removed from the home due to Mother's meth use and her admission of an ongoing relationship with Ward. Evans noted that when she picked up Z.M. to return her to her foster home, the child was not upset. While Evans visited Z.M. at her foster home, the child disclosed that

she had been untruthful by telling her Ward was not living with Mother and her. In fact, Ward ran out the back door when Evans arrived at the prior visit, and Mother told the child not to tell DHS that Ward lived with them, or she would go back to foster care. Z.M. explained that Ward, whom she did not like, yelled at her a lot, and she had to stay in her room a lot. The child also reported that Mother slept a lot, and there were times when Ward was responsible for watching her. Z.M. disclosed she felt unsafe around Ward. After Evans noticed a bruise on Z.M.'s arm, the child reported that Ward hit her twice because she would not eat a particular food. Z.M. reported a similar incident to another DHS worker, Whitney Roberson. Z.M.'s foster mother, Vanessa Ryder, also testified Z.M. reported Ward hit her when she did not clean her room properly.

¶23 As noted above, State filed its motion to terminate in December 2022, and Mother was removed from FTC and not allowed to graduate. Evans testified that while awaiting trial, Mother admitted Ward had been in her home, though he was "couch hopping." About two-and-a-half weeks before trial, Evans testified Mother expressed an interest in taking parenting classes with Ward, so they could raise Z.M. together. Mother also submitted a hair follicle test and a UA, which were both positive for meth. She also missed around 14 UAs during this time. On one occasion, about two weeks before trial, Evans asked that Mother take a drug test about 30 minutes before the testing facility closed. The facility was about ten to 15

minutes away. Despite leaving for the facility at the same time, Evans arrived in plenty of time before it closed, but Mother turned in the opposite direction Evans went and inexplicably never arrived at the facility.

¶24 Mother testified at trial. Though she testified she took responsibility for her choices, she disputed many facts offered by DHS and FTC workers, continued to minimize her drug usage, and blamed her relapses on others. Mother admitted she still needed lots of help to address her addiction and admitted to using marijuana the night before she testified at trial.[6] Regarding Ward, Mother denied telling DHS workers she wanted to raise Z.M. with him shortly before trial. She testified that if Z.M. was returned to her, she would not be around Ward. However, she admittedly had not even begun to address her issues with domestic violence and trauma involving Ward and others, despite years of counseling during the pendency of the case.

¶25 In view of the above evidence and other evidence presented at trial, we find the jury could have reasonably formed a firm belief or conviction that Mother failed to correct the conditions of possessing/using illegal drugs/addiction, neglect, leaving the children with inappropriate caregivers, and failure to provide a safe and stable

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[6] Jordan Bilby, with FTC, testified that despite marijuana being legal with a medical marijuana card under Oklahoma (but not Federal) law, taking any mind-altering substance was a bad idea for anyone in recovery for substance abuse. Mother was aware of FTC's position on this issue but disagreed with it.

home, after having been given at least three months to do so. As for Mother's arguments that she should have been given more time to correct the conditions, we note she was given over three years to do so, and the statute states termination is proper for a failure to correct after only three months.[7] Thus, we find clear and convincing evidence supported termination under section 1-4-904(B)(5).

2. Termination under section 1-4-904(B)(17)

¶26 Under section 1-4-904(B)(17), termination is proper based on a finding that a child younger than four years of age at the time of placement has been placed in foster care by DHS for at least six of the 12 months preceding the filing of State's motion to terminate, and the child cannot be safely returned to the parent's home.[8] As it pertains to this case, under the statute, Z.M. is considered to have entered foster care on her adjudication date, or February 20, 2020. *Id.* At trial, it was undisputed that Z.M. had been in foster care for the requisite amount of time for termination

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[7] Mother also argues she had a difficult time maintaining employment due to DHS's requirements. However, this is not the issue that resulted in termination. Rather, the focus of State's case was Mother's continued meth use and involvement with Ward, which pertained to all the issues the jury found she failed to correct.

[8] The statute also provides, and the jury was instructed, that it may consider:

> (1) circumstances of the failure of the parent to develop and maintain a parental bond with the child in a meaningful, supportive manner, and
>
> (2) whether allowing the parent to have custody would likely cause the child actual serious psychological harm or harm in the near future as a result of the removal of the child from the substitute caregiver due to the existence of a strong, positive bond between the child and caregiver.

None of these considerations appear particularly relevant to the evidence the jury was presented at trial.

under section 1-4-904(B)(17). In fact, at the time of trial, she had been in foster care within the meaning of the statute for over three years.

¶27 As thoroughly detailed above, the evidence at trial was more than sufficient to allow the jury to form a firm belief or conviction that Z.M. could not be safely returned to Mother's home. Therefore, we find clear and convincing evidence also supported termination under section 1-4-904(B)(17).

3. Z.M.'s best interests

¶28 Regarding the issue of Z.M.'s best interests, the jury could have reasonably determined termination was in her best interests from the evidence at trial. The evidence overwhelmingly showed that despite Mother receiving an extensive level and number of services over a span of several years, including multiple opportunities for in-patient treatment, she continues to have issues with addiction/ substance abuse. The evidence also overwhelmingly showed Mother continued to have a relationship with a dangerous person, whom she allowed to care for Z.M., resulting in fear and injury to the child. The evidence also showed Mother is willing to coach Z.M. to hide dangers within her home from others, which the jury could have determined was a significant safety concern. Specifically, Evans testified that returning Z.M. to Mother would result in serious emotional and physical harm to the child due to Mother's continued meth use and continued relationship with Ward. Moreover, Ryder, who was Z.M.'s foster mother before the trial reunification,

testified about the differences she observed in Z.M. after returning from Mother's home. For instance, Ryder testified Z.M. now has night terrors, cries in her sleep, and is scared to sleep in her room.

¶29 Additionally, Evans testified that Z.M. needs a stable, permanent home where she can feel safe. Ryder echoed these sentiments, testifying Z.M. views foster care negatively and does not want to be a foster kid. Ryder also testified about her willingness to adopt the child and to facilitate safe contact with Mother even after termination.

¶30 Furthermore, Evans testified it was in Z.M.'s best interests for Mother's rights to be terminated, despite recognizing Z.M. and Mother love each other and acknowledging Z.M. would likely experience an adjustment period after termination that would require therapy, which she was already attending. Evans, however, testified there were considerations beyond love to consider when determining Z.M.'s best interests, including her physical safety, emotional safety, and need for stability and permanency.[9] She also noted Z.M. had a "very strong" bond with her foster family, including her foster siblings.

¶31 We are aware of conflicting evidence in the record, most significant of which is that Mother and Z.M. undisputedly love each other and share a strong bond.

[9] Z.M.'s testimony indicated she wanted to live with Mother if Ward was not there, but if she could not stay with Mother she wanted to stay with her foster mother.

However, the jury's decision need not rest on uncontroverted evidence. *See Matter of Adoption of A.W.H.*, 1998 OK 61, ¶ 4, 967 P.2d 1178. Of equal importance, the jury was not charged with determining whether Mother and Z.M. love each other or the strength of their bond. Rather, it was charged by statute with determining whether termination was in the child's best interests, which is a broader inquiry. The jury was not required to weigh the evidence of the love and bond between Mother and Z.M. more heavily than the multitude of other evidence showing that termination was in the child's best interests. The jury was entitled to find from the evidence that though Mother loves Z.M., she continually made decisions that placed the child in danger, despite receiving extensive services, therapy, and treatment. The jury could have also found that Mother has continually failed to provide Z.M. with stability and permanency, which witnesses testified were in the child's best interests. Moreover, the jury could have concluded from the evidence that despite Z.M.'s wishes to stay with Mother (if Ward was not in the home), a six-year-old child might not know what is in her own best interests, considering all the circumstances of the situation.

¶32 Significantly, the Supreme Court has explicitly cautioned us from reweighing the evidence in parental termination cases. If we were to reverse the jury's verdict on this record, we would be doing exactly that. It is the jury's role, not that of this Court, to weigh the evidence and determine the credibility of the witnesses. It is axiomatic that the jury is in the best position to make these determinations because

the jury observes the witnesses and hears their testimony firsthand. *In the Matter of B.K.*, 2017 OK 58, ¶ 36. Thus, we will not reverse the jury's verdict by reweighing the conflicts in the evidence in Mother's favor. Given that the evidence in the record is sufficient for a jury to reasonably form a firm belief or conviction that termination of Mother's rights was in Z.M.'s best interests, we find the jury's determination was supported by clear and convincing evidence.

CONCLUSION

¶33 We affirm the April 20, 2023 order terminating Mother's parental rights.

¶34 **AFFIRMED.**

HUBER, P.J., concurs, and BLACKWELL, J., dissents.

BLACKWELL, J., dissenting:

¶1 Misti Mapp appeals the termination of her parental rights as to her minor child, Z.M., alleging that the state's evidence for termination was insufficient. The child's attorney filed a brief supporting reversal and argued throughout the trial below against termination. The state did not respond to the petition in error and never filed a brief. Only upon an order to show cause issued by this Court did the state file a waiver of its right to file any brief.[1]

[1] In violation of the Supreme Court's rules, the state has yet to file an entry of appearance. Okla.Sup.Ct.R. 1.5(a) ("All parties to any proceeding in the appellate courts shall immediately, but no later than filing the first document in the appellate court, file an Entry of Appearance ....").

¶2 Although reversal is never automatic, when no answer brief is filed this Court will generally reverse if the appellant's brief is "reasonably supportive" of reversal. *Cooper v. Cooper*, 1980 OK 128, ¶ 6, 616 P.2d 1154. Here, I find that the appellant's brief, as joined by the minor child, is reasonably supportive of reversal. Additionally, while the lack of answer brief compels "no duty to search the record for some theory to sustain the trial court judgment," *id.*, given the gravity of interests at stake here, I have reviewed the full record and find that the state failed to meet its burden to prove by clear and convincing evidence that termination was in the best interest of the minor child.[2] I therefore respectfully dissent.

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[2] Clearly, I have a very different view of this record than the majority. I suspect this is due, in large part, to a disagreement as to the correct standard of review to employ in cases such as this, where we are to review the sufficiency of the evidence in a termination of parental rights case.

Confusion on the issue is understandable, in my view, as there is significant tension in the standard of review in termination cases as developed by the Oklahoma Supreme Court since *Matter of S.B.C.*, 2002 OK 83, 64 P.3d 1080. In that case, the Supreme Court changed the standard of review from the "any competent evidence" standard typically used to review facts determined in a case at law to one requiring an appellate court to "canvass[] the record on review to ascertain whether [the trial court's] fact findings rest on clear-and-convincing proof." *Matter of S.B.C.*, 2002 OK 83, ¶ 6, 64 P.3d 1080, 1082 (emphasis removed). The Court made it clear that "*anything less than the very same standard as that which is required in the trial courts*," was not acceptable. *Id.* ¶ 7.

This sounds suspiciously like "*de novo*" review, and this Court immediately took it to mean just that. In two cases issued less than two months after *S.B.C.*—indeed, the first two cases citing *S.B.C.*—Division I of this Court held that an appellate court must "serve as the 13th juror to re-weigh the evidence and determine again whether there was clear and convincing evidence" to support termination. *Matter of T.M.*, 2002 OK CIV APP 129, ¶ 8, 62 P.3d 802, 804; *Matter of J.K.*, 2002 OK CIV APP 130, ¶ 9, 62 P.3d 807, 809. Subsequently, in numerous cases (though without ever formally overruling *Matter of T.M.* or *Matter of J.K.*), the Supreme Court has stated, while continuing to cite *S.B.C.*, that an appellate court "does not re-weigh the evidence but determines if the evidence for termination 'is such that a fact finder could reasonably form a firm belief or conviction that the grounds for termination were proven.'" *Matter of L.M.A.*, 2020 OK

63, ¶ 38, 466 P.3d 559, 569 (quoting *Matter of B.K.*, 2017 OK 58, ¶ 35, 398 P.3d 323, 330). However, the Supreme Court has also directly held, that the standard of review for sufficiency claims in termination cases is *de novo*. *Matter of C.M.*, 2018 OK 93, ¶ 19, 432 P.3d 763, 768 ("Appellate review of a termination of parental rights must show that the record contains clear and convincing evidence to support the district court's decision. **Therefore, we review *de novo*.**" (citations omitted) (emphasis supplied)).

The Court has not explained exactly how one is 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—including the question of what is in the best interest of the child—without using our own judgment. In using that judgment, we must necessarily ascribe some weight to the evidence contained in the record on appeal. *See* "Judgment" Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/judgment (accessed May 8, 2024) (defining "judgment" as "the process of forming an opinion or evaluation by discerning *and comparing*"). I would submit that the standard of review as first stated by *S.B.C.* is not consistent with the Court's later command that we never weigh evidence, or its claim that such review is *de novo*. The rejection of the "any competent evidence" standard by *S.B.C.* obviously envisages situations where there is competent evidence, but it is not sufficiently "clear and convincing" for a reasonable factfinder to have found in favor of termination. 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 each member of this Court using its own judgment to ascribe some weight to the evidence.

Another option would be to do what it appears the majority has done here and make each possible inference in favor of the state. Although a similar standard is commonly employed in criminal appeals, *see, e.g.*, *Black* v. *State*, 2001 OK CR 5, ¶ 34, 21 P.3d 1047, 1062 ("We review sufficiency of the evidence claims by viewing the trial evidence in the light most favorable to the State and asking whether a rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt."), and I see no reason it could not be employed in termination cases (with the caveat that a "clear and convincing" standard be substituted for a "beyond a reasonable doubt" standard), I do not believe it is consistent with the standard as articulated by *Matter of S.B.C.*, and it clearly violates the command of *Matter of C.M.* to perform our review *de novo*. Despite many opportunities to do so, the Supreme Court has never directed us to review the evidence in termination cases under a criminal law standard or "in the light most favorable to the state." To the extent the majority has done so here, I believe it has erred.