

No. 1-18-2427

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

<i>In re</i> N.F. & I.S., Minors,)	
)	
(THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Petitioner-Appellee,)	Cook County
)	
v.)	Nos. 15 JA 748 &
)	15 JA 749
A.S.,)	
)	The Honorable
Respondent-Appellant).)	Maxwell Griffin,
)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court, with opinion.
Justices Hyman and Walker concurred in the judgment and opinion.

OPINION

¶ 1 Respondent A.S. appeals from an order of the juvenile court finding her unfit to parent N.F. and I.S., minors, and finding that it was in the best interests of the children to terminate her parental rights. For the following reasons, we affirm the judgment of the juvenile court.

¶ 2 I. BACKGROUND

¶ 3 A.S. is the mother of N.F., a minor born July 28, 2010, and I.S., a minor born June 16, 2014. Neither N.F.’s father nor I.S.’s father is a party to this appeal.

¶ 4 On July 30, 2015, the State filed a petition for adjudication of wardship for I.S., alleging that he was abused or neglected because A.S. had two prior indicated reports for substantial risk

of physical injury/environment injurious, I.S. had been diagnosed with non-organic failure to thrive in February 2015, A.S. had a mood disorder, and A.S. failed to make progress in services offered. Also on July 30, 2015, the State filed a petition for adjudication of wardship for N.F., alleging that N.F. was abused or neglected because A.S. had two prior indicated reports for substantial risk of physical injury/environment injurious, N.F.'s minor sibling, I.S., was hospitalized and diagnosed with non-organic failure to thrive, A.S. had a mood disorder, and A.S. failed to make progress in services offered. The State also filed motions for temporary custody of N.F. and I.S. based on the same facts alleged in the petitions.

¶ 5 On March 22, 2016, the juvenile court found I.S. neglected due to a lack of care and an injurious environment because he was diagnosed with non-organic failure to thrive, and because A.S. was diagnosed with a mood disorder and was not consistent in taking her prescribed medication. On March 22, 2016, the juvenile court found N.F. neglected due to an injurious environment because I.S. was diagnosed with non-organic failure to thrive, and because A.S. was diagnosed with a mood disorder and was not consistent in taking her prescribed medication. The court found that the neglect of both N.F. and I.S. was inflicted by A.S.

¶ 6 On September 26, 2016, the juvenile court adjudged N.F. and I.S. wards of the court, finding that A.S. was unable to care for them.

¶ 7 A permanency planning hearing was held on September 29, 2017. A.S. moved to exclude James D., the foster father of I.S., from the hearing because A.S. did not want James D. to hear testimony about her. The court granted and denied the motion in part, stating “when we get to that point and we start discussing the mother and the services, I will ask [James D.] to step out. When that’s done, we’ll bring him back in, all right?” No objection was made to the court’s stated intention. James D. left the courtroom during the testimony of Erika Burns, a caseworker from

Aunt Martha's for N.F. and I.S., and Amber LeFevour, the clinical supervisor who oversaw A.S.'s parenting coach and therapists. After Burns and LeFevour finished testifying, the juvenile court then allowed James D. back into the courtroom without objection from A.S. The court asked the parties for their positions on the agency's permanency goals of substitute care pending termination of parental rights set for N.F. and I.S. The State and the guardian *ad litem* (GAL) stated that they were in favor of the agency's recommended goal, and A.S. argued for a goal to return the children return home in 12 months. The juvenile court orally entered a permanency goal of substitute care pending the court's determination on termination of parental rights.

¶ 8 On December 20, 2017, the State filed supplemental petitions for the appointment of a guardian with the right to consent to adoption for N.F. and I.S., alleging that A.S. was unfit to parent N.F. and I.S. because she failed to maintain a reasonable degree of interest in the children's welfare, in violation of section 1(D)(b) of the Adoption Act (Act) (750 ILCS 50/1(D)(b) (West 2016)), and failed to make reasonable progress toward the return of the children during any nine month period after the adjudication of neglect or dependency, in violation of section 1(D)(m)(ii) of the Act (*id.* § 1(d)(m)(ii)). The supplemental petitions alleged that termination of A.S.'s parental rights was in N.F.'s and I.S.'s best interests because adoption by their respective foster parents would be in their best interests. The supplemental petitions stated that N.F. and I.S. had been living with their respective foster parents since August 19, 2015, and their foster parents wanted to adopt them.

¶ 9 On May 23, 2018, a hearing was held on A.S.'s fitness to parent N.F. and I.S. The State offered eleven exhibits that were admitted into evidence. These exhibits included three service plans, a psychological evaluation of A.S., and A.S.'s treatment records. A.S. then moved to exclude David R., the foster parent of N.F., and James D., the foster parent of I.S. The court denied the

motion. The State informed the court that it was going to call the Aunt Martha's caseworker, Erika Burns, and that the foster parents would only be called during the best interests hearing. The GAL stated that it would call Janice Williams-Boyd, the supervisor at Aunt Martha's. The court denied the motion to exclude the foster parents but excluded Williams-Boyd during Burns's testimony.

¶ 10 Burns's testimony is summarized as follows. A.S. successfully completed parenting classes and domestic violence services. A.S. was consistent in attending parenting coaching and individual therapy until she became inconsistent in June of 2017. She was discharged unsuccessfully from parenting coaching and individual therapy after the September 29, 2017, permanency planning hearing due to the permanency goal change. A.S. had not been making satisfactory progress in her services before the September 29, 2017, permanency planning hearing. A.S. had difficulty regulating her emotions and consistently attended psychiatric monitoring for posttraumatic stress disorder and generalized anxiety disorder, but she did not successfully complete substance abuse services. A.S. often got into "altercations" with N.F. during visits in the summer of 2017, and her visits with the children "started to go downhill" in June of 2017. A.S. failed to implement parenting strategies to reduce her overreactions to normal child behaviors and failed to engage with I.S. at visits. Due to A.S.'s inappropriate behavior, her visits with N.F. were suspended in June 2017.

¶ 11 The State rested after Burns's testimony. The GAL rested without calling any witnesses.

¶ 12 A.S. testified and two certificates of completion were admitted into evidence evidencing her satisfactory completion of domestic violence services and intensive outpatient drug treatment services. A.S. testified that she felt the caseworkers believed her behavior was inappropriate because she cried in front of her children.

¶ 13 After argument, the juvenile court stated that it was dissatisfied with some of the "generalized testimony" it received, and that it still had questions about when the problems with

A.S.'s visits with N.F. and I.S. occurred and the reason why A.S.'s services were terminated. The court stated that it wanted to hear from Amber LeFevour and Burns to clear up these "gaps in the timeline" and continued the case for further testimony from these witnesses.

¶ 14 On July 19, 2018, the court reconvened to hear testimony from LeFevour. Crystal Deberry, A.S.'s parenting coach, and Ewenece Boyd, a transporter from Aunt Martha's. A.S. moved to exclude witnesses and objected to any testimony from Deberry and Boyd because they were not previously disclosed as witnesses. The court excluded Deberry and Boyd and allowed Burns to remain because she had already testified.

¶ 15 LeFevour testified that she was the clinical supervisor from Aunt Martha's during the time A.S. was receiving services, and that she saw A.S. two or three times for therapy sessions. A.S. did not make progress in her treatment goal of managing her emotions because she continued to display erratic behavior, failed to implement coping skills, and failed to take responsibility for her own actions. A.S. was increasingly inconsistent in attending therapy after the fall of 2016 and took a one-month "break" from therapy in August 2017. A.S. did make progress toward her other treatment goals of maintaining sobriety and maintaining a healthy living environment.

¶ 16 The State then called Deberry, who testified as follows. She met with A.S. biweekly, but A.S. did not make progress in controlling her emotional outbursts. A.S.'s difficulty in controlling her emotions often resulted in her getting angry with N.F. A.S.'s visits with N.F. ended early on at least two occasions in July 2017 and March 2018, and the visits were suspended altogether for a period in 2017 at N.F.'s request. A.S. was unsuccessfully discharged from parenting coaching in July of 2017 because she refused the service.

¶ 17 After Deberry testified, the court stated that it did not need to hear additional testimony. The court invited the parties "to reopen their case if they feel that these witnesses have added

something that needs to be addressed.” All parties declined. The State and the GAL argued that they had met their burden. A.S. argued that the State had not met its burden to show by clear and convincing evidence that A.S. was unfit on the grounds pled in the petition.

¶ 18 On October 17, 2018, the court found, based on the testimony of Burns, LeFevour, and Deberry, that A.S. was unable to control her emotions and that this negatively impacted her ability to parent. The court found that this testimony was consistent with the State’s Exhibit No. 6, a psychological evaluation of A.S. that showed her inability to regulate her emotions. The court found that the State had met its burden to show that A.S. failed to make reasonable progress towards the return of N.F. and I.S. from March 22, 2016, through December 22, 2016, December 22, 2016, through September 22, 2017, and August 23, 2017, through May 23, 2018, under section 1(d)(m)(ii) of the Act (750 ILCS 50/1(D)(m)(ii) (West 2016)). The court found that the State had not shown that A.S. failed to maintain a reasonable degree of interest in I.S. under section 1(d)(b) of the Act (*id.* § 1(d)(b)).

¶ 19 The court then proceeded to the best interests hearing. The court granted A.S.’s motion to exclude the foster parents because they would be called as witnesses. After hearing testimony from Burns, James D., and David R., the court found that the State had proven by a preponderance of the evidence that it was in the best interests of N.F. and I.S. to terminate A.S.’s parental rights.

¶ 20 A.S. filed a timely notice of appeal

¶ 21 **II. ANALYSIS**

¶ 22 A.S. first argues that she was prejudiced and deprived of due process by the juvenile court *sua sponte* reopening the fitness hearing proofs. A.S. argues that the juvenile court abused its discretion by acting as an advocate for the State in reopening the proofs for testimony that was favorable to the State. The State and the GAL contend that A.S. forfeited this argument because

she did not object to reopening the proofs at trial or in a written posttrial motion. Because A.S. raises a claim that the juvenile court departed from its role as the neutral factfinder and acted as an advocate for the State, “no objection by opposing counsel is necessary to preserve the issue for review.” *In re Maher*, 314 Ill. App. 3d 1088, 1097 (2000). We therefore consider the merits of A.S.’s claim.

¶ 23 “A trial judge may question witnesses to elicit truth, clarify ambiguities in the witnesses’ testimony, or shed light on material issues.” *In re Tamesha T.*, 2014 IL App (1st) 132986, ¶ 26 (citing *Obernauf v. Haberstick*, 145 Ill. App. 3d 768, 771 (1986); Ill. R. Evid. 614(b) (eff. Jan. 1, 2011)). In doing so, the court must ensure it does not act as an advocate for either party. *Id.* “The propriety of an examination of a witness by the trial court must be determined by the circumstances of each case and rests within the discretion of the trial court.” *In re Maher*, 314 Ill. App. 3d at 1097. We thus review the juvenile court’s actions for an abuse of discretion. *In re Tyreke H.*, 2017 IL App (1st) 170406, ¶¶ 112-114 (citing *People v. Franceschini*, 20 Ill. 2d 126 (1960)).

¶ 24 A.S. cites to *People v. Kuntz*, 239 Ill. App. 3d 587 (1993), to support her claim that the juvenile court abused its discretion. In *Kuntz*, the defendant’s driver’s license was suspended after he submitted to a breathalyzer test that indicated that his blood alcohol content was above the legal limit. *Id.* at 588. After a hearing on the defendant’s petition to rescind the summary suspension of his driver’s license, the defense pointed out that the State had failed to present evidence that the breathalyzer was accurate and working properly. *Id.* at 590. After argument, the trial court asked the State if it wanted time to bring in evidence that the breathalyzer was tested for accuracy. *Id.* On appeal, we held that the trial court abused its discretion by *sua sponte* reopening the proofs and prompting the State to present additional evidence that would support its case. *Id.* at 592.

¶ 25 We also addressed the issue of when a trial court may *sua sponte* reopen the proofs in *In re Tyreke H.*, 2017 IL App (1st) 170406. In that case, the trial court granted the respondent’s motion to suppress a firearm after a hearing. *Id.* at ¶ 15. When the State filed a motion to reconsider, the trial court stated that it would like to view the size of the firearm in the pants the respondent was wearing at the time he was stopped by police in order to evaluate whether it was “immediately apparent” that the bulge in the respondent’s pocket was a gun. *Id.* at ¶ 17. On appeal, we held that the trial court did not act as an advocate for the State in reopening the proofs because the “additional evidence could have cut either way.” *Id.* at ¶ 115. The fact that the evidence hurt rather than helped the respondent’s case did not mean that the trial court acted as an advocate for the prosecution. *Id.*

¶ 26 Our review of the record in this case shows that the juvenile court did not abuse its discretion when it reopened the proofs *sua sponte*. Here, the juvenile court heard testimony from Burns and A.S. on the issue of A.S.’s fitness to parent. In deciding to *sua sponte* reopen the proofs, the court found that the “generalized testimony” had led to “certain gaps in the timeline” that needed to be clarified before it could enter its findings. The juvenile court stated,

“It would appear that the therapy was ultimately terminated because [A.S.] failed to make progress. It was also suggested it was terminated simply because of the goal change.

I think that was somewhat cleared up by the GAL’s testifying [*sic*], but I shouldn’t have to guess, is my concern. And so I want to try to get in the author of this report, Ms. LeFevour.”

¶ 27 It is readily apparent that the juvenile court did not make a finding that the State had failed to meet its burden of proof. Rather, the court stated that it needed to know when the problems with the visits occurred. The court also stated that conflicting testimony was given regarding the reason

for A.S.'s discharge from services, and, although the court believed that issue had been cleared up, the court did not want to guess what the reason was. It is obvious to us that the juvenile court was intent on understanding the evidence before rendering its decision.

¶ 28 After the proofs were reopened, the State introduced the testimony of LeFevour and Deberry relative to the timing of the events first mentioned by Burns. LeFevour and Deberry also clarified that the reason that A.S. was discharged from services was because she did not attend therapy regularly and that she had not made progress toward her services. The court itself asked only clarifying questions of LeFevour and Deberry relating to the timing of the events and the reason for A.S.'s discharge from services. None of the parties took the opportunity to reopen their case because of the additional testimony from LeFevour and Deberry.

¶ 29 Based on this record, we find that the juvenile court did not act as an advocate for the State when it reopened the proofs. Unlike in *Kuntz*, the juvenile court did not prompt the State to introduce evidence that it knew would bolster the State's case. Rather, similar to *Tyreke H.*, the court here did not know what the additional evidence would show. The additional testimony it sought from LeFevour and Deberry could have "cut either way." The additional testimony could have shown that A.S.'s services were in fact terminated because of the permanency goal change, as Burns believed, or it could have shown that the periods during which A.S. failed to make progress and the problematic visits did not match the periods pled by the State in the petitions. That the juvenile court's ultimate finding was adverse to A.S. does not demonstrate that the juvenile court acted as an advocate for the State.

¶ 30 A.S. argues that her due process rights were violated when the juvenile court reopened the proofs but fails to develop this argument with explanation or citations to any authority. Points not argued are forfeited (Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018)), and in the absence of clearly

developed legal argument this court will not “act as an advocate or seek error in the record” (*U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 459 (2009)). Our review of the fitness hearing shows the juvenile court was diligent in its responsibility to hear relevant testimony in order to make an informed judgment on the fitness of A.S. We therefore reject A.S.’s claim that the trial court’s decision to seek additional evidence violated her rights to due process.

¶ 31 A.S. next claims that the juvenile court committed reversible error in denying her motion to exclude witnesses under Illinois Rule of Evidence 615 (eff. Jan. 1, 2011). A.S. does not specify which of the juvenile court’s rulings on the motions to exclude she is challenging. Our review of the record shows that the juvenile court denied A.S.’s motions to exclude witnesses twice: at the opening of the fitness hearing on May 23, 2018, to exclude the foster parents, James D. and David R., and at the continued fitness hearing on July 19, 2018, to exclude the caseworker, Burns, who previously testified. A.S. argues that the language of Rule 615 is mandatory, and that the juvenile court’s failure to exclude witnesses upon her request requires reversal as a matter of right. We disagree.

¶ 32 Rule 615 provides in part that “At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion.” Ill. R. Evid. 615 (eff. Jan. 1, 2011). Notably, long before the adoption of the Illinois Rules of Evidence, Illinois caselaw was clear that the decision to exclude witnesses from the courtroom is a matter within the discretion of the trial court. *People v. Dixon*, 23 Ill. 2d 136 (1961). A defendant “has no absolute right to have witnesses excluded.” *People v. Mack*, 25 Ill. 2d 416, 422 (1962). In *Dixon*, our supreme court considered the rationale behind making exclusion of witnesses a matter of right, which proposes that sequestration of witnesses prevents witnesses from altering their testimony based on the testimony of another. 23 Ill. 2d at 138-139. The *Dixon* court

stated that generally, motions to exclude witnesses should be allowed. *Id.* at 140. However, our supreme court held that in some cases it may be proper to permit one or more witnesses to remain in the courtroom. *Id.* Accordingly, the trial court's denial of a motion to exclude witnesses should not be disturbed unless the record fails to disclose a sound basis for the denial or prejudice to the defendant is shown. *Id.*; *People v. Chennault*, 24 Ill. 2d 185, 187 (1962).

¶ 33 Here, we find that the juvenile court did not abuse its discretion in denying A.S.'s motions to exclude witnesses. The record discloses that the juvenile court denied, in part, A.S.'s motion to exclude the foster fathers, James D. and David R., at the beginning of the fitness hearing on May 23, 2018. The record shows that the State did not intend to call James D. or David R. as witnesses during the fitness hearing. The State represented that James D. and David R. would be called as witnesses at the best interests hearing. Because neither James D. nor David R. testified during the fitness part of the termination of parental rights trial, the juvenile court did not abuse its discretion in denying A.S.'s motion. There was no testimony to be presented by James D. and David R. that could have been influenced by their presence during the fitness hearing.

¶ 34 A.S. argues that she was prejudiced because James D. later testified at the best interests hearing with a pad of notes. However, A.S. has not shown what was on the note pad or that James D. relied on it during his testimony. As such, A.S. has not demonstrated any prejudice. Further, because A.S. does not challenge the juvenile court's best interests determination on appeal, her argument fails.

¶ 35 Second, at the continued fitness hearing on July 19, 2018, the juvenile court denied A.S.'s motion to exclude Burns because she had "already testified" during the fitness hearing on May 23, 2018. Because Burns had previously testified, it was reasonable for the court to presume that her exclusion from the courtroom was not necessary to prevent her from altering or fabricating her

testimony based on the testimony of other witnesses. We find no error by the juvenile court in this regard.

¶ 36 A.S. argues that the codification of the Illinois Rules of Evidence resulted in Illinois adopting an interpretation of Federal Rule of Evidence 615 (eff. Dec. 1, 2011), where the exclusion of witnesses is a matter of right. We disagree. Nothing in our rules of evidence reflects an intention to modify the longstanding rule in Illinois that a defendant “has no absolute right to have witnesses excluded.” *Mack*, 25 Ill. 2d at 422. Furthermore, federal courts of appeal have acknowledged that, while “Rule 615 sequestration is mandatory *** a trial court has discretion to allow the testimony of a witness who had violated the Rule and that a party must demonstrate an abuse of discretion and ‘sufficient’ prejudice to warrant reversal on account of such testimony.” *United States v. Ortega-Chavez*, 682 F.2d 1086, 1089-90 (5th Cir. 1982); see also *Malek v. Federal Insurance Co.*, 994 F.2d 49, 53-54 (2d Cir. 1993) (reviewing the district court’s exclusion of an expert during an adversary’s expert testimony for an abuse of discretion); *United States v. Charles*, 456 F.3d 249, 257 (1st Cir. 2006) (“A district court’s decision on whether to sequester a witness is reviewed for abuse of discretion.”). It is clear that even the Federal Rule of Evidence 615 has been interpreted as giving the federal district courts discretion to exclude witnesses and craft remedies for any prejudicial violations of the rule.

¶ 37 Furthermore, the Committee Commentary to our rules of evidence states that “the Committee incorporated into the Illinois Rules of Evidence the current law of evidence in Illinois whenever the Illinois Supreme Court or the Illinois Appellate Court had clearly spoken on a principle of evidentiary law within the last 50 or so years.” Ill. R. Evid., Committee Commentary (1) (eff. Jan. 1, 2011). The Committee Commentary notes that only “[w]here there was no conflict with statutes or recent Illinois Supreme Court or Illinois Appellate Court decisions,” it incorporated “uncontroversial developments with respect to the law of evidence as reflected in the Federal Rules

of Evidence.” Ill. R. Evid., Committee Commentary (3) (eff. Jan. 1, 2011). The committee noted 14 instances where this occurred, among which Rule 615 is not included. *Id.* Before the adoption of the Illinois Rules of Evidence, our supreme court clearly spoke on the issue of excluding witnesses. And, as the Committee Commentary explains, the codification of Rule 615 was not intended to alter the substantive rights of the parties in Illinois related to the exclusion of witnesses. Rather, the codification of Rule 615 merely affirmed existing Illinois law on the exclusion of witnesses and improved accessibility to the existing rule.

¶ 38 Finally, A.S. argues that the juvenile court’s judgment finding her unfit to parent N.F. and I.S. is against the manifest weight of the evidence.

¶ 39 The State must prove unfitness of a parent by clear and convincing evidence. *In re H.S.*, 2016 IL App (1st) 161589, ¶ 23. A parent’s failure to make “reasonable progress” toward the return of their child can support a finding of unfitness. *Id.* at ¶ 24 (citing 750 ILCS 501/1D(m)(ii) (West 2014)). Reasonable progress is an objective standard that requires, at a minimum, “measurable or demonstrable movement” toward reunification. *In re Daphnie E.*, 368 Ill. App. 3d 1052, 1067 (2006). A parent’s compliance with service plans and court directives is the benchmark for measuring reasonable progress. *Id.* We may reverse the juvenile court’s finding of clear and convincing evidence of parental unfitness where that finding is against the manifest weight of the evidence. *In re C.N.*, 196 Ill. 2d 181, 208 (2001). “A finding is against the manifest weight of the evidence where the opposite conclusion is clearly evident.” *Id.*

¶ 40 The juvenile court found that A.S. was unfit on the grounds that she had failed to make reasonable progress towards the return of N.F. and I.S. during the periods of March 22, 2016, through December 22, 2016, December 22, 2016, through September 22, 2017, and August 23, 2017, through May 23, 2018. We may affirm the juvenile court’s finding of unfitness based on

A.S.'s failure to make reasonable progress in any nine-month period. *In re Phoenix F.*, 2016 IL App (2d) 150431, ¶ 7.

¶ 41 We find that the evidence was clear and convincing that A.S. failed to make reasonable progress toward the return of the children during the period of December 22, 2016, through September 22, 2017. LeFevour testified that A.S.'s attendance at therapy was inconsistent during this period, before stopping altogether for a month in August of 2017. Burns also testified that A.S. was inconsistent in attending individual therapy during the summer of 2017. Deberry testified that because of A.S.'s inability to control her emotions, one of her visits with the children was ended early in July 2017. Deberry, LeFevour, and Burns also testified that A.S.'s visits were suspended with N.F. in June or July 2017. Deberry also testified that A.S. was unsuccessfully discharged from parenting coaching in July 2017 because she refused the service. Deberry, LeFevour, and Burns all testified that A.S. was not making measurable progress in individual therapy or parenting coaching towards her goal of regulating her emotional outbursts during this period. The evidence thus shows that A.S. failed to consistently attend her services, and that she failed to demonstrate that she was implementing the strategies and skills she learned in her services. We therefore find that the juvenile court's judgment that A.S. failed to make reasonable progress toward the return of the children from December 22, 2016, through September 22, 2017, is not against the manifest weight of the evidence.

¶ 42

III. CONCLUSION

¶ 43 The judgment of the juvenile court is affirmed.

¶ 44 Affirmed.