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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2070**

In the Matter of the Welfare of the
Children of: B. L. P., Parent.

**Filed May 11, 2010
Affirmed
Bjorkman, Judge**

Nicollet County District Court
File No. 52-JV-08-330

Marisela E. Cantu, Eskens Gibson & Behm Law Firm, Chtd., Mankato, Minnesota (for appellant B.L.P.)

John L. Yost, New Ulm, Minnesota (for respondent D.W.)

Sarah Nelson, St. Peter, Minnesota (guardian ad litem)

Considered and decided by Shumaker, Presiding Judge; Larkin, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant father challenges the termination of his parental rights to his two children, asserting that the district court's findings are not adequate. Because we conclude that the district court's findings address the statutory criteria, are based on

substantial evidence, and the inclusion of unsupported findings is harmless error, we affirm.

FACTS

Appellant B.L.P. challenges the termination of his parental rights to his children, B.P. (born in 1994) and A.P. (born in 1997). Appellant and respondent D.W. were married in 1992 and divorced in 2000. After the divorce, the children frequently spent weekends in appellant's home.

On December 7, 2006, B.P. found camcorder tapes in appellant's closet. She watched some of the tapes, and, disturbed by their content, turned them over to respondent. When respondent watched the tapes, she found that they showed B.P. and her childhood friend, J.T., nude.

The next day, respondent contacted the New Ulm Police Department. The lead investigator was Commander Dave Borchert. After viewing the tapes, Commander Borchert obtained a warrant and searched appellant's residence, seizing a video camera and several additional tapes. Appellant was arrested and charged with using a minor in a sexual performance in violation of Minn. Stat. § 617.246 (2002).

On July 18, 2007, appellant was indicted in federal court on multiple counts of production of child pornography in violation of 18 U.S.C. § 2251(a), (e) (2003). At the same time, the state charges were dropped. Appellant pleaded guilty to one count of producing child pornography and was sentenced to 198 months' incarceration.¹

¹ Appellant's incarceration will not end until after both children have reached the age of majority.

Respondent filed a petition to terminate appellant's parental rights in October 2008. The district court appointed a guardian ad litem (GAL) to determine the best interests of the children. The GAL's investigation included interviewing both children. The GAL reported that both children had been traumatized by appellant's conduct and that termination of appellant's parental rights was in the best interests of the children.

The district court conducted an evidentiary hearing. Appellant appeared by interactive television and was represented by counsel. The district court took testimony from respondent, respondent's husband, Commander Borchert, the GAL, and appellant.

Respondent testified to the content of the tapes. She stated that they showed B.P. and J.T. nude. Based on the footage, respondent estimated that the children were eight years old when the tapes were made. The tapes repeatedly focused on the girls' breasts and genitals. The girls identified the camera operator as "dad." Respondent identified the operator's voice as being appellant's. Another part of the tapes showed a young girl, apparently sleeping, at first with her underwear on, and then with her genitals exposed.

Commander Borchert also testified about the content of the tapes, including that one shows the camera operator touching one of the girl's genitals. He also testified that appellant acknowledged, during questioning, that he had made the tapes. Appellant explained to Commander Borchert that he had been dating J.T.'s mother at the time he made the tapes, and when their relationship began to deteriorate he began to take a sexual interest in J.T. He referred to the filming of the tapes as a "sick escape" from his problems. But appellant denied that he had ever touched the girls.

The district court issued its order terminating appellant's parental rights on October 25, 2009. This appeal follows.

D E C I S I O N

Because “parental rights may be terminated only for grave and weighty reasons,” *In re Welfare of Child of W.L.P.*, 678 N.W.2d 703, 709 (Minn. App. 2004), “[t]his court exercises great caution” when reviewing termination proceedings, *In re Welfare of S.Z.*, 547 N.W.2d 886, 893 (Minn. 1996). We review decisions to terminate parental rights to determine “whether the [district court’s] findings address the statutory criteria, whether those findings are supported by substantial evidence, and whether they are clearly erroneous.” *In re Welfare of D.D.G.*, 558 N.W.2d 481, 484 (Minn. 1997). “A finding is clearly erroneous if it is either manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 660–61 (Minn. 2008) (quotation omitted). “[B]ecause a child’s best interests are a paramount consideration in TPR proceedings,” the district court cannot terminate parental rights unless it is in the child’s best interests. *In re Welfare of Children of S.W.*, 727 N.W.2d 144, 149 (Minn. App. 2007), *review denied* (Minn. Mar. 28, 2007).

Parental rights may be terminated where

a child has experienced egregious harm in the parent’s care which is of a nature, duration, or chronicity that indicates a lack of regard for the child’s well-being, such that a reasonable person would believe it contrary to the best interest of the child or of any child to be in the parent’s care.

Minn. Stat. § 260C.301, subd. 1(b)(6) (2008). The term “egregious harm” is defined as

the infliction of bodily harm to a child or neglect of a child which demonstrates a grossly inadequate ability to provide minimally adequate parental care. . . . Egregious harm includes, but is not limited to:

. . . .

(10) conduct toward a child that constitutes criminal sexual conduct under sections 609.342 to 609.345.

Minn. Stat. § 260C.007, subd. 14. All of the conduct referenced in subpart (10) involves touching of a person's intimate parts or sexual penetration.

The district court found that there was substantial evidence to support a finding of egregious harm. We agree. Commander Borchert testified that the tapes recovered at appellant's home showed the camera operator touching a sleeping girl's genital area.² Appellant admitted to Commander Borchert that he made the tapes. Respondent testified that the two girls depicted in the tapes were eight years old. This testimony is evidence of conduct toward a child that constitutes criminal sexual conduct as defined by Minn. Stat. § 609.343, subd. 1(a) (2008) (prohibiting sexual contact with a person who is under 13 years of age by an actor who is more than 36 months older). On this record, we conclude that the district court's finding of egregious harm is not clearly erroneous.

Appellant argues that certain of the district court's findings are based on evidence not contained in the record. We agree. But when the findings necessary to sustain a legal

² Appellant argues that respondent did not meet her burden of proof because the tapes themselves were not admitted. But appellant did not raise this issue in the district court and did not object to the testimony about the tapes. Accordingly, we do not consider this argument. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating general rule that an appellate court will not consider matters not argued to and considered by the district court); *see also D.D.G.*, 558 N.W.2d at 485 (applying *Thiele* in a termination-of-parental-rights appeal).

conclusion are adequately supported, a court's inclusion of other unsupported findings is harmless error. *Hanka v. Pogatchnik*, 276 N.W.2d 633, 636 (Minn. 1979). The challenged findings refer to an interview of J.T. that is not part of the record and references to the procedural history of appellant's criminal proceedings. These findings are not supported by record evidence, but they are not inconsistent with the critical findings. Because the district court's findings related to egregious harm are adequately supported by the evidence, we discern no grounds for reversal due to the minimal unsubstantiated findings. *See In re Welfare of S.R.A.*, 527 N.W.2d 835, 838 (Minn. App. 1995) (refusing to reverse the termination of parental rights for harmless evidentiary error), *review denied* (Minn. Mar. 29, 1995).

Appellant also challenges the termination on the ground that the county agency should have initiated this proceeding. This argument is unavailing. The Minnesota Rules of Juvenile Protection Procedure expressly provide that "[a] termination of parental rights petition may be drafted and filed by the county attorney or any responsible person." Minn. R. Juv. Prot. P. 33.01, subd. 3. The mere fact that the county did not initiate termination proceedings has no bearing on respondent's legal right to do so or the merits of the petition.

We note that appellant does not challenge the district court's findings regarding the best interests of the children. *See S.W.*, 727 N.W.2d at 149 (observing that the best interests of the child is the paramount standard in termination-of-parental-rights cases). The GAL's testimony presented substantial record evidence that the best interests of both children would be served by termination. Because the district court's findings are not

clearly erroneous and address the statutory criteria, we conclude that the district court did not abuse its discretion in terminating appellant's parental rights.

Affirmed.