

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of KAYLA HESS, Minor.

CYNTHIA and SCOTT ROLLENHAGEN,

Petitioners-Appellees,

v

JAIRO HESS,

Respondent-Appellant.

UNPUBLISHED

December 18, 2003

No. 249798

Kent Circuit Court

Family Division

LC No. 03-004901-NA

Before: Fitzgerald, P.J., and Neff and White, JJ.

MEMORANDUM.

Respondent-appellant appeals as of right from the trial court order terminating his parental rights to the minor child under MCL 712A.19b(3)(f) and (g). We affirm.

We agree with respondent-appellant that the trial court clearly erred in finding that § 19b(3)(f) was established. There was no evidence that respondent-appellant had the ability to support or assist in supporting Kayla. Further, there was no evidence that respondent-appellant was able to communicate with Kayla while imprisoned. It is certainly possible that respondent-appellant could have provided some support for Kayla and communicated with her while incarcerated, but this record contains no evidence to support the possibility. See *In re Caldwell*, 228 Mich App 116, 121-122; 576 NW2d 724 (1998). However, the trial court did not clearly err in finding that § 19(b)(3)(g) was established. Respondent does not dispute the trial court's finding that he had failed to provide proper care and custody in the past for Kayla. Respondent admitted at trial that he had made "mistakes" in the past that had led to previous incarcerations, including attacking the child's mother and severely harming her. Respondent also did not dispute petitioner's evidence that he had no contact with Kayla for over three years. Given respondent's history and giving deference to the trial court's superior ability to assess credibility, we do not have a definite and firm conviction that the trial court made a mistake in finding that § 19b(3)(g) was established. MCR 3.977(J). Because only one statutory ground is required to terminate parental rights, we affirm on this basis.

Respondent-appellant's claim that he received ineffective assistance is without merit. The alleged errors that respondent-appellant relies upon were matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Among the alleged errors, respondent-appellant attacks counsel's decision not to call respondent-appellant as a witness. However, we note that respondent-appellant was able to read a lengthy statement into the record that detailed his version of the events and his position and was not subject to cross-examination by the other parties. Respondent-appellant has not established that counsel's performance fell below an objective standard of reasonableness, nor that the representation so prejudiced him that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Helene N. White