STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ARISTA LITTLE, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

LISA M. LITTLE,

Respondent-Appellant,

and

COREY A. COEUR,

Respondent.

UNPUBLISHED
May 11, 2004

No. 250944
Ogemaw Circuit Court
Family Division
LC No. 03-012230-NA

In the Matter of ARISTA LITTLE, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

COREY A. COEUR,

Respondent-Appellant,

and

LISA M. LITTLE,

Respondent.

No. 250981
Ogemaw Circuit Court
Family Division
LC No. 03-012230-NA

Before: Murray, P.J., and Neff and Donofrio, JJ.

PER CURIAM:

In these consolidated appeals, respondents appeal as of right from the trial court order terminating their parental rights to the minor child. In Docket No. 250944, we reverse as to respondent Lisa Little. In Docket No. 250981, we affirm as to respondent Corey Coeur.

Respondents both argue that they were denied the right to effective assistance of counsel when their attorneys failed to question juror Burgher regarding a conversation she heard involving witness Megan Van Horn. This issue was not preserved for appellate review because it was not argued in a motion for a new trial. The issue also clearly lacks merit. Using the criminal appeal as an analogy, a parent is denied the right to effective assistance of counsel when counsel's performance was defective, prejudiced the parent, and deprived the parent of a fair trial. See *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *In re Nash*, 165 Mich App 450, 458; 419 NW2d 1 (1987). To show prejudice, the parent must show that, but for counsel's error, there was a reasonable probability the result would have been different. *People v Shively*, 230 Mich App 626, 628; 584 NW2d 740 (1998).

In the present case, respondents were not prejudiced or denied a fair trial by their attorneys' failure to voir dire juror Burgher. At trial, the attorneys discussed this issue with their clients, and both declined the court's offer to voir dire juror Burgher. The conversation she overheard occurred three months before the trial and revealed no facts or allegations other than those the judge had read from the petition during voir dire. The alleged error was not so serious as to impugn the integrity of the jury and not so offensive to the maintenance of a sound judicial system that it could never be called harmless. See *People v Grove*, 455 Mich 439, 472; 566 NW2d 547 (1997); *People v Clark*, 220 Mich App 240, 246; 559 NW2d 78 (1996). Furthermore, the alleged mistake was likely to have been trial strategy, and absent the alleged error, there is no reasonable likelihood of a different result. The performance of respondents' attorneys was otherwise adequate. *Shively, supra*.

Similarly, we find no error in the failure of counsel for respondent Coeur to request additional medical tests for ostegenesis imperfecta, also known as "OI" or brittle bone disease. Drs. Petrani, Kottamasu, and Outwater all agreed that there was no evidence of "OI" here. The pattern of rib fractures and the baby's facial features differed from those found with "OI." The fractures were consistent with non-accidental trauma. Considering this evidence, there is no reasonable likelihood of a different result absent counsel's alleged error.

Respondents both claim reversible error in the termination of their parental rights. Respondents' parental rights were apparently terminated under MCL 712A.19b(3)(b)(ii) and (iii) and (j). On appeal, respondents argue that clear and convincing evidence did not exist to show there was a reasonable likelihood of harm should Arista be returned to their custody. We review the trial court's findings for clear error. *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). A finding is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); *In re Terry*, 240 Mich App 14, 22; 610 NW2d 563 (2000).

Upon review of the record, we have a definite and firm conviction that a mistake was committed in terminating the parental rights of respondent mother. *In re Boursaw*, 239 Mich App 161, 177; 607 NW2d 408 (1999) overruled in part on other grounds, *In re Trejo,* 462 <ocj 341' 612 NW2d 407 (2000); *In re Marin*, 198 Mich App 560, 566; 499 NW2d 400 (1993). Respondent mother cooperated and benefited from the parenting classes and other services required or provided to improve parenting skills. Respondent mother was generally appropriate with the baby during visitations. She was working, attending classes, and planning for the baby. Although she had failed to protect Arista from abuse, the perpetrator was never identified and respondent mother clearly was learning to be more attentive to and protective of the baby. We believe termination of her parental rights was premature. She should have been offered transportation assistance and the opportunity to have visitations separate from respondent father. She indicated a willingness to separate from respondent father in order to retain parental rights to Arista. On remand, she should be given a chance to make good on this offer, with separate visitations and a new parent/agency agreement that does not involve respondent father. As in *Boursaw*, *supra*, the trial court's conclusion of a reasonable likelihood of harm should the child be returned to respondent mother was "essentially conjecture."

With respect to respondent father, the evidence did clearly and convincingly show a reasonable likelihood of harm if Arista were returned to his home. Respondent father fell asleep or feigned sleep during visitations, repeatedly handled Arista so roughly as to alarm the case-worker or respondent mother, and ignored or responded with hostility to FIA's parenting suggestions and respondent mother's requests to hold Arista, to do something differently, or to refrain from doing something annoying or dangerous. Respondent father was a registered sex offender, having victimized a young boy as a teen. Respondent father had a history of stealing, lying, and disruptive and assaultive behavior. He did not attempt to obtain employment until late in the case. His attitude was uncooperative in general; he did not believe he needed parenting education or anger management classes, and participated only to retain custody of Arista. The evidence showed that he did not benefit from the services. We find that clear and convincing evidence supported the trial court's decision to terminate respondent father's parental rights under subsection (3)(j).

Further, the evidence did not show that termination of respondent father's parental rights was clearly not in Arista's best interests. MCL 712A.19b(5); *Trejo, supra* at 356-357. Respondent father's behavior during visitations, uncooperative attitude, and assaultive history indicated that it was not in Arista's best interests to be returned to his care. Arista is very young and needs a safe, permanent home. There was no evidence of a strong bond between Arista and respondent father. Arista cannot wait for respondent father to acknowledge and work on his problems sufficiently to become an effective parent. Thus, we conclude that the trial court did not clearly err in its finding regarding respondent father on the best interests question.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Janet T. Neff
/s/ Pat M. Donofrio