STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of CASEY ALEXANDER O'BERRY and KYLE MICHAEL O'BERRY, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

NATHAN ALLEN O'BERRY,

Respondent-Appellant.

UNPUBLISHED
March 18, 2008

No. 279493
Oakland Circuit Court
Family Division
LC No. 07-729356-NA

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Respondent appeals as of right from the order terminating his parental rights to the minor twin children pursuant to MCL 712A.19b(3)(b)(i), (g), (j), (k)(iii), and (k)(iv). We affirm.

Respondent first contends that the trial court improperly denied his request to call a witness at the bench trial. Respondent argues that, by denying him the opportunity to call witnesses not included on his witness list, the trial court construed MCR 3.922 in a way that was contrary to the concepts of fairness, flexibility, and simplicity.

"The trial court has discretion to exclude witnesses not listed on the party's witness list." *Gillam v Lloyd*, 172 Mich App 563, 584; 432 NW2d 356 (1988). The trial court abuses its discretion in an evidentiary matter when the ruling has no basis in law or fact. See *Mulholland v DEC Int'l Corp*, 432 Mich 395, 411; 443 NW2d 340 (1989).

MCR 2.401(I)(2)[1] provides that the trial court may order that any witness not listed on a witness list will be prohibited from testifying "except upon good cause shown." We find that respondent-father failed to show "good cause." At the bench trial, respondent's attorney stated that he learned that day that there "may" be a witness who could testify regarding how the infant

[1] MCR 3.922(D), which is a rule specifically applicable to child protective proceedings, references MCR 2.401.

child was injured. Neither counsel nor respondent stated who this witness was or whether this witness could in fact testify regarding how the injury occurred. Further, neither counsel nor respondent indicated why they had received the alleged exculpatory information at such a late date. Thus, the trial court did not abuse its discretion by not allowing this unknown witness to testify.

Respondent next challenges the sufficiency of the evidence to establish the statutory grounds for termination. Termination of parental rights is appropriate if the petitioner proves by clear and convincing evidence at least one basis for termination. *In re Trejo*, 462 Mich 341, 352, 355; 612 NW2d 407 (2000). Once this has occurred, the trial court shall terminate parental rights unless it finds that the termination is clearly not in the best interests of the children. *Id*. at 352-354. This Court reviews the trial court's findings under the clearly erroneous standard. *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999); MCR 3.977(J).

Respondent specifically contends that the trial court erred in relying on his statements to a police officer that he was responsible for his infant son's injuries. Respondent moved to suppress these statements and, after a hearing, the trial court found that the statements were voluntarily made and were admissible as evidence. We conclude that we do not need to review the voluntariness of defendant's statements to the police. Even if we were to find that the statements should have been suppressed, there was other evidence establishing the statutory grounds for termination of respondent's parental rights. Dr. Jody Johnson, the emergency medicine physician, testified that one of the three-month-old twins suffered from a spiral fracture on the left femur. Dr. Johnson and Dr. Adeel Khalid, the radiologist, testified that the child's injury was caused by twisting the leg. Dr. Johnson and Dr. Khalid both opined that this injury could not have occurred as a result of the child's sitting in a baby swing. Dr. Khalid testified that this injury happened within a few hours to within a few days before the child was examined in the emergency room. There was testimony that respondent had been taking care of the child in the days before the injury. In addition, the children's mother testified that respondent told her, in a letter sent from jail, that he may have been too rough when changing the baby's diaper. Finally, there was evidence at the trial that respondent had been convicted of second-degree child abuse as a result of the incident at issue.[2]

We find that the above evidence, along with respondent's testimony that he had not seen a psychiatrist because he did not think that he needed to do so, supported the trial court's conclusions that respondent caused physical injury to a child or a sibling and that there was a reasonable likelihood that the children would be injured in the future if returned to respondent's care, MCL 712A.19b(3)(b)(i); that there was a reasonable likelihood that the children would be harmed if returned to respondent's care, MCL 712A.19b(3)(j); that the abuse of a child or a sibling included severe physical abuse, MCL 712A.19b(3)(k)(iii); and that the abuse also included the serious impairment of a limb, MCL 712A.19b(3)(k)(iv). The evidence established, clearly and convincingly, at least one statutory basis for termination, *Trejo, supra* at 352, 355, even without considering defendant's statements to the police that were admitted at the trial.

[2] Defendant does not make an argument in his appellate brief that the evidence of his conviction should not have been admitted.

Respondent finally argues that the trial court erred in determining that termination of his parental rights was not contrary to the children's best interests. MCL 712A.19b(5). Although respondent testified that he was in counseling, was taking his prescribed medication regularly, and had been participating in drug screens, there was no testimony regarding his progress in counseling. Respondent's psychological evaluation tended to show that the children would not be safe in respondent's care. The trial court noted that there had been no evidence on how termination of respondent's parental rights would affect his young twin sons and therefore no evidence to show that termination of respondent's parental rights was clearly not in their best interests. We find that the trial court did not clearly err in its best interests determination.

Affirmed.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Kurtis T. Wilder