STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of SAVANNA DEPEW, NOVAE RAELYNN ASHLEY, and MATTHEW JAMES ASHLEY, JR., Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

TONY HARVILLE,

Respondent-Appellant,

and

GENA MARIE ASHLEY and MATTHEW JAMES ASHLEY, SR.,

Respondents.

UNPUBLISHED
April 17, 2008

No. 280120
Calhoun Circuit Court
Family Division
LC No. 2006-001025-NA

In the Matter of NOVAE RAELYNN ASHLEY, SAVANNA DEPEW, and MATTHEW JAMES ASHLEY, JR., Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

GENA MARIE ASHLEY,

Respondent-Appellant,

and

No. 280377
Calhoun Circuit Court
Family Division
LC No. 2006-001025-NA

MATTHEW JAMES ASHLEY, SR., and TONY HARVILLE,

Respondents.

In the Matter of NOVAE RAELYNN ASHLEY, MATTHEW JAMES ASHLEY, JR., and SAVANNA DEPEW, Minors.

DEPARTMENT OF HUMAN SERVICES,

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v

MATTHEW JAMES ASHLEY, SR.,

Respondent-Appellant,

and

GENA MARIE ASHLEY and TONY HARVILLE,

Respondents.

No. 280378
Calhoun Circuit Court
Family Division
LC No. 2006-001025-NA

Before: Jansen, P.J., and Donofrio and Davis, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from the trial court order terminating respondent Tony Harville's parental rights to the minor child Savanna under MCL 712A.19b(3)(c)(ii), (g), (j), (l), and (m), respondent Matthew Ashley, Sr.'s parental rights to the minor children Novae and Matthew, Jr. under MCL 712A.19b(3)(c)(i), (g), and (j), and respondent Gena Ashley's parental rights to all three children under MCL 712A.19b(3)(c)(i), (g), and (j). We affirm.

I. Respondent Tony Harville

The trial court did not clearly err in finding that the statutory grounds for termination of respondent Tony Harville's parental rights were established by clear and convincing evidence. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). More than 182 days elapsed between the initial disposition for Savanna and the termination hearing. The original condition leading to adjudication with regard to respondent Harville was his incarceration, but he was released two weeks after the adjudication trial. He had failed to provide proper care or custody for Savanna due to his incarceration, instead leaving Savanna in the care of respondent mother Gena Ashley, who lost custody of her children because of abuse and neglect. Additional conditions requiring the trial court's continuing jurisdiction over Savanna after respondent Harville's release from prison were his lack of housing, a history of child abuse leading to termination of his parental rights to other children, anger management issues, lack of employment, and lack of parenting skills. Respondent Harville was provided a recommendation, notice, a hearing, and 12 months to rectify those conditions.

The evidence clearly showed that, during the 12 months following his release from prison, respondent did not rectify those conditions. He did not gain employment. He found suitable housing nine months after release, but it was funded by his girlfriend's SSI income. Respondent engaged in counseling for four months while it was paid by the agency, but quit when reunification funding stopped. He successfully completed parenting classes, but his therapist testified at the termination hearing that he required an additional year of intensive therapy before he could parent a child without perpetuating a cycle of abuse. He did not attend anger management classes as recommended.

Given respondent's complete dependence on others for income and shelter during the 12 months before termination, and his inability to parent a child without perpetuating abuse absent another year of intensive counseling, the trial court did not clearly err in finding that he had not rectified the additional conditions of adjudication and would not provide proper care or custody for Savanna, and there was no reasonable expectation that he would do so within a reasonable time. If returned to his care, Savanna would be at risk of physical harm due to respondent's inability to provide her basic needs, and she would suffer the emotional harm of separation from her siblings. The trial court did not clearly err in terminating respondent's parental rights under §§19b(3)(c)(ii), (g), and (j).

The evidence also established that in 2001 respondent Harville had voluntarily released his parental rights to two children after an abuse proceeding was initiated against him for physically abusing his oldest child. In 2003, he voluntarily released his parental rights to a third child, and in 2005 his parental rights were involuntarily terminated to a fourth child because he was incarcerated. Therefore, clear and convincing evidence also supported the trial court's termination of respondent's parental rights under §§19b(3)(l) and (m).

Furthermore, the evidence did not show that termination of respondent Harville's parental rights was clearly contrary to Savanna's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). Respondent was a stranger to Savanna, and she was not bonded to him. She resisted visiting him even though he was appropriate at visits. He lacked the financial resources to provide for her basic needs and could not safely parent her for a year or more. Savanna was strongly bonded to her siblings and fictive kin, and there was no evidence

that termination of her father's parental rights would negatively impact her. The trial court did not err in finding that continued placement in the fictive kin's pre-adoptive home was in Savanna's best interests.

II. Respondent Matthew Ashley, Sr.

Respondent Matthew Ashley, Sr. does not address the statutory grounds on which his parental rights were terminated. Instead, he contests for the first time on appeal the trial court's jurisdiction, arguing that jurisdiction, and hence ultimately termination, was based on the inadmissible hearsay testimony of forensic interviewer Elizabeth Brown.

A tender years hearing was held before the adjudication trial to determine whether Novae's statements alleging Mr. Ashley's sexual abuse in separate forensic interviews with Elizabeth Brown and Beth Gonding contained adequate indicia of trustworthiness and could be admitted at trial. Elizabeth Brown noted that the audio-video tape of her interview with Novae lacked audio, and the trial court referee declined to view it at the tender years hearing for lack of probative value. Respondent argues on appeal that the best evidence rule, MRE 1002, requires that, "[t]o prove the content of a writing, recording, or photograph, the original of the writing, recording, or photograph is required, except as otherwise provided in these rules or by statute," and that the trial court reversibly erred in not viewing the best evidence, the tape, before ruling that Elizabeth Brown's statements were admissible.

It is well established that the trial court's jurisdiction may not be collaterally attacked in a subsequent appeal of an order terminating parental rights. *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993). Respondent's counsel acquiesced to the trial court's decision by saying "okay" when the court declined to view the tape. Respondent did not seek review or rehearing under MCR 3.991 or MCR 3.992 of the trial court's decision that Elizabeth Brown's and Beth Gonding's testimonies would be admissible, if offered. Therefore, respondent did not preserve this issue for appeal. Unpreserved constitutional issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

The trial court's failure to view the audio-video tape before finding Elizabeth Brown's testimony admissible was not error and did not affect respondent Matthew Ashley's substantial rights. Beth Gonding's testimony alone was sufficient to show Novae's statements contained adequate indicia of trustworthiness. Beth Gonding later observed Elizabeth Brown's forensic interview of Novae and testified that Novae gave consistent information during both interviews. In addition, the tape was defective to the extent that it could not be transcribed and would have little, if any, probative value if viewed without sound. Therefore, the tape without audio no longer constituted the best evidence of Novae's statements, rather Elizabeth Brown's testimony did, and that testimony was properly heard by the jury.

III. Respondent Gena Ashley

Respondent Gena Ashley does not address the statutory grounds on which her parental rights were terminated, but appeals on the ground that she was denied the effective assistance of counsel. Respondent did not raise the issue of ineffective assistance of counsel in the trial court. However, a claim of ineffective assistance of counsel may be raised for the first time on appeal if the details relating to the alleged ineffective assistance of counsel are sufficiently contained in

the record to permit this Court to decide the issue. *People v Cicotte*, 133 Mich App 630, 636; 349 NW2d 167 (1984).

To establish a claim of ineffective assistance of counsel, respondent is required to show that her attorney's performance was prejudicially deficient and that, under an objective standard of reasonableness, the attorney made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). In showing that counsel's representation was deficient, respondent must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed2d (1984). To demonstrate prejudice, respondent must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694.

Respondent claims the following instances of error by her first attorney at the adjudication trial and her second attorney at the permanency planning and termination hearings: (1) failure to voir dire the jury, (2) failure to make opening statements presenting respondent mother's position, (3) being chastised by the trial judge in front of the jury, (4) pursuing questioning harmful to respondent's cause, and (5) failure to elicit helpful testimony.

A. Failure to Voir Dire the Jury

An attorney's decisions relating to the selection of jurors generally involve matters of trial strategy, which this Court normally declines to evaluate with the benefit of hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Following voir dire of the jury by the trial judge and two other attorneys at the adjudication trial, respondent's first attorney stated, "I think everything has been asked, so I won't continue with the same questions. . . ." Declining to engage in needlessly repetitive questioning was not conduct that fell below an objective standard of reasonableness, and there was no evidence on the record that, but for counsel's failure to actively participate in the jury voir dire, the outcome of the proceedings would have been different.

B. Failure to Make Opening Statements

Neither of respondent's attorneys made opening statements at their respective proceedings. However, the decision to waive opening statement is a subjective judgment and matter of trial strategy that is rarely the basis of a successful claim of ineffective assistance of counsel. *People v Pawelczak*, 125 Mich App 231, 242; 336 NW2d 453 (1983). Where an attorney makes an extensive closing argument during which he is afforded a full and fair opportunity to comment on the case and the evidence presented, prejudice does not generally result from the waiver of an opening statement. *People v Buck*, 197 Mich App 404, 413-414; 496 NW2d 321 (1992). Counsels' closing statements at the adjudication trial, permanency planning hearing, and termination hearing fully commented on the evidence and advocated respondent's position. She has not shown that declining to make opening statements placed counsels' performance below an objective standard of reasonableness, or but for that omission the outcome of the proceeding would have been different.

C. Chastisement by the Trial Judge

Respondent's first attorney was briefly chastised in the presence of the jury when the trial judge stated during the adjudication trial, "I have to interrupt here. We have disruption at counsel table. I don't want any more of that, please. Mr. Hofstee. Thank you. Go ahead." Respondent did not object in the trial court, and our review is limited to the record provided on appeal, which does not indicate what the disturbance consisted of, that the judicial veil of impartiality was pierced, that the jury perceived counsel as ineffective, or that the outcome of the adjudication trial was affected in any way because of this slight reprimand.

D. Pursuing Questioning Harmful to Respondent's Case

Respondent next alleges that her first attorney's questions of her regarding violation of her agreement with the agency not to allow the children any contact with Mr. Ashley were harmful to her cause, and that counsel's cross-examination of other witnesses regarding Mr. Ashley's sexual abuse of Novae only served to emphasize that abuse and harmed her case. The transcript of the adjudication trial showed the protective services worker had previously testified to respondent's violation of the no-contact agreement, and counsel's questions to respondent were for the purpose of mitigating the effect of that contact by establishing that she had only allowed it in public places where she and the children were never alone with Mr. Ashley. Likewise, Mr. Ashley's perpetration of sexual abuse had already been firmly established through the testimony of Elizabeth Brown and Beth Gonding, and counsel for respondent necessarily acknowledged in cross-examination that the abuse had occurred in order to establish respondent's complete ignorance of the abuse. Counsel's questioning effectively brought out the best of the bad situations in which respondent had been involved. Respondent has not overcome the presumption that counsel's questioning was sound trial strategy, and there is no evidence that it prejudiced the outcome of the adjudication trial.

E. Failure to Elicit Helpful Testimony

Lastly, respondent argues that her second attorney failed at both the permanency planning hearing and the termination hearing to elicit testimony about her compliance with services, progress she had made, the reason she remained with Mr. Ashley, and her ignorance of the abuse. A review of the lower court record shows counsel elicited positive testimony about the positive aspects of respondent's case, including the fact that she very successfully completed parenting classes, made progress in counseling which she voluntarily continued after the termination petition was filed, was sporadically if not permanently employed through a temporary agency, had very positive visits with the children, and had a strong bond with the children. In closing argument, counsel explained that respondent stayed with Mr. Ashley because no criminal charges had been brought against him, and she chose not to take the drastic step of separating from her husband where there was a lack of convincing evidence that he had committed sexual abuse. Respondent and Mr. Ashley had not obtained stable housing or a steady income during the proceeding, and there was not positive information to elicit in that regard. Unfortunately, respondent's actions during the 16 months following the children's removal spoke much louder than any argument counsel could make on her behalf, and it was her refusal to separate from Mr. Ashley and failure to stabilize her housing and income, not counsel's performance, that prejudiced her cause.

In summary, respondent failed to demonstrate that errors she attributes to counsel were anything other than appropriate trial strategy, and she failed to show that the outcome of the adjudication trial, permanency planning hearing, or termination hearing were prejudicially affected by counsel's performance. Respondent was not denied the effective assistance of trial counsel.

Affirmed.

/s/ Kathleen Jansen
/s/ Pat M. Donofrio
/s/ Alton T. Davis