

STATE OF MICHIGAN  
COURT OF APPEALS

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In the Matter of of ZACHARY JAMES COX and  
MCKENZIE ALEXANDRIA COX, Minors.

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DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

KANDICE E. CANTRELL, f/k/a KANDICE E.  
COX,

Respondent-Appellant.

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UNPUBLISHED  
September 25, 2008

No. 284599  
Cass Circuit Court  
Family Division  
LC No. 06-000120-NA

Before: Saad, C.J., and Sawyer and Beckering, JJ.

PER CURIAM.

Respondent appeals as of right the trial court order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(i), (g), and (j). We affirm.

I

Respondent first argues that the trial court improperly admitted an audiotape recording on which she can be heard verbally abusing, and possibly physically abusing, her children. Respondent argues that the admission of this evidence violated state and federal eavesdropping statutes. Generally, we review the admission of evidence for an abuse of discretion. *In re Hill*, 221 Mich App 683, 696; 562 NW2d 254 (1997). But, because defendant never argued during the termination proceedings that the evidence was inadmissible under the federal eavesdropping statute or that admission of the evidence would deny her due process, we review that portion of her argument for plain error affecting her substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Although no specific state statute is referenced on appeal, respondent argued below that the recording was obtained in violation of MCL 750.539d, which provides, in part:

(1) Except as otherwise provided in this section, a person shall not do either of the following:

(a) Install, place, or use in any private place, without the consent of the person or persons entitled to privacy in that place, any device for observing, recording, transmitting, photographing, or eavesdropping upon the sounds or events in that place.

(b) Distribute, disseminate, or transmit for access by any other person a recording, photograph, or visual image the person knows or has reason to know was obtained in violation of this section.

(2) This section does not prohibit security monitoring in a residence if conducted by or at the direction of the owner or principal occupant of that residence unless conducted for a lewd or lascivious purpose.

The audiotape recording was obtained by respondent's boyfriend, who hid a recording device in respondent's house. While it appears that respondent's boyfriend obtained the recording in violation of MCL 750.539d, the statute does not prohibit the admission of the recording into evidence. Respondent argued below that admission of the recording was prohibited by the exclusionary rule. The exclusionary rule bars the introduction into evidence of materials seized and observations made during an unconstitutional search. *People v Hawkins*, 468 Mich 488, 498-499; 668 NW2d 602 (2003). The purpose of the rule is to deter improper police conduct. *Id.* at 499. However, the exclusionary rule does not apply to statutory violations unless the statute so provides. *Id.* at 500. MCL 750.539d does not contain any provision barring the introduction of evidence obtained in violation of the statute, and we will not create a remedy that the Legislature chose not to create. See *Hawkins, supra* at 500. Furthermore, the recording in this case was not obtained during an unconstitutional search, and there was no improper police or other governmental conduct involved in obtaining the evidence. Compare *People v Livingston*, 64 Mich App 247, 255; 236 NW2d 63 (1975) (holding that a violation of MCL 750.539c does not "call into play the per se exclusionary rule applicable to constitutionally defective searches and seizures"). Therefore, suppression of the evidence was not required, notwithstanding a possible violation of the Michigan eavesdropping statute.

Respondent also argues that the trial court's admission of the evidence violated 18 USC 2515, which provides:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

The term "intercept" is defined as "the aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical, or other device." 18 USC 2510(4).

However, 18 USC 2511(2)(d) provides:

It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

In this case, respondent addressed her boyfriend on the audiotape recording, making him a party to the communication. Therefore, pursuant to 18 USC 2511(2)(d), it was not unlawful for him to intercept the communication. Absent an unlawful interception under the federal eavesdropping statute, the remedy of suppression is not warranted. See *Resha v United States*, 767 F2d 285, 288 (CA 6, 1985); *United States v Horton*, 601 F2d 319, 324 (CA 7, 1979).

MCR 3.977(G)(2) provides that the “Michigan Rules of Evidence do not apply, other than those with respect to privileges,” to termination proceedings. In this case, the trial court was entitled to consider all relevant and material evidence in deciding whether to terminate respondent’s parental rights. See *Id.* The audiotape recording was probative evidence of respondent’s relationship and interaction with her children, and was relevant to her fitness as a parent. Therefore, we conclude that the trial court properly admitted the recording into evidence.

## II

Next, respondent argues that the trial court erred in finding that a statutory ground for termination was established by clear and convincing evidence and that termination was in the children’s best interests. We disagree. We review the trial court’s findings of fact for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A trial court’s decision to terminate parental rights is clearly erroneous if, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

The evidence presented at the termination hearing established that respondent had serious problems with anger management and domestic violence resulting in the abuse of her children. Although respondent made some progress in therapy, she failed to fully acknowledge the abuse of her children and its affect on them. Although respondent required additional therapy on child abuse issues, the therapy she obtained after discontinuing her relationship with her first therapist did not focus on those issues, instead focusing on respondent’s current situation and the loss of her children. Thus, the issues that made respondent an abusive parent remained unresolved and were not reasonably likely to be resolved within a reasonable time. Accordingly, there remained a reasonable likelihood that the children would be harmed if returned to respondent’s home.

We disagree with respondent’s argument that her case was mismanaged because her first therapist, Karen Chism, never worked on a relapse prevention and lifestyle plan, as Dr. Haugen and Dr. Henry had recommended, and because she was not provided with a home therapist, which Dr. Henry felt was needed if the children were returned to respondent’s care. Because the children were never returned to respondent, there was no need for a home therapist. Moreover, while Chism may not have worked on a relapse prevention and lifestyle plan, she worked on the critical issues in this case, e.g., respondent accepting responsibility for the removal of her

children, gaining insight into the negative impact of the abuse on the children, understanding the children's emotional needs, improving parenting skills, and evaluating past relationships and gaining insight into how those affected the children. Accordingly, respondent's argument does not provide a basis for concluding that the trial court clearly erred in finding that the statutory grounds for termination were established by clear and convincing evidence.

Finally, the evidence failed to show that termination of respondent's parental rights was clearly contrary to the children's best interests. MCL 712A.19b(5); *In re Trejo, supra* at 354. On the contrary, both children were severely traumatized by events that occurred in respondent's home and the children's therapist agreed that it would be contrary to their best interests to return to respondent's home. The trial court did not clearly err in terminating respondent's parental rights to the children. *Id.* at 356-357.

Affirmed.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Jane M. Beckering