STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of D.K. and J.K., Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

MICHAEL DENNIS KOENIGBAUER,

Respondent-Appellant,

and

HADLEY CRAWFORD,

Respondent-Appellee.

UNPUBLISHED
October 22, 2009

No. 289371
Wayne Circuit Court
Family Division
LC No. 07-468548-NA

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Respondent Michael Koenigbauer (respondent) appeals as of right from an order terminating his parental rights to the two minor children under MCL 712A.19b(3)(b)(*i*), (j), and (k)(*ii*). We affirm.

The case was initiated after it was alleged that respondent sexually abused one of his children, hereinafter referred to as "child X," born on October 9, 2003.

Respondent first argues that the trial court committed an error requiring reversal when it barred the testimony of Dr. Katherine Okla, respondent's proposed expert witness on "[f]orensic interviewing, forensic psychology, child and adolescent psychology, and suggestibility of children." During voir dire by petitioner's attorney, Dr. Okla testified that she had not interviewed child X but had

> reviewed medical records from the pediatrician, medical records from the Children's Hospital, Children's Protective Services Report, summary of, I believe it was, 2 Care House interviews, clinical notes from Therapist, Ruth Kusiak, and a report that – that therapist wrote to DHS [Department of Human Services], a

> Police Report, and transcripts of hearings held in this court, on 02/04th and 03/17th.

Dr. Okla testified that she had read the full transcripts of the court hearings held on those days, during which Ruth Kusiak,[1] a child therapist, testified regarding the abuse claims made by child X. The attorneys for the mother, the children, and petitioner objected to having Dr. Okla testify, indicating that Dr. Okla's reading the full transcript of the court proceedings on those days violated the court's sequestration order. The court barred the testimony without elaboration, simply stating, "I don't believe she can testify."

We review for an abuse of discretion a trial court's imposition of a sanction for the violation of a sequestration order. *People v Meconi*, 277 Mich App 651, 654-655; 746 NW2d 881 (2008). The pertinent question is whether the court's decision fell outside the range of principled outcomes. *Id*. at 654; *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

MRE 615 states:

> At the request of a party *the court may order witnesses excluded so that they cannot hear the testimony of other witnesses*, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause. [*Emphasis added*.]

Although Dr. Okla "read" the testimony in question as opposed to "hearing" it, this distinction is immaterial, seeing as she obtained the same information by reading the testimony as she would have by hearing it. Although respondent contends that, under the circumstances present here, involving an expert witness, a sequestration order does not apply because an expert's review of testimony is akin to a review of other types of reports, it is important to note that respondent did not make his argument until after the witness had already read the transcript. In other words, respondent violated the sequestration order and then tried to justify it, after the fact, instead of obtaining a prior ruling allowing for a technical violation of the order. The trial court's conclusion that respondent violated the sequestration order therefore did not fall outside the principled range of outcomes. Nor, given the blatant violation of the sequestration order with no attempt beforehand to justify it, did the trial court abuse its discretion in concluding that Dr. Okla should be barred from testifying. This was not a situation in which a witness, on her own, mistakenly remained in the courtroom for opening statements, see *Meconi*, *supra* at 653-655, but rather a situation in which respondent's attorney intentionally provided full trial transcripts to the witness in question and only later attempted to justify these actions. Under the circumstances, we find no basis for reversal.

[1] Although spelled "Kuziak" in multiple appellate briefs and in portions of the lower-court record, the pertinent transcript indicates that the correct spelling of this name is "Kusiak."

Respondent next argues that the trial court erred in barring the proposed testimony of Dr. Melvin Guyer. After the court indicated that Dr. Okra's testimony would be disallowed, respondent's attorney stated that she would need to make a telephone call to "see if [she could] procure [her] other witness, who has not reviewed transcripts . . . ." She telephoned Dr. Guyer and offered his testimony by way of speakerphone; the three other attorneys objected to the testimony, indicating that Dr. Guyer was not listed on the witness list. When asked by the court how Dr. Guyer's testimony would assist the trier of fact, respondent's attorney stated:

> He will assist you in being able to explain the differences between the forensic and the clinical rule, the difference in the information that can elicit the – he will talk about memory and suggestibility of children, he has a class that helps and correct me, but I believe that it has been more than 30 years in working with children in a clinical and a forensic capacity, not the same children, but doing both, he has been a professor at the University of Michigan in both psychology and psychiatry department [sic] for a number of years, he will further assist you in understanding the forensic interviewing protocol, and its requirements, and why it exists, and why it must be followed.
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> * * *
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> He will be able to assist the [trier] of fact in understanding memory and how events are in-coded, but how they are repronged and how they are relied upon research [sic] that shows the indicia of accuracy and reliability of those memories.

During voir dire, Dr. Guyer admitted that he did not know child X, had never reviewed any materials relating to child X, and had spoken about the case only with respondent's attorney. The court, after hearing considerable voir dire testimony, stated: "I am really impressed by the doctors [sic] resume, but I am not of the opinion that I will be assisted by the doctors [sic] testimony in this matter, so, I am not going to allow him to testify as an expert." The court later added:

> the testimony I heard during voir dire is that the doctor doesn't know anything about the facts of this case, it would be difficult for him to apply the principles which I believe he is abundantly skilled in to the facts of the case that he has no idea of what the facts of the case are [sic]. I think that both prong 1 and prong 3 [of MRE 702] are not met, therefore, I do not feel that I would be assisted by this particular witness as an expert.

We review a trial court's evidentiary rulings for an abuse of discretion. See *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). "[T]he determination regarding the qualification of an expert and the admissibility of expert testimony is within the trial court's discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). An abuse of discretion occurs when the court's decision falls outside the principled range of outcomes. *Maldonado, supra* at 388.

MRE 702 states:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The court concluded that Dr. Guyer's testimony met neither prong 1 nor prong 3 of this test. On appeal, respondent states that "Dr. Guyer may not have been able to discuss the facts of this case, but as an expert witness he could have answered hypothetical questions concerning the accuracy and reliability of certain techniques." Significantly, respondent does not argue, as he did at the pertinent hearing, that Dr. Guyer could have taken some time to familiarize himself with the specific facts of this case.

We simply cannot conclude that the court's decision to exclude Dr. Guyer's testimony fell outside the range of principled outcomes. At the very least, the court was within its rights to conclude that prong 3 of MRE 702 – "the witness has applied the principles and methods reliably to the facts of the case" – was not satisfied. Respondent himself *admits* on appeal that "Dr. Guyer may not have been able to discuss the facts of this case . . . ." While Dr. Guyer may have been able to testify in general concerning his opinion of certain techniques, it was, of course, the specific facts and techniques *actually employed here* that were of critical importance in this case, and the court did not abuse its discretion in concluding that Dr. Guyer's "general information" would not have been helpful to a resolution of the case.

Respondent also argues that the trial court committed errors requiring reversal when it precluded the testimony of Dr. Richard Leo and Dr. Ira Schaer. We find no basis for reversal. First, respondent's briefing of this issue is woefully inadequate. Respondent fails to explain precisely how these witnesses would have aided his case but instead frames his argument in generalities. Moreover, he provides no lower-court references and cites no case law or other pertinent law in discussing the proposed testimony of Dr. Leo and Dr. Schaer. Under these circumstances, we decline to address the issue. See *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).

Also, with regard to Dr. Schaer, the trial court listened to an *extensive* voir dire and offer of proof, and concluded that the information Schaer would provide consisted of "things that I think I have noticed myself and was planning on using in evaluating the evidence already, so, under Rule 702, I am ruling that I would not be assisted by the Doctor to understand the evidence, or to determine the fact and issue [sic]." Given these circumstances, we would find no abuse of discretion even if we *were* to address the issue of the admissibility of Dr. Schaer's testimony.

Dr. Leo's testimony was offered to show how police interrogations might lead to false confessions. The trial court indicated that it had doubts about the reliability of the witness's principles and methods and that it would not be assisted by the witness's testimony. The court

also stated that Dr. Leo's testimony would be of questionable value because Dr. Leo would not be able to go into detail about the polygraph examinations administered to respondent.[2] Given that the witness did admit to some criticism of his work, given the lengthy voir dire to which the court listened before concluding that it would not be helped by the testimony, and given the order excluding the polygraph examinations from trial, we would find no basis for reversal with regard to Dr. Leo's testimony even if we were to review the issue.

Respondent next argues that the trial court should have excluded the disclosures made by child X to therapist Ruth Kusiak because the disclosures lacked sufficient indicia of reliability.

MCR 3.972(C)(2)(a) indicates that a statement regarding abuse made by a child under 10 years old may be admitted:

> regardless of whether the child is available to testify or not, and is substantive evidence of the act or omission if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness. This statement may be received by the court in lieu of or in addition to the child's testimony.

The trial court held a hearing in accordance with this court rule. During that hearing, Kusiak testified that she began providing therapy to child X in March 2007, when child X was three and one-half years old, and was still providing that therapy at the time of her testimony in February 2008. Child X's mother brought child X to therapy in March 2007 because she was "wetting herself" and having problems sleeping. Kusiak testified that she was able to determine that child X knew the difference between the truth and a lie. Kusiak testified that she used a book and a board to discuss the difference between "good" touches and "bad" touches with the child. She stated that at the very first session, the child grabbed her own crotch and stated, "Daddy hurt me." In subsequent sessions, the child stated that "daddy was mean" and "daddy gave [me] a rash." When asked about the rash, she pointed to the "bottom" of a doll. She also got upset during "play therapy" when the "daddy doll" was near the other dolls.

Kusiak admitted that she was not a "forensic interviewer" and therefore does not follow the "State Forensic Interview Protocol." However, she indicated that child X's statement that her daddy touched her and gave her a rash were unsolicited and unprompted. Kusiak also admitted that at a session in September 2007, child X stated that "daddy doesn't hurt me anymore."

Kusiak admitted that she had "an idea" from the child's mother when she first interviewed the child that there might be "a criminal case" pending. However, she testified that the child's mother did not want to believe at that point that "anything had happened to the child."

The court ruled that Kusiak's testimony, as well as the testimony of Margo Moltmaker and the child's mother, was admissible, stating:

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[2] Respondent made his incriminating statements during an interview that incorporated two polygraph examinations. More information regarding this interview is set forth *infra*.

> I have been reviewing my notes, I don't think I have had a hearing go this long ever before. I am going to rule that the indicia of trustworthiness is adequate, based upon the totality of the circumstances here, the factors that are given to me . . . spontaneity, consistent repetition, mental state of the juvenile, looking out for unexpected terminology that would indicate fabrication, and the motive to fabricate, I believe these statements were spontaneous, they are consistent right from the first statements made from the juvenile to Ruth Kusiak . . . .
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> * * *
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> I am deeply suspicious, and I have been of a motive to fabricate, and my first glance at this, it looked to be a custody fight by other means or perhaps, vengeance, I have been looking strenuously to try to see that, I have not seen it. Everything that I have seen indicates spontaneity, consistency of repetition, the juvenile's mental state from beginning to end seems to be the same, I see nothing to cause me to worry there. I see no unexpected terminology from a 3 year old, and again, I have seen no motive to fabricate . . . .

We review the admission of evidence under the abuse of discretion standard. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). In *Matter of Brimer*, 191 Mich App 401, 405; 478 NW2d 689 (1991), the Court noted the following concerning admission of a child's statements:

> Circumstances indicating the reliability of a hearsay statement may include spontaneity and consistent repetition, the mental state of the declarant, use of terminology unexpected of a child of a similar age, and lack of motive to fabricate. Whether particular guarantees of trustworthiness are present depends on the totality of the circumstances.

Here, Kusiak clearly testified that the statements concerning abuse made by child X were spontaneous. She also stated that she was able to determine that child X knew the difference between the truth and a lie. Further, she stated that child X gave repeated abuse-related information on different days, and there was nothing in her testimony to indicate that child X used "terminology unexpected of a child of a similar age. . . ." *Id*. Moreover, Kusiak stated that even though she had some idea of the abuse allegations when she began seeing child X, she believed that the mother did not want to believe at that point that abuse had occurred. This mitigates against the idea of a motive to fabricate.

As in *Brimer*, a case involving a child of a similar age, "there was no evidence in the record that the child was coerced or unfairly led into making the accusations." *Id*. at 406. It is also significant that respondent *admitted* to touching the outside of child X's vagina inappropriately "for 5 seconds" and subsequently admitted to putting his finger inside child X's vagina on two separate occasions. This lends corroboration to the child's statements.

Respondent strongly emphasizes that Kusiak did not follow the Forensic Interviewing Protocol compiled by the Governor's Task Force on Children's Justice and the Department of Human Services. However, MCR 3.972(C)(2)(a) does not require that a statement be made in

the context of such an interview before it will be deemed admissible. Under the totality of the circumstances, the trial court did not abuse its discretion in allowing Kusiak's testimony.

Respondent also argues that the trial court should not have admitted the testimony of Margo Moltmaker. Moltmaker, a forensic interviewer with Care House, a child advocacy center, testified that she interviewed child X on April 19, 2007. Moltmaker testified that she used an anatomically correct drawing and asked the child if anyone had hurt her. Child X responded that "daddy had hurt her." Child X then stated that "daddy hurt her bunny." Moltmaker stated that she was unable to get a clarification from child X regarding the meaning of the term "bunny." Moltmaker testified that she followed the forensic interview protocols that she had been trained to use, in order to minimize the dangers of suggestibility. Moltmaker admitted that she did not take contemporaneous notes during her interview with child X, even though "[t]he protocol is that the interviewer should take these notes . . . ." However, a detective did take contemporaneous notes of the interview, and Moltmaker reviewed those notes to attempt to refresh her recollection.

The court allowed Moltmaker's testimony for the same reasons it admitted Kusiak's testimony.[3] We find no abuse of discretion with regard to the trial court's ruling. Moltmaker testified that she used questions designed to minimize suggestibility and that she only asked the question involving "hurt" because she was following the protocol of moving from open-ended to more focused questions. Respondent argues that Moltmaker violated the "Governor's Protocol," such as by failing to take contemporaneous notes of the interview, but we again note that MCR 3.972(C)(2)(a) does not require that a statement be made in the context of an interview conducted under this protocol before it will be deemed admissible. Moltmaker's questions were not unduly suggestive, the child repeated the allegations of being hurt, and Moltmaker testified that she determined that child X knew the difference between "right" and "wrong." See *Brimer*, *supra* at 405. Moreover, there is no indication that child X used "terminology unexpected of a child of a similar age," *id*., and, as noted by the trial court, no motive to fabricate has been demonstrated. Under the circumstances, the trial court's decision to admit Moltmaker's testimony was within the principled range of outcomes. *Maldonado*, *supra* at 388.

Respondent next argues that the trial court erred in admitting only portions of an interview of respondent conducted by Secret Service Agent Michael Suratt.

Suratt administered two polygraph examinations to respondent at the request of the authorities involved in this case. Respondent, during the course of the interview that encompassed the polygraph examinations, admitted to inappropriately touching child X's vagina. Respondent contends that he made this admission only because Agent Suratt encouraged him to admit to "some inappropriate but understanding touching."

Respondent sought any recordings and notes associated with Suratt's interview of respondent, and an order of disclosure was entered. Suratt testified that he could not provide a

[3] The court made one ruling encompassing the testimony of Kusiak, Moltmaker, and the child's mother.

recording of the examination because it was Secret Service policy to not record polygraph examinations. Respondent contends that the trial court should have barred Agent Suratt's testimony in its entirety because recordings and notes concerning the actual polygraph examinations were not produced.[4]

Respondent frames this issue in terms of a discovery violation. We review a trial court's decision concerning discovery sanctions for an abuse of discretion. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 450; 540 NW2d 696 (1995). In *Richardson*, the Court set forth the following nonexhaustive list of factors applicable to the fashioning of a discovery sanction:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests . . . ; (3) the prejudice to the defendant; (4) . . . ; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. [*Id*. at 451 (internal citation and quotation marks omitted).]

Respondent states that the examinations were audiotaped or videotaped. However, Agent Suratt testified that he merely marked on the pertinent form that the room was *equipped* with audio- or visual-recording equipment but that no recording, to his knowledge, was actually made of the examination. He explained that it was the policy of the Secret Service to not record polygraph examinations. There was also information set forth at the pertinent hearing that federal law prohibits the disclosure of the actual polygraph charts. Under these circumstances, even assuming that Suratt's actions can be attributed to petitioner, there was no *willful* violation of the discovery order. Moreover, Suratt *did* provide other documents pertaining to the interview, such as pre-polygraph documents and defendant's written statements. In addition, there is no allegation of a history of delay or noncompliance with discovery orders on the part of petitioner, and there is insufficient evidence of prejudice. Respondent contends that he needs the information in question in order to show that Agent Suratt engaged in trickery and "lied about other critical facts in the proceeding." However, respondent himself testified at trial and was free to elaborate on any trickery that he believed occurred. Under these circumstances, the court did not err in refusing to preclude Agent Suratt's testimony as a discovery-violation sanction.

Respondent also contends that allowing Agent Suratt's testimony violated MRE 106, which states:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

[4] The court allowed Suratt's testimony without elaborating on the reasoning for its decision.

We disagree that this rule was applicable. Two written statements by respondent were introduced – the two statements he made during the course of Agent Suratt's interview. These statements were introduced in their entirety. Respondent is now evidently suggesting that recordings or charts of the polygraph examinations themselves should have been introduced at trial, but he himself consented to an order barring the polygraph results from trial. Reversal is unwarranted.

Respondent next argues that the trial court erred in terminating his parental rights to the children. The court terminated his rights under MCL 712A.19b(3)(b)(*i*), (j), and (k)(*ii*), which state:

> The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
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> (b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
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> (*i*) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.
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> * * *
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> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.
>
> (k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:
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> * * *
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> (*ii*) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

To justify the termination of parental rights, petitioner must have established at least one of the statutory grounds by clear and convincing evidence. *In re Trejo*, 462 Mich 341; 612 NW2d 407 (2000). We review the trial court's decision for clear error. *Id*. at 356.

The trial court evaluated all the evidence and stated, in part:

> Based on all of the above, the [c]ourt finds Grounds for Termination . . . . The father sexually abused one of his daughters, he would do it again to that one and probably to the other one also, and in the foreseeable future. There is a lot more than a reasonably [sic] likelihood in the [c]ourt's mind, based on the [f]ather's conduct, that he would do it again if the [j]uveniles were placed in his home. These [j]uveniles are his daughters, and the [f]ather sexually penetrated one of them, and this was abuse.

We conclude that, at a minimum, MCL 712A.19b(3)(k)(*ii*) was established by clear and convincing evidence. First, there was the testimony of Kusiak and Moltmaker discussed above. Additionally, the child's mother testified that child X informed her that she was having pain while trying to urinate and that there was a red mark on child X's vagina. The mother also testified that child X stated that respondent "kissed her," and then pointed to her "private parts." Further, respondent admitted to Suratt that he penetrated child X's vagina with his finger. This evidence adequately supported the trial court's conclusion that MCL 712A.19b(3)(k)(*ii*) was established. While respondent testified at trial that he did not inappropriately touch child X, it was up to the trial court to judge the credibility of the witnesses. MCR 2.613(C).

Once at least one statutory basis for termination has been established, the court must order termination of parental rights if it finds that termination would be in the children's best interests. MCL 712A.19b(5). We review the trial court's best-interests determination for clear error. *Trejo*, *supra* at 356-357.

The court stated the following with regard to best interests:

> The [c]ourt finds [t]ermination [c]learly in the [c]hildren's best [i]nterests.[5] The [c]ourt believes [child X] will remember these events, and contact with the [f]ather will bring it all back. The [f]ather pays no support. As stated above, the [c]ourt feels he would do it again.

Given the clear and convincing evidence that respondent committed criminal sexual conduct involving penetration against child X, given that both child X and her sibling are females of around the same age, and given that respondent denies having done anything inappropriate, we simply cannot conclude that the trial court clearly erred in finding that termination was in the children's best interests.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering

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[5] Respondent contends that the trial court should have used the prior version of MCL 712A.19b(5), which stated, in part, that the court must order termination "unless the court finds that termination of parental rights to the child is clearly not in the child's best interests." We need not address this issue, because the fact that the trial court found a basis to terminate under the current version of MCL 712A.19b(5) necessarily means that the trial court would have found a basis to terminate under the prior version. In other words, because the court found that termination was in the children's best interests, it follows that the court did *not* find that termination was "clearly not in the [children's] best interests."