

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of AM, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ATIBA MERIWEATHER,

Respondent-Appellant.

UNPUBLISHED

May 27, 2010

No. 293762

Wayne Circuit Court

Family Division

LC No. 09-485127-NA

In the Matter of TM1, KO1, KO2, and TM2,
Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ALVENA OCASIO,

Respondent-Appellant,

and

MICHAEL MANNS and ATIBA
MERIWEATHER,

Respondents.

In the Matter of TM1 and KO1, Minors.

DEPARTMENT OF HUMAN SERVICES,

No. 293763

Wayne Circuit Court

Family Division

LC No. 08-480722-NA

Petitioner-Appellee,

v

ATIBA MERIWEATHER,

Respondent-Appellant,

and

ALVENA OCASIO and MICHAEL MANNs,

Respondents.

No. 293764
Wayne Circuit Court
Family Division
LC No. 08-480722-NA

Before: WHITBECK, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

In Docket No. 293762, respondent Atiba Meriweather appeals as of right from the trial court’s order terminating his parental rights to “AM” under MCL 712A.19b(3)(g), (h), (j), (k)(ii), and (n)(i). In Docket No. 293763, respondent Alvena Ocasio appeals as of right from the trial court’s order terminating her parental rights to “TM1,” “KO1,” “KO2,” and “TM2” under §§ 19b(3)(g) and (j). In Docket No. 293764, respondent Meriweather appeals as of right from the same order terminating his parental rights to TM1 under §§ 19b(3)(g), (h), (j), (k)(ii), and (n)(i). We affirm.

I. DOCKET NO. 293762

Respondent Meriweather argues that petitioner failed to make reasonable efforts to reunite him with the minor child. Because Meriweather failed to raise this issue in the trial court, it is not preserved, and our review is limited to determining whether a plain error occurred that affected his substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). “Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings.” *Id.* at 9. Even if plain error occurs, reversal is warranted only if the error seriously affected the fairness, integrity, or public reputation of the proceedings. *Id.*

Meriweather’s argument is misplaced because petitioner was not required to make reasonable efforts toward reunification. MCL 712A.19a(2) provides, in relevant part:

Reasonable efforts to reunify the child and family must be made in all cases except if any of the following apply:

(a) There is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in section 18(1) and (2) of the child protection law, 1975 PA 238, MCL 722.638.

MCL 722.638 states, in pertinent part:

(1) The department shall submit a petition for authorization by the court under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, if 1 or more of the following apply:

(a) The department determines that a parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home, has abused the child or a sibling of the child and the abuse included 1 or more of the following:

* * *

(ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

Under these provisions, reasonable efforts to reunite Meriweather with AM were not required because Meriweather was convicted of first-degree criminal sexual conduct, involving penetration, with his child TM1. See *In re Rood*, 483 Mich 73, 118; 763 NW2d 587 (2009). Thus, Meriweather has failed to establish plain error.

Meriweather also contends for the first time in this Court that the trial court erred by failing to grant a temporary wardship regarding AM so that Meriweather would have time to appeal his criminal convictions. Because Meriweather fails to cite any authority that required the trial court to grant a temporary wardship pending the appeal of his criminal convictions, he has abandoned this issue on appeal. *Berger v Berger*, 277 Mich App 700, 715; 747 NW2d 336 (2008). In any event, we are aware of no authority requiring a court deciding a termination case to consider the strength of a respondent's appeal involving his criminal convictions or grant a temporary wardship pending an appeal. Thus, Meriweather has again failed to establish plain error.

II. DOCKET NO. 293763

Respondent Ocasio argues that clear and convincing evidence did not support the trial court's decision to terminate her parental rights to her children under §§ 19b(3)(g) and (j). We disagree. The record shows that the trial court did not clearly err in finding sufficient evidence to support termination under both subsections. See MCR 3.977(K) and *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004) (discussing the standard of review).

The primary issue involving Ocasio was her failure to protect TM1 from continued sexual abuse by Meriweather. After TM1 had spent time in Meriweather's care, Meriweather informed Ocasio that TM1 had red bumps in her vaginal area. Ocasio took TM1 to the hospital, and medical tests were conducted to determine the source of the bumps. The hospital records indicated that the source of the bumps appeared to be herpes, TM1's pediatrician confirmed this preliminary diagnosis, and Ocasio informed hospital staff that Meriweather suffered from herpes outbreaks. Nevertheless, Ocasio returned TM1 to Meriweather's care, stating that she had no reason to suspect that he had done anything to her. Ocasio thereafter failed to take TM1 to a

follow-up child protective team appointment at the hospital and failed to appear at a team decision meeting with Child Protective Services (CPS).

The record also shows that TM1 disclosed Meriweather's sexual abuse to several people, including Ocasio. TM1 told Dr. Dena Nazer that she informed Ocasio about Meriweather's conduct but Ocasio did not do anything about it. TM1 told Debbie Kennedy, a Children's Hospital nurse, that Meriweather denied any wrongdoing when Ocasio talked to him about TM1's allegations and that TM1 thereafter saw Ocasio and Meriweather hugging. Further, TM1 testified that Ocasio witnessed Meriweather sexually assaulting her one night at Meriweather's place of employment. According to TM1, Ocasio became angry afterwards, and she and TM1 left and went to an aunt's home, but Ocasio did not contact the police. During a "Kid's Talk" interview, TM1 told Kate Anton that Ocasio asked her why she did not yell or tell Meriweather "no," and TM1 responded that she was scared. Thus, contrary to Ocasio's assertions, the record sufficiently established that TM1 disclosed Meriweather's sexual abuse and that Ocasio failed to take appropriate steps to protect TM1 from his continued abuse. Moreover, Ocasio's failure to parent TM1 properly was probative of her ability or inclination to properly parent her other children.

In addition, the record shows that Meriweather physically abused Ocasio and that Ocasio and the children moved to a suburb of Philadelphia in 2005 to escape the abuse. Ocasio nevertheless moved back to Michigan and reunited with Meriweather approximately 12 or 18 months later, and the domestic abuse resumed. The children were often present during the abuse. Meriweather also became both emotionally and physically abusive when Ocasio became pregnant with other men's children. Further, Ocasio failed to maintain stable housing (she repeatedly changed residences) and failed to cooperate adequately with the CPS investigation. Accordingly, the trial court did not clearly err in finding that termination of Ocasio's parental rights was justified under §§ 19b(3)(g) and (j).

Ocasio also argues that she was denied the effective assistance of counsel. "[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings." *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002), quoting *In re EP*, 234 Mich App 582, 598; 595 NW2d 167 (1999), overruled on other grounds by *In re Trejo*, 462 Mich 341; 612 NW2d 407 (2000). To prevail on an ineffective assistance of counsel claim, a respondent must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the respondent that it denied her a fair trial. *In re CR*, 250 Mich App at 198. Establishing prejudice necessarily requires demonstrating a reasonable probability that the result of the proceedings would have been different absent counsel's errors. *Id.* Because Ocasio failed to raise this issue in the trial court in a motion for a new trial or evidentiary hearing, this Court's review is limited to errors apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Ocasio argues that her attorney was ineffective for failing to object to Dr. Nazer's and Anton's testimony regarding TM1's statements to them and by ultimately agreeing to the admission of these statements as part of petitioner's case-in-chief. Much of Dr. Nazer's testimony regarding TM1's statements to her was admissible under the hearsay exception for statements made for the purpose of medical diagnosis or treatment. MRE 803(4) provides that the hearsay rule does not exclude

[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis or treatment.

TM1's statements to Dr. Nazer regarding how she contracted the vaginal bumps, what Meriweather's sexual contact with her involved, and when it occurred were reasonably necessary to diagnose and treat TM1's condition. See *People v McElhaney*, 215 Mich App 269, 282-283; 545 NW2d 18 (1996). As noted in *McElhaney*, *id.* at 283, "[s]exual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment."

Also, TM1's statements to Dr. Nazer and Anton regarding the sexual abuse were admissible under MCR 3.972(C). Ocasio correctly argues that TM1's statements to Dr. Nazer regarding whether TM1 had informed Ocasio of Meriweather's conduct were not admissible for the purposes of medical diagnosis or treatment under MRE 803(4). These statements, however, as well as TM1's statements to Anton during the Kid's Talk interview and TM1's other statements made to Dr. Nazer, were admissible under MCR 3.972(C), which provides, in relevant part:

(1) *Evidence; Standard of Proof.* Except as otherwise provided in these rules, the rules of evidence for a civil proceeding and the standard of proof by a preponderance of evidence apply at the trial, notwithstanding that the petition contains a request to terminate parental rights.

(2) *Child's Statement.* Any statement made by a child under 10 years of age . . . regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622(f), (j), (w), or (x), performed with or on the child by another person may be admitted into evidence through the testimony of a person who heard the child make the statement as provided in this subrule.

(a) A statement describing such conduct 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.

TM1's statements to Dr. Nazer and Anton regarding the sexual abuse, including whether TM1 informed Ocasio about the abuse, were admissible under MCR 3.972(C)(2). Moreover, the trial court correctly determined that the statements were reliable based on the consistency of the statements, the prior test of TM1's ability to differentiate between a true and an untrue statement, and the corroborating medical findings after TM1's physical examination. Accordingly, the referee properly determined that the circumstances surrounding the statements provided adequate

indicia of trustworthiness before admitting the statements as substantive evidence as required under MCR 3.972(C)(2)(a).¹ Because the statements were admissible under either MRE 803(4) or MCR 3.972(C)(2)(a), counsel was not ineffective for failing to object to their admission.

Ocasio also contends that counsel was ineffective for failing to make a judge demand regarding TM2's case because the referee lost her ability to be impartial after determining that TM1's statements were trustworthy and consistent. Ocasio waived appellate review of this issue by specifically agreeing to proceed before the referee with respect to TM2. See *People v Harper*, 479 Mich 599, 642 n 72; 739 NW2d 523 (2007). Moreover, Ocasio has not established a reasonable probability of a different result had counsel made a judge demand regarding TM2. Thus, she has failed to show prejudice resulting from counsel's alleged error, and her ineffective-assistance claim must fail. *In re CR*, 250 Mich App at 198.

Ocasio further argues that counsel was ineffective for failing to object to Akisha Meriweather's testimony that Ocasio was a "pole dancer" and that she had sexual relations with women. Again, Ocasio has not demonstrated prejudice resulting from counsel's failure to object. The primary issue involving Ocasio was her failure to protect TM1 from Meriweather's repeated sexual assaults. The referee's report and recommendation does not reference Akisha's testimony and, therefore, in adopting the referee's recommendation, the trial court did not rely on this testimony in terminating Ocasio's parental rights. Accordingly, Ocasio was not prejudiced by counsel's failure to object, and the ineffective-assistance claim is without merit.

II. DOCKET NO. 293764

Respondent Meriweather argues that the trial court erred by failing to secure the presence of Alquinn Meriweather at trial. Because respondent Meriweather failed to preserve this issue for our review by raising it in the trial court, our review is limited to determining whether a plain error occurred that affected his substantial rights. *In re Utrera*, 281 Mich App at 8.

Meriweather argues that although he presented some evidence, he was denied his ability to present additional evidence because the referee was unable to secure the presence of Alquinn, Meriweather's brother, in court. The record shows that on April 6, 2009, Alquinn was housed in the Wayne County Jail and was being sentenced for a parole violation on that date. The record further shows that the referee made extensive efforts to obtain Alquinn's presence in court that day, but was unsuccessful. The referee then indicated that she would do whatever was necessary to obtain Alquinn's testimony by speakerphone on a different date. Despite an opportunity to call additional witnesses, Meriweather rested without presenting Alquinn's testimony. In his brief on appeal, Meriweather fails to indicate the substance of Alquinn's proposed testimony or explain how it might have affected the outcome of the proceedings. Accordingly, Meriweather has failed to show that the failure to secure Alquinn's testimony constituted a plain error affecting his substantial rights. *Id.* at 8.

¹ We reject Ocasio's suggestion that the court erred in failing to conduct a further hearing on the matter.

Meriweather also argues that the referee erred by failing to adjourn the proceedings to allow his counsel time to obtain a transcript of TM1's criminal-trial testimony before she testified in the present case. Meriweather's counsel did not request an adjournment before TM1 testified, but rather objected to her testimony altogether. In overruling the objection, the referee noted that counsel had insisted that TM1 come to court previously and that she was ready to testify on a previous occasion, but the parties had run out of time before calling her to testify. Further, Meriweather does not indicate how his counsel's inability to review TM1's criminal-trial testimony before cross-examining her affected the outcome of the proceeding. Thus, he has failed to establish a plain error affecting his substantial rights. *Id.* at 8.

Finally, Meriweather appears to argue that the trial court erred by determining that the statutory bases for termination were proven by clear and convincing evidence. However, he fails to address the specific statutory bases on which the trial court relied or offer any argument regarding why these grounds were not proven. By failing to adequately brief this issue, Meriweather has abandoned the issue on appeal. *People v McGraw*, 484 Mich 120, 131 n 36; 771 NW2d 655 (2009). In any event, the trial court did not clearly err by terminating Meriweather's parental rights under §§ 19b(3)(g), (h), (j), (k)(ii), and (n)(i). The evidence showed that Meriweather repeatedly engaged in sexual penetration with TM1 over at least a two-year period beginning when she was four, five, or six years old. Meriweather's sexual abuse resulted in TM1's contracting both herpes and chlamydia. As a result of his conduct, Meriweather was convicted of four counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct and was sentenced to a minimum term of 25 years' imprisonment. In addition, during Dr. Nazer's physical examination of TM1, she discovered a mark on TM1's inner thigh that TM1 indicated was caused when Meriweather struck her with a belt. Meriweather also repeatedly physically abused Ocasio in the children's presence and threw TM1 against a wall. Considering Meriweather's conduct involving TM1 and his lengthy prison sentence, the trial court did not clearly err by terminating his parental rights under §§ 19b(3)(g), (h), (j), (k)(ii), and (n)(i).

Affirmed.

/s/ William C. Whitbeck
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood