STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
November 16, 2010

In the Matter of JANSSEN-DAVIS, Minors.

No. 297923
Ingham Circuit Court
Family Division
LC Nos. 08-002146-NA
08-002147-NA
08-002148-NA

In the Matter of JANSSEN-DAVIS, Minors.

No. 297925
Ingham Circuit Court
Family Division
LC Nos. 08-002146-NA
08-002147-NA
08-002148-NA

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from the trial court order terminating their parental rights to the minor children under MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (g), (j), and (k)(*ii*). We affirm.

Initially, respondent father argues that the trial court erred reversibly and abused its discretion in failing to exclude evidence of sexual abuse as a narrowly tailored sanction for the police department's inadvertent loss of a forensic interview DVD with the alleged victim. A litigant "is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action." *Brenner v Kolk*, 226 Mich App 149, 162; 573 NW2d 65 (1977). Here, Detective Eisfelder interviewed the child in October 2008, and a DVD was made of the interview. The detective testified that in cases of "disclosure," i.e., where the victim discloses sexual abuse, DVDs are transcribed and turned over to the prosecutor. In cases of "no disclosure," DVDs are discarded after a year and are not transcribed unless someone requests them. In this case, the police interpreted the child's responses as "no disclosure." Thus, police did not preserve or transcribe the DVD, and could not locate it for the termination hearing, which occurred more than one year after the interview.

Respondent father argues, however, that the DVD was exculpatory and police had a duty to preserve it. Respondent father notes that he was not charged with any crime in connection with the alleged sexual abuse of his daughter. At the termination hearing, Detective Eisfelder did not remember the interview. The only testimony regarding the interview came from the child and DHS investigator Flores of Children's Protective Services (CPS), who watched from another room and took notes. Flores's own interview of the child did produce a "disclosure" that respondent father sexually abused the child. The child said it happened "a bunch of times" in the old house, another "bunch" in the other old house, and a few times in the new house. However, according to Flores's notes, the child told Detective Eisfelder stories about playing in the park. She changed her statements often regarding where the alleged abuse occurred. The child said she had never seen her father touch her, but she thought it had to be him because it could not be anyone else. When asked if she had seen him touch her, she said she could not remember. But she said she did not feel safe with Dad and did not want to go home. She only wanted Dad to go away. She did not want him to go to jail.

Later, the child told Flores that she knew why Detective Eisfelder had not believed her: it was because she lied. But she did not lie about her dad and what he did; she lied by saying she could not remember. She said this because she was nervous and afraid, her head was throbbing, and she could not think straight. At the termination hearing, the child gave extremely graphic and believable testimony regarding the sexual abuse. A DHS caseworker also testified that respondent father said he first became attracted to his daughter when he saw her in her cheerleading outfit. This testimony, plus the testimony of sexual abuse from the victim and other witnesses, was noted by the trial court in its opinion.

Evidentiary rulings are reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Discovery sanctions are also reviewed for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). An abuse of discretion occurs where the outcome falls outside a range of reasonable and principled outcomes. *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194 (2007). Here, the trial court declined to impose the sanction suggested by respondent father, i.e., to exclude all evidence of sexual abuse, because it was too harsh and in excess of the type of harm that might result from the DVD being lost. We find no abuse of discretion. MCR 3.922(A)(4) provides that in child protective proceedings, failure to produce recorded statements in the possession or control of law enforcement permits the court to issue sanctions under MCR 2.313(B)(2)(b). As the trial court noted here, the sanctions are not mandatory. DHS did not intentionally suppress the DVD, and Flores, Eisfelder, and the child all testified and were subject to cross-examination. Flores's report and notes were also made available to respondents. In this situation, we find no abuse of discretion in the trial court's refusal to exclude all evidence of sexual abuse, a remedy which was neither "narrowly tailored" nor appropriate to the situation.

Next, respondents argue that the trial court clearly erred in finding sufficient evidence to terminate their parental rights. Termination of parental rights requires a finding that at least one of the statutory grounds under MCL 712A.19b(3) has been established by clear and convincing evidence. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747; *In re Trejo Minors*, 462 Mich 341, 350, 356-357; 612 NW2d 407 (2000); *In re B and J*, 279 Mich App 12, 17; 756 NW2d 234 (2008). The trial court must then order termination of parental rights if it finds that termination is in the child's best interests. MCL 712A.19b(5). The trial court findings are reviewed for clear

error. MCR 3.977(K); *Mason*, 486 Mich at 152; *Trejo*, 462 Mich at 356-357; *B and J*, 279 Mich App at 17. A finding is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake was committed, giving due regard to the trial court's opportunity to observe the witnesses. *Mason*, 486 Mich at 152; *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); *B and J*, 279 Mich App at 17-18.

In the present case, the trial court found sexual abuse of respondents' daughter proven by clear and convincing evidence. This finding was not clearly erroneous. The child's testimony was overall consistent and clearly established repeated sexual abuse by the father and failure to prevent the abuse or protect the child by the mother. Respondents were provided a parent agency agreement (PAA), and the father completed parenting classes. Because of the sexual abuse allegations, the father was not offered counseling. See MCL 712A.19a(2); MCL 722.638(1). The couple's two younger children remained with the mother for a time during the pendency of the case, but respondents did not abide by a no-contact order aimed at preventing the father from having unsupervised contact with the children. The two younger children came to believe that their sister was responsible for breaking up the family. While it was respondent father who broke up the family, the mother steadfastly refused to believe that he could have sexually abused their daughter. This placed a strain on the mother-daughter relationship and also helped to turn the boys against their sister. The mother even said repeatedly that she would return to the father when their daughter turned 18.

We acknowledge that some testimony showed respondents to be appropriate with their children at visitations. However, respondent mother did not complete parenting classes or counseling, and she did not benefit from services. Respondent father did not go for rehabilitation for a closed-head injury, as suggested by DHS. A parent must benefit from services to be able to provide a safe, nurturing home. *In re Gazella*, 264 Mich App 668, 676-677; 692 NW2d 708 (2005). Here, the mother was so lax in supervising the children that they had many tardies and absences at school, and one was almost crushed while playing in a garbage dumpster. Evidence of drug abuse was presented; respondent father tested positive for THC, and both parents had missed screens, which are considered positive. Moreover, at visits the mother would fail to show affection toward her daughter. Family counseling failed to help the situation. Respondent father, at his separate visits with his sons, would frequently sit on the couch and not play with the boys. There was evidence that both parents had whipped their children with a belt. But most importantly, neither parent was willing to do the hard work involved in trying to change and heal the rift between their daughter and the rest of the family. Like the trial court, we find the evidence of sexual abuse by respondent father clear and convincing. The fact that police did not charge him with a crime is no evidence in his favor; the burden of proof is lower in a termination of parental rights case than in a criminal case, and police and prosecutors do make mistakes.

We also find that the trial court did not clearly err in finding termination of respondents' parental rights to be in the children's best interests. MCL 712A.19b(5). Respondents correctly note that their sons loved their parents and were bonded to them, and their daughter loved and was bonded with respondent mother. However, the father's sexual abuse of his daughter, coupled with respondent mother's refusal to believe her, made it impossible for respondents to offer a nurturing home to any of their children.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad