STATE OF MICHIGAN

COURT OF APPEALS

In re BOOTH/SCROGGS-BOOTH, Minors.

UNPUBLISHED
March 15, 2016

No. 327824
Monroe Circuit Court
Family Division
LC No. 13-023086-NA

Before: M. J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

Respondent-mother appeals as of right the trial court's order terminating her parental rights to her minor children under MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continue to exist), (g) (failure to provide proper care and custody), and (j) (likelihood of harm if returned). Respondent does not challenge the court's factual findings in connection with those criteria, but instead raises various procedural issues. Because respondent has failed to establish that she is entitled to appellate relief, we affirm.

Respondent first contends that the trial court erred by receiving the expert testimony of Vicki Collins, M.D., because petitioner failed to specifically designate her as an expert on its witness list. Respondent also asserts that Collins's testimony did not satisfy the requirements of expert testimony under MRE 702, and that Collins was improperly allowed to offer an opinion on an ultimate issue in the case. Respondent did not preserve these issues by objecting below; consequently, our review is limited to plain error affecting 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.

Respondent has not satisfied the plain error standard because she has not shown that any of the alleged errors affected the outcome of the proceedings. Contrary to respondent's contention, the record offers no indication that the trial court relied heavily on the testimony provided by Collins. Most of Collins's testimony pertained to the medical condition of one of respondent's children shortly after removal, and thus bore little relation to the grounds for termination under MCL 712A.19b(3)(c)(*i*) or (g). Although Collins's opinion that the children would be at risk if returned to respondent directly implicated MCL 712A.19b(3)(j), the record does not suggest that the court relied more than incidentally on Collins's opinion when reaching its conclusion for that factor. The only time the trial court specifically mentioned Collins's testimony was when summarizing all the testimony presented in the case. The court never cited Collins's testimony when articulating its findings under any of the statutory termination factors.

In fact, Collins never testified in connection with the most important reasons behind the decision to terminate parental rights, which included housing, income, domestic violence, and lack of benefit from services. Further, the only time the court referred to Collins's testimony while discoursing upon the children's best interests was a brief reference to their health abnormalities when removed from respondent's care. In sum, the record indicates that the trial court did not rely more than marginally on Collins's testimony when deciding the case. Consequently, respondent has failed to show that she suffered sufficient prejudice to justify reversal in connection with any of her claims of error relating to Dr. Collins's participation in the proceedings.

Next, respondent contends that the trial court erred by consulting a psychological evaluation conducted on respondent, and hearing testimony referring to it. Again, respondent failed to object below in connection with this issue, leaving us to review for plain error affecting substantial rights. See *In re Utrera*, 281 Mich App at 8.

The parties agree that the Rules of Evidence applied to evidence relating to respondent's mental health because that topic was not one of the issues that led the court to take jurisdiction. See MCR 3.977(F)(1)(b).[1] Respondent argues that the report itself, and thus a caseworker's testimony about its contents, were inadmissible hearsay. See MRE 801-805. Petitioner responds that the report at issue was admissible under the hearsay exception for business records. See MRE 803(6).

We note, however, that the report was previously admitted, without objection, at the May 13, 2014 review hearing. Respondent cites no authority for the proposition that a court considering a new theory advanced in a supplemental petition for termination of parental rights may not consider any evidence properly admitted in earlier proceedings. Accordingly, we decline to consider for the first time on appeal whether the report was inadmissible hearsay without exception. We further conclude that the trial court did not commit plain error in declining sua sponte to initiate such advocacy at the termination hearing.

Finally, respondent alleges ineffective assistance of counsel, on the grounds that her attorney below did not object in relation to Dr. Collins or the psychological evaluation. We disagree. Because respondent did not move in the trial court for a new trial or an evidentiary hearing on this matter, our review is limited to mistakes apparent on the existing record. See *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

"In analyzing claims of ineffective assistance of counsel at termination hearings, this Court applies by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law context." *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). Effective assistance of counsel is presumed and respondent bears the heavy burden of

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[1] We note that this argument implicates the trial court's findings under MCL 712A19b(3)(g) and (j), but not (c)(*i*). MCR 3.977(F)(1)(b)(ii). Because "[o]nly one statutory ground for termination need be established," *In re Olive/Metts Minors*, 297 Mich App 35, 41; 823 NW2d 144 (2012), this argument alone does not set forth a basis for reversing the result below.

proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, respondent must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's deficient performance, there was a reasonable probability that the result of the proceeding would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

Concerning Dr. Collins, an objection based on the imperfect listing of her as an expert witness should have resulted in nothing more than the trial court concluding that respondent was not in fact surprised at petitioner's intention to call her as an expert. See *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989) ("Counsel is not obligated to make futile objections."). Further, as discussed above, the record suggests that Collins' testimony had only marginal bearing on the result below. Similarly, counsel would have had nothing to gain from objecting to the psychological evaluation at the termination hearing when it was properly admitted into evidence earlier in the proceedings. See *id.* Therefore, respondent cannot show that counsel's failure to object in relation to Collins or the psychological evaluation affected the outcome of the proceedings. Moreover, there was ample evidence that the statutory grounds for termination were met, and that termination was in the children's best interests, independent of Collins's testimony and the psychological evaluation. See *Uphaus (On Remand)*, 278 Mich App at 185. And, alternatively, respondent's counsel may have wanted the opportunity to cross-examine Collins and to use the psychological evaluation to his client's advantage. See *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999) (an appellant pressing a claim of ineffective assistance of counsel must overcome a strong presumption that counsel's tactics were matters of sound trial strategy).

In summary, respondent is not entitled to appellate relief on the asserted grounds.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro