STATE OF MICHIGAN

COURT OF APPEALS

In re A. D. BARDEN, Minor.

UNPUBLISHED
October 13, 2016

No. 332037
Monroe Circuit Court
Family Division
LC No. 14-023245-NA

Before: FORT HOOD, P.J., and GLEICHER and O'BRIEN, JJ.

PER CURIAM.

Respondent-mother appeals as of right from a circuit court order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(c), (g), (j), and (l). We affirm.

Respondent's sole claim on appeal is that her attorney was ineffective for calling certain witnesses whose testimony she claims was unfavorable to her. Respondent does not dispute that petitioner established at least one statutory ground for termination by clear and convincing evidence. However, she argues that petitioner failed to establish that termination of her parental rights was in her child's best interests, and that the witnesses called by trial counsel enabled the trial court to resolve that issue against respondent. We disagree.

"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). Because respondent did not raise this issue in the trial court, this Court's review is limited to errors apparent on the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

"To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance caused him or her prejudice." *People v Nix*, 301 Mich App 195, 207; 836 NW2d 224 (2013), citing *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). "To demonstrate prejudice, a defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different." *Nix*, 301 Mich App at 207. It is presumed that trial counsel used effective trial strategy, and a defendant has a heavy burden to overcome this presumption. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

The decision "to call or question witnesses [is] presumed to be [a] matter[] of trial strategy" and will only constitute ineffective assistance when it deprives defendant of a substantial defense. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (citation omitted). "We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *Payne*, 285 Mich App at 190 (citation omitted).

At the close of petitioner's case, respondent's attorney called witnesses to testify in support of respondent's parenting abilities, which was her primary barrier in this case. Respondent argues that these witnesses provided damaging testimony to her case, and that her attorney was ineffective for calling the witnesses at trial. We disagree. Each of the witnesses at issue testified favorably regarding petitioner.[1] While negative testimony may have been elicited on cross-examination, we will not use "the benefit of hindsight when assessing counsel's competence." *Id*.

For thoroughness, we discuss respondent's specific concerns with each witness. Jill Frederick conducted some of respondent's parenting classes and supervised family visits during the proceedings. Plaintiff complains that Frederick's testimony was damaging because on cross-examination, Frederick testified that respondent had offered the minor child restricted food during a visit, as indicated in a report prepared by Frederick.[2] However, there was already evidence of that incident in the record, and evidence of another similar incident. Thus, we do not see how respondent could have been prejudiced by this testimony. *Nix*, 301 Mich App at 207. Moreover, Frederick testified that she did not view the incident as a problem because eating together promoted bonding. Any detriment to respondent from this line of testimony was not so damaging as to undermine or outweigh Frederick's favorable testimony. In fact, the trial court barely made note of it, finding only that respondent "would bring food that she was not permitted to bring during the visits," and that was apparently a pre-existing problem that had led the court to prohibit bringing food in the first place.

Respondent next argues that counsel was ineffective for calling Michelle Griffin, the child's foster-care worker in a prior case. While respondent contends that Griffin's testimony "was not necessary," it was favorable to respondent. It showed that she had participated in

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[1] The lawyer guardian ad litem (LGAL) stated during closing argument that he was undecided whether termination was in the best interests of the child until after respondent's witnesses' testified. However, the LGAL also acknowledged that the witnesses provided some positive testimony for respondent.

[2] The record does not support respondent's claim that counsel was ineffective for failing to request an adjournment to review the report before it was offered into evidence. Nothing in the record indicates that counsel was unable to review the report. While counsel stated that he had only recently received the report, he was apparently satisfied that he had sufficient time to review it because *he* offered it into evidence and it was received as respondent's exhibit.

reunification services and completed them successfully with the result that her child was returned to her care and the court terminated its jurisdiction. This evidence showed that respondent was educable and could benefit from services to the point of reunification, which undermined another witness's testimony that respondent had failed to benefit from services in another case and thus supported counsel's argument that respondent was benefiting from services to the extent that it would be in the child's best interests to continue reunification efforts. However, on cross-examination, Griffin admitted that she would "question" whether respondent had really benefited from services in light of the fact that the child had once again been removed from the home, or at least question why respondent had left the child with his father knowing that the father's home was unsanitary. Again, we do not agree this one admission was so damaging as to undermine Griffin's favorable testimony such that it was a serious error for counsel to call Griffin as a defense witness, particularly in light of the favorable testimony Griffin provided for defendant.

Respondent lastly argues that counsel was ineffective for calling her boyfriend, Harold Hera, to testify. Respondent contends that petitioner's evidence showed that she had suitable housing, which was undermined by Hera's testimony that respondent's house had recently been sold. This is a mischaracterization of the record. While the foster-care worker initially testified that she had no concerns regarding respondent's home, she later noted that it had been sold and that respondent's housing plans were unknown. While Hera confirmed that the house had been sold, he also testified that he and respondent did not have to vacate it immediately and that they had placed an offer on a new place. Thus, Hera's testimony regarding respondent's housing was favorable because it showed that respondent's living situation was not as indefinite and uncertain as the foster-care worker's testimony suggested.

Respondent also complains that Hera offered unfavorable testimony by mentioning that she was still driving without a license. The fact that respondent routinely drove without a license was clearly established by petitioner's evidence and thus the fact that Hera mentioned it was not so damaging as to undermine his favorable testimony. For these reasons, we reject respondent's claim.[3]

Affirmed.

/s/ Karen M. Fort Hood
/s/ Elizabeth L. Gleicher
/s/ Colleen A. O'Brien

[3] In her statement of facts, respondent states that trial counsel's decision to call Dawn Nartker to testify regarding possible relative placement was "unnecessary," as it was later determined that Nartker was not a relative. However, respondent does not develop any argument regarding this statement in her brief. To the extent respondent raised this issue, it was abandoned on appeal because respondent failed to present a meaningful argument. *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008).