STATE OF MICHIGAN

COURT OF APPEALS

In re WEGNER, Minors.

UNPUBLISHED
October 20, 2016

No. 332294
Delta Circuit Court
Family Division
LC No. 15-000172-NA;
15-000173-NA;
15-000174-NA

Before: MARKEY, P.J., and MURPHY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondents appeal as of right the order terminating their parental rights to the minor children, JWW, NJW, and RAW, under MCL 712A.19b(3)(b)(*i*), (j), and (k)(*iii*). We affirm.

I. STATUTORY GROUNDS FOR TERMINATION

Respondents first contend that the trial court erred in finding that the cited statutory grounds for termination were established by clear and convincing evidence. We disagree.

"To terminate parental rights, a trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been proved by clear and convincing evidence." *In re Brown/Kindle/Muhammad Minors*, 305 Mich App 623, 635; 853 NW2d 459 (2014) (citation and quotation marks omitted). "This Court reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination. The trial court's factual findings are clearly erroneous if the evidence supports them, but we are definitely and firmly convinced that it made a mistake." *In re White*, 303 Mich App 701, 709-710; 846 NW2d 61 (2014) (citations omitted). "A reviewing court must defer to the special ability of the trial court to judge the credibility of witnesses." *In re LaFrance*, *Minors*, 306 Mich App 713, 723; 858 NW2d 143 (2014).

The trial court concluded that termination of respondents' parental rights was warranted under MCL 712A.19b(3)(b)(*i*), (j), and (k)(*iii*). Those provisions authorize termination under the following circumstances:

> (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:

(*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.

* * *

(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:

* * *

(*iii*) Battering, torture, or other severe physical abuse. [MCL 712A.19b(3).]

The trial court found that each of these grounds were established based on its findings that respondents intentionally caused burns to JWW's buttocks and broke his arm with a baseball bat. JWW testified that as punishment for breaking the zipper on his jacket, respondents spanked him with a bat and it hurt, so he blocked it with his left hand and his arm was broken. Respondents told JWW to tell the doctor that he hurt his arm in a sledding accident. JWW did so because he was afraid respondents would hurt him again, and they bribed him with an MP3 player. JWW also testified that respondents burned him because he was getting in trouble and they wanted to "burn the demons out" of him. They pulled down his pants, bent him over a chair, and burned him with a metal shish kabob skewer that was heated up with a grill or lighter. They applied the shish kabob three times. NJW testified that he saw JWW's arm being broke with a bat, heard respondents say they were going to lie and say that JWW broke his arm sledding. NJW also told the Maltreatment in Care Specialist for the Department of Health and Human Services (DHHS), Andrew Porath, that respondents burned JWW's buttocks with a metal poker, which respondent father heated with a candle.

Respondents claim that clear and convincing evidence of the statutory grounds did not exist because JWW and NJW lacked credibility based on prior allegations and recantations, the inconsistencies in their testimony and statements, and the fact that NJW was struggling at home and admitted he would leave if he were old enough to do so. The trial court recognized the credibility issues in this case and, nonetheless, found that JWW and NJW were credible regarding these two allegations. It is true that JWW previously alleged abuse and recanted, that JWW's and NJW's allegations had inconsistencies, and that NJW wanted out of respondents' home. However, NJW clearly testified that he wanted to leave because of the abuse, and we must defer to the trial court's special ability to judge the credibility of the witnesses. *In re LaFrance Minors*, 306 Mich App at 723.

Respondents also focus on the fact that no other witnesses testified about the abuse. However, none of the investigators, police, or therapists were alleged to have been present when the abuse occurred. Respondents also argue that neither of the nurses who examined JWW at Hawthorn Center saw scars on his buttocks. However, there was evidence of purple marks on

his buttocks in 2013, and the physician's assistant who examined JWW in September 2015 observed three scars on his buttocks. Respondents further claim that petitioner's expert, Dr. N. Debra Simms, could not conclude whether JWW's arm was broken in a sledding accident or by a baseball bat, and that the scars could have been caused in a variety of ways. Moreover, Dr. Zachary C. Leonard opined that the broken arm was more likely caused by an indirect injury. Although neither doctor definitively testified that JWW's arm was broken by a baseball bat and not a sledding accident, they also did not rule out the possibility.

Accordingly, the trial court did not clearly err in finding that respondents intentionally burned JWW's buttocks and broke his arm with a baseball bat. This constituted battering, torture, or severe physical abuse. See MCL 712A.19b(3)(k)(*iii*). Respondents also caused physical injury and there was a reasonable likelihood that the child would suffer from injury or abuse, or be harmed, in the foreseeable future if placed in respondents' home. See MCL 712A.19b(3)(b)(*i*) and (j). The likelihood of future harm can reasonably be inferred based on respondents' past conduct. Respondents claim that there was no evidence that the children would be harmed if returned to the home, particularly given that JWW was placed in a limited guardianship. However, respondent mother testified that she could revoke the guardianship, which could result in JWW being placed back in respondents' home. And even if grounds under MCL 712A.19b(3)(b)(*i*) and (j) were not established with regard to JWW, they were established with regard to NJW and RAW, who would be at risk in the home given respondents' past conduct, and MCL 712A.19b(3)(k)(*iii*) was clearly established with regard to JWW, who suffered the abuse. Therefore, the trial court did not clearly err in finding that the statutory grounds for termination were proven by clear and convincing evidence.

II. BEST INTERESTS

Respondents also contend that termination of their parental rights was not in the children's best interests. We disagree.

"The trial court must order the parent's rights terminated if the Department has established a statutory ground for termination by clear and convincing evidence and it finds from a preponderance of the evidence on the whole record that termination is in the children's best interests." *In re White*, 303 Mich App at 713. "We review for clear error the trial court's determination regarding the children's best interests." *Id*.

> The trial court should weigh all the evidence available to determine the children's best interests. To determine whether termination of parental rights is in a child's best interests, the court should consider a wide variety of factors that may include "the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption. [*Id.* at 713-714 (citations omitted).]

Generally, it is in a child's best interests to be kept with his or her siblings. See *In re Olive/Metts Minors*, 297 Mich App 35, 42; 823 NW2d 144 (2012).

The trial court found that termination was in the children's best interests based on its finding that JWW and NJW were adamant that they did not wish to return to respondents' home, the apparent lack of bonding between the children and respondents, the intentional physical abuse of injuries inflicted on JWW, and respondents' complete denial of any abuse or neglect. Respondents focus on problems in the children's current placements, but despite those issues, all three children referred to their guardian or foster parents as "mom" or "dad" and had the possibility of permanency. Moreover, despite any difficulties the children faced while in care, the trial court did not clearly err in finding that termination was in the children's best interests based on the physical abuse suffered in respondents' home. NJW was clear that the reason he wanted to leave was the abuse. Finally, even if a bond existed between RAW and respondents, termination was in his best interests based on the physical abuse suffered by his sibling.

III. CREDIBILITY DETERMINATIONS

Respondents contend that the trial court clearly erred in its assignment of weight and credibility to respondents' witnesses. We disagree.

Although the trial court's findings regarding the statutory grounds are reviewed for clear error, its credibility determinations are given great deference. See *In re White*, 303 Mich App at 709, 711. As discussed earlier, the trial court did not clearly err by finding that respondents broke JWW's arm with a baseball bat despite Dr. Leonard's opinion that a sledding accident was more likely the cause. While Dr. Leonard opined that the break was more likely caused by an indirect injury, he did not definitively rule out the use of a baseball bat. Dr. Simms was also unable to definitively say that the broken arm was not caused by a baseball bat or that the scars were not caused by burns. The trial court was free to believe JWW's and NJW's testimony regarding the incidents. See *First Nat. Bank & Trust Co. of Marquette v Albert*, 66 Mich App 252, 264; 238 NW2d 827 (1975).

IV. MRE 801 (d)(2)

Respondents next argue that the trial court erred by ruling that the children were not parties to the action and, therefore, MRE 801(d)(2) did not apply to their out-of-court statements. "Evidentiary rulings are reviewed for an abuse of discretion; however, we review de novo preliminary questions of law affecting the admission of evidence, e.g., whether a statute or rule of evidence bars admissibility." *In re Martin*, ___ Mich App ___, ___; ___ NW2d ___ (2016) (Docket Nos. 330231; 330232); slip op at 2.

MRE 801(d) provides, in relevant part, that the following statements are not hearsay:

> (2) *Admission by Party-Opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter

> within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy.

MCR 3.903 provides definitions of terms in proceedings involving juveniles. MCR 3.903(A)(19)(b) defines "party" to include the "petitioner, child, respondent, and parent, guardian, or legal custodian in a protective proceeding."

Respondents asked NJW on cross-examination, "Do you remember [JWW] saying at that point in time, [JWW] said, 'They're getting too strict.'" Petitioner objected based on hearsay and respondents argued that NJW could testify regarding a statement made by JWW because JWW was a party-opponent. The trial court, however, ruled that JWW was not a party to the lawsuit, and the rule allowing admissions by a party-opponent was not applicable. Respondents raised the issue again during Porath's testimony when they asked Porath whether NJW previously stated that respondents were not able to use the shock collar on him, and during the testimony of William Hilberg, a former children's services worker, when they asked Hilberg whether JWW told someone at the hospital that it was not a sledding accident.

Based on MCR 3.903(A)(19)(b), JWW and NJW were parties because they were children in a child protective proceeding. Therefore, the trial court could have properly determined that MRE 801(d)(2) was applicable to statements made by the children.

However, JWW and NJW were also witnesses. These statements were reiterated by JWW and NJW during their testimony at trial. Moreover, their statements were subject to cross-examination. MRE 801(d)(1) states that the following statements are not hearsay:

> (1) *Prior Statement of Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person;

JWW was questioned on the stand regarding his statement to NJW about respondents' "getting too strict." JWW was also questioned about his statements to hospital staff indicating his broken arm was not a result of a sledding accident. NJW was questioned about his statement regarding the respondents' use of the shock collar on him. Thus, in each instance the declarant had previously testified during the trial, was subject to cross-examination, and the statements were consistent with the declarants' previous testimony. By questioning NJW, Porath and Hilberg, the respondents were seeking to show that the declarants' testimony was recently fabricated, improperly influenced, or was elicited for an improper motive, i.e., to be removed from respondents' care. Consequently, the exclusion of NJW's testimony, Porath's testimony, and Hilberg's testimony regarding these statements was proper under MRE 801(d)(2), but improper under MRE 801(d)(1).

However, this error was harmless under MCR 2.613(A) ("An error in the admission or the exclusion of evidence . . . is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice."). Respondents failed to argue that any of the excluded testimony would have affected the outcome of the proceeding. Respondents claimed that the ruling changed the questions respondents' counsel was able to ask, but they fail to specify any particular evidence that was excluded as a result of the ruling or how it affected the outcome of the proceedings. Respondents also argue that they were unable "to show the motive of the children," but they fail to explain what that motive was, or what evidence they would have introduced and how the exclusion of such evidence affected the outcome of the proceedings. Moreover, respondents were able to introduce other testimony suggesting reasons why JWW and NJW might be lying.

V. MISTRIAL

Finally, respondents contend that the trial court erred by denying their motion for a mistrial after the guardian ad litem (GAL) asked the jurors in his opening statement during the trial concerning jurisdiction to use their hearts to come to the correct decision. We disagree. "Whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion resulting in a miscarriage of justice." *Veltman v Detroit Edison Co*, 261 Mich App 685, 688; 683 NW2d 707 (2004) (citation omitted).

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action. [*Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982).]

"[A]n attorney's comments during trial warrant reversal where they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 501-502; 668 NW2d 402 (2003). Respondents contend that the GAL's statement asking the jury to bring with them their hearts and "ultimately the right thing will be done" was an appeal to sympathize with the children and prevented a fair trial.

At the end of his opening statement, the GAL stated:

> We'll revisit these things, the burdens of proof and what the evidence showed, at the conclusion of the case, but bring with you your - - as was beaten into us by counsel during voir dire - - bring with us your minds and your hearts throughout this whole process and I think ultimately the right thing will be done. Thank you.

Respondents subsequently objected, arguing that the statement was an improper appeal to sympathize with the children and the prejudice could not be corrected except by granting a mistrial. The GAL responded that, in context, doing the right thing meant following the rules and that the statement was trivial. The trial court considered providing a curative instruction informing the jury that doing the right thing meant following the law and instructions. The court opined that, although the statement could be interpreted another way, it did not believe the statement came close to warranting a mistrial and it could not believe that respondents would want a mistrial "given the way the case is going and the way the jury has been picked." Respondents' attorney stated that he had to object "for appeal reasons," and that it did not "mean that I truly believe in my heart that." At the start of the next day, the trial court stated that it had reviewed the tape and found the opening statement to be proper, so it denied the motion for a mistrial or a curative instruction.

Respondents rely on the law prohibiting a prosecutor from making appeals to the jury to sympathize with a victim. See *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003), and *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). A prosecutor may not make blatant appeals to the jury's sympathy. See *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). The GAL's statement was such an appeal. Even though improper, the comment was brief and was not likely to deflect the jury's attention from the evidence presented or have a controlling influence on the verdict. See *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008); *Wiley*, 257 Mich App at 501-502. Under these circumstances, any error would be harmless. Accordingly, the trial court did not abuse its discretion in denying a mistrial.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Amy Ronayne Krause