STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of CECILIA CIANA MARTINEZ, ALFONSO FRANCISCO MARTINEZ, JR., ALEXANDRIA AMANDA MARTINEZ and ERICA ASHLEY MARTINEZ, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

V

ALFONSO FRANCISCO MARTINEZ,

Respondent-Appellant.

UNPUBLISHED
November 20, 2003

No. 248918
Saginaw Circuit Court
Family Division
LC No. 01-027411

Before: Murray, P.J., and Gage and Kelly, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating his parental rights to the minor children under MCL 712A.19b(3)(c)(i), (g) and (j). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This case came to the attention of the Family Independence Agency when the children's mother was found dead in the trunk of her car and respondent was arrested and charged with her murder. Throughout the pendency of this case and at the time of the termination of parental rights, respondent remained incarcerated awaiting trial on charges of open murder.

On appeal, respondent contends that he was denied the effective assistance of counsel by a number of claimed errors and omissions by his trial counsel. Because respondent did not move for an evidentiary hearing or a new trial, this Court's review is limited to matters apparent on the existing record. *In re Schmeltzer*, 175 Mich App 666, 673; 438 NW2d 866 (1989). The principles of effective assistance of counsel developed in the criminal context apply by analogy in child protective proceedings. *In re CR*, 250 Mich App 185, 198; 646 NW2d 506 (2002); *In re Trowbridge*, 155 Mich App 785, 786; 401 NW2d 65 (1986). To prevail on a claim of ineffective assistance of counsel, respondent must show that his trial counsel's performance was deficient, that is, it "fell below an objective standard of reasonableness" and that respondent was so prejudiced that he was denied a fair trial. *In re CR, supra* at 198, quoting *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). In order to show prejudice, respondent must demonstrate

"a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *In re CR, supra* at 198, quoting *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). An attorney's use of an unsuccessful trial strategy does not mean that the attorney was ineffective. *In re CR, supra* at 199. This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *In re Simon*, 171 Mich App 443, 448; 431 NW2d 71 (1988).

Respondent asserts that his trial counsel was ineffective for failing to adequately develop the argument that respondent had a viable care plan for the children. However, there was little for counsel to argue where respondent's own testimony indicated that he had no plan for the children other than desiring their placement with his mother, whose home was found unsuitable, and concurring in their placement with their maternal grandparents, whose home was also found unsuitable. On this record, we find that counsel's conduct did not fall below an objective standard of reasonableness,. *In re CR, supra* at 198.

Respondent also contends on appeal that his counsel was ineffective by failing to seek disqualification of petitioner's counsel on the grounds that the same office was prosecuting respondent for murder. The thrust of this argument appears to be that petitioner's counsel manipulated the timing of the criminal trial so that it would occur after the termination trial, to respondent's potential detriment. In view of the fact that respondent was ultimately convicted of first-degree murder, we are unable to discern any prejudice to respondent. *In re CR, supra* at 198. In a related argument, respondent faults his trial counsel for failing to adequately argue that the criminal and termination matters were "inextricably intertwined." Because it is unclear what benefit respondent would have realized from the intertwinement theory, no prejudice is apparent. In any event, the intertwinement of the two cases appears so obvious that it needed no emphasis from trial counsel, and counsel's alleged failure in this regard cannot be said to fall below an objective standard of reasonableness. Indeed, counsel's failure to emphasize the theory may well have been a matter of trial strategy, which should not be second guessed by this Court. *In re CR, supra* at 199; *In re Simon, supra* at 448.

We further conclude that respondent was not denied the effective assistance of counsel by his attorney's failure to secure his attendance at a review hearing, by her failure to object to respondent's participation in the termination trial by closed circuit television, or by her failure to request an audio hookup so that respondent could communicate confidentially with her. With respect to the review hearing, we note that even at an initial dispositional hearing, "respondent has the right to be present, *or may appear through legal counsel."* MCR 5.973(A)(3), now MCR 3.973(D)(2) (emphasis added). Furthermore, respondent has identified no prejudice that might have resulted from his absence at the review hearing, and none is apparent on the record. With respect to the issue concerning video participation and failure to request an audio hookup, we note that a respondent is not absolutely entitled to be physically present at termination proceedings when other means such as telephone or videotape are available to ensure that the respondent receives due process. *In re Vasquez*, 199 Mich App 44, 48-49; 501 NW2d 231 (1993). The record reflects that the lower court ensured that respondent would be able to see and hear the proceedings. The record also reflects that respondent spoke with his attorney immediately before trial began, and during the proceedings the court conscientiously ensured that respondent could confer confidentially with his counsel by emptying the courtroom for this purpose. In these circumstances, we can detect no prejudice to respondent from the alleged

errors. There is no basis whatsoever to conclude that the result might have been different if respondent had been able to be physically present in the courtroom.

Respondent also faults his attorney for failing to file a motion for parenting contact. However, this matter was addressed by the trial court at the dispositional hearing and placed in the discretion of the children's therapist. The therapist, as well as the social worker, reviewed letters from respondent to the children and determined that they were inappropriate. Under these circumstances, a motion for parenting contact would likely have been futile. An objective standard of reasonableness does not require counsel to do a futile act. See *In re Powers*, 244 Mich App 111, 123; 624 NW2d 472 (2000). Moreover, the record before us offers no basis to conclude that a motion for letter contact with the children might have caused a different outcome in the termination trial. We similarly conclude that counsel's failure to object to the untimeliness of review hearings did not result in prejudice to respondent. Where respondent could not comply with the parent-agency agreement while incarcerated, and even at trial presented no care plan for his children, there is no likelihood that the ultimate outcome would have been different if timely review hearings had been held.

Finally, respondent faults his trial counsel for failing to challenge the sufficiency of the evidence to terminate parental rights. In closing argument counsel for respondent admitted that at least one statutory ground for termination was established, and focused her argument on the best interests of the children, also arguing that respondent had done all it was possible to do while incarcerated, might soon be released, and was very willing to undertake all necessary steps to regain custody of his children. This was clearly a trial strategy. In *In re CR, supra*, this Court found a similar strategy to be a good one as it was obviously tailored to address the low probability that the respondent would retain parental rights based on the sufficiency of the evidence. *Id.* at 199-200. The same is true in this case, where even if respondent had been acquitted, substantial time and effort would be required to reunite him with the children, none of whom wished to live with him. Based on the record, there is no basis to conclude that a different argument would have resulted in a denial of termination.

Respondent also challenges the sufficiency of the evidence supporting the termination of his parental rights. The trial court did not clearly err by finding that the statutory grounds for termination were established by clear and convincing evidence. MCR 5.974(I), now MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). The conditions that led to the adjudication were respondent's incarceration and his failure to have a plan for the care of the children. At trial, respondent described his care plan as placing the children in the care of his mother, and failing that, with their maternal grandparents. However, respondent's mother was investigated as a possible placement and found inappropriate; and prior to the termination trial the children were removed from the maternal grandparents' care because of domestic violence in that home. Where there was no evidence that respondent had any alternate care plan in the event of his conviction other than those already rejected as unsuitable, and where extensive services and rehabilitation would have to be commenced in the event of respondent's acquittal, the trial court did not clearly err by finding that the conditions of adjudication continued to exist and that respondent would be unable to rectify those conditions in the reasonable future. MCL 712A.19b(3)(c)(i).

The trial court also did not clearly err by terminating respondent's parental rights under MCL 712A.19b(3)(g) and (j). The evidence clearly showed that respondent failed to provide

proper care and custody for the minor children by engaging in domestic violence against their mother in their presence. He had been convicted of domestic violence as well as malicious destruction of property and breaking and entering. Domestic violence remained an extremely problematic issue since respondent continued to minimize and justify his conduct even at the termination trial. For example, he emphasized that the children's mother had also been convicted of domestic violence and that she was "very aggressive." He found the question why he had engaged in domestic violence if he loved his wife to be "ridiculous" and stated that "[e]verybody fights." Respondent initially denied that the children ever witnessed domestic violence, then stated that they had witnessed it on only one occasion, an assertion that was contradicted by testimony that one of the children had intervened in domestic violence between respondent and the children's mother on a number of occasions. Given respondent's testimony, it is clear that his domestic violence problem was not resolved by the five-week anger management class that he took while in jail. Therefore, the trial court did not clearly err by finding that respondent would not be able to provide proper care and custody in the reasonable future. MCL 712A.19b(3)(g). The evidence that respondent has not resolved his domestic violence problem further indicates a likelihood that such conduct would recur, creating a likelihood of harm to all of the children such that termination under MCL 712A.19b(3)(j) was also appropriate.

Finally, the evidence did not show that the termination of respondent's parental rights was clearly not in the children's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). While the testimony indicated that respondent loves the children and they love him, none of them want to live with respondent. The testimony of the children's therapist and their foster care worker strongly indicated that the children need closure regarding the death of their mother and their own futures. Considering this evidence as well as that indicating that respondent still has a substantial problem with domestic violence, we are left with no conviction that the trial court made a mistake by finding that termination was in the best interests of the minor children.

Affirmed.

/s/ Christopher M. Murray
/s/ Hilda R. Gage
/s/ Kirsten Frank Kelly