STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ANIYA JOY DOWELL, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ANTHONY GERARD DOWELL,

Respondent-Appellant.

UNPUBLISHED
December 28, 2004

No. 254567
Oakland Circuit Court
Family Division
LC No. 2002-665248-NA

Before: Murphy, P.J., and White and Kelly, JJ.

PER CURIAM.

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

The trial court did not clearly err in finding that the statutory grounds for termination were established by clear and convincing evidence. MCR 3.977(J); *In re Sours Minors*, 459 Mich 624, 632-633; 593 NW2d 520 (1999). The original petition in this matter sought permanent custody of the minor child, alleging that respondent had murdered the mother of the child in her presence. This allegation was proven by the testimony of an eyewitness to the murder and by respondent's conviction for first-degree murder, which was admitted into evidence. This evidence clearly establishes an act profoundly harmful to the minor child, which certainly constitutes failure to provide proper care and custody. Moreover, because respondent was convicted of first-degree murder and is now incarcerated for life without the possibility of parole, there is no reasonable likelihood that he will be able to provide proper care and custody for the child in the reasonable future. Respondent contends that the trial court lacked clear and convincing evidence that he would be unable to care for Aniya in the reasonable future because his criminal conviction is currently being appealed and he may be granted a new trial and acquitted in the future. Assuming such a scenario, without addressing its likelihood, we still conclude, on the basis of the evidence provided in the termination proceedings, that respondent's conduct establishes his unfitness to care for the child in the future. Respondent has demonstrated a callous disregard for the welfare of the child not only by killing her mother and forever depriving the child of the mother's care and guidance, but by carrying out the brutal murder in the presence of the minor child. See *In the Matter of Mudge*, 116 Mich App 159, 162; 321

NW2d 878 (1982). This evidence is also sufficient to support the trial court's conclusion that there is a reasonable likelihood that the child will be harmed if returned to respondent.

Furthermore, the evidence on the whole record did not establish that termination was clearly contrary to the best interests of the child, who is now three years of age and in need of permanency and stability. *In re Trejo Minors,* 462 Mich 341, 356-357; 612 NW2d 407 (2000).

Respondent additionally asserts that he received ineffective assistance of counsel in the trial court. Because respondent did not move for an evidentiary hearing or 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). Respondent first contends that his trial counsel failed to ascertain the identity and testimony of a witness respondent wished to call and to present that witness. Respondent does not identify this witness or state what testimony would have been given, even on appeal. From the limited discussion of this matter found in the record, it appears that respondent's attorney's actions in this regard were trial strategy, which this Court will not second-guess. *In re Simon*, 171 Mich App 443, 448; 431 NW2d 71 (1988).

Respondent next challenges his counsel's statement to the court, during a discussion concerning the adjournment of the adjudication pending respondent's criminal trial, that it would have no alternative but to terminate respondent's parental rights if he were convicted of first-degree murder. A review of the record suggests that counsel was merely observing that a criminal conviction for first-degree murder would effectively determine the outcome of the termination matter. Although, as respondent argues, the opportunity to find termination contrary to the best interests of the child despite the establishment of a statutory ground for termination is reserved to the trial court by statute, MCL 712A.19b(5), we nevertheless conclude that, in the instant case, no rational assessment of the evidence would permit the conclusion that termination was contrary to the best interests of the child. In any event, there is no indication on the record that the statement by respondent's counsel influenced the outcome of this matter, and the trial court did in fact make an independent best interests determination in its bench opinion and written opinion.

Finally, respondent asserts that he should have received new counsel when he expressed his dissatisfaction with his trial counsel at the beginning of the trial. The record reflects that respondent's trial counsel was respondent's second attorney, appointed after he became dissatisfied with his initial appointed attorney. Because there is no basis to conclude that trial counsel provided ineffective assistance, or would have done so had respondent permitted him to represent respondent throughout the trial, the trial court's failure to replace respondent's second attorney did not deny respondent the effective assistance of counsel. Respondent's claim that an adjournment should have been granted because of his disagreement with his attorney equally fails to establish a denial of effective assistance of counsel because we are unable to conclude that an adjournment would have altered the outcome of this matter.

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Kirsten Frank Kelly