

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of SAMANTHA HOLM, ALYSSA
JO HOLM, and VIKTORIA ANNE HOLM,
Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

MICHAEL HOLM,

Respondent-Appellant.

UNPUBLISHED
November 25, 2008

No. 285397
Clinton Circuit Court
Family Division
LC No. 06-019239-NA

Before: Murphy, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Respondent appeals as of right from a circuit court order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(n)(i). We affirm.

Following the initiation of proceedings in 2006, the trial court terminated respondent's parental rights at the initial dispositional hearing pursuant to MCL 712A.19b(3)(b)(i). In a prior appeal, this Court reversed that decision, primarily because the trial court had not properly exercised jurisdiction over the children. *In re SJH, AJH, & VAH*, 277 Mich App 662; 747 NW2d 547 (2008). On remand, petitioner filed an amended petition based on respondent's interim criminal conviction and sentence. Respondent, who was incarcerated, was allowed to appear by telephone, but hung up before the case was called and thereafter refused to participate. The trial court held a bench trial and found that it had jurisdiction over the children. The case then proceeded to disposition and the court terminated respondent's parental rights.

Respondent first argues that the trial court erred in failing to advise him of his right to a trial by jury before proceeding with a bench trial. This issue has not been properly preserved for appeal because respondent did not raise it below. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 162; 742 NW2d 409 (2007). Therefore, the issue is reviewed for plain error. *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006).

The record discloses that respondent was properly advised of his right to a trial by jury at the preliminary hearing. See MCR 3.965(B)(6). There is no record of a jury demand having been filed in accordance with MCR 3.911(B); and, therefore, respondent waived his right to a

jury trial. *In re Hubel*, 148 Mich App 696, 699-700; 384 NW2d 849 (1986). Following the prior appeal, this Court remanded for a determination of jurisdiction and, if necessary, disposition. The trial court was not required to hold another preliminary hearing. Although there is some indication in the record that the court did hold another preliminary hearing on the amended petition, it was unable to advise respondent of any of his rights because he refused to participate in the proceedings. “Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence.” *Phinney v Perlmutter*, 222 Mich App 513, 558; 564 NW2d 532 (1997). Accordingly, respondent has failed to establish a plain error.

Respondent next argues that trial counsel was ineffective because she failed to advise the trial court that he had requested a jury trial. A respondent has a right to the effective assistance of counsel in child protective proceedings. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002). “[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings.” *In re EP*, 234 Mich App 582, 598; 595 NW2d 167 (1999), overruled in part on other grounds by *In re Trejo Minors*, 462 Mich 341, 353 n 10; 612 NW2d 407 (2000).

Because respondent failed to raise this issue below, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish ineffective assistance of counsel, respondent “must first show that (1) his trial counsel’s performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citation omitted).

The record shows that counsel did not file a jury demand or request a jury trial after conferring with respondent before the adjudicatory hearing began. However, there is nothing in the record to show that respondent had advised counsel at any time that he wanted a jury trial. Thus, respondent has failed to establish an error by counsel. Further, respondent has not shown a reasonable probability that the outcome of the proceeding would have been different had counsel requested a jury trial. The court may assume jurisdiction over a child found within the county if that child’s home or environment is an unfit place in which to live due to a parent’s criminality or depravity. MCL 712A.2(b)(2). Petitioner is only required to establish jurisdiction by a preponderance of the evidence. MCR 3.971(C)(1). In light of the testimony offered at the hearing and the certified copy of the judgment of conviction, there is no reasonable probability that a jury would have concluded that jurisdiction had not been established. Accordingly, respondent has failed to establish a right to relief.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Michael R. Smolenski