STATE OF MICHIGAN

COURT OF APPEALS

In re K. E. GRIFFIN, Minor.

UNPUBLISHED
September 15, 2016

No. 331211
Genesee Circuit Court
Family Division
LC No. 15-132128-NA

Before: CAVANAGH, P.J., and SAAD and FORT HOOD, JJ.

PER CURIAM.

Respondent appeals the trial court's order that terminated her parental rights to the minor child under MCL 712A.19b(3)(b)(*ii*) (failure to protect) and (j) (reasonable likelihood of harm). For the reasons provided below, we affirm.

I. BASIC FACTS

Child Protective Services (CPS) received a complaint that respondent's one-year-old child was physically and sexually assaulted by his father, respondent's boyfriend. During its investigation, CPS discovered physical evidence of abuse, which included injuries to the child's anus and bleeding from his nose and mouth. A medical examination revealed that the child had multiple bruises on his buttocks and multiple anal tears, with both types of injuries being at different stages of healing, and had bleeding coming from his anus, mouth, and nose. The child had also been shot in the face, purportedly with an airsoft gun, and an expelled pellet from the weapon was lodged in the back of his neck.[1] The minor child's father was arrested. He pleaded no contest to assault with intent to murder, two counts of first-degree criminal sexual conduct, and first- and second-degree child abuse. The petition alleged that although the abuse took place while the child was in the care and custody of his father, respondent should have known of the potential for abuse because the father had a criminal history of sexually assaulting his stepbrother.

II. ANALYSIS

[1] Medical evidence was provided showing that a pediatric neurologist decided to leave the projectile where it was because removing it posed serious risks, including the possibility of paralysis.

A. SUMMONS

Respondent argues that the trial court erred because she was not personally served with a summons that accurately identified the nature of the hearing noticed. We review whether a court has personal jurisdiction over a party de novo. *In re Terry*, 240 Mich App 14, 20; 610 NW2d 563 (2000). "[S]tatutes requiring service of notice to parents must be strictly construed." *In re Kozak*, 92 Mich App 579, 582; 285 NW2d 378 (1979).

MCL 712A.12 provides in pertinent parts as follows:

> After a petition shall have been filed and after such further investigation as the court may direct, . . . the court may dismiss said petition or may issue a summons reciting briefly the substance of the petition, and requiring the person or persons who have custody or control of the child, or with whom the child may be, to appear personally and bring the child before the court at a time and place stated . . . . If the person so summoned shall be other than the parent or guardian of the child, then the parents or guardian, or both, shall also be notified of the petition and of the time and place appointed for the hearing thereon, by personal service before the hearing, except as hereinafter provided. Summons may be issued requiring the appearance of any other person whose presence, in the opinion of the judge, is necessary.
>
> Any interested party who shall voluntarily appear in said proceedings, may, by writing, waive service of process or notice of hearing.

The statutory notice and summons requirement is jurisdictional. *In re Brown*, 149 Mich App 529, 535; 386 NW2d 577 (1986). The purpose of a summons is to give notice of the hearing and "to apprise interested parties of the charges and afford them a reasonable time in which to prepare a defense." *Id.* at 541-542. Accordingly, the failure to comply with the notice requirements of MCL 712A.12 is a jurisdictional defect that renders all the proceedings void. *Id.* at 542.

During the preliminary hearing, respondent was personally served with the petition and the summons. She was informed of the time and date she was to appear before the circuit court, the purpose of the hearing, and that the child did not need to appear. Respondent concedes that "[n]ormally, this would be adequate to fulfill the requirements of the statute." We agree that 712A.12 was satisfied and therefore hold that the court properly obtained jurisdiction over respondent.

Respondent maintains that, although she was served with the summons, the summons was defective, which makes the proceedings void. The requirement that a summons in a child protective hearing must "include notice that the hearings could result in termination of parental rights of a respondent parent" is provided under MCR 3.920(B)(3)(c) of the Michigan Court Rules. Although the box on the summons that reads, "to rule on a request that your parental rights over the child[ren] be terminated," was not checked, the summons nonetheless specifically noted that respondent was ordered "to appear in person before the court for a hearing on the allegations in the attached petition" and that "this hearing may result in a temporary or

permanent loss of your rights to the child(ren)." Thus, despite the box not being checked, the summons notified respondent that the hearings could result in termination of her parental rights, which satisfied the requirements under the court rule. Moreover, even if any court rules were not fully satisfied, such failure to do "would not establish a jurisdictional defect." *In re Adair*, 191 Mich App 710, 714; 478 NW2d 667 (1991), citing *In re Brown*, 149 Mich App at 540-542.

B. REUNIFICATION SERVICES

Respondent argues that the court erred when it failed to provide her with reunification services. A respondent's contention that reasonable services were not offered "ultimately relates to the issue of sufficiency" of the evidence adduced in support of termination of parental rights. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005).

MCL 712A.19a(2) mandates a trial court to make "reasonable efforts to reunify a child and family," except when certain enumerated conditions exists. One of those conditions is set forth in § 19a(2)(a): "There is a judicial determination that the parent had subjected the child to aggravated circumstances as provided in [MCL 722.638(1) and (2)]." MCL 722.638 (2), in turn, states:

> In a petition submitted as required by subsection (1), if a parent is a suspected perpetrator or *is suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk*, the department shall include a request for termination of parental rights at the initial dispositional hearing as authorized under . . . MCL 712A.19b. [Emphasis added.]

The record in this case contains substantial evidence to show that respondent "plac[ed] the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk." The evidence established that prior to the incident that led to these proceedings, respondent was aware of the following: the father had a violent temper;[2] the father burned the child with a cigarette; the father committed other abuse to the child, including holding the child upside down and yelling, "I'm going to hold you like this until you pass out"; and respondent's psychologist was uncomfortable with her leaving the child with the father.

While the record demonstrates that it is virtually certain that respondent "plac[ed] the child at an unreasonable risk of harm due to [her] failure to take reasonable steps to intervene to eliminate that risk," we note that the statute only requires that there be a *suspicion* of such

[2] Respondent wrote a letter to her mother, which stated:

> There is something I have been hiding from you. the day the hole in the door frame by living room got put in there I was extremely scared that [the child's father] was going to hit [the child] and me because he was so upset. Then also the day in my room when he made the holes in my cealining. . . . When things get heated, Im scared he's going to hurt me.

activity. Accordingly, it is patent that the trial court did not err when it failed to offer services pursuant to MCL 712A.19a(2)(a) and MCL 722.638(2).

C. FIFTH AMENDMENT RIGHT

Respondent claims that the trial court failed to advise her properly that her silence in the proceedings could be used against her when she invoked her rights under the Fifth Amendment. We review this unpreserved constitutional issue for plain error affecting substantial rights. *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011).

"The privilege against self-incrimination not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also permits him not to answer official questions put to him in any other proceedings, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Phillips v Deihm*, 213 Mich App 389, 399-400; 541 NW2d 566 (1995). "However, the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refused to testify in response to probative evidence offered against them: the amendment does not preclude the inference where the privilege is claimed by a party to a civil cause." *Id.*

During the preliminary hearing, the hearing referee, while advising respondent and her boyfriend of their rights, stated as follows: "You have the right to remain silent. If you choose to do that, your silence will not be used against you. If you say anything, what you say may be used against you." Further, during the termination hearing, when respondent informed the court that she was invoking her Fifth Amendment right against self-incrimination, the court questioned her about invoking that right, but did not mention that her silence could be considered in the proceedings.

Respondent argues that plain error occurred when the referee misstated the law by informing her at the preliminary hearing that her silence would not be used against her. We agree that this instruction was erroneous, as a fact-finder in a civil proceeding can make negative inferences regarding a person's silence. *Id.*

However, respondent cannot show how this particular error affected the outcome of the proceeding. There is no evidence anywhere that the referee or the trial court gave any consideration to respondent's refusal to testify. The trial court, in terminating respondent's parental rights, was "shocked at mother's alliance with the abuser . . . after the abuse came to light." But nowhere does the court state that it made any inferences related to respondent's invocation of her right to remain silent. Indeed, no such inferences were needed, as the record is replete evidence of respondent's continued alliance with the father, including over 600 e-mails in a six-month period after she became aware that he sexually assaulted the child, in which she professed her "everlasting love" and support for him. In sum, it appears that the trial court did as respondent was initially informed—that her silence would not be used against her. Accordingly, respondent has not demonstrated how she was prejudiced by any error, and she therefore is not entitled to any relief on this issue.

Respondent also contends that the trial court erred in accepting her "blanket refusal" to testify pursuant to the Fifth Amendment. The privilege against self-incrimination may only be

asserted on a question-by-question basis to questions that would tend to incriminate the witness, and cannot be asserted as a blanket response to all questions. *People v Dyer*, 425 Mich 572, 578-579; 390 NW2d 645 (1986). At the outset, respondent has waived this issue, as she is the one who sought this blanket refusal at the trial court. See *Living Alternatives for the Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994) ("A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court."). Moreover, there is no evidence as to how respondent would have testified (in response to any non-incriminating questions) if she had not claimed this blanket protection. Thus, as before, she cannot show how her failure to testify caused any prejudice.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent also argues that she received ineffective assistance of counsel during the proceedings. Because "respondent did not move in the trial court for a new trial or an evidentiary hearing" on the basis of ineffective assistance of counsel, our "review is limited to mistakes apparent from the record." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

For an ineffective assistance of counsel claim, we apply the same standard of review as in criminal proceedings. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). Effective assistance of counsel is presumed and a respondent bears a heavy burden to prove otherwise. *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below the objective standard of reasonableness under the prevailing professional norms, and (2) that there is reasonable probability that, but for the counsel's error, the result of the proceeding would have been different." *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Respondent's claim of ineffective assistance of counsel is based on two alleged errors. First, respondent argues that trial counsel erred when she allowed respondent to enter a no-contest plea to the petition and pleading to jurisdiction without receiving any benefit in return. Here, respondent initially entered a no-contest plea to the "jurisdiction portion" of the petition, which was contingent on her getting a psychological evaluation and a bonding assessment. Respondent eventually completed the psychological evaluation, but the court disposed of the bonding assessment because it believed that the child may experience a posttraumatic stress reaction if he had contact with respondent. And because the bonding assessment could not be completed, the court agreed to let respondent to withdraw her plea. Thereafter, a full trial on jurisdiction occurred. Thus, because respondent was allowed to withdraw her plea and because a full trial on jurisdiction occurred, respondent cannot demonstrate how counsel's performance fell below an objective level of reasonableness.

Second, respondent contends that trial counsel's handling of the Fifth Amendment issue was ineffective. Specifically, she argues that counsel failed to: (1) advise respondent that the protections of the Fifth Amendment do not apply in civil cases; (2) do research on the application of the Fifth Amendment to civil cases; and (3) object to the trial court's use of the Fifth Amendment.

Respondent informed the court that she discussed her rights under the Fifth Amendment with her attorney. There is nothing in the record to show that counsel did not properly advise respondent and did not perform sufficient research on the matter. As for respondent's argument that her trial counsel failed to object to the trial court's invocation of her right to remain silent, for the reasons previously stated, the requisite prejudice has not been shown.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Karen M. Fort Hood