STATE OF MICHIGAN

COURT OF APPEALS

In re GATES, Minors.

UNPUBLISHED
September 15, 2016

No. 331395
Kent Circuit Court
Family Division
LC Nos. 15-053469-NA;
15-053470-NA;
15-053471-NA

Before: MURRAY, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM.

Respondent-mother appeals as of right the January 14, 2016 order terminating her parental rights to the minor children MG, AG, and IG, under MCL 712A.19b(3)(g) (failure to provide proper care and custody) and (j) (reasonable likelihood that child will be harmed if returned to the parent). We affirm.

In March 2013, a complaint was submitted to the Department of Health and Human Services ("DHHS") alleging that AG and IG sustained multiple bone fractures while in mother's custody. Mother offered no adequate explanations for these injuries, and medical examiners determined that the injuries indicated that the children had been physically abused. The children were removed from mother's custody, and mother was offered services. In August 2015, the trial court terminated its jurisdiction over the children and returned them to mother. However, approximately one month later, the DHHS received a complaint that IG had been abused while in mother's custody. Mother admitted that she and her boyfriend Martinez spanked the children. During a forensic interview, MG told Leticia Pittman, an investigator from the DHHS, that mother slapped his nose because he made noise when he slept, and that this caused his nose to bleed. AG told Pittman that she saw mother punch MG's nose because he made noise in his sleep. Mother refused to fully participate in services. She was verbally aggressive and condescending to the children during visits. The DHHS petitioned for termination of mother's and father's[1] rights to the three children.

On January 4, 2016, the trial court held a hearing to determine whether Pittman's testimony regarding MG's and AG's statements to her was admissible at adjudication. The trial court concluded that Pittman's testimony regarding MG's statements that mother hit his nose

[1] Father is not a party to this appeal.

was admissible under MCR 3.972(C)(2), and that her testimony regarding AG's statements that mother hit MG's nose was admissible under MRE 803(24). The trial court held an adjudication trial immediately after the evidentiary hearing and took jurisdiction over the children. The trial court then held a dispositional hearing, after which it terminated mother and father's parental rights.

Mother argues that the trial court abused its discretion in admitting Pittman's testimony at the adjudication trial regarding MG's and AG's statements to her during the forensic interview. Mother objected to admission of Pittman's testimony, so this issue is preserved. See *In re AJR*, 300 Mich App 597, 600; 834 NW2d 904 (2013). " 'A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes.' " *In re Brown/Kindle/Muhammad Minors*, 305 Mich App 623, 629; 853 NW2d 459 (2014), quoting *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

Except as provided by MCR 3.900 *et seq.*, the Michigan Rules of Evidence applied at the January 4, 2016 adjudication. MCR 3.972(C)(1); see also *In re Dearmon*, 303 Mich App 684, 696; 847 NW2d 514 (2014). The Michigan Rules of Evidence generally prohibit admission of hearsay testimony, such as Pittman's testimony regarding MG's statements to her during the forensic interview. MRE 802. However, the trial court admitted Pittman's testimony regarding Marques's statements about mother punching his nose under MCR 3.972(C)(2), "which expressly applies to adjudication trials . . . ." *In re Martin*, ___ Mich App ___, ___; ___ NW2d ___ (Docket Nos. 330231; 330232; issued June 23, 2016); slip op at 4. That provision states in relevant part as follows:

> Any statement made by a child under 10 years of age or an incapacitated individual under 18 years of age with a developmental disability as defined in MCL 330.1100a(25) regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622(f), (j), (w), or (x), performed with or on the child by another person may be admitted into evidence through the testimony of a person who heard the child make the statement as provided in this subrule.
>
> (a) A statement describing such conduct may be admitted regardless of whether the child is available to testify or not, and is substantive evidence of the act or omission if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness. This statement may be received by the court in lieu or in addition to the child's testimony. [MCR 3.972(C)(2).]
>
> With regard to MCR 3.972(C)(2), this Court has stated that
>
> [t]he reliability of a statement depends on the totality of the circumstances surrounding the making of the statement. Circumstances indicating the reliability of a hearsay statement may include spontaneity, consistent repetition, the mental state of the declarant, use of terminology unexpected of a child of a similar age,

and lack of motive to fabricate. [*In re Archer*, 277 Mich App 71, 82; 744 NW2d 1 (2007) (citation omitted).]

Pittman interviewed MG when he was "under 10 years of age." MCR 3.972(C)(2). He told Pittman that mother punched his nose and caused it to bleed, which is an act of child abuse as defined in MCL 722.622(g).[2] Furthermore, "the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness." MCR 3.972(C)(2). Specifically, Pittman testified at the evidentiary hearing that she had extensive training in conducting forensic interviews of children. She determined that MG knew the difference between a truth and a lie. She testified that MG told her that he would tell her the truth. Pittman testified that MG then "immediately" told her, without prompting, that mother told him to lie about allegations that she bruised IG. Pittman asked MG whether he wanted to talk about anything else. MG told her that mother punched him when he was sleeping because he made noise when he slept and that the punching caused his nose to bleed. He further told her that mother told him to get tissue and clean his nose. Pittman testified that MG told her that AG saw mother punch him.[3] In sum, unrefuted evidence before the trial court showed that MG understood the difference between the truth and lies, he told Pittman that he would tell her the truth, his statements were spontaneous, he had no motive to lie, and his statements were corroborated by AG's statements. The trial court did not abuse its discretion in admitting the testimony under MCR 3.972(C)(2). *In re Brown*, 305 Mich App at 629, 633-634; *In re Archer*, 277 Mich App at 82.

Mother argues that because caseworker William Broyles conducted a forensic interview of MG before Pittman interviewed MG, MG's statements to Broyles should have been admitted instead of MG's statements to Pittman. In making this argument, mother apparently relies on MRE 803A, which provides for the admission of hearsay evidence of a child's "statement describing an incident that included a sexual act . . . ." MRE 803A states that "[i]f the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule." MG's statement to Pittman did not concern a sexual act, so MRE 803A is inapplicable. Moreover, MCR 3.972(C)(2) contains no requirement that only the first statement regarding an abusive act is admissible. Mother also argues that Pittman failed to follow the forensic protocol when interviewing MG because Pittman did not record the interview, there was not another individual present to document the interview, and Pittman failed to explore alternative explanations for MG's statements. However, there are no facts in the record

[2] We note that although MCR 3.972(C)(2) states that it applies to statements regarding child abuse as defined in MCL 722.622(f), MCL 722.722 was amended effective March 8, 2016, such that child abuse is now defined under MCL 722.622(g) rather than under (f). 2016 PA 35.

[3] During Pittman's forensic interview of AG, AG told Pittman without prompting that she saw mother punch MG's nose, that his nose bled, and that mother told him to get tissue and clean his nose.

indicating that Pittman failed to follow the forensic protocol when interviewing MG, and mother cites no law indicating that Pittman failed to follow the protocol.[4]

Contrary to mother's argument, MG's statements to Pittman were reliable. Although evidence indicates that there were minor inconsistencies among the children's statements, they were entirely consistent with regard to the most relevant point: that mother struck MG's nose, mother caused his nose to bleed, and she told MG to get tissue to clean his nose. MCR 3.972 requires only "*adequate* indicia of trustworthiness." MCR 3.972(C)(2)(a) (emphasis added). The minor inconsistencies in the children's statements do not render Pittman's testimony regarding MG's statements inadmissible. *In re Brown*, 305 Mich at 629. Mother further argues that Pittman's testimony was not credible because her own testimony was inconsistent and because she was inexperienced in testifying. However, credibility is the province of the trial court. *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009).

Next, mother argues that the trial court abused its discretion in admitting Pittman's testimony regarding AG's statements.[5] As discussed above, "[h]earsay is not admissible except as provided by" the Michigan Rules of Evidence. MRE 802. However, the following hearsay is not excluded:

> A statement not specifically covered by any of the foregoing exceptions [i.e., MRE 803(1-23)] but having the equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statements into evidence. [MRE 803(24).]

In other words,

> in order to be admissible under the exception found in MRE 803(24), "a hearsay statement must: (1) demonstrate circumstantial guarantees of trustworthiness equivalent to the categorical exceptions, (2) be relevant to a material fact, (3) be the most probative evidence of that fact reasonably available, and (4) serve the interests of justice by its admission." [*Int'l Union, United Auto, Aerospace &*

[4] Mother apparently cited in the trial court academic articles in support of her argument that Pittman failed to follow protocol, but these articles are not in the record. MCR 7.210(A)(1); *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 305; 486 NW2d 351 (1992).

[5] We note that the trial court admitted Pittman's testimony regarding AG's statements under MRE 803(24), rather than under MCR 3.972(C)(2), because MCR 3.972(C)(2) concerned statements about abuse "performed with or on the child . . . ." AG's statements about mother hitting MG did not concern abuse performed with or on AG; therefore, MCR 3.972(C)(2) did not apply.

Agricultural Implement Workers of America v Dorsey, 273 Mich App 26, 41-42; 730 NW2d 17 (2006), quoting *People v Katt*, 468 Mich 272, 290; 662 NW2d 12 (2003).]

"There is no complete list of factors to consider when determining whether a statement has 'particularized guarantees of trustworthiness.' " *Dorsey*, 273 Mich App at 42, quoting *Katt*, 469 Mich at 291. "Instead, a court must examine the 'totality of the circumstances' and 'consider all factors that add to or detract from the statement's reliability.' " *Id*., quoting *Katt*, 469 Mich at 291-292. However, our Supreme Court referred to the factors in the Federal Rules of Evidence Manual "and stated that the factors contained in it, while not all-inclusive, provided general guidelines for courts. This list of factors includes whether the statement appears to have been made in anticipation of litigation and is favorable to the person who made or prepared the statement." *Dorsey*, 273 Mich App at 42.

There is no dispute that Pittman's testimony regarding AG's statements was relevant to a material fact, that it was the most probative evidence of that fact available, or that admission of the testimony served the interests of justice. Mother argues only that the evidence was inadmissible because it was not trustworthy. We reject that argument. Pittman testified that she used the forensic protocol when interviewing AG, that AG knew what truth was, that AG said she would tell Pittman the truth, and that AG made her statements without prompting. There is no indication on the record that AG's statements to Pittman were "made in anticipation of litigation" or that they were in any way favorable to AG. *Id.* Furthermore, AG's statements were closely corroborated by MG's statements because both children told Pittman that mother hit MG's nose because he made noise when he slept, and that mother told MG to get a tissue and clean his nose. There is also no indication that AG's testimony was the result of coaching. For these reasons, we conclude that the trial court did not abuse its discretion by admitting Pittman's testimony regarding AG's statements about mother hitting MG. *In re Brown*, 305 Mich at 629.

Mother argues that the trial court clearly erred in taking jurisdiction over the minor children because the trial court improperly considered the proceedings in which the children were removed from mother's care from March 2013 until August 2015, and because the trial court considered Pittman's testimony regarding AG's and MG's statements during the forensic interviews. "We review a trial court's decision to exercise jurisdiction for clear error in light of the court's findings of fact[.]" *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). "To properly exercise jurisdiction, the trial court must find that a statutory basis for jurisdiction exists." *Id*. "Jurisdiction must be established by a preponderance of the evidence." *Id*.

The trial court took jurisdiction over the minor children with regard to mother under MCR 712A.2(b)(1) and (2), which state that the trial court has jurisdiction over "a juvenile under 18 years of age found within the county . . . who is subject to a substantial risk of harm to his or her mental well-being[,]" or "[w]hose home environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent . . . is an unfit place for the juvenile to live in." As discussed above, the trial court did not abuse its discretion in admitting Pittman's testimony regarding MG's and AG's statements during the forensic interviews. Further, mother's argument that the trial court impermissibly considered the record from the prior proceedings fails. "[A] court may take judicial notice of its own files and records . . . ." *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009). During the January 4, 2016

adjudication, the trial court took judicial notice of the April 9, 2013 petition, which the trial court authorized on April 9, 2013. Therefore, the trial court properly took judicial notice of the petition, and mother has not established plain error in that regard. *Id.*; *Rivette v Rose-Molina*, 278 Mich App 327, 328-329; 750 NW2d 603 (2008).

Mother next argues that the trial court clearly erred in terminating her parental rights. "In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). This Court reviews the trial court's determination of statutory grounds for clear error. *Id.*; MCR 3.977(K). If this Court concludes that the trial court did not clearly err in finding one statutory ground for termination, we need not address the additional grounds. *In re HRC*, 286 Mich App at 461.

Termination of parental rights is proper under MCL 712A.19b(3)(j) where, "[t]here 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." Contrary to mother's argument that the only evidence supporting termination of her rights was a bruise on IG's cheek, there was ample evidence that the children suffered physical abuse in her custody. At the dispositional and termination portion of the January 4, 2016 hearing, the parties stipulated that the file from the children's first removal could be used for statutory grounds. That file contained a multitude of evidence of mother's physical violence and the children's suffering of physical abuse while in mother's care. Mother admitted to the DHHS that she was sentenced to probation in 2008 for assault and battery. In April 2009, the DHHS received a complaint that mother physically assaulted her mother, Mullane, while MG was between mother and Mullane. IG and AG suffered multiple bone fractures while in mother's custody, and these injuries indicated physical abuse. Mother was arrested in July 2013 and charged with aggravated domestic violence for attacking her roommate. Mother's roommate suffered a broken nose, a broken eye socket, and missing skin from her face from the attack. Mother pleaded guilty to the charge. Pittman's testimony at adjudication showed that after the children were returned to mother in August 2015, mother physically abused MG. Although mother argues that this evidence was inadmissible, as discussed above, Pittman's testimony that AG told her that she saw mother hit MG's nose at least ten times was admissible under MRE 803(24); therefore, the trial court could properly consider it at the termination hearing. See MCR 3.977(E)(3). Mother was verbally aggressive during visits, and became frustrated quickly, and she was unable to manage her emotions, which affected her ability to safely parent.

Mother argues that a caseworker's testimony that mother discontinued the children's services and medication was false, and that mother's daily usage of marijuana was not grounds for termination because she obtained a medical marijuana card before February 2015. However, the credibility of the caseworker was for the trial court to decide. *In re HRC*, 286 Mich App at 459. And mother herself testified that she lost her medical marijuana card in April 2015. Furthermore, the trial court made no findings regarding mother's marijuana use or the discontinuation of the children's services or medication. For these reasons, the trial court did not clearly err in finding that there was a reasonable likelihood that the children would be harmed if returned to her care. *In re BZ*, 264 Mich App at 296.

Finally, mother argues that the trial court clearly erred in finding that termination of her rights was in the children's best interests. This Court reviews the trial court's determination of best interests for clear error. *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012). "Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *Id.* When considering best interests, the focus is on the child rather than the parent. *In re Moss*, 301 Mich App 76, 87; 836 NW2d 182 (2013). The trial court may consider such factors as "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[.]" *In re Olive/Metts*, 297 Mich App at 41-42 (citations omitted).

The record evidence supports the trial court's findings. Mother engaged in relationships with violent men. Mother herself behaved violently on a number of occasions. AG and IG suffered unexplained fractures while in mother's care, and mother did not immediately seek treatment for these injuries. Evidence showed that mother's participation in the children's services was merely for the purpose of having them returned to her rather than to understand how to satisfy their needs. She was aggressive and condescending during visits. The bond between mother and the children was weak, as shown by their reluctance to participate in visits with her. Since March 2013, the children had spent all but approximately one month in foster care. They needed permanency and stability, which their foster parents were willing and able to provide them. There were clear advantages to foster care, and little likelihood that the children would ever be returned to mother. Therefore, the trial court did not clearly err in finding that termination of mother's rights was in the children's best interests. *Id.*; *In re Frey*, 297 Mich App 242, 248-249; 824 NW2d 569 (2012); *In re BZ*, 264 Mich App at 296.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Jane M. Beckering