

STATE OF MICHIGAN
COURT OF APPEALS

In re SCARBROUGH, Minors.

UNPUBLISHED
January 17, 2017

No. 331736
Macomb Circuit Court
Family Division
LC No. 2015-000202-NA

Before: RIORDAN, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court order of adjudication exercising jurisdiction over the minor children, DS and GS.¹ We affirm.

I. FACTUAL BACKGROUND

In 2013, DS was born. Shortly after his birth, both respondents agreed to place DS in a guardianship with respondent's mother. In June 2015, respondents sought to terminate the guardianship, prompting a Children's Protective Services ("CPS") investigation. Later that month, respondent-mother gave birth to GS. Before GS left the hospital, he was removed from respondents' care pursuant to an ex parte order entered by the Family Division of the Macomb Circuit Court and placed in the temporary custody of petitioner, the Department of Health and Human Services ("DHHS"). Two days later, petitioner filed a petition for removal of GS, which stated detailed allegations parallel to the circumstances that constituted the basis of the ex parte order. Most relevant to this appeal concerning respondent-father, the petition alleged that (1) both respondents had a CPS history related to DS; (2) a guardianship petition was granted in October 2014 with regard to DS based on "respondent-mother's ongoing mental health issues and both parents' financial and housing instability"; (3) both respondents failed to rectify those concerns before GS was born, placing GS at a risk of future harm; (4) in June 2015, CPS received a complaint stating concerns related to respondents' ability to care for GS given respondent-mother's "untreated mental health issues, substance abuse, and housing/financial

¹ During these child protective proceedings, respondent-mother pleaded no contest to the allegations in the petition for removal, and she is not a party to this appeal. Thus, we will refer to respondent-father as "respondent" in this opinion, but will refer to both parents jointly as "respondents."

instability concerns” and respondent-father’s “housing/financial instability and substance abuse concerns”; (4) respondent-mother claimed that she had been sexually abused by respondent-father and that there has been domestic violence in respondents’ relationship, yet they continued to remain in a relationship; (5) respondent-father was between homes—as the home in which he claimed to reside was under construction and uninhabitable and he “[was] not regularly welcome at” the residence of respondent-mother’s parents—and he recognized that he could not have children in his care given the unsafe condition of his home; and (6) respondent-father had a history of substance abuse, which had resulted in the confiscation of his driver’s license, and he had refused to submit to a drug screen based on his alcohol and marijuana use. In particular, concerning respondent’s substance abuse, the petition stated, “[Respondent’s] continued substance use and not benefitting from prior services places his child at risk of harm and interferes with his decision making abilities.” After a continued preliminary hearing, the petition was authorized.

Meanwhile, the Oakland County Circuit Court terminated the guardianship concerning DS in light of the petition for removal that had been filed concerning GS in Macomb County, and it ordered DHHS to file a petition for removal concerning DS in Macomb County. An amended petition for removal was then filed in this case so that both children were involved in the instant child protective proceedings. The petition did not include any new allegations.

A second amended petition then was filed which restated the previous allegations and further alleged that respondent’s home did not have an occupancy permit and no one should be living there. It also included additional allegations regarding respondent’s ongoing substance abuse, including that respondent tested positive for marijuana in August 2015. A third amended petition was filed in November 2015, but it did not include any new allegations.

Respondent requested a jury trial, and he was ultimately adjudicated in February 2016.² He chose to represent himself at the trial.³ Petitioner presented testimony from Kurt Davis, the chief mechanical inspector in the city of Warren’s building division; respondent’s mother; and Jennifer Raleigh, a CPS caseworker. The jury found was that one or more of the statutory grounds for jurisdiction alleged in the petition had been proven. Consistent with the jury’s verdict, the trial court entered an order of adjudication finding that petitioner had established a statutory basis for the court to exercise jurisdiction over the children under MCL 712A.2(b) based on a “substantial risk of harm to mental well-being” and “an unfit home environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian.”

II. IMPROPER ARGUMENT AT ADJUDICATION

Respondent’s sole claim on appeal is that he is entitled to a new adjudication because the

² In August 2015, the trial court accepted respondent-mother’s no contest plea to the allegations in the petition.

³ Standby counsel also was present.

prosecuting attorney and the children’s guardian ad litem (“GAL”) asked the jury during their closing arguments to consider disposition-related matters when it determined whether there were sufficient grounds for the court to exercise jurisdiction over the children under MCL 712A.2(b).⁴ We reject respondent’s claim.

A. STANDARD OF REVIEW

Because respondent failed to object to the allegedly improper arguments in the trial court, our review is limited to plain error affecting respondent’s substantial rights. *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008).

Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings. When plain error has occurred, [r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant’s innocence. [*Id.* at 9 (quotation marks and citations omitted; emphasis omitted).]

B. ANALYSIS

For a circuit court to exercise jurisdiction over a child, “the factfinder must determine by a preponderance of the evidence that the child comes within the statutory requirements of MCL 712A.2.” *In re Ramsey*, 229 Mich App 310, 314; 581 NW2d 291 (1998). See also MCR 3.972(C)(1); *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006). In relevant part, MCL 712A.2(b) provides that a court has “[j]urisdiction in proceedings concerning a juvenile under 18 years of age found within the county” under the following circumstances:

(1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. . . .

⁴ Defendant’s claim of error is based on the following statements: The prosecuting attorney questioned Jennifer Raleigh, the CPS caseworker, regarding the purposes of these child protective proceedings, and Raleigh stated that petitioner sought to protect the children and secure services for respondent, not to terminate his parental rights. Later, during her closing argument, in addition to arguing that the evidence presented at trial established statutory grounds for jurisdiction, the attorney referenced Raleigh’s testimony regarding the goals of the proceedings and stated, “Now, we’re asking that the [c]ourt get jurisdiction and be able to issue orders that protect these children.” Similarly, the GAL asked the jury to find that the court has jurisdiction in this case so that the court would have the authority to issue orders that gave respondent an opportunity to receive the services that he needed to care for his children.

* * *

(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

The jury's verdict that statutory grounds for adjudication under MCL 712A.2(b)(1) and (2) were established by a preponderance of the evidence is supported by abundant evidence in the record. Davis, the chief mechanical inspector, testified that respondent's house was uninhabitable—and it was against Warren's city code for anyone to live in it—because there was no hot water, the furnace was not working, the ladder to the attic (where the furnace was located) was not working, there were issues with some gas valves, there was incomplete duct work, there were missing grills and registers, there were issues with the electrical fixtures, and there were roofing issues and broken windows, among other issues. In addition, respondent's mother, with whom the minor children had been living since their birth, testified regarding the guardianship that was previously in place and respondent's ability to care for the children. Although she provided some positive testimony regarding respondent's hard-working nature, his willingness to assist with caring for the children, and his ability to properly care for the children, she acknowledged respondent's substance abuse history and his inability to maintain a steady job. Most notably, she expressed her concern that the children would not be safe with respondent given his lack of income, his lack of suitable housing, and his ongoing involvement with respondent-mother, who had significant mental health issues and other health problems. Jennifer Raleigh, the CPS caseworker, also provided extensive testimony regarding respondent's lack of suitable housing; his financial instability and unstable employment; his failure to provide adequate support for the children; his ongoing participation in a "toxic" relationship with respondent-mother, who had significant untreated substance abuse and mental health issues; his substance abuse history, including his refusal to take a drug screen because he was concerned that it would come back positive because he had been drinking and using marijuana at a time when he did not have a medical marijuana card; and his criminal history.⁵ Given this evidence, even if we assume, *arguendo*, that the prosecuting attorney and GAL made improper statements during their closing arguments, there is no basis for concluding that these comments affected the outcome of the proceedings. See *re Utrera*, 281 Mich App at 9.

Furthermore, the trial court specifically instructed the jury, consistent with M Civ 97.44, that it should not consider the potential disposition of the case in rendering its verdict, *i.e.*, in determining whether the statutory grounds for jurisdiction alleged in the petition had been established by a preponderance of the evidence. See MCR 3.972(E); *In re Ramsey*, 229 Mich App at 314; *In re AMAC*, 269 Mich App at 536. The court specifically advised the jury that it shall not concern themselves with what would happen to the children or their family following its verdict. Simultaneously, the court also explained that if it exercised jurisdiction over the children, they would not necessarily be removed from their home or made wards of the court, whether temporarily or permanently. Rather, the court would decide what to do about the

⁵ He later secured a medical marijuana card in September 2015.

children and their family at a later time, and there were many options available to the court. The trial court also informed the jury, consistent with M Civ 97.12, that they must consider only evidence and testimony in rendering their verdict and that the lawyers' statements and arguments were not evidence.

In criminal cases, we "will not find error requiring reversal if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005), aff'd in part, lv den in part 475 Mich 101 (2006). Similarly, here, we will not find prejudice requiring reversal when the trial court's instructions specifically addressed the purported error. "It is well established that jurors are presumed to follow their instructions," *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and there is no indication that the jurors failed to do so in this case. Moreover, in civil cases, "[w]hen reviewing claims of improper conduct by a party's lawyer, . . . [a] lawyer's comments will usually not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict." *Ellsworth v Hotel Corp of Am*, 236 Mich App 185, 191-192; 600 NW2d 129 (1999). Unpreserved claims of improper conduct are reviewed "to determine whether [opposing] counsel's comments may have caused the result or played too large a part and may have denied the party a fair trial." *Id.* (quotation marks and citations omitted).⁶ As previously discussed, the evidence presented at trial thoroughly supported the jury's verdict. There is no indication that the attorneys' statements produced the result of the adjudication or denied respondent a fair trial.

Respondent has failed to establish a plain error affecting his substantial rights. See *In re Utrera*, 281 Mich App at 8-9.

III. CONCLUSION

Respondent has failed to establish that he is entitled to relief based on the statements of the prosecuting attorney and GAL during the adjudication jury trial.

Affirmed.

/s/ Michael J. Riordan
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto

⁶ Cf. *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011) (stating that "[t]he test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.").