STATE OF MICHIGAN

COURT OF APPEALS

In re C. J. RICKETT, Minor.

UNPUBLISHED
March 16, 2017

No. 334333
Wayne Circuit Court
Family Division
LC No. 16-522252-NA

Before: MARKEY, P.J., and WILDER and SWARTZLE, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating his parental rights to his 15-year-old biological son pursuant to MCL 712A.19b(3)(g), (j), and (k)(*ii*). We affirm.

I. BACKGROUND

Petitioner filed an original petition requesting termination of respondent's parental rights to his biological son following a "Kids Talk" interview with respondent's stepdaughter, in which she stated that respondent sexually abused her. The trial court authorized the petition and trial was eventually set for May 19, 2016. On the first day of trial, before petitioner called its first witness, respondent's attorney indicated that he had talked to someone about getting discovery but he had not received it. Respondent's counsel stated that he would either request an adjournment or he would continue the hearing so long as discovery was provided before the next hearing, which was to be held nearly two months later on July 11, 2016, and he had an opportunity to continue cross-examining any witnesses once he had received the requested discovery. The trial court agreed to allow counsel to recall any witnesses whose testimony had been completed and trial continued. At petitioner's request, respondent filed a written discovery request and petitioner provided the information available before the next hearing.

Respondent's 16-year-old stepdaughter testified in this case on July 27, 2016. She stated that her mother married respondent when she was 14 years old and that the wedding reception was held at her mother's house. According to respondent's stepdaughter, when she got into bed that night, respondent came into her room, and put his tongue into her vagina for approximately five minutes. Respondent's stepdaughter also testified regarding a second incident that occurred nearly a year later. She stated that she was babysitting her younger sisters while her mother was away and went to sleep in her mother's bed. According to her, she woke when she felt respondent rubbing her leg. She testified that respondent then pulled down her pants and they "had sex," meaning that respondent put his penis into her for approximately ten minutes and

"broke" her virginity. She added that respondent threatened to kill her and her mother if she told anyone what happened.

Respondent's wife testified that respondent angrily admitted to her and her sister that he was having sexual relations with her daughter and asked her what she was going to do about it. According to respondent's wife, an altercation broke out between respondent, his wife, and his wife's sister, after respondent swung at his wife's sister on the night he admitted the molestation. Respondent's wife testified that respondent later apologized to her for molesting the girl. Multiple witnesses testified that respondent's son was aware of, and upset by, respondent's abuse of his stepdaughter. Respondent's son's caseworker testified that the son told her that his dad had threatened to kill him before and that he wanted respondent's parental rights terminated.

Respondent was incarcerated throughout the trial and testified that he was so incarcerated because he violated parole when he was convicted of assault and threatening and intimidating behavior of the his wife's sisters. Respondent testified that his parole stemmed from a 2005 conviction for felony firearm and assault with intent to commit great bodily harm less than murder. Respondent is currently awaiting trial on charges of criminal sexual conduct stemming from his alleged abuse of his stepdaughter.

The trial court found that clear and convincing evidence existed that respondent sexually abused his stepdaughter and that termination of respondent's parental rights was appropriate under MCL 712A.19b(3)(g), (j), and (k)(*ii*). The trial court further found that termination of respondent's parental rights was in his son's best interests because respondent's presence around his son would cause him significant harm.

II. ANALYSIS

On appeal, respondent challenges the trial court's conclusion that statutory grounds existed to terminate parental rights. "We review for clear error both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." *In re Trejo*, 462 Mich 341, 356–57; 612 NW2d 407 (2000). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296–97; 690 NW2d 505 (2004).

Because parents have a protected liberty interest in the "companionship, care, custody, and management of their children," the due process clauses of the Fifth and Fourteenth amendments to the United States Constitution require that each "state-required breakup of a natural family" be supported by proof of the parent's unfitness to parent his or her child. *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). To facilitate respect for these rights, our legislature has enumerated the grounds upon which the state may seek to terminate a parent's parental rights. See MCL 712A.19b(3). "Termination of parental rights is appropriate [only] where the petitioner proves by clear and convincing evidence at least one ground for termination." *BZ*, 264 Mich App at 296. Where multiple statutory grounds support termination of a parent's parental rights, so long as termination is appropriate under one statutory ground, the

trial court's error concerning any of the remaining statutory grounds may be harmless. *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

"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." *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012). Because proof of a statutory ground for termination establishes the state's "substantial interest in protecting the welfare of the child," *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013), the trial court need not find clear and convincing evidence that termination is in the child's best interests. Rather, "whether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *Id*.

The child is the "primary" intended beneficiary of the best-interests determination. *Trejo*, 462 Mich 341 at 356. A trial court deciding whether termination is in a child's best interests "may consider 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." *Olive/Metts*, 297 Mich App at 41-42 (internal quotation marks and citations omitted).

In this case, the trial court terminated respondent's parental rights under the following provisions of MCL 712A.19b(3), which provide that the trial court may terminate a respondents parental rights where:

> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
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> * * *
>
> (j) There 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.
>
> (k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:
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> * * *
>
> (*ii*) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

Stepsiblings Do Not Meet the Definition of Siblings. Petitioner and the attorney for the minor child concede that the trial court improperly terminated respondent's parental rights under MCL 712A.19b(3)(k)(*ii*), which requires the parent to have sexually abused the child or a sibling of the child. We agree that petitioner could not establish this statutory ground because respondent did not sexual abuse his son and his son was not the "sibling" of the children respondent abused. To be a "sibling" under MCL 712A.19b(3)(k), the children must be "related through birth or adoption by at least 1 common parent." MCL 712A.13a(1)(*l*). Because there is no evidence in the record that

respondent adopted the stepdaughter he abused and respondent's son is not biologically related to those girls, we conclude that the trial court erred in finding statutory grounds to terminate respondent's parental rights under MCL 712A.19b(3)(k)(*ii*). Nonetheless, we find this error harmless because we conclude that the trial court properly found that MCL 712A.19b(3)(j) supported termination of respondent's parental rights. *Powers Minors*, 244 Mich App at 118.[1]

Anticipatory Neglect Extends to Stepsiblings. Respondent argues that the trial court inappropriately applied the doctrine of anticipatory neglect to terminate his rights to his biological son under MCL 712A.19b(3)(j) because any alleged assault of respondent's stepdaughter did not provide evidence of a reasonable likelihood that respondent's son would be harmed in respondent's care. We disagree.

The doctrine of anticipatory neglect stands for the proposition that "how a parent treats one child is certainly probative of how that parent may treat other children." *In re Powers*, 208 Mich App 582, 588; 528 NW2d 799 (1995), superseded on other grounds by MCL 712A.19b(3)(b)(*i*). Respondent argues that his biological son was not vulnerable in his care because he was a different gender than respondent's stepdaughter and respondent was not biologically related to his stepdaughter. This Court, however, has already concluded that the doctrine of anticipatory neglect "should not be limited to situations where parents abuse or neglect *their own child*." *Id*. at 591–92.

Respondent sexually abused his stepdaughter, who was close in age to respondent's biological son. Respondent then admitted to his wife and her sister that he was abusing his stepdaughter, asking his wife "what [she was] going to do about" him having sexual relations with both her and her daughter. At a minimum, respondent's actions show an inability to comprehend the wrongfulness of his conduct. On this record, we cannot conclude that the trial court erred by concluding that respondent's son would be at risk of abuse if returned to respondent's care.

Additionally, the record in this case, as well as respondent's criminal record, indicate that respondent has a history of physically assaultive behavior that is not limited to young girls. On the night respondent admitted to his wife that he was abusing her daughter, respondent swung at his wife's sister and the police eventually broke up a fight between respondent and others present in the home. Further, respondent was incarcerated throughout trial because he violated his parole on his conviction for assault with intent to cause great bodily harm when he was convicted of

[1]Given the frequency of stepchild relationships in modern society, we note that the Legislature may wish to revisit the definition of sibling provided by MCL 712A.13a(1)(*l*), especially in situations where the stepchild lives in the same home with a respondent and his or her biological child. Though we may find the same concerns present when a respondent abuses a stepchild as when a respondent abuses a biological or adopted child, MCL 712A.13a(1)(*l*) unambiguously excludes stepchildren from the definition of sibling. We therefore apply the clear language of the statute as an expression of the Legislature's intent. See *People v Hall*, 499 Mich 446, 453–54; 884 NW2d 561, 565 (2016) (stating that this Court applies the Legislature's clear intent as conveyed through its statutes).

assault and threatening and intimidating behavior of his wife's sisters. Finally, respondent's stepdaughter testified that respondent threatened to kill her and her mother if she told anyone about the abuse.

That respondent may not have laid a hand on his own child provides respondent little relief in this case. MCL 712A.19b(3)(j) does not require the trial court to wait for respondent to actually harm his child before it may terminate his parental rights. That respondent has threatened to assault, or actually assaulted, multiple individuals, including many in his son's life, is sufficient to find that MCL 712A.19b(3)(j) supported termination of respondent's parental rights.

Moreover, the harm to the child contemplated under MCL 712A.19b(3)(j) includes emotional harm as well as physical harm. See *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011). Although respondent may not have physically assaulted his son, the evidence shows that his son was aware that respondent sexually abused his stepsister and that he suffered emotional harm as a result. Indeed, the emotional harm this child has suffered is apparent from the child's outburst at trial, in which he scolded respondent for talking out of turn and then ran out of the courtroom. Additionally, the child, whom multiple witnesses stated enjoyed a normal relationship with respondent before learning of respondent's abuse of his stepsisters, informed caseworkers that he wanted respondent's parental rights terminated. On this record, we conclude that the trial court properly found that MCL 712A.19b(3)(j) supported termination of respondent's parental rights.[2] Because the trial court need only find one ground supporting termination of respondent's parental rights, we need not address MCL 712A.19b(3)(g). *Powers Minors*, 244 Mich App at 118.

Termination Was in the Son's Best Interests. Additionally, we conclude that this evidence supports the trial court's determination that termination of respondent's parental rights was in his son's best interests. We note that, outside of the obvious fact that respondent's violent tendencies put his son at a severe risk of harm if returned to his care, respondent's actions caused his son such severe distress that the parent-child relationship had completely broken down,

[2] Respondent's brief indicates in sporadic places that the evidence the trial court relied upon was hearsay. The rules of evidence generally do not apply in proceedings to terminate parental rights once the child has come within the court's jurisdiction, MCR 3.977(H)(2), although exceptions apply to this rule. Because, on appeal, respondent has not stated a claim for relief on this ground, we need not address his contentions that certain evidence was hearsay. We do note that the trial court applied the rules of evidence and excluded some challenged testimony as hearsay. Additionally, we find enough non-hearsay evidence to support the trial court's determination that MCL 712A.19b(3)(j) supported termination of respondent's parental rights and note that, because this was a simultaneous hearing on statutory grounds and best interests, the challenged hearsay evidence would otherwise be admissible to the extent that it was relevant to the child's best interests. See *In re Gilliam*, 241 Mich App 133, 136-137; 613 NW2d 748 (2000) (stating that the rules of evidence do not apply at the dispositional phase of a proceeding to terminate parental rights).

rendering it unlikely that respondent would ever be able to provide his son with proper care or parental guidance.

Reunification Services Were Not Warranted. Respondent argues that the Department of Health and Human Services (DHHS) failed to make reasonable efforts toward reunification in this case. He argues that the DHHS made no efforts to reunite him with his son and never evaluated whether he posed a risk to his son. He also claims that, because the victims in this case were not his son's siblings, the DHHS was obligated under MCL 712A.19a(2) to make reasonable efforts to reunite him with his son before pursuing termination of his rights. We disagree.

Generally, the DHHS must make reasonable efforts to reunite the parent and child unless certain aggravating circumstances exist. See MCL 712A.19a(2). However, the DHHS "is not required to provide reunification services when termination of parental rights is the agency's goal." *In re HRC*, 286 Mich App 444, 463; 781 NW2d 105 (2009). The agency may request termination at the initial hearing and, if termination is appropriate, the agency need not provide any reunification services. See MCL 712A.19b(4), MCR 3.961(B)(6), MCR 3.977(E). Here, the agency requested termination in the original petition. Because we conclude that the trial court properly granted that request, thereby terminating respondent's parental rights, we also conclude that respondent was not entitled to any reunification services.

Respondent's Counsel Was Not Ineffective. Finally, respondent argues that his trial counsel was ineffective. Because respondent failed to request a *Ginther*[3] hearing or move for a new trial in the matter, "our review of this issue is limited to mistakes apparent on the appellate record." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94. "If the record does not contain sufficient detail to support [respondent's] ineffective assistance claim, then he has effectively waived the issue." *Id*.

Respondents in proceedings to terminate parental rights have a right to the assistance of counsel. *In re CR*, 250 Mich App 185, 209; 646 NW2d 506 (2001); *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). The right to counsel plays a crucial role in the Sixth Amendment's guarantee of a fair trial by ensuring that the respondent has access to the "skill and knowledge" necessary to respond to the petition against him or her. *Strickland v Washington*, 466 US 668, 685; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "The right to counsel also encompasses the right to the effective assistance of counsel." *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). See also *Strickland*, 466 US at 686.

An appellate court is required to reverse the termination of a respondent's parental rights when "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the [respondent] by the Sixth Amendment." *Strickland*, 466 US at 687. A respondent requesting reversal of an otherwise valid termination bears the burden of proving "(1) the performance of his counsel was below an objective standard of reasonableness under

[3] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

To prove the first prong, respondent "must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). Counsel is not ineffective for failing to make a futile motion. *Sabin*, 242 Mich App at 660. A respondent is prejudiced if there is a reasonable probability that, "but for [his] counsel's errors, the result of the proceeding would have been different." *People v Heft*, 299 Mich App 69, 81; 829 NW2d 266 (2012).

Respondent first argues that his counsel failed to obtain discovery. This argument is unsupported by the record. The record shows that respondent's counsel informed the court before trial began on May 19, 2015, that he was missing discovery material. The court agreed to allow counsel to recall any witnesses whose testimony had been completed if the discovery materials were provided before the next hearing and revealed new or unknown information. The first day of trial lasted only a few hours and respondent's wife was the only testifying witness. Respondent's counsel extensively cross-examined respondent's wife, specifically on the allegations that respondent sexually abused her daughter. At petitioner's request, after this trial date, respondent's counsel filed a written discovery request and petitioner provided respondent's counsel with the available requested information before the next day of trial, some two months later on July 11, 2016. Respondent did not recall his wife to testify, indicating that this additional discovery raised no new concerns for his counsel. This is not surprising given that respondent's counsel's oral motion before the court indicated that he was aware of the criminal charges against respondent stemming from his alleged abuse of his stepdaughter. Thus, respondent's claim that his counsel was ill-prepared and missing information to adequately represent him is unsupported by the record.

Respondent also argues that his counsel was ineffective for failing to call more witnesses or subpoena his son. Again, we disagree. The decision to call or not call a particular witness is presumed to be a matter of trial strategy, *Rockey*, 237 Mich App at 76, and "the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the respondent of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

The record shows that, without calling additional witnesses, respondent advanced his theory of defense—which was essentially that the biological difference between respondent's son and his stepdaughter indicated that his son was not at risk in his care. Thus, respondent was not deprived of a substantial defense, and this Court cannot conclude that counsel's decision not to call the witnesses constituted ineffective assistance. Further, because respondent has provided no evidence that any witness would have undermined the evidence that he sexually abused his stepdaughter, it is clear to this Court that additional witnesses would not have altered the outcome of this trial. Accordingly, we conclude that respondent has failed to establish that his trial counsel's performance fell below an objective standard of reasonableness or that his

counsel's assistance denied him a fair trial. Respondent is not entitled to reversal of the trial court's termination of his parental rights.

Affirmed.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Brock A. Swartzle