STATE OF MICHIGAN

COURT OF APPEALS

In re KNIERIM/THORN/SEKMISTRZ, Minors.

UNPUBLISHED
March 13, 2018

Nos. 340140; 340171
Monroe Circuit Court
Family Division
LC No. 17-024057-NA

Before: TALBOT, C.J., and BECKERING and CAMERON, JJ.

PER CURIAM.

In these consolidated appeals, respondent-mother and respondent-father each appeal as of right the trial court's order assuming jurisdiction over the minor children, CT, ES, and PK. Respondent-mother is the mother of all three children. Only ES is respondent-father's child.[1] The trial court assumed jurisdiction over the children following a jury's determination that grounds for jurisdiction under MCL 712A.2(b) were established by a preponderance of the evidence. We affirm.

I. BACKGROUND

Between 2012 and 2015, respondents lived together with respondent-mother's autistic son, CT, and their daughter, ES. During a brief breakup in early 2016, respondent-mother became pregnant with her third child, PK. At some point, respondents reconciled and resumed living together. The family came to the attention of Child Protective Services ("CPS") when PK tested positive for amphetamines at birth. Because PK was born at a hospital in Detroit, a referral was made to Wayne County CPS. During the initial investigation, respondent-mother reported that she had been using Adderall during her pregnancy. Respondent-mother claimed that she received the medication from an urgent care clinic, but admitted that she did not have a valid prescription for the drug. Wayne County CPS recommended that respondent-mother voluntarily participate in services.

Although PK tested positive for amphetamines, she did not experience any symptoms of withdrawal. Consequently, she was discharged from the hospital. Initially, respondent-mother

[1] CT and PK have separate fathers, who both pleaded no contest to the allegations in the petition for removal and are not parties to this appeal.

and PK's biological father agreed that PK would live with her father. However, after PK was released from the hospital, she went home with the maternal grandfather and step-grandmother. Respondent-mother apparently returned to the apartment that she shared with respondent-father.

Because the children lived in Monroe County, the CPS investigation was transferred from Wayne County to Monroe County. During the investigation that followed, it was discovered that for more than a year, CT had been living with the maternal grandmother and step-grandfather. Also, while ES ostensibly lived with respondents, respondent-mother would leave her at the home of the maternal grandmother and step-grandfather for three to four days at a time every week. At no time were the grandparents granted any legal authority to care for the children.

Further, respondents did not fully cooperate with the CPS investigation. They failed to return phone calls from CPS and did not attend a Family Team Meeting. Respondents also refused to provide petitioner with their current address. In light of these concerns, a petition was filed in January 2017, seeking an order removing the children from respondents' care. The petition cited, among other things, respondent-mother's Adderall use during pregnancy, her continued drug use, respondents' abandonment of the children to the grandparents' care without providing the caregivers with legal authority to properly care for the children, and threats to PK's safety due to respondent-father's animosity toward PK's biological father. Following a preliminary hearing, the children were legally placed with the two sets of maternal grandparents—CT and ES with the maternal grandmother and step-grandfather, and PK with the maternal grandfather and step-grandmother. Sometime during these proceedings, respondents married.

An adjudication trial began in June 2017, but ended in a mistrial after it was discovered that a juror and witness knew each other and had spoken during a lunch break. The second adjudication trial was held in August 2017. A jury found that multiple statutory bases for jurisdiction under MCL 712A.2(b) had been established with respect to each respondent. This consolidated appeal followed.

II. EVIDENCE OF DOMESTIC VIOLENCE

For their first claim of error, respondents both raise an evidentiary challenge. During the August 2017 adjudication trial, over respondents' objections, two witnesses testified that respondent-father physically abused respondent-mother. Respondents argue that because the petition did not contain specific factual allegations related to domestic violence between respondents, petitioner should have been prohibited from eliciting testimony of this nature from the witnesses. Respondents reason that in light of the lack of notice that domestic violence would be an issue, the trial court's evidentiary ruling allowing such testimony denied them due process and a fair trial. We disagree.

We review for an abuse of discretion a trial court's decision regarding the admission of evidence. *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008). However, when an evidentiary issue involves a question of law, our review is de novo. *Id*.

Pursuant to MCR 3.961(A), "a request for court action to protect a child must be in the form of a petition." Pursuant to this same court rule, a petition must contain "[t]he essential facts

that constitute an offense against the child under the Juvenile Code." MCR 3.961(B)(3). The petition must also include a citation to the section of the Juvenile Code relied on for jurisdiction. MCR 3.961(B)(4). A petition serves two essential functions: (1) to "set forth the alleged basis of the court's jurisdiction," and (2) to "communicate to the respondents a notice of the charges against them so that they might evaluate their situation and prepare a response." *In re Hatcher*, 443 Mich 426, 434 n 7; 505 NW2d 834 (1993) (citations omitted). These requirements are necessary to satisfy due process, which requires that a party be afforded sufficient notice of the charges against which the party is required to defend. *In re Slis*, 144 Mich App 678, 683; 375 NW2d 788 (1985). Furthermore, pursuant to MCL 712A.11(6), "[a] petition or other court record may be amended at any stage of the proceedings as the ends of justice require."

After reviewing the petition, we conclude that it was legally sufficient to permit the admission of evidence related to domestic violence. Although the amended petition did not specifically include factual allegations of domestic violence between respondents, it did clearly cite the statutory grounds under the Juvenile Code for the court's intervention. The petition alleged, among other things, that the court had jurisdiction over the children because they were "deprived of emotional well[-]being" and because they had been exposed to a "home or environment by reason of neglect, cruelty, drunkenness, criminality or depravity on the part of a parent . . . [that made the home] an unfit place for the juvenile to live in." See MCL 712A.2(b). The petition further alleged salient facts to support the statutory grounds. In addition to allegations that respondents left the children in the care of relatives without giving them legal authority to properly care for them, the petition alleged that respondent-father did not want PK in the family home because of physical confrontations with PK's biological father. Moreover, the petition alleged that respondent-father was a threat to PK because of this animosity. These allegations provided respondents with notice that they may have to defend against evidence related to criminality and the children's emotional well-being. When reading the petition in its entirety, acts of domestic violence in front of the children would be subsumed by the allegations as pleaded. The allegations provided respondents with sufficient notice of the probability that they would have to defend against allegations of cruelty and criminality, which would encompass domestic violence.

Furthermore, to the extent that the allegations in the petition were alone insufficient to identify domestic violence as a potential issue, admission of evidence of this nature was still permissible because respondents had actual notice that the trial would include this subject matter. On May 31, 2017, petitioner filed a supplemental witness and exhibit list. This filing identified as a potential exhibit a photograph of an injury to respondent-mother's back. In addition, before the June adjudication trial ended in a mistrial, the maternal grandmother testified that she was aware of domestic violence between respondents. Specifically, she testified that she had been told by respondent-mother that respondent-father had strangled her and that he had bitten her on the back when she attempted to run away during an altercation. The events at the first adjudication trial put respondents on notice that jurisdiction would be sought, in part, on the basis of domestic violence in the home.

In addition, the issue of domestic violence was raised again at a hearing between the two adjudication trials. While respondent-father did not attend this hearing, respondent-mother and her counsel were present. The prosecutor's statements at the hearing identified domestic violence as an issue in the case.

Based on the foregoing events, it is evident that respondents were aware that they would be called upon to defend against allegations of domestic violence. Furthermore, respondents had almost two months between the first and second trials to consider any potential allegations of this nature. Accordingly, because respondents had notice, the failure to allege specific facts related to domestic violence was not a fatal flaw. This is particularly true because, at any time, the petition could have been amended to include domestic violence. MCL 712A.11(6) permits amendment of a petition "at any stage of the proceedings as the ends of justice require." *In re Dearmon*, 303 Mich App 684, 695 n 7; 847 NW2d 514 (2014). Because respondents had notice of petitioner's intent to rely, in part, on instances of domestic violence to support the request for jurisdiction, the ends of justice would have justified amending the petition to include specific facts related to instances of domestic violence. Therefore, the trial court did not abuse its discretion when it permitted petitioner to elicit testimony related to acts of domestic violence between respondents, and the admission of this evidence did not violate respondents' right to due process.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, respondent-father argues that he was denied the effective assistance of counsel. We disagree.

This Court applies criminal law principles to claims of ineffective assistance of counsel in child protective proceedings. *In re Martin*, 316 Mich App 73, 85; 896 NW2d 452 (2016). Accordingly, because respondent-father did not raise this issue in a motion for a new trial or request for an evidentiary hearing below, our review is limited to mistakes apparent on the record. See *People v Payne,* 285 Mich App 181, 188; 774 NW2d 714 (2009).

"To establish a claim of ineffective assistance of counsel, a [respondent] must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. In order to demonstrate that counsel's performance was deficient, the [respondent] must show that it fell below an objective standard of reasonableness under prevailing professional norms." *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003), citing *Strickland v Washington,* 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); see also *People v Pickens,* 446 Mich 298, 302-303; 521 NW2d 797 (1994). Establishing prejudice necessarily requires demonstrating a reasonable probability that the result of the proceedings would have been different but for counsel's error. *People v Nix*, 301 Mich App 195, 207; 836 NW2d 224 (2013).

Respondent-father asserts two theories to support his claim that he was denied the effective assistance of counsel. These theories, while separate, are interrelated. First, respondent-father argues that trial counsel should have sought severance of his adjudication trial from that of respondent-mother. Alternatively, respondent-father argues that trial counsel's representation was deficient because counsel failed to object to inadmissible hearsay that was admissible only against respondent-mother. After reviewing the record in its entirety, we conclude that respondent-father has failed to demonstrate that he was denied the effective assistance of counsel.

Respondent-father contends that he was prejudiced when he was tried jointly with respondent-mother because harmful evidence was admitted that, while admissible against respondent-mother, was inadmissible hearsay as to him. Initially, although due process requires a specific adjudication of an individual parent's unfitness before the state can infringe on the parent-child relationship, *In re Sanders*, 495 Mich 394, 422; 852 W2d 524 (2014), there is no applicable authority supporting the proposition that multiple respondents are entitled to separate adjudication trials. In support of his position, respondent-father relies on criminal court rules governing separate trials among multiple criminal defendants. MCR 6.121(C) provides that a trial court must "sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." However, there is no authority for the proposition that MCR 6.121(C) is applicable to juvenile proceedings. Child protective proceedings are not criminal proceedings. *In re Brock*, 442 Mich 101, 107; 499 NW2d 752 (1993). "Furthermore, the rules applicable in child protective proceedings also differ from those applicable in criminal cases." *Id*. at 108. Indeed, MCR 3.901(2) provides that "[o]ther Michigan Court Rules apply to juvenile cases in the family division of the circuit court only when this subchapter specifically provides." Respondent-father has failed to show that MCR 6.121 is applicable to juvenile proceedings.

Even if criminal procedures apply by analogy to this child protective proceeding, respondent-father has failed to make a persuasive showing that he would have been entitled to a separate trial under that framework. Public policy favors the use of joint trials in the interest of judicial economy and administration. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). In *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994), our Supreme Court explained that "[s]everance is mandated under MCR 6.121(C) only when a defendant provides the trial court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." Inconsistencies in defenses are not enough to require severance of two or more codefendants. *Id*. at 349. The defenses must be mutually exclusive, indeed irreconcilable. *Id.* Defenses may be mutually exclusive when probative evidence that is admitted against one codefendant is inadmissible against the other codefendant. *Id.* at 346 n 7. Finally, in the criminal context, if a defendant fails to make the necessary pretrial showing, a trial court's decision to proceed with a joint trial will not be reversed absent a "significant indication on appeal" that prejudice in fact occurred during trial. *Id*. at 346-347.

Applying these principles, it is unlikely that a motion for severance would have been successful in this case. Respondents did not have adverse interests at trial. Indeed, after the children were removed, respondents married and indicated that they were planning together. Moreover, although the parties voluntarily agreed to a joint trial, the trial court still considered and rejected the proposition of holding separate adjudication trials because of the overlapping grounds for taking jurisdiction.

On appeal, respondent-father argues that he and respondent-mother did have adverse interests because probative evidence that was admissible as to respondent-mother was

inadmissible as to him. See *Hana,* 447 Mich at 346 n 7. At the heart of respondent-father's argument is the admission of the domestic violence evidence.[2] Respondent-father argues that because he and respondent-mother were tried together, the jury heard evidence regarding domestic violence in the relationship. Specifically, the maternal grandmother testified that respondent-mother said she was physically abused by respondent-father. Respondent-father asserts that while this statement was admissible against respondent-mother as an admission of a party-opponent, MRE 801(d)(2), it constituted inadmissible hearsay when offered against him. Respondent-father reasons that if he and respondent-mother had been tried separately, the jury would not have heard inadmissible hearsay implicating him in domestic violence. Respondent-father contends that his claim of ineffective assistance is bolstered by the fact that the requisite prejudice did in fact occur at the adjudication trial. We disagree with respondent-father's argument that he demonstrated that he was prejudiced during the trial.

Contrary to respondent-father's suggestion, he was not prejudiced by the admission of inadmissible hearsay. Statements made by respondent-mother, which were elicited during the testimony of the maternal grandmother, were properly admitted as to both respondents. The maternal grandmother testified that respondent-mother claimed respondent-father strangled her. The circumstances surrounding this statement indicate that it would have qualified for admission under the excited utterance exception to the hearsay rule. MRE 803(2) provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule. "The rule allows hearsay testimony that would otherwise be excluded because it is perceived that a person who is still under the sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy." *People v McLaughlin*, 258 Mich App 635, 659; 672 NW2d 860 (2003) (citation and quotation marks omitted). The maternal grandmother testified that respondent-mother disclosed that respondent-father had strangled her immediately after respondents had been fighting in the driveway. When respondent-mother ran into her mother's house, she was visibly crying and ES was clinging to her. The maternal grandmother specifically observed that respondent-mother's face and neck were red. Indeed, much of the maternal grandmother's testimony about the events was not hearsay at all, but rather her personal observations. With respect to the statement that respondent-father strangled respondent-mother, however, the circumstances surrounding that statement show that the requirements for an excited utterance were satisfied. The statement was made after a startling event, before respondent-mother had the reflective capacity necessary for fabrication.

[2] We note that respondent-father's argument in support of his ineffective assistance of counsel claim is inconsistent with his first claim that he did not have adequate notice that domestic violence in the home would be pursued as a basis for exercising jurisdiction. Respondent's argument in this issue is premised on the assumption that trial counsel knew that domestic violence evidence would be elicited and, therefore, it was incumbent upon trial counsel to move for separate trials.

Assuming that trial counsel had moved for a separate trial, respondent-father would have been unable to establish that his rights would be prejudiced if tried with respondent-mother. Similarly, trial counsel's failure to object did not result in inadmissible hearsay being admitted against respondent-father. Accordingly, respondent-father has failed to establish that his counsel's performance fell below an objective standard of reasonableness. Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion or objection. *Riley*, 468 Mich at 142.

Even if trial counsel erred by failing to move for separate trials or by neglecting to object to the admission of the evidence on hearsay grounds, respondent-father has not demonstrated that these asserted deficiencies affected the outcome of the adjudication. Any admission of hearsay statements related to domestic violence was harmless. The jury found that there were several grounds supporting the trial court's exercise of jurisdiction over ES with respect to respondent-father. As explained below, legally admissible evidence unrelated to domestic violence between respondents was presented at the adjudication trial and supports the trial court's exercise of jurisdiction over ES. Thus, respondent-father has failed to establish a reasonable probability that but for counsel's errors, the result of the adjudication would have been different. *Nix*, 301 Mich App at 207. Accordingly, reversal of the adjudication is not warranted on ground that respondent-father was denied the effective assistance of counsel.

IV. ADJUDICATION

Lastly, both respondents challenge the sufficiency of the evidence at the adjudication used to support the existence of a statutory ground for jurisdiction. This Court reviews a jury's verdict regarding jurisdiction over children in a child protective proceeding to determine if a preponderance of the evidence satisfied the statutory requirements of MCL 712A.2(b). *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004).

Child protective proceedings are comprised of two phases: the adjudicative phase and the dispositional phase. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). "Generally, a court determines whether it can take jurisdiction over the child in the first place during the adjudicative phase." *Id.* For a circuit court to exercise jurisdiction over a child "the factfinder must determine that the child comes within the statutory requirements of MCL 712A.2." *In re Ramsey*, 229 Mich App 310, 314; 581 NW2d 291 (1998). MCL 712A.2(b) sets forth the following statutory grounds for a trial court to assume jurisdiction over a child:

> The Court has the following authority and jurisdiction:
>
> * * *
>
> (b) Jurisdiction in proceedings concerning a juvenile under 18 years of age within the county:
>
> (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. . . .
>
> * * *
>
> (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.

At the adjudication, petitioner must prove by a preponderance of the legally admissible evidence that the children are subject to the trial court's jurisdiction. *In re Ramsey*, 229 Mich App at 314.

The evidence showed that both respondents left their children in the care of the maternal grandparents without providing them with legal authority necessary to properly care for the children. CT, who was diagnosed with autism, was particularly vulnerable. In light of his anxiety, eating, and sleeping issues, CT required consistency and stability. Despite these needs, respondent-mother left the child in the care of the maternal grandmother and step-grandfather without any plan to ensure long-term consistency and stability. Indeed, it appears that CT ended up in his grandparents' care simply by default. As the maternal grandmother testified, CT came to live with her because "he just stayed." Although CT received approximately $700 a month in government benefits related to his autism diagnosis, respondent-mother failed to contribute any of this money to his care. She did not provide any food, clothing, or financial support to the caregivers.

Similarly, before the trial court's involvement, respondents left ES in the care of the maternal grandmother and step-grandfather for three or four days a week. When respondent-mother dropped ES off, there was no discussion as to how long she would stay, what respondents' plans were, or when she would be picked up. ES regularly appeared disheveled and dirty. Her clothes were ill-fitting and frequently she was without socks and underwear. Although the maternal grandmother tried to treat a persistent lice infestation each week, the lice issue persisted for approximately a year because every time ES went home with respondent-mother, ES returned with lice.

The evidence further established that PK tested positive for Adderall at birth, that respondent-mother was taking this drug illegally, and that she had a long-standing substance abuse issue. This, alone, was ample evidence for the court to acquire jurisdiction over the children. A parent's prenatal substance abuse constitutes neglect sufficient to establish the trial court's jurisdiction. *In re Baby X,* 97 Mich App 111, 116; 293 NW2d 736 (1980).

Respondent-mother asserts that she demonstrated her concern for the children because she left them with responsible caregivers. However, respondent-mother ignores the fact that she declined to give these caregivers the necessary legal standing to properly protect and care for the children. In the year before the trial court's involvement, respondent-mother only saw CT for a few minutes each week when she dropped off and picked up ES at the maternal grandmother and step-grandfather's home. Respondent-mother did not assist in his care and did not provide for him physically, emotionally, or financially. In the context of a termination hearing, this Court has found that allegations of abandonment and neglect were established where the evidence

showed that the respondent had "little or no contact with her children from the time they were placed with their grandmother, and that [the] respondent failed to comply with parent agency agreements geared at providing the children with a stable home." *In re Hall*, 188 Mich App 217, 223-224; 469 NW2d 56 (1991). While procedurally distinguishable, *Hall* is instructive to the extent that it confirms that the evidence in this case supported a finding of abandonment and neglect.

Respondent-father asserts that the evidence did not support a finding that he was an unfit parent. Respondent-father argues that respondent-mother was responsible for leaving ES with the maternal grandmother and step-grandfather. He claims that he did not know the extent to which respondent-mother abdicated her parental responsibilities. However, this argument ignores the extent to which respondent-father abdicated his role as a parent. Respondent-father also argues that he was the victim of "guilt by association" with respondent-mother. However, respondent-father left his daughter in the care of respondent-mother, who he knew was not properly caring for the children. Respondent-father was not being held responsible for respondent-mother's drug use and poor parenting, but rather for his own actions that included leaving his daughter in respondent-mother's primary care despite her known Adderall addiction.

In sum, a preponderance of the evidence showed that both respondents neglected their children and failed to provide proper care and custody. The children's physical and mental well-being was at risk and their home was unfit. Because the jury's verdict is supported by a preponderance of the evidence, the trial court properly exercised jurisdiction over the children.

Affirmed.

/s/ Michael J. Talbot
/s/ Jane M. Beckering
/s/ Thomas C. Cameron