STATE OF MICHIGAN

COURT OF APPEALS

In re OMN, Minor.

UNPUBLISHED
October 22, 2019

No. 348485
Tuscola Circuit Court
Family Division
LC No. 18-011338-NA

Before: CAVANAGH, P.J., and BECKERING and GADOLA, JJ.

PER CURIAM.

Respondent-father[1] appeals as of right the trial court's order terminating his parental rights under MCL 712A.19b(3)(b)(*i*) (physical or sexual abuse), (g) (failure to provide proper care or custody), (j) (reasonable likelihood of harm), (k)(*ii*) (criminal sexual conduct involving penetration, attempted penetration, or intent to penetrate), and (k)(*ix*) (sexual abuse as defined in MCL 722.622). Because the trial court did not clearly err by terminating respondent's parental rights and because respondent has not supported his ineffective assistance of counsel claim, we affirm.

I. BACKGROUND

Respondent's child, ON, disclosed physical and sexual abuse to her mother in February 2018, and her mother immediately took her to the hospital. Based in part on the results of an examination by Katrine Ferris, a sexual assault nurse examiner, a forensic interview by Kathleen Sweeney at the Tuscola County Child Advocacy Center (CAC), and further investigation by Detective Sergeant Scott Jones of the Tuscola County Sheriff's Office, petitioner asked the court to terminate respondent's parental rights in its original petition. The court removed ON from respondent's care and placed her with her mother, who did not live with respondent.

At the termination trial, ON testified that she did not like living at respondent's house because he "hurt [her] really bad and he looked inside [her] private butt." By "private butt," ON

[1] The child's mother was not listed as a respondent, and the child was placed with her mother.

meant "vagina and private," the area she used to "poop" and "pee." When asked if respondent touched her "in a private spot," ON answered, "Yes, he did." Later, when again asked if respondent touched her vagina or if anyone hurt her private parts, ON answered that he "just looked in [her] private." She said she asked respondent to stop, but he would not, and that he did it more than once. ON also testified that she saw respondent and his friends, some of whom she named, smoking, drinking, and using drugs. ON also testified that respondent hit her, grabbed her by the shoulders, and pushed her shoulder, chest, or stomach. She said that she got bruises on her back at respondent's home, but she did not remember how. Respondent's counsel asked ON if her mother told her what to say at the hospital, and the child answered, "Yes, and tell her what happened. I told her everything." ON testified that her mother told her to tell the judge the truth about what happened, and she denied that her mother told her what to say. ON said that she was scared to go back to respondent's house because he was going to "hurt" her again by smoking, doing drugs, and "look[ing] in [her] private butt," and she did not "want that to happen."

Petitioner also presented expert testimony from Ferris, Sweeney, and Dr. John Petras. Testifying as an expert in the field of sexual examination, Ferris reported that ON told her that respondent "had punched her in the back" and "pinched her breasts." Ferris said that when she was examining ON's genital area, the child said, "ouch, that's where daddy hurt me." Ferris found bruising or red marks on ON's right breast and on her back. She also observed a 1.5 centimeter tear through the labia majora and the labia minora and bruising in the vaginal area. Ferris described the tear as "a pretty significant injury" based on its depth and size, and the area was "very sensitive" when Ferris touched it. Ferris confirmed that she was unable to state how old the injury was and unable to determine whether ON had preexisting injuries because of "ON's discomfort with the genital examination." She acknowledged that she could not "rule out everything," and stated that the existence of tearing did not definitively establish sexual assault.

Qualified as an expert in forensic interviewing, Sweeney stated that she forensically interviewed ON on February 5, 2018. She said that ON's demeanor during the interview was "typical of a child with autism." Her mood "fluctuated" throughout the interview because she was scared, and she became more "agitated [and] concerned about going back" to respondent's home when she disclosed the abuse.

Admitted into evidence was a videorecording and transcription of the forensic interview authenticated by Sweeney. According to the transcript, ON stated at the forensic interview that respondent took her "to dope houses" where he and several other people, whom she named, "smok[ed] dope" around her. She indicated that respondent and his friends penetrated her digitally, and that she asked them to stop, but they would not. ON also told Sweeney that she had bruises on her back because respondent punched her in the back more than one time, and he pinched her. Throughout the forensic interview, ON stated that she was scared, asked not to go back to respondent's house, and stated that she wanted to go to her mother's house.

Dr. Petras was qualified as "an expert in the area of sex offender therapy and treatment." He testified that he met with respondent to conduct a psychosexual risk evaluation, the purpose of which was to determine a patient's risk of committing a sex offense and to recommend a course of treatment to address "problematic sexual behavior patterns" and surrounding risk factors. Dr. Petras indicated that the psychosexual risk evaluation was designed to assess risk

factors, but it did not have "predictive value." Respondent's counsel agreed to the admission of Dr. Petras's report for the purpose of the best-interest analysis.

Using a variety of factors, which he detailed during his testimony, Dr. Petras computed an "overall risk index" that placed respondent in the 88th percentile, meaning respondent presented a risk of sexual offense greater than 88% of the population. According to Dr. Petras, a risk factor greater than 75% was significant. Petras also described a component of the evaluation called the "sexual projective card sets." It consisted of 40 drawings that depicted scenes that one could perceive as either "cooperation" or having a "sexual innuendo." He said that clients' perceptions typically corresponded with their discussions about sex during the overall session. However, although respondent spoke little about sex during the initial session, he gave nearly 30 "sexualized" and "idiosyncratic" responses to the cards. Dr. Petras indicated that he found many of respondent's responses concerning because they "involved parent/child sexual situations." Dr. Petras acknowledged, however, that respondent's responses to the cards did not "at all" mean that he was sexually abusing someone.

Dr. Petras concluded that respondent posed "a sexual risk to ON." Although he did not think that respondent should never have contact with his daughter, he did believe that both should attend therapy and recommended supervised visitation for respondent. Dr. Petras believed that respondent needed therapy to help him understand the role he played "in the problems that surround" him because respondent blamed other people and extraneous forces for his problem. He also believed that respondent needed therapy to understand his relationship with ON because ON described him as "distant" and "hands[-]off," while respondent believed himself to be "always with her, helping her with her schoolwork, [and] making sure she was okay."

Respondent's only witness was Matt Nagy, a "supports coordinator," who coordinated services in the community for people with a mental illness or a developmental disability. According to his testimony, Nagy worked as ON's supports coordinator for about two years, meeting with her at school every two or three months, and at her home "four or five times a year." As ON's "educational advocate," Nagy attended her individual education plan (IEP) meetings and met with her teachers to ensure that "her educational needs were being met." Nagy confirmed that he also worked closely with respondent, and that respondent attended all of ON's school meetings and had a good relationship with ON's teacher. Nagy testified that respondent worked to keep ON's routine constant, which was important for a child diagnosed with autism spectrum disorder, monitored what she watched, sacrificed financially to meet ON's needs and requests, took her to annual physical examinations and to the doctor when she was unwell, and encouraged her to take her daily medication. He said that respondent was concerned about ON's level of functioning and "spent a lot of time trying to make her happy[,]" and he believed that respondent "went above and beyond and did a great job working with ON." Nagy testified that ON did not voice any concerns to him about respondent's behavior, and that, as a mandatory reporter, he had not observed suspicious behavior or anything that required reporting.

After the termination trial, the trial court found that clear and convincing evidence established grounds to terminate respondent's parental rights and that termination of respondent's parental rights was in the child's best interests. The court entered a corresponding order, from which respondent now appeals.

II. TERMINATION OF RESPONDENT'S PARENTAL RIGHTS

Respondent first challenges the trial court's finding that clear and convincing evidence established statutory grounds for the termination of his parental rights and that a preponderance of the evidence showed that termination was in the best interests of the child. This Court reviews for clear error the trial court's determination that statutory grounds for termination of respondent's parental rights existed and that termination of parental rights was in the child's best interests. *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012). "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, 296-297; 690 NW2d 505 (2004).

A. STATUTORY GROUNDS FOR TERMINATION

"To terminate parental rights, a trial court must find by clear and convincing evidence that at least one statutory ground under MCL 712A.19b(3) has been established." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). In this case, the trial court found statutory grounds to terminate respondent's parental rights under MCL 712A.19b(3)(b)(*i*), (g), (j), (k)(*ii*), and (k)(*ix*). To terminate parental rights pursuant to MCL 712A.19b(3)(b)(*i*), the trial court must find by clear and convincing evidence that

> (b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
>
> (*i*) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

The trial court noted that, although ON's trial testimony differed from her prior statements at the physical examination and the forensic interview made more than one year earlier, it was clear that respondent sexually abused ON. Based on the child's testimony that the sexual abuse occurred more than once, and considering Petras's conclusions from the psychosexual risk assessment, the trial court found it reasonably likely that the abuse would continue if ON were returned to respondent's care. The trial court further found that respondent physically abused ON based on her testimony, substantiated by the physical examination. The trial court concluded that the physical abuse was also reasonably likely to recur. Accordingly, the trial court found that clear and convincing evidence established MCL 712A.19b(3)(b)(*i*) as a ground to terminate respondent's parental rights.

Respondent challenges the trial court's determination that MCL 712A.19b(3)(b)(*i*) provided the statutory basis for termination primarily by arguing that the testimony of ON and her mother was not credible and that, contrary to the mother's testimony, she coached ON to make false allegations of sexual abuse against him. This Court will not "displace the trial court's credibility determination." *In re HRC*, 286 Mich App 444, 460; 781 NW2d 105 (2009). In the absence of objective evidence directly contradicting their testimony, respondent's argument has no merit.

In addition, respondent's argument does not account for the corroborating evidence. In a case involving physical abuse of an infant, this Court has deemed medical documentation showing injuries consistent with physical abuse sufficient to support a statutory basis for termination under MCL 712A.19b(3)(b)(*i*). *In re Ellis*, 294 Mich App 30, 31-32, 35-36; 817 NW2d 111 (2011). Similarly, this Court has determined that medical findings consistent with digital penetration supported termination for sexual abuse under MCL 712A.19b(3)(b)(*i*). *In re Schadler*, 315 Mich App 406, 410; 890 NW2d 676 (2016). In this case, the sexual assault examination revealed tearing and bruising in the child's vaginal area, which was consistent with the child's previous statements that respondent touched or put his fingers inside her vagina.

Regarding a future likelihood of abuse, the trial court found it significant that the abuse occurred more than once. The trial court also relied on the results of Dr. Petras's psychosexual risk assessment to find a reasonable likelihood of future abuse. Dr. Petras testified that he was concerned about respondent's relationship with the child and respondent's repeated statements about a parent and a child having an interaction with a sexual overtone in response to visual cue cards. In addition, Dr. Petras concluded that respondent presented a risk of sexual abuse to the child. Therefore, the trial court did not clearly err by relying on the frequency of past abuse and the conclusions drawn from Dr. Petras's testimony about respondent's psychosexual risk assessment to determine that respondent was reasonably likely to sexually abuse the child in the future.

Moreover, the child testified that respondent hit her and pushed her in the chest, stomach, or shoulders and that she had bruises on her back. Consistent with this testimony, the sexual assault nurse examiner testified that the child told her that respondent punched her in the back and pinched her breasts, and the sexual assault examination showed bruising and red marks on the child's back and right breast. Respondent does not challenge the evidence that he physically abused the child. Considering this evidence in combination with the child's fear that respondent would hurt her if she were returned to his care, the trial court did not clearly err by finding that respondent physically abused the child and that he was reasonably likely to do so in the future.

In light of the foregoing, we conclude that the trial court did not clearly err in finding that clear and convincing evidence established MCL 712A.19b(3)(b)(*i*) as a statutory basis for the termination of respondent's parental rights. Because petitioner needed only to establish one ground for termination, MCL 712A.19b(3), we need not address whether the trial court properly found additional grounds for termination, *In re Powers Minors*, 244 Mich App 111, 119; 624 NW2d 472 (2000).

B. BEST INTERESTS

"Once a statutory ground for termination is established by clear and convincing evidence, the trial court must terminate parental rights unless it finds from the whole record that termination clearly is not in the child's best interests." *In re BZ*, 264 Mich App at 301. "[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App at 90. Factors to consider include "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 Minors*, 297 Mich App at 41-42 (citations omitted).

Respondent argues that Nagy's testimony shows that termination of respondent's parental rights was not in the child's best interests. Respondent further argues that the only evidence to the contrary was the testimony of the child and her mother, which was not credible because the child's mother coached the child so as to regain custody. As previously discussed, respondent's challenges to the credibility of the child and her mother are meritless. Although Nagy testified that respondent was well able to care for the child, Nagy had limited contact with the child and respondent. On the other hand, respondent admitted substance abuse to the investigating officer, and respondent presented no evidence to the contrary. The child repeatedly testified that she was scared and did not want to go back to respondent's house because she did not want him to hurt her. The forensic interviewer testified that the child told her she was scared to go back to respondent's house and became upset when discussing the abuse. The child's home-care worker, Joann Foster, also testified that the child became more angry, anxious, and withdrawn when talking about respondent. The child was placed with her mother, and the CPS investigator recommended that this placement continue. The child's mother could provide the child with permanency, stability, and finality as well as a safe environment away from respondent's abusive behavior. In short, the trial court did not clearly err by finding that termination of respondent's parental rights was in the child's best interests.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent also argues on appeal that his trial counsel was ineffective. We disagree. To preserve an ineffective assistance of counsel claim, a respondent should raise the issue in the trial court in a motion for a new trial or a motion for an evidentiary hearing. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Because respondent first raised the ineffective assistance of counsel claim on appeal, the issue is not preserved. We review an unpreserved ineffective assistance of counsel claim "for plain error affecting substantial rights." *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014). "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).

The right to effective assistance of counsel in a child protective proceeding derives from the due-process protections of the Fifth Amendment. *In re HRC*, 286 Mich App at 458. "The principles applicable to claims of ineffective assistance of counsel in the arena of criminal law also apply by analogy in child protective proceedings; therefore, it must be shown that (1) counsel's performance was deficient, falling below an objective standard of reasonableness, and that (2) the deficient performance prejudiced the respondent." *In re Martin*, 316 Mich App 73, 85; 896 NW2d 452 (2016). This Court presumes that counsel was effective, and the respondent "bears a heavy burden of proving otherwise." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The respondent "must overcome the strong presumption that counsel's performance was sound trial strategy." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "Furthermore, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the [respondent] of a substantial defense." *Dixon*, 263 Mich App at 398. "A substantial defense is one that could have affected the outcome of the trial." *People v Putman*, 309 Mich App 240, 248; 870 NW2d 593 (2015).

Respondent argues that trial counsel was ineffective for failing to impeach the child's credibility with prior inconsistent statements under MRE 613(b). However, MRE 613(b) does not *require* confrontation of a witness with a prior inconsistent statement, as respondent asserts; rather, it prescribes the procedure for doing so for the purpose of admitting extrinsic evidence of a prior inconsistent statement. Further, eliciting testimony about the child's prior inconsistent statements could have risked bolstering the child's credibility by highlighting that she made statements to two different people in two different settings that respondent touched or put his fingers inside her vagina.

Additionally, respondent's argument that trial counsel should have confronted the child with prior inconsistent statements ignores the reality of the child's difficulty with testifying. ON often provided nonresponsive answers, and the longer she testified, the more she demonstrated the echolalia described by Foster,[2] repeating the same answers regardless of the question. As cross-examination progressed, ON started talking about unrelated matters, such as spending time with her cousin Brandon. Eventually, respondent's counsel stopped asking ON questions, likely because ON was not answering them, as demonstrated by the trial court's subsequent attempts to ask ON for clarification about where on her body respondent pushed her. Trial counsel's decision to stop asking ON questions reflected a tactical assessment that the child was not likely to give useful testimony.

Even if we assume for the sake of argument that counsel's decision not to impeach ON with prior inconsistent statements fell below an objective standard of reasonableness, respondent has failed to show that he suffered prejudice thereby. The trial court's written opinion demonstrates that the court was fully aware of ON's inconsistencies, and the medical evidence substantiated the claims of sexual abuse ON made to the sexual assault examiner and at the forensic interview. In light of the court's awareness and the substantiating testimony, trial counsel's decision not to attempt to confront the child with prior inconsistent statements did not likely affect the outcome of the proceeding. In short, trial counsel did not render constitutionally ineffective assistance by deciding not to press ON about prior inconsistent statements.

Respondent argues that trial counsel was ineffective for failing to call the witnesses named in respondent's witness list, failing to call respondent to testify, and failing to offer critical medical records listed in respondent's exhibit list. In his brief on appeal, respondent merely provides statements of random, unsubstantiated facts, and offers conclusory assertions about how the testimony of "several witnesses" would have supported his position; he declares that certain witnesses should have testified and certain documents should have been procured, without indicating the content either of the testimony or the documents. Respondent has not produced affidavits or other documents to show what evidence would have been introduced through the other witnesses, respondent's testimony, or the exhibits that respondent implies would have affected the outcome of the proceeding. Additionally, trial counsel challenged

[2] Foster testified that ON displayed echolalia, which was common for children with autism, meaning that ON repeated statements she had heard or seen. Foster stated that ON might also repeat something that she was saying to herself to soothe herself.

witnesses' credibility throughout the hearing, and trial counsel mounted several successful objections that curtailed various lines of questioning, showing that respondent's counsel protected respondent's right to due process, made successful evidentiary challenges, and highlighted weaknesses in the evidence, particularly witness credibility. Respondent did not provide factual support for his claims that trial counsel was inadequate, and a review of the record shows that trial counsel rendered adequate assistance.

In conclusion, considering the child's testimony and the record evidence, the trial court reasonably concluded that respondent had sexually and physically abused the child, and respondent has not established that the evidentiary fixes he proposed on appeal would likely have altered that conclusion.

We affirm.

/s/ Mark J. Cavanagh
/s/ Jane M. Beckering
/s/ Michael F. Gadola