STATE OF MICHIGAN

COURT OF APPEALS

In re R. L. STEWART, JR., Minor.

UNPUBLISHED
December 10, 2020

No. 353138
Kent Circuit Court
Family Division
LC No. 19-052497-NA

Before: MURRAY, C.J., and K. F. KELLY and STEPHENS, JJ.

PER CURIAM.

Respondent-mother, L. Meyering, appeals as of right the trial court's order terminating her parental rights to the minor child, RLS, under MCL 712A.19b(3)(i) (parental rights to one or more siblings terminated), and (j) (reasonable likelihood child will be harmed if returned home). We affirm.

I. BACKGROUND

Between 2014 and 2018, respondent's parental rights to her four oldest children, AC, KC, JB, and AB, were involuntarily terminated. Immediately after RLS's birth in 2019, petitioner filed a petition seeking termination of respondent's parental rights at the initial disposition. Still, respondent was provided services between the filing of the petition and the hearing for termination. After a three-day hearing, the trial court concluded that RLS came within its jurisdiction under MCL 712A.2b(1) and (2). The court took judicial notice of respondent's prior child protective proceedings before the court which led to the terminations of respondent's other children. In a lengthy opinion from the bench, the court concluded that there was clear and convincing evidence to terminate respondent's parental rights under MCL 712A.19b(3)(i) and (j), and that a preponderance of the evidence demonstrated that termination of respondent's parental rights was in the child's best interests. Thereafter, this appeal ensued.

II. TESTIMONY OF SOCIAL WORKER

Respondent challenges, on several fronts, the trial court's decision to permit social worker Victoria Lemmen to testify by speakerphone. Respondent asserts that the court was unable to establish that the purported witness was actually Lemmen. She also argues that this procedure violated her Sixth Amendment right of confrontation. Respondent further argues that she is

entitled to relief because Lemmen was never sworn as a witness before she testified. We reject these claims of error.

Although respondent objected below on the ground that the trial court was unable to establish the identity of the proffered witness, she did not argue that admission of the witness's testimony violated her constitutional right of confrontation. Therefore, respondent's constitutional challenge to the evidence is unpreserved. *Nahshal v Fremont Ins Co*, 324 Mich App 696, 709-710; 922 NW2d 662 (2018). This Court generally reviews for an abuse of discretion preserved challenges to a trial court's evidentiary rulings. *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008). A court abuses its discretion when it chooses an outcome outside the range of principled outcomes. *Id*. We review de novo any preliminary questions of law concerning the admission of evidence. See *In re Archer*, 277 Mich App 71, 77; 744 NW2d 1 (2007). By contrast, we review unpreserved claims of constitutional error for plain error affecting respondent's substantial rights. *In re Ferranti*, 504 Mich 1, 29; 934 NW2d 610 (2019); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). On plain-error review, respondent "must establish that (1) error occurred; (2) the error was 'plain,' i.e., clear or obvious; and (3) the plain error affected [] substantial rights." *In re Ferranti*, 504 Mich at 29. "[A]n error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *In re Utrera*, 281 Mich App at 9. In addition, the error must have "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings . . . ." *In re Ferranti*, 504 Mich at 29, quoting *Carines*, 460 Mich at 763.

MCR 3.923 governs miscellaneous matters in proceedings involving juveniles. MCR 3.923(E) specifically provides:

> The court may allow the use of videoconferencing technology, speaker telephone, or other similar electronic equipment to facilitate hearings or to protect the parties. The court may allow the use of videotaped statements and depositions, anatomical dolls, or support persons, and may take other measures to protect the child witness as authorized by MCL 712A.17b.

The plain language of MCR 3.923(E) expressly provides for the use of speakerphones in child protection proceedings.

Notwithstanding the foregoing, respondent contends that MCR 3.923 does not address a *witness's* appearance by telephone. She argues that the provisions of MCR 3.923 only apply to the protection of a child witness or the party. Respondent provides no authority for this interpretation, which is inconsistent with the plain language of the court rule. This Court "interprets court rules using the same principles that govern the interpretation of statutes." *In re McCarrick/Lamoreaux*, 307 Mich App 436, 446; 861 NW2d 303 (2014) (quotation marks and footnote omitted). The court rules must be interpreted to give effect to the intent of the Legislature. *Id*. The language of the court rule itself provides the best indication of intent. *Id*. "If the plain and ordinary meaning of a court rule's language is clear, judicial construction is not necessary." *Id*. (footnotes omitted). In this case, the court rule clearly provides, without qualification, that in child protective proceedings, the court may allow the use of speaker telephones to facilitate hearings.

The use of a speakerphone was necessary in this case to facilitate the presentation of testimony during the hearing. In its motion to allow the witness to appear by speakerphone,

petitioner explained that Lemmen had given birth by caesarian section on December 26, 2019, and it was anticipated that she would not be medically cleared to travel and appear at the January 2020 hearing. Consequently, the court permitted testimony in a manner necessary to facilitate the hearing.

Respondent also argues, as she did below, that the trial court had no way to insure the purported witness was actually Lemmen. In response to respondent's concerns, however, the court indicated that it would permit the witness's testimony if her identity could be verified. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(a). MRE 901(b)(5) provides that "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker" satisfies the requirement of authentication or identification. Petitioner called Rajmonda Gieske, a Children's Protective Services worker, who testified that five to six weeks earlier she met and spoke in person with Lemmen for 20 minutes on one occasion and, on another occasion, they had spoken over the phone for approximately 15 minutes. Gieske testified that she could identify Lemmen by her voice. The proposed witness also identified herself as Victoria Lemmen and explained that she was employed as a medical social worker for Spectrum Health. Thereafter, Gieske testified that she recognized the voice of the proposed witness as that of Lemmen. Further, during Lemmen's testimony, Lemmen was able to describe respondent's physical appearance, which no one challenged as inaccurate. After considering the record, we conclude that the trial court properly found Lemmen's voice authenticated under MRE 901(b)(5), and thus did not abuse its discretion by permitting the witness to testify by speakerphone. "The credibility of identification testimony is a question for the trier of fact that we do not resolve anew." *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Further, questions related to the credibility of Gieske's identification of Lemmen's voice went to the weight of the evidence rather than its admissibility.

Respondent also argues, for the first time on appeal, that admission of Lemmen's testimony by speakerphone violated respondent's Sixth Amendment right to confront the witness. Other than making this bald assertion, respondent provides no authority for her constitutional challenge. "A party cannot simply assert an error or announce a position and then leave it to this Court to discover and rationalize the basis for [her] claims, or unravel and elaborate for [her her] argument, and then search for authority either to sustain or reject [her] position." *Mitchell v Mitchell*, 296 Mich App 513, 524; 823 NW2d 153 (2012) (quotation marks and citation omitted). Even if we were to consider this constitutional claim, respondent has not shown that a clear or obvious error occurred or that any error affected the outcome of the proceedings. *In re Utrera*, 281 Mich App 8-9.

The record does not suggest that respondent's ability to examine the witness was in any way compromised by the use of a speakerphone. Further, our Supreme Court has held that because child protective proceedings are not criminal in nature, the Sixth Amendment right of confrontation does not apply. *In re Brock*, 442 Mich 101, 107-108; 499 NW2d 752 (1993). The Court noted that while there were due process implications inherent in terminating a parent's rights, due process did not always require confrontation. *Id.* at 109. Accordingly, we cannot conclude that the trial court plainly erred when it failed to sua sponte bar the testimony on the ground that it violated respondent's right to confront a witness against her.

Finally, respondent asserts that the trial court erred by accepting Lemmen's testimony because Lemmen was never sworn as a witness. It is clear from the record that the witness was not sworn. The court recognized the omission with respect to Lemmen when it issued its oral opinion. At no time, however, either during or after Lemmen's testimony, did respondent object to the court considering Lemmen's testimony in light of the fact that she was never sworn as a witness. Consequently, respondent has now waived the right to object on this ground on appeal. *People v Kemmis*, 153 Mich 117, 118; 116 NW 554 (1908) ("We dispose of this contention by saying that it was not made in the trial court and cannot be made for the first time in this court."); *Mettetal v Hall*, 288 Mich 200, 207-208; 284 NW 698 (1939) ("Where a witness gives his testimony without being sworn, the adverse party by not objecting thereto waives any objection to it."); *People v Knox*, 115 Mich App 508, 511; 321 NW2d 713 (1982) (This Court, citing *Kemmis* and *Mettetal*, held that the issue of unsworn testimony was not reviewable because "defense counsel did not object to the failure of the trial court to insist on an oath or affirmation").

Had respondent brought the irregularity to the trial court's attention, the court could have corrected the omission by administering the oath to Lemmen and then having her reaffirm her testimony or testify again. Further, there is no indication in the record that the failure to swear Lemmen as a witness changed the manner in which she testified or how the hearing proceeded. Notably, there is no indication that Lemmen provided untruthful testimony. Moreover, Lemmen's testimony was corroborated by other properly admitted evidence. For example, Lemmen's testimony was cumulative of the testimony given by other witnesses, including Gieske and another caseworker. Therefore, any error in the admission of Lemmen's testimony was not outcome-determinative. *People v Solomon*, 220 Mich App 527; 560 NW2d 651 (1996). Accordingly, respondent cannot demonstrate that the plain and obvious error by the trial court in not administering an oath affected her substantial rights.

III. REASONABLE EFFORTS

Respondent argues that the trial court erred in terminating her parental rights because petitioner failed to make reasonable efforts to reunite her with her son. We disagree. Respondent did not preserve this issue by raising it in the trial court; therefore, our review is for plain error affecting respondent's substantial rights.[1]

[1] In general, issues raised, addressed, and decided by the trial court are preserved for appellate review. *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014). However, in *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012), this Court, relying on *In re Terry*, 240 Mich App 14, 27; 610 NW2d 563 (2000), held that "the time for asserting the need for accommodation in services is when the court adopts a service plan" and the issue is deemed unpreserved if a respondent "fail[s] to object or indicate that the services provided to them were somehow inadequate." Based on a review of the record, we note that respondent did not object to the services that were offered until closing arguments. Considering the holding in *In re Frey*, it would appear that this issue was not properly preserved. However, to the extent that this issue is preserved, the trial court did not clearly err by finding that reasonable efforts, to the extent they were required, were in fact made to preserve and unify the family.

Generally, when a child is removed from the parent's custody, the petitioner must make reasonable efforts to rectify the conditions that caused the child to be removed by adopting a case service plan outlining the steps petitioner and respondent will take to rectify the conditions and reunify the family. "The adequacy of the [DHHS]'s efforts to provide services may bear on whether there is sufficient evidence to terminate a parent's rights." *In re Rood*, 483 Mich 73, 89; 763 NW2d 587 (2009). However, reasonable efforts are not required in all cases. MCL 712A.19a(2) provides in pertinent part, that "Reasonable efforts to reunify the child and family must be made in all cases except if . . .[t]he parent has had rights to the child's siblings involuntarily terminated and the parent has failed to rectify the conditions that led to that termination of parental rights." MCL 712A.19a(2)(c).

Consistent with the foregoing statute, the trial court determined that reasonable efforts were not required because respondent's parental rights to four other children were involuntarily terminated, and, as discussed below, respondent failed to rectify the conditions that led to the termination of those parental rights, and there continued to be a risk of harm to the child at issue in this appeal. See MCL 712A.19a(2)(c) and MCL 722.638(1)(b)(*i*).

Notwithstanding that reasonable efforts were not required, the record clearly demonstrates that petitioner did, in fact, engage in reasonable efforts to assist respondent in removing the barriers to reunification. Respondent was ordered to participate in a psychological evaluation to address her mental health issues. Respondent was referred to trauma-informed parenting classes, but stopped attending after the first class. Respondent was also referred to a parent nurturing group through Arbor Circle. Respondent participated in the intake, but then did not attend any of the classes. Similarly, respondent was referred to a postpartum support group, but did not attend. Respondent was also referred to a domestic violence program, but at the time of the February 18, 2020 hearing, respondent had not had a chance to start that program. In an effort to accommodate respondent's cognitive delays, respondent's case worker met with respondent once a week to discuss the case, provided respondent with a weekly written to-do list and calendar, offered respondent a simplified treatment plan, called and texted respondent to remind her of appointments, and frequently provided transportation assistance. Respondent attended only 10 of 17 therapy appointments at Cherry Street Health. Respondent was referred to several housing commissions for assistance. Respondent was offered parenting time with RLS twice a week for two hours; she attended 17 of 29 visits. Of the visits she attended, she left 10 visits early.

In toto, the evidence demonstrated that while there was no obligation to do so, and even in the face of a petition seeking termination at the initial disposition, petitioner continued to make extraordinary efforts to assist respondent in addressing the barriers to reunification. Despite these efforts, respondent failed to participate in and benefit from the services offered. Considering this, the trial court did not plainly err when it concluded that petitioner made reasonable efforts to reunite respondent with her son. Otherwise, respondent has failed to identify what services petitioner should have provided that would have yielded a different outcome. *In re Fried*, 266 Mich App 535, 543; 702 NW2d 192 (2005).

IV. STATUTORY GROUNDS FOR TERMINATION

Respondent challenges the trial court's findings that the statutory grounds for termination were established by clear and convincing evidence. We find no error in this regard. In order to

terminate parental rights, the trial court must find that at least one of the statutory grounds for termination has been established by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000). This Court reviews the trial court's findings under the clearly erroneous standard. MCR 3.977(K). A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been committed. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

The trial court terminated respondent's parental rights under MCL 712A.19b(3)(i) and (j), which permit termination under the following circumstances:

> (i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and the parent has failed to rectify the conditions that led to the prior termination of parental rights.
>
> (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.

The record supports the trial court's decision to terminate respondent's parental rights under these statutory grounds.

It was undisputed that respondent suffered from cognitive delays and mental health issues. Several witnesses, including respondent, testified that respondent was diagnosed with numerous disorders, including learning disabilities, bipolar disorder, ADHD, PTSD, and postpartum depression. The evidence established that in 2015, respondent's parental rights to her two oldest children, AC and KC, were involuntarily terminated in North Dakota because of respondent's neglect. Respondent returned to Michigan and then, between 2016 and 2017, she gave birth to two more children, JB and AB. In June 2018, respondent's rights to those children were terminated pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j). In that proceeding, the trial court found that although petitioner provided specialized services in a manner that was designed to address respondent's cognitive limitations, respondent did not adequately participate in or benefit from the treatment offered. Respondent had not addressed her longstanding mental health issues, poor parenting skills, and her chronic housing instability. Accordingly, the court concluded that the children would be at risk of harm in respondent's care. Moreover, the court found that because of respondent's history, and her inability or unwillingness to participate in services, it would be unlikely that she would be able to remove the barriers to reunification within a reasonable time. In February 2019, this Court affirmed that decision. *In re Beeler*, unpublished per curiam opinion of the Court of Appeals, issued February 19, 2019 (Docket Nos. 344457 and 344458).

Less than a year after this Court affirmed the termination of respondent's parental rights to JB and AB, respondent gave birth to RLS, the child at issue in this appeal. At the time, the credible evidence established that respondent was homeless and that she lacked the skills necessary to care for her child's most basic needs, including feeding, clothing, and diapering the newborn. Despite the filing of a permanent-custody petition seeking termination of parental rights at the initial disposition, respondent was provided a case service plan and was referred for multiple services. Again, as in the prior case, respondent was offered services in a manner designed to accommodate her limitations. Respondent, however, refused to fully participate in and benefit from the services

offered. Respondent had mental health issues that were still untreated. Respondent showed no improvement in her parenting skills, she continued to demonstrate erratic behavior, and her housing remained unstable. At times, respondent reported living under a bridge, in a hotel, and in homeless shelters. During parenting time, respondent did not appropriately and adequately respond to the child's needs. Indeed, she frequently left parenting time early, or simply abandoned her child to the care of the case aide who was required to be in the room because of respondent's history of instability. In essence, respondent exhibited the exact same behaviors and conduct that precipitated the termination of her parental rights to her older children. All of the issues that led to the prior termination of parental rights, including emotional instability, housing instability, and lack of parenting skills, were still present in the instant case. Indeed, the caseworker opined that respondent was in no better position to parent RLS than she had been when her parental rights to JB and AB were terminated.

The trial court took judicial notice of its prior decisions and orders related to RLS's siblings, which concluded that respondent had failed to address a multitude of issues despite being offered an appropriate parent-agency treatment plan. This evidence provided clear and convincing evidence that respondent's parental rights to RLS's siblings had been terminated due to serious and chronic neglect. Further, evidence illuminating the circumstances at RLS's birth and respondent's failure to meaningfully participate in services after the birth clearly and convincingly established that respondent had failed to rectify the conditions that led to the prior terminations of her parental rights. There was overwhelming evidence that respondent, either because she was unwilling or unable, had not adequately addressed her mental health issues, had not improved her parenting skills, and still was unable to obtain and maintain suitable and stable housing. Accordingly, the trial court did not clearly err when it terminated respondent's parental rights to RLS under MCL 712A.19b(3)(i).

While only one statutory ground need be proven for termination, *In re Trejo*, 462 Mich at 355, the same evidence also supported termination of respondent's parental rights under MCL 712A.19b(3)(j). The prior terminations, coupled with the evidence presented at the termination hearing in this matter, provided clear and convincing evidence that RLS would be at significant risk of harm if returned to respondent's care. Respondent lacked the parenting skills to safely and properly provide for her child's most basic needs. Moreover, her emotional volatility put the child at grave risk. Indeed, respondent's own testimony was compelling evidence that supported this conclusion. On one occasion, when asked why she left parenting time early, respondent explained that she was trying to protect RLS from herself. Respondent then confessed that when she has flashbacks, she sometimes becomes violent. Respondent candidly admitted that she was afraid she might hurt her child. Based on this persuasive evidence, the trial court also did not clearly err when it terminated respondent's parental rights under MCL 712A.19b(3)(j).

V. BEST INTERESTS

Lastly, respondent challenges the trial court's finding that termination of her parental rights was in RLS's best interests. We disagree.

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of the parental rights and order that additional efforts for reunification of the child with the parent not be

made." MCL 712A.19b(5). The court may consider several factors when deciding if termination of parental rights is in a child's best interests, including 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 35, 42; 823 NW2d 144 (2012). The court may also consider psychological evaluations, the child's age, continued involvement in domestic violence, and a parent's history. *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009). Whether termination of parental rights is in a child's best interests must be proven by a preponderance of the evidence. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). This Court reviews for clear error a trial court's finding that termination of parental rights is in a child's best interests. *In re Jones*, 286 Mich App at 129.

The trial court did not clearly err when it found that termination of respondent's parental rights was in RLS's best interests. More than a preponderance of the evidence established that respondent was unable to provide a safe and stable home environment for her son. During parenting time, even with the assistance of a case aide, respondent still struggled to meet her child's most basic needs. Perhaps most compelling was respondent's own admission that she feared she might harm the child. Considering this, it was clear that RLS would not be safe in respondent's care. Moreover, there was no significant parent-child bond given that the child was removed shortly after birth and, respondent's lack of attendance and engagement at parenting time.

By contrast, RLS was thriving in a stable foster home where his needs were being met. RLS was placed together in the adoptive home of his two biological siblings, JB and AB, and the foster mother had expressed an interest in adopting RLS as well. Termination was the best avenue for the child to achieve stability, permanence, and finality. Accordingly, the trial court did not clearly err when it found that termination of respondent's parental rights was in RLS's best interests.

Affirmed.

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens