STATE OF MICHIGAN

COURT OF APPEALS

In re K. I. KILBOURNE, Minor.

UNPUBLISHED
December 22, 2020

No. 353238
Bay Circuit Court
Family Division
LC No. 19-012764-NA

Before: SWARTZLE, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

Respondent-mother appeals as of right the trial court's order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j). We affirm.

I. HEARSAY

Respondent first argues that reversal is required because inadmissible hearsay testimony was introduced at the adjudication trial at which the trial court exercised jurisdiction over the child. This argument is unpersuasive.

To preserve a challenge to the admission of evidence, a party is required to object timely to the evidence, stating the specific ground for objection unless the ground is apparent from the context. MRE 103(a)(1). Respondent concedes that she did not object to any of the testimony challenged on appeal. Therefore, respondent's claims of evidentiary error are unpreserved, and our review is limited to plain error affecting respondent's substantial rights. *In re Ferranti*, 504 Mich 1, 29; 934 NW2d 610 (2019). To be entitled to relief, respondent must establish that: (1) an error occurred; (2) the error was plain, meaning it was clear or obvious; (3) the plain error affected substantial rights; and (4) reversal is warranted because the plain error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*; *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). An error can be said to have affected a party's "substantial rights when there is 'a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.' " *People v Walker*, 504 Mich 267, 276; 934 NW2d 727 (2019), quoting *Carines*, 460 Mich at 763.

"In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase." *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). During

the adjudicative phase, the trial court determines whether to take jurisdiction of the child. *Id*. The "fact-finding adjudication of an authorized petition to determine if the minor comes within the jurisdiction of the court" is called a trial. MCR 3.903(A)(27). "In order to find that a child comes within the court's jurisdiction, at least one statutory ground for jurisdiction contained in MCL 712A.2(b) must be proven, either at trial or by plea." *In re SLH*, 277 Mich App 662, 669; 747 NW2d 547 (2008). During the adjudicative phase, "the rules of evidence for a civil proceeding apply, and the standard of proof is a preponderance of the evidence." *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006); see also MCR 3.972(C)(1).

Hearsay is inadmissible unless the rules of evidence provide otherwise. MRE 802. Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Respondent argues that inadmissible hearsay evidence was presented to support the trial court's findings that she left the minor child with respondent's mother at a homeless shelter and that respondent did not provide proper care and custody for the child because she did not provide her mother with a power of attorney or other legal authority to care for the child. Respondent also challenges the introduction of evidence that workers at the shelter were concerned that respondent's mother had been neglecting the child and that respondent's mother and the child were spending many hours outside in the cold during January.

Petitioner acknowledges, and we agree, that hearsay testimony was introduced at the adjudication trial. This included testimony regarding what respondent's mother said about respondent's absence and the fact that respondent did not provide a power of attorney to authorize her mother to care for the child. The caseworker also testified that a worker told him about her concerns that respondent's mother was not adequately caring for the child. Likewise, another caseworker testified regarding what respondent's mother told him about respondent, including that respondent had abandoned the child to her mother's care. This testimony was introduced for the truth of the matters asserted. Respondent has demonstrated that plain error occurred because of the introduction of inadmissible hearsay testimony at the adjudication trial.

We next consider whether the error was outcome-determinative. "Where the error asserted is the erroneous admission of evidence, the court engages in a comparative analysis of the likely effect of the error in light of the other evidence." *People v Lukity*, 460 Mich 484, 492; 596 NW2d 607 (1999) (cleaned up).

In this case, the trial court's decision to take jurisdiction over the child was supported by ample admissible evidence. Nonhearsay evidence included testimony from two caseworkers about their many unsuccessful efforts to locate respondent. Respondent's posts on social media showed that she was frequently moving and staying in different homes. MRE 801(2)(A). The posts also depicted respondent smoking marijuana. Furthermore, with respect to respondent's decision to leave the child in the care of her mother, apart from the hearsay testimony that respondent's mother had not been provided with any legal authority to care for the child, nonhearsay testimony was introduced that respondent's mother was not an appropriate placement option because she had her own history with Child Protective Services (CPS), which led to her placement on the Central Registry. That history included allegations that respondent's mother had allowed respondent to be sexually assaulted by another individual when respondent was 12 or 13 years old.

In sum, independent, admissible evidence showed that respondent was unavailable to care for the child because her whereabouts could not be determined and that respondent's mother was not an appropriate placement option because of her own CPS history. The trial court also took judicial notice of the court file, which provided further factual support for these facts, which clearly supported the trial court's decision to exercise jurisdiction over the child, who was without proper custody. MCL 712A.2(b)(1). Although hearsay was offered by several witnesses, this was a bench trial, and a trained jurist "is presumed to know how to sift through reliable versus unreliable evidence," *People v Parker*, 319 Mich App 664, 672; 903 NW2d 405 (2017), and there was more than sufficient nonhearsay evidence for the trial court to take jurisdiction here. Because respondent has not established that the challenged hearsay testimony affected the outcome of the adjudication trial, she is not entitled to relief with respect to this unpreserved issue.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent next argues that she did not receive the effective assistance of counsel at the adjudication trial. Parents have a right to counsel in child-protective proceedings. *In re Williams*, 286 Mich App 253, 275-276; 779 NW2d 286 (2009). "The right to counsel includes the right to competent counsel." *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). "The principles applicable to claims of ineffective assistance of counsel in the arena of criminal law also apply by analogy in child protective proceedings." *In re Martin*, 316 Mich App 73, 85; 896 NW2d 452 (2016). To establish ineffective assistance of counsel, respondent must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *People v Vaughn*, 491 Mich 642, 669-670; 821 NW2d 288 (2012) (cleaned up).

Respondent first argues that counsel was ineffective for failing to object to the introduction of the hearsay testimony discussed earlier. The decision whether to object to evidence is a matter of trial strategy. *People v Cooper*, 309 Mich App 74, 85; 867 NW2d 452 (2015). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, and will not assess counsel's competence with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). As discussed earlier, hearsay testimony was introduced at the adjudication trial and respondent's counsel did not object to that testimony. To the extent that counsel's failure to object can be considered objectively unreasonable, respondent has not demonstrated that she was prejudiced by counsel's failure to object. As already discussed, ample other competent evidence supported the trial court's decision to exercise jurisdiction over the child. Even if counsel had objected, there is no reasonable probability that the outcome of the adjudication trial would have been different. Accordingly, this ineffective-assistance claim cannot succeed.

Respondent also argues that her counsel was ineffective by advocating against her interests during closing argument. After the attorneys for both petitioner and the child advocated in favor of the trial court exercising jurisdiction, respondent's counsel stated:

> Unfortunately I have to concur with the comments made by [petitioner] and [the L-GAL] adding to the fact that respondent is not here. I have not had any contact with her, unfortunately, so there is not much I can add to the record, your Honor.

Contrary to respondent's argument, counsel's remarks were not unreasonable under the circumstances. As discussed earlier, substantial competent evidence supported the trial court's decision to exercise jurisdiction. Efforts to locate respondent had not been successful, respondent failed to appear for the trial, and respondent's mother, with whom the child had been left, was not a suitable care provider. Given these facts, the outcome of the trial was compelled by the evidence. Moreover, respondent does not suggest what argument counsel could have made that would have had a reasonable probability of resulting in a different outcome. Accordingly, respondent has not shown that counsel's acquiescence was objectively unreasonable, or that she was prejudiced by counsel's statements.

III. ICWA AND MIFPA

Respondent next argues that the trial court erred by failing to invoke the protections of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq.*, after respondent disclosed that one of the child's possible fathers, FC, had Native American heritage. Respondent did not raise this issue below or otherwise argue that the trial court should further investigate whether the child might be eligible for membership into a Native American tribe. Therefore, this issue is unpreserved and we are constrained to review this issue for plain error affecting respondent's substantial rights. *Ferranti*, 504 Mich at 29.

25 USC 1912(a), which is part of ICWA, provides:

> In any involuntary proceeding in a State court, *where the court knows or has reason to know that an Indian child is involved*, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. [Emphasis added.]

Similarly, the MIFPA, MCL 712B.9(1), provides:

> In a child custody proceeding, [which includes the proceedings to terminate parental rights, see MCL 712B.3(b)(*ii*),] *if the court knows or has reason to know that an Indian child is involved*, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending child custody proceeding and of the right to intervene. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, notice shall be given to the secretary in the same manner described in this subsection. The secretary has 15 days after receipt of notice to provide the requisite notice to the parent or Indian custodian and the tribe. [Emphasis added.]

Complimenting these statutory tribal notice provisions of each act, our court rules require the trial court to inquire at the preliminary hearing "if the child or either parent is a member of an Indian tribe." MCR 3.965(B)(2).

The Michigan Supreme Court has held that the tribal notice provision under ICWA is triggered if the court is presented with "sufficient indicia of Indian heritage . . . to give the court a reason to believe the child is or may be an Indian child," which the Court defined as "sufficiently reliable information of virtually any criteria on which [tribal] membership might be based." *In re Morris*, 491 Mich 81, 108; 815 NW2d 62 (2012). See also MCL 712B.9(4).

And while the "reason to know" standard for purposes of the ICWA tribal notice provision "set[s] a rather low bar," *In re Morris*, 491 Mich at 105, the bar is not so low as to be rendered meaningless. As explained in *In re Morris*:

> Precisely what constitutes "reason to know" or "reason to believe" in any particular set of circumstances will necessarily evade meaningful description. *As in other contexts, reasonable grounds to believe must depend upon the totality of the circumstances and include consideration of not only the nature and specificity of available information but also the credibility of the source of that information and the basis of the source's knowledge.* In light of the purpose of [ICWA], however, to permit tribal involvement in child-custody determinations whenever tribal members are involved, the threshold requirement for notice was clearly not intended to be high. [*Id*. at 106 (cleaned up; emphasis added).]

Respondent's appellate claim that the tribal-notice provisions were triggered is based on the fact that one of the named possible fathers of the child, FC, allegedly had Native American descent. Considering the totality of the circumstances and the "nature and specificity" of respondent's statements concerning FC, we conclude that there was insufficient information or evidence to provide "reasonable grounds to believe" that the child may be a Native American child.

Respondent was absent for much of the case. Respondent's mother, who did not know the identity of the child's father, had informed the trial court that respondent was not eligible for membership in any Native American tribe. The trial court held two putative-father hearings and respondent named three different persons as the child's possible father. Indeed, respondent later identified a fourth person as another possible father at the termination hearing. Apart from one person, who refused to take a DNA test, respondent provided very limited information regarding the other possible fathers and petitioner was unable to locate or obtain additional relevant information regarding the other putative-father candidates, including FC. The caseworker testified that she located a Facebook account for FC with respondent's assistance, but was unable to find any identifying information. At the second putative-father hearing, the court noted that it had published notice in the *Saginaw News* because all of the identified potential fathers allegedly lived in Saginaw. None of the possible fathers appeared for the hearing. At the hearing, respondent provided a partial physical description for FC, which included that he was, in part, of Native American descent. Respondent shared her belief that FC was the child's father because she thought the child looked more like him than the other potential father candidates.

Although respondent stated that FC was, in part, of Native American descent, she did not know what tribe FC might belong to, and she was unwilling or unable to provide much other information about him. Petitioner was unable to locate FC from the limited information that

respondent provided. Respondent had also named other men as the child's possible father. Ultimately, the trial court found that it did not have sufficient information to determine the identity of the child's biological father. In sum, there was no confirmation of respondent's assertion that FC was even part Native American and, more significantly, no confirmation that he was even the child's father. Under these circumstances, the record fails to disclose a sufficient basis for reasonably believing or knowing that the child might be a Native American child under ICWA or MIFPA. Therefore, respondent has not demonstrated that she is entitled to any appellate relief on plain-error review. *In re Ferranti*, 504 Mich at 29.

IV. STATUTORY GROUNDS

As her final ground for appellate relief, respondent argues that the trial court erred when it found that the statutory grounds for termination were established by clear and convincing evidence. "In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). We review the trial court's decision for clear error. *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011).

The trial court found that grounds for termination were established under MCL 712A.19b(3)(c)(*i*), which allows for termination under the following circumstances:

> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

The evidence supports the trial court's finding that termination of parental rights was warranted under § 19b(3)(c)(*i*). During much of the proceedings, respondent was homeless and a runaway. She admitted engaging in sexual relations with others in exchange for money and a place to sleep. She left the child with her mother, who had her own CPS history and was living at a homeless shelter. Respondent did not provide for any of the child's medical or physical needs, and failed to provide her mother with legal authority to obtain medical care for the child or to enroll the child in school. During most of the case, respondent was either missing or incarcerated in various juvenile facilities. Although she appeared ready to make progress in August 2019, she promptly returned to her self-destructive behaviors. Witnesses testified about respondent's current progress, but respondent had only started her current program a month before and had at least six months, and possibly much longer, before she would finish the program. Even then, she would need to find employment and housing, arrange for day care for the child, and maintain her sobriety. The child had been in care for more than a year and respondent had visited her only four times during that period. The caseworker testified that the child was no longer bonded with respondent, or even knew who she was. The trial court did not clearly err by finding that the evidence supported termination of respondent's parental rights under § 19b(3)(c)(*i*).

Because only one statutory ground for termination is sufficient to support termination of parental rights, *In re Schadler*, 315 Mich App 406, 410; 890 NW2d 676 (2016), we need not consider whether additional statutory grounds existed for termination of respondent's parental rights.

Affirmed.

/s/ Brock A. Swartzle
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher