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STATE OF MICHIGAN

COURT OF APPEALS

In re A. Z. E. SKEES, Minor.

UNPUBLISHED
June 17, 2021

No. 354785
Monroe Circuit Court
Family Division
LC No. 19-024882-NA

Before: K. F. KELLY, P.J., and SHAPIRO and SWARTZLE, JJ.

PER CURIAM.

Respondent-father appeals from the trial court's order terminating his parental rights to the minor child, AZES, pursuant to MCL 712A.19b(3)(b)(*i*), (g), and (j). Respondent argues that several evidentiary errors were committed at the adjudication trial before a jury. Although we agree with some of his evidentiary claims, we conclude that these errors, even when viewed cumulatively, were harmless in light of the overwhelming evidence supporting the jury's finding of a statutory basis for jurisdiction. We similarly conclude that any errors by respondent's counsel were not outcome determinative. Finally, we find no error in the trial court's conclusion that termination of respondent's parental rights was in the child's best interests. Accordingly, we affirm.

I. INTRODUCTION

J. Brantley is the mother of the minor child, AZES. Although Brantley and respondent never married, they maintained a relationship for a few years after AZES's birth in 2014. When the two separated, AZES lived primarily with Brantley, but she spent three days a week with respondent pursuant to an informal custody arrangement between the two parents. In October 2019, Brantley observed AZES, who was then five years old, "humping" a blanket. Brantley testified that when she inquired further, AZES told her that respondent had pulled his "private" out in front of her, had pulled her panties down, and that sometimes "sticky" stuff came out of respondent's private part. Initially, Brantley contacted respondent about the allegations, but then, approximately a week later, she reported AZES's disclosures to the Monroe County Sheriff's Department, which in turn contacted petitioner, the Department of Health and Human Services.

On October 21, 2019, AZES made disclosures during a forensic interview with Detective John Gurganus indicating that she had been sexually abused by respondent. Two days later, during

an interview with Det. Gurganus, respondent denied exposing his penis to AZES or removing her panties, but he made other admissions about having sexual contact with the child. Petitioner subsequently filed a petition seeking termination of respondent's parental rights at the initial disposition pursuant to MCL 712A.19b(3)(b)(*i*), (g), and (j). The court authorized the petition, released the child to her mother, and suspended respondent's parenting time.

After an adjudicatory trial in January 2020, the jury found that a preponderance of the evidence established statutory grounds for jurisdiction under MCL 712A.2(b). Pursuant to the jury's verdict, the court assumed jurisdiction over the minor child. Thereafter, in August 2020, the court conducted a dispositional hearing, following which it terminated respondent's parental rights to AZES. Respondent now appeals as of right.

II. ADMISSIBILITY OF FORENSIC INTERVIEW VIDEO

Respondent first argues that the video recording from AZES's forensic interview was erroneously introduced into evidence at the adjudication trial. After a tender-years hearing, the trial court concluded that Det. Gurganus could testify to the child's statements made during the forensic interview pursuant to MCR 3.972(C)(2). But the court then sua sponte determined that the "best evidence" of the child's statements was the video recording of the forensic interview and therefore ordered that the video be played for the jury. We agree with respondent that the court's decision to introduce the video constitutes plain error,[1] but we conclude that reversal is not required.

"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). The trial court determines whether to take jurisdiction of the child during the adjudicative phase. *Id.* The court can exercise jurisdiction if the petitioner proves allegations in the petition at a trial or if a respondent-parent enters a plea of admission or no contest to the allegations. *In re Ferranti*, 504 Mich 1, 15; 934 NW2d 610 (2019).

MCL 712A.17b governs, in part, "videorecorded statements made by a witness under the age of 16 in a forensic interview undertaken by the state in connection with proceedings concerning the alleged abuse and neglect of the witness." *In re Martin,* 316 Mich App 73, 81; 896 NW2d 452 (2016). MCL 712A.17b(5) provides:

> A custodian of the videorecorded statement may take a witness's videorecorded statement. The videorecorded statement shall be admitted at all proceedings *except the adjudication stage* instead of the live testimony of the witness. The videorecorded statement shall state the date and time that the

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[1] To preserve an evidentiary issue for appellate review, a party must object at trial on the same ground that it presents on appeal. *In re Weiss,* 224 Mich App 37, 39; 568 NW2d 336 (1997). Respondent did not object to the introduction of the video at trial. Therefore, this issue is unpreserved and review is limited to plain error affecting respondent's substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). "[A]n error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *Id.* at 9.

> statement was taken; shall identify the persons present in the room and state whether they were present for the entire video recording or only a portion of the video recording; and shall show a time clock that is running during the taking of the statement. [Emphasis added.]

By its plain language, MCL 712A.17b(5) precluded admission of AZES's videorecorded statement at the adjudication. Thus, the jury was not permitted to substantively consider the video for purposes of assessing the statutory grounds for jurisdiction. Consequently, the introduction of the video qualifies as plain error. However, respondent fails to show outcome-determinative prejudice from this error.

Petitioner sought jurisdiction under MCL 712A.2(b)(1) and (2), which provide that a court has jurisdiction over a child:

> (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. . . .

The jury found that a preponderance of the evidence established that AZES's home environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of respondent, was an unfit place for her to live. After reviewing the record, it is apparent that the jury would have reached this same conclusion even if the video recording had not been introduced. There was overwhelming evidence of ongoing criminality and depravity in the home, and respondent's own admissions were the primary source of this compelling evidence. "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) (citation omitted). Considering the properly admitted evidence, it is readily apparent that respondent cannot establish that the error was outcome-determinative.

First and foremost, had the trial court not ruled that the video be played for the jury, then Det. Gurganus would have testified to AZES's statements pursuant to MCR 3.972(C)(2)(a). As will be discussed in the next issue, we disagree with respondent that the trial court abused its discretion by ruling that Det. Gurganus could testify to the child's statements under MCR 3.972(C)(2)(a).

Even setting aside AZES's statements to Det. Gurganus, there was ample evidence to support the jury's finding under MCL 712A.2(b)(2). Respondent was also interviewed by Det. Gurganus, and a video recording of this interview was properly played for the jury. During his interview, respondent explained that AZES had a small bed in his bedroom and it was located at the foot of his bed. Respondent admitted that AZES, on more than one occasion, had seen him

having sex with other women and masturbating in his bed. When asked how AZES could have encountered his semen, respondent denied that he ever ejaculated in front of her, but he admitted that she crawled into his bed to "cuddle" with him and he had been touching himself at the time. Respondent confessed that he did not really care if AZES saw anything because he believed that his daughter was too young to understand what she was seeing. Although these events clearly demonstrate that respondent had no understanding of, or the ability to set, appropriate boundaries with his daughter, he made even more concerning admissions. Respondent admitted that he allowed AZES to come into his bed, climb on top of him, scoot down to his private area, and "grind" on him. Essentially, respondent admitted that he permitted AZES to have contact with him of a sexual nature.

Respondent explained that AZES appeared "curious" when she thought he "was doing something or something was going on." She would then want to "cuddle" and he would allow her to come into his bed. Respondent further explained that AZES would try to get on top him. Respondent admitted that "there was a time where I didn't push her off right away because I was – I was curious as to if she really knew what she was doing."

Respondent was also asked to explain why AZES would report that he would "ride" her. In reply, respondent pondered whether this came out of her seeing him with other women, or, "was it when she climbed on top of me and would try to grind on me and I didn't pull her off right away to see if she knew what she was doing." Later, respondent explained that when he would have an erection in the morning, he allowed AZES to come into his bed, and she would "scoot" down to it. Respondent admitted that it got to the point where it terrified him so he told AZES, "Listen, you-you can't tell people you come cuddle with me because it's – it's getting weird."

In addition to respondent's own statements, the jury was also permitted to consider the testimony of witnesses who had heard AZES make certain disclosures, i.e., Brantley, the child's maternal grandmother, and pediatrician Dr. Daniel Lis. Respondent does not challenge the testimony of Brantley and the maternal grandmother regarding statements they heard AZES make, and therefore, for purposes of resolving this issue, we will consider the testimony of these two witnesses.

The maternal grandmother testified that in August 2019, while AZES was visiting her home, the child, without any prompting, stated, "My dad rides me and I ride him." When the maternal grandmother told AZES that she could tell her anything, AZES stated that she was told not tell because it would get respondent in trouble. According to Brantley's testimony, a month later AZES made additional and consistent disclosures. Brantley testified at trial that in October 2019, AZES stated that respondent would "ride" her. When Brantley asked her to explain, AZES stated, "Let me show you." According to Brantley, AZES then pulled her panties down, and, while pointing to corresponding spots on her body, said that respondent would take his private part out and touch her inner thigh and vagina. AZES also revealed that respondent would hold her hips and "bounce her up and down on it" and that sometimes "sticky clear stuff would come out." Thus, independent, legally admissible evidence provided overwhelming support for the jury's finding that AZES's home environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of respondent, was an unfit place for her to live.

In sum, considering the totality of the record, while the video was erroneously introduced into evidence, this error did not affect respondent's substantial rights. Respondent was not prejudiced because the video did not affect the outcome of the proceedings. Accordingly, respondent is not entitled to relief with respect to this unpreserved issue.

III. ADMISSIBILITY OF DET. GURGANUS'S TESTIMONY

Next, respondent argues that the trial court erred when it determined that Det. Gurganus could testify to statements made to him by AZES during the forensic interview. Respondent argues that the circumstances surrounding the child's statements did not provide adequate indicia or trustworthiness to permit their admission under MCR 3.972(C)(2)(a). We disagree.[2]

Although the rules of evidence for a civil proceeding apply during the adjudication, *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006), hearsay statements of a child pertaining to acts of child abuse are admissible at the trial if the criteria for reliability set out in MCR 3.972(C)(2) are satisfied. *In re Archer,* 277 Mich App 71, 82; 744 NW2d 1 (2007). MCR 3.972(C)(2) provides, in relevant part:

> Any statement made by a child under 10 years of age or an incapacitated individual under 18 years of age with a developmental disability as defined in MCL 330.1100a(25) regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622 (g), (k), (z), or (aa), performed with or on the child by another person may be admitted into evidence through the testimony of a person who heard the child make the statement as provided in this subrule.
>
> (a) A statement describing such conduct may be admitted regardless of whether the child is available to testify or not, and is substantive evidence of the act or omission if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness. This statement may be received by the court in lieu of or in addition to the child's testimony.

Thus, pursuant to MCR 3.972(C)(2)(a), "the court must determine, 'in a hearing held before trial,' whether the statement possesses adequate indicia of trustworthiness." *In re Archer*, 277 Mich App at 81, quoting MCR 3.972(C)(2)(a). "Circumstances indicating the reliability of a hearsay statement may include spontaneity, consistent repetition, the mental state of the declarant, use of terminology unexpected of a child of a similar age, and lack of motive to fabricate." *Id.* at 82. Moreover, "the reliability of a statement depends on the totality of the circumstances surrounding the making of the statement." *Id.* Of particular note, when a statement is made during a forensic

[2] A trial court's evidentiary rulings in a child protective proceeding are generally reviewed for an abuse of discretion. *In re Jones*, 286 Mich App 126, 130; 777 NW2d 728 (2009). "An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of principled outcomes." *Id.* (quotation marks and citation omitted).

interview, the fact that the interview is conducted in accordance with the state's forensic interview protocol is an indication of trustworthiness. *Id.*

Testimony elicited during the tender-years hearing confirmed that the circumstances surrounding AZES's statements provided adequate indicia of reliability. Det. Gurganus testified at the pretrial hearing that he had been employed as a deputy with the Monroe County Sheriff's Department since 2000. He had undergone training in child abuse, neglect, sexual abuse, and assault. Det. Gurganus testified that he followed Michigan's forensic interviewing protocol during AZES's 48-minute interview. Det. Gurganus explained that he engaged in some rapport building with AZES and discussed with her the ground rules. Det. Gurganus confirmed that AZES was able to distinguish between a truth and a lie. Consistent with the protocol, the detective asked AZES, and she agreed, to tell the truth, not to guess, and to correct him if he said something wrong. In general, Det. Gurganus would typically ask a child to tell him why they were there. With AZES, however, it took a while to get into the reason why she was there. Eventually, Det. Gurganus simply asked AZES if she was caught doing something to her blanket. This question led to her disclosures. The detective's use of the forensic interviewing protocol supports the reliability of AZES's statements.

Further, the details with which AZES described her experiences support the truthfulness of her statements. AZES used phrases such as "my daddy takes out his private parts." She also said, "That's how he rides her." She then demonstrated by putting her cupped hands out in front of her. During the interview, AZES also stated that respondent "pulled out his private part." She then demonstrated what he did with his private part by curving her fingers around to touch her thumb and then moving her hand around. While AZES's vocabulary was typical of a five-year-old, the corresponding demonstrations were not to be expected of a child her age. The manner in which AZES conveyed her experiences indicated that her statements were based on her personal knowledge and not something she fabricated.

AZES's mental state during the interview similarly supported the trustworthiness of her statements. Det. Gurganus testified that AZES spoke favorably about respondent, indicated that she loved spending time with him, and she did not demonstrate that she had any fear of respondent. Her demeanor during the interview was pleasant and she was easy to talk to. In sum, according to Det. Gurganus, AZES presented as a happy, pleasant, five-year-old girl. The evidence that AZES was not under distress, did not feel any external pressure to disclose, and was not hesitant in making the statements, support that her statements had indicia of truthfulness.

Further, Det. Gurganus, a trained forensic interviewer, testified that it did not appear that AZES was being untruthful. Indeed, AZES's statements were consistent with disclosures she had made to other individuals. Moreover, Det. Gurganus found no evidence that AZES had been coached or was motivated to lie. Under the circumstances, it was unlikely that AZES was influenced by her mother because AZES was not present when Brantley spoke with Det. Gurganus at the outset and Brantley was not in the conference room during the interview.

At the conclusion of the tender-years hearing, the trial court noted that Det. Gurganus had complied with the forensic protocol and reviewed the ground rules with AZES. The court further found compelling that AZES's mother was not in the room during the interview. The court noted that Det. Gurganus's testimony was based in part on his independent recollection and in part on

his review of the report. After considering these factors, the court concluded that AZES's statements to the detective had the requisite indicia of reliability to be admissible under MCR 3.972(C)(2). We similarly conclude that the totality of the circumstances provided adequate indicia of trustworthiness to warrant admission of AZES's statements to Det. Gurganus under MCR 3.972(C)(2)(a). Accordingly, the trial court's ruling was not an abuse of discretion.

Respondent also asserts that because Det. Gurganus's independent recollection of the interview was weak, his testimony should not have been admitted under MCR 3.972(C)(2). While it is true that Det. Gurganus had to frequently refresh his memory with his report, he explained that he needed to refer to his report because he wanted to make sure he answered accurately. Considering the nature and intent of a tender-years hearing, Det. Gurganus's frequent reference to his report suggests a desire to be confident regarding the child's exact words rather than a factor that would create suspicion regarding the circumstances surrounding the giving of the statement. In any event, a witness is permitted to use a writing to refresh his memory. MRE 612.

Respondent also argues that the trial court erred when it failed to admit and view the video recording of AZES's forensic interview during the tender-years hearing. As indicated earlier, MCL 712A.19b(5) prohibits the admission of a child's videorecorded statement during the adjudication. However, in *In re Martin,* 316 Mich App at 83, this Court held that

> a videorecorded statement taken in compliance with MCL 712A.17b must be admitted at a tender-years hearing and can be used by the trial court to assess whether a proposed witness who took the videorecorded statement should be permitted to testify at trial about the statement, i.e., to assess whether "the circumstances surrounding the giving of the statement provide[d] adequate indicia of trustworthiness."

Pursuant to this Court's holding in *In re Martin*, it would appear that the trial court plainly erred when it failed to admit the video from AZES's forensic interview during the tender-years hearing. However, respondent has failed to demonstrate that any error was outcome-determinative.

Respondent does not explain how the trial court's ruling regarding the admissibility of Det. Gurganus's testimony would have been different if the court had reviewed the video before ruling. That is, he does not explain how the video would have demonstrated that the circumstances surrounding AZES's statements lacked adequate indicia of trustworthiness. 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 his claims, or unravel and elaborate for him his argument, and then search for authority either to sustain or reject his position. *In re TK*, 306 Mich App 698, 712; 859 NW2d 208 (2014). After reviewing the video, it is readily apparent that Det. Gurganus's testimony during the tender-years hearing accurately described the circumstances surrounding the interview. We cannot conceive of any basis for the trial court to have reached a different conclusion, if it had reviewed the video, regarding whether the circumstances surrounding the giving of AZES's statements provided adequate indicia of reliability. Accordingly, respondent has not demonstrated that any error in failing to view the video recording of AZES's forensic interview at the tender-years hearing affected his substantial rights.

IV. ADMISSIBILITY OF DR. LIS'S TESTIMONY

Respondent next challenges the admissibility of pediatrician Dr. John Lis's testimony during the adjudication. Dr. Lis testified at the adjudication trial regarding statements made by AZES during an examination. Respondent first argues that the trial court erred by ruling that AZES's out-of-court statements to Dr. Lis were admissible under MRE 803(4). Second, he asserts that Dr. Lis improperly vouched for AZES's credibility. We conclude that any error in admitting AZES's statements to Dr. Lis was harmless, and that the record does not support respondent's argument that Dr. Lis improperly vouched for AZES's credibility.

A. MRE 803(4)

During the tender-years hearing, Dr. Lis testified that while examining AZES, he asked the child "when was the last time any incident happened" with her father. In response, AZES indicated that something had happened a month earlier. She then said, "he ride me." When asked to explain, AZES stated that respondent put his privates on her inner thighs and vagina. At the conclusion of the evidentiary hearing, the trial court held that Dr. Lis's testimony was not admissible under MCR 3.972(C)(2). The court was concerned about the reliability of AZES's statements to Dr. Lis because Brantley reported to Dr. Lis, in AZES's presence, that they were at the appointment because AZES had been sexually abused. The court also expressed concern about the manner in which Dr. Lis questioned AZES. Nonetheless, the court held that because the statements were made for purposes of medical treatment, they were admissible under MRE 803(4). On appeal, respondent argues that because the trial court found that the statements were unreliable, it erred when it admitted them under MRE 803(4). We agree.

MRE 803(4) is a hearsay exception for statements that a declarant makes for the purpose of medical treatment or diagnosis. The rule provides that the following statements are not excluded by the hearsay rule:

> Statements made for purposes of medical treatment or medical diagnosis in connection with treatment. Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

In *People v Meeboer (After Remand),* 439 Mich 310, 322; 484 NW2d 621 (1992), the Supreme Court explained that the rationale for this hearsay exception involves "(1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient." The Court identified several factors to be considered when assessing the circumstances under which the statements were made:

> Factors related to trustworthiness guarantees surrounding the actual making of the statement include: (1) the age and maturity of the declarant, (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of a statement), (3) the manner in which the statements are phrased (childlike terminology may be evidence of genuineness), (4) use of terminology unexpected of a child of similar age, (5) who initiated the examination

> (prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment), (6) the timing of the examination in relation to the assault (the child is still suffering pain and distress), (7) the timing of the examination in relation to the trial (involving the purpose of the examination), (8) the type of examination (statements made in the course of treatment for psychological disorders may not be as reliable), (9) the relation of the declarant to the person identified (evidence that the child did not mistake the identity), and (10) the existence of or lack of motive to fabricate. [*Id.* at 324-325 (citations omitted).]

The Court further stressed that in cases of suspected or alleged child abuse, a trial court should consider the totality of the circumstances to determine the trustworthiness of a child's statements and whether the child understood the importance of telling the truth. *Id.* at 324-325.

In this case, it appears that the trial court focused solely on the fact that AZES's statements were made during a medical examination, and thus must be considered statements made for the purpose of medical diagnosis or treatment, without considering the *Meeboer* factors. During its MCR 3.972(C)(2) analysis, however, the court evaluated the totality of the circumstances and found that the circumstances surrounding the giving of the statements to Dr. Lis did not provide adequate indicia of trustworthiness. Given these findings, the court could not have rationally reached a different result when considering the admissibility of the statements under MRE 803(4). Indeed, the court found concerning and persuasive the suggestive manner in which the statements were elicited, the second factor identified by the Court in *Meeboer.* Although the internal inconsistency in the trial court's analysis cannot be explained or harmonized, engaging in such an exercise is unnecessary because we are satisfied that any error in the admission of the testimony was harmless and, as such, no relief is warranted. MCR 2.613(A); MCR 3.902(A).

First, we note that Dr. Lis's testimony was extremely brief. It followed the testimony of Brantley and the maternal grandmother and, with regard to the nature of the disclosures, it mirrored the testimony that was already given by these witnesses. Further, although respondent asserts that the jury might have given undue weight to the pediatrician's testimony because of his stature as a doctor, we find this assertion unpersuasive. We note that the jury would have had reason to question Dr. Lis's credibility because he insisted that AZES used the exact words "penis" and "vagina" in her disclosures. No other evidence supported that AZES used anatomically correct terminology. Indeed, the testimony was consistently to the contrary. Finally, respondent's own admissions were the most compelling evidence that he had engaged in inappropriate contact of a sexual nature with his daughter. Accordingly, any error in the admission of Dr. Lis's testimony was harmless.

B. VOUCHING

Respondent also argues that Dr. Lis improperly vouched for AZES's credibility. The record does not support this claim. As an initial matter, respondent has materially misrepresented the nature of Dr. Lis's testimony. Respondent represents that Dr. Lis testified that he believed AZES's statements to be truthful. This is not accurate. During the trial, on direct examination, Dr. Lis was asked if he had any reason to doubt the veracity of AZES's statements. He replied, "No." Dr. Lis neither vouched for AZES's credibility, or offered any opinion testimony that AZES

had been sexually abused. This type of query was simply to assist the jury in generally identifying when a child might be engaged in fabrication. Dr. Lis did not testify that he believed AZES, he simply did not find any reason to question her veracity. Consequently, there is no record support for respondent's assertion that Dr. Lis improperly vouched for AZES's credibility.

V. ADMISSIBILITY OF PURPORTED IRRELEVANT TESTIMONY

Next, respondent argues that he was prejudiced by Brantley's irrelevant testimony relating to respondent's prior history with Child Protective Services (CPS) and his allegedly poor housekeeping and parenting skills. He argues that this improper testimony deprived him of a fair trial. We disagree.

At the adjudication, Brantley was asked on direct examination what her relationship with respondent was like. She testified that they had a "fairly decent relationship," but that six months prior to the disclosures she had contacted CPS regarding respondent "for neglect, filthiness of a home, [and] no insurance or registration on a vehicle . . . ." Brantley denied that there was an animosity between her and respondent. She was then asked about what led her to contact the authorities. She explained that after the initial disclosure she informed respondent of the child's statements and offered "him polygraph tests, counseling, things to help figure out what was going on, and why our child is saying this." She gave respondent five or six days, but after "he did nothing to try and help [her]" Brantley contacted the Monroe County Sheriff's Department. She also testified to respondent's statements to her after she contacted the police, including that he asked her "how could [she] do this" and that she was "not being a good mother because [she] was taking a father away from a child." Brantley was also asked if there were any pending court proceedings regarding custody or visitation, and she explained that she and respondent were subpoenaed by the Friend of the Court for a hearing on child support about two weeks prior to the disclosures for which respondent did not show.

On cross-examination, respondent's counsel questioned Brantley's testimony that she had a good relationship with respondent given the CPS referral six months prior to the child's disclosures. Counsel also asked Brantley if she was considering seeking a custody order at that time if respondent "didn't straighten up in your eyes[?]" Brantley then testified at length about what led her to make the CPS referral, including that respondent was failing to give AZES her medication. At that point the trial court intervened and asked to Brantley to "[j]ust try to stay within the context of the—the question that's asked, Okay?" Respondent's counsel then asked, "[T]o summarize, you had some serious grievances on how you thought [respondent] parented," and Brantley agreed. Counsel then asked Brantley about when she told respondent and the police of AZES's disclosures, noting, "You actually waited several days to report it to any authorities."

At the conclusion of the trial testimony, before the jury was instructed, the court sua sponte indicated that it was concerned that the jury would be confused by Brantley's testimony. Specifically, the court was troubled that the jury might also consider as grounds for jurisdiction the unpleaded allegations regarding respondent's prior neglect investigation and not just the sexual abuse allegations in the petition. After much discussion, both on and off the record, the court indicated, and all parties agreed, that it would give the following curative instruction:

> You have heard testimony about a prior CPS investigation on respondent father. The Department of Health and Human Services is not seeking jurisdiction on the allegation and facts concerning the prior CPS investigation. Only consider the facts alleged in the petition in making your determination. They are listed in instruction 97.06, which I am tabbing with a post-it note.

The court did, in fact, give this instruction. During closing argument, petitioner specifically reiterated that it was only seeking jurisdiction on the basis of the sexual abuse allegations and that it was not seeking jurisdiction on any other grounds, including the other conditions in respondent's home and his previous CPS investigation. Petitioner's counsel stated that those issues were not important enough to file a petition and seek jurisdiction from the court.

Contrary to respondent's argument, the bulk of Brantley's testimony was relevant. Specifically, Brantley and respondent's history, the CPS referral, and any pending court proceedings were directly relevant to whether Brantley had a motive to coach AZES into making false allegations against respondent. See *Powell v St John Hosp*, 241 Mich App 64, 72; 614 NW2d 666 (2000) ("Evidence that shows bias or prejudice on the part of a witness is always relevant."). That Brantley waited several days to report the disclosures to the police and her reasons for the delay were also relevant. Indeed, respondent's own counsel questioned Brantley about these matters and referenced them in his closing statement. "A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken at trial." *Holmes v Holmes,* 281 Mich App 575, 587-588; 760 NW2d 300 (2008) (quotation marks and citation omitted). In other words, a "[r]espondent may not assign as error on appeal something that [he] deemed proper in the lower court because allowing [him] to do so would permit respondent to harbor error as an appellate parachute." *In re Hudson,* 294 Mich App 261, 264; 817 NW 2d 115 (2011). And while respondent contends that Brantley's testimony of his statements to her constitutes hearsay, he overlooks that a party's own statement offered against the party is not hearsay. MRE 801(d)(2).

We agree with respondent that at times Brantley provided extraneous information that was unfavorable to him. However, any prejudice that might have followed was effectively minimized by the trial court's prompt remedial actions. The trial court provided a specific instruction to the jury, informing the jurors not only that they were to only consider the allegations in the petition, but specifically, that they were not to consider respondent's CPS history as a basis for finding statutory grounds for jurisdiction. This instruction cured any resulting prejudice, and jurors are presumed to follow their instructions. *People v Mullins,* 322 Mich App 151, 173; 911 NW2d 201 (2017). Accordingly, Brantley's testimony did not deny respondent a fair trial.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent also argues that he did not receive effective assistance of counsel at the adjudication trial.[3]

Parents have a right to counsel in child protective proceedings. *In re Williams,* 286 Mich App 253, 275-276; 779 NW2d 286 (2009). That right to counsel includes the right to competent counsel. *In re Simon,* 171 Mich App 443, 447; 431 NW2d 71 (1988). To establish ineffective assistance of counsel, respondent must show that counsel's performance was deficient and that he was prejudiced by the deficient performance. See *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003). In this case, to the extent that counsel's representation may have fallen below an objective standard of reasonableness, respondent has failed to demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the adjudicative proceeding would have been different. See *People v Vaughn*, 491 Mich 642, 669-670; 821 NW2d 288 (2012).

We agree with respondent that trial counsel's failure to object at the adjudication trial to the admission of the video recording of AZES's forensic interview fell below an objective standard of reasonableness. Michigan law clearly provides that a child's recorded forensic interview is not admissible during the adjudicative stage. MCL 712A.19b(5); *In re Martin,* 316 Mich App at 81. As explained earlier, however, there was overwhelming legally admissible evidence presented at the adjudication trial to show that respondent sexually abused his five-year-old daughter. The most compelling evidence was his own admissions. Accordingly, there is no reasonable probability that the jury would have concluded that petitioner failed to establish a statutory basis for jurisdiction if the video had been excluded. Thus, respondent has failed to demonstrate the requisite prejudice to establish this ineffective-assistance claim.

Regarding respondent's claim that counsel was ineffective for failing to object to Brantley's testimony, much of this testimony was relevant to whether Brantley was biased against respondent or had a motive to coach AZES into making false allegations against respondent, as discussed. Respondent's counsel plainly relied on this testimony as part of his trial strategy. Decisions regarding what arguments to make, how to cross-examine witnesses, and what evidence to present all involve matters of trial strategy. "Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). To the extent that certain statements made by Brantley should have been objected to, the trial court's curative instruction adequately cured any prejudiced incurred by respondent.

Respondent also contends that his counsel was ineffective for failing to object to the court's ruling that Dr. Lis's testimony was admissible pursuant to MRE 803(4). However, counsel did object to Dr. Lis testifying regarding AZES's out-of-court statements, arguing that AZES's statements were not admissible because they lacked the requisite indicia of trustworthiness. This

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[3] This Court applies criminal law principles to claims of ineffective assistance of counsel in child protective proceedings. *In re Martin*, 316 Mich App at 85. Because respondent did not move for a new trial or evidentiary hearing below, our review of this issue is limited to mistakes apparent from the record. See *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

argument was equally applicable to MCR 3.927(C)(2) and MRE 803(4). The trial court accepted respondent's position with respect to the admissibility of Dr. Lis's testimony under MCR 3.972(C)(2), but then found an alternative basis for admitting the testimony under MRE 803(4). At that point, it would have been futile for counsel to continue to pursue the exclusion of the testimony. Failure to continue to advance a "futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Similarly, respondent's counsel was not ineffective for failing to object to Dr. Lis's testimony on the grounds that Dr. Lis improperly vouched for AZES's credibility. Contrary to respondent's assertion, Dr. Lis did not vouch for AZES's credibility, either directly or indirectly. Therefore, an objection would have been futile.

VII. BEST INTERESTS

Lastly, respondent challenges the trial court's finding that termination of his parental rights was in AZES's best interests. We find no error in this regard.[4]

"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).

The trial court did not clearly err when it found that termination of respondent's parental rights was in AZES's best interests. The record clearly established that AZES would not be safe in respondent's care. Respondent exposed AZES to aberrant behavior of a sexual nature. At the time of the termination hearing, even after participating in a sex-offender program and a cognitive behavior program, respondent still lacked insight into his actions. He only recognized his behavior as "inappropriate"; he did not see that he had sexually abused his five-year-old daughter. Moreover, respondent denied that he needed further therapy. The court's conclusion that AZES would be at risk of harm in respondent's care is supported by a preponderance of the evidence.

The court also found that the bond between respondent and his daughter had significantly diminished. And because the terms of respondent's criminal probation precluded him from having any contact with AZES for five years, there was no basis for believing that the bond would improve anytime soon.

At the time of termination, respondent was thriving in her mother's care. AZES had been in therapy since the initial disclosure. She was active in typical children's activities and her health

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[4] 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.

and behavior had improved since the court precluded parenting time with respondent. Brantley was providing for all of AZES's needs and she was clearly an advocate for her daughter. Brantley could provide AZES with the stability and permanency she required. In addition, termination of respondent's parental rights would provide AZES with the finality she would need to work through the trauma caused by respondent's actions.

Further, although AZES was in the home of a relative, the court was not required to consider this factor where that relative was her other parent. Typically, a child's placement with relatives is a factor that must be considered and it generally weighs against termination of parental rights. MCL 712A.19a(8)(a); *In re Olive/Metts,* 297 Mich App at 43. However, because a child's other parent is not a "relative" as defined under MCL 712A.13a(1)(j), the trial court was not required to weigh AZES's placement with her mother as a factor weighing against termination. *In re Schadler*, 315 Mich App 406, 413; 890 NW2d 676 (2016). The perversion and abandonment of respondent's parental role as AZES's caregiver was a factor that supported the trial court's finding that termination of respondent's parental rights was in the child's best interests.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro
/s/ Brock A. Swartzle