

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
July 28, 2011

In the Matter of S. DYSON, Minor.

No. 302133
Wayne Circuit Court
Family Division
LC No. 10-495344

Before: M. J. KELLY, P.J., and O'CONNELL and SERVITTO, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating his parental rights under MCL 712A.19b(3)(b)(i), (j), and (k)(ii). Because the trial court did not abuse its discretion in granting a tender years hearing and admitting statements obtained therefrom, nor did it err in acquiring jurisdiction over the minor child, finding that clear and convincing evidence established statutory grounds for termination of respondent's parental rights, or finding that termination was in the child's best interests, we affirm.

Petitioner sought termination of respondent's parental rights at the initial disposition based on allegations that he sexually abused his six-year-old daughter. Before the adjudication, the court conducted a "tender years" hearing under MCR 3.972(C)(2)(a) and admitted the child's out-of-court statements regarding the alleged sexual abuse after finding that the circumstances surrounding the giving of the statements provided an "adequate indicia of trustworthiness." The trial court assumed jurisdiction over the child and, following trial, terminated respondent's parental rights pursuant to MCL 712A.19b(3)(b)(i), (j), and (k)(ii).

On appeal, respondent first contends that the trial court abused its discretion in granting the "tender years" motion and admitting hearsay statements made by the minor child. We disagree.

We review a decision to admit evidence for an abuse of discretion. *In re Archer*, 277 Mich App 71, 77; 744 NW2d 1 (2007). Under MCR 3.972(C)(2)(a), any statement made by a

child under the age of 10 regarding an act of sexual abuse¹ may be admitted into evidence through the testimony of a person who heard the child make the statement “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.” “The reliability of a statement depends on the totality of the circumstances surrounding the making of the statement.” *Archer*, 277 Mich App at 82, citing *In re Brimer*, 191 Mich App 401, 405; 478 NW2d 689 (1991). “Circumstances indicting 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 similar age, and lack of motive to fabricate.” *Archer*, 277 Mich App at 82, citing *Brimer*, 191 Mich App at 405.

After reviewing the tender years’ testimony in its entirety, we are satisfied that the circumstances provide adequate indicia of trustworthiness. First, the child’s disclosures to multiple individuals concerning the alleged sexual abuse were, for the most part, repetitive and consistent. *Archer*, 277 Mich App at 82. Although the child revealed varying levels of detail to different individuals, her statements consistently and repeatedly centered on respondent “washing her up too hard” in her vaginal area by inserting a towel covered finger in her vagina. The child’s initial disclosures to her mother and doctors that respondent “washed her up too hard” were made in response to her vaginal irritation, pain, and bleeding. The child stated that she woke up and found respondent putting his fingers in her vaginal opening with a towel wrapped around his hand. Although the child made additional disclosures further implicating respondent in the abuse during interviews by professionals (i.e., neither the child nor respondent were wearing underwear, he put his penis in her private parts, and he hurt her when he “went in too deep,”) the use of forensic interviewing protocol by the interviewers tended to increase the reliability of those statements. The interviews were conducted outside the presence of any caregiver, thus reducing the potential for suggestibility, and the potential for spontaneous responses was increased by using open-ended questions and allowing the child to narrate. The interviewers also ascertained that the child knew the difference between the truth and a lie.

Furthermore, the testimony did not indicate any motivation on the part of the child to fabricate the statements about the alleged abuse and the child repeatedly and consistently used terminology unexpected from a young child. *Archer*, 277 Mich App at 82. Moreover, the circumstances prompting the child’s disclosures strongly corroborated the child’s statements implicating respondent in the abuse and bolstered their trustworthiness. Again, the six year old child experienced vaginal itching, irritation, and bleeding a short time after a visit with her

¹ MCL 722.622(w) defines “sexual abuse” as “engaging in sexual contact or sexual penetration as those terms are defined in . . . MCL 750.520a, with a child.” Under MCL 750.520a, “‘sexual contact’ includes the intentional touching of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purposes of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner” while “‘sexual penetration’ means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body”

father. She was diagnosed with the sexually transmitted disease chlamydia at that time. Respondent was also diagnosed with chlamydia in close proximity to the child's visit.

We conclude that the totality of the circumstances surrounding the child's statements provided adequate indicia of trustworthiness to warrant their admissibility as substantive evidence in the adjudicatory trial under MCR 3.972(C)(2)(a). Accordingly, the trial court did not abuse its discretion in admitting the child's out-of-court statements regarding the alleged sexual abuse. *Archer*, 277 Mich App at 77.

Respondent next claims that the trial court erred in finding a statutory basis to support its assumption of jurisdiction over the child. We disagree.

"To properly exercise jurisdiction, the trial court must find that a statutory basis for jurisdiction exists." *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). "Jurisdiction must be established by a preponderance of the evidence." *Id.*

The evidence revealed that respondent was diagnosed with chlamydia within a week of the child's weekend visit with him. The child started experiencing symptoms, including vaginal irritation, itching, and bleeding, one to two weeks after the visit (notably, within the one to two week incubation period for chlamydia) and the child tested positive for chlamydia shortly thereafter. Expert testimony established that the only way the child could have contracted chlamydia was through direct contact with infected semen or genital discharge between the penis and the labia. This evidence, coupled with the child's disclosures implicating respondent in sexual abuse, including her out-of-court statements to several individuals and her own in-court testimony that was consistent with her prior disclosures, strongly suggests that respondent sexually abused the child. The alleged sexual abuse clearly placed the child at a substantial risk of harm to her mental wellbeing, MCL 712A.2(b)(1), and made respondent's home environment unfit for the child, MCL 712A.2(b)(2). Although the child's disclosures were not entirely consistent and respondent denied the abuse, we must give regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it and it was evident that the trial court believed the child. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).² Considering the circumstances in their totality, we find that a preponderance of the evidence showed that respondent sexually abused the child, establishing the statutory grounds for exercising jurisdiction over the child. *BZ*, 264 Mich App at 295.

Finally, respondent contends that statutory grounds for termination were not established by clear and convincing evidence, and that termination was not in the child's best interests. We disagree.

² Additionally, the child revealed that she was sexually abused by respondent's ten-year-old brother while in respondent's home on at least three occasions, thereby placing into question respondent's ability to adequately protect the child from abuse.

We review a decision terminating parental rights for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *In re Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993); MCR 3.977(K).

Here, the child's disclosures and the medical testimony clearly and convincingly established that respondent sexually abused the child and also physically injured the child by infecting her with chlamydia. The abuse constituted criminal sexual conduct because the child, then six years old, was under the age of 13 when the contact occurred, and the contact involved penetration as statutorily defined, warranting termination under subsection (k)(ii).³ MCL 712A.19b(3)(k)(ii). Only one statutory ground in MCL 712A.19b(3) must be met by clear and convincing evidence to terminate parental rights, *Jackson*, 199 Mich App at 25.

We disagree with respondent's argument that that the evidence failed to clearly and convincingly establish penetration because the child never stated that respondent had sex with her and there was no medical or physical evidence of sexual penetration. Sexual intercourse was not required for "penetration" to constitute criminal sexual conduct. Instead, "sexual penetration" as statutorily defined includes "any other intrusion, however slight, of any part of a person's body . . . into the genital or anal openings of another person's body. . . ." MCL 750.520a(r). Here, the child's statements, her testimony, and the medical evidence, as previously discussed, clearly and convincingly established that at least minimally, respondent intruded the child's vaginal opening with his finger. Further, medical testimony indicated that the child's medical examinations were wholly consistent with sexual abuse.

We also disagree with respondent's argument that the evidence failed to clearly and convincingly establish that he infected the child with chlamydia because it was plausible that she contracted the disease through contact with individuals other than respondent, specifically the child's mother or her boyfriend. However, there was no evidence submitted to support respondent's alternate theories and it is uncontested that respondent was diagnosed with chlamydia in close proximity (within a week) of the child's last weekend visit.

Finally, we find no error in the trial court's determination that termination of his parental rights was in the child's best interests under MCL 712A.19b(5). *Trejo*, 462 Mich at 356-357. Although testimony indicated that the child and respondent shared a bond and the child loved respondent, the serious allegations implicating respondent in the sexual abuse of the child clearly established that termination would be in the child's best interests. Accordingly, the trial court properly terminated respondent's parental rights to the child.

³ Under the Michigan Penal Code, engaging in sexual penetration with another person under age 13 constitutes first-degree criminal sexual conduct. MCL 750.520b(1)(a). "Penetration" is statutorily defined under MCL 750.520a.

Affirmed.

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto