STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ROBBENNOLT, Minors.

UNPUBLISHED
November 21, 2013

Nos. 316087 & 316251
Ingham Circuit Court
Family Division
LC No. 13-000178-NA

Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

In this consolidated appeal, respondent-father and respondent-mother appeal as of right from the trial court's order terminating their parental rights to their two minor children, FR and AR. We affirm.

First, respondent-father argues that the trial court erred in admitting statements under MCR 2.972(C)(2), made by FR to an investigating officer during a forensic interview. We disagree.

A trial court's decision on the admission of evidence is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). An abuse of discretion occurs when the trial court chooses an outcome that is outside the range of principled results. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). Generally, a trial court's determination on a close evidentiary question is not an abuse of discretion. *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 729; 761 NW2d 454 (2008). However, a trial court's decision to admit evidence pursuant to statute or court rule is reviewed de novo. *In re Archer*, 277 Mich App, 71, 77; 744 NW2d 1 (2007).

MCR 3.972(C)(2) is also known as the "tender years exception" and provides the following:

> Any statement made by a child under 10 years of age . . . regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation . . . 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.

Whether the statements sought to be admitted under MCR 3.972(C)(2) are reliable is determined by looking at the totality of the circumstances surround the statement. *In re Archer*, 277 Mich App at 82. The following circumstances may indicate reliability: "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.*

Respondent-father argues that there were insufficient indicia of trustworthiness and, therefore, the statements should not have been admitted. However, in reciting what had occurred, the officer commented on the indicia of trustworthiness she witnessed during the interview. To this end, the officer testified that FR did not change her story, used age-appropriate words, and was consistent in reporting what happened to both herself and AR. In addition, the officer testified that she used the state's forensic interviewing protocol to conduct the interview. An officer's adherence to the state's forensic interviewing protocol can be considered when determining whether sufficient indicia of trustworthiness exist. See *id.* Evidence under MCR 3.972(C)(2) can describe "an act of *child abuse*, child neglect, sexual abuse, or sexual exploitation." (Emphasis added). In this case, termination was being sought on multiple grounds. The trial court did not err in determining that, at a minimum, FR's statements provided evidentiary support that respondent-father had physically abused her. Based on a totality of the circumstances, there were adequate indicia of trustworthiness such that the trial court did not abuse its discretion in admitting the evidence.

Next, respondent-father argues the trial court erred in terminating his parental rights pursuant to MCL 712A.19b(3)(b) and (j). However, the trial court also found that termination of respondent-father's parental rights was warranted based on MCL 712A.19b(3)(k) and (*l*), and he does not challenge these particular grounds on appeal. Therefore, because only one statutory ground is necessary to support the termination of parental rights, *In re Powers*, 244 Mich App 111, 117; 624 NW2d 472 (2000), we need not consider respondent-father's arguments focused solely on MCL 712A.19b(3)(b) and (j).

Respondent-father's last argument is that termination was not in the children's best interests. We disagree.

The trial court's determination that termination is in the best interests of the child is reviewed for clear error. *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009). "A finding is clearly erroneous if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re Mason*, 486 Mich at 152 (internal quotation marks and citations omitted).

If the trial court determines that at least one statutory ground for termination exists then the court must order termination if the trial court affirmatively finds termination is in the best interests of the children. MCL 712A.19b(5); *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012). The trial court may consider the child's needs for permanency, stability, and

finality when making the best-interest determination. *In re Olive/Metts*, 297 Mich App at 41-42. The trial court may also consider the bond between the child and the parent, the parent's ability to parent, and any advantages of a foster home over the parent's home. *Id.*

Here, the trial court determined that respondent-father had both physically and sexually abused FR. Furthermore, the trial court determined that respondent-mother failed to protect the children when respondent-mother had the opportunity to do so. Based on respondent-father's previous parenting history with the parties' other child, AH, the trial court determined respondent-father was not invested in either FR or AR. Reviewing the evidence presented, the trial court did not clearly err in determining that it was in the children's best interests to terminate respondent-father's rights. The children needed safety and stability, none of which they were receiving from respondent-father.

In her appeal, respondent-mother argues that the trial court erred in allowing FR's therapist to testify about assertions FR made through play therapy. We disagree.

Respondent-mother did not object to the therapist's testimony regarding what FR disclosed during play therapy. Therefore this issue is unpreserved. Unpreserved issues are reviewed for plain error affecting substantial rights. *Kern v Blethern-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). To avoid forfeiture for plain error, the party alleging error carries the burden of proving that (1) there was an error, (2) the error was clear or obvious, and (3) the plain error affected substantial rights. *Id.*, citing *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

The therapist testified that she was a mental health therapist and began working with FR in March 2013. The therapist indicated that she used play therapy with FR and during one session, FR undressed the "daddy" doll, placed it naked in a chair, and then placed the "FR" doll on the daddy's lap. The therapist stated that FR also took the "AR" doll and put it in a chair next to the "daddy" doll and put the "AR" doll's head in between the "daddy" doll's legs. The therapist went on to say that when the subject of "daddy" was brought up, FR was "very serious, wide-eyed . . . when demonstrating with the dolls, she's very sad looking, sullen." The therapist said FR's play and play therapy matched FR's words and that made the therapist conclude FR was re-enacting events that occurred to FR.

Hearsay is an out of court statement offered for the truth of the matter asserted. MRE 801(c). As it pertains to hearsay, a "statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a). Generally hearsay is not admissible unless it falls within one of the hearsay exceptions. MRE 802. We note that MCR 3.972(C)(2) specifically deals with children's statements that were "heard" by another; therefore, a child's non-verbal "statements" do not fall under the plain language of this court rule. However, this is not the only exception to hearsay.

MRE 803(4) allows admission of hearsay statements if the statement was "made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, . . . or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

FR's assertion through play therapy was admissible under MRE 803(4). To qualify as an exception under MRE 803(4), the statement must be (1) made for the purposes of medical treatment, (2) must describe medical history, past or present symptoms, pain, or sensations, or the general character of the cause, (3) be reasonably necessary to diagnosis or treatment. *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992). In order to properly treat FR, the therapist needed to know what had happened to FR. FR's disclosure with the dolls was describing the general cause of FR's mental health issues, and allowed the therapist help tailor the therapy.

However, our Supreme Court has held that a young child's statement must also be trustworthy to be admitted under MRE 803(4). *Id.* at 324-326. The totality of the circumstances must be considered when determining whether a statement has indicia of trustworthiness. *Id.* at 324-325. Here there were sufficient indicia of trustworthiness to allow admission of the statements. FR's actions with the dolls would be unexpected of a child her age. Her demeanor was consistent with the disclosure. Her disclosure with the dolls was consistent with her disclosure to the investigating officer who conducted the forensic interview. And FR had no apparent motivation to fabricate. Based on the totality of the circumstances the statements appeared to be trustworthy. Therefore the statements made by FR through play therapy were admissible hearsay under MRE 803(4), and respondent-mother failed to establish any error, let alone any clear or obvious error.

Respondent-mother's last argument is that her trial counsel was ineffective because counsel argued that respondent-mother was a victim of domestic violence instead of advancing respondent-mother's theory of the case. We disagree.

Generally, an ineffective assistance of counsel claim has a mixed standard of review. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008). "This Court reviews the trial court's factual findings for clear error and reviews de novo questions of constitutional law." *Id.* However, unpreserved claims of ineffective assistance of counsel are reviewed for errors apparent on the record. *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008).

Both the United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. Usually the right to effective assistance of counsel is only present in criminal cases. *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2002). However, "the right to due process also indirectly guarantees assistance of counsel in child protective proceedings." *Id.* (internal quotations and citations omitted). Therefore the principles of effective assistance of counsel in criminal cases also apply in termination cases. *Id.* at 197-198.

Generally, effective assistance is presumed and the defendant carries the heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). When raising a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below objective professional norms, and that but for counsel's ineffectiveness, the ultimate result would likely have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). In addition, the defendant must show that the proceedings were fundamentally unfair or unreliable because of counsel's ineffectiveness. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). However, counsel is not required to make frivolous or meritless motions or

objections. *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011). Defense counsel also has wide discretion in trial strategy, including whether to object to procedures employed and arguments presented. *Unger*, 278 Mich App at 242.

During closing argument, respondent-mother's counsel argued that respondent-mother was a victim of domestic violence. Counsel went on to point out that respondent-mother took some steps to protect her children, which was difficult considering she could not protect herself. Counsel also argued there was a bond between respondent-mother and her children, and respondent-mother was a good parent.

This strategy was consistent with the testimony presented at trial. One of the investigating officers testified that respondent-mother disclosed domestic violence to him. The children's maternal grandmother testified that respondent-mother said that respondent-father would hit, punch, and knock respondent-mother down and that respondent-father also sexually abused respondent-mother. Therefore trial counsel's assertion that respondent-mother was a victim of domestic violence was supported by the record. Also, while respondent-mother was able to present her testimony to the trial court that injuries to FR were accidental, in light of the investigating officer's testimony that respondent-father admitted to intentionally hitting FR, counsel most likely made a strategic decision not to pursue this further as a theory to support respondent-mother's position. Based on the evidence presented, we find that respondent-mother has not demonstrated that counsel's actions fell below professional norms. *Frazier*, 478 Mich at 243. Nor, given the strong evidence that respondent-mother had both failed to protect the children and was more interested in continuing to pursue her relationship with respondent-father than reunite with her children, is there any likelihood that counsel's decision to pursue this theory had an effect on the outcome of the proceedings. Therefore respondent-mother has failed to demonstrate that counsel was ineffective.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder