

STATE OF MICHIGAN
COURT OF APPEALS

In re MOILES Minors.

DEPARTMENT OF HUMAN SERVICES,

UNPUBLISHED

October 18, 2012

Petitioner-Appellee,

and

ELAINA RENA MOILES and KORBIN
NICOLAS MOILES,

Appellees

v

No. 309862

Mecosta Juvenile Division

LC No. 11-005712-NA

KENNETH LYNN MOILES,

Respondent-Appellant.

Before: WILDER, P.J., and O'CONNELL and K.F. KELLY, JJ.

PER CURIAM.

Respondent father appeals by right from an order exercising jurisdiction over his minor children, ERM and KNM, pursuant to MCL 712A.2(b). The trial court entered an order of disposition after the jury returned a verdict of jurisdiction over the children during the adjudication hearing. We affirm.

Danielle McCauley, a child protective services (CPS) worker, testified that on October 6, 2011, she had received a referral that KNM was at the doctor's office with "a significant handprint across his face." After a preliminary hearing, the trial court authorized the petition concerning both ERM and KNM. An adjudication hearing was then held.

Respondent is the father of another child, KAM, who is not a subject of this appeal. In another proceeding, respondent had pleaded no-contest to jurisdiction over KAM after respondent had bruised KAM's eye, ostensibly while using a belt to discipline him. At the time of KNM's referral, CPS had returned KAM to respondent's care.

On the ground that how a parent treats one child is evidence of how the parent treats other children in his home, petitioner introduced KAM's bruise as a topic at the adjudication hearing. Respondent testified that on the day KAM was injured, KAM had not done his chores. Respondent claimed that when attempting to discipline KAM with a belt, KAM turned over and put his arm up. Respondent testified that he could not stop the belt, and it traveled up KAM's arm and hit his eye. Respondent testified that KAM had a black eye when respondent sent him to school. McCauley testified that she spoke with KAM at his elementary school. Dr. Sushila Rao, a pediatrician, testified that KAM came into her office with a significant bruise on his eye. Dr. Rao testified that she diagnosed KAM as an abused child. CPS removed KAM from respondent's care. Barbara Fogue, a licensed professional counselor, testified that she had met with KAM after CPS had removed him from the home. Fogue testified that after speaking with KAM, she concluded that the bruise had been "an accident that occurred during a non-abusive consequence."

Regarding the injury to KNM, his mother testified that respondent had called her on October 5, 2011, and had complained about KNM's high-pitched scream, that KNM would not listen, and that KNM would not put his shoes on. KNM's mother testified that respondent later brought the children home at approximately 9:15 p.m. and put them to bed. She testified that it was too dark in KNM's room to see anything. However, when KNM came downstairs the next morning, she saw that he had a handprint on his face. She testified that she took KNM to the doctor's office.

Dr. Jonathan Williams, a pediatrician, testified that he saw KNM on October 6, 2011. Dr. Williams testified that KNM had a red mark on the left side of his face that appeared to be the impression of a hand. He testified that the mark was recent and that it was the result of a significant amount of physical force. Dr. Williams testified that he diagnosed KNM as a physically abused child. McCauley testified that she received an abuse referral from the doctor's office and went to see KNM at the office. She testified that she noticed a significant handprint on the side of KNM's face. McCauley testified that she was asking the jury for jurisdiction because of the "two separate, but severe incidences with [respondent's] children" and because respondent had refused to participate in services. The court instructed the jury that even though KAM was not the subject of the proceeding, it could consider evidence concerning KAM when making its decision on ERM and KNM. The jury found for jurisdiction.

Respondent argues on appeal that the use of evidence under "the doctrine of anticipatory neglect" violated his due process rights because it allowed the trial court to admit evidence that it should not have admitted under the Michigan Rules of Evidence. We review this unpreserved claim of constitutional error for plain error affecting respondent's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130. Thus, respondent must establish the following: (1) an error occurred, (2) the error was plain, meaning clear or obvious, and (3) the error affected the party's substantial rights. *Id.* at 763. An error affects a party's substantial rights when the error affects the outcome of the lower court proceedings. *Id.*

The trial court has jurisdiction over any child whose home environment is an unfit place for a child to live because of neglect or cruelty. MCL 712A.b(2). A petitioner must prove the requirements of this section by a preponderance of the evidence for the court to acquire jurisdiction over a child. MCR 3.972(A), (C)(1). A party has the right to a jury at the trial in a

child-protective proceeding. MCR 3.911. The procedures used at child-protective proceedings are generally sufficient to provide a parent with due process of law. It is well established that parents have a constitutionally protected liberty interest in caring for their children. *In re AMB*, 248 Mich App 144, 209; 604 NW2d 262 (2001). Thus, proceedings during the adjudication must have constitutionally sufficient due process protections. *Id.* at 209-210. “Due process requires fundamental fairness.” *In re Brock*, 442 Mich 101, 111; 449 NW2d 752 (1993). Generally, the procedures used at an adjudicative hearing will protect parents from the risk of erroneous deprivation of their liberty interests in raising their children. *Id.* The Michigan Rules of Evidence apply at the adjudication trial in a child protective proceeding. MCR 3.972(C)(1).

We will first address respondent’s argument that the trial court improperly admitted evidence of respondent’s prior convictions and his no-contest plea in KAM’s case. We conclude that respondent has waived any assertion of error on these issues.

Generally, the trial court may not admit a party’s old convictions or no-contest pleas as evidence in a civil case. When more than ten years have elapsed since a conviction or the person’s release from confinement, that conviction is not admissible. MRE 609(c). Similarly, a no-contest plea can only be used as evidence against a party in civil proceeding under specific circumstances. MRE 410. However, “[o]ne who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights.” *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). A party can waive a “broad array of constitutional and statutory provisions,” and can waive those rights through the actions of the party’s counsel. *Id.* at 216-218. A party’s affirmative approval of an action constitutes a waiver. *People v McDonald*, 293 Mich App 292, 296; 881 NW2d 507 (2011). In this case, it was respondent’s counsel that initially elicited information from McCauley about respondent’s pleas in KAM’s case and respondent’s criminal history, in which he had pleaded guilty to a variety of offenses. A party cannot base error on its own planned or negligent actions. *In re Utrera*, 281 Mich App 1, 11; 761 NW2d 253 (2008). This information obviously was a part of respondent’s trial strategy. Counsel used respondent’s criminal history to argue that respondent had always taken responsibility and had held himself accountable for his past behaviors, and that respondent would not plead to jurisdiction over KNM because he had not slapped KNM. Respondent cannot now complain that the trial court improperly admitted this evidence.

Respondent next argues that the trial court’s admission of evidence about KAM violated his due process rights because its application of the doctrine of anticipatory neglect contradicted the application of the rules of evidence in this case. We disagree. Even if evidence was improperly admitted under the rules of evidence, that fact alone does not necessarily equate to a constitutional due-process violation. If every violation of the rules of evidence amounted to a denial of due process, there would be no non-constitutional evidentiary error. In short, one asserting a due-process claim must establish that the proceedings were inherently unfair. See *In re Estate of Adams*, 257 Mich App 230, 233-234; 667 NW2d 904 (2003) (“The essence of due process is ‘fundamental fairness.’”).

Moreover, we find that respondent failed to show that it was plain error to admit evidence regarding respondent’s conduct directed toward KAM. Generally, relevant evidence is admissible, and irrelevant evidence is not admissible. MRE 402. “The doctrine of anticipatory neglect recognizes that how a parent treats one child is certainly probative [or relevant] of how

that parent may treat other children.” *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001). Thus, evidence of respondent’s treatment of his other children is relevant and normally admissible. MRE 402.

Under MRE 404(b)(1), relevant “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith,” but may “be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identify, or *absence of mistake or accident* when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.” Thus, evidence of these “bad acts” can be admissible as long as it is offered for a proper purpose. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than establishing a defendant’s character to show his propensity to commit the charged offense. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005).

Here, the evidence was arguably admissible to show the absence of mistake or accident. Respondent claimed that KNM was injured through an accident and not by any intentional act on respondent’s part. Thus, under MRE 404(b), the evidence of respondent’s intentional striking of KAM¹ can be admissible to show the absence of mistake related to KNM. Our Supreme Court addressed a similar situation in *People v Sabin (On Remand)*, 463 Mich 43; 614 NW2d 888 (2000). In *Sabin*, the prosecution argued that evidence of the defendant’s prior assaults on his stepdaughter was admissible to show absence of mistake regarding the defendant’s charged assaults on his daughter. *Id.* at 69. The Supreme Court held that since the defendant denied the occurrence of the crime generally and did not argue that the victim was mistaken in believing that sexual penetration had occurred, absence of mistake was not “in issue,” and the evidence was not admissible to establish absence of mistake. *Id.* But in the present case, respondent did argue that KNM was injured because of accident. Therefore, we find that the present case is distinguishable from *Sabin* and that respondent failed to show how the evidence related to KAM was not admissible for a proper purpose under MRE 404(b). Consequently, we conclude that respondent failed to establish the existence of any clear or obvious error.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O’Connell
/s/ Kirsten Frank Kelly

¹ Although there was evidence that KAM’s *injury* may have been accidental, the evidence was undisputed that respondent did *intentionally* strike KAM with a belt, and that the belt strike injured KAM’s eye.