

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
January 16, 2014

In the Matter of BROWN/MORRIS, Minors.

No. 316761
Wayne Circuit Court
Family Division
LC No. 12-510776-NA

Before: MURPHY, C.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating her parental rights over the minor children, D. Brown and C. Morris, pursuant to MCL 712A.19b(3)(b)(ii) (failure to prevent abuse), (3)(g) (neglect without regard to intent), and (3)(j) (reasonable likelihood that the minor child would be harmed if returned to the parent’s home). We affirm.

I. HEARSAY

Respondent argues that the trial court erred when it admitted several hearsay statements into evidence. Because respondent failed to object at the trial court, this issue is not preserved for appellate review. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 368; 533 NW2d 373 (1995). Thus, we review this unpreserved issue for plain error that affected respondent’s substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008).

Respondent first asserts that the statements D. Brown made to Loria Henry, a Child Protective Services (“CPS”) worker, regarding C. Morris’s abuse at the hands of his legal father, were inadmissible because the tender-years exception only applies to abuse where the declarant child was the subject of the abuse.

The Michigan Rules of Evidence apply to trials in child protective proceedings. MCR 3.972(C)(1); *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006). Hearsay is an out-of-court statement offered to prove the truth the matter asserted and is not admissible unless an exception applies. MRE 801(c); MRE 802; *In re Utrera*, 281 Mich App at 18. The “tender-years exception” provides, in pertinent part, that

[a]ny statement made by a child under 10 years of age . . . regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622(f), (j), (w), or (x), 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. [MCR 3.972(C)(2); see also *In re Archer*, 277 Mich App 71, 77-84; 744 NW2d 1 (2007).]

The plain language of MCR 3.972(C)(2) provides that a child's statement is admissible if the statement was regarding an act of child abuse that was "performed with or on the child." Here, the out-of-court statement did not involve abuse that was performed "with or on" the declarant; instead, the child described abuse that was directed to another child. Thus, D. Brown's statements were not admissible under this court rule.

However, that does not mean that the statement was not admissible through other means. A catchall exception to the hearsay rule provides:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. [MRE 803(24); see also *Augustine v Allstate Ins Co (On Remand)*, 292 Mich App 408, 430-432; 807 NW2d 77 (2011).]

To be admissible under MRE 803(24), a statement that would otherwise be excluded as hearsay must meet four requirements. *Augustine*, 292 Mich App at 430. It first must "demonstrate circumstantial guarantees of trustworthiness equivalent to the categorical exceptions." *Id.* D. Brown "provided a narrative" to Henry after she asked him to "tell [her] everything that had happened that day." Henry testified that D. Brown "agreed to only tell [her] things that were true," that he seemed to understand her questions, and that he understood "what was going on." The trial court found that D. Brown's statements to Henry were "credible and trustworthy" and there was no indication "that [D. Brown] was lying or had any reason to lie." The trial court further noted that Henry "went over the forensic protocol with [D. Brown] to ensure that he knew the difference between the truth and a lie." Thus, the trial court specifically addressed the substance of this requirement and found that it was met.

Second, the statement must "be relevant to a material fact." *Id.* D. Brown's statements were directly related to the petition's allegations that the minor children were exposed to domestic violence and physical abuse in respondent's home and that respondent failed to protect the minor children from abuse despite having the opportunity to do so. Those allegations formed the basis of the trial court's jurisdiction over the minor children and ultimately established the statutory grounds justifying termination of respondent's parental rights. Thus, D. Brown's statements were "relevant to a material fact" for the purpose of MRE 803(24).

Third, the statement must be “the most probative evidence of that fact reasonably available.” *Id.* D. Brown’s statements were the most reliable evidence of the physical abuse of C. Morris since respondent denied having known both about the incident, which resulted in C. Morris sustaining brain damage and other serious injuries, and the other beatings that D. Brown said had lasted for “months.” While the child’s father admitted that he grabbed C. Morris “by the collar,” “shook him,” and hit him “a few times,” he denied that respondent knew of the abuse. Therefore, the most probative evidence that respondent knew of the abuse of C. Morris and did not prevent it came from D. Brown’s first-hand account.

Fourth, the statement must “serve the interests of justice by its admission.” *Id.* Because D. Brown’s statements were highly relevant and went to the heart of the matter, their admission serves the interests of justice.

Additionally, “a statement may not be admitted under [MRE 803(24)] unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it.” MRE 803(24). Here, petitioner’s written motion notified respondent and the trial court of its intent to introduce D. Brown’s statements under both MCR 3.972(C)(2) and MRE 803(24) and summarized the information Henry would provide. Thus, this final requirement was satisfied as well.

Therefore, because all of the elements of the catchall exception to the hearsay rule, MRE 803(24), were met, respondent cannot demonstrate any plain error from the admission of D. Brown’s statements.

Respondent claims that this Court must reverse because the trial court did not cite MRE 803(24) in ruling on petitioner’s motion. While the trial court explicitly referred only to MCR 3.972(C), we have already determined that the statements were admissible under MRE 803(24). “When a trial court reaches the right result for the wrong reason, the ruling will not be disturbed.” *Miller-Davis Co v Ahrens Const, Inc (On Remand)*, 296 Mich App 56, 70; 817 NW2d 609 (2012). Respondent also argues that the trial court improperly allowed Henry to describe the “complete dialogue between herself and [D. Brown]” because MCR 3.972(C)(2)(a) uses the singular “statement” and not the plural “statements.” This argument need not be addressed, however, because Henry’s testimony was proper under MRE 803(24).

Respondent also maintains that the trial court erroneously found that D. Brown’s statements were reliable because Henry was not qualified as an expert in forensic interviewing. This argument concerns the credibility of witnesses and the weight of the evidence, each of which are best assessed by the finder of fact, which, in this case, was the trial court, see *Drew v Cass Co*, 299 Mich App 495, 501-502; 830 NW2d 832 (2013), and the record does not demonstrate that the trial court’s determination was clearly erroneous.

Respondent next argues that Henry’s testimony concerning the services petitioner offered or attempted to offer respondent was inadmissible hearsay. However, as a CPS worker assigned to this case, Henry had personal knowledge of the services petitioner provided respondent, including Families First, parenting classes, counseling, and in-home services that assisted respondent with nutrition, cleaning, and homemaking. In short, the testimony was not hearsay

because Henry did not offer any out-of-court statement for the purpose of proving the truth of what the statement asserted.

Respondent also argues that foster-care case manager, Chaurice Butler, was improperly allowed to testify regarding C. Morris's medical condition. Butler briefly summarized the treatment that C. Morris received, including physical therapy, occupational therapy, and speech therapy twice weekly. She also said that, because of his injuries, he wears a cast on his arm and leg braces, cannot walk flat-footed, cannot keep his balance, and suffers seizures. This testimony was not so specialized or confusing to the fact finder that it required an expert's experience, knowledge, or training, and it was clearly based on Butler's personal knowledge of C. Morris's treatment regimen. See MRE 702; *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779-780; 685 NW2d 391 (2004). As was the case with Henry's testimony concerning respondent's case history, Butler's testimony was not hearsay because the testimony consisted of no out-of-court statements.

Respondent argues that her trial counsel rendered her ineffective assistance by failing to object to the admission of the testimony she charges was inadmissible. A respondent in child protective proceedings who is financially unable to retain an attorney is entitled to a court-appointed attorney at "any hearing conducted pursuant to these rules, including the preliminary hearing." MCR 3.915(B)(1)(a)(i). "[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings." *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002). However, counsel is not ineffective for failing to raise a futile or meritless objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Thus, because each of respondent's arguments underlying her claims of ineffective assistance lacks merit, she cannot establish that she was denied the effective assistance of counsel.

II. STATUTORY GROUNDS FOR TERMINATION

Respondent next argues that the trial court clearly erred when it found that statutory grounds existed to justify terminating respondent's parental rights and that termination was in the minor children's best interests.

This Court reviews the trial court's findings that grounds for termination have been established and regarding the best interests of the children for clear error. MCR 3.977(K); *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). A finding is clearly erroneous if, despite evidence to support the finding, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been made. *Id.* at 91.

A trial court may terminate a respondent's parental rights if it finds that (1) a statutory ground under MCL 712A.19b(3) has been established by clear and convincing evidence and (2) that termination is in the children's best interests. *In re CR*, 250 Mich App 185, 194-195; 646 NW2d 506 (2001). The trial court terminated respondent's parental rights under MCL 712A.19b(3)(b)(ii), MCL 712A.19b(3)(g), and MCL 712A.19b(3)(j), which provide:

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

(b) The child or a sibling of the child has suffered physical injury or sexual abuse under 1 or more of the following circumstances:

(ii) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

* * *

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

Henry testified that D. Brown told her, during a forensic interview, that he heard "thumping sounds" and "sounds of [the child's father] hitting [C. Morris] and [C. Morris] screaming, [the child's father] screaming at [C. Morris,] and . . . heard [C. Morris] crying until he cried no more." D. Brown told Henry that C. Morris's father then brought him into the living room and respondent asked the father, "What did you do?" He answered, "I don't know," and respondent said, "[W]ell, you was the one [who was] beating him." D. Brown further told Henry that respondent was aware that C. Morris had been beaten by his father for "months" and did not prevent the abuse.

These facts circumstantially establish that respondent "had the opportunity to prevent the physical injury [and] failed to do so," and her chilling comment that C. Morris's father was "the one who was beating him" creates a "reasonable likelihood that [the minor children] will suffer injury or abuse in the foreseeable future if placed in [respondent's] home." MCL 712A.19b(3)(b)(ii). Respondent argues that the trial court's findings were based on inadmissible hearsay, but, as discussed above, D. Brown's statements to Henry were admissible. Respondent's argument that her other children had not been injured or neglected lacks merit because the statute only requires that the "child *or* a sibling of the child" be abused, MCL 712A.19b(3)(b)(ii) (emphasis added), and this Court has noted that "[e]vidence of how a parent treats one child is evidence of how he or she may treat the other children," *In re Hudson*, 294 Mich App 261, 266; 817 NW2d 115 (2011). Because only one statutory ground is necessary to

support the termination of a parent's rights, we need not address whether any other conditions were satisfied as well.¹ *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011).

Respondent merely states in her brief on appeal that “[i]t was not in the best interest of [C. Morris] that [respondent’s] parental rights were terminated.” A party abandons an argument when she merely announces a position, gives it cursory treatment, and fails to support it. See *PT Today, Inc v Comm’r of Office of Fin & Ins Servs*, 270 Mich App 110, 131-132; 715 NW2d 398 (2006); *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003). In any event, respondent’s argument lacks merit. Based on the evidence of domestic violence and physical abuse in the record and respondent’s failure to protect the minor children therefrom, the trial court did not clearly err when it found that termination of respondent’s parental rights over the minor children was in their best interests.

Affirmed.

/s/ William B. Murphy
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood

¹ Regardless, we note that the same set of facts also support the trial court’s determination under MCL 712A.19b(3)(g) and MCL 712A.19b(3)(j) because respondent’s failure to discover the bruises and marks on C. Morris and her failure to admit that her neglect caused him irreversible damage, augur poorly for her ability to provide proper care and custody within a reasonable time considering the ages of the minor children.