

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of SNYDER Minors.

UNPUBLISHED
February 4, 2014

No. 316294
Tuscola Circuit Court
Family Division
LC No. 12-010401-NA

Before: METER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Respondent appeals as of right from an order terminating his parental rights to two minor children, CS and AS, pursuant to MCL 712A.19b(3)(b)(i), (g), (j), and (k)(ii). We affirm.

I. FACTS AND PROCEEDINGS

The minor children were removed from respondent's home after petitioner and law enforcement investigated reports that respondent's two children and the four children of respondent's live-in partner were involved in several incidents of sexual-acting-out behavior. The six children were interviewed by Debra Pascoe at the Children's Advocacy Center (CAC) in September and October 2012, pursuant to forensic interview protocols. Respondent's two children were placed in foster care because of concerns that they were not safe in respondent's home and because their natural mother did not properly attend to their hygiene and inappropriately discussed the case with the children.

CS clashed with her first foster mother, but adjusted well to her second foster-care placement. In February 2013, CS disclosed to a therapist that respondent had sexually abused her several years earlier, and CS returned to the CAC for another forensic interview with Pascoe. During the interview, CS stated that respondent had ordered her to undress and lie on his bed. She described the assault by stating that respondent put his "no-no" into her "no-no." She explained that "no-no" was the part of respondent's body that stuck out and that he used to pee, and that her "no-no" was the part of her body that she used to pee. She described two acts of penetration, one vaginal and one anal. CS placed the incident a few years before her removal from respondent's home. She provided details about the incident, such as the clothing she was wearing, the bed on which the assault occurred, and the weather on the day of the assault. The interview was supposed to be recorded, but it was discovered afterward that there had been an equipment malfunction, so no recording of the interview was available.

After CS's disclosure, petitioner filed a supplemental petition to terminate respondent's parental rights. Following an evidentiary hearing, the trial court ruled that CS's statements regarding respondent's sexual abuse were admissible under MCR 3.972(C)(2). Following a two-day termination hearing, the trial court terminated respondent's parental rights.

II. DUE PROCESS

Respondent argues that his due-process rights were violated by the admission of CS's out-of-court statements regarding respondent's sexual abuse and by petitioner's failure to provide a full police report of the police investigation and a report of a medical examination of CS.

"Whether a child protective proceeding complied with a respondent's right to due process presents a question of constitutional law that we review de novo." *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009). The substance of this issue primarily pertains to the trial court's admission of CS's out-of-court statement. "This Court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion." *In re Archer*, 277 Mich App 71, 77; 744 NW2d 1 (2007). Issues regarding the trial court's compliance with MCR 3.972(C)(2) are reviewed do novo. *Id.* The trial court's findings of fact in relation to its decision to admit the child's statements are reviewed for clear error. See, generally, *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000), and MCR 3.977(K).

"Due process applies to any adjudication of important rights." *In re HRC*, 286 Mich App 444, 454; 781 NW2d 105 (2009) (internal citations and quotation marks omitted). "Due process requires fundamental fairness, which will involve consideration of the private interest at stake, the risk of an erroneous deprivation of such interest through the procedures used, the probable value of additional or substitute procedures, and the state or government interest[.]" *Id.* "The private interest at stake in a termination hearing is a parent's fundamental liberty interest in the care and custody of his or her child . . . as well as the child's interest in his or her own proper care and custody . . ." *Id.* at 455. In the context of termination of parental rights, procedural due process requires a court to consider whether the procedures were constitutionally adequate to protect the parent's liberty interest in caring for his or her children. *In re CR*, 250 Mich App 185, 204; 646 NW2d 506 (2002).

Respondent contends that CS's statements did not qualify for admission under MCR 3.972(C)(2), which provides, in pertinent part:

Child's Statement. Any 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 722.623(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.

(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.

"The reliability of a statement depends on the totality of the circumstances surrounding the making of the statement." *In re Archer*, 277 Mich App at 82. "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 similar age, and lack of motive to fabricate." *Id.*

Respondent argues that the circumstances surrounding CS's statements were not sufficient to show that the statements were trustworthy. Respondent emphasizes that only one witness, Detective Scott Jones, testified regarding the trustworthiness of the statements and that Jones merely testified that the statements were elicited in a forensic interview. Respondent further argues that because the forensic interview was not recorded, he is unable to determine how Pascoe directed CS to discuss sexual abuse.

Jones testified that he was familiar with forensic interview protocols from his experience as a police detective and that he did not observe any instance in which Pascoe deviated from the protocols. Respondent argues that Jones's memory of the interview is not reliable because he admitted that, without reviewing files, he could not remember all the details from the interviews he had observed. This argument pertains to the weight and credibility of Jones's testimony, which were matters for the trial court to decide. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Moreover, Jones's inability to remember details such as CS's date of birth does indicate that he could not properly recall whether Pascoe gave leading questions or violated protocols during the interview.

Respondent implies that he has no independent basis for determining whether Pascoe complied with the protocols because the recording device failed. The record establishes that no one knew until after the interview was over that the recording equipment had malfunctioned. Both CPS Investigator Allison Grifhorst and Jones independently observed and took notes during the interview. The absence of a recording is part of the totality of the circumstances that may be considered in determining the admissibility of CS's statements during the interview, but is not dispositive of the admissibility of her statements under MCR 3.972(C)(2). The court rule does not contain any requirement that a child's statement be recorded before it may be admitted. Respondent had the opportunity to cross-examine Jones at the pre-termination hearing to explore the manner in which the interview was conducted, and to also cross-examine Grifhorst and Pascoe at the termination hearing regarding the circumstances of the interview. Respondent did not call Grifhorst or Pascoe as witnesses at the pre-termination hearing. Respondent speculates that Pascoe may have asked leading questions or influenced CS, but such speculation is not supported by any evidence.

Respondent also argues that he was denied due process because he did not receive the full police report or the medical report regarding CS's medical examination by a trained sexual assault nurse examiner (SANE). He argues that these reports might have contained exculpatory information, such as the absence of physical evidence of any sexual abuse. The trial court indicated that it would afford respondent the opportunity to call witnesses to explore these types of issues, but respondent did not avail himself of this opportunity. Petitioner's and the children's

counsel also did not have these records and consequently did not rely on them to prove a statutory basis for termination. Moreover, there is no record basis for the underlying premise of one of respondent's arguments: that the absence of physical injury four or five years after the reported incident would disprove CS's accusations. Under the circumstances, there is no basis for concluding that respondent's right to due process was violated.

Respondent raises several additional points that purportedly weigh against the trial court's finding that the child's statements were trustworthy. Citing *In re Archer*, 277 Mich App at 82, respondent implies that the record does not reveal that CS's statements were made under circumstances associated with reliable hearsay, namely, "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." Respondent argues that the child's use of the childish euphemism "no-no" for male and female genitals is inconsistent with her previously established knowledge of sexual anatomy. Although Grifhorst testified that the child had "extensive knowledge . . . of private parts, [and] of sexual acts," Grifhorst did not unambiguously indicate that CS herself used anatomically correct terms in discussing sexual conduct. Moreover, the child's choice of a euphemism could be attributed to her increased understanding that her knowledge of sex or at least her use of certain sexual terms was inappropriate for a child her age. Petitioner presented evidence that CS entered foster care without appropriate boundaries or respect for other persons' privacy when undressing, but that she began to respect boundaries when she was placed in her second foster home. The evidence of CS's progress in learning normal standards about personal and sexual boundaries is consistent with the development of a sense of modesty and embarrassment about graphically discussing sexual acts.

Respondent raises additional arguments attacking the trustworthiness and credibility of the child's statements, but these arguments pertain to the weight of evidence and witnesses' credibility. Respondent had the opportunity to argue at both the pre-termination hearing and at the termination hearing itself that the child's statements were unreliable, but the trial court gave greater weight to factors supporting its findings of trustworthiness. Testimony supported that Pascoe complied with forensic interview protocols, that CS's statements were spontaneous rather than the product of leading or suggestive questioning, and that CS's delay in not disclosing the abuse until after she was living in a safe environment did not undermine the trustworthiness of the statements. The statements were also consistent with other evidence, especially evidence that CS was the initiator of the sexual-acting-out behavior in the children's home. The trial court did not err in admitting CS's statements under MCR 3.972(C)(2).

III. STATUTORY GROUNDS FOR TERMINATION

Respondent next argues that the trial court erred in finding that the evidence was sufficient to establish the statutory grounds for termination. In an action to terminate parental rights, the petitioner must prove by clear and convincing evidence that at least one statutory ground for termination in MCL 712A.19b(3) exists. MCR 3.977(A)(3) and (H)(3); *In re Trejo*, 462 Mich at 355-356. We review the trial court's decision for clear error. MCR 3.977(K). A finding is clearly erroneous when the reviewing court is left with the firm and definite conviction that a mistake was made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

The trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(b)(i), (g), (j), and (k)(ii), which permit termination under the following circumstances:

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

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from 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.

(k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:

* * *

(ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

CS's statements describing respondent's acts of sexual penetration, which the trial court found were trustworthy, justified termination under subsection (3)(k)(ii). The statements also supported the sexual-abuse element of subsection (3)(b)(i), and respondent's failure to comprehend his obligation to protect the children from harm and from continued exposure to sexual activity in the family home, his refusal to admit wrongdoing, and his continued association with his father, a convicted child sexual offender, supported the additional element in subsection (3)(b)(i) that sexual abuse was reasonably likely to occur in the foreseeable future if the children were placed in his home. The sexual abuse, respondent's failure to remove his children from the ongoing sexual activity with his partner's children, respondent's lifestyle in an unsafe home, and respondent's failure to resolve his problems with anger and substance abuse established that he was not capable of providing proper care and custody, thereby supporting termination under subsection (3)(g), and established a reasonable likelihood that the children would be harmed if returned to his home, thereby also supporting termination under subsection (3)(j).

Respondents' arguments on appeal are mainly directed at the credibility of the various witnesses. This Court generally defers to the trial court's findings regarding credibility. *In re Miller*, 433 Mich at 337. Moreover, our review of the record convinces us that the body of evidence provided a clear and convincing basis for the trial court to credit the testimony of petitioner's witnesses. Contrary to respondent's argument, the record does not disclose a "rush to judgment" in this case. The testimony establishes that petitioner and law enforcement authorities conducted a thorough investigation, and the trial court did not clearly err in finding that the statutory grounds for termination were established by clear and convincing evidence.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent lastly argues that he was denied the effective assistance of counsel. "[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 at 197-198, quoting *In re EP*, 234 Mich App 582, 597-598; 595 NW2d 167 (1999), overruled on other grounds by *In re Trejo*, 462 Mich 341. Because respondent did not raise an ineffective-assistance issue in an appropriate motion or request for an evidentiary hearing in the trial court, our review of this issue is limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, respondent must show that counsel's performance fell below an objective standard of reasonableness and that counsel's errors were prejudicial, i.e., that but for counsel's errors, the outcome of the hearing would have been favorable to respondent. *In re CR*, 250 Mich App at 198. Respondent must also demonstrate that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Respondent must "overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Although respondent complains that counsel unreasonably agreed to represent respondent despite his lack of experience, inexperience alone does not establish a claim for ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 415; 639 NW2d 291 (2001). Respondent also complains that counsel did not have sufficient time to prepare for the hearing and cites counsel's failure to obtain the police report and the medical examination report. The police report could not be disclosed in its entirety because the police investigation was ongoing. The medical record was not available to any of the parties.¹ Under these circumstances, respondent has not demonstrated that counsel's failure to obtain these items was objectively unreasonable. Moreover, respondent has not produced either of these items or otherwise demonstrated that they actually contained favorable information that could have affected the

¹ As noted, a recording of the February 2013 forensic interview was unavailable through no fault of counsel. Respondent complains that counsel "had not reviewed the first forensic interview," but respondent does not indicate how this impacted the outcome of the termination hearing and does not even indicate to which of the fall 2012 interviews he is referring.

outcome of the proceeding. Accordingly, respondent has not established that he was prejudiced by counsel's failure to obtain and present this evidence.

Respondent argues that counsel was ineffective for failing to object when petitioner asked to reopen the proofs to present Pascoe's testimony. Respondent does not specify the basis on which counsel should have objected, and he does not assert that counsel was unprepared to deal with Pascoe's testimony. Moreover, respondent has not overcome the presumption that counsel exercised sound strategy in allowing Pascoe to testify. In view of Pascoe's importance as the forensic interviewer who heard CS's accusation against respondent, defense counsel reasonably may have wanted Pascoe to testify to gain an additional opportunity to attempt to undermine the reliability and trustworthiness of CS's statements. Counsel used his cross-examination of Pascoe to highlight that the interview in which CS disclosed the abuse was the only interview that was not recorded and that other adults in CS's life had past histories of criminal sexual conduct. Respondent has not overcome the presumption of sound strategy.

Respondent cites several instances in which counsel purportedly displayed his confusion about the case or ignorance about court procedure. For instance, counsel expressed that he was unaware that a witness was already included on his witness list, and he was evidently confused about procedures for calling witnesses. Counsel also requested information about a conference between the other attorneys that he mistakenly believed concerned him. Although these exchanges may have revealed counsel's inexperience, they do not establish that counsel committed an objectively unreasonable error that affected the outcome of the hearing.

Respondent also argues that counsel was ineffective for failing to call a physician or the SANE nurse as witnesses, even after the trial court allowed him to do so. "Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy . . ." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Respondent bears the burden of establishing the factual basis for a claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Here, there is no factual basis showing how the nurse or physician would have testified. Without an offer of proof showing that these witnesses could have offered favorable testimony, respondent cannot demonstrate that he was prejudiced by counsel's failure to call the witnesses.

Respondent also argues that counsel should not have called Rebecca Wiklanski. Although Wiklanski's testimony was not favorable to respondent, there is no basis for concluding that it affected the outcome of the proceeding. Wiklanski's testimony did not add any additional support to petitioner's evidence regarding CS's allegations that respondent sexually abused her. Wiklanski provided additional evidence, such as evidence of respondent's contacts with his father, his anger, and his ramshackle living conditions, but the trial court's decision cited the sexual-abuse evidence as a primary factor.² Respondent has not demonstrated that he was prejudiced by counsel's decision to call Wiklanski.

² We reiterate that only *one* of the grounds in MCL 712A.19b(3) need be established to justify termination of parental rights. See *In re Trejo*, 462 Mich at 355-356.

Finally, respondent argues that counsel failed to effectively cross-examine witnesses. He cites two specific examples of missed opportunities for effective cross-examination, namely questioning witnesses about CS's adoption of the term "no-no" after allegedly using proper anatomical terms earlier, and questioning the foster parent about possible "coaching" of CS. As previously indicated, Grifhorst did not unambiguously state that CS had previously used proper anatomical terms, and CS's later adoption of childish terms may have been a reflection of her increased understanding that use of certain sexual terms by children her age was abnormal. In addition, the record does not support respondent's claim that counsel was ineffective in cross-examining the foster parent. Counsel elicited that the foster parent was not trained to interview children about abuse and that no one had warned her that she might confuse a child by making suggestive comments. However, there was no evidence that the foster parent actually coached CS or influenced her accusations. There is no factual predicate for inferring that more aggressive cross-examination would have elicited any admission favorable to respondent.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Henry William Saad