

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of T. L. ROMANOWSKI, Minor.

UNPUBLISHED
April 22, 2014

No. 316121
Oakland Circuit Court
Family Division
LC No. 12-800992-NA

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Before: WILDER, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

In these consolidated appeals, respondents, the adoptive parents of the involved minor child, appeal as of right from a circuit court dispositional order placing the child in the temporary custody of the court with petitioner, the Department of Human Services (DHS), after an adjudication jury trial. We affirm.

I. SUFFICIENT EVIDENCE OF A STATUTORY BASIS FOR JURISDICTION

We initially address respondent father’s argument in Docket No. 316127 that the evidence at the jury trial was insufficient to establish a statutory basis for jurisdiction over the child. Although respondent father did not did not move for a directed verdict, judgment notwithstanding the verdict, or a new trial, we will review his unpreserved claim for plain error due to the important constitutional liberty interest at stake in the care and custody of the child. *In re Williams*, 286 Mich App 253, 273-274; 779 NW2d 286 (2009); *In re Rose*, 174 Mich App 85, 88; 435 NW2d 461 (1989), rev’d on other grounds 432 Mich 934 (1989). “When reviewing a claim that there was insufficient evidence presented in a civil case, this Court must view the evidence in a light most favorable to [the petitioner] and give [the petitioner] the benefit of every reasonable inference.” *Zaremba Equip, Inc v Harco Nat’l Ins Co*, 302 Mich App 7, 17; 837 NW2d 686 (2013) (quotations marks omitted).

For a circuit court to exercise jurisdiction over a child, “the factfinder must determine by a preponderance of the evidence that the child comes within the statutory requirements of MCL

712A.2.” *In re SR*, 229 Mich App 310, 314; 581 NW2d 291 (1998); see also MCR 3.972(C)(1). In relevant part, MCL 712A.2(b) provides that a court has “[j]urisdiction in proceedings concerning a juvenile under 18 years of age found within the county,” under the following circumstances:

(1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk or harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. . . .

* * *

(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

In the September 2012 petition requesting that the circuit court exercise jurisdiction over the child, petitioner asserted that the child came within the court’s jurisdiction pursuant to both MCL 712A.2(b)(1) and (2). The petition specifically alleged that respondents had “not provided proper mental health treatment for the [special-needs] child,” that respondents “refused to pay for the child’s mental health services when able to do so,” that respondent father at least twice physically abused the child and had “difficulty controlling his anger when disciplining” the child, that respondent father refused “to participate in services currently provided,” that despite respondent mother’s awareness of respondent father’s “difficulties controlling his anger” she left the child unsupervised in his care, and that respondents had tried to rescind their parental rights.

We detect no error arising from the jury’s adjudication of the child under MCL 712A.2(b)(1) or (2), a verdict that finds abundant support in the record. The testimony of several witnesses established that, over the course of three to four years before the jury trial, respondents received assistance for their difficulties parenting the child, who had mental health diagnoses including an impulse control disorder, posttraumatic stress disorder, and reactive attachment disorder. The three child psychiatrists who testified at the jury trial agreed that the child’s mental health conditions made her a challenge to parent because the child likely would continue exhibiting some violent behavior, but effective methods existed for managing the child’s behaviors and reducing the frequency of her episodes. The child psychiatrists and several caseworkers agreed that the child needed stability in her home and for her parents to consistently employ nonphysical and supportive parenting techniques. Several witnesses testified that children with special needs do not respond well to confrontational and physical discipline; instead they respond better to positive reinforcement techniques.

Five service providers testified concerning the services Easter Seals and Wrap Around offered respondents between 2008 and 2012, including (1) weekly in-home therapy for the child, which incorporated therapies generally accepted in treating children with reactive attachment disorder, (2) family therapy focused on helping respondents to develop empathy with the child, to give the child adequate encouragement, to set limits for the child, and to use nonphysical

methods of intervention in dealing with their child's trauma-related special needs, (3) up to 20 hours of community living support to aid respondents and the child in developing skills and increasing socialization, (4) a professional behavioral assessment of the child, (5) out-of-home respite services, (6) parenting classes, (7) marital and individual counseling for respondents, (8) sending the child to summer camp, and (9) in-home assistance by social workers and therapists to guide respondents regarding sensory and other techniques for managing the child's anger, as well as different techniques for helping respondent father try to stay calm.

Julie Szczepanski, who worked with respondents between October 2008 and February 2012, described that respondents briefly applied the skills they learned in parenting classes but then resorted to their prior parenting methods. Szczepanski also testified that respondent father remained rigid in "the way that he wanted [the child] . . . to accomplish tasks," and according to respondent mother he sometimes became loud with the child and used force to coerce the child, which usually resulted in a combative situation. Wrap Around offered respondents marital counseling to address their inability to face the child's difficult behaviors with a united front, which caused the child confusion and a sense of instability in her home. Szczepanski recalled that respondent mother declined to attend individual counseling because she felt respondent father was the problem in the household, that respondent father only briefly attended individual therapy, and that respondent mother continued to leave the child in the control of respondent father "knowing that he[] . . . has problems physically controlling" the child. Szczepanski testified that after respondent father withdrew from therapy, she observed a continuation of the in-home dynamic between respondent father and the child: the child "act[ed] out aggressively toward[] him"; respondent father would become angry, sometimes raise his voice at the child; and respondent mother would have to attempt to intervene. Szczepanski explained that her periodic assessments of the child's behaviors revealed that by the time services stopped in early 2012, the child was exhibiting more problematic behaviors than when services began in October 2008.

Easter Seals therapist Michele Tibbitt testified that between January 2012 and September 2012, she went to respondents' home on a weekly basis. Tibbitt offered family therapy to address ways of redirecting the child to avoid outbursts, but respondents did not achieve significant progress because respondent father, who felt fed up, often refused to participate, and respondents concededly did not routinely implement Tibbitt's advice. Yvette Woodruff, the clinical supervisor who oversaw the Easter Seals services offered to respondents and the child, similarly testified about respondents' inability to consistently apply the therapeutic principles offered over the nearly four-year period. Tibbitt recalled that respondents did not get along, primarily due to their very different parenting ideas for the child. While respondent mother tried to implement some redirection techniques, respondent father adhered to the notion that the child "should just listen and do what she's asked," which she described as an ineffectual parenting technique for a special-needs child. According to Tibbitt, she explained several times to respondent father that a special-needs child requires different parenting techniques and proposed ways to manage the child's emotions, "but he would not implement them." Respondent mother frequently told Tibbitt that she felt like a victim of the child, and respondents never exhibited their capacity to establish a stable, supportive home structure that the child needed to thrive. Tibbitt remembered that respondents both voiced "on a number of occasions" "that Easter Seals is wasting their time with us because" the agency "need[ed] to put more time into [the child], not into" them. Tibbitt and Woodruff testified that the family had reached a crisis stage by mid-

2012, as evidenced by the child's multiple 2012 psychiatric hospitalizations, and respondent mother's April 2012 communication to Tibbitt that she wanted to release her parental rights to the child because the child's "mental health needs have not been met and our family has suffered for way too long."

Mark Reed, a specialist with Children's Protective Services (CPS), testified that (1) in 2009 CPS had previously investigated the family and substantiated an allegation that respondent father physically abused the child, (2) he investigated a December 2011 complaint alleging that respondent father hurt the child's finger causing discoloration and swelling, which Reed ultimately determined was not supported by a preponderance of the evidence, (3) he investigated a February 2012 complaint alleging that respondent father had struck the child "on the face and left a cut or a bruise on her face" and that respondent father acknowledged trying to physically force the child to go to bed and striking the child's face after she bit his leg, but Reed concluded that physical abuse had not occurred, and (4) in April 2012 he investigated another complaint alleging that respondent father caused bruising or scratching on the child's cheek and bruising on her back and concluded that a preponderance of the evidence substantiated physical abuse. Reed denied that respondent mother had accepted any responsibility for the atmosphere in the home on any of these incidents. Reed believed that respondent father had taken some responsibility for his actions, but Reed denied that respondent father exhibited any remorse.

Additional evidence established that Havenwyck Hospital had admitted the child for short-term psychiatric treatment on 13 occasions, including six times during the 9 or 10 months preceding the jury trial, and that beginning in the spring of 2012, the child was hospitalized in Hawthorne Center for three or four months. The three child psychiatrists recounted that the child consistently had identified her home environment as a source of stress.

Viewed in a light most favorable to petitioner, a preponderance of the evidence presented at the jury trial was sufficient to establish multiple grounds for the circuit court's jurisdiction over the child. Given respondents' prolonged inability to properly parent the special-needs child and the child's many recent psychiatric hospitalizations, a jury could find by a preponderance of the evidence that the child faced "a substantial risk of harm to . . . her mental well-being," MCL 712A.2(b)(1), and lived in an unfit home "by reason of neglect," MCL 712A.2(b)(2).

II. JURY INSTRUCTIONS

Both respondents challenge the circuit court's addition of language to M Civ JI 97.37 and M Civ JI 97.46(2), which they contend effectively lessened the preponderance of the evidence standard of proof by contrasting it with the higher burdens of proof and jury unanimity applicable in criminal proceedings.

We generally review de novo claims of instructional error. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002).

In doing so, we examine the jury instructions as a whole to determine whether there is error requiring reversal. The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. Instructions must not be extracted

piecemeal to establish error. Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. We will only reverse for instructional error where failure to do so would be inconsistent with substantial justice. MCR 2.613(A). [*Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000) (citation omitted).]

However, respondents' "failure to timely and specifically object" to the jury instruction "precludes appellate review absent manifest injustice." *Heaton v Benton Constr Co*, 286 Mich App 528, 537; 780 NW2d 618 (2009). Manifest injustice only exists when a party demonstrates "a clear or obvious error that affected the outcome of the case." *Shinholster v Annapolis Hosp*, 255 Mich App 339, 350; 660 NW2d 361 (2003), rev'd in part on other grounds 471 Mich 540 (2004), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Respondents characterize as prejudicial the circuit court's incorporation of additional language into the final instruction concerning petitioner's burden of proof. The circuit court properly instructed the jury in conformity with M Civ JI 97.37, which describes the preponderance of the evidence standard of proof applicable to a circuit court's exercise of jurisdiction in a child protective proceeding. M Civ JI 97.37 provides, in its entirety, "The standard of proof in this case is proof by a preponderance of the evidence. Proof by a preponderance of the evidence means that the evidence that a statutory ground alleged in the petition is true outweighs the evidence that that statutory ground is not true." Respondents argue on appeal that the circuit court's reading of the following language after it completed reading the text of M Civ JI 97.37 was erroneous: "This is important for you to understand. The burden in this case is not beyond a reasonable doubt, it's preponderance of the evidence. That's what the standard of proof is." The circuit court's statements undoubtedly were correct – a preponderance of the evidence is less than proof beyond a reasonable doubt. The addition of these statements merely reinforced the applicable standard of proof applicable to the jury's adjudication verdict. MCR 3.972(C)(1). Accordingly, we perceive no error, let alone any that would amount to "manifest injustice."

Respondents further complain that by deviating from the standard language comprising M Civ JI 97.46(2), the circuit court further minimized petitioner's burden of proof to the jury. Respondents point to the following emphasized addition by the court:

When at least five of you agree upon a verdict it will be received as the jury's verdict. *It is not unanimous*. In the jury room you will discuss the case among yourselves but ultimately each of you will have to make up your own mind. Any verdict must represent the individual considered judgment of at least five of you. [Emphasis added.]

Again, the circuit court merely offered additional explanation of the rule applicable to adjudication jury trials that "a verdict in a case tried by 6 jurors will be received when 5 jurors agree." MCR 3.911(C)(2)(b). Thus, the circuit court did not err, and respondents are not entitled to any relief.

III. ADMISSION OF EVIDENCE

Both respondents additionally argue that the circuit court improperly admitted during Szczepanski's testimony emails from respondent mother. Respondents claim that the emails were not admissible under MRE 801(d)(2)(A) because the contents of those emails were not against respondent mother's interest.¹ Although respondent father raised a hearsay objection to petitioner's counsel's questions of Szczepanski concerning statements or emails from respondent mother relating to things that respondent father said, respondent mother made no such objection.

With respect to respondent father's preserved objection, we review for an abuse of discretion a circuit court's ruling on a preserved challenge to the admissibility of evidence. *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008). "An abuse of discretion occurs when the [circuit] court chooses an outcome that falls outside the range of principled outcomes." *Id.* (internal quotation and citation omitted). This Court considers de novo any underlying question of law involving statutory or court rule interpretation. *Id.* But with respect to respondent mother's unpreserved evidentiary objection, we review it "for plain error affecting [her] substantial rights." *Lockridge v Oakwood Hosp*, 285 Mich App 678, 691; 777 NW2d 511 (2009).

The emails were authored by respondent mother and were admitted pursuant to MRE 801(d)(2)(A), which provides that a statement is not hearsay if "[t]he statement is offered against a party and is . . . the party's own statement, in either an individual or a representative capacity." Respondents' argument that the emails did not fall under MRE 801(d)(2)(A) because they supposedly were not "against" respondent mother's "interest" is unavailing. The plain language of MRE 801(d)(2)(A) does not require that the statement be "against" any "interest"; instead, it merely requires that it must be the party's own statement and *offered* against the party. In *Shields v Reddo*, 432 Mich 761, 774 n 19; 443 NW2d 145 (1989), our Supreme Court addressed this common misperception:

The rationale for the nonhearsay status of statements by party opponents is often confused with the rationale for statements against interest, MRE 804(b)(3) The confusion is understandable given that the rule [in MRE 801(d)(2)(A)] is referred to as the "party-opponent admission" rule, despite the fact that *a statement need not be an admission in the ordinary meaning of the word to qualify as a "party-opponent admission."* Although party-opponent admissions frequently do fall within the category of statements against interest, this is not necessarily the case. *Party-opponent admissions need not be statements against interest at all to be admissible*, nor, when they are statements which can be construed as against the interest of the party is it necessary, as under [MRE 804(b)(3)], that the statements have been against the party's interest at the time they were made. [Emphasis in original omitted; emphasis added.]

¹ We note that respondent father merely "adopt[ed] and incorporate[d] by reference" respondent mother's argument on appeal on this issue.

Therefore, whether the emails were “against” respondent mother’s “interest” is of no consequence. All that matters is that they were authored by her and offered against her by petitioner. Accordingly, we discern no plain error in the trial court’s admission of the email statements in mother’s case under MRE 801(d)(2)(A), and the admission of the same evidence was not an abuse of discretion in father’s case.

IV. REFERENCES TO DISPOSITION

Respondent father further asserts in Docket No. 316127 that the circuit court deprived him of a fair trial by twice referencing the child’s potential disposition, a matter that the jury was not to consider. He complains that (1) the court mentioned to the jury at the outset of trial the potential termination of respondents’ parental rights; and (2) the court allowed petitioner to present testimony about the child’s foster care placement.

Respondent father did not object to the circuit court’s preliminary instruction mentioning a potential termination of parental rights, which we therefore consider only to ascertain whether a clear or obvious error affected his substantial rights. *Carines*, 460 Mich at 763; *Shinholster*, 255 Mich App at 350. Respondent father urges that the court’s preliminary instruction mentioning the termination of parental rights violated the principle embodied in M Civ JI 97.44, which cautions the jury against considering any potential disposition of a child if the jury “should find that one or more of the statutory grounds alleged in the petition have been proven.”

Immediately after opening statements, the circuit court offered the following clarification:

Okay, I just want to make it clear again that what the attorneys say . . . that’s not evidence. But what I also just want to make very clear and I’ve . . . let the attorneys know I was going to tell you this, this is not a case where we are going to ask you to terminate the rights of these two people. That is not what you are going to decide. You are deciding whether or not . . . the prosecutor has met the burden to take jurisdiction which means to even allow the state to get involved with this child. You are not going to decide whether or not these two people should have parental rights terminated. Does everyone understand that? Okay. Just wanted to make that clear.

The circuit court’s additional preliminary instruction followed a bench conference that occurred immediately after respondent mother’s counsel stated, “Right now . . . the question as I look as it is who has the better interest in raising the child, the State . . . or the mother.”

We conclude that respondent father has not established any error, plain or otherwise, given that the circuit court’s preliminary instruction accurately advised the jury that it would not consider a potential termination of parental rights, but only whether the court should exercise jurisdiction over the child. See MCR 3.972(E) (providing that the adjudication trial “verdict must be whether one or more of the statutory grounds alleged in the petition have been proven”). Furthermore, during final jury instructions the court emphasized, in conformity with M Civ JI 97.44, that the jury should not consider the child’s potential disposition. Reviewing the circuit court’s instructions as a whole, we detect no error or prejudice. *Case*, 463 Mich at 6.

Respondent father also avers that the circuit court improperly allowed testimony from the child's current caseworker, information entirely unrelated to the petition and violative of "the rule against giving the jury information in the adjudication regarding potential outcome." We review this preserved claim of evidentiary error for an abuse of discretion. *In re Utrera*, 281 Mich App at 15.

On the fourth day of trial, in response to the court's request for an offer of proof concerning any additional witnesses, petitioner's counsel proposed to call Jaime Murdock, the child's current foster care worker, to testify "simply that the child has thrived since removal from the home." Petitioner theorized that the testimony was relevant to the central question at issue in the adjudication, i.e., whether "the parent's [sic] home environment . . . is a contributing cause that places [the child] at a substantial risk to her mental well being." Respondent father's counsel objected on the grounds of relevancy and "that the prejudicial value of this totally outweighs the" probative value. The trial court deemed testimony limited to the child's functioning after her removal from respondents' home as being relevant. Murdock briefly testified that after the child's removal from respondents' custody, she never needed psychiatric hospitalization, required physical restraints, experienced delusions or hallucinations, or engaged in self harm. Murdock also reported that the child had done well in her current school setting.

Respondents correctly argue that the trial court erred in admitting Murdock's testimony on the child's postremoval status. "It is totally inappropriate to weigh the advantages of a foster home against the home of the natural and legal parents. Their fitness as parents and the question of neglect of their children must be measured without reference to any particular alternative home which may be offered the children." *Fritts v Krugh*, 354 Mich 97, 115; 92 NW2d 604 (1958), overruled on other grounds *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993). Accord *In re Mathers*, 371 Mich 516, 530; 124 NW2d 878 (1963) (although evidence of the suitability of the foster care placement may have been relevant to an order of disposition, it was error to admit such testimony on the issue of the mother's neglect); see also *In re Foster*, 285 Mich App 630, 634; 776 NW2d 415 (2009) (it is inappropriate to consider the advantages of a foster home in deciding whether a statutory ground for termination has been established, but such considerations are appropriate in a best-interest determination). But as discussed earlier in Part I, there was overwhelming evidence supporting the conclusion that the child faced "a substantial risk of harm to . . . her mental well-being" in respondents' care, MCL 712A.2(b)(1), and lived in an unfit home "by reason of neglect," MCL 712A.2(b)(2), so any error in the admission of evidence of the child's postremoval status was harmless. See *In re TC*, 251 Mich App 368, 371; 650 NW2d 698 (2002), citing MCR 2.613(A) and MCR 3.902(A).

V. CUMULATIVE ERROR

Respondent father lastly submits that the cumulative effect of the "many errors in the jury instructions, in the general conduct of the trial and the introduction of evidence" deprived him of his due process right to a fair trial. "[A]t times, the cumulative effect of a number of minor errors may require reversal." *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 471; 624 NW2d 427 (2000).

In his cumulative error argument, respondent father makes two additional, unpreserved claims. First, respondent father alleges that MCR 3.972(C)(2) was violated when Sonya Parry, a

clinical social worker who counseled the child during her 2012 psychiatric hospitalization, was asked on direct examination, “Did [the child] describe her father being physically aggressive with her?” and Parry replied, “She did.” MCR 3.972(C)(2)(a) permits such a child’s out-of-court statement to be admitted through the 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.” There is nothing indicating that such a pretrial hearing took place. Regardless, this error was entirely harmless; there was ample other evidence that established that respondent father was “physically aggressive” with the child.

Second, respondent father alleges that there “was an additional violation of the rule that the jury should not concern itself with dispositional issues.” Specifically, respondent father takes issue with Tibbitt testifying that, after Tibbitt left Easter Seals, the child “was at Mandy’s Place,” which was “a shelter in Oakland County,” located “at Children’s Village.” Respondent father does not explain how this statement references “dispositional issues.” “A party may not announce a position and leave it to this Court to discover and rationalize the basis for the party’s claim.” *Badiee v Brighton Area Schs*, 265 Mich App 343, 357; 695 NW2d 521 (2005) (quotation marks omitted). Moreover, in our review of the record, which documents many different placements of the child, this abbreviated reference to a shelter does not embody a postpetition reference to the child’s disposition, and we perceive no plain error.

Accordingly, even though we conclude that testimony regarding the child’s postremoval status (see Part IV) and Parry’s observation of physical aggression was erroneous, the amount of prejudice is negligible, and the accumulation of any error does not undermine the confidence in the reliability of the verdict. Cf *People v Douglas*, 296 Mich App 186, 202-203; 817 NW2d 640 (2012)..

Affirmed.

/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto