

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of PHILLIP WALLACE and
DIAMOND BUSH, Minors.

DEPARTMENT OF HUMAN SERVICES, f/k/a
FAMILY INDEPENDENCE AGENCY,

UNPUBLISHED
April 11, 2006

Petitioner-Appellee,

v

TONACIDA MAJOR,

No. 264790
Wayne Circuit Court
Family Division
LC No. 04-437147-NA

Respondent-Appellant,

and

PHILANDERS WALLACE and RAYMON BUSH,

Respondents.

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Respondent Tonacida Major appeals as of right from an order exercising jurisdiction over her minor children pursuant to MCL 712A.2(b)(1) and (2). We affirm.

In child protective proceedings, to acquire jurisdiction the trial court must determine by a preponderance of the evidence that the child comes within the statutory requirements of MCL 712A.2. *In re Brock*, 442 Mich 101, 108-109; 499 NW2d 752 (1993).

The original petition alleged that inappropriate sexual behavior had occurred between the minor children over a period of time, two prior referrals had been made indicating that Phillip had abused Diamond, respondent had separated the siblings and obtained therapy for Diamond, but there was evidence that the minor siblings were again living in the same house contrary to the advice of protective services. At the tender years hearing, respondent's sister testified that Diamond told her that she was sexually abused by two cousins and her brother, Phillip. Respondent's sister reported to respondent what Diamond had said, and respondent took Diamond to the hospital. Diamond's therapist also testified regarding statements Diamond made to her about the sexual abuse. The trial court found that the statements had sufficient indicia of

trustworthiness and were admissible as substantive evidence. A trial was held and two of respondent's sisters and her mother testified about incidents that had occurred between Phillip and other children, including Diamond. Respondent testified that she had taken appropriate action when she was made aware of the incidents. The trial court found by a preponderance of the evidence that the minor children came within the jurisdiction of the court under MCL 712A.2(b)(1) and (2).

The trial court did not err when it exercised jurisdiction over the minor children. There were numerous incidents that were reported to respondent in which Phillip engaged in inappropriate sexual activities with Diamond as well as with other children. The incidents were reported to respondent beginning in 1996 and at least every few years after that until the most recent incident in October 2004. These activities were reported to respondent, not by strangers, but by close family members, including her mother and three sisters. While respondent testified that she obtained counseling for Phillip, the counseling was not sufficient in that she continued to receive reports of these activities. In addition, she did not take these reports seriously enough to protect Diamond from further sexual abuse. There was a preponderance of evidence to show that Phillip did in fact engage in inappropriate sexual activities with Diamond and that respondent was aware of these activities. She allowed the minor children to be together even when protective services became involved and instructed her to keep the children separate until they could each receive appropriate treatment. Even when all of this came to light, respondent did not understand the need for some stability in the children's lives and continued to move them from relative to relative without any specific plans to help them. She did not provide Phillip and Diamond with the necessary support for their well-being and put each of them at risk of harm.

Respondent also argues that her due process rights were violated by numerous evidentiary errors. We disagree. Pursuant to MCR 3.972(C)(2), a statement made by a child under ten years of age regarding sexual abuse or exploitation performed on the child is admissible as substantive evidence through the testimony of the person to whom the child made the statement, provided that "the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness." MCR 3.972(C)(2)(a). In this case, the court held a hearing before trial and found that the statements Diamond made to her therapist and to her aunt were admissible under this exception.

The statements regarding abuse that Diamond made to her therapist occurred over a period of time during which Diamond and the therapist were forming a therapeutic relationship. The fact that Diamond changed her story is not inconsistent with the fact that they were working on trust issues in therapy and that Diamond had many reasons why she would not quickly trust others. That Diamond used sophisticated words when describing what happened to her is not inconsistent with truth because, as the therapist explained, they had been discussing different body parts on a doll and the therapist helped Diamond to use words that could describe what happened to her. The fact that Diamond was sexually abused was corroborated by the statements that Diamond made to her aunt and to her cousin. Accordingly, the trial court did not err when it allowed this testimony to be introduced into evidence.

Respondent argues that the trial court improperly allowed Diamond's therapist to (1) testify that she believed Diamond was truthful, (2) give her opinion regarding Diamond's changed story, and (3) testify regarding her observations of respondent. A trial court's decision

to admit or exclude evidence is reviewed for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). Respondent did not object to this testimony at trial, and therefore has not preserved these alleged errors for appellate review. MRE 103(a)(1). Moreover, Diamond's therapist did not give her opinion regarding Diamond's changed story, but only stated that children sometimes change their story in these situations. With regard to the other two statements, it is clear that if admission of the statements constituted error, any error was harmless because the ultimate determination of sexual abuse was made on the basis of the court's own assessment of the other facts and circumstances indicative of sexual abuse, not the witness's opinion. See *In re Brimer*, 191 Mich App 401, 408; 478 NW2d 689 (1991).

With regard to the testimony regarding an incident that occurred on July 26, 2002, respondent argues that the trial court improperly allowed this testimony because it was not mentioned in the petition, although other specific alleged prior incidents were mentioned by exact date, and because it involved inappropriate sexual conduct on a cousin of Diamond. The trial court properly allowed this testimony because the petition alleges a number of assaults over a period of time. Diamond was in fact involved in this incident because, not only did she witness it, but one of the boys attempted to sexually abuse her as well. Respondent contends that the trial court improperly allowed the July 26, 2002 police report to be introduced into evidence because the report was not authenticated and contained hearsay statements made by witnesses at the scene. Respondent's attorney did in fact object to this testimony at the time of trial. The trial court, however, properly admitted this evidence under the business records exception and public records hearsay exceptions pursuant to MRE 803(6) and 803(8). Finally, any error of the trial court in allowing respondent's sister to testify about statements made by her son three or four years before trial was harmless given the other testimony regarding Phillip's sexual conduct with other children.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra