

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of AQUILA SMITH and D'JON
MICHAEL BAK, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

SHERONDA RENEE SMITH,

Respondent-Appellant.

UNPUBLISHED

April 26, 2007

No. 273434

Oakland Circuit Court

Family Division

LC No. 04-696104-NA

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Respondent appeals as of right the trial court order terminating her parental rights to the minor children under MCL 712A.19b(3)(c)(i), (g), and (j). We affirm. This appeal is being decided without oral argument. MCR 7.214(E).

Respondent first argues that her constitutional right to due process was violated because the trial court was biased against her, because the prosecutor improperly refreshed a witness's recollection, and because of the cumulative effect of these errors. We disagree.

Respondent claims that the trial court demonstrated its bias by suggesting before trial that her counsel would not need to be present at a review hearing for one of the children's fathers. Respondent's counsel responded that respondent would indeed need to be present at the hearing if she prevailed at trial. The trial court then stated that it would change the date of the hearing if respondent prevailed.

According to respondent, this exchange evidenced the trial court's predisposition to rule against her at trial. However, this dialogue between the court and respondent's counsel, without further evidence of bias, simply does not rise to the level of judicial impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996).

Respondent also claims that the prosecutor improperly refreshed the foster care worker's recollection. However, respondent failed to preserve this issue by way of a timely objection. *In re Hildebrant*, 216 Mich App 384, 389; 548 NW2d 715 (1996). We review unpreserved claims of error for outcome-determinative plain error affecting substantial rights. *Kern v Blethen-*

Coluni, 240 Mich App 333, 336; 612 NW2d 838 (2000). We acknowledge that the prosecutor improperly refreshed the foster care worker's recollection regarding the children's ages and other matters during her testimony. Counsel may not attempt to refresh a witness's recollection unless it is first affirmatively shown that the witness's memory "need[s] refreshing." *People v Pena*, 96 Mich App 101, 103; 292 NW2d 141 (1980). However, the testimony at issue here was background information, and the trial court was already aware of the relevant information, all of which was contained in the case file. Therefore, any error in admitting the refreshed recollections did not affect respondent's substantial rights, and was not determinative of the outcome. *Kern, supra* at 336.

Respondent next argues that the trial court improperly terminated her parental rights to the minor children. We disagree. In order to terminate parental rights, the court must find that at least one of the statutory grounds set forth in MCL 712A.19b has been met by clear and convincing evidence. *In re Terry*, 240 Mich App 14, 21-22; 610 NW2d 563 (2000). Once a ground for termination is established, the court must terminate the respondent's parental rights unless it finds that termination is clearly contrary to the children's best interests. *In re Trejo*, 462 Mich 341, 364-365; 612 NW2d 407 (2000). We review the trial court's findings for clear error. *Id.* at 356-357; see also MCR 3.977(J).

The conditions leading to adjudication were respondent's incarceration and substance abuse, which also prevented respondent from providing proper care and custody for her children. At the time of trial, respondent was still incarcerated and her release date was unknown. Further, it was established through respondent's admissions and testimony that respondent had a serious problem with crack cocaine, that she had passed out from cocaine use in the past, and that she had sold cocaine while the children were in her care. In addition, respondent continued to commit crimes, which caused her to be incarcerated and unable to care for her children. Finally, respondent did not have housing or employment, or a plan to obtain housing or employment upon her release from prison. The trial court did not clearly err in finding that the statutory grounds for termination were established by clear and convincing evidence. MCR 3.977(J).

Nor did the trial court clearly err in its best-interests determination. The children's bond with respondent was questionable, as she had not seen them in two years. Moreover, respondent's incarceration was indefinite, and her substance abuse problem appeared unresolved. The court properly found that termination would not be clearly contrary to the minor children's best interests. MCL 712A.19b(5).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello