

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
January 25, 2011

In the Matter of HICKS/BROOKS, Minors.

No. 298477
Oakland Circuit Court
Family Division
LC No. 05-703445-NA

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Respondent appeals a trial court order that terminated his parental rights to the minor children under MCL 712A.19b(3)(k)(iii). For the reasons set forth below, we affirm.

Defendant contends that insufficient evidence supported the termination of his parental rights. We review for clear error a trial court's decision whether the petitioner has proven a basis for termination under MCL 712A.19b(3) by clear and convincing evidence. MCR 3.977(K); *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A trial court's factual findings are clearly erroneous if, although some evidence exists to support them, a reviewing court is left with a definite and firm conviction that a mistake has been made, giving due regard to a trial court's special opportunity to observe witnesses. *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004); *In re Pardee*, 190 Mich App 243, 250; 475 NW2d 870 (1991). We review issues of statutory interpretation de novo. *In re SR*, 229 Mich App 310, 314; 581 NW2d 291 (1998).

MCL 712A.19b(3)(k) allows a trial court to terminate a respondent's parental rights to a child under the following circumstances:

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

(i) Abandonment of a young child.

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

(iii) Battering, torture, or other *severe physical abuse*. [Emphasis added.]

Because “severe physical abuse” is not defined in the statute, the trial court, in adopting the referee’s recommendation, looked to the child abuse statute for assistance in interpreting that term. The court opined that there was no essential difference between “severe physical abuse” in § 19b(3)(k)(iii) and “severe physical harm” as that term is defined with respect to second-degree child abuse, MCL 750.136b(3), to which respondent had pleaded guilty. The child abuse statute provides:

“Serious physical harm” means any physical injury to a child that seriously impairs the child’s health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut. [MCL 750.136b(1)(f).]

Thus, to show serious physical harm, the petitioner must show that a child suffered a physical injury. Here, no evidence showed that “EA” suffered a physical injury. Accordingly, even if the definition of “serious physical harm” in the child abuse statute can be applied to § 19b(3)(k)(iii), the facts do not satisfy that definition and the evidence did not support termination under § 19b(3)(k)(iii). Moreover, the two phrases cannot be interpreted synonymously because the terms “harm” and “abuse” have different meanings. *Random House Webster’s College Dictionary* (2001) defines “harm” as “injury or damage” and “abuse” as “bad or improper treatment.” Thus, it is possible for a person to suffer physical abuse without suffering physical harm.

It appears from the statutory text that “severe physical abuse” does not encompass sexual abuse. Under the doctrine of *noscitur a sociis*, the meaning of a word may be determined by its context or setting. *Bloomfield Estates Improvement Ass’n, Inc v City of Birmingham*, 479 Mich 206, 215; 737 NW2d 670 (2007). In addition to “severe physical abuse,” § 19b(3)(k)(iii) encompasses “battering” and “torture.” Further, § 19b(3)(k)(ii) expressly pertains to criminal sexual conduct. Thus, it appears that the Legislature intended § 19b(3)(k)(ii) to encompass sexual abuse and § 19b(3)(k)(iii) to encompass physical abuse that is not of a sexual nature.

In any event, termination under § 19b(3)(k)(ii) was proper as applied to the trial court’s factual findings, and the trial court erred by ruling otherwise. The trial court opined that termination under that subsection would be inappropriate because, by virtue of respondent’s guilty plea to second-degree child abuse, there was no criminal finding that he committed criminal sexual conduct. However, the plain language of § 19b(3)(k)(ii) does not require that respondent be convicted of an offense involving criminal sexual conduct in order to terminate his parental rights under that subsection. EA testified that respondent “tried to put his finger in [her] private area,” and that he put his finger inside, “but not all the way.” The trial court found her testimony credible. Because the testimony established penetration and attempted penetration, the trial court erred by concluding that termination under § 19b(3)(k)(ii) was improper. However, we will not reverse when a trial court reaches the correct result notwithstanding its erroneous reasoning. *In re Hamlet*, 225 Mich App 505, 523 n 2; 571 NW2d 750 (1997), overruled in part on other grounds in *In re Trejo*, 462 Mich at 353-354.

Respondent argues that the trial court erroneously admitted the testimony of Chris DeBoer and EA’s friend, CKT. Because respondent failed to preserve this issue for appellate

review by objecting to the testimony below, our review is limited to plain error affecting his substantial rights. *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008).

Respondent argues that DeBoer's testimony regarding the sexual assault was inadmissible hearsay. The record shows that DeBoer did not merely repeat what EA told him regarding the sexual acts. Rather, he testified that EA's account of the incident remained consistent throughout the lower court proceedings except for the length of time that the oral intercourse lasted. According to DeBoer, EA previously testified that the oral intercourse lasted two to three minutes, while at the adjudication hearing she testified that it lasted approximately 15 seconds. EA's previous testimony regarding the duration of the oral intercourse was the only out-of-court statement admitted. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. MRE 801(c); *In re Utrera*, 281 Mich App at 1. Because EA's statement regarding the length of the oral intercourse was not offered for its truth, but rather to show the consistency of EA's recounts of the incident—a nonhearsay purpose—its admission was not erroneous.

Respondent also contends that the trial court should not have admitted CKT's testimony regarding what EA told her about the sexual assault. However, CKT's testimony was properly admitted under the excited utterance exception to the hearsay rule. MRE 803(2) provides that the hearsay rule does not preclude evidence of "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." A statement is admissible under this exception if "(1) there was a startling event and (2) the resulting statement was made while the declarant was under the excitement caused by that event." *People v Layher*, 238 Mich App 573, 582; 607 NW2d 91 (1999).

The evidence shows that EA informed CKT of the sexual assault immediately after it occurred. CKT awoke when EA entered her bedroom crying. When CKT asked EA what was wrong, EA typed into her cell phone the details of the sexual assault and showed the phone to CKT. CKT assumed that EA did not want respondent to hear her talking about the incident. The two girls then sat in EA's bedroom for approximately 30 minutes while EA cried. This evidence shows that a startling event occurred, and that EA told CKT about it immediately after it occurred and while she was under the stress of excitement caused by the incident. Because CKT's testimony was admissible under MRE 803(2), there was no error.

Respondent also challenges the trial court's findings with regard to EA's credibility and the significance of respondent's guilty plea. We do not second guess questions of witness credibility as determined by the trial court. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). Further, it is for the trial court to determine the weight to accord evidence. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Here, the record supports the trial court's findings. Respondent has not demonstrated a plain error affecting his substantial rights.

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Jane M. Beckering