

STATE OF MICHIGAN
COURT OF APPEALS

In re MCCONNELL/TRUE, Minors.

UNPUBLISHED
December 18, 2014

No. 321878
St. Clair Circuit Court
Family Division
LC No. 14-000039-NA

Before: MURRAY, P.J., and SAAD and HOEKSTRA, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating his parental rights to his two minor children pursuant to MCL 712A.19b(3)(b)(i), (g), (j), and (k)(ii). Because there was clear and convincing evidence establishing statutory grounds for termination and respondent was not denied the effective assistance of counsel, we affirm.

I. STATUTORY GROUNDS FOR TERMINATION

Respondent first argues on appeal that the trial court erred in finding that the statutory grounds for termination were established by clear and convincing evidence. We review the trial court's decision for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); MCR 3.977(K). "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong." *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999) (citation omitted). Under a clear error standard, the trial court's findings of fact may be set aside only if we are left with a definite and firm conviction that a mistake has been made. *In re LE*, 278 Mich App 1, 18; 747 NW2d 883 (2008). When reviewing the trial court's findings, we afford due regard to the trial court's special opportunity to judge the credibility of witnesses. *Id.*

The statutory grounds at issue in this case are MCL 712A.19b(3)(b)(i) (parent's act caused sexual abuse and reasonable likelihood child may suffer injury if placed in parent's home), (g) (failure to provide proper care and custody), (j) (reasonable likelihood child will be harmed if returned to parent's home), and (k)(ii) (parent sexually abused the child or sibling and the abuse involved penetration). In concluding that termination was appropriate on these grounds, the trial court in this case found that there was clear and convincing evidence that respondent sexually abused his four-year-old daughter and that this abuse involved penetration. Respondent argues on appeal that this finding was clearly erroneous.

Contrary to respondent's arguments, the finding of sexual abuse was not clearly erroneous given testimony from respondent's daughter which indicated that respondent licked

and fondled her genitals when they shared respondent's bed. Cunnilingus, as described by the child, constitutes sexual penetration. MCL 750.520a(r); *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992). The trial court credited the child's testimony, noting she was "matter of fact" in her description of events and that she provided credible particulars of the abuse, including respondent's admonishment that the child should remain quiet. The child's testimony did not need to be corroborated in order to establish by clear and convincing evidence that the abuse occurred. See MCL 750.520h. See also *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995). Nevertheless, we note that there was corroboration for the child's testimony that she slept in respondent's bed. In addition, consistent with her testimony, the child reported the abuse to her mother, telling her she had a "boo boo" on her privates and that respondent "puts his finger down there and he tickles her and that he licks her privates." Moreover, while medical personnel were not prepared to opine that there was physical evidence that sexual abuse occurred, shortly after the child reported the incident to her mother, medical personnel observed redness and an abrasion in her genital area. Given the child's testimony and other evidence, and affording due regard to the trial court's opportunity to assess witness credibility, we see nothing clearly erroneous in the trial court's findings of sexual abuse. In light of the fact that the evidence showed respondent sexually abused his daughter, there was also nothing clearly erroneous in the trial court's decision to terminate parental rights to both children under MCL 712A.19b(3)(b)(i), (g), (j), and (k)(ii). Cf. *In re HRC*, 286 Mich App 444, 460; 781 NW2d 105 (2009).

On appeal, respondent's only challenge to the trial court's findings relates to contesting the credibility of his daughter's testimony. Specifically, he maintains that his daughter was "confused as to what happened." However, the trial court found the child credible and witness credibility is, as noted, a matter for the trial court. *In re LE*, 278 Mich App at 18. On the record presented, we see no basis for setting aside the trial court's findings of fact or its decision to terminate respondent's parental rights to both children. See *In re HRC*, 286 Mich App at 460 ("It is not for this Court to displace the trial court's credibility determination.").

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Related to his challenges regarding the credibility of his daughter's testimony, respondent next argues that trial counsel was ineffective for failing to present testimony from the examining doctor and the investigating officer. According to respondent, this testimony would show that, during interviews with police and an examining physician, respondent's daughter indicated that respondent rubbed "his private" on her private, "inside where [she] wipe[s]." Because there was purportedly no damage to the child's hymen, and she did not describe such acts in her trial testimony, respondent maintains this additional testimony would have established inconsistency in his daughter's explanation of events and thereby damaged her credibility.

Due process has been said to indirectly guarantee assistance of counsel in child protective proceedings, and "the principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings." *In re Kanjia*, ___ Mich App ___, ___; ___ NW2d ___ (2014), slip op at 9 (citation omitted). To establish ineffective assistance of counsel, respondent must show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error. *Id.* "Effective assistance of counsel is

presumed, and a respondent bears a heavy burden to prove otherwise.” *Id.* (citation omitted). It is respondent’s burden to establish the factual predicate of his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Because respondent failed to raise an ineffective assistance of counsel issue in the trial court, our review of this issue is limited to errors apparent from the record. See *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

“Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Decisions regarding how to cross-examine and impeach witnesses are also matters of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999); *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987). Ineffective assistance of counsel may be established by the failure to call witnesses only if the failure deprives a respondent of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

In this case, the record does not support respondent’s explanation of what testimony would have been provided by the examining doctor and interviewing detective, and there is consequently no basis on which to conclude counsel rendered ineffective assistance of counsel. The petition in this case alleged that the child had been interviewed by a detective and examined by a doctor, and defense counsel included both the doctor and the detective on his witness list, but did not call either to testify. However, the only information in the record regarding any testimony the doctor could have offered is the allegation in the petition that the doctor “reported no physical findings of sexual abuse” but “because of the child’s consistent statements he could not rule out non traumatic sexual abuse.”¹ Contrary to respondent’s presentation of the issue on appeal, there is no indication that the doctor would have testified that the child reported penile-vaginal penetration in a manner inconsistent with the touching and licking she described at trial. Similarly, regarding the detective, although the record shows the detective interviewed the child and the child “disclosed sexual abuse by her father,” there is nothing in the lower court record to indicate what specific testimony the detective could have offered in relation to that interview. On this record, respondent has not met his burden of establishing the factual predicate for his claim of ineffective assistance.² See *Hoag*, 460 Mich at 6. As a result, respondent has not

¹ Respondent does not focus his appellate brief on this information. But, to the extent it is representative of testimony the doctor would have provided at trial, the doctor’s testimony would have been merely cumulative of evidence offered by an examining nurse who testified that “there was no medical evidence to support child abuse.” Indeed, the trial court found that the medical findings were not conclusive regarding whether sexual abuse occurred. Given the nurse’s testimony and trial court’s recognition that medical evidence was inconclusive, respondent has not shown that failure to present the doctor’s testimony deprived him of a substantial defense, and trial counsel was not ineffective for failing to present cumulative evidence. See *People v Carbin*, 463 Mich 590, 603-604; 623 NW2d 884 (2001).

² The documents appended to respondent’s appellate brief in support of his argument are not properly before this Court because they are not part of the lower court record, and a party cannot

overcome the presumption that the decision not to call these witnesses was a matter of trial strategy, and he has not shown that the failure to do so affected the outcome of the proceedings. See *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Indeed, we note that, even assuming that the witnesses would have testified as respondent claims, given the marginal impeachment value of the testimony compared to its highly prejudicial effect, respondent has not overcome the presumption that counsel elected not to present it as a matter of sound trial strategy. See *In re Kanjia*, slip op at 9. In short, respondent has not demonstrated the ineffective assistance of counsel, and he is not entitled to relief on this basis.

Affirmed.

/s/ Christopher M. Murray
/s/ Henry William Saad
/s/ Joel P. Hoekstra

expand the record on appeal. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).