STATE OF MICHIGAN

COURT OF APPEALS

In re A. L. MANNOR, Minor.

UNPUBLISHED
July 19, 2018

No. 341956; 341957
Newaygo Circuit Court
Family Division
LC No. 16-008834-NA

Before: HOEKSTRA, P.J., and MURPHY and MARKEY, JJ.

PER CURIAM.

Respondents each appeal by right the trial court's order terminating their parental rights to their infant son, ALM. The trial court entered an order terminating both parents' parental rights to the child after a referee held a hearing and found that the Department of Health and Human Services (DHHS) had proved by clear and convincing evidence grounds as to both parents under MCL 712A.19b(3)(j) and that termination was in the child's best interests.

I. ADA AND GROUNDS FOR TERMINATION

In her first two claims of error on appeal, respondent-mother argues that the trial court erred when it terminated her parental rights to ALM. More specifically, she maintains that the DHHS failed to make reasonable modifications to its service plan to accommodate her disability, as required by the Americans with Disabilities Act (ADA), see 42 USC 12101 *et seq.* She also argues that, because there was evidence that she had benefited and would continue to benefit from services, the trial court clearly erred when it found that the DHHS established grounds for terminating her parental rights.

This Court reviews de novo whether the trial court properly interpreted and applied the ADA. *In re Terry*, 240 Mich App 14, 24; 610 NW2d 563 (2000). This Court reviews for clear error the trial court's finding that the DHHS made reasonable efforts to reunify the family. *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005). A trial court's finding is clearly erroneous when, after reviewing the entire evidence, this Court is left with the definite and firm conviction that the trial court made a mistake. *In re Gonzales/Martinez Minors*, 310 Mich App 426, 430-431; 871 NW2d 868 (2015). However, because respondent-mother did not raise her ADA challenge before the trial court, that claim is unpreserved for appellate review. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). This Court reviews an unpreserved claim of error in a termination proceeding for plain error affecting the respondent's substantial rights. *Id.* A plain error affects substantial rights when it affected the outcome of the lower court proceedings. *Id.* at 9.

During the proceedings involving ALM's sibling, KRM, the DHHS learned that respondent-mother had a cognitive impairment. Sandra K. Terwillegar, who was a limited license psychologist, evaluated respondent-mother. Terwillegar noted that respondent-mother had had a portion of her brain removed when she was nine years old to control seizures. The surgeons also removed a portion of her hippocampus, which is involved in the formation of memories. She indicated that the damage to respondent-mother's left lobe would impair her learning, her ability to retrieve information, her reasoning, her planning and higher emotional processing, her executive function, and her sequential thinking.

Terwillegar said that respondent-mother presented as very childlike. She described her as "tangential" as though she were "eight to ten years old." She was "very pleasant," but her history showed that she could be violent, explosive, and "physically out of control." Respondent-mother's tests indicated that she had an IQ of 78, give or take four points. She said respondent-mother's verbal comprehension was in the "third percentile," which meant that 97% of all persons functioned at a higher level than her. Her working memory was in the sixth percentile and her processing speed was in the fourth percentile. And those scores remained pretty consistent from her testing in 2009.

The testing further indicated that respondent-mother had anxiety, depression, extreme self-doubt, low self-esteem, and was explosive and erratic, and could turn on herself or others. She also appeared to be suffering from post-traumatic stress. Terwillegar opined that respondent-mother had an "intellectual disability" and was cognitively, socially, and practically limited. She had the ability to perform basic self-care but was dependent on others for her other needs. She was also pretty paranoid and had limited executive function and impaired judgment.

Generally, "the Department has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights." *In re Hicks*, 500 Mich 79, 85; 893 NW2d 637 (2017), citing MCL 712A.18f(3)(b) and (c), and MCL 712A.19a(2). To that end, the DHHS must create a case service plan outlining the steps that it and the parent will take to rectify the conditions that led to the DHHS's intervention and achieve reunification. *Id.* at 85-86. The ADA prohibits public entities—such as the DHHS—from discriminating against persons with disabilities by excluding them from services, programs, or activities offered by the entity or otherwise denying them the benefits of those services, program, or activities. *Id.* at 86, citing 42 USC 12132. In order to comply with the ADA when developing a case service plan, the DHHS must make reasonable modifications necessary to avoid discrimination on the basis of disability. *Id.* If the DHHS does not make reasonable accommodations to the case service plan offered to a disabled parent, the DHHS has necessarily failed in its duty to make reasonable efforts at reunification. See *id.*; see also *Terry*, 240 Mich App at 26. An affirmative duty to make reasonable accommodations arises once the DHHS is aware of the parent's disability without regard to whether the parent specifically notified the DHHS of his or her disability—the DHHS may not take a passive approach to providing accommodations. See *Hicks*, 500 Mich at 87-88.

Although the DHHS must make "[r]easonable efforts to reunify the child and family" in most cases, there are exceptions. MCL 712A.19a(2). The DHHS has no obligation to make

reasonable efforts to reunify the child with the family if the "parent has had rights to the child's siblings involuntarily terminated." MCL 712A.19a(2)(c).[1] It was undisputed that respondent-mother had had her parental rights to ALM's sister, KRM, terminated just months earlier. As such, the DHHS had no obligation to provide respondent-mother with any services and, accordingly, its alleged failure to provide her with more services or to provide her with more time to complete the services cannot serve as defense to the trial court's decision to terminate her parental rights to ALM. See *Hicks*, 500 Mich at 85 n 2 (recognizing that the Legislature has enumerated exceptions to the rule that the DHHS must make reasonable efforts to reunify the family before seeking termination of parental rights); *In re Smith*, 291 Mich App 621, 623; 805 NW2d 234 (2011) (holding that the DHHS's failure to provide services was harmless because it had no obligation to provide services at all given that the parent had had his parental rights to the child's sibling involuntarily terminated in a prior proceeding).

For the same reason, the DHHS's purported failure to better accommodate respondent-mother's disability cannot serve as a basis for attacking the order terminating her parental rights to ALM. An agency's decision to provide elective services—even without adequate accommodations for a disability—cannot serve as the basis for a direct attack on an order terminating parental rights because the provision of such services is not a requirement that must be met before terminating parental rights. See *Hicks*, 500 Mich at 86-87 (noting that the duty of DHHS to make reasonable accommodations dovetails with its duty to make reasonable efforts to reunify the family to which enumerated exceptions apply); see also *In re Smith*, 291 Mich App at 623. Nevertheless, there was evidence that the DHHS made reasonable efforts to reunify the family and that it provided respondent-mother with reasonable accommodations.

There was testimony that the DHHS provided respondent-mother with numerous services to address the primary barriers to reunification—namely, her parenting skills, her mental health concerns, and her problems with domestic violence—and did so throughout both children's cases. A foster-care worker, Nicole Klomp, testified that the DHHS provided respondent-mother with an extensive psychological evaluation to assess and understand her limitations during KRM's case. It also provided her with supervised parenting time and "hands-on guidance and demonstration" by DHHS staff and through the Parents as Teachers program to help her with her parenting skills. It also provided her with "Early-On services, WIC, Maternal Infant Health, True North Services," and conducted family team meetings to discuss concerns. To address the ongoing problem with domestic violence, the DHHS referred respondent-mother to a domestic violence program called WISE, provided individual and couples counseling, provided anger management counseling, and referred her to a program called Alternatives to Violence.

The DHHS also provided respondent-mother with services after ALM's birth. She was given services to help her with her parenting skills. The DHHS referred her to the Parents as Teachers program, provided her with parenting time, and referred her to the Infant Mental Health

[1] The Legislature amended MCL 712A.19a(2)(c), effective June 12, 2018, to read: "The parent has had rights to the child's siblings involuntarily terminated and the parent has failed to rectify the conditions that led to that termination of parental rights." See 2018 PA 58.

program. With regard to the mental health and domestic violence concerns, the DHHS again referred her to the WISE program and provided her with counseling services.

There was testimony that the DHHS made efforts to accommodate respondent-mother's cognitive impairment in both cases. Klomp testified that the DHHS asked both respondents what accommodations it might make for them and what services they would like to participate in. In both cases, respondents denied that they needed any accommodations or services. Nevertheless, despite their statements, the DHHS took affirmative steps to accommodate respondent-mother's apparent disability. Klomp stated that the DHHS's staff gave her frequent reminders, discussed with her how she might best learn the skills that were being taught, reviewed all the documentation with her and provided her with a reader, gave timely feedback and encouragement, and extended the period for services and allowed her to repeat services. The DHHS also provided hands-on demonstrations to help her learn skills. When respondent-mother refused to cooperate with a parent educator, Sharon Maile, the DHHS encouraged Maile to continue providing services despite the problems. After Maile again decided to terminate services, the DHHS asked respondent-mother if she would work with a different parent educator. The DHHS agreed to allow respondent-mother to resume the Parents as Teachers program with the educator of her choosing once respondent-mother identified her preferred educator several weeks later.

The services described by Klomp appear to be reasonably calculated to rectify the circumstances that led to DHHS intervention. See *Hicks*, 500 Mich at 85-86. Moreover, the DHHS took affirmative steps to accommodate respondent-mother's cognitive disability even though she denied needing any accommodations or services and at various points refused to cooperate with the provision of services. See *id.* at 87-88. The accommodations also appeared to be reasonably calculated to help her benefit from the services notwithstanding her limitations. See *id.* at 86 (recognizing that the DHHS must make reasonable accommodations to the services or programs offered to the disabled parent to facilitate the child's return to his or her home); see also *Terry*, 240 Mich App at 27 (stating that the DHHS can provide reasonable accommodations by repeating instructions, reminding the parent of tasks that had to be completed, and tailoring its programs to help developmentally disabled persons). This record does not demonstrate that the DHHS failed to comply with the ADA amounting to plain error. See *Utrera*, 281 Mich App at 9.

On appeal, respondent-mother suggests that the DHHS should have accommodated her by giving her more frequent and longer parenting-time sessions. She also maintains that the DHHS should have provided her with services for a longer period. Had it done so, she asserts, she would have demonstrated her ability to benefit from the services.

The DHHS presented testimony that it did accommodate her by providing her with more time to complete services and with repeat services. Despite the extra time, respondent-mother continued to struggle with even the most basic parenting skills. Testimony established that various staff persons and parent educators taught respondent-mother basic parenting skills and modeled those skills for her during both the case involving KRM and the present case. Nevertheless, the evidence showed that respondent-mother did not recognize ALM's cues and instead proceeded through a checklist of activities to address his potential needs. Testimony suggested that respondent-mother was unable to adjust her checklist to meet ALM's needs under circumstances outside the controlled setting present during parenting time. Even with repeated

admonitions and modeling of behavior, respondent-mother continued to mishandle her son and miss his cues. She even made statements expressing her lack of concern for his needs. Respondent-mother's lack of insight and inability to demonstrate progress with even the most basic parenting skills suggested she would not benefit from additional parenting time or services. As Terwillegar aptly noted during her testimony in KRM's case, respondent-mother had had services for nearly all her life and still had the same difficulties. The DHHS has an obligation to make "reasonable efforts to reunify" the family, see MCL 712A.19a(2); it does not have to provide endless services to the family. See, e.g., *In re JL*, 483 Mich 300, 326-327; 770 NW2d 853 (2009) (noting that even under the stricter rules of the Indian Child Welfare Act, the DHHS does not have an obligation to provide endless services and stating that there comes a time when the DHHS may justifiably pursue termination without providing more services).

The same was true with the DHHS's efforts to rectify respondent-mother's exposure to domestic violence. There was evidence that respondent-mother was dependent on others for her needs and that she would continue to rely on those persons even though they might pose a risk to her. There was also testimony that suggested that respondent-mother did not grasp the concepts taught to her in the classes on domestic violence. She repeatedly minimized respondent-father's violence toward her, continued to associate with him even after she received counseling on domestic violence, and was again the victim of domestic violence at his hands during this case.

There was also testimony that respondent-mother historically had not benefited from counseling and likely would not benefit even if provided with more services. Klomp tried to refer respondent-mother to a limited license psychologist, Dave Raquet, who provided respondent-mother with services in 2009 and 2012 when she was still a child. Raquet refused. He explained that respondent-mother had a demonstrated inability to benefit from interventions. Each time he tried to help her, she would show some short-term benefit, but the benefit would then deteriorate. He refused to help her when she was again referred to him because he felt the outcome would be the same. Raquet's opinion was strongly corroborated by the testimony and evidence that respondent-mother had not benefited from the services provided to her after she began having children.

Admittedly, there were witnesses who opined that respondent-mother's cognitive limitations did not prevent her from properly parenting and who stated that she had benefited from services. Nevertheless, there was also evidence that she did not fully participate in or benefit from some services, as she was required to do. See *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012) (stating that the respondents must participate in and benefit from the services provided). There was also testimony that she might be incapable of learning the skills necessary to parent ALM safely and that any benefit that she might derive would be temporary. As such, whether respondent-mother would in fact benefit from additional services or additional time for the provision of services came down to an assessment of the weight and credibility of the testimony. The trial court resolved the dispute in favor of the DHHS and found that its efforts to reunify the family were reasonable under the circumstances and this Court must defer to the trial court's superior ability to assess the weight and credibility to be afforded the conflicting testimony. See *In re Miller*, 433 Mich 331, 344; 445 NW2d 161 (1989).

Given the totality of the evidence, the trial court did not clearly err when it determined that the DHHS provided respondent-mother with reasonable services over a reasonable period of

time that the services were reasonably calculated to rectify the conditions that led to DHHS intervention and that those services included reasonable accommodations for respondent-mother's disability. See *Fried*, 266 Mich App at 542-543. There was no plain error involving the ADA. See *Utrera*, 281 Mich App at 8-9.

The trial court also did not clearly err when it found that the DHHS proved by clear and convincing evidence that termination was warranted under MCL 712A.19b(3)(j). A trial court may terminate a parent's parental rights if it finds by clear and convincing evidence that there is a "reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." MCL 712A.19b(3)(j).

In this case, there was evidence that respondent-mother had cognitive limitations and was dependent on others to provide her with support. The evidence further showed that she had a history of erratic and violent outbursts. She was also involved in an abusive relationship and did not appreciate the consequences of her continued relationship with her abusive partner. Instead, she minimized the danger associated with living in a violent household. There was some evidence that respondent-mother might separate from respondent-father after the most recent incident of domestic violence. However, the evidence that she had repeatedly failed to appreciate the danger that domestic violence posed to her and her baby, when considered with the evidence that she was highly dependent on others, permitted an inference that she would continue to expose her child to domestic violence. See, e.g., *Gonzales/Martinez*, 310 Mich App at 432 (stating that evidence that a parent continued her relationship with an abusive partner is evidence that she would place her own desires over the needs of her children).

Testimony also established that respondent-mother had difficulty learning even basic parenting skills, such as recognizing a baby's cues and soothing an upset baby. There was also testimony that she did not fully understand her role as a caregiver for a helpless child. For example, she told a caseworker that it was not her problem when the child became upset and others suggested that he might have a stomach ache. Respondent-mother also continued to handle the baby unsafely despite having been taught how to handle a baby safely.

Although some witnesses opined that respondent-mother had made progress, there was also compelling evidence that she did not and would not benefit from the services designed to help safely parent and avoid domestic violence. It was for the trial court to resolve the evidentiary dispute, and it found that respondent-mother had not made progress in alleviating the conditions that led to the adjudication. This Court will defer to the trial court's resolution of that dispute. See *Miller*, 433 Mich at 344. Respondent-mother's failure to benefit from these services was evidence that she would not be able to properly care for the child and would continue to expose him to potential harm in the form of domestic violence. See *In re Trejo Minors*, 462 Mich 341, 346 n 3; 612 NW2d 407 (2000).

The trial court did not clearly err when it found that the DHHS made reasonable efforts to reunify the family and did not clearly err when it found that the DHHS proved by clear and convincing evidence grounds for terminating respondent-mother's parental rights to ALM under MCL 712A.19b(3)(j). See *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003).

II. EVIDENTIARY ERRORS

We next address respondent-mother's claim that the trial court erred when it admitted the transcripts from KRM's case and this Court's opinion affirming the termination in that case. Respondent-mother did not preserve these claims of error by objecting before the trial court. Therefore, our review is for plain error. *Utrera*, 281 Mich App at 8-9. Respondent-mother further argues that her trial counsel's failure to object amounted to ineffective assistance of counsel. Because the trial court did not hold an evidentiary hearing on the ineffective assistance of counsel claim, there are no findings to which this Court must defer; instead, this Court's review is limited to mistakes that appear on the record alone. *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008). This Court reviews de novo whether a particular act or omission fell below an objective standard of reasonableness under prevailing professional norms and prejudiced a respondent's trial. *Id.* at 242.

Respondent-mother does not argue that the transcripts at issue were inadmissible under the rules of evidence. Instead, she argues that the transcripts were inadmissible under the circumstances of this case because their admission deprived her of the right to confront the witnesses against her. More specifically, she complains that the trial court's admission of the transcripts deprived her of the right to cross-examine two expert witnesses, Terwillegar, and the psychologist who performed the bonding assessment on her, Byron Barnes.

The protections provided by the Sixth Amendment are explicitly confined to criminal prosecutions. See *Austin v United States*, 509 US 602, 609; 113 S Ct 2801; 125 L Ed 2d 488 (1993). Because child protective proceedings are not criminal proceedings, the Sixth Amendment does not apply to them. See *In re Brock*, 442 Mich 101, 107-108; 499 NW2d 752 (1993). Additionally, the requirements of due process do not mandate confrontation and cross-examination in every case. *Id.* at 109-115. Rather, whether due process requires an opportunity to confront a witness depends a balancing of the risk of an erroneous deprivation of parental rights, the value of the additional safeguard, and the burdens occasioned by imposing the additional safeguard. *Id.* at 111-112. Respondent-mother abandoned this claim of error by failing to address whether and to what extent the requirements of due process precluded the trial court from admitting the transcripts of the experts' testimony without affording her the opportunity to cross-examine the witnesses,. See *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008) ("A party abandons a claim when it fails to make a meaningful argument in support of its position.").

In any event, respondent-mother has not shown plain error that affected the outcome of the lower court proceedings. See *Utrera*, 281 Mich App at 8-9. She maintains that the admission of the transcripts deprived her of the ability to examine the experts and update them about events since they performed their assessments. But respondent-mother's trial counsel had the opportunity to cross-examine both witnesses at the prior hearing and presumably was intimately aware of their opinions. Further, had she wanted to update the witnesses and cross-examine them about the validity of their opinions in light of the events since they first testified, nothing precluded her from calling the witnesses at the adjudication trial. Respondent-mother also has not identified any evidence that the experts would have changed their opinions on the basis of the events that happened over the months since they last testified. On this record, it cannot be said that the trial court plainly erred by admitting the transcripts without first requiring the experts to be available at trial for cross examination about their previous testimony and has not shown that any error prejudiced her trial. See *id.*

Respondent-mother has also not shown that the admission of this court's unpublished opinion amounted to plain error that warrants relief. *Id.* Even assuming that this Court's opinion was inadmissible, any error was harmless. The jury had the reports and transcripts that served as the basis for this Court's recitation of the facts in the unpublished opinion. Further, the trial court instructed the jury that the evidence concerning respondent-mother's treatment of another child such as KRM could only be considered as evidence of how she might treat ALM. The trial court also instructed the jury about the applicable law. These instructions cured whatever minimal prejudice might have been occasioned by admitting this Court's unpublished opinion. See *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 25; 837 NW2d 686 (2013). Therefore, the error does not warrant relief. See MCR 2.613(A).

Respondent-mother similarly has not established that her trial counsel's failure to object to the admission of the transcripts or the unpublished opinion amounted to ineffective assistance. A parent involved in a termination proceeding has the right to appointed counsel, and that right includes the right to have competent representation. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). When a parent argues that he or she did not receive competent representation, "this Court applies by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law context." *Id.* Accordingly, respondent-mother must show that her trial counsel's failure to object fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the error, the outcome would have been different. See *Unger*, 278 Mich App at 242.

In asserting her claim of ineffective assistance, respondent-mother must overcome the strong presumption that her trial counsel acted within the wide range of reasonable professional assistance. *Id.* An appellate court must not only be required to give counsel the benefit of the doubt with this presumption of professional reasonableness but must also affirmatively entertain the range of possible reasons that counsel proceeded as he or she did. *Cullen v Pinholster*, 563 US 170, 196; 131 S Ct 1388; 179 L Ed 2d 557 (2011). If this Court determines that there might have been a legitimate strategic reason for the act or omission after affirmatively entertaining the range of possible reasons for the act or omission, then this Court must conclude that the act or omission fell within the wide range of reasonable professional conduct. See *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In this case, respondent-mother's trial counsel represented respondent-mother in the earlier termination proceedings and even cross-examined the two experts at issue. The witnesses testified in January 2017, which was just over nine months earlier. As such, it was unlikely that they would testify favorably, and it was unlikely that further cross-examination would undermine their testimony. Given her experience with these witnesses, trial counsel might reasonably have concluded that it would not be beneficial to recall the experts to testify in person at the adjudication trial. She might have determined that—as a matter of trial strategy—it would be better to let the jury examine the cold record. And, indeed, trial counsel argued that the jury should not pay too much attention to the events involving KRM because the jury had to examine what had happened with ALM since his birth in July 2017. Because there was a plausible and legitimate strategic reason for trial counsel's decision not to object to the admission of the transcripts, respondent-mother has not overcome the presumption that her trial counsel's decision was within the wide range of reasonable professional conduct. See *Unger*, 278 Mich App at 242.

Respondent-mother similarly has not established that her trial counsel's failure to object to the admission of the opinion amounted to ineffective assistance that warrants relief. Even assuming that trial counsel should have objected to the admission of this Court's unpublished opinion, as already noted, any error in the admission of the opinion did not prejudice her trial. All of the information contained in the opinion was admitted through the transcripts and exhibits from the case involving KRM. Additionally, the trial court instructed the jury on the applicable law. As such, the admission of the opinion could not have affected the outcome of the proceedings and, for that reason, does not warrant relief. See *Unger*, 278 Mich App at 234-235.

Respondent-mother has not identified any errors involving the admission of the transcripts and opinion that warrant a new adjudication trial.

III. JUROR MISCONDUCT

Finally, respondent-mother argues that the trial court erred when it denied her motion for a mistrial after it was discovered that the jury had disregarded the court's instruction not to discuss the case before the case had been submitted to them. This Court reviews a trial court's decision on a motion for a mistrial for an abuse of discretion. See *Persichini v William Beaumont Hosp*, 238 Mich App 626, 635; 607 NW2d 100 (1999). A trial court abuses its discretion when it selects an outcome that is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The respondent in a termination proceeding is entitled to fair trial by an impartial jury. See *Maldonado*, 476 Mich at 402 (stating that few interests are more fundamental than the right to a fair trial by an impartial jury). A trial court may grant a motion for mistrial if the jury engaged in misconduct. See MCR 2.611(A)(1)(b). Juror misconduct will not, however, warrant a mistrial in every case. *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 627; 769 NW2d 911 (2009). The misconduct must have materially affected the substantial rights of the complaining party. See MCR 2.611(A)(1). As such, the moving party must demonstrate actual prejudice or that the misconduct materially affected his or her substantial rights. *Bynum v ESAB Group, Inc*, 467 Mich 280, 286-287; 651 NW2d 383 (2002).

At approximately 10:30 a.m. on the second day of trial, respondent-mother's trial counsel indicated that she had one more witness whom she believed would testify at 11:00 a.m. The trial court decided to take a recess at that point. When court reconvened at 11:17 a.m., respondent-mother's trial counsel indicated that she would not be calling the witness and rested her case. The lawyers all agreed that the proofs were closed at that point. The court and lawyers then discussed some matters and brought the jury back into court at 11:35 a.m. When the jury returned, the court remarked that it had been given a written question from the jury, which it wanted to discuss with counsel. For that reason, it again removed the jury.

After the jury left, the court read the following note into the record:

> "The jurors would like an explanation as a result of our decision, what rights and privileges would be gained or lost by the parents, what rights and privileges would be gained by the agencies. Specifically, the juror[s] would like to know why the parents' rights were terminated with [KRM]."

The trial court speculated that the note might indicate that the jurors had already begun to discuss the case despite its instruction that they were not to discuss the case before the close of proofs. The trial court indicated that counsel could address the issue in their closing remarks and counsel for the DHHS noted that there was an instruction that would address the jury's question. Respondent-father's counsel, however, did not agree that the instruction and closing remarks would be sufficient to address the concerns raised by the jury's question. He explained that the question indicated to him that the jury had "already started discussing evidentiary matters." Respondent-mother's counsel agreed that the question was troubling. She opined that the question showed that the jury had "ignored a very fundamental rule" and wondered what "else are they ignoring?" For that reason, she concurred in the motion for a mistrial. The trial court decided to question the jury to ascertain the nature of their discussions, if any.

After the jury reentered the courtroom, the court restated the relevant instruction, reminded the jury that it gave that instruction at the start of the case, and then informed the jurors that it intended to question them about their written question to determine "whether or not you have followed the instruction." The court questioned juror one about whether the jury held a discussion about whether to ask questions. The juror agreed that they did discuss what questions to ask the court. The juror also agreed that they had discussed the court's admonition not to talk about the case. The juror said they "thought [they] weren't allowed to talk about it until we had all the evidence which was when all the witnesses [were] done." The trial court inquired whether the juror could still decide the case fairly: "Do you believe that the discussion you had that led to these three questions has anyway prejudiced you or the others in such a way that you can't listen to the arguments and come up with a decision based not only on the evidence you've already heard but also the arguments and the jury verdict form?" The juror responded, "no." The juror further agreed that he could still render a "fair and honest" decision.

The trial court then asked the next juror whether she had heard the questions and wanted to add anything. She responded that she agreed with the first juror's statements. She agreed that she could keep an open mind. The next two jurors also agreed that they could still decide the case. The court then questioned the fifth juror and that juror indicated that she had "an open mind" and further explained that "nothing was discussed or determined on where someone stood and what their vote would be, or anything like that." The court then asked whether the jurors had begun "picking through the evidence," and the fifth juror indicated that they had not. The sixth juror also agreed that she had an open mind still and when asked if she felt that the other jurors still had an open mind, she stated, "Yes, definitely." The last juror also stated that he agreed with the other jurors and agreed that he had no doubt that he could fairly decide the case.

After questioning the jury, the trial court found that the jurors had violated its earlier instruction but determined that the violation was harmless. It stated that there was no evidence of "adverse consequences." The court explained that the questions were reasonable and did not suggest that "they sat down and discussed particular testimony or particular evidence that was admitted." For that reason, it determined that the violation did not warrant a mistrial and denied the motions.

On appeal, Respondent-mother argues that the trial court abused its discretion by denying her motion for a mistrial because there was a clear violation of the court's instruction. But misconduct alone does not invariably warrant a mistrial. *Unibar Maintenance*, 283 Mich App at

627. Rather, she must show actual prejudice or misconduct that materially affected her substantial rights. See *Bynum*, 467 Mich at 286-287, citing MCR 2.611(A)(1). Respondent-mother does not, however, discuss the fact that the jurors each agreed that he or she could decide the case on the basis of the evidence, closing remarks, and instructions. She also does not address the statement by a juror indicating that the jurors had not discussed the evidence; they only discussed what questions to ask the court. Because the jurors agreed that they had an open mind and were capable of considering the closing remarks and instructions, respondent-mother has not shown that the jurors' premature discussion caused her actual prejudice or deprived her of her fundamental right to a fair and impartial jury. See *id.*

The trial court investigated the extent to which the jurors might have disobeyed its earlier instruction, and the investigation revealed that the jurors had had limited discussions on the questions that might be sent to the court; they did not discuss the evidence or reveal their positions. The trial court also satisfied itself that the jurors could remain fair and impartial and decide the issue on the merits. Therefore, the trial court's decision to not grant a mistrial was within the range of reasonable and principled outcomes. *Maldonado*, 476 Mich at 388.

IV. RESPONDENT-FATHER'S CLAIMS OF ERROR

On appeal, respondent-father also argues that the trial court erred when it denied his motion for a mistrial on the basis of juror misconduct. For the reasons already discussed, the trial court did not abuse its discretion when it denied the respondents' motions for a mistrial. Respondent-father also argues that the trial court clearly erred when it found that the DHHS proved a statutory ground for termination by clear and convincing evidence and clearly erred when it found that termination was in the child's best interests.

This Court reviews de novo a trial court's interpretation and application of the relevant statutes, but reviews the factual findings underlying its application of the law for clear error. *Gonzales/Martinez*, 310 Mich App at 430-431. A trial court's finding is clearly erroneous when, after reviewing the entire evidence, this Court is left with the definite and firm conviction that the trial court made a mistake. *Id.* This Court reviews for clear error a trial court's finding that a statutory ground has been proved by clear and convincing evidence and its finding that termination is in the child's best interests. See *In re JK*, 468 Mich at 209.

On appeal, respondent-father discusses whether there was evidence that he failed to provide proper care and custody for ALM and whether the DHHS established that his parental rights to ALM's sibling had been terminated. These arguments implicate the grounds for termination stated under MCL 712A.19b(3)(g) and (*l*), but the trial court did not terminate his parental rights under those grounds; it terminated his parental rights under MCL 712A.19b(3)(j). Therefore, his analysis of the evidence involving those possible alternate grounds for terminating his parental rights is inapposite.

The trial court had the authority to terminate respondent-father's parental rights under MCL 712A.19b(3)(j) if it found by clear and convincing evidence that "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." The trial court found that respondent-father posed a direct and indirect danger to ALM: it found that he was "a violent person who

impulsively reacts to stressful situations with violence," which was troubling because "[r]aising children is an activity wrought with stressful situations." It further found that he had already "established a history of domestic violence." From the evidence, the court found that, if placed in respondent-father's care, ALM "would himself be victimized" or "would be a witness of domestic violence" against his mother.

Significant evidence supported that respondent-father had mental health issues, making it likely he would resort to violence when frustrated or angry. He told Terwillegar that he had in the past gone into rages that were so severe that he blacked out. He also admitted that he has hit and choked respondent-mother during these rage episodes. While he denied having abused his first two wives or his previous girlfriend, he admitted that he argued frequently with his first wife and that he left his girlfriend because he was afraid he might hit her. Respondent-father's history was also consistent with the mental health concerns raised by his psychological testing.

Terwillegar's tests showed that respondent-father had problems setting realistic goals, that he sought novel experiences, and was restless, excitable, and hostile. The testing also showed that he may have "hypomanic episodes" and may throw tantrums or explode in to uncontrollable rages. Terwillegar stated that the testing indicated that respondent-father had bi-polar disorder and "unspecified personality disorder," which meant that he would be "histrionic," "dramatic," and "narcissistic." He would also manipulate people to get what he wanted and may become sadistic. Terwillegar explained how these traits might prevent him from being able to care for a child:

> Well bi-polar disorder, especially, you know, if it's with psychosis, he may have some issues with reality at times, but he'll be explosive, he may go into anger, rages, become explosive, may then become real depressed; the ups and downs like that. And with the histrionic narcissistic, there's going to be dramatics, pretty self-centered, want attention himself. Maybe not real realistic about—about things happening in his life. He may want what he wants, when he wants it. . . .

Barnes similarly opined that respondent-father's mental health posed a risk to his child; he explained that respondent-father "might lose control" in a moment of frustration or be aggressive or angry with the child.

On appeal, respondent-father complains that the testing only gave rise to a suspicion that he might pose a risk to ALM, which is too speculative to support a finding that ALM would actually be harmed if returned to his care. But the statutory ground does not require clear and convincing evidence that the parent will certainly harm the child; it only requires the DHHS to establish that there is a "reasonable likelihood" that the child will be harmed if returned to the parent's care. MCL 712A.19b(3)(j).

Evidence showed that respondent-father had a history of arguing with respondent-mother and hitting and choking her in moments of rage, which was entirely consistent with the tendencies revealed by his psychological testing. Moreover, while some witnesses opined that respondent-father had benefited from domestic violence counseling, those witnesses were not particularly credible. His counselor, for example, admitted that he came to his opinion in part on the basis that respondent-father had not reported any significant anger episodes. But testimony

established that respondents continued to argue and, despite participating in services designed to address his anger and resort to violence, respondent-father again choked respondent-mother during the pendency of the proceedings involving ALM. The continued incidents of domestic violence significantly undermined the credibility of the counselor's opinion that respondent-father had made above average progress and did not pose a danger to respondent-mother. And respondent-father's continued resort to violence—even after having participated in various services designed to correct his behavior—supported an inference that he would resort to violence with ALM if frustrated and angry or, at the very least, that he would expose ALM to incidents of domestic violence perpetrated against his mother, which would harm ALM's mental health.

There was conflicting evidence concerning the danger that respondent-father posed to respondent-mother and ALM, and the trial court determined that the evidence tending to suggest that he did not pose a danger lacked credibility. This Court must defer to the trial court's superior ability to resolve such disputes. *Miller*, 433 Mich at 344. After reviewing the entire evidence, we are not left with the definite and firm conviction that the trial court made a mistake when it found there was a "reasonable likelihood, based on the conduct or capacity," MCL 712A.19b(3)(j), that ALM would be harmed if returned to respondent-father's home. See *Gonzales/Martinez*, 310 Mich App at 430-431.

Once the trial court found that the DHHS had proved at least one statutory ground for terminating respondent-father's parental rights, it had to order the termination of his parental rights if it also found by a preponderance of the evidence that termination was in the best interests of the child. MCL 712A.19b(5). The trial court may consider a variety of factors in finding whether termination is in the children's best interests: it may consider the "child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *Gonzales/Martinez*, 310 Mich App at 434 (quotation marks and citation omitted). The trial court could also consider the fact the parent's history of domestic violence. See *In re White*, 303 Mich App 701, 714; 846 NW2d 61 (2014).

In this case, the trial court found that termination was in ALM's best interests because he was "very young and vulnerable" and would be at "significant" risk of harm if returned to respondent-father's care. The court noted that the risk included "likely domestic violence."

On appeal, respondent-father makes much of the fact that at least one witness testified that it was not in ALM's best interests to terminate respondent-father's parental rights. There was, however, evidence that respondent-father would continue to engage in acts of domestic violence and that ALM would be exposed to those acts. There was also evidence that respondent-father might be unable to handle the stress and frustration of caring for a baby and could become aggressive and angry with the child. The need to protect ALM from the potential for harm while in respondent-father's care along with his need for permanency and stability strongly supported the trial court's finding that it was in ALM's best interests to terminate respondent-father's parental rights. See *id.*

Respondent-father also briefly suggests that the trial court should have considered relative placement before finding that termination was in ALM's best interests. Although the

fact that a child has been placed with relatives is a factor that weighs against termination, see *Gonzales/Martinez*, 310 Mich App at 434, ALM had not been placed with relatives; he was placed with the same foster family with whom his sister had been placed. The children were doing well with the foster family, and the foster family was in the process of adopting KRM. Additionally, respondent-father has not cited any record evidence that there was a suitable relative placement for ALM that the trial court could have considered. As such, the trial court cannot be faulted for failing to consider relative placement. See *id.* The trial court did not clearly err when it found that termination was in ALM's best interests. See *JK*, 468 Mich at 209.

There were no errors warranting relief in either case.

We affirm in both dockets.

/s/ Joel P. Hoekstra
/s/ William B. Murphy
/s/ Jane E. Markey