

STATE OF MICHIGAN
COURT OF APPEALS

In re MCCLAIN, Minors.

UNPUBLISHED
May 14, 2020

No. 352379
Wayne Circuit Court
Family Division
LC No. 93-306065-NA

Before: K. F. KELLY, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Respondent-mother appeals by right the trial court’s order of adjudication exercising its jurisdiction over her twin minor children, JMM and JFM. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In June 2019, petitioner, the Department of Health and Human Services (DHHS), filed a petition with the trial court requesting the court to take jurisdiction over JMM and JFM under MCL 712A.2(b)(1) and (2), and to terminate respondent’s parental rights under MCL 712A.19b(3)(b)(ii), (b)(iii), (g), (j), and (k)(iii). The petition alleged that Childrens Protective Services (CPS) had been contacted by police officers after they found JMM walking alone approximately 6 miles from her home and observed welts and scars on her back as well as bruising on her extremities. Similar injuries and scars were observed on JFM. The petition alleged that respondent had physically abused the children by using an extension cord to discipline them. Respondent has a long history with CPS, including the termination of her parental rights to four of her other children and the placement of two others in guardianship until they reached adulthood. JMM and JFM had previously been removed from respondent’s home in 2010 and made temporary court wards, but were returned to respondent’s care in 2011.

The children were removed from respondent’s home and an adjudication bench trial was scheduled. Before trial, petitioner filed a “tender years” motion, seeking to admit the children’s statements to Bonita Canty, a CPS worker, as substantive evidence under MCR 3.972(C)(2) and MRE 803(24). At the hearing on petitioner’s motion, Canty testified that, in separate forensic

interviews, the children had told her that respondent whipped¹ them with an extension cord to discipline them. Dr. Sam Gabbara, a pediatrician at Children's Hospital of Michigan, also testified that the children had told her that respondent used an extension cord to discipline them. Dr. Gabbara observed multiple scars, welts, and bruises on the children's bodies consistent with being beaten with a belt or extension cord. Dr. Gabbara opined that the marks on the children's bodies were intentionally inflicted by another person.

The trial court admitted the children's statements to Canty and Dr. Gabbara, concluding that the statements had adequate indicia of trustworthiness and were sufficiently corroborated by other evidence. The trial court then proceeded to trial and exercised jurisdiction over the children. In the dispositional phase, the trial court determined that there was clear and convincing evidence of at least one statutory ground to terminate respondent's parental rights, but ultimately concluded that termination was not in the children's best interests. The trial court dismissed the permanent custody petition, made the children temporary court wards, and ordered that a parent-agency treatment plan be developed for respondent.

This appeal from the initial order of disposition after adjudication followed. See MCR 3.933(A)(2). On appeal, respondent challenges the trial court's admission of the children's statements to Canty and its decision to exercise jurisdiction over the children.

II. TENDER YEARS MOTION

Respondent argues that the trial court abused its discretion when it granted petitioner's motion and admitted the children's statements made to Canty during the forensic interviews. We disagree.

We review for an abuse of discretion the trial court's evidentiary rulings in a termination proceeding. *In re Martin*, 316 Mich App 73, 80; 896 NW2d 452 (2016). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of principled outcomes. *In re Brown*, 305 Mich App 623, 629; 853 NW2d 459 (2014). We review de novo preliminary questions of law, such as the interpretation of court rules and the rules of evidence. *Id.*

The trial court admitted the children's statements to Canty under MCR 3.972(C), which "permits a trial court to receive as substantive evidence of abuse what would otherwise be deemed inadmissible hearsay evidence." *In re Brown*, 305 Mich App at 630. MCR 3.972(C) provides, in relevant part:

(2) Any statement made by a child under 10 years of age or an incapacitated individual under 18 years of age with a developmental disability as defined in MCL 330.1100a(25) regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622 (g), (k), (z), or (aa), performed with or on the child by another person may be admitted into evidence through the

¹ Various testifying witnesses used the terms "whipping" and "whooping" interchangeably.

testimony of a person who heard the child make the statement as provided in this subrule.

(a) A statement describing such conduct may be admitted regardless of whether the child is available to testify or not, and is substantive evidence of the act or omission if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness. This statement may be received by the court in lieu of or in addition to the child's testimony.

In other words, the statement of child under 10 years old that concerns and describes an act of physical abuse performed on the child by another person may be admissible at an adjudication proceeding “ ‘through the testimony of a person who heard the child make the statement,’ regardless of the child’s availability, but only if the court finds at a hearing before trial ‘that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness.’ ” *In re Martin*, 316 Mich App at 80, quoting MCR 3.972(C)(2)(a).

Canty testified at the motion hearing that she conducted separate interviews with JMM and JFM on June 6, 2019. The children were under 10 years old at the time of the interviews. Before Canty asked about the allegations of physical abuse, she developed a rapport with the children by asking them personal questions. Only after Canty established that each child could follow her line of questioning and understand the difference between truth and a lie did she ask about the allegations of physical abuse. Canty’s questions were open ended, so that she did not dictate the responses from the children.

Canty testified that JFM told her that she and JMM were “routinely whipped with extension cords.” Canty observed bruises on JFM’s forearm. JMM had scars and bruising on various parts of her body, including her back, legs, and thighs. When Canty asked how respondent disciplined JMM, JMM said that respondent used an extension cord. JMM also told Canty that she was scared of respondent and scared to go home. Canty testified that she had spoken to respondent, and she had admitted to Canty that she “whooped” the children when they misbehaved. Dr. Gabbara also testified to the injuries she had observed on the children, and that both children had told her, during separate examinations, that respondent hit them with a belt or extension cord.

Both children gave consistent narratives and details regarding respondent’s use of an extension cord to punish them. These statements to Canty were consistent with statements the children had made to foster care workers, and were also corroborated by medical documents, police reports, and respondent’s own admissions. Conversations that Canty later had with the children were consistent with what the children had said during their interviews.

The children’s statements to Canty were both consistent and independently corroborated. We conclude that they had adequate indicia of trustworthiness. *Martin*, 316 Mich App at 80. Therefore, the trial court did not abuse its discretion when it admitted the children’s statements to Canty. *Id.*, MCR 3.972(C).

Because we find that the evidence was properly admitted under MCR 3.972(C), we need not analyze whether it was also properly admitted under the residual hearsay exception,

MRE 803(24). However, we note that the statements possessed “circumstantial guarantees of trustworthiness equal to the categorical [hearsay] exceptions.” *People v Katt*, 468 Mich 272, 279; 662 NW2d 12 (2003).

III. JURISDICTION

Respondent argues that the trial court erred when it exercised jurisdiction over the children. We disagree.

This Court reviews the trial court’s decision to exercise jurisdiction over minor children for clear error in light of the court’s factual findings. *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). “A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court’s special opportunity to observe the witnesses.” *Id.*

Respondent’s argument concerning jurisdiction appears to be entirely premised on the assumption that Canty’s testimony concerning the children’s statements was inadmissible. As we have discussed, we disagree. Respondent raises no additional claims of error, and has therefore abandoned any other claims. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 220; 761 NW2d 293 (2008). (“An appellant may not merely announce its position and leave it to this Court to discover and rationalize the basis for its claims.”). In any event, petitioner more than carried its “burden of proving by a preponderance of the evidence one or more of the statutory grounds for jurisdiction alleged in the petition,” even without Canty’s testimony concerning the children’s statements. *In re Sanders*, 495 Mich 394, 405; 852 NW2d 524 (2014), citing MCR 3.927(E). Respondent admitted that she struck the children with an extension cord and did not seek medical attention for their injuries. The children had welts, scars, and bruises on their bodies. Dr. Gabbara testified that the marks on the children’s bodies were intentionally made and opined that they were a sign of physical abuse. Therefore, the trial court did not err by determining that respondent presents a substantial risk to the well-being of the children, MCL 712A.2(b)(1), or that the exercise of its jurisdiction over the children was appropriate because of respondent’s neglect, cruelty, criminality, or depravity, MCL 712A.2(b)(2).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra