

STATE OF MICHIGAN
COURT OF APPEALS

In re R. R. PALMER, Minor.

UNPUBLISHED
September 10, 2020

No. 352761
Oakland Circuit Court
Family Division
LC No. 2019-872176-NA

Before: MARKEY, P.J., and K. F. KELLY and TUKEL, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating his parental rights to his minor child, RP. The trial court found statutory grounds to terminate respondent’s parental rights under MCL 712A.19b(3)(b)(i), (j), (k)(ii), and (k)(ix). Respondent argues the trial court abused its discretion when it admitted RP’s out of court statements through the testimony of Kendyl Davis (Davis), an employee of Orchard Children’s Services, under MCR 3.972(C)(2). Specifically, respondent argues that the trial court erred in admitting statements RP made to Davis because the circumstances concerning the statements were unreliable. This appeal is being decided without oral argument pursuant to MCR 7.214(E)(1). We affirm.

I. UNDERLYING FACTS

This case arises out of allegations that respondent sexually abused RP. Petitioner, the Department of Health and Human Services (DHHS), authored a petition requesting termination of respondent’s parental rights to RP. According to the petition, RP’s mother (MC) had sole physical custody of RP and RP would visit respondent on alternating weekends. In March 2019, MC took RP to a doctor because RP was having difficulty urinating. RP tested positive for herpes and chlamydia. RP’s primary caregivers (respondent, MC, and MC’s boyfriend) were tested for sexually transmitted infections (STIs) and only respondent tested positive for chlamydia and herpes.

II. ANALYSIS

“A trial court’s evidentiary rulings in a child protection proceeding are reviewed for an abuse of discretion.” *In re Jones*, 286 Mich App 126, 130; 777 NW2d 728 (2009). “An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of principled

outcomes.” *Id.* (quotation marks and citation omitted). “This Court, however, will not reverse on the basis of an evidentiary error unless the court’s ruling affected a party’s substantial rights.” *In re Caldwell*, 228 Mich App 116, 123; 576 NW2d 724 (1998). “To the extent that our determination of [an] evidentiary question requires an examination of MCR 3.972(C)(2) . . . our review is de novo.” *In re Archer*, 277 Mich App 71, 77; 744 NW2d 1 (2007).

“In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase.” *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). “The adjudicative phase occurs first and involves a determination whether the trial court may exercise jurisdiction over the child, i.e., whether the child comes within the statutory requirements of MCL 712A.2(b).” *In re Archer*, 277 Mich App at 79-80 (quotation marks and citation omitted). “During the adjudicative phase, a trial may be held to determine whether any of the statutory grounds alleged in the petition have been proven.” *Id.* (quotation marks and citation omitted). “Although the rules of evidence for a civil proceeding apply during such a trial, hearsay statements of children pertaining to acts of child abuse are admissible at the trial if the criteria for reliability set out in MCR 3.972(C)(2) (formerly MCR 5.972[C][2]) are satisfied.” *Id.* MCR 3.972(C)(2) provides, in relevant part:

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 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.

“Under MCR 3.972(C)(2)(a), the court must determine, ‘in a hearing held before trial,’ whether the statement possesses adequate indicia of trustworthiness.” *In re Archer*, 277 Mich App at 81, quoting MCR 3.972(C)(2)(a). In addressing this requirement, this Court has held that “[t]he reliability of a statement depends on the totality of the circumstances surrounding the making of the statement.” *Id.* at 82. “Circumstances indicating the reliability of a hearsay statement may include spontaneity, consistent repetition, the mental state of the declarant, use of terminology unexpected of a child of a similar age, and lack of motive to fabricate.” *Id.*

Before trial, the trial court considered petitioner’s motion to admit RP’s out of court statements under MCR 3.972(C)(2) and called Davis as a witness. Davis testified she was employed at Orchard’s Children Services, where she educates families on parenting skills. Davis explained that, while she was reading a book to RP about the differences between appropriate and inappropriate touching, RP spontaneously stated “that her daddy touched her down there” while

gesturing to her vaginal area. The trial court stated that it found Davis to be “extremely credible” and that Davis established that RP made the statement spontaneously. Consequently, the trial court decided to admit RP’s statement through Davis’s testimony.

Respondent argues that the circumstances concerning RP’s statements were unreliable because Davis does not have training to conduct forensic interviews of children. But Davis was not interviewing RP when RP made the statement. Davis specifically stated she had not asked RP any questions or otherwise prompted RP to make any type of statements.¹ Instead, Davis was reading RP a book that explained the differences between appropriate and inappropriate touching. While reading that it was inappropriate to be touched in the “swimsuit area,” RP stated “that her daddy touched her down there,” and gestured to her vaginal area. Consequently, Davis’s interaction with RP was not an interview because Davis was not actually asking RP any questions. Rather, Davis was reading a book to RP and RP chose to make a spontaneous and unprompted comment while Davis read the book to her. Thus, respondent’s argument is unconvincing because Davis was not engaged in an interview of RP, and RP’s statement was unprompted and not elicited through questioning.

In addition, the record establishes that RP’s mental state during her meeting with Davis supports the trustworthiness of her statement. Specifically, RP was three years old when she met with Davis. Davis described RP as appearing “calm” and “comfortable” during their interaction and when RP made the spontaneous statement. As such, because RP was not under evident stress and was not hesitant in making the statement, the statement had the indicia of truthfulness. Respondent also asserts RP may have been “coached” to make a statement that respondent had touched her inappropriately because RP did not make the statement until four months after the allegations of sexual abuse arose. But other than speculation, respondent has not presented any evidence that RP was influenced, coached, or intimidated. Furthermore, RP’s statements are supported by other evidence that was introduced at trial. After RP was diagnosed with chlamydia and herpes, her primary caregivers were tested for STIs. Only respondent tested positive for herpes and chlamydia. Dr. Mary Elizabeth Smyth, a board-certified child abuse pediatrician, explained that chlamydia is transmitted by sexual contact. She further testified that she had never seen a case of chlamydia that was transmitted in a nonsexual manner. Although it is possible for a fetus to contract chlamydia if the mother has chlamydia, because RP was diagnosed with chlamydia when she was three years old, Dr. Smyth opined that RP contracted the STI through penile penetration and not at birth. Indeed, Dr. Smyth’s conclusion is supported by the fact that MC did not test positive for chlamydia.

Finally, respondent’s half-sisters, HP and JP, testified that respondent sexually abused them when they were children. HP testified that when she was eight years old respondent would touch her breasts and vagina. HP also stated that respondent forced her to have sex with him and would penetrate her with his penis. JP testified that respondent started sexually abusing her when

¹ Davis acknowledged that the most reliable way to question a child is to ask open ended questions that do not suggest an answer. She did not do this during the incident in question because she did not actually ask RP any questions.

she was five years old. JP additionally stated that respondent touched her private parts and threatened to harm her if she told anyone about the touching. JP stated that the inappropriate touching involved her private parts being touched by respondent's private parts, but denied penetration. In 2015, Detective Robert Wells investigated the allegations that respondent sexually abused his half-sisters and stated that respondent "admitted to touching their breasts" and "[t]ouching their vaginal areas both with his hands and with his penis."² Consequently, because the circumstances concerning RP's statement provided an adequate indicia of trustworthiness, and RP's statement was supported by other evidence introduced at trial, the trial court did not err when it admitted RP's statements through Davis's testimony.

III. CONCLUSION

For the reasons stated in this opinion, the trial court's order terminating respondent's parental rights and its underlying decision to admit RP's statement under MCR 3.972(C)(2) is affirmed.

/s/ Jane E. Markey
/s/ Kirsten Frank Kelly
/s/ Jonathan Tukel

² No charges were brought against respondent concerning the allegations of sexual assault perpetrated on his half-sisters because the sexual assaults occurred seven years before Detective Wells's investigation.