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# STATE OF MICHIGAN

# COURT OF APPEALS

*In re* JO and AF, Minors.

UNPUBLISHED
November 19, 2020

No. 352712
Genesee Circuit Court
Family Division
LC No. 15-132408-NA

Before: REDFORD, P.J., and RIORDAN and TUKEL, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court's order terminating his parental rights to the minor children, JO and AF, under MCL 712A.19b(3)(b)(*i*) (parent's act caused physical injury or abuse to child or sibling); (c)(*i*) (failure to rectify the conditions leading to adjudication); (c)(*ii*) (failure to rectify other conditions); (g) (failure to provide proper care and custody); and (j) (reasonable likelihood of harm if returned to the parent). We affirm.

## I. FACTS & PROCEDURAL HISTORY

In October 2018, the Department of Health and Human Services (DHHS) filed a petition requesting removal of JO (then age 16 years old)[1] and AF (then age 11 years old) from respondent-father's home after respondent-father physically abused and injured JO. DHHS alleged that respondent-father admitted to hitting JO with a stick and a cane. The trial court exercised jurisdiction over the children and ordered respondent-father to participate in a case service plan which included parenting classes and anger management classes. The children were removed from respondent-father's care and custody and placed in foster care. Respondent-father was granted supervised parenting time with AF, but parenting time with JO was suspended. In December 2018, the trial court suspended respondent-father's parenting time with AF because respondent-father assaulted and threatened the DHHS foster caseworker and threatened the children's foster parents.

[1] JO reached the age of majority while this case was pending on appeal. However, the case is not moot with respect to JO due to the remaining collateral legal consequences of the termination proceeding. *In re Smith*, 324 Mich App 28, 43; 919 NW2d 427 (2018).

In April 2019, respondent-father had not made progress toward mitigating the conditions that led to the children being removed and placed into care, and the trial court ordered respondent to complete anger management and a psychological evaluation and to follow all recommendations. In July 2019, DHHS reported that respondent-father had indicated that he would not participate in anger management classes because he was attending Dialectical Behavior Therapy (DBT) and that he would not complete a psychological evaluation or other services that the court ordered. In October 2019, DHHS filed a supplemental petition and requested that respondent-father's parental rights be terminated under MCL 712A.19b(3)(b)(*i*); (c)(*i*) and (*ii*); (g); and (j). Following a hearing in January 2020, the trial court entered an order terminating his parental rights. This appeal followed.

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent-father first argues that he was deprived of effective assistance of counsel because his trial counsel failed to obtain and introduce into evidence information and witness testimony regarding his ongoing mental health treatment. We disagree.

The trial court did not hold an evidentiary hearing, and therefore, our review is limited to the facts on the existing record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). "The principles applicable to claims of ineffective assistance of counsel in the arena of criminal law also apply by analogy in child protective proceedings[.]" *In re Martin*, 316 Mich App 73, 85; 896 NW2d 452 (2016).

> We analyze the ineffective-assistance-of-counsel claim under "the same standard as all other claims of ineffective assistance of counsel[.]" *People v Jurewicz*, ___ Mich ___ (2020) (Docket No. 160318). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. To establish an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. A defendant must also show that the result that did occur was fundamentally unfair or unreliable. [*People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012) (citations omitted).]

"When asserting ineffective assistance of counsel premised on counsel's unpreparedness, a defendant must demonstrate prejudice resulting from the lack of preparation." *People v Bosca*, 310 Mich App 1, 37; 871 NW2d 307 (2015). A claim of ineffective assistance of counsel based on the failure to investigate or call witnesses will fail when the party does not produce affidavits describing testimony that would have been elicited from those witnesses or show how the proposed testimony would have benefited the defense. See *People v Davis*, 250 Mich App 357, 369; 649 NW2d 94 (2002).

Respondent-father does not identify witnesses or provide affidavits from witnesses that his counsel allegedly failed to call. Respondent-father does identify what evidence of his ongoing mental health treatment that his counsel allegedly failed to introduce into evidence. Respondent-father has not shown how the alleged testimony and evidence would have benefited his case, *id.*,

and "[f]ailing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel," *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Accordingly, he fails to rebut the strong presumption that his counsel was effective. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Moreover, respondent-father fails to demonstrate that, but for counsel's alleged error, the result of the proceeding would have been different. There was substantial evidence from which the court could have concluded that respondent failed to address his mental health and anger management issues. Respondent-father did not complete the DBT treatment or anger management. His therapist testified that he had not improved or resolved his mental health or anger management issues during the approximately three months of DBT treatment. The DHHS worker testified that he refused to complete a psychological evaluation or participate in anger management classes. His parenting time with AF was suspended as a result of his threatening behavior toward a DHHS case worker and a foster parent, and there was evidence that he threatened physical harm against service providers, the police department, and the court during the case. Additionally, at the termination hearing, he admitted to hitting JO with his cane and testified that he would hit JO again if the same circumstances occurred. Accordingly, respondent-father's claim of ineffective assistance of counsel is without merit.

## III. STATUTORY GROUNDS

Respondent-father next argues that the trial court erred by finding a statutory ground for termination. We disagree.

"In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011).

> This Court reviews for clear error a trial court's factual findings following a termination hearing. A finding is clearly erroneous if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made. However, this Court . . . reviews de novo whether the trial court properly selected, interpreted, and applied a statute. [*In re Gonzales/Martinez*, 310 Mich App 426, 430-431; 871 NW2d 868 (2015) (quotation marks, citations, and brackets omitted; ellipsis in original).]

Additionally, we must give "due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004). If we conclude that the trial court did not clearly err by finding one statutory ground for termination, we not need address any additional grounds. *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009).

On appeal, respondent-father fails to challenge the trial court's finding that statutory grounds existed to terminate his parental rights under Subsection (3)(b)(*i*). This failure is fatal to his appeal. Because respondent-father does not challenge this statutory ground on appeal, he has abandoned any argument that the trial court erroneously found that this statutory ground for termination existed. See *Riemer v Johnson*, 311 Mich App 632, 653; 876 NW2d 279 (2015); *In re JS & SM*, 231 Mich App 92, 98-99; 585 NW2d 326 (1998), overruled in part on other grounds

by *In re Trejo*, 462 Mich 341, 353 n 10; 612 NW2d 407 (2000). Because only one statutory ground for termination must be established to terminate parental rights, *In re HRC*, 286 Mich App at 461, respondent-father's failure to challenge the trial court's findings under MCL 712A.19b(3)(b)(*i*) precludes appellate relief. *In re JS & SM*, 231 Mich App at 98.

Even if respondent-father had not abandoned this issue on appeal, we would conclude that the trial court did not err by concluding that the statutory grounds for termination of his parental rights were proven by clear and convincing evidence. Termination of parental rights is proper under MCL 712A.19b(3)(c)(*i*) when "the totality of the evidence amply supports that [the respondent] had not accomplished any meaningful change in the conditions" that led to the adjudication, *In re Williams*, 286 Mich App 253, 272; 779 NW2d 286 (2009), and would not be able to rectify those conditions within a reasonable time, MCL 712A.19b(3)(c)(*i*). The determination of what is a reasonable time properly includes both how long it will take for the parent to improve conditions and how long the child can wait for the improvement. *In re Dahms*, 187 Mich App 644, 647-648; 468 NW2d 315 (1991).

Respondent-father did not accomplish any meaningful change in the conditions that led to adjudication. At the termination hearing, he admitted to hitting JO and testified that he would hit JO again if the same circumstances occurred. Respondent-father's therapist testified that he had not improved or resolved his mental health or anger management issues during the approximately three months of DBT treatment, and she did not believe that the children should be returned to his care. Respondent-father testified that he did not complete the DBT program or anger management. He also testified that he had completed a psychological evaluation; however, he did not provide the evaluation to his caseworker or the court, and the DHHS worker testified that respondent-father had refused to complete a psychological evaluation and participate in anger management classes. Although respondent-father completed a parenting class, the DHHS foster care worker testified that respondent-father did not benefit from the service because he continued to blame JO for the removal and make statements that he was not responsible for the abuse that occurred in the home. The DHHS worker also testified that respondent-father indicated that JO deserved the physical abuse. Further, there was also evidence that respondent-father had threatened physical harm against DHHS workers, foster parents, service providers, the police department, and the court during the case. Despite being provided ample services to address the conditions that led to the children's adjudication, respondent-father failed to complete and sufficiently benefit from services.

The record also supports the trial court's finding that there was no reasonable likelihood that respondent-father would rectify his parenting barriers in the foreseeable future. "[T]he Legislature did not intend that children be left indefinitely in foster care[.]" *In re Dahms*, 187 Mich App at 647. The children were in foster care since October 2018. During the pendency of this case, respondent-father did not have any parenting time with JO and had not had parenting time with AF since December 2018. The record also indicates that the children had been previously removed from respondent-father's care in 2015 as a result of physical neglect, unfit home environment, and allegations of physical abuse and subsequently returned to respondent-father in 2017. There was no indication that respondent-father would rectify the barriers within a reasonable time given the length of time already provided and the lack of progress. Despite being provided ample services, he made minimal progress in rectifying the conditions that led to adjudication. Therefore, we cannot conclude that the trial court clearly erred by finding that the

grounds for termination found in MCL 712A.19b(3)(c)(*i*) had been proven by clear and convincing evidence. This same evidence also provides support for its finding regarding the grounds found in MCL 712A.19b(3)(j). See *In re White*, 303 Mich App 701; 711, 846 NW2d 61 (2014) ("[A] parent's failure to comply with the terms and conditions of his or her service plan is evidence that the child will be harmed if returned to the parent's home."). Similarly, respondent-father's testimony that he would physically hit JO again supports the trial court's findings regarding the grounds found in MCL 712A.19b(3)(b)(*i*). See MCL 712A.19b(3)(b)(*i*).[2]

## IV. CONCLUSION

Respondent-father was not deprived of effective assistance of counsel and the trial court did not commit error requiring reversal when it concluded that statutory grounds for termination of respondent-father's parental rights was established by clear and convincing evidence. Accordingly, we affirm.

/s/ James Robert Redford
/s/ Michael J. Riordan
/s/ Jonathan Tukel

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[2] We note that the trial court clearly erred by applying an incorrect version of MCL 712A.19b(3)(g). Under the current version of the statute, effective June 12, 2018, termination is appropriate if "[t]he parent, *although, in the court's discretion, financially able to do so*, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." MCL 712A.19b(3)(g) as amended by 2018 PA 58 (emphasis added). Because the trial court failed to apply the correct version of the statute and did not make the required findings, termination was improper under MCL 712A.19b(3)(g). Nevertheless, because we conclude that termination was proper under MCL 712A.19b(3)(b)(*i*), (c)(*i*), and (j), the error was harmless. See *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009).