Order

Michigan Supreme Court
Lansing, Michigan

February 11, 2022

163731

In re BOURBEAU, Minors.

SC: 163731
COA: 356222
Oakland CC Family Division:
2015-832568-NA

_____/

On order of the Court, the application for leave to appeal the October 14, 2021 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and we REMAND this case to that court for a new appeal. On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Oakland Circuit Court and direct that court to appoint counsel to represent the respondent in the Court of Appeals. The record in this case reveals that the respondent's counsel provided ineffective assistance by failing to cite to the record to support the claims being asserted, citing incorrect legal standards in support of those claims, and failing to raise potentially meritorious claims. As noted by the Court of Appeals throughout its opinion, the brief filed by the respondent's counsel made numerous cursory assertions with no argument or citations to the record, and abandoned claims raised in the trial court. A right to counsel necessarily includes the right to competent counsel. See *In re Trowbridge*, 155 Mich App 785, 786 (1986); *In re Osborn (On Remand, After Remand)*, 237 Mich App 597, 606 (1999). The respondent did not receive competent appellate counsel and is thus entitled to a new appeal.

We do not retain jurisdiction.

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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 11, 2022

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

In re BOURBEAU, Minors.

UNPUBLISHED
October 14, 2021

No. 356222
Oakland Circuit Court
Family Division
LC No. 2015-832568-NA

Before: SWARTZLE, P.J., and CAVANAGH and GADOLA, JJ.

PER CURIAM.

Respondent-father ("respondent")[1] appeals by delayed leave granted[2] an order terminating his parental rights to the minor children, AJB and CMB (sometimes referred to collectively as "the boys" or "the children"), pursuant to MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continue to exist) and (j) (reasonable likelihood of harm).[3] We affirm.

Respondent and MB are the parents of AJB and CMB. In 2015, petitioner, the Department of Health and Human Services ("petitioner" or "the DHHS"), filed petitions seeking jurisdiction over each child. As relevant here, it was alleged that respondent and MB had engaged in incidents of domestic violence in the presence of AJB, that respondent had verbally and physically abused AJB, and that there had been inadequate supervision of CMB that led to injuries to CMB. Respondent and MB each pleaded no contest to the allegations in the petitions, and the trial court accepted the pleas. The trial court entered orders of adjudication finding that there were statutory

[1] As will be explained later, the children's mother, MB, was also a respondent in these proceedings. However, she ultimately agreed to the termination of her parental rights and is not involved in this appeal. Hence, we will refer to her as "MB" and to respondent-father as "respondent."

[2] See *In re Bourbeau Minors*, unpublished order of the Court of Appeals, entered April 30, 2021 (Docket No. 356222).

[3] Petitioner, the Department of Health and Human Services, also sought termination under MCL 712A.19b(3)(g) (failure to provide proper care and custody), but the trial court found that petitioner failed to present evidence of respondent's financial ability to provide proper care and custody, and the trial court thus ruled that termination was improper under that statutory ground.

grounds to exercise jurisdiction with respect to each child. An initial dispositional hearing was held, and the case service plan for respondent was that he find and maintain appropriate housing, continue to provide a legal source of income, continue with supervised visitation of the children, and follow the recommendations of a psychological evaluation, which included that he attend anger-management therapy, continue attending individual therapy, and participate in drug and alcohol screening upon request. On October 5, 2015, the trial court entered an initial order of disposition that adopted the respective case service plans for respondent and MB.

After a series of review hearings at which the DHHS worker reported that respondent and MB were not making sufficient progress on their respective case service plans, the DHHS filed, on October 28, 2016, the first supplemental petition to terminate the parental rights of respondent and MB with respect to both children. It was alleged that respondent had failed to obtain suitable housing for the children, failed to complete and benefit from anger-management therapy, failed to follow his therapist's suggestion to see a forensic psychologist for further assessment, failed to submit to drug screens, and failed to benefit from a parenting program. The termination hearing on the first supplemental petition was held over several dates from January 2017 through October 2017. During this hearing, MB pleaded no contest to the existence of statutory grounds for termination of her parental rights with respect to both children and stipulated that it was in the best interests of the children to terminate her parental rights. The trial court accepted MB's plea and terminated her parental rights to the children. After the termination hearing, the trial court found, on November 27, 2017, that statutory grounds existed to terminate respondent's parental rights under MCL 712A.19b(3)(j) but that termination of respondent's parental rights was not in the children's best interests, and the court thus denied the first supplemental petition to terminate respondent's parental rights.

Dispositional review hearings for respondent then resumed. At a February 12, 2019 review hearing, the assigned foster-care worker, Jefferson Bach, stated that there had been multiple Child Protective Services ("CPS") reports of physical abuse or neglect, as well as inappropriate conversations, on the part of respondent during his parenting time with the children in late 2018 and early 2019; this was parenting time that was either unsupervised or supervised by respondent's designee rather than by the DHHS. The DHHS had concerns regarding the safety and wellbeing of the children. Given how long the case had been pending, new concerns about respondent, and his need for further progress on his mental health and parenting skills, the DHHS was planning to file a second supplemental petition for termination of respondent's parental rights.

On May 22, 2019, the DHHS filed a second supplemental petition to terminate respondent's parental rights. The DHHS stated that, on February 28, 2018, respondent had signed an updated case service plan, which required him to: complete and benefit from parent-education services; attend weekly parenting-time visits; participate in and benefit from anger-management therapy through individual therapy services; and continue to provide verification of his employment and housing. Respondent did not benefit from the case service plan with respect to parent-education services, weekly parenting-time visits, and anger-management therapy. Although respondent had completed three parent-education programs, he had not benefited from this service because he continued to use physical discipline and to lose his temper during his parenting time that was either unsupervised or supervised by a designee. Both children had reported physical abuse on the part of respondent in early 2019. Respondent showed minimal benefit from anger-management therapy and posed a continued risk of harm to the children. The

children had been in foster care for almost four years, and respondent had failed to rectify the conditions that led to the adjudication. The DHHS sought termination of respondent's parental rights to the children under MCL 712A.19b(3)(c)(*i*), (g), and (j).

The termination hearing on the second supplemental termination petition was held over 20 dates from August 6, 2019 to February 26, 2020. On November 30, 2020, the trial court issued an 85-page written opinion finding by clear and convincing evidence that termination of respondent's parental rights was warranted under MCL 712A.19b(3)(c)(*i*) and (j). The court further found by a preponderance of the evidence that termination of respondent's parental rights was in the best interests of both children. A separate order terminating respondent's parental rights to both children was entered on December 2, 2020. Respondent filed an untimely claim of appeal, which this Court treated as a delayed application for leave to appeal. *In re Bourbeau Minors*, unpublished order of the Court of Appeals, entered February 10, 2021 (Docket No. 356222). This Court later granted the delayed application for leave to appeal. *In re Bourbeau Minors*, unpublished order of the Court of Appeals, entered April 30, 2021 (Docket No. 356222).

Respondent first argues on appeal that the trial court committed an error requiring reversal and violated his constitutional right to due process because the order terminating respondent's parental rights was not issued in a timely manner. Respondent's argument is unavailing.

In general, an issue must be raised in or decided by the trial court in order to be preserved for appellate review. *Glasker-Davis v Auvenshine*, 333 Mich App 222, 227-228; ___ NW2d ___ (2020). Also, to preserve a constitutional claim, a party must object on that ground below. *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014). Respondent did not raise this issue below.[4] Moreover, although the trial court provided explanations for the delay in issuing its written opinion, this was not done in the context of addressing an alleged violation of MCR 3.977(I)(1) or a claimed violation of respondent's constitutional rights. Therefore, the issue is unpreserved.

Review of an unpreserved issue is for plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). To obtain relief, respondent must show that an error occurred, that it was clear or obvious, and that the error affected his substantial rights. *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011). Generally, an error affects substantial rights if it is prejudicial, i.e., it affected the outcome of the case. *In re Utrera*, 281 Mich App at 9.

MCL 712A.19b(1) states, in part, that "[t]he court shall issue an opinion or order regarding a petition for termination of parental rights within 70 days after the commencement of the initial hearing on the petition. The court's failure to issue an opinion within 70 days does not dismiss the

[4] In his appellate brief, respondent tersely says that he preserved this issue by objecting throughout the second termination hearing, but he provides no specific page references to the transcripts in order to support this assertion. See MCR 7.212(C)(7) ("Page references to the transcript, the pleadings, or other document or paper filed with the trial court must also be given to show whether the issue was preserved for appeal by appropriate objection or by other means."). This Court will not search the record for factual support for a party's claims. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Anyway, we have found no support in the transcripts for respondent's claim that he preserved this issue.

petition." MCR 3.977(I)(1) provides, in relevant part, "If the court does not issue a decision on the record following hearing, it shall file its decision with 28 days after the taking of final proofs, but no later than 70 days after the commencement of the hearing to terminate parental rights."

It is undisputed that the trial court's decision in this case was untimely under MCL 712A.19b(1) and MCR 3.977(I)(1). However, the trial court's failure to issue its opinion and order in a timely manner does not entitle respondent to reversal of the order terminating his parental rights. "MCR 3.902(A) provides that MCR 2.613 governs limitations on the correction of errors in proceedings involving juveniles." *In re Utrera*, 281 Mich App at 14. MCR 2.613(A) provides:

> An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

MCL 712A.19b(1) expressly states that "[t]he court's failure to issue an opinion within 70 days does not dismiss the petition." Moreover, this Court has held that a trial court's violation of the time limits set forth in the court rule does not require dismissal. *In re TC*, 251 Mich App 368, 370-371; 650 NW2d 698 (2002).[5] In *In re TC*, the trial court failed to issue its final decision within 70 days after the commencement of the termination hearing. *Id*. at 369. This Court rejected the "respondent's argument that the silence of the court rule with regard to a sanction for violating the rule signals the [Michigan] Supreme Court's rejection of the express statement of the statute that violation of the time requirements will not result in a dismissal." *Id*. at 370. "There is no reason to suppose that the [Michigan] Supreme Court intended that the penalty for delay would be more delay." *Id*. at 371. This Court held that reversal was not required under MCR 2.613(C). *Id*. See also *In re Jackson*, 199 Mich App 22, 28-29; 501 NW2d 182 (1993) ("This Court will not impose sanctions that the Legislature and the [Michigan] Supreme Court have declined to impose."). In the present case, respondent has not demonstrated any prejudice arising from the untimely issuance of the trial court's decision. He provides no reason to believe that a timely decision would have reached a different outcome. Respondent is not entitled to reversal of the termination decision.

Respondent's contention that he was denied due process lacks merit. "Due process requires that there be jurisdiction over the respondent and subject matter of the litigation and that the respondent be afforded notice of the nature of the proceedings and an opportunity to be heard." *In re Kirkwood*, 187 Mich App 542, 546; 468 NW2d 280 (1991). "Due process is flexible and calls for such procedural protections as the particular situation demands." *In re Sanborn*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket Nos. 354915 and 354916); slip op at 7 (quotation marks, brackets, and citation omitted). There is no challenge to jurisdiction, and respondent does not deny having notice of the nature of the proceedings. Respondent had ample opportunity to be heard.

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[5] At the time of the issuance of *In re TC*, the provision now located at MCR 3.977(I)(1) was located at former MCR 5.974(G)(1). The current court rule is substantively identical to the former court rule at issue in *In re TC*. See *In re TC*, 251 Mich App at 369; see also *In re Utrera*, 281 Mich App at 13 n 4 (noting that, effective May 1, 2003, "MCR subchapter 5.900 was moved to new MCR subchapter 3.900, and MCR 3.977 corresponds to former MCR 5.974[]").

Indeed, the extensive length of the second termination hearing is attributable in part to the thorough cross-examination of the DHHS's witnesses by respondent's counsel and to the presentation by respondent's counsel of multiple witnesses. This contributed to the voluminous size of the record that the trial court had to review in preparing its written opinion. In addition, respondent fails to discuss or acknowledge the unprecedented COVID-19 pandemic that struck the state of Michigan shortly after closing arguments. The trial court explained that the pandemic required the court to devote time and resources to adjusting court operations in order to ensure the continuation of judicial services. This Court has rejected a similar but not identical due-process claim in part on the basis of the COVID-19 pandemic. See *id*. (noting that any delay in holding hearings could "be attributed to the unprecedented COVID-19 pandemic"). Further delay arose from the trial court's discovery, while preparing its written opinion, that respondent's former counsel, Landon David Bush, was suspended from the practice of law for failure to pay his bar dues when he presented closing argument on February 26, 2020; the trial court afforded the parties an opportunity to be heard regarding whether Bush's suspension had any effect on how this case should proceed. Overall, respondent has not shown that he was denied any procedural protections that should have been afforded in the circumstances of this case. His due-process claim is therefore unavailing.[6]

Respondent next argues that he was denied his constitutional rights to due process and equal protection[7] because of Bush's suspension; respondent seems to make a related argument that he was denied the effective assistance of counsel. Respondent's arguments fail.

In general, an issue must be raised in or decided by the trial court in order to be preserved for appellate review. *Glasker-Davis*, 333 Mich App at 227-228. Also, to preserve a constitutional claim, a party must object on that ground below. *In re TK*, 306 Mich App at 703. Respondent did not raise below the due-process and equal-protection challenges that he asserts on appeal related to the suspension of Bush's law license. Although the trial court addressed the issue of how to proceed in light of Bush's suspension, the court did not address the due-process and equal-protection claims asserted on appeal. Therefore, respondent's constitutional challenges are unpreserved.

Respondent also asserts on appeal a claim that Bush was ineffective during the termination hearing. To preserve a claim of ineffective assistance of counsel in a termination-of-parental-rights case, a respondent must move for a new termination hearing or an evidentiary hearing on

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[6] Respondent also makes a cursory assertion that the untimely issuance of the trial court's decision denied him his constitutional right to the equal protection of the laws. But respondent waived any equal-protection claim with respect to the timeliness issue because he failed to include it in his statement of questions presented. See *Seifeddine v Jaber*, 327 Mich App 514, 521; 934 NW2d 64 (2019). Moreover, his argument is cursory; he devotes a mere two sentences to asserting an equal-protection claim on this issue. Respondent "cannot leave it to this Court to make his arguments for him. His failure to adequately brief the issue constitutes abandonment." *Id*. (citation omitted).

[7] In the heading of his argument for this issue, respondent asserts that he was denied his constitutional right to equal protection, but he provides no argument regarding equal protection. Respondent "cannot leave it to this Court to make his arguments for him. His failure to adequately brief the issue constitutes abandonment." *Seifeddine*, 327 Mich App at 521 (citation omitted).

the issue of ineffective assistance of counsel. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). In a brief filed below in response to the trial court's inquiry regarding the effect of Bush's suspension, respondent asserted that the trial court's question regarding whether Bush was ineffective was premature and that respondent did not waive any right to raise an appellate claim regarding Bush's ineffectiveness. Respondent conceded that, under current caselaw, a suspension for failure to pay bar dues does not by itself establish ineffective assistance of counsel. Respondent did not move for a new termination hearing or an evidentiary hearing on the issue of ineffective assistance of counsel. Therefore, the issue of ineffective assistance of counsel is not preserved for appeal.

We disagree with the DHHS's contention that this entire issue is waived. "Waiver is the voluntary and intentional relinquishment of a known right. One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Varran v Granneman*, 312 Mich App 591, 623; 880 NW2d 242 (2015) (quotation marks and citations omitted). Although respondent failed to raise his due-process and equal-protection claims below, he did not voluntarily and intentionally relinquish a right to assert constitutional claims on appeal. Respondent said that his new attorney, Catherine M. O'Meara, did not wish to present a new closing argument, but respondent's appellate argument is not confined to Bush's closing argument. Although respondent agreed that the suspension of Bush's license did not by itself establish ineffective assistance of counsel, respondent's appellate argument does not rely solely on the suspension of Bush's license. Also, respondent's brief in the trial court expressly stated that he was not waiving a right to pursue an ineffective-assistance claim on appeal.

Any review of respondent's unpreserved due-process and equal-protection claims is for plain error affecting substantial rights. *In re Utrera*, 281 Mich App at 8. To obtain relief, respondent must show that an error occurred, that it was clear or obvious, and that the error affected his substantial rights. *In re VanDalen*, 293 Mich App at 135. Generally, an error affects substantial rights if it is prejudicial, i.e., it affected the outcome of the case. *In re Utrera*, 281 Mich App at 9.

"A claim of ineffective assistance of counsel is a mixed question of law and fact. A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008) (citation omitted). Because respondent failed to preserve his ineffective-assistance claim, this Court's review of the issue is limited to mistakes apparent on the record. *People v Head*, 323 Mich App 526, 538-539; 917 NW2d 752 (2018).

"The constitutional concepts of due process and equal protection . . . grant respondents in termination proceedings the right to counsel." *In re Powers*, 244 Mich App 111, 121; 624 NW2d 472 (2000).[8] "[A]lthough child protective proceedings are not criminal in nature, where the right to effective counsel arises from the Sixth Amendment, the Due Process Clause indirectly guarantees effective assistance of counsel in the context of child protective proceedings." *In re HRC*, 286 Mich App 444, 458; 781 NW2d 105 (2009). When analyzing a claim of ineffective

[8] A respondent's right to counsel in termination proceedings is specifically provided for by statutory and court rule provisions. See MCL 712A.17c(4); MCR 3.915(B)(1).

assistance of counsel in the context of a termination-of-parental-rights case, "this Court applies by analogy the principles of ineffective assistance of counsel as they have developed in the context of criminal law." *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988).

Looking by analogy to the relevant principles developed in criminal law, it follows that, to establish ineffective assistance of counsel, a respondent must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability exists that counsel's deficient performance prejudiced the respondent. *People v Lane*, 308 Mich App 38, 68; 862 NW2d 446 (2014). "Effective assistance of counsel is presumed, and the [respondent] bears a heavy burden of proving otherwise." *Head*, 323 Mich App at 539 (quotation marks, brackets, and citation omitted). The respondent must overcome the strong presumption that counsel's performance was derived from a sound strategy. *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). To establish prejudice, a respondent must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018) (quotation marks and citation omitted). A respondent "has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Initially, respondent asserts that Bush's suspension for failure to pay his bar dues affected hearing dates other than February 26, 2020, the date of closing arguments. However, the State Bar of Michigan's notice of suspension indisputably establishes that Bush was suspended effective February 12, 2020. The only termination hearing date after that was February 26, 2020, when closing arguments were presented. Therefore, Bush was not suspended on any date of the termination hearing other than February 26, 2020.

Moreover, the mere fact that Bush was suspended on one date of the termination hearing does not by itself establish a clear or obvious violation of respondent's constitutional rights or ineffective assistance of counsel per se. Although Bush was suspended for failure to pay his bar dues at the time of closing arguments, he was still an attorney. Our Supreme Court has explained:

> A suspended attorney is an attorney who has been suspended from the practice of law, but is still an attorney. A person who becomes an attorney remains an attorney until formally disbarred or otherwise permanently separated from the bar. A suspension does not alter the formal status as an attorney. [*People v Pubrat*, 451 Mich 589, 594-595; 548 NW2d 595 (1996).]

The fact that an attorney continued to practice law while under suspension does not necessitate the conclusion that the attorney's performance fell below an objective standard of reasonableness. *Id.* at 600. In *Pubrat*, our Supreme Court held that, although a suspended attorney's practice of law in a criminal case may warrant disciplinary proceedings against the attorney, those disciplinary proceedings were a separate matter and could not be used to attack the validity of the criminal defendant's conviction. *Id.* "The consequences of [the attorney's] actions are to be borne by him alone, rather than used to affect the conviction of his client." *Id.* at 601. A criminal defendant in such a situation could pursue a claim of ineffective assistance of counsel, but "[t]he possibility that an attorney's suspension may sometimes reflect on the effectiveness of representation does not justify a rule of reversal per se or automatic remand for a hearing on effectiveness." *Id.*

Accordingly, respondent has not established the existence of a clear or obvious violation of any constitutional rights or ineffective assistance of counsel per se arising from the mere fact of Bush's suspension as of the date of closing arguments. Bush's practice of law while suspended may have warranted and led to disciplinary proceedings against Bush, but that is a separate matter that may not be used to attack the validity of the order terminating respondent's parental rights. See *Pubrat*, 451 Mich at 600-601.

Although respondent's brief is not a model of clarity, he seems to suggest further grounds on which to claim that he was denied the effective assistance of counsel at the termination hearing. To the extent that respondent makes such additional arguments, they are unavailing.

Respondent asserts that Bush asked "to appear by telephone and arrived late to hearings." But respondent provides no citations to the record to support this assertion. MCR 7.212(C)(7) provides, in relevant part, "Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court." This Court will not search the record for factual support for a party's claims. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Anyway, respondent fails to present any argument to explain how a request to appear by telephone or any late arrivals rendered Bush's performance constitutionally deficient. Nor does respondent present an argument regarding how any such deficient performance was prejudicial; he makes no effort to demonstrate a reasonable probability of a different outcome but for the alleged unprofessional errors. Respondent "cannot leave it to this Court to make his arguments for him. His failure to adequately brief the issue constitutes abandonment." *Seifeddine v Jaber*, 327 Mich App 514, 521; 934 NW2d 64 (2019) (citation omitted).

Respondent suggests that Bush's appearance in this case while suspended led to disciplinary proceedings. Respondent states that "[t]he Attorney Grievance Commission's records appear to reference the instant case for the disciplinary suspension that followed [Bush's] administrative suspension." But respondent has not made any such records of the Attorney Grievance Commission part of the lower court record in this case, nor has he made any effort to properly place the Attorney Grievance Commission records before this Court.[9] This Court's review is limited to the lower court record, and it is generally impermissible to expand the record on appeal. See MCR 7.210(A); *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Anyway, assuming that there were disciplinary proceedings against Bush, such a fact would not by itself necessitate a conclusion that his performance in this case was constitutionally deficient and prejudicial. See *Pubrat*, 451 Mich at 600-601.

Finally, respondent asserts that Bush "was not focused upon proper challenge of the hearsay utilized against [respondent], as [Bush] was coping with his own disciplinary issues." Respondent says that the trial court should have allowed O'Meara to brief the hearsay issue. Respondent's argument fails. His contention that the trial court improperly admitted hearsay lacks merit for the reasons explained later. In particular, the Michigan Rules of Evidence, other than rules with respect to privileges, did not apply at the termination hearing, and the trial court was

[9] Respondent has not attached the Attorney Grievance Commission records to his brief on appeal, nor has he filed a motion to expand the record on appeal.

permitted to receive all relevant and material evidence. MCR 3.977(H)(2). "Failing 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). In any event, the record reflects that Bush objected repeatedly to the admission of hearsay, the trial court rejected Bush's position, and the trial court granted Bush a standing objection on the matter. The record therefore contradicts respondent's argument. Respondent has failed to establish the factual predicate of his claim that Bush was not focused on making hearsay objections.

Respondent next argues that the trial court erred and violated his constitutional rights to due process and equal protection by failing to follow the Michigan Rules of Evidence, including by admitting hearsay evidence, at the termination hearing. Respondent's argument fails.

In general, an issue must be raised in or decided by the trial court in order to be preserved for appellate review. *Glasker-Davis*, 333 Mich App at 227-228. Also, to preserve an evidentiary issue for appeal, a party opposing the admission of evidence must make a timely objection in the trial court on the same ground asserted on appeal. *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). Respondent repeatedly objected below to the admission of hearsay evidence, argued that the Michigan Rules of Evidence were applicable, and obtained a standing objection on the matter; the trial court rejected respondent's arguments. Hence, to the extent that respondent challenges the admission of hearsay evidence or the trial court's determination regarding the applicability of the Michigan Rules of Evidence, this issue is preserved for appeal.

To preserve a constitutional claim, a party must object on that ground below. *In re TK*, 306 Mich App at 703. In the trial court, respondent did not object on constitutional grounds to the admission of hearsay evidence or to the trial court's determination regarding the applicability of the Michigan Rules of Evidence. Hence, the constitutional aspect of the issue is unpreserved. *Id.*

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion; any preliminary questions of law are reviewed de novo. *Mueller v Brannigan Bros Restaurants & Taverns, LLC*, 323 Mich App 566, 571; 918 NW2d 545 (2018). "An abuse of discretion generally occurs only when the trial court's decision is outside the range of reasonable and principled outcomes, but a court also necessarily abuses its discretion by admitting evidence that is inadmissible as a matter of law." *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 604; 886 NW2d 135 (2016).

Any review of respondent's unpreserved due-process and equal-protection claims is for plain error affecting substantial rights. *In re Utrera*, 281 Mich App at 8. To obtain relief, respondent must show that an error occurred, that it was clear or obvious, and that the error affected his substantial rights. *In re VanDalen*, 293 Mich App at 135. Generally, an error affects substantial rights if it is prejudicial, i.e., it affected the outcome of the case. *In re Utrera*, 281 Mich App at 9.

Although respondent asserts in his issue heading that he was deprived of his constitutional rights to due process and equal protection when the trial court admitted hearsay evidence and failed to adhere to the Michigan Rules of Evidence, respondent presents no argument and cites no authority in support of his constitutional claims. "A party may not simply announce a position and leave it to this Court to make the party's arguments and search for authority to support the party's

position. Failure to adequately brief an issue constitutes abandonment." *Seifeddine*, 327 Mich App at 519-520 (citation omitted). Respondent's constitutional claims have thus been abandoned.

Moreover, the trial court correctly determined that the Michigan Rules of Evidence were inapplicable at the termination hearing, and the court properly received and considered all relevant and material evidence. MCR 3.977 "applies to all proceedings in which termination of parental rights is sought." MCR 3.977(A)(1). MCR 3.977(E) applies to termination of parental rights at the initial dispositional hearing; in that situation, the court must rely on legally admissible evidence in finding that statutory grounds for termination have been established. See MCR 3.977(E)(3). MCR 3.977(F) applies to a supplemental petition to terminate parental rights on the basis of new or different circumstances from what led the court to take jurisdiction; in that situation, the court likewise must rely on legally admissible evidence in finding that statutory grounds for termination exist. See MCR 3.977(F)(1)(b). If termination of parental rights is not sought at the initial dispositional hearing or on the basis of new or different circumstances, then MCR 3.977(H) applies to a supplemental petition to terminate parental rights. MCR 3.977(H)(2) provides that "[t]he Michigan Rules of Evidence do not apply, other than those with respect to privileges," and that "all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value."

Respondent argues that the trial court failed to comply with MCR 3.977(E)(3), but that provision applies to termination at the initial dispositional hearing. Respondent's parental rights were not terminated at the initial dispositional hearing. Respondent's initial dispositional hearing was held in 2015. The termination hearing at issue here was held in 2019 and 2020 pursuant to a second supplemental petition to terminate respondent's parental rights. Respondent's reliance on MCR 3.977(E)(3) is thus misplaced. The trial court correctly ruled that MCR 3.977(H) applied and that the Michigan Rules of Evidence, other than those with respect to privileges, were inapplicable. The court properly received and relied on all relevant and material evidence.[10]

We next address what appears to be an assertion by respondent that the trial court clearly erred in finding that statutory grounds existed to terminate respondent's parental rights. To the extent that respondent makes such an argument, it is unavailing.

"To terminate parental rights, a trial court must find by clear and convincing evidence that at least one statutory ground under MCL 712A.19b(3) has been established." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). This Court reviews "for clear error a trial court's finding of whether a statutory ground for termination has been proven by clear and convincing evidence." *Id*. Clear error exists when the reviewing court is definitely and firmly convinced that a mistake

[10] Respondent argued below that MCR 3.977(F) applied because termination was being sought on the basis of different circumstances from what led the court to take jurisdiction. The DHHS argued, and the trial court agreed, that the second supplemental termination petition alleged that the conditions that led the court to take jurisdiction had not been rectified; the second supplemental termination petition did not assert different circumstances. Hence, the court ruled, MCR 3.977(H) applied. On appeal, respondent does not renew his argument under MCR 3.977(F). This Court need not address aspects of a trial court's ruling that are unchallenged on appeal. See *Niederhouse v Palmerton*, 300 Mich App 625, 637 n 3; 836 NW2d 176 (2013).

was made. *Id.* "In applying the clear error standard in parental termination cases, regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Schadler*, 315 Mich App 406, 408-409; 890 NW2d 676 (2016) (quotation marks and citation omitted).

Initially, respondent's appellate presentation on this issue, to the extent that he makes one, is deficient. He does not raise this issue separately in his brief on appeal. Respondent's only real argument on this issue is that the court's findings when terminating his parental rights were improperly based on hearsay that was inadmissible under the Michigan Rules of Evidence; respondent asserts that there was no legally admissible evidence that he was unfit. But as explained earlier, the trial court correctly ruled that MCR 3.977(H) applied and that the Michigan Rules of Evidence, other than those with respect to privileges, were inapplicable. The court properly received and relied on all relevant and material evidence. Aside from his contention regarding the applicability of the Michigan Rules of Evidence, respondent makes generalized assertions that could be viewed as a challenge to the trial court's findings that statutory grounds for termination existed; he says that he completed his service plan and benefited from services. But aside from these conclusory assertions, he fails to provide any discernible argument regarding whether or how the trial court's findings under MCL 712A.19b(3)(c)(*i*) and (j) were clearly erroneous. Respondent "cannot leave it to this Court to make his arguments for him. His failure to adequately brief the issue constitutes abandonment." *Seifeddine*, 327 Mich App at 521 (citation omitted). Although the children's attorney raises this issue separately, challenges the trial court's ruling, and makes a fuller argument than respondent does, the children's attorney is not an appellant. Hence, the argument of the children's attorney does not alter the conclusion that this issue has been abandoned. We nonetheless address this issue.

> Termination of parental rights is proper under MCL 712A.19b(3)(c)(*i*) if the court finds:
>
> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age. . . .

This statutory ground is satisfied when the conditions that led to the adjudication continue to exist "despite time to make changes and the opportunity to take advantage of a variety of services." *In re White*, 303 Mich App 701, 710; 846 NW2d 61 (2014) (quotation marks, ellipsis, and citation omitted). It is not enough for a respondent to participate in services; the respondent must also benefit from the services. *In re TK*, 306 Mich App at 711.

It is undisputed that more than 182 days had elapsed since the issuance of the initial dispositional order. Also, the trial court did not clearly err in finding by clear and convincing evidence that the conditions that led to the adjudication continued to exist and that there was no reasonable likelihood that the conditions would be rectified within a reasonable time considering the children's ages.

The trial court noted that the conditions that led to the adjudication included verbal and physical abuse of AJB, domestic violence between respondent and MB in the presence of AJB, and inadequate supervision of CMB resulting in injuries to him. The trial court found that respondent continues to exhibit an inability to provide a safe, stable, and appropriate parental environment for both children, which was part of what led to the adjudication. The court noted that, during a parenting-time visit that was not supervised by the DHHS, respondent physically abused AJB by pushing AJB's knee into his face, which left a mark on his face. Respondent was also verbally hostile to the children when he yelled and cursed at them after CMB unbuckled his seatbelt. The court found that respondent did not sufficiently apply the skills he was taught in parenting classes and did not meaningfully change his parenting. Respondent continues to have abnormal anger issues and to exhibit an inability to communicate with the children in a way that fosters a nurturing and appropriate family dynamic. He has spanked AJB and has had inappropriate conversations with the boys; respondent has difficulty accepting feedback on his parenting skills. The court found that there was no reasonable likelihood that the conditions would be rectified in a reasonable time, given that respondent demonstrated little progress in his parenting and anger management over the years that this case has been pending. The children had spent most of their lives in foster care and could not wait indefinitely for respondent to improve his parenting skills.

We discern no clear error in the trial court's findings regarding MCL 712A.19b(3)(c)(*i*). The trial court thoroughly analyzed the evidence, credited the testimony of the DHHS's witnesses, and found respondent's witnesses to lack credibility. The court aptly noted that, despite having participated in parenting classes and anger-management therapy, respondent failed to apply what he was taught when he engaged in parenting time with his children. He continued to exhibit abnormal anger issues leading to verbal and physical abuse of the children during parenting time that was not supervised by the DHHS. In one instance, respondent yelled and cursed at both children after CMB unbuckled his seatbelt, and on another occasion, respondent pushed AJB's knee into his face, leaving a mark on his face. During parenting-time sessions supervised by the DHHS, respondent showed an inability to accept feedback regarding his parenting style and did not interact appropriately with the children. The trial court reasonably concluded that, given that the children had already spent most of their lives in foster care and given that respondent had failed to make any meaningful progress despite the multiple services provided to him, there was no reasonable likelihood that the conditions that led to adjudication would be rectified in a reasonable time considering the ages of the children. The court did not clearly err in finding that termination was justified under MCL 712A.19b(3)(c)(*i*).

Because termination was proper under MCL 712A.19b(3)(c)(*i*), and because only one statutory ground need be proven to terminate a respondent's parental rights, *In re Laster*, 303 Mich App 485, 495; 845 NW2d 540 (2013), this Court could decline to address the trial court's determination that a statutory ground for termination also existed under MCL 712A.19b(3)(j). We will nonetheless address that additional statutory ground.

Under MCL 712A.19b(3)(j), the trial court may terminate parental rights if the court finds, 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." A reasonable likelihood of either physical harm or emotional harm is sufficient to support termination under MCL 712A.19b(3)(j). *In re Hudson*, 294 Mich App 261, 268; 817

NW2d 115 (2011). "[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." *In re White*, 303 Mich App at 711.

In finding clear and convincing evidence to support termination under MCL 712A.19b(3)(j), the trial court aptly noted that respondent continued to be emotionally unstable and to lack parenting skills, thus placing the children in danger of emotional and physical harm. The children had reported physical discipline and abuse on the part of respondent. The court noted that, in addition to the evidence discussed in connection with MCL 712A.19b(3)(c)(*i*), Bach testified regarding CMB's disclosures that, during parenting time that the DHHS did not supervise, respondent had threatened to spank CMB and had hit CMB on the head, causing him to fall to his knees and hurt himself. AJB reported that respondent had spanked AJB during a parenting-time visit. The trial court found that "these instances of physical discipline and abuse occurring while [r]espondent's parenting time is not being monitored by [the] DHHS is probative of alarming concern that the boy[s], who both have special needs emotionally, will not be physically or emotionally safe if returned to [r]espondent's care." The court took note of testimony that AJB engaged in troubling and aggressive behavior that worsened during periods in which respondent's parenting time was increased, whereas AJB's behavior improved markedly when respondent's parenting time was decreased. The trial court found that respondent did not benefit from parenting classes and anger-management therapy. The trial court's findings were supported by the evidence credited by the court. The trial court did not clearly err in finding that termination was justified under MCL 712A.19b(3)(j).

Finally, respondent asserts on appeal that the trial court clearly erred in finding that termination of respondent's parental rights was in the best interests of the children. Respondent's argument is unavailing.

"Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012). "[T]he preponderance of the evidence standard applies to the best-interest determination." *In re Moss*, 301 Mich App at 83. This Court reviews for clear error the trial court's determination regarding the children's best interests. *In re White*, 303 Mich App at 713. Clear error exists when the reviewing court is definitely and firmly convinced that a mistake was made. *In re Schadler*, 315 Mich App at 408. "In applying the clear error standard in parental termination cases, regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Id*. at 408-409 (quotation marks and citation omitted).

Initially, respondent has waived this issue because he failed to include it in his statement of questions presented. *Seifeddine*, 327 Mich App at 521. Moreover, respondent's argument on this issue is made only in passing and is cursory, essentially consisting merely of a conclusory assertion that the children are bonded to respondent. Respondent "cannot leave it to this Court to make his arguments for him. His failure to adequately brief the issue constitutes abandonment." *Id*. (citation omitted). Although the children's attorney raises this issue separately, challenges the trial court's best-interests determination, and presents a fuller argument on this issue than respondent does, the children's attorney is not an appellant. Therefore, the argument of the

children's attorney on this issue does not alter the conclusion that this issue has been waived and abandoned. We nonetheless address this issue.

The trial court should weigh all available evidence when determining the children's best interests. *In re White,* 303 Mich App at 713.

> To determine whether termination of parental rights is in a child's best interests, the court should consider a wide variety of factors that may include 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. The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption. [*Id*. at 713-714 (quotation marks and citation omitted).]

Also, a child's placement with relatives weighs against termination and thus constitutes "a factor to be considered in determining whether termination is in the child's best interests." *In re Olive/Metts*, 297 Mich App at 43.

The trial court provided a separate best-interests analysis regarding each child. With respect to AJB, the court found that there was a very weak bond between respondent and AJB. Respondent exhibited a repeated inability to properly parent AJB during parenting time; respondent made inappropriate statements to AJB and imposed inappropriate discipline. Even if a weak bond existed between respondent and AJB, it was outweighed by AJB's need for permanency, stability, and safety, which could best be effectuated by termination of respondent's parental rights. Respondent did not meaningfully benefit from his case service plan. AJB has thrived in the home of his foster parents, who were willing to adopt AJB. Considering all of these factors, the court found that termination was in AJB's best interests.

As for CMB, the trial court found that there was little or no bond between respondent and CMB. Respondent repeatedly demonstrated an inability to properly parent CMB during parenting time; respondent yelled at and hit CMB. CMB had a critical need for permanence; removing him from the care of his maternal grandmother, Cynthia Focht, would be detrimental to him because he had lived with her for his entire life. Respondent did not meaningfully benefit from his case service plan. The court addressed the fact that CMB was placed with a relative, Focht, which the court acknowledged weighs against termination; but the court concluded that CMB's need for permanence and stability, his attachment to Focht, his anxiety and fear of respondent, Focht's willingness to adopt CMB, and CMB's overall success in Focht's care all favored termination. In sum, the court found that termination of respondent's parental rights was in CMB's best interests.

In short, the trial court considered relevant factors that this Court has identified as pertinent to the best-interests determination, and the court specifically discussed CMB's placement with a

relative. The court's findings are supported by the evidence credited by the court. The court did not clearly err in finding that termination of parental rights was in the children's best interests.[11]

Affirmed.

/s/ Brock A. Swartzle
/s/ Mark J. Cavanagh
/s/ Michael F. Gadola

[11] The children's attorney criticizes the trial court for considering testimony regarding each child's need for permanency, stability, and finality; the children's attorney says that there was no "actual measure" of such needs. But the children's attorney fails to explain this assertion or to cite authority requiring any particular method of measuring a child's needs for permanency, stability, and finality. Multiple professional witnesses presented by the DHHS testified in regard to such needs on the part of the children, and the case had been pending for many years, with the children having spent most of their lives in foster care. There was testimony that the children exhibited considerable anxiety and behavioral problems associated with the lack of certainty regarding their futures. It was not unreasonable for the trial court to credit testimony that the children needed permanency, stability, and finality. The children's attorney also criticizes the trial court for crediting testimony regarding the weak or nonexistent nature of any bond between the children and respondent. The children's attorney thinks that respondent has demonstrated "remarkable diligence" as a single father over the years that this case has been pending and that the court should have considered this "as an 'element' or 'force' invisibly uniting the father with his sons." However, there was ample testimony credited by the trial court establishing that the children had little or no bond with respondent. Overall, the arguments of the children's attorney are unconvincing in light of the deference that must be afforded to the trial court's assessment of the credibility of witnesses who appeared before it. See *In re Schadler*, 315 Mich App at 408-409.