STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
July 17, 2012

In the Matter of SPITLER, Minor.

No. 307429
Clinton Circuit Court
Family Division
LC No. 11-023111-NA

Before: GLEICHER, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Respondent, the father of the minor child, appeals as of right a circuit court order terminating his parental rights pursuant to MCL 712A.19b(3)(b)(*i*), (g), and (j). We affirm.

I. BASIC FACTS AND UNDERLYING PROCEEDINGS

On July 27, 2011, a Child Protective Services (CPS) worker filed a petition seeking circuit court jurisdiction of KS and her older half-brother BS, and an order removing respondent from the home. The petition alleged that five-year-old KS had been examined by a SANE nurse at Sparrow Hospital after the child "asked her grandmother why her daddy touches her privates." According to the petition, KS repeated the sexual abuse allegations during a forensic interview with a Lansing Police detective and described that respondent had also sexually abused KH, her younger half-sister.[1] The petition also named as a respondent KS's mother, S Spitler. The sole petition paragraph concerning Spitler averred that Spitler allowed respondent to remain in the home and to care for her children despite that he used marijuana, "drank to the point of getting 'smashed,'" and behaved abusively toward her and BS.

At an August 2, 2011 preliminary hearing, CPS worker Toni Fabus testified that Ingham County CPS had initially investigated KS's allegations and subsequently transferred the file to Clinton County, where KS resides. According to Fabus, "a similar petition" had been filed in Ingham County regarding KH. Fabus advised that after she received the Lansing police report she filed an amended petition seeking termination of respondent's parental rights to KS. Respondent's counsel conceded that "the allegations and the testimony do meet the standard for

[1] KH is respondent's biological daughter from another relationship. KH lived with her mother.

probable cause." Fabus recommended that KS and BS remain in Spitler's custody, and the circuit court adopted this recommendation.

On August 19, 2011, respondent's counsel filed a discovery request pursuant to "MCR 5.922"[2] seeking in relevant part:

> B. All written or recorded non-confidential statements made by any person with knowledge of the events in possession or control of Petitioner or law enforcement agency, including police reports and including all notes in connection with the preliminary hearing herein.
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> * * *
>
> G. Copies of all Protective Services reports of an investigative nature regarding all of the Respondents, including but not limited to, statements, medical evidence, medical records, and opinions of any and all physicians or health care specialists in connection with their observations, treatments rendered, or prescribed and prognosis in relation to the child as might be used in the litigation related to this matter.

On October 26, 2011, the court assumed jurisdiction based on Spitler's admission that she had taken no action after KS acted out sexually by placing herself in a "frog position," rubbing "her pee pee" while looking at respondent, and exclaiming "you rub me here daddy." Spitler further admitted to allowing respondent to remain in her home despite that he had been verbally abusive toward her in the presence of her son. Respondent's counsel objected to the court's assumption of jurisdiction, contending that "the mother has essentially testified against the father rather than made admissions to her own wrong doing." The circuit court overruled counsel's objection, finding that Spitler had permitted respondent "to reside on and off with her" and to supervise the children despite KS's statement suggesting sexual abuse.

On November 9, 2011, the circuit court conducted an initial dispositional hearing and a termination trial. KS did not testify at the trial, and the prosecutor failed to file a pretrial request for the admission of her statements under MCR 3.972(C)(2)(a). Nevertheless, the prosecutor offered evidence of KS's statements through testimony provided by other witnesses. Because respondent challenges the admissibility of a portion of this testimony, we review the evidence on which the circuit court relied in terminating respondent's parental rights.

Stacey Lynn Metz, a friend of Spitler's, recounted that in June 2011, KS positioned herself in a manner that revealed her panties, "put her hand on her crotch," and looked at respondent. The court ruled inadmissible KS's concomitant statement. Metz testified without

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[2] MCR 5.922 has been superseded by MCR 3.922, which governs discovery in juvenile proceedings.

objection that responded replied, "No I don't." According to Metz, KS then "kind of turned her head down and she didn't say anything else after that."

L Brewer, Spitler's mother and KS's grandmother, testified that she had witnessed respondent playing kickball with the children while smoking marijuana and had heard him "yelling and swearing" in their presence. In July 2011, while Brewer gave KS a bath, KS volunteered that she had "asked my daddy why he rubs my private." In response to Brewer's questioning, KS described that she "rub[bed] his privates sometimes too," and that the two shared other secrets because "he's a secret boy." Respondent preserved an objection to this testimony, which the circuit court admitted under MRE 803(3) as a statement of KS's then existing mental, emotional or physical condition. After KS's disclosures, Brewer and Spitler brought KS to a "forensic nurse" at Sparrow Hospital. The nurse interviewed KS and then contacted the Lansing police.

Lansing police detective Victoria Nevins described that her forensic interview of KS tested "alternative hypotheses . . . what may have happened, to see if there is something that could explain what the child said besides a sexual abuse allegation." Nevins ruled out that the events KS described were consistent with "a medical or hygiene purpose," "didn't happen at all," involved someone other than respondent, and that KS "was simply exploring her own body[.]" On cross-examination Nevins testified that although respondent had not been criminally charged, a criminal investigation remained open pending his participation in a polygraph examination:

> Q. Why is the investigation still open at this time?
>
> A. Waiting for a date for a polygraph exam.
>
> Q. Okay. And if none takes place are you comfortable or do you feel you have enough evidence to present this to the prosecutor's office?
>
> A. Yes, I will present it to the prosecutor's office with or without [respondent's] polygraph exam, but I would rather have that in hand.
>
> Q. Why?
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> A. It's - - we are required to offer polygraph exams to person's [sic] accused of sexual misconduct. It's only a delay at the [Michigan State Police] that it hasn't been done yet.
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> * * *
>
> Q. Were all of the statements [KS] made during the interview with her credible?
>
> A. I do remember having to correct her on a couple of things. It's - - I don't remember, it was something about like knowing my dog's name or, you know, things like that that she didn't know that I had to remind her of the rules of the interview.

Nevins' cross-examination concluded with her testimony that she believed KS "was telling the truth."

Additional witnesses testified concerning the Ingham County petition involving KH and a previous Clinton County petition involving respondent. The earlier proceedings centered on allegations that respondent had physically abused KH's mother, regularly used marijuana, and drank excessively. Respondent's compliance with services and a parent agency agreement led to dismissal of the earlier proceedings.

In a bench opinion, the circuit court terminated respondent's parental rights, reasoning in relevant part as follows:

> In this instance although there has been some conflict in fact by the different witnesses there are some witnesses who's [sic] testimony appear more credible or I give more weight. In looking what led up to this I have a situation where a mutual friend of [respondent's] and the mother's had a personal observation of some conduct and interaction between [KS] and her father that caused her concern that something had happened that was inappropriate. And she disclosed this to respondent mother and her - - and then later her sister because she was concerned that something wasn't appropriate about what happened.
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> * * *
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> Also the maternal grandmother testified that - - and while, you know, I understand my concern when relatives testify is that there is some bias there or agenda, but the things that she testified to that kind of take it - - separate a possible bias for all of her testimony and the reason why some of her testimony is persuasive to me is she indicated that she witnessed [respondent] smoking a joint while he was playing kickball with the kids while the kids were right with him. That she was consistent that he would get angry and talk to Ms. Spitler in an inappropriate way, swearing at her, yelling at her. That [KS] approached her saying - - in the bathroom saying I want to talk but [KS] reached out to her wanting to say something and regardless of what was said and I did deny admission of some of her statements but when she said I want to talk and she's approaching her grandmother who she has had a lot of contact with and made some disclosures, whatever was said even if none of that - - those statements were entered in, the grandmother's testimony was that child was taken to the hospital and a doctor - - and that a professional examined her and as a result of that examination the mother and grandmother were directed to take this child to the police station and this child had to undergo a forensic interview. So there were a chain of events that are not usual occurrences and not mandatory occurrences just because a child makes some disclosures or a relative may allege the conduct. So it seems to me there was something to what - - to what was concerning this little girl and a medical professional and law enforcement professional support that.
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> * * *

> Then Ms. Nevins testified, Detective Nevins who was very persuasive, her credentials were important in this situation because of the training she has had in forensic interviewing. She did indicate that she ruled out self exploration, that she ruled out there was something other than [respondent] involved, she ruled out that - - the possibility that nothing happened, and she ruled out that any contact was for medical or hygienic purposes. And she did state that regardless of what the polygraph indicates that she is going to send this information to the prosecutor to determine whether charges should be filed that she felt that strongly about the evidence that she had.
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> So I - - I do think that there is clear and convincing evidence that there was some sexual and/or physical abuse of this child by [respondent] and that given fact that there have been repeated incidents, repeated disclosures of not the same incident, that there is - - oh, and that there are ongoing concerns about abuse of alcohol, abuse of marijuana, that there is a reasonable likelihood that [KS] will suffer injury or abuse in the foreseeable future if placed in the parent's home.

II. ANALYSIS

Respondent initially contends that a discovery violation committed by the prosecutor denied his due process right to a fair trial. According to respondent, the prosecutor failed to provide respondent's trial counsel with the updated service plan (USP) prepared several days before the trial, and a report authored by Dr. Stephen Guertin, a physician who examined KS at the prosecutor's request. Whether a child protective proceeding complied with a respondent's right to due process presents a question of constitutional law that we review de novo. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009). Because respondent did not challenge this omission in the circuit court, we review his claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). An error affects substantial rights if it causes prejudice, meaning that it affects the outcome of the proceedings. *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).

MCR 3.922 governs discovery in child protective proceedings and sets forth, in pertinent part:

> (A) Discovery.
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> (1) The following materials are discoverable as of right in all proceedings provided they are requested no later than 21 days before trial unless the interests of justice otherwise dictate:
>
> (a) all written or recorded statements and notes of statements made by the juvenile or respondent that are in possession or control of petitioner or a law enforcement agency, including oral statements if they have been reduced to writing;
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> (b) all written or recorded nonconfidential statements made by any person with knowledge of the events in possession or control of petitioner or a law enforcement agency, including police reports;

* * *

> (f) the results of all scientific, medical, or other expert tests or experiments, including the reports or findings of all experts, that are relevant to the subject matter of the petition;
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> * * *
>
> (2) On motion of a party, the court may permit discovery of any other materials and evidence[.] . . . Absent manifest injustice, no motion for discovery will be granted unless the moving party has requested and has not been provided the materials or evidence sought through an order of discovery.
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> * * *
>
> (4) Failure to comply with subrules (1) and (2) may result in such sanctions, as applicable, as set forth in MCR 2.313.

We agree with respondent that the USP and Dr. Guertin's report fell within MCR 3.922(A)(1)(f), and that the prosecutor should have supplied these records to respondent's counsel. Furthermore, under general discovery principles, respondent's reasonable discovery request placed the prosecutor under an identical obligation. "The ultimate objective of pretrial discovery is to make available to all parties, in advance of trial, all relevant facts which might be admitted into evidence at trial." *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993). However, respondent has not provided this Court with a copy of Dr. Guertin's report. In the absence of any record setting forth Dr. Guertin's findings and conclusions we are unable to determine whether his report might have been relevant to respondent's defense, or whether the prosecutor's failure to disclose it prejudiced respondent's due process rights.

Our review of the USP reveals that nothing in it qualified as either exculpatory or helpful to respondent. Respondent points to several report entries made in September 2011 reflecting Nevins' evaluation of respondent's criminal liability. In an entry dated September 12, 2011, a CPS worker recounted:

> Detective Nevins . . . is not moving forward with charges because it would be too hard to prove relying on a 5 year old to take the stand. She also observed Dr. Guertin's report and there is not strong enough evidence in the report to hold up in court.

The USP included an email from Nevins relating as follows:

> I received a very scathing and threatening message from [Spitler] saying that if her child isn't safe, she will be suing everyone involved, mostly me for mishandling the case.
>
> I have asked my two co-workers to peer-review the case to see it [sic] they can see anything I have missed. One co-worker has already done so and

> concluded that the case would be impossible to prosecute. My other co-worker will review it soon.
>
> Even if all three of us feel the case is not strong enough, I will send this case to the Prosecutor's office for review - - - and yes I told you otherwise. Maybe they will see things differently and issue a warrant.

This evidence neither contradicts nor weakens the testimony Nevins offered at the November 2011 termination trial, and does not qualify as exculpatory. Nevins took the position that after respondent submitted to a polygraph she would present the results of her investigation to the prosecutor. She was not asked, and did not volunteer, whether she had an opinion as to the strength or weakness of the evidence supporting respondent's potential criminal liability. Moreover, the circuit court judge undoubtedly was aware of the heightened standard of proof applicable in a criminal trial and the difficulties inherent in presenting to a jury the testimony of a very young child. Despite our conclusion that the USP entries should have been provided to respondent's counsel in advance of the trial, we discern no prejudice.

Respondent next contends that because the amended petition "does not contain any allegations of wrong doing by the mother; just the Respondent-father," the circuit court erred by assuming jurisdiction. Contrary to respondent's argument, the amended petition avers that Spitler allowed respondent to remain in the home despite his marijuana use, abusiveness, and KS's allegations. Spitler's plea to having failed to protect her children sufficed to confer jurisdiction. *In re SLH*, 277 Mich App 662, 669-670; 747 NW2d 547 (2008).

Next, respondent challenges the admission of certain hearsay statements attributed to KS. Respondent contends that the circuit court erred by admitting Brewer's testimony under MRE 803(3) in light of the prosecutor's failure to request a "tender years" hearing under MCR 3.972(C)(2)(a). We have located no authority that mandates a "tender years" hearing if a child's testimony is admissible pursuant to a recognized exception to the hearsay rule. In this case, however, we agree with defendant that KS's statements should not have been admitted into evidence.

MRE 803(3), the state of mind exception to the hearsay rule, permits the admission of:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

"[S]tatements indicative of the declarant's state of mind are admissible when state of mind is an issue in the case." *People v DeWitt*, 173 Mich App 261, 268; 433 NW2d 325 (1988). "[T]he scope of MRE 803(3) is very narrow . . . ." *UAW v Dorsey (On Remand)*, 273 Mich App 26, 38; 730 NW2d 17 (2006). Here, KS's state of mind was not at issue; whether respondent had sexually abused her was. The prosecutor introduced KS's statement to prove its truth rather than to establish KS's mental state. Consequently the circuit court erred by admitting through Brewer the substance of KS's statements describing sexual abuse. Nevertheless, other legally admissible

evidence, particularly the testimony of Detective Nevins, clearly and convincingly substantiated the circuit court's determination that the prosecutor established grounds for termination of respondent's parental rights.

Lastly, respondent argues that the circuit court improperly relied on stale evidence of respondent's prior alcohol and marijuana use to terminate his parental rights. Respondent contends that after jurisdiction under the 2009 petition terminated, he "displayed a lengthy period of time remaining alcohol and drug free," and that the testimony related to his use of substances arose from events preceding 2009. Respondent further alleges that the circuit court improperly relied on allegations in the Ingham petition that he had abused KS's half-sister, KH. Evidence presented by Metz and Brewer demonstrated that respondent used alcohol and marijuana in 2011, while in the children's presence. Because the circuit court never mentioned the Ingham petition, we reject that any evidence concerning it played even a small role in the proceedings.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Henry William Saad
/s/ Jane M. Beckering