STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
November 27, 2012

In the Matter of H. SEWEJKIS, Minor.

No. 310381
Wayne Circuit Court
Family Division
LC No. 12-504780-NA

Before: JANSEN, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Respondent, A.L. Sewejkis, appeals as of right the trial court order terminating his parental rights to the minor child, H. Sewejkis, under MCL 712A.19b(3)(b)(*i*), (g), (j), (k)(*iii*), and (k)(*v*). We affirm.

This case arises from respondent's abuse of his infant son. On December 7, 2011, respondent slammed the child's head into a floor, causing severe injury. Hours after the incident, respondent and the child's mother, L. Garlick, took the child to the hospital. The child underwent emergency surgery and suffered extensive brain damage. Respondent was arrested, and charged with first-degree child abuse. Termination proceedings began directly after the incident.

Respondent argues that that the trial court erred when it denied his request for an adjournment pending his criminal trial because, in doing so, the court failed to protect his Fifth Amendment right against self-incrimination. We disagree.

A ruling on a motion for an adjournment is reviewed for an abuse of discretion. *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008). An abuse of discretion occurs when the outcome is outside the range of principled outcomes. *Id.* at 19.

Adjournments of trials or hearings in child protective proceedings should only be granted: "(1) for good cause, (2) after taking into consideration the best interests of the child, and (3) for as short a period of time as necessary." MCR 3.923(G). Good cause meriting an adjournment of termination of parental rights proceedings requires a showing of "a legally sufficient or substantial reason," for the adjournment. *Utrera*, 281 Mich App at 10-11. Respondent claimed, in the lower court and on appeal, that there was good cause to adjourn—the protection of his Fifth Amendment right against self-incrimination.

The United States and Michigan Constitutions provide for a privilege against self-incrimination. US Const, Am V; Const 1963, art 1, § 17; *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 383-384; 808 NW2d 511 (2011). The right against self-incrimination allows a person to decline to testify against himself during a criminal trial in which he is a defendant. *Id.* at 384. "It also allows a person not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, when the answers might incriminate him in future criminal proceedings." *Id.* See also *In re MU*, 264 Mich App 270, 283, n 5; 690 NW2d 495 (2004). Child protective proceedings are civil proceedings. See MCL 712A.1. Therefore, respondent had a right to invoke the Fifth Amendment right against self-incrimination if faced with an incriminating question during the termination proceedings. On appeal, respondent does not explain how his right was violated, or how the court failed to protect his right. Respondent was never called to testify, and he did not attempt to testify. If he had testified, he could have asserted his right against self-incrimination if he was asked an incriminating question. Additionally, respondent claims that the court prevented him from presenting a defense at the termination hearing. Respondent stated that he called no witnesses and presented no evidence, but does not explain how the trial court's denial of his motion to adjourn prevented him from presenting evidence or witnesses. Moreover, this Court has found that a trial court's denial of a respondent's motion to adjourn child protective proceedings until after a criminal trial does not violate a respondent's Fifth Amendment right against self-incrimination. *In re Stricklin*, 148 Mich App 659, 663-666; 384 NW2d 833 (1986). For these reasons, the trial court did not abuse its discretion by denying respondent's motion to adjourn.

Respondent next argues that the trial court abused its discretion when it admitted certain evidence over respondent's objections at the termination hearing. We disagree.

A trial court's decision regarding the admission of evidence is reviewed for an abuse of discretion. See *Utrera*, 281 Mich App at 19. An abuse of discretion occurs when the outcome falls outside the range of principled outcomes. *Id.*

First, defendant challenges statements made by respondent's mother, Donna Bird, to the child's treating doctor, Lisa Markman, at the hospital after the child was admitted. During the termination hearing, Markman testified regarding Bird's statements. Specifically, Bird told Markman that, although she did not have any information about the specific incident, she had concerns about respondent's inappropriate interactions with the child in the past. She had seen respondent throw the child across a room onto a bed. Bird had heard respondent scream and yell at the child. Additionally, respondent told Bird that he had taped the child's pacifier to his mouth. Bird had called Child Protective Services (CPS) on a number of occasions because of respondent's behavior. Respondent argues on appeal that the statements made by Bird were inadmissible hearsay because the statements were not made for the purpose of medical treatment or diagnosis and because the statements were not made by the victim of the abuse. We disagree.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); see *Utrera*, 281 Mich App at 18. Generally, hearsay is inadmissible. MRE 802. However, MRE 803 provides several exceptions. MRE 803. MRE 803(4) provides for an exception to hearsay for statements made for the purpose of medical treatment or diagnosis. MRE 803(4) provides:

> (4) Statements made for purposes of medical treatment or medical diagnosis in connection with treatment. Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment. MRE 803(4).

The supporting rationale behind MRE 803(4) is "the existence of (1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient." *Merrow v Bofferding*, 458 Mich 617, 629; 581 NW2d 696 (1998). Therefore, admissibility of a statement under this exception requires both reliability of the declarant, shown by self-interested motivation, and the statement must have been reasonably necessary to the diagnosis and treatment of the patient.

Bird's statements were sufficiently self-interested to justify their reliability. Bird was the child's paternal grandmother, and went to the hospital because she was concerned for the child's well being. At the hospital, Markman sought out the child's family in order to obtain his history and ascertain what happened to him. Markman could not find L. Garlick, so she asked if any other family members were there, and was directed to Bird. Bird was crying and very upset when talking to Markman. Based on these facts, Bird made the statements to Markman because she was concerned for her grandson, who was injured in the hospital. Her statements were intended to assist Markman, not incriminate respondent. Therefore, Bird's statements were reliable.

Bird's statement was also made for the purpose of medical treatment or diagnosis. H. Sewejkis was only four months old and came to the hospital with severe injuries indicating abuse. Some of the injuries occurred within 72 hours, but there was also an indication of injuries that had occurred earlier. Therefore, Bird's statements, which suggested possible abuse by respondent, were relevant to the child's injuries. Moreover, "[a] physician should also be aware of whether a child will be returned to an abusive home." *People v Meeboer*, 439 Mich 310, 329; 484 NW2d 621 (1992). Given the fact that the abuse was perpetrated by a family member, identification of the assailant was relevant to the medical treatment.

Respondent argues that because Bird was not the victim of the abuse, her statements to Markman cannot qualify as statements made for medical treatment or diagnosis. Respondent's argument is not convincing. In *Merrow*, the Michigan Supreme Court found that the patient history contained in medical records could include information obtained by the patient directly or from the patient's companion. *Merrow*, 458 Mich at 626. In this case, the child was incapable of providing his own medical history because he was only four months old. If respondent's argument were accepted, it would preclude admission of patient histories obtained by a doctor whenever the patient was an infant. That effect would be overly encompassing and not promote the rationale behind MRE 803(4). Therefore, Bird, although not the patient, was able to provide a patient history for the child.

Even assuming Bird's statements to Markman was inadmissible hearsay, its admission did not constitute reversible error. The improper admission of hearsay evidence in a termination

of parental rights proceeding does not require reversal of the termination if the legally admissible evidence established clear and convincing evidence of the statutory grounds for termination. *Utrera*, 281 Mich App at 21-22. In this case, there was substantial evidence justifying the termination of respondent's parental rights. Most notably, testimony regarding respondent's statements that he had slammed the child's head into the floor. Because there was legally admissible evidence showing respondent's abusive conduct to the child, respondent would not be entitled to reversal even if an evidentiary error were demonstrated.

Respondent also argues that admission of Bird's statements violated his constitutional right to confrontation because respondent was not able to cross-examine Bird regarding her statements. However, an accused's right under the United States Constitution to be confronted with the witnesses against him does not apply to civil proceedings. *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 607; 683 NW2d 759 (2004). Child protective proceedings are civil proceedings. See MCL 712A.1. Therefore, respondent's argument on this issue lacks merit.

Second, respondent challenges the admissibility of statements he made to detective Timothy Wright and L. Garlick. Respondent argues that the statements were made during a custodial interrogation before he was administered the required *Miranda*[1] warnings, and when the court failed to determine the voluntariness of his statements, it violated his right to due process. Respondent contends his statements to L. Garlick following his interview with Wright were inadmissible under the fruit of the poisonous tree doctrine because the evidence would not have been discovered without the illegal conduct of police. We disagree.

"A statement taken without benefit of *Miranda* warnings is not barred from evidence in a civil proceeding." *Birdsey v Grand Blanc Community Sch*, 130 Mich App 718, 722; 344 NW2d 342 (1983). "The *Miranda* rule is not a constitutional right but, rather, a procedural safeguard designed to protect an individual's Fifth Amendment privilege against self-incrimination." *Id*. Child protective proceedings are civil proceedings because, "in child protective proceedings, the focus is the protection of the child, not the punishment of the parent, nor the vindication of the public interest in the enforcement of the criminal law." *MU*, 264 Mich App at 281 (internal quotation marks and citations omitted). Moreover, child protective proceedings are statutorily not criminal in nature. MCL 712A.1. Therefore, even if respondent was entitled to *Miranda* warnings, Wright's failure to provide the warnings would not bar respondent's statements from admission at trial, and respondent's statements to L. Garlick would, therefore, also be admissible. Respondent attempts to distinguish his case by asserting that there had not yet been a determination in his pending criminal proceedings whether his statements were voluntary. However, even if the statements were determined to be inadmissible in the criminal proceedings, it would not impact the admissibility of the statements in the child protective proceedings.

Third, respondent challenges the admissibility of a police report prepared by Wright. When the report was admitted, the court specified that its admission was limited only to the

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

statements it contained that were made by respondent. Respondent argues that the police report was inadmissible because it contained hearsay and was adversarial in nature. We disagree.

Although hearsay, evidence of public records of matters observed pursuant to duty imposed by law are admissible, but reports containing matters observed by police officers in criminal cases are not. MRE 803(8). The admitted portions of the police report in this civil proceeding only described matters that were actually observed by Wright. See *In re DMK*, 289 Mich App 246, 258, n 6; 796 NW2d 129 (2010). Furthermore, respondent's statements to Wright constitute admissions by a party opponent, which is a hearsay exclusion. MRE 801(d)(2). Therefore, the police report, as admitted in its limited capacity, was not hearsay and was properly admitted. Even assuming the police report did constitute inadmissible hearsay, its admission did not constitute reversible error because there was substantial evidence justifying the termination of respondent's rights. *Utrera*, 281 Mich App at 21-22.

Respondent next argues that the trial court erred in finding that there was clear and convincing evidence of the grounds for termination pursuant to MCL 712A.19b(3)(b)(*i*), (g), (k)(*iii*), and (k)(*v*), and that it was in the child's best interests to terminate respondent's parental rights. We disagree.

We review the trial court's finding that a ground for termination has been established and that termination is in a child's best interests for clear error. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009), quoting *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* at 91.

"To terminate parental rights, a trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been proved by clear and convincing evidence." *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). "Only one statutory ground need be established by clear and convincing evidence to terminate a respondent's parental rights, even if the court erroneously found sufficient evidence under other statutory grounds." *Id.* If a statutory ground for termination is established, and the trial court finds that termination of parental rights is in the child's best interests, the court must order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made. *Id.* at 32-33.

The trial court did not clearly err in finding that there was clear and convincing evidence of the grounds for termination pursuant to MCL 712A.19b(3)(b)(*i*), (g), (k)(*iii*), and (k)(*v*). MCL 712A.19b(3)(b)(*i*) provides a statutory ground for termination if the child has suffered physical injury or physical or sexual abuse and the parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home. MCL 712A.19b(3)(k)(*iii*) provides a statutory ground for termination if the parent abused the child and the abuse included battering, torture, or other severe abuse. MCL 712A.19b(3)(k)(*v*) provides a statutory ground for termination if the parent abused the child and the abuse included a life-threatening injury. Because MCL 712A.19b(3)(b)(*i*), (k)(*iii*), and k(*v*) all relate to abuse by a parent, they are considered together.

MCL 712A.19b(3)(b)(*i*), (k)(*iii*), and k(*v*) were all established by clear and convincing evidence at the termination hearing. The evidence showed that on December 7, 2011, respondent was watching H. Sewejkis while L. Garlick was at work. L. Garlick went home at about 3:00 p.m. for lunch, and the child was fine at that time. At about 6:00 p.m., respondent called L. Garlick, and told her that the child had fallen off the couch. Later, respondent admitted to Wright and L. Garlick that the child had not fallen off the couch. The child was crying, and respondent got frustrated, lifted his shoulders, and slammed his head into the floor. Respondent told a foster care worker that if he had "just been allowed to go outside and smoke a cigarette, things would have been different." After the incident, L. Garlick and respondent exchanged several text messages regarding the child's condition. Respondent told L. Garlick that the child was "still breathing and moving a little bit," and that, "One of his pupils is bigger than the other." When L. Garlick returned home at 9:00 p.m., she immediately observed that the child was making unusual sounds, a "monotonous moany-whine type." She also saw that his face was "droopy," on one side, and that he was not responsive. Respondent and L. Garlick then took the child to the hospital. After the child was admitted to the hospital, he underwent emergency surgery because he had significant brain swelling. He suffered two skull fractures, bleeding in his brain, and multiple inner-retinal hemorrhages in his right eye. Markman unequivocally testified that the child was the victim of abusive head trauma. Additionally, the child's injuries indicated that he was struck at least twice, and that one injury occurred within 72 hours of his admission to the hospital.

Initially, the child's injuries were expected to be fatal, but he was able to survive. However, there were serious and lasting effects from the injuries. He suffered severe brain damage, and the left side of his brain was extensively damaged. Because the left side of the brain controls the right side of the body, the child had difficulty with the right side of his body. He could not lift his head or sit by himself, and it was unlikely that he would ever be able to do those things. He had no hearing in his right ear, it was unclear if he could see, and he had a feeding tube in place. The child had to spend several weeks in the hospital recovering from his injuries, and even after his release, it was expected that he would continue to be severely impaired for his entire life.

Based on the facts, there was clear and convincing evidence that respondent physically injured and severely abused the child, resulting in a life-threatening injury. Respondent not only admitted to slamming the four-month-old's head into the floor, but the evidence established that the child was the victim of abusive head trauma and that respondent was alone with the child when the injuries were sustained. Based on respondent's abusive behavior, there was a reasonable likelihood that the child would suffer from injury or abuse in the future if returned to respondent's home.

Respondent argues that because Markman testified that the child's injuries had occurred within 72 hours, there was a question regarding whether respondent's actions had caused the injuries, particularly considering the fact that the child suffered multiple skull fractures and respondent only admitted to slamming the child's head on to the floor one time. However, while Markman testified that the injuries could have occurred within 72 hours, she also stated that the injuries most likely occurred only hours before the child's admission to the hospital because the injuries were so severe that the child would not have been able to survive for more than a few hours. Furthermore, just because the injuries could have occurred within 72 hours did not mean

that the injuries did not occur on December 7, 2011. While the evidence did show that the child suffered two skull fractures, given the evidence regarding respondent's past behavior toward the child, it was reasonable for the court to find that respondent slammed the child's head into the ground multiple times or that respondent had previously caused the child harm that went untreated.

MCL 712A.19b(3)(g) states that a court must find by clear and convincing evidence that "[t]he parent, without regard to intent, 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." There was clear and convincing evidence to show that respondent failed to properly care for the child. In addition to the evidence regarding the December 7, 2011, injury, there was also evidence presented that respondent had mistreated the child at other times. Two prior referrals to CPS were made in regard to the child, and one referral was specifically made in reference to respondent. According to the CPS worker, it was reported that respondent had been putting his hand and medical tape over the child's mouth to stop the child from crying, and that respondent had shaken the child. While respondent denied the allegations and the reports were ultimately unsubstantiated, CPS offered preventative services, which respondent explicitly refused. The child's family members also stated that respondent exhibited inappropriate behavior toward the child. The child's paternal grandfather testified that the child had a bruise on his face on Thanksgiving in 2011. Respondent's mother, Bird, told Markman that she had witnessed respondent throw the child across the room and scream and yell at the child, and that respondent told her he taped a pacifier to the child's mouth to stop him from crying. Even L. Garlick admitted to sending a Facebook message to a friend that said respondent was endangering the child. While there was testimony from L. Garlick that respondent loved the child and had a bond with him, it does not discount the evidence presented regarding respondent's violent and abusive behavior toward the child. Based on respondent's mistreatment of the child before December 7, 2011, and his actions on December 7, 2011, there was clear and convincing evidence that respondent failed to provide proper care and custody for the child. Given the severity of respondent's abuse and the significance of the child's injuries, there was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time.

The court did not clearly err in finding that it was in the child's best interests to terminate respondent's parental rights.

MCL 712A.19b(5) provides:

> (5) If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made. [MCL 712A.19b(5).]

After finding that at least one of the statutory grounds for termination has been met, a court must then determine whether termination is in the child's best interests. "In deciding whether termination is in the child's best interests, the court may consider 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." *In re Olive/Metts*, ___ Mich App ___;

___ NW2d ___ (Docket No. 306279, issued June 5, 2012) (slip op at 3) (internal quotation marks and citations omitted).

The court did not err in determining that termination was in the child's best interests. Respondent abused the child, and caused significant and lasting injuries that will impact the child's life permanently. As a result of the injuries, the right side of the child's body was paralyzed, including his right shoulder, arm, hand, and eye. The child had to eat from a feeding tube and take daily pain and anti-seizure medication. The full extent of his injuries was unknown because he was so young, but at the time of the hearing, his motor and physical skills were that of a three-month old child. Even assuming respondent did love and bond with the child before the injuries, respondent's abuse and the child's extensive injuries surely eliminated that bond. The child's well being was better served in an environment without abuse that could support his ongoing physical and mental challenges.

Affirmed.

/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan