STATE OF MICHIGAN

COURT OF APPEALS

In re R. R. BOWERMAN, Minor.

UNPUBLISHED
May 16, 2017

No. 335080
Oakland Circuit Court
Family Division
LC No. 2015-837770-NA

Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Respondent father appeals by leave granted the circuit court's order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(g), (j), and (k)(*ii*). We affirm.

This case arose from the child's disclosure that respondent had sexually assaulted her several years before when she was a young girl. The child testified that in the summer when she was "coming up on" her eighth birthday, she went with respondent, her stepmother, and half-brothers on an overnight trip to a waterpark, after which they returned home to her grandmother's farmhouse. After her stepmother left the house, respondent came into the upstairs bedroom where the child stayed when she visited him and he started touching her chest area over her clothing and "down [t]here" (in the area of covered by her pants) under her clothing. The touching escalated to respondent removing her pants and underwear, getting on top of her, and penetrating her vagina with his penis. During the incident, respondent held her mouth shut and she did not move and said nothing. The child recalled urinating on the bed as a result of the incident. According to the child, when her stepmother returned home, respondent got up, left the room, went downstairs, and told her stepmother that the child had "an accident." Respondent then returned to the child's room, took her into the bathroom in the hallway to clean up, and told the child he would kill her if she told anyone what had occurred. Respondent then went downstairs and acted like nothing happened.

For several years, the child told no one about the sexual assault and never spoke to respondent about it. The child testified that she was scared to tell and believed respondent's threat that he would kill her because (a) she had observed incidences of domestic violence between respondent and her stepmother, (b) respondent had a really bad temper, and (c) he would scream, swear, call the child names, and push the child around. According to the child, respondent did not sexually assault her again.

In 2015, when the child was 16 years old, she disclosed to her best friend and subsequently to her mother that respondent had sexually assaulted her when she was a young

girl. As a result of her disclosure, petitioner initiated an investigation, which ultimately led to these proceedings seeking to terminate respondent's parental rights at the initial disposition. Respondent denied ever sexually assaulting the child and attempted to discredit the child's account by highlighting inconsistencies in her testimony and the contradicting testimony regarding the circumstances surrounding the alleged assault. After finding that the child's testimony "did not appear embellished or exaggerated in any way and . . . with respect to all the major details of the assault was completely credible," the circuit court assumed jurisdiction over the child under MCL 712A.2(b) and terminated respondent's parental rights under MCL 712A.19b(3)(g), (j), and (k)(*ii*).

I. JURISDICTION

Respondent argues that the circuit court clearly erred in assuming jurisdiction over the child under MCL 712A.2(b). We disagree.

> To properly exercise jurisdiction, the trial court must find that a statutory basis for jurisdiction exists. Jurisdiction must be established by a preponderance of the evidence. We review the trial court's decision to exercise jurisdiction for clear error in light of the court's findings of fact. [*In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004) (internal citations omitted).]

A trial court's finding of fact is "clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *Id.* at 296-297.

Respondent challenges the circuit court's credibility determination. However, after a review of the testimony in light of the matters raised by defendant, we conclude that the court did not clearly err in finding the child's testimony to be credible with respect to the major details of the assault. See *id*. at 295. As respondent asserts, the child's testimony regarding the circumstances surrounding the sexual assault is not entirely without inconsistencies and there is no other evidence to substantiate the sexual assault. However, the child never wavered in her testimony regarding the sexual assault and testified consistently, with certainty, regarding the assault. In particular, the child testified that respondent sexually assaulted her, including penetrating her vagina with his penis, when she was about 8 years old, in the bedroom she stayed in when she visited respondent at her grandmother's farmhouse, and after the family had visited a waterpark in the summer.

Despite the numerous issues raised by respondent to attempt to discredit the child's testimony, ultimately this case hinged on the credibility of the witnesses and we must accord due deference to the circuit court's credibility determinations in light of its special opportunity to observe the witnesses. See *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989), citing MCR 2.613(C). This Court has previously recognized that, when a respondent denies sexually assaulting a child, but the trial court believes the testimony of the child, "[i]t is not for this Court to displace the trial court's credibility determination." *In re HRC*, 286 Mich App 444, 460; 781 NW2d 105 (2009).

And, here, although there was testimony indicating that respondent did not actually reside at his mother's farmhouse during the time period of the sexual assault, this fact, as the court found, does not undermine the child's testimony that the assault occurred at the farmhouse. The evidence also showed that respondent exercised parenting time with the child at the farmhouse even when he was not living there, especially in the summers. Further, although there was testimony contradicting the child's testimony regarding the family trip to the waterpark before the assault occurred, as the court found, the child's testimony was corroborated by her mother who testified that the child went on a trip to a waterpark with respondent and his wife during the same time period that the child stated the assault occurred. And, although there was no other evidence to substantiate the sexual assault, it is well established that a sexual assault may be proven based "on the uncorroborated evidence of a CSC victim[.]" *People v Lemmon*, 456 Mich 625, 642 n 22; 576 NW2d 129 (1998).

Considering the evidence of record and giving due regard to the circuit court's special opportunity to judge the credibility of the child, as well as the other witnesses, we are not definitely and firmly convinced that the court made a mistake in its credibility determination. See *In re Miller*, 433 Mich at 337; *In re BZ*, 264 Mich App at 296-297. Further, based on the child's account of the serious sexual assault perpetrated on her by respondent, we agree that a preponderance of the evidence established a statutory basis for the court to assume jurisdiction over the child under MCL 712A.2(b). See *id*. at 295. The child's testimony clearly established that there was a substantial risk of harm to her wellbeing, MCL 712A.2(b)(1), and that respondent's home was unfit "by reason of neglect, cruelty, drunkenness, criminality, or depravity," MCL 712A.2(b)(2). Therefore, the court's decision to exercise jurisdiction over the child was not clearly erroneous. See *In re BZ*, 264 Mich App at 295.

II. STATUTORY GROUNDS FOR TERMINATION

Respondent also argues that the circuit court clearly erred in finding that petitioner established statutory grounds for termination under MCL 712.19b(3)(g), (j), and (k)(*ii*). We disagree.

Termination of parental rights is appropriate where the petitioner proves by clear and convincing evidence at least one statutory ground for termination under MCL 712A.19b(3). *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012). We review for clear error the circuit court's decision that a statutory ground for termination has been proven by clear and convincing evidence. *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003). A decision of the circuit court is clearly erroneous if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Id*. at 209-210.

The circuit court's determination that clear and convincing evidence established grounds for termination under MCL 712A.19b(3)(g), (j), and (k)(*ii*) was not clearly erroneous. MCL 712A.19b(3)(g) provides for termination where "[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." MCL 712A.19b(3)(j) provides for termination where "[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." MCL 712A.19b(3)(k)(*ii*) provides for termination when the

parent abused the child and the abuse included "[c]riminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate."

As he did in his claim challenging the circuit court's decision to assume jurisdiction over the child, respondent again challenges the court's credibility determination. But as discussed above, the court found the child's account of the sexual assault credible in all major respects and we defer to that credibility determination. See *In re HRC*, 286 Mich App at 460. Accordingly, the child's testimony that respondent sexually assaulted her when she was a young child while visiting him at her grandmother's farmhouse and that the assault started with him touching her chest area and vagina and then escalated to penetration of her vagina with his penis, clearly and convincingly established that respondent abused the child and the abuse included criminal sexual conduct involving penetration or attempted penetration as set forth under MCL 712A.19b(3)(k)(*ii*). See *In re Olive/Metts*, 297 Mich App at 40.

Although only one statutory ground is necessary to terminate respondent's parental rights, we also conclude that the circuit court did not clearly err in finding that petitioner established grounds for termination under MCL 712A.19b(3)(g) and (j) by clear and convincing evidence. See *In re JK*, 468 Mich 209-210. Considering the child's testimony regarding the sexual assault, which the court found credible in all major respects, respondent clearly failed to provide proper care and custody of the child. And, considering the serious nature of the sexual assault, there was no reasonable expectation that respondent, who denied the abuse, would be able to provide proper care and custody for the child within a reasonable time, especially given that the child was 16 years old at the time of the termination hearing. See MCL 712A.19b(3)(g). Further, considering the child's recent disclosure of the sexual assault, there is a reasonable likelihood that, based on the conduct of respondent, the child would suffer harm if she was returned to his home. See MCL 712A.19b(3)(j).

III. BEST-INTEREST DETERMINATION

Respondent also argues that the circuit court clearly erred in determining that termination was in the child's best interests. We disagree.

"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." *In re Olive/Metts*, 297 Mich App at 42, quoting MCL 712A.19b(5). "[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). "The trial court should weigh all the evidence available to determine the child[]'s best interests." *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). "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, [and] the child's need for permanency, stability, and finality[.]" *In re Olive/Metts*, 297 Mich App at 41-42 (internal citations omitted). The parent's abuse of a child is also a consideration in determining whether termination is in the child's best interests. *In re Powers*, 244 Mich App 111, 120; 624 NW2d 472 (2000). We review a trial court's best-interest determination under MCL 712A.19b(5) for clear error. *In re Olive/Metts*, 297 Mich App at 40.

In this case, considering the record in its entirety, the circuit court did not clearly err when it determined that termination was in the child's best interests. See *id*. The child, who had just turned 17 years old at the time of the best-interests hearing, had recently disclosed that respondent perpetrated a serious sexual assault against her when she was a young child. It is evident from the record that the child has a strong need for finality regarding the sexual assault for her mental and emotional wellbeing and, as the circuit court found, a need for safety in light of the sexual assault and the issues surrounding it. Further, there was also no evidence of a significant bond between respondent and the child, who was doing well in her mother's care and making progress towards addressing her issues. In fact, respondent did not present any evidence of a bond and the guardian ad litem informed the court that the child had no interest in having respondent in her life. Although, as respondent points out, the testimony indicated that the child visited respondent throughout her childhood and even resided with him for several months in 2015 before disclosing the sexual assault, the testimony also indicated that the child's motivation for her visits was more to see respondent's side of the family (her little brother, her stepmother's nieces, and her grandmother), rather than to spend time with respondent. Accordingly, the circuit court properly concluded that petitioner proved by a preponderance of the evidence that termination of respondent's parental rights was in the child's best interests. See *In re Moss*, 301 Mich App 90; *In re Olive/Metts*, 297 Mich App at 40.

IV. TESTIMONY OF TROOPER REMPINSKI

Respondent further argues that Michigan State Police Trooper James Rempinski, who investigated the child's allegation of sexual assault, improperly vouched for the child's credibility during his testimony. We disagree.

Respondent did not object to the challenged testimony before the circuit court therefore our review is for plain error affecting substantial rights. See *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011), citing *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. at 763.

To support his argument, respondent cites *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857, amended 450 Mich 1212 (1995), which concerns the scope of expert testimony in childhood sexual abuse cases. In that case, our Supreme Court reaffirmed its holding in *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990), that "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." *Peterson*, 450 Mich at 352. We first note that Trooper Rempinski was neither offered as, nor qualified as, an expert. He testified as a lay witness regarding his investigation into the child's allegation of sexual assault. Nevertheless, our Supreme Court has also recognized that "it is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial" because such comments lack probative value. *People v Musser*, 494 Mich 337, 349; 835 NW2d 319 (2013). However, opinions and inferences of a lay witness are permissible under MRE 701 when they are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." An example would be where

police officer witnesses "were explaining the steps of their investigations from their personal perceptions." *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012).

First, although the circuit court, as respondent asserts, stated in its findings of fact that, "[a]fter his investigation, Trooper Rempinski was able to determine that [the child] was sexually assaulted when she was about 8 years old," it is apparent from the context of his testimony that Rempinski did not improperly vouch for the child's credibility, opine that respondent was guilty, or testify that the sexual assault actually occurred. See *Musser*, 494 Mich at 349; *Peterson*, 450 Mich at 352. Instead, Rempinski testified during direct examination regarding his investigation into the child's sexual assault allegation from his personal perception, explaining the basis for his investigation (the Child Protective Services [CPS] complaint), his reasons for asking certain questions during his forensic interview of the child (to ascertain whether respondent vaginally penetrated the child for the purpose of determining the degree of the alleged assault and to ascertain the location of the assault for jurisdictional purposes), and the results of the investigation, i.e., the child disclosed during the interview that she was sexually assaulted by respondent at the farmhouse in Romeo when she was approximately 8 years old. Because Rempinski's testimony regarding his investigation into the child's sexual assault allegation is permissible under MRE 701, respondent has failed to establish plain error in this regard. See *Heft*, 299 Mich App at 83.

Respondent further asserts that Rempinski improperly vouched for the child's credibility during redirect examination when he testified that (1) the child told her mother, the CPS worker, and two Oakland County deputies that respondent had sexually assaulted her, (2) the child never recanted her allegations, (3) there were similarities regarding the sexual assault in the child's different disclosures, and (4) the child maintained to the deputies that respondent had raped her and to everyone that he had sexually assaulted her. Again, this testimony explaining his investigation does not amount to improper vouching of the child's credibility. But even assuming the challenged testimony was improper, respondent has not demonstrated that any error affected the outcome of the trial. The child also testified that she told her mother, the CPS worker, an Oakland County Sheriff deputy, and Rempinski that she was sexually assaulted by respondent, and that she never followed up with these individuals to clarify anything she told them. Accordingly, Rempinski's testimony was duplicative of the child's testimony and thus would not have unduly prejudiced the trial. Regardless, it is clear from the circuit court's opinion that it ultimately relied on the child's testimony regarding the sexual assault in assuming jurisdiction over the child, finding statutory grounds for termination, and terminating respondent's parental rights. Respondent, therefore, has not demonstrated plain error that affected his substantial rights with respect to Rempinski's testimony. See *Carines*, 460 Mich at 763.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood