STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of CALEB NEIL ARMSTRONG,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ROBERT ARMSTRONG,

Respondent-Appellant,

and

LINDSEY ARMSTRONG,

Respondent.

UNPUBLISHED
December 10, 2009

No. 290413
Oakland Circuit Court
Family Division
LC No. 2007-740505-NA

In the Matter of CALEB NEIL ARMSTRONG,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

LINDSEY ARMSTRONG,

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and

ROBERT ARMSTRONG,

Respondent.

No. 290414
Oakland Circuit Court
Family Division
LC No. 2007-740505-NA

Before: Stephens, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

In these consolidated appeals, respondents Robert and Lindsey Armstrong appeal as of right from the trial court's order terminating their parental rights to the minor child pursuant to MCL 712A.19b(3)(b)(ii) and (j).[1] We affirm.

Respondent father argues that his right to due process was violated because the trial court failed to comply with various procedural requirements at the preliminary hearing and when initially removing the child. Because respondent father did not raise any of the alleged procedural defects below, this issue is not preserved. Accordingly, we review respondent father's claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999); *In re Egbert R Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007), aff'd 480 Mich 19 (2008).

The record indicates that the order authorizing the child to be taken into protective custody was issued following a hearing on November 8, 2007, which was conducted in accordance with the procedures prescribed in MCR 3.963(B). The referee took testimony from the caseworker regarding the child's bruised condition, respondent father's unwillingness to discuss a safety plan and the doctor's opinion that the bruising was inconsistent with respondent father's explanations of the injury. Therefore, the trial court did not err in finding that there were reasonable grounds to believe that it would be contrary to the child's welfare to remain in the parents' home and that reasonable efforts had been made to prevent the child's removal.

We also find no merit to respondent father's claims that the preliminary hearing was not timely held, that he was not afforded counsel at the preliminary hearing, or that he did not receive a copy of the petition. MCR 3.965(A)(1) provides that "[t]he preliminary hearing must commence no later than 24 hours after the child has been taken into protective custody . . . unless adjourned for good cause shown, or the child must be released." Here, when the trial court issued its order taking the child into custody, it scheduled a preliminary hearing for the next day. A hearing was held the next day at which both respondents were present.[2] The court asked both respondents if they intended to retain counsel or wanted the court to appoint counsel. Both respondents asked the court to appoint counsel. The court agreed, but because counsel had not yet been appointed, it adjourned the preliminary hearing pending the appointment of counsel, as permitted by MCR 3.965(B)(1). The adjourned preliminary hearing was held on November 14

[1] Although the parties assert that parental rights were also terminated under §§ 19b(3)(b)(i), (g), and (k)(iii), the record indicates that the trial court found that termination was not warranted under those grounds.

[2] Although respondent father observes that the transcript of this hearing is labeled "placement hearing," the trial court referred to the proceeding as a preliminary hearing and the substantive nature of the proceeding was that of a preliminary hearing. Thus, we find no merit to respondent father's claim that this proceeding was not a preliminary hearing.

and 15, 2007, well within the 14-day period set forth in MCR 3.965(B)(10). Further, MCR 3.965(B)(2) and (10) authorized the court to continue the child's temporary placement outside the home pending completion of the preliminary hearing. At the adjourned preliminary hearing, both respondents were again present, both were represented by counsel, and both acknowledged having received a copy of the petition. Thus, respondent father has failed to show any procedural errors, plain or otherwise.

Respondent mother argues that the trial court lacked jurisdiction over the child because a statutory basis for jurisdiction was not factually established at the preliminary hearing. MCL 712A.2(b)(1) and (2) provide that the court has jurisdiction over a child under 18 years of age if the child's parents are neglectful, or the child's home, by reason of neglect or cruelty, is an unfit place to live. To acquire jurisdiction over a child, "the factfinder must determine by a preponderance of the evidence that the child comes within a requirement of MCL 712A.2." *In re MU*, 264 Mich App 270, 278; 690 NW2d 495 (2004) (citations omitted). Here, however, respondent mother improperly focuses on the evidence at the preliminary hearing to address the question of jurisdiction. The question of jurisdiction was decided at a bench trial in July 2008. Respondent mother does not address or challenge that decision on appeal. At the preliminary hearing, the trial court is only required to decide whether to authorize the filing of a petition based "upon a showing of probable cause . . . that one or more allegations in the petition are true and fall within MCL 712A.2(b)." MCR 3.965(B)(11). Here, the petition alleged that the one-month-old child had received multiple bruises over his body while in respondents' care, which doctors had determined were inconsistent with respondents' explanations. The trial court found:

> This is a child who's not ambulatory, this is a child who – the injuries on this child could not be self-inflicted. The evidence is that the child resides with both parents – with the parents and the law is that the parents are charged with the care and custody and well-being of the child.
>
> Somebody has injured this child. It appears that the injury is something which is repetitive based upon observations initially at the earliest portion of November followed up with observations on or around November 8th.
>
> I think there is a basis to believe that the child's home or environment is unfit for the child by reason of behavior that is at least neglectful and more likely abusive.

The trial court's decision is supported by the testimony at the preliminary hearing. The trial court did not err in determining that the testimony established probable cause to believe that the allegations in the petition were true and fell within MCL 712A.2(b).

Both respondents argue that the trial court erred in finding that the statutory grounds for termination were established by clear and convincing evidence. We disagree. We review the trial court's decision under the clearly erroneous standard. MCR 3.977(J); *In re Trejo*, 462 Mich 341, 351; 612 NW2d 407 (2000); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). The court specifically declined to terminate on the basis of either parent haven been proven by clear and convincing evidence to have battered the infant. Instead, the court found that the child was battered and that both parents had the opportunity to prevent the injury and did not do so. At four weeks of age, when the child was neither ambulatory or old enough to harm himself, the

child had severe bruises over several areas of his body and a swollen area on his head. The injuries varied in age. Respondents each gave multiple inconsistent explanations for the injuries. A doctor determined that the explanations given were not consistent with the actual injuries. Although both respondents assert that the evidence did not show who injured the child, considering the number of bruises, their visibility, and their varying ages, and that the child had been in the care of both respondents, the trial court did not clearly err in finding that both respondents had the opportunity to prevent the child's injuries and failed to do so. The caseworker assigned to case at the time of the termination hearing testified that, as of that date, neither parent had offered a plausible explanation of how the child was injured. Further, respondent father had attempted suicide weeks before the termination hearing and had not enrolled in any after care as prescribed when he was hospitalized. We can find no error in the court's finding that there was a reasonable likelihood that the child would be injured if returned to respondents' home.[3] Thus, termination was warranted under MCL.712A.19b(3)(b)(ii) and (j).

The initial petition in this case was for termination and, therefore there is no requirement that services be offered to the parents. However, the record reveals that a parent agency agreement was entered in this case. While there was a factual dispute as to what services were offered to these parents and when, the parties agree that at least one referral was made for parenting education. There was undisputed evidence that respondents were referred for a parenting class, which they stopped attending because they did not believe it was inappropriate, and they did not ask for another referral. It was not plain error for the trial court to have credited the caseworker's testimony that a housing referral was also made. It is noteworthy that there was testimony from a psychologist, Ms Harris, that the parents needed at least six months in confrontational therapy. She was critical of the failure to afford them that service and urged the court to allow six months of such counseling before a decision to terminate was made. However, it was also the mental health care professional's testimony that the parents' denial and lack of insight did not suggest a good prognosis for treatment. She explained that the "likelihood [of a good prognosis for treatment] based on where they are now is slim. It's not good."

Finally, the trial court did not clearly err in finding that termination of respondents' parental rights was in the child's best interests. MCL 712A.19b(5); *In re Trejo, supra* at 354. Apart from receiving several injuries while in respondents' care, the child was removed from respondents' custody at only four weeks of age and had been in foster care for more than a year. Respondent father's visits were ended after he made threatening and racially derogatory remarks about the foster care worker. The foster care worker testified that respondent mother had a distant attitude toward the child and did not interact with him in a comforting way. One of the foster care workers who had supervised the parental visitation testified that while the mother visited the child regularly, she had been observed leaving feces on him when she changed his diaper, and did not feed him during visits.

A psychologist who examined respondents found that respondents needed intense counseling and therapy, which had not been offered to them. However, he also found that their

[3] Respondent father's reliance on *In re Rood*, 483 Mich 73; 763 NW2d 587 (2009), is misplaced. Unlike the situation in *In re Rood*, the child here was injured while in respondent father's care.

prognosis for change was poor. Thus, the trial court did not err in terminating respondents' parental rights to the child.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder