Order

Michigan Supreme Court
Lansing, Michigan

June 7, 2024

165711

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

In re O O CLAUDIO-PEREZ, Minor.

SC: 165711
COA: 360356
Kalamazoo CC Family Division:
18-000181-NA

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On March 14, 2024, the Court heard oral argument on the application for leave to appeal the April 27, 2023 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and REMAND this case to the Kalamazoo Circuit Court for further proceedings consistent with this order.

Respondent-mother, Elizabeth Sales Perez, applies for leave to appeal the trial court's order terminating her parental rights to her minor child, OOCP, under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), and (j). Because petitioner, the Department of Health and Human Services (DHHS), failed to make reasonable efforts toward reunification, see MCL 712A.19a(2), we reverse.

Perez's argument that DHHS failed to make reasonable efforts toward reunification is unpreserved. Accordingly, we review that issue for plain error. See *In re Utrera*, 281 Mich App 1, 8-9 (2008). "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." *People v Carines*, 460 Mich 750, 763 (1999). An error is clear or obvious if it is not subject to reasonable dispute. See *In re Pederson*, 331 Mich App 445, 463 (2020). An error affects substantial rights if it resulted in prejudice to the appealing party, such that it affected the outcome of the trial court proceedings. See *id*. Reversal is warranted only if the plain, forfeited error "seriously affected the fairness, integrity or public reputation of judicial proceedings . . . ." *Id*., quoting *People v Randolph*, 502 Mich 1, 10 (2018), in turn quoting *Carines*, 460 Mich at 763-764 (quotation marks omitted).

As a general matter, DHHS must make "[r]easonable efforts to reunify the child and family . . . ."[1] MCL 712A.19a(2). Respondents must participate in and benefit from offered services. See *In re TK*, 306 Mich App 698, 711 (2014). DHHS, meanwhile, "has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights." *In re Hicks*, 500 Mich 79, 85 (2017), citing MCL 712A.18f(3)(b) and (c); MCL 712A.19a(2). When making those reasonable efforts, DHHS "must create a service plan outlining the steps that both it and the parent will take to rectify the issues that led to court involvement and to achieve reunification." *In re Hicks*, 500 Mich at 85-86, citing MCL 712A.18f(3)(d).

In this case, the lower courts held that termination was appropriate because Perez "had not demonstrated the ability to properly care for her medically fragile son suffering from Ehlers-Danlos syndrome." *In re OO Claudio-Perez (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued April 27, 2023 (Docket No. 360356), p 4. Accordingly, the issue is whether DHHS made reasonable efforts to cure *that* deficiency. We find that it did not.

DHHS concedes that it did not offer Perez specific training on OOCP's medical condition. Instead, DHHS appears to have assumed that Perez would glean what she needed to know from attending medical appointments. Nobody at DHHS told Perez, however, that she needed to use those appointments to become an expert on OOCP's condition. On the contrary, Perez's first caseworker told her that she did not need to attend the medical appointments. Moreover, at no point did DHHS provide Perez with resources to educate herself further on OOCP's condition.

In sum, DHHS determined that Perez's lack of medical knowledge was an obstacle to reunification. Despite that determination, DHHS failed to provide Perez with the necessary training to overcome this obstacle. When DHHS fails to provide a respondent with any resources to overcome the obstacles to reunification, it necessarily fails to make reasonable efforts at reunification. See MCL 712A.19a(2); *In re Hicks*, 500 Mich at 85-86. Accordingly, the trial court's holding that DHHS made reasonable efforts at reunification constitutes plain error. See *In re Pederson*, 331 Mich App at 463.

For the reasons set forth in this order, we reverse the Court of Appeals' judgment. We remand this case to the trial court for further proceedings consistent with this order.

We do not retain jurisdiction.

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[1] MCL 712A.19a(2) sets forth exceptions to the general rule that DHHS must make reasonable efforts to reunify children with their families. Those exceptions do not apply in this case.

WELCH, J. (*concurring*).

I agree with the Court's order in this matter, which I join in full. Specifically, I agree that petitioner, the Department of Health and Human Services (DHHS), failed to make reasonable efforts toward reunification. See MCL 712A.19a(2). I write separately to: (1) provide additional factual context; (2) explain why I believe that the trial court clearly erred by finding that statutory grounds existed to terminate parental rights under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), and (j); and (3) add to the Court's analysis regarding the reasonableness of the reunification efforts in this case.

I. FACTUAL BACKGROUND

Respondent-mother, Elizabeth Sales Perez, was born in rural Guatemala. As a child, Perez experienced poverty and abuse. OOCP, the child at issue in this case, is the product of rape and incest. When Perez was 17 years old, she and OOCP obtained refugee status in the United States as victims of human trafficking. Perez and OOCP lived in a shelter in Arizona for two years before relocating to Kalamazoo, Michigan. Perez's formal education ended in the ninth grade, and she often requires a translator when communicating in English.[2]

OOCP was sickly from birth. He suffers from several physical and cognitive conditions. Most notably, OOCP has Ehlers-Danlos syndrome, which makes him extremely susceptible to physical injury. Because of his condition, OOCP requires extensive and frequent medical attention.

OOCP experienced several injuries in early 2018 that required emergency medical treatment. In response, Children's Protective Services (CPS) opened an investigation. Although CPS made no findings of abuse, doctors worried that Perez could not adequately care for OOCP. Following a DHHS petition, the circuit court took jurisdiction over OOCP and placed him in foster care. DHHS asserted that the foster family had special medical training to meet OOCP's medical needs. Perez pleaded no contest to DHHS's allegation that she could not meet OOCP's special needs. The circuit court first ordered that DHHS make reasonable efforts to reunify Perez and OOCP.

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[2] DHHS provides Perez with a Spanish-language translator. However, according to the Court of Appeals, Spanish is not Perez's primary language. The Court of Appeals noted that her primary language is one of Guatemala's indigenous languages. *In re OO Claudio-Perez*, unpublished per curiam opinion of the Court of Appeals, issued September 22, 2022 (Docket No. 360356), p 1 n 1. The record is unclear as to Perez's Spanish-language proficiency.

After officials instructed Perez to refrain from using physical discipline, she requested services, such as parenting classes, to help her learn alternatives to the physical discipline that she had learned as a child. Perez also requested notice of OOCP's medical appointments so that she could attend. Finally, she requested assistance making appointments for OOCP, learning how to ride the bus, and obtaining a driver's license.

From 2018 through 2020, Perez appeared to make significant progress. A caseworker reported that OOCP loved Perez's parenting-time visits and that Perez met OOCP's needs during those visits. Perez attended some of OOCP's medical appointments, and she participated in therapy for her own mental health needs. During this time, the caseworkers reported that Perez was doing everything asked of her.

Perez missed a few of OOCP's medical appointments during 2018 to 2020. Perez testified that DHHS had not informed her that she needed to attend those appointments. Eventually, however, she started to attend the appointments consistently. The only exceptions were virtual appointments for which Perez had no notice and a few emergency room visits.

In November 2020, despite Perez's consistent and improved involvement with OOCP, DHHS recommended that Perez's parental rights be terminated. The trial court held termination hearings in 2021. At those hearings, Perez testified about OOCP's conditions and her ability to schedule and attend appointments. In addition, a caseworker assigned to Perez, Vanessa Guerrero, testified that DHHS had not provided Perez with specialized medical training because OOCP was in foster care and an initial goal was guardianship. Guerrero opined that DHHS erred by failing to offer such training. Guerrero also testified that Perez's previous caseworker had neglected to explain the importance of medical appointments to Perez. At various points, Guerrero expressed concern that Perez's language barrier might hinder her ability to meet OOCP's medical needs. There is no evidence in the record, however, that DHHS ever attempted to communicate with Perez in her primary language. With respect to Perez and OOCP's relationship, the testimony indicated that the visits between the two continued to go well. In addition, Perez admitted to having previously used physical discipline, but she testified that she had since learned that such methods were inappropriate.

The trial court terminated Perez's rights under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), and (j). The trial court held that termination was warranted under MCL 712A.19b(3)(c)(*i*) and (j) because Perez could not provide appropriate medical care and that there was risk of physical discipline. As to MCL 712A.19b(3)(c)(*ii*), the trial court relied on: (1) six instances when Perez asked the caseworker for assistance with chores, (2) the fact that Perez's boyfriend contributed to rent and thus her housing stability was questionable, and (3) the fact that Perez lacked a driver's license.

Perez appealed, and the Court of Appeals affirmed. *In re OO Claudio-Perez*, unpublished per curiam opinion of the Court of Appeals, issued September 22, 2022 (Docket No. 360356). Perez applied to this Court for leave to appeal. In lieu of granting Perez's application, we remanded the case to the Court of Appeals "to review and address the trial court's decision finding statutory grounds to terminate parental rights under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), and (j)." *In re OO Claudio-Perez*, 511 Mich 873, 873 (2023). On remand, the Court of Appeals affirmed once again. *In re OO Claudio-Perez (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued April 27, 2023 (Docket No. 360356).

Perez applied to this Court for leave to appeal. We scheduled oral argument on the application. In our order, we directed the parties to address whether:

> (1) the Kalamazoo Circuit Court Family Division erred in finding statutory grounds for termination were proven by clear and convincing evidence; (2) the petitioner failed to make reasonable efforts to rectify the condition that led to the child's removal; and (3) the trial court erred by concluding that the conditions leading to adjudication could not be rectified in a reasonable amount of time with continued guardianship while expanding the respondent's parenting time and providing appropriate services. [*In re OO Claudio-Perez*, 511 Mich 1104, 1104-1105 (2023).]

II. LEGAL BACKGROUND

The statutory grounds for termination of parental rights are governed by MCL 712A.19b. The grounds relevant to this appeal are contained in MCL 712A.19b(3)(c)(*i*), (c)(*ii*), and (j), which provide as follows:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
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> * * *
>
> (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:
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> (*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.
>
> (*ii*) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the

> parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
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> * * *
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> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if the child is returned to the home of the parent.

III. STANDARD OF REVIEW

"The clear-error standard controls our review of both the court's decision that clear and convincing evidence supported a ground for termination and that termination served the children's best interests." *In re Dearmon*, 303 Mich App 684, 699 (2014). "Clear error exists when some evidence supports a finding, but a review of the entire record leaves the reviewing court with the definite and firm conviction that the lower court made a mistake." *Id*. at 700. We review de novo the interpretation and application of statutes and court rules. See *In re Sanders*, 495 Mich 394, 404 (2014).

IV. DISCUSSION

As stated earlier, I agree with the Court's order. I write separately: (1) to explain why I believe that the lower courts clearly erred by finding that statutory grounds for termination were proven by clear and convincing evidence, and (2) to explain further my view regarding the efforts made as to reunification.

A. STATUTORY GROUNDS FOR TERMINATION

The Court of Appeals held that the trial court did not clearly err by finding statutory grounds to terminate Perez's parental rights under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), and (j). I believe that the Court of Appeals is incorrect.

The evidence does not establish that "[t]he 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." MCL 712A.19b(3)(c)(*i*). When DHHS commenced adjudication, Perez had little to no knowledge regarding OOCP's medical conditions and needs. It was undisputed at the time of the termination hearings that Perez had learned a significant amount about OOCP's medical needs and improved in her ability to meet OOCP's medical needs. Accordingly, the trial court clearly erred by determining that the conditions that led to adjudication—i.e., that Perez was totally unable to meet OOCP's medical needs—continue to exist and will not be rectified within a reasonable time.

Nor does the evidence establish 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 the child is returned to the home of the parent." MCL 712A.19b(3)(j). The trial court erroneously opined that Perez's previous physical discipline of OOCP amounted to abuse and that there was nothing other than Perez's word that she had learned to behave differently. The record, however, "is void of any instance of physical abuse by mother since OOCP was removed from her care in April of 2018." *In re OO Claudio-Perez (On Remand)*, unpub op at 4 n 2. Indeed, the *only* evidence with respect to physical discipline—Perez's testimony—suggests that Perez would no longer use it as a result of what she has learned since receiving services from DHHS. And the only evidence that physical discipline occurred was related to discipline imposed *prior* to Perez receiving further education on the matter and learning that although she had grown up with such discipline, it was inappropriate for her child. Because no evidence supported the trial court's conclusion, the trial court clearly erred by finding that clear and convincing evidence established a reasonable likelihood that Perez would harm OOCP through physical discipline if OOCP returned to Perez's care.

The next issue arising under MCL 712A.19b(3)(j) is whether OOCP would likely be harmed because of Perez's alleged inability to meet OOCP's medical needs. On that front, we must distinguish between whether OOCP might have future medical emergencies and whether those emergencies will be Perez's fault. On the one hand, given his medical condition, OOCP will almost certainly experience medical emergencies during his childhood, regardless of the care and supervision he receives. OOCP's medical condition leaves him so fragile that, according to his foster mother, he cannot play alone because he might hurt himself. Nevertheless, OOCP has been to the emergency room at least six times while living with his foster family. Under those conditions, no parent or guardian can guarantee that their child will experience absolute medical safety, even assuming that such a guarantee is feasible under normal circumstances.

On the other hand, the evidence does not establish that OOCP will be harmed *because of* Perez's inability to meet his medical needs. Instead, the evidence shows that Perez and OOCP have a strong bond, that Perez can attend OOCP's medical appointments, that Perez understands OOCP's condition, and that Perez can provide OOCP with reasonable supervision. Under those conditions, the trial court clearly erred by finding that clear and convincing evidence established that Perez is unable to meet OOCP's medical needs and that OOCP will be harmed if he returns to Perez's care. Put simply, no evidence exists that Perez cannot provide OOCP with competent care. Rather, the evidence upon which the trial court relied was stale, and it failed to account for Perez's improvements over time in understanding OOCP's needs and changing her behaviors.

The final issue is whether the trial court clearly erred by finding that Perez "received recommendations to rectify [certain] conditions" and "the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given

a reasonable opportunity to rectify the conditions . . . .” MCL 712A.19b(3)(c)(*ii*). As noted earlier, it is undisputed that Perez did what DHHS told her to do—for example, she incorporated caseworker feedback, ceased using physical discipline, visited OOCP regularly, and attended his medical appointments. That is what MCL 712A.19b(3)(c)(*ii*) requires of parents. The trial court therefore clearly erred by finding that statutory grounds existed under MCL 712A.19b(3)(c)(*ii*).

The arguments to the contrary are not persuasive. OOCP’s guardian ad litem argues that OOCP is at risk under Perez’s care because (1) Perez did not recognize the name of OOCP’s hematologist, (2) Perez did not keep a calendar of OOCP’s appointments, (3) Perez could not name each of OOCP’s medical providers, and (4) Perez sometimes acceded to OOCP’s reluctance to eat, despite the importance of nutrition. Those arguments—viewed in isolation or as a whole—do not come close to justifying the termination of parental rights. First, parents are not required by statute to keep a calendar of their children’s appointments, especially when DHHS does not instruct them to do so. Second, Perez is a refugee from Guatemala who is navigating a complex medical system using a translator who translates into a language that is not Perez’s primary language. Under these circumstances, it is quite understandable that she does not recognize or know the names of some of OOCP’s numerous doctors. Finally, as many parents know, forcing a child to eat unwillingly can be quite difficult, regardless of how important nutrition is. And, of course, attempting to force-feed a child is replete with its own risks.

The trial court found that termination under MCL 712A.19b(3)(c)(*ii*) was appropriate because (1) Perez asked the caseworker for assistance with chores on six different occasions, (2) Perez’s boyfriend contributed to rent, and (3) Perez lacked a driver’s license. None serves as clear and convincing evidence warranting termination. First, asking for help with chores or tasks is not termination-worthy, nor is it prohibited by statute. Second, nobody has suggested that Perez’s relationship with her boyfriend is unstable or unhealthy. Holding this factor against Perez is, frankly, a shocking notion given the cost of living and the number of parents who reside with a partner and who share household expenses. Finally, as discussed earlier, Perez was working to obtain a driver’s license and to master the public transportation system in Michigan.

The Court of Appeals’ justifications for termination are similarly unavailing. The Court of Appeals faulted Perez for failing to ask doctors questions at medical appointments and for the fact that she “was usually more engaged with OOCP than with the medical providers.” *In re OO Claudio-Perez*, unpub op at 4. Considering Perez’s background, the multitude of people participating in the appointments, the fact that Perez’s English is limited, and the fact that OOCP does not live with Perez, it is neither surprising nor concerning that Perez engaged with OOCP during some of the limited time they have together at doctor’s appointments. The Court of Appeals also highlighted some of the difficulties Perez has with scheduling medical appointments. Even if Perez does have some difficulties with scheduling appointments, it is undisputed that OOCP ultimately received

the care he needed. Struggling to schedule or calendar appointments is not clear and convincing evidence that it is likely "that the child will be harmed if the child is returned to the home of the parent." MCL 712A.19b(3)(j).

B. REASONABLE REUNIFICATION EFFORTS

I agree with the Court's analysis that DHHS failed to make reasonable efforts at reunification. I write to explain why I am troubled by the legal arguments that DHHS and the child's guardian ad litem provided.

DHHS concludes one section of its brief by quoting the statements of OOCP's guardian ad litem at the termination hearing:

> "Could the Department have done more? Sure. Just because more could have been given does not mean that what was provided was insufficient. Just because she was not given the information doesn't mean mom could not have shown an interest on her own.
>
> *She keeps saying that nobody tells her what she needs to do, but there is more that could have been done of her own initiative had she thought more about it.* Simple things like looking for her own classes and support groups, watching videos on YouTube regarding first aid, looking up things about Ehlers disease, keep a journal about what is talked about at each medical appointment, work on the physical therapy and occupational therapy exercises at home during her parenting time.
>
> Ultimately whose burden is it to reduce the barriers? Parents need to take ownership and do the work. Mom has only shown passing progress with extensive support of the case worker. If this case were to close and she no longer has the support of her case worker I don't—I am unconvinced she would be able to do it." [Emphasis added.]

DHHS and the guardian ad litem are incorrect as a matter of law. The statute requires that DHHS make reasonable efforts at reunification. MCL 712A.19a(2). Such efforts necessarily include *telling parents what to do* to eliminate the obstacles to reunification. DHHS seems to want this Court to adopt a rule that parents must do things *that nobody asked them to do* in order to regain custody of their children. Because such a rule has no basis in statute, this Court cannot adopt it. See *id*.

The guardian ad litem further asserts that Perez "does not get special consideration just because she is an immigrant with a tragic history. She does not get special treatment just because she chose to take refuge in the United States." Once again, the guardian ad litem is incorrect. For reunification efforts to be "reasonable," the state must "tailor[]" its

efforts to a parent's individual needs. *In re Hicks*, 500 Mich 79, 89-90 (2017). Accordingly, of course Perez gets "special consideration . . . because she is an immigrant with a tragic history." The statute requires that all parents receive tailored efforts based on their unique needs.

V. CONCLUSION

I agree that DHHS failed to make reasonable efforts at reunification. I would also have held that the lower courts clearly erred by finding clear and convincing evidence that statutory grounds for termination existed.

BOLDEN, J. (*concurring*).

I agree with the majority's disposition. Petitioner, the Department of Health and Human Services, did not make reasonable reunification efforts in this case, as required by MCL 712A.19a(2). This Court properly reverses. To me, however, there is an open question of whether plain error is the proper standard of review when the trial court record clearly shows that petitioner concedes the inadequacy of its reunification efforts, as is the case here. Because respondent does not counter petitioner's claim that plain error should apply, and given that respondent would be entitled to reversal under plain error or some lesser standard of review, I join the majority's order in full.

The Court of Appeals reviewed this issue for plain error because respondent "concede[d] on appeal that no objection was made to indicate that the services provided to her were inadequate," so the issue was unpreserved. *In re OO Claudio-Perez*, unpublished per curiam opinion of the Court of Appeals, issued September 22, 2022 (Docket No. 360356), p 4, citing *In re Frey*, 297 Mich App 242, 247 (2012).[3] Although the record supports respondent's concession that no objection was raised, it is unclear to me what kind of objection would have been appropriately raised in the trial court to preserve this issue for appellate review. After all, the basis of the majority's order is that during the trial court proceedings, petitioner *conceded* on the record that it did not offer respondent specific training on OOCP's medical condition. Requiring a party to object to a concession would seem to defy the purpose of the preservation doctrine and plain-error review.

This state has long recognized the purpose of preserving issues for appellate review by raising contemporaneous objections at trial so that litigants "seek a fair and accurate trial the first time around . . . ." *People v Carines*, 460 Mich 750, 761 (1999) (quotation marks and citation omitted). The purpose of plain-error review is supported by the policy

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[3] Respondent conceded not only that no objection was raised but also that plain error was the proper standard of review in her brief on appeal to the Court of Appeals. Respondent did not contest plain-error review before this Court.

that "requiring a contemporaneous objection provides the trial court 'an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address' " the issue. *Id.* at 764-765 (citation omitted). In sum, the underlying presumption behind plain-error review is that there was some error that could have been corrected or something objectionable to the nonmoving party that could have been addressed at the time it became part of the trial court record. It's not clear to me that anything about the concession of an adverse party would generate a need to raise a timely objection.

Herein lies the distinction I would draw between this case and *In re Frey*. In that case, whether reasonable reunification efforts were made was unpreserved because the respondents "failed to object or indicate that the services provided to them were somehow inadequate . . . ." *In re Frey*, 297 Mich App at 247. Here, the trial court repeatedly used the hearings to develop a record, including petitioner's concession, that reasonable reunification resources were not provided. The record supports that respondent—at a minimum—indicated that reunification resources were inadequate, rendering an objection unnecessary. It is not clear that any objection would have " 'obviate[d] the necessity of further legal proceedings' " at that time to correct the error. *Carines*, 460 Mich at 764-765 (citation omitted). In short, no objection was needed to preserve the issue because it was already raised and developed.

Respondent has tied the hands of the Court of Appeals and this Court by taking the position that plain-error review should apply. Nonetheless, this Court now correctly concludes that respondent has shown error requiring reversal under the plain-error standard. Therefore, the correct result was reached for the correct reason. I agree fully with the majority but write separately to articulate my hesitation with applying plain-error review when no contemporaneous objection could have been raised.

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.

June 7, 2024

Clerk

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