COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2014AP1672
2014AP1673

Cir. Ct. Nos. 2013TP17
2013TP18

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

NO. 2014AP1672

IN RE THE TERMINATION OF PARENTAL RIGHTS TO SARYAH M. M., A PERSON UNDER THE AGE OF 18:

RACINE COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

LATASIA D. M.,

RESPONDENT-APPELLANT.

NO. 2014AP1673

IN RE THE TERMINATION OF PARENTAL RIGHTS TO SUNAI M. M., A PERSON UNDER THE AGE OF 18:

RACINE COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

LATASIA D. M.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed*.

¶1 REILLY, J.[1] In these consolidated appeals from orders terminating her parental rights to Saryah M. and Sunai M., Latasia M. argues that she is entitled to a new fact-finding and/or dispositional hearing as the court erred when it (1) failed to permit her to withdraw her jury demand, (2) admitted evidence of her battery conviction, and (3) failed to properly consider the "substantial relationship" factor in the dispositional phase. Additionally, Latasia argues that WIS. STAT. § 48.415(6) is facially void for vagueness. We disagree and affirm the circuit court in all respects.

BACKGROUND

¶2 Saryah and Sunai were removed from Latasia's home and found to be children in need of protection or services after their older sister came to school

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

with numerous marks to her face and body consistent with strikes from a belt or electrical cord. The older sister told investigators that Latasia had become angry and "whooped her with a belt on her legs and butt" and that her uncle had "punched her in the face." The Racine County Human Services Department filed termination of parental rights (TPR) petitions against Latasia about two and one-half years following Saryah and Sunai's removal from Latasia's home. The petitions alleged that grounds existed to terminate Latasia's parental rights to Saryah and Sunai based on her failure to assume parental responsibility and based on the children's continuing need of protection or services.

¶3 Latasia demanded a jury trial at her initial appearance. Latasia subsequently attempted to withdraw her demand, but the Department refused to consent to the withdrawal. Latasia argued that the Department had forfeited its right to a jury trial when it failed to submit its own demand at the initial hearing. The court disagreed, finding that once Latasia demanded a jury trial, the Department did not need to file a separate demand in order to preserve its right to a jury trial.

¶4 Prior to the jury trial, Latasia filed a motion to prohibit any references to prior criminal convictions, including her conviction for the battery to her oldest daughter that triggered the removal of Saryah and Sunai from her home. The court found the battery was relevant and admissible as it related to the conditions of return that needed to be considered by the jury for the ground that the children were in continuing need of protection or services. The court granted Latasia's motion as to other convictions that it determined were irrelevant to the proceedings.

¶5 The jury found grounds to terminate Latasia's parental rights to Saryah and Sunai as she had failed to assume parental responsibility for both children and as both children were in continuing need of protection or services. The court subsequently held a dispositional hearing and determined that it was in the best interest of the children to terminate Latasia's parental rights.

¶6 Latasia filed a postdisposition motion in which she argued that the TPR orders should be vacated as one of the termination grounds, failure to assume parental responsibility under WIS. STAT. § 48.415(6), is facially void for vagueness. The court denied her motion. Latasia appeals. We granted Latasia's motion to consolidate the appeals. *See* WIS. STAT. RULE 809.10(3).

DISCUSSION

Withdrawal of Jury Demand

¶7 Latasia first contends that she should have been permitted to withdraw her jury demand. The right to a jury trial in a TPR proceeding is statutorily given, *see* WIS. STAT. §§ 48.31(2), 48.422(4); therefore, we independently review Latasia's challenge as it involves statutory interpretation, *see* ***State v. Quinsanna D.***, 2002 WI App 318, ¶37, 259 Wis. 2d 429, 655 N.W.2d 752. Latasia argues that withdrawal should have been granted as the Department had forfeited its right to a jury trial by not filing its own timely demand. She contends that the court erred in requiring the consent of a party that had not demanded a jury trial before she could withdraw her own request and that WIS. STAT. § 805.01(3) is inapplicable to TPR proceedings. We disagree.

¶8 TPR proceedings are civil in nature, ***Door Cnty. DHFS v. Scott S.***, 230 Wis. 2d 460, 465, 602 N.W.2d 167 (Ct. App. 1999), and thus the procedures

and practice of such proceedings are governed by WIS. STAT. chs. 801 to 847 "except where different procedure is prescribed by statute or rule," WIS. STAT. § 801.01(2). "The TPR statute allows a parent to demand a jury trial but does not provide a means to withdraw such a demand." ***Manitowoc Cnty. HSD v. Allen J.***, 2008 WI App 137, ¶16, 314 Wis. 2d 100, 757 N.W.2d 842. We therefore look to WIS. STAT. § 805.01(3), which provides the procedure for withdrawing a jury demand in civil proceedings and requires "the consent of the parties." The circuit court properly applied § 805.01(3) to deny Latasia's request to withdraw her jury demand when the Department refused to consent to the withdrawal.

Void for Vagueness

¶9 Latasia next argues that the statute establishing one of the grounds on which she was found unfit—failure to assume parental responsibility under WIS. STAT. § 48.415(6)—is void for vagueness as it unconstitutionally denied her the right to due process. Latasia's argument rests largely on the possibility that jurors and courts may define words or interpret concepts in the statute in different ways and on the fact that our supreme court has provided confusing or inadequate guidance. The constitutionality of a statute presents a question of law that we review de novo. ***State v. Pittman***, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993). We reject Latasia's argument that § 48.415(6) is unconstitutionally vague.

¶10 A statute is unconstitutionally vague if it fails to give proper notice of the conduct that it seeks to proscribe or leads to erratic and arbitrary interpretations by those seeking to enforce it. ***County of Kenosha v. C & S Mgmt., Inc.***, 223 Wis. 2d 373, 391-92, 588 N.W.2d 236 (1999). A statute "need not define with absolute clarity and precision what is and what is not unlawful conduct." ***Pittman***, 174 Wis. 2d at 276-77 (citation omitted). "The ambiguity

must be such that 'one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact … is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule.'" ***Id.*** at 277. Latasia must convince us "that the 'heavy burden' to overcome the presumption of [the statute's] constitutionality has been met, and that there is proof beyond a reasonable doubt that the statute is unconstitutional." ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶46, 333 Wis. 2d 273, 797 N.W.2d 854.

¶11 WISCONSIN STAT. § 48.415(6)(a) provides that the parental rights of an individual may be terminated on the ground that the individual has "not had a substantial parental relationship with the child." The statute defines "substantial parental relationship" as "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child" and further provides a nonexhaustive list of factors that a trier of fact may consider in determining whether the parent has a substantial parental relationship. Sec. 48.415(6)(b). These include

> whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

Id.

¶12 The statute not only provides exactly what is needed to prove the ground of failing to assume parental responsibility, i.e., failing to have a substantial parental relationship with the child, the statute also expressly defines

this concept and lists factors that may be considered in making this determination. The statute does so by employing words and concepts "well enough known to enable those within their reach to correctly apply them," ***Connally v. General Constr. Co.***, 269 U.S. 385, 391 (1926), and giving an ample description of the proscribed conduct such as to provide both advance warning to "one bent on obedience" and a standard to be applied by the trier of fact. Latasia has not met her heavy burden of proof. WISCONSIN STAT. § 48.415(6) is not void for vagueness.

Battery Conviction

¶13 Latasia next contends that the court erroneously admitted evidence of her conviction for battery. Latasia argues that this conviction was irrelevant as it involved Latasia's battery of her eldest daughter, not Saryah or Sunai. A circuit court's decision to admit or exclude evidence is reviewed for an erroneous exercise of discretion. ***La Crosse Cnty. DHS v. Tara P.***, 2002 WI App 84, ¶6, 252 Wis. 2d 179, 643 N.W.2d 194. We will not upset an evidentiary decision if it has a rational basis in accordance with the law and facts of the case. ***Id.*** Latasia's challenge fails under this deferential standard.

¶14 The court allowed the admission of Latasia's battery conviction into evidence as the conduct involved was the reason that Saryah and Sunai had been removed from Latasia's home and the reason for several of the conditions Latasia had to meet before they would be returned. The court thus found that this evidence was relevant to the proceedings. The court limited references to the incident over the course of the four-day trial and Latasia was allowed to present evidence there had not been further abuse.

¶15 The court's decision to admit evidence of Latasia's battery of her eldest daughter for the limited purpose of explaining the reason that her younger daughters had been removed from her home and why safety considerations were a condition of their return had a rational basis in accordance with the law and the facts of this case. *See* ***Reynaldo F. v. Christal M.***, 2004 WI App 106, ¶20, 272 Wis. 2d 816, 681 N.W.2d 289. The court did not err in admitting this relevant evidence.

Substantial Relationship

¶16 Lastly, Latasia argues that the circuit court erroneously exercised its discretion at the dispositional phase of the proceedings "by failing to properly consider" whether Saryah or Sunai had a substantial relationship with Latasia and whether it would be harmful to sever this relationship. *See* WIS. STAT. § 48.426(3). "A proper exercise of discretion requires the circuit court to apply the correct standard of law to the facts at hand." ***State v. Margaret H.***, 2000 WI 42, ¶32, 234 Wis. 2d 606, 610 N.W.2d 475. Latasia contends that the court improperly applied the law by relying on the jury's verdict at the fact-finding hearing that Latasia did not have a substantial parental relationship with the girls as well as by utilizing its own experience in rendering its decision. We disagree that the court's comments in this area reflected an erroneous exercise of discretion.

¶17 Although the court addressed the jury's verdict at the fact-finding hearing, it did not rely on the jury's findings during the portion of its oral decision that focused on the WIS. STAT. § 48.426(3) factors. The court specifically addressed the § 48.426(3)(c) "substantial relationship" factor as follows:

> The youngest child here really has not had a substantial relationship with her mother or father. She's been out of the house for basically essentially most of her life. Her

> contacts with her parents have been limited; with her father, really limited; with her mother, less limited.
>
> I concede [Latasia, the father,] when those children were born, they were there. They provided for them. They were there every single day. They cared for them. They put them to sleep. They probably read to them, walked them, don't have an issue with that. But what happened was the children were removed, contact lessened, and basically, you know, you lose that substantial relationship, okay. I mean, it happens.
>
> I have some experience with that. My oldest child is adopted. Her father is alive. She visits him on occasion, but he's not her father. I'm her father. I've had the substantial relationship. He had one at one time. She was with him for four years, but he doesn't anymore, and he knows it, and he's a hell of a nice guy.

As can be seen from this passage, the court did not rely on the WIS. STAT. § 48.415(6)(b) "substantial parental relationship" factors or the jury's verdict at the fact-finding hearing in its consideration of § 48.426(3)(c). The court instead focused on the reduced contact between Latasia and her children that resulted in the children losing any substantial relationship they once had with their biological mother.

¶18 The court's comments regarding its own experience with an adopted daughter highlighted how reduced contacts can affect the biological relationship. Such observations are not outside the common knowledge and experience of the average person such that they were improperly considered by the court in its weighing of the evidence. *See* ***State v. Sarnowski***, 2005 WI App 48, ¶¶15-16, 280 Wis. 2d 243, 694 N.W.2d 498.

¶19 Further, even if the court had relied in part on the definition and factors from WIS. STAT. § 48.415(6)(b) to analyze whether Saryah and Sunai had a substantial relationship with Latasia, we do not necessarily view this alone as

applying an incorrect standard of law. The court stated that it was "important to remember" the jury's finding with regard to Latasia no longer having a substantial parental relationship with her daughters, not that it was bound by that decision, and WIS. STAT. § 48.426(3) expressly permits the consideration of other nonenumerated factors in evaluating the best interests of the children. Many of the factors utilized to determine whether Latasia had a substantial parental relationship with Saryah and Sunai at the fact-finding hearing are likewise relevant to determining whether Saryah and Sunai had a corresponding substantial relationship with Latasia and whether termination of their mother's parental rights would be in the best interest of the children. Additionally, implicit in the court's determination that the children no longer had a substantial relationship with Latasia was that it would not be harmful to sever this diminished relationship. We find no erroneous exercise of discretion.

CONCLUSION

¶20 As Latasia has identified no error meriting a reversal of either the jury's decision at the fact-finding hearing or the court's decision at the dispositional hearing, we affirm the court's orders terminating her parental rights to Saryah and Sunai and denying her postdisposition motion.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.