COURT OF APPEALS
DECISION
DATED AND FILED

March 30, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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.

No. 00-0161

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO CASSANDRA L.R., A PERSON UNDER THE AGE OF 18:

IOWA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

MARY M.K.,

RESPONDENT-APPELLANT,

MARTIN R.,

RESPONDENT.

APPEAL from a judgment of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] Mary M.K. appeals the termination of her parental rights to her daughter, Cassandra L.R. She ascribes the following errors: (1) alleged due process violations arising from insufficient warnings that her parental rights could be terminated, both in the initial dispositional order that placed Cassandra outside of her home and in the order that extended that placement; (2) that the underlying CHIPS orders were devoid of written findings of fact and conclusions of law; (3) that she was prejudiced when the court informed the jury that abandonment would not be used as a ground for termination of her parental rights, without stating that the abandonment "count" had been dismissed; and (4) an alleged erroneous exercise of discretion in denying her motion for a mistrial because of the district attorney's questions during *voir dire*. Because we conclude there is no merit to any of her contentions, we affirm the judgment of the circuit court.

BACKGROUND

¶2 Mary and Martin R.[2] are the parents of Cassandra, born June 18, 1992. Mary suffers from long-term alcoholism and from other substance abuse problems. Cassandra was removed from Mary's home on February 4, 1997, under circumstances which later resulted in Mary's conviction for child neglect. On April 8, 1998, while the child was still residing in foster care, an initial dispositional order was entered based on Cassandra being a child in need of protection or services. That order contained a warning that termination of Mary's

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1997-98). Additionally, all further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] Martin's parental rights were also terminated, but he does not appeal the judgment.

parental rights could occur if the grounds of abandonment or Cassandra's status as a child in need of protection or services (CHIPS) continued. The notice also stated some of the facts which could be used for proof of abandonment, as well as some which could be used to show a continuing CHIPS. On March 19, 1999, the dispositional order was extended. That order notes that Mary was verbally warned of the potential grounds to terminate her parental rights and it also included a written attachment on which abandonment and CHIPS were checked as the potential grounds for a termination of parental rights (TPR) proceeding. The form was not checked in a manner to detail which facts listed on the form were relevant to abandonment or to CHIPS in Mary's case. Both dispositional orders contained all of the conditions toward which Mary needed to make substantial progress, before Cassandra could be returned to her.

¶3 The departments of social services, for both Iowa County and Dane County, repeatedly tried to assist Mary in meeting the conditions necessary for Cassandra's return. However, due to Mary's severe alcohol addiction, she continued to drink; she did not maintain regular, frequent contact with Cassandra; and she did not secure a stable home or a stable job. Therefore, on May 27, 1999, the Iowa County Department of Social Services (the Department) filed a petition to terminate her parental rights to Cassandra.

¶4 At trial, the jury found that Mary had failed to make substantial progress toward the return of Cassandra to her home; that there was a substantial likelihood that Mary would not do so in the next twelve months; and that Cassandra would continue to be CHIPS and require supervision outside of Mary's home. At the dispositional hearing, the court found that returning Cassandra to Mary's home would be contrary to Cassandra's welfare and that reasonable efforts had been made to return Cassandra to Mary. It also found that Cassandra had been

placed outside of Mary's home for more than six months; that Cassandra was in good health and adoptable, probably by the foster parents; and that it was in Cassandra's best interest to terminate Mary's parental rights. Based on these findings, Mary's parental rights were terminated.

¶5 Mary appeals, based on what she claims to be a violation of her right to due process arising from allegedly insufficient written and oral warnings that her parental rights could be terminated; alleged insufficient factual findings and legal conclusions in the underlying CHIPS orders; prejudice resulting from references to abandonment as a ground on which the termination of her parental rights could be based, at the beginning of the trial, and then not telling the jury why the court was not submitting it as a ground for termination; and in denying her motion for a mistrial due to statements the district attorney made in *voir dire*.

DISCUSSION

Standard of Review.

¶6 We will not reverse a factual determination made by a jury or by a circuit court, unless it is clearly erroneous. *See* WIS. STAT. § 805.17(2); ***Hur v. Holler***, 206 Wis. 2d 335, 342, 557 N.W.2d 429, 432 (Ct. App. 1996), *petition for review granted*, 208 Wis. 2d 211, 562 N.W.2d 601 (1997). The construction and application of a statute under facts as found by a court or by a jury presents a question of law which we review independently. *See* ***R.A.C.P. v. State***, 157 Wis. 2d 106, 118-19, 458 N.W.2d 823, 829 (Ct. App. 1990), *aff'd*, 166 Wis. 2d 464, 480 N.W.2d 234 (1992). Additionally, whether a litigant's due process rights were violated by the circuit court is a question of law which we review *de novo*. *See* ***Thomas Y. v. Saint Croix County***, 175 Wis. 2d 222, 229, 499 N.W.2d 218, 221 (Ct. App. 1993). And finally, we review instructions given to a jury and a

court's decisions about whether to grant a mistrial under the erroneous exercise of discretion standard. *See* ***M.P. v. Dane County Dep't of Human Servs.***, 170 Wis. 2d 313, 331, 488 N.W.2d 133, 140 (Ct. App. 1992) (citation omitted).

Sufficiency of Warnings.

¶7 Mary contends that the insufficient warnings she was given violated her right to due process of law. The Wisconsin Supreme Court has recognized that "'state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause.'" ***B.L.J. v. Polk County Dep't of Soc. Servs.***, 163 Wis. 2d 90, 114, 470 N.W.2d 914, 924 (1991) (citation omitted). To establish a due process violation, a litigant must show not only that she has been deprived of a constitutionally protected interest, but also that the procedure used to deprive the plaintiff of the interest was constitutionally deficient. *See* ***Casteel v. McCaughtry***, 176 Wis. 2d 571, 579, 500 N.W.2d 277, 281 (1993). However, Mary engages in no legal analysis to support her claimed due process violation. Therefore, we discuss it no further. Constitutional contentions made, but not developed by legal reasoning, are not considered on appeal. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 520, 451 N.W.2d 759, 763 (Ct. App. 1989) (citations omitted).

¶8 Aside from the due process contention, Mary claims that reversible error occurred because the statute was not followed in regard to the warnings that were required to be given. The parties agree that a warning, that Mary's parental rights could be terminated if Cassandra remained out of her home for more than six months and continued to be CHIPS, was required for the dispositional order

issued on April 8, 1998 and the extension order issued on March 19, 1999.[3] The Department contends, however, that the written warnings given to Mary were sufficient and that no oral warnings are required to accompany either order. Mary contends that both written and oral warnings are required in a TPR proceeding and that both of these warnings were deficient.

¶9 We begin with WIS. STAT. § 48.356(1) which states in relevant part:

> **Duty of court to warn. (1)** Whenever the court orders a child to be placed outside his or her home … because the child … has been adjudged to be in need of protection or services under s. 48.345, 48.347, 48.357, 48.363 or 48.365, the court shall orally inform the parent or parents who appear in court … of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child … to be returned to the home ….
>
> **(2)** In addition to the notice required under sub. (1), any written order which places a child … outside the home … shall notify the parent or parents … of the information specified under sub. (1).

¶10 It has been held that it is reversible error to terminate a parent's rights on grounds substantially different from those of which the parent was warned under WIS. STAT. § 48.356. *See* ***State v. Patricia A.P.***, 195 Wis. 2d 855, 863, 537 N.W.2d 47, 50 (Ct. App. 1995). It has also been held that giving more grounds for termination than the specific grounds which apply to the parent in an individual case is not reversible error. *See* ***Cynthia E. v. La Crosse County Human Servs. Dep't***, 172 Wis. 2d 218, 227-28, 493 N.W.2d 56, 60-61 (1992).

[3] Because the parties seem to agree that both orders required full notices, we do not address whether the extension order really required that type of a notice. *See* ***Marinette County v. Tammy C.***, 219 Wis. 2d 206, 224, 579 N.W.2d 635, 642 (1998) (concluding that an order which did not change the placement of a minor from his mother's home to somewhere outside the home, because the child was already outside of the home at the time the order was issued, did not require the notice of possible loss of parental rights, required under WIS. STAT. § 48.356).

¶11 At the hearing held on March 31, 1998, from which the April 8th dispositional order resulted, the court orally instructed Mary that:

> We will review the possibilities of termination of parental rights. Ms. K., pursuant to Wisconsin law, a parent who continues in a pattern of neglect of a child or a parent who continues with a pattern of out placement of the child is subject to the possibility of termination of parental rights.… The out placement of a child, in other words, the placement of a child in family—in a foster home placement pattern could also—for extended periods of time could also result in termination of parental rights.

The written order then stated the warning of potential loss of rights and the two grounds for termination at issue as follows:

> Termination of parental rights means that, pursuant to a court order, all rights, powers, privileges, immunities, duties and obligations existing between parent and child are permanently severed. The court may terminate the parental rights of a parent by making a finding that grounds exist for termination of parental rights. Grounds for such termination of parental rights shall be one of the following:
>
> **ABANDONMENT.** … [and]
>
> **CONTINUING NEED OF PROTECTION OR SERVICES.** …

¶12 At the time that the April 8, 1998 order was issued, WIS. STAT. § 48.415 contained eleven grounds for the termination of parental rights: (1) abandonment; (2) continuing need of protection or services; (3) continuing parental disability; (4) continuing denial of periods of physical placement; (5) child abuse; (6) failure to assume parental responsibility; (7) incestuous parenthood; (8) intentional or reckless homicide of a parent; (9) parenthood as a result of sexual assault; (10) commission of a serious felony against one of the person's children; and (11) prior involuntary termination of parental rights to another child. The warning identified two of those grounds: abandonment and continuing need of protection or services. There is no statutory requirement that

the facts which may be used at trial to prove those grounds be set forth in the order. Additionally, there is no contention in this appeal that the order did not provide a listing of those conditions which Mary was required to make substantial progress toward, before Cassandra could be returned to her home.

¶13 Additionally, in the extension of the dispositional order which was issued on March 19, 1999, a warning was again given that Mary could lose her parental rights if the grounds of abandonment and CHIPS continued. The warning was provided through the use of a form, on which the Iowa County circuit judge had checked abandonment and continuing need of protection or services as the two grounds which could result in the termination of Mary's parental rights. It also contained the conditions which were necessary for Mary to make substantial progress toward, before Cassandra could be returned to her. At the extension hearing, the court questioned Mary about whether she understood those conditions and she replied, "Your Honor, they have been the same for almost two years now. It's just I have no objection to any of them." At that hearing, the court also orally informed Mary that abandonment and a continuing need of services were grounds for termination.

¶14 On appeal, Mary argues that because a full and detailed explanation was not made of how the Department could prove abandonment or a continuing need of protection or services in the initial dispositional order, and because those two grounds were simply checked off a form as part of the extension order, she was not afforded the warning which the statute requires. We are not persuaded.

¶15 First, any alleged errors about abandonment as a ground for termination is a red herring. It was not an issue submitted to the jury and it was not the ground on which Mary's parental rights were terminated. Therefore, even

assuming *arguendo* that there was a problem with the way that ground was presented to Mary, it did not result in the loss of Mary's parental rights. Second, the statute simply requires that the warning notify a parent of the grounds which may form a basis for the termination of parental rights. The grounds were given. That a check-off type of form was used on one occasion and a brief listing was used on another occasion is no basis for a claim of reversible error. The warnings were sufficient to comply with WIS. STAT. § 48.356(2). *See* ***Cynthia E.***, 172 Wis. 2d at 227-28, 493 N.W.2d at 60-61.

¶16 Mary also complains that the oral warnings she was given at both hearings were insufficient under WIS. STAT. § 48.356(1). That argument is equally without merit. As this court concluded in ***M.P.***, 170 Wis. 2d at 325, 488 N.W.2d at 137-38, in a TPR proceeding, only written warnings as provided for in § 48.356(2) are required. As we explained, "to establish the child's continuing need for protection or services as a basis for termination, it must be shown, among other things, that the CHIPS adjudication and placement was accomplished 'pursuant to one or more court orders … containing the notice required by s. 48.356(2).'… [The statute] makes no reference to sec. 48.356(1), which states the oral notice requirement for CHIPS proceedings." ***M.P.***, 170 Wis. 2d 325, 488 N.W.2d at 137-38 (citation omitted). Only written warnings are required in a TPR, and those were provided.

Factual Basis for Original Dispositional Order.

¶17 Mary next contends that the underlying CHIPS orders did not adequately state findings of fact and conclusions of law. She also argues that the dispositional order did not specify: the services or continuation of services that were to be provided to the child and to the family; whether child support should or

should not be paid; or what efforts were made to keep the family together. We disagree.

¶18 First, some of these concerns are obviously irrelevant; for example, Mary is not claiming to be prejudiced because she was not ordered to pay child support in the order. Second, the circuit court adopted Ms. Paulus's court report, which set out the facts necessary to a finding that Cassandra was in need of protection or services, the services which had been provided and that entering an order which placed Cassandra outside of her mother's home was in her best interest. Third, each order detailed what tasks Mary must make substantial progress toward in order for Cassandra to be returned to her. The orders were sufficient.

Jury Instructions.

¶19 Mary next contends that the circuit court erroneously exercised its discretion when it did not instruct the jury that the initially stated two grounds of abandonment and CHIPS had been reduced to one ground, CHIPS. The instructions a jury is given are within the discretion of the circuit court. *See* ***State v. Lenarchick***, 74 Wis. 2d 425, 455, 247 N.W.2d 80, 96 (1976). In determining whether that discretion has been erroneously exercised, we review the totality of the instructions in light of the facts that the jury is asked to resolve. *See* ***id.***

¶20 Mary argues that testimony that she had not visited Cassandra in three months was evidence which was not relevant to the CHIPS ground for termination and was introduced to support abandonment, a ground not submitted to the jury. In contrast, the Department argues that all of the evidence that was submitted on the issue of abandonment could have been independently submitted

on the issue of a failure to comply with the CHIPS order as well. The Department refers to paragraph 6(g) of the dispositional orders which required:

> Mary M.K. shall cooperate with the visitation plan developed by the Iowa County Department of Social Services, Dane County Department of Human Services, the therapists for Mary M.K. and her children, and the Guardian ad Litem and that Mary M.K. must visit on a regular basis and that Mary M.K. shall recognize the children's emotional and physical needs, their need for safety, predictability and security during visits as well as demonstrate a continuing ability to meet those needs.

¶21 We agree with the Department. The evidence could properly have been used to support the CHIPS ground. Additionally, Mary did not object to the instruction given to the jury at the instruction conference. This is a condition precedent to contending on appeal that the circuit court erred in the instructions that were given. *See* ***Hamed v. County of Milwaukee***, 108 Wis. 2d 257, 271, 321 N.W.2d 199, 207 (1982); WIS. STAT. § 805.13(3).

Mistrial.

¶22 Mary contends the circuit court erred when it did not grant her mistrial request. She claims the district attorney's reference during *voir dire* to an "alcohol and drugs" restriction was improper because Mary was required only to refrain from all use of alcohol, while the use of drugs was prohibited only prior to visitation. Mary contends the jury was misled because of the manner in which the restrictions were lumped together. Whether to grant a mistrial is a decision within the circuit court's discretion. *See* ***State v. Copening***, 100 Wis. 2d 700, 710, 303 N.W.2d 821, 826-27 (1981).

¶23 The questions complained of occurred during the portion of *voir dire* where the jurors were taken one by one into the judges chambers for this question

and two or three other questions, and therefore, the complained of question was repeated over and over. Despite these numerous repetitions, trial counsel made no objection. Additionally, Mary's use of both substances was restricted under the terms of the CHIPS orders, although in different ways, and there was testimony that Mary used alcohol in violation of those orders. And finally, Mary had been ordered to have no further law violations. Drug usage, at any time, would have violated the CHIPS orders. Therefore, we conclude that there was no erroneous exercise of discretion by the circuit court when it denied Mary's motion for a mistrial.

CONCLUSION

¶24 Because we have concluded that there is no merit to any of Mary's contentions of error, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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