COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 2010

David R. Schanker
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 No. 2009AP3090 **Cir. Ct. No. 2009TP3**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO CECELIA E. N., A PERSON UNDER THE AGE OF 18:

CALUMET COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

AMBER S. L.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Calumet County: PETER L. GRIMM, Judge. *Affirmed*.

¶1 ANDERSON, J.[1] Amber S. L. contends the circuit court erred when it denied her motion in limine to bar introduction of evidence of her voluntary termination of parental rights to her first child, and it also erred when it overruled her motion in limine seeking to strike a portion of Calumet County Department of Human Services (DHS) counsel's closing argument that Amber asserts breached a pretrial order barring reference to the "best interest" of the child. She argues that these errors are serious enough to mandate a new trial. Because we conclude that the circuit court did not err, we affirm.

¶2 DHS filed a petition to involuntarily terminate Amber's rights to her infant daughter on the grounds that the child was in continuing need of protection or services. *See* WIS. STAT. § 48.415(2). Amber challenged the petition and requested a jury trial. At the conclusion of a two-day trial, the jury returned a unanimous verdict, finding that grounds existed for the termination of Amber's parental rights.[2]

¶3 Pretrial, Amber filed a motion in limine requesting, among other things, an order:

> That during the fact finding hearing, the Petitioner and the Guardian Ad Litem be prohibited from introducing any evidence, expressing any opinions, or making any reference to the best interests of the child. Please see In Interest of C.E.W., 124 Wis. 2d 47, 70 (1985) and sec. 48.424(3) Wis. Stats.

¶4 During closing arguments, counsel for DHS told the jury:

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] During the pendency of Amber's case, the biological father voluntarily terminated his parental rights.

> Mr. Been [guardian ad litem] will probably tell you more about what his role is, and Mr. Been doesn't represent the State. Mr. Been doesn't represent the Department of Human Services. Mr. Been doesn't represent the mother. Mr. Been represents the child and what's best for the child. I ask you to listen to his argument.

¶5 Counsel for Amber objected that the argument violated the order barring reference to the best interests of the child. He asked that the remarks be stricken and the jury instructed not to consider the remarks. Counsel did not request a mistrial and he did not renew his objection after the jury had retired to deliberate. We will address the merits because in ***Pophal v. Siverhus***, 168 Wis. 2d 533, 545, 484 N.W.2d 555 (Ct. App. 1992), the court said, "We repeatedly review errors when a timely objection has been made unaccompanied by a motion for a mistrial."

¶6 On appeal, Amber asserts that the circuit court erroneously exercised its discretion when it did not strike the remarks and give the jury a cautionary instruction. We disagree. "Counsel has wide latitude in arguing to the jury; but control of the argument's content remains within the sound discretion of the trial court. And the trial court's ruling will stand unless there has been an abuse of discretion that is likely to have affected the jury's verdict." ***State v. Bjerkaas***, 163 Wis. 2d 949, 962-63, 472 N.W.2d 615 (Ct. App. 1991) (citation omitted).

¶7 The court did not erroneously exercise its discretion when it overruled Amber's objection and motion to strike. Counsel for DHS made the remark during his description of who the guardian ad litem does not represent. Counsel was describing how the parties and their attorneys were aligned; counsel was not telling the jury they should consider the "best interest" of the child. Even if we were to decide that counsel's remarks were inappropriate and the court should have struck them, it would not entitle Amber to a new trial. In ***Door***

County Department of Health & Family Services v. Scott S., 230 Wis. 2d 460, 469, 602 N.W.2d 167 (Ct. App. 1999), we set out the standard for a new trial under similar circumstances:

> Only when the court or the GAL instruct[s] the jury that it should consider the best interests of the child is there reversible error. Here the GAL did nothing to imply that the jury should consider the child's best interests in reviewing the evidence, but rather that her best interests require the jury to answer the questions from the evidence…. Therefore, we believe the GAL's reference to the best interests of the child was harmless and does not make the result unreliable.

¶8 With another motion in limine, Amber sought to bar introduction of evidence that she voluntarily terminated her parental rights to her firstborn child after failing to follow through on conditions of the child's return to Amber's custody.

> The Petitioner and the Guardian ad Litem be prohibited from introducing any evidence concerning any child of Amber L[.] other than Cecilia [sic]. The grounds for excluding said evidence are that it is irrelevant under sec. 904.01 Wis. Stats. Also, said evidence is inadmissible under sec. 904.04(2) Wis. Stats. because it would be offered to prove the character of Amber L[.] in order to show that she acted in conformity therewith. Even if said evidence has some limited relevance, its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or waste of time, pursuant to sec. 904.03 Wis. Stats.

¶9 The circuit court held that the evidence was relevant to the special verdict question that asked if there was a substantial likelihood that Amber would meet the conditions of return established for Cecelia. The court also balanced the probative value of the evidence against its potential prejudice and concluded the evidence was not prejudicial. The court denied this motion in limine.

¶10 At trial, DHS introduced evidence of Amber's voluntary termination of her parental rights to her first child through its adverse examination of Amber. Amber testified she was unable to complete the conditions for the safe return of her first child because of her immaturity and excessive use of drugs and alcohol and she decided to voluntarily terminate her parental rights.

¶11 On appeal, Amber argues that the limited probative value of this evidence was outweighed by the substantial prejudice, which she asserts was increased by the jury learning that she voluntarily terminated her rights.

> Calumet County's theme from the beginning of the trial was to dwell on Amber's admitted failure with [her first child] and then build on it to argue that the jury could find by clear and convincing evidence that Amber could not meet the present conditions with the present child (Cecilia [sic]) within the next 9 months. The spillover prejudice was so substantial in the way that Calumet County presented its case that no reasonable judge could find that the probative value of the prior TPR evidence substantially outweighed the danger of unfair prejudice.

¶12 This court reviews evidentiary questions on the basis of whether there was an erroneous exercise of discretion. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). The basic principles of relevancy, materiality and probative value apply to proof of questions of fact in termination proceedings. *See* WIS. STAT. § 48.299(4)(b). Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. WIS. STAT. § 904.01. We will uphold a circuit court's decision to admit evidence if the court exercised discretion in accordance with accepted legal standards and the facts of record. ***LaCrosse County DHS v. Tara P.***, 2002 WI App 84, ¶6, 252 Wis. 2d 179, 643 N.W.2d 194. The circuit court did so here.

¶13 Amber concedes the evidence had probative value, but asserts that any probative value is swamped by the prejudicial nature of evidence. We agree that the evidence had probative value. DHS was seeking to terminate Amber's parental rights under WIS. STAT. § 48.415(2), contending that Amber would be unable to fulfill conditions imposed for the safe return of Cecelia. The probative value of the challenged evidence was considerable in that Amber voluntarily terminated her rights to her first child approximately one month after Cecelia was born, and her conduct leading her to voluntarily terminate her rights went to the fact to be proven, namely, the risk that Amber would neglect Cecelia. *See* ***State v. Speer***, 176 Wis. 2d 1101, 1118, 501 N.W.2d 429 (1993).

¶14 We do not agree that the evidence was unduly prejudicial. Evidence is not unfairly prejudicial simply because it is adverse to a party; rather, evidence is unfairly prejudicial if it threatens the fundamental goals of accuracy and fairness by misleading the jury or influencing the jury to decide the case on an unfair basis. *See* ***State v. DeSantis***, 155 Wis. 2d 774, 791-92, 456 N.W.2d 600 (1990). Amber does not persuade us that individually or collectively the evidence amounts to the type of shocking, inflammatory or scandalous information that would excite the jury's passions against her. *Cf*. ***State v. Gulrud***, 140 Wis. 2d 721, 736, 412 N.W.2d 139 (Ct. App. 1987).

¶15 Because we have concluded that the circuit court did not err in either instance broached by Amber, we do not have to address her contention that the accumulated errors mandate a new trial.

By the Court.—Order affirmed.

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