

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 25, 2012

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. 2012AP1562
2012AP1563
2012AP1564**

**Cir. Ct. Nos. 2011TP6
2011TP7
2011TP8**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 2012AP1562

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO WILLIAM V., A PERSON
UNDER THE AGE OF 18:**

BUFFALO COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JENNIFER C.,

RESPONDENT-APPELLANT.

No. 2012AP1563

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO BRADLEY C., A PERSON
UNDER THE AGE OF 18:**

BUFFALO COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JENNIFER C.,

RESPONDENT-APPELLANT.

NO. 2012AP1564

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO APRIL C., A PERSON
UNDER THE AGE OF 18:**

BUFFALO COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JENNIFER C.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Buffalo County:
JOSEPH D. BOLES, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Jennifer C. appeals orders terminating her parental rights to her children, William V., Bradley C., and April C. Jennifer argues the circuit court erred by allowing a counselor to testify about the information that served as the basis for his opinions. We affirm.

¹ These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

BACKGROUND

¶2 On March 19, 2010, Buffalo County took temporary custody of William, Bradley, and April, and placed the children in foster care. A circuit court subsequently found each child to be in need of protection or services, continued the out-of-home placement, and ordered Jennifer to complete various conditions so the children could be returned to her.

¶3 On July 15, 2011, the County petitioned to terminate Jennifer's parental rights to William, Bradley, and April. As grounds for termination, the petitions alleged the children continued to be children in need of protection or services (CHIPS). *See* WIS. STAT. § 48.415(2). The County asserted Jennifer had failed to complete the court-ordered conditions for return.

¶4 Prior to the jury trial, the County moved to introduce certain evidence that Jennifer revealed during a parenting risk and probability assessment. Specifically, the County wanted to introduce evidence that:

1. Jennifer[']s father ... sexually abused at least two (2) of his daughters and was incarcerated for that abuse when Jennifer was a child.
2. Ada S[.], Jennifer[']s mother, was sexually abused in front of Jennifer
3. Jennifer ... observed her sister being sexual with her mother and another male.
4. Ada ... abused drugs and alcohol.
5. Ada ... was murdered when Jennifer ... was seven (7) years old. Jennifer ... was the first to find her decease[d] mother.
6. Jennifer ... lived in five (5) separate foster homes before she was adopted.

7. Jennifer ... was physically and emotionally abused by her adoptive mother.
8. Jennifer ... was sexually abused by her adoptive father. He was incarcerated for that offense.
9. Jennifer ... was placed in three (3) other foster homes after being adopted.
10. Jennifer ... had a total of six (6) children. Jennifer[']s parental rights to Kathleen C[.], Cody S[.] and Atalissa C[.] were all terminated.
11. Jennifer[']s ... parental rights to Kathleen ... were terminated because Jennifer ... was unable to care for her due to drug use.
12. Jennifer[']s ... parental rights to Cody ... were terminated because Jennifer ... left her son in the care of a boyfriend who abused Cody to the point of Cody suffering from shaken baby syndrome.
13. Jennifer[']s ... parental rights to Atalissa ... were terminated because Jennifer ... left her in the care of a convicted sex offender. Jennifer ... had participated in a sexually abusive incident with this man.
14. Jennifer ... was married to Timothy V[.], father of William V[.] Timothy ... was physically and emotionally abusive to Jennifer
15. Jennifer ... was married to Curtis C[.], father of Bradley C[.] and April C[.] Jennifer ... participated in sexually molesting one of Curtis[']s daughters and left Atalissa ... in Curtis[']s ... care when she moved from North Carolina to Minnesota.
16. Jennifer ... did not graduate from high school and has no GED or HSED.
17. Jennifer ... first used THC at age fourteen ... and alcohol at age thirteen
18. April ... was diagnosed with fetal alcohol syndrome.

¶5 The County argued this evidence was relevant to prove one of the continuing CHIPS elements: whether there is a substantial likelihood that Jennifer will not meet the conditions for return within the nine-month period following the

conclusion of this hearing.² *See* WIS. STAT. § 48.415(2); *see also* WIS JI—CHILDREN 324A (2011). It contended, in part, that licensed counselor Ted Stein relied on this information to diagnose Jennifer with post-traumatic stress disorder and to support his opinions about Jennifer’s parenting abilities. Significantly, Stein opined that Jennifer’s post-traumatic stress disorder, along with unresolved “traumas” from her past, impeded her ability to meet the needs of her children and to respond to her children’s safety needs.

¶6 Jennifer objected to the evidence. She argued the information about her past was not relevant to whether she would complete the required conditions within the next nine months. She also asserted the evidence was unduly prejudicial.

¶7 The circuit court observed that the background information appeared relevant because it gave the jury insight as to “some of the reasons why experts one way or the other think [Jennifer] can’t do it.” It then asked which of the facts

² The other continuing CHIPS elements are:

1. Has [the child] been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?
2. Did the ... County Department of Social Services make a reasonable effort to provide the services ordered by the court?
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3. Has [the parent] failed to meet the conditions established for the safe return of [the child] to [the] parent’s home?

WIS JI—CHILDREN 324A (2011); *see also* WIS. STAT. § 48.415(2).

listed in the County's motion were "instrumental in [Stein] forming his opinion about ... whether [Jennifer] can meet the conditions in the next nine months?"

¶8 The County advised the court that all the facts were relevant to Stein's opinion. It pointed out that Stein included all this information in a section of his report, entitled "Relevant Background Information."

¶9 The court granted the County's motion in part, concluding the facts listed in numbers one through fifteen and eighteen were "relevant to the expert opinion of ... Stein," which in turn was relevant to whether Jennifer would be able to meet the conditions for return in the nine-month period following the hearing. The court found the facts' probative value was not outweighed by undue prejudice.

¶10 As for the remaining facts, the court found Jennifer's lack of a high school degree and the age when she first used marijuana were minimally relevant to Stein's opinions. It determined the evidence was not admissible because its marginal relevance caused any probative value to be outweighed by prejudicial effect.

¶11 At the fact-finding hearing, the County called Stein as an expert witness. Stein read portions of his report into the record, including the information about Jennifer's past. The County also called more than one dozen other witnesses who testified about whether Jennifer had completed the conditions for return.

¶12 The jury found grounds existed to terminate Jennifer's parental rights. The court terminated her parental rights to each child following a dispositional hearing.

DISCUSSION

¶13 On appeal, Jennifer argues the circuit court erred by admitting the evidence from Stein's report that related to her past. Circuit courts have broad discretion to admit or exclude evidence. *State v. Ringer*, 2010 WI 69, ¶24, 326 Wis. 2d 351, 785 N.W.2d 448. We will not disturb a circuit court's evidentiary determination unless the circuit court erroneously exercised its discretion. *La Crosse Cnty. Dep't of Human Servs. v. Tara P.*, 2002 WI App 84, ¶6, 252 Wis. 2d 179, 643 N.W.2d 194. A circuit court erroneously exercises its discretion if it applied the wrong legal standard or the facts of record fail to support the circuit court's decision. *Id.*

¶14 At the outset, Jennifer's argument about the evidence's erroneous admission appears to be focused on two theories of admissibility: (1) whether the evidence was independently admissible; and (2) whether Stein could testify about the evidence because it formed the basis of his expert opinion. As to the first theory, Jennifer argues, for example, that witnessing her mother's sexual abuse has no bearing on whether she will complete the conditions for return in the next nine months. We agree with Jennifer that, on an independent basis, the evidence's direct relevance to whether she would meet the conditions for return is tenuous.

¶15 However, in this case, the circuit court did not determine the evidence was admissible because it was directly relevant to one of the elements the County needed to prove at trial. Rather, the court determined the evidence was admissible because it formed the basis of Stein's opinions and Stein's opinions were relevant to whether there was a substantial likelihood that Jennifer would complete her conditions for return in the next nine months.

¶16 WISCONSIN STAT. § 907.03,³ which is entitled, “Bases of opinion testimony by experts,” provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion or inference substantially outweighs their prejudicial effect.

¶17 Here, the circuit court determined Jennifer’s background information was admissible because it was relevant to Stein’s opinions. Specifically, the court observed that this information gave the jury insight as to “why experts one way or the other think [Jennifer] can’t” meet her conditions for return. We conclude the evidence was admissible pursuant to WIS. STAT. § 907.03 and the court offered a reasonable explanation for admitting the evidence. *See Tara P.*, 252 Wis. 2d 179, ¶6. Although the circuit court did not explicitly cite § 907.03 when determining Stein would be allowed to testify about the information that provided the basis for his opinions, it was not required to do so. *See State v. Keith*, 216 Wis. 2d 61, 76, 573 N.W.2d 888 (Ct. App. 1997). The court did not err by admitting the evidence of Jennifer’s past.

³ WISCONSIN STAT. § 907.03 was amended by 2011 Wis. Act 2 § 38, effective February 1, 2011.

By the Court.—Orders affirmed.

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

