

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 21, 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. 2012AP2004
2012AP2005**

**Cir. Ct. Nos. 2011TP54
2011TP55**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO SYDNEY D-R., A PERSON
UNDER THE AGE OF 18:**

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

KRISTLE S.,

RESPONDENT-APPELLANT.

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

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

KRISTLE S.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for La Crosse County:
TODD W. BJERKE, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.¹ Kristle S. appeals two orders of the circuit court terminating her parental rights to her two children. Kristle alleges that the circuit court erroneously exercised its discretion in restricting her cross-examination of a witness. For the reasons we explain below, we affirm.

BACKGROUND

¶2 In November 2009, Kristle gave birth to a daughter, Teagan. Kristle is married to Teagan's father, Jason. Kristle also has an older daughter, Sydney, from a different relationship. About a week after Teagan's birth, the La Crosse City Police Department received a report of a domestic dispute between Kristle and Jason. Following that incident, the La Crosse County Department of Human Services filed two Child In Need of Protection or Services (CHIPS) petitions under WIS. STAT. § 48.13(10). At the time, the Department was not concerned about Kristle's ability to care for her children, but was concerned about her ability to keep the children safe from Jason. Accordingly, Kristle was allowed to remain with her children as long as she and her children had no contact with Jason.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) and (3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶3 In April 2010, the court entered orders removing the children from Kristle’s care because Kristle and the children had contact with Jason. Kristle was later advised of the conditions that she was required to meet for the return of her children. Significantly, Kristle was required to “[e]stablish and maintain a clean, stable and safe home” and “[c]ontrol the activities in the home” by not allowing anyone to live with her without prior approval from the Department’s social worker. Moreover, Kristle was prohibited from maintaining “associations with people who are deemed to not be in Sydney and Teagan’s best interest.”

¶4 Prior to September 2010, Kristle lived in several different places. In September 2010, the Department connected Kristle with New Horizons, a shelter for victims of domestic violence, which provided her with transitional housing. While living in transitional housing, Kristle made progress toward reunification with her children. However, in June 2011, the Department discovered that Kristle and her children had contact with Jason. The Department also discovered that Kristle allowed two individuals, Josh and JoLynn, to live with her for approximately two weeks and have contact with her children. In the Department’s view, Josh and JoLynn were unsafe for the children.

¶5 In October 2011, the Department petitioned to terminate Kristle’s parental rights to her two children on the ground that the children were in continuing need of protection or services under WIS. STAT. § 48.415(2)(a). Specifically, the petitions provided that the children were placed outside Kristle’s home for more than six months; that the Department made a reasonable effort to provide services ordered by the court; that Kristle failed to meet the conditions established for the return of the children to her home; and that Kristle was unlikely to meet the conditions in the following nine months.

¶6 In May 2012, a jury trial was held to determine whether there were grounds to terminate Kristle's parental rights. At trial, Kristle cross-examined the Department's social worker, Heather Simmons, in an effort to show that: (1) Kristle did not introduce her children to unsafe people by allowing Josh and JoLynn to live with her; and (2) Simmons was not credible as a witness because she made inaccurate statements in a permanency plan report. As we discuss below, the court permitted Kristle to question Simmons extensively on those issues but eventually instructed Kristle to move to a different line of questioning. At the close of evidence, the jury found that there were grounds to terminate Kristle's parental rights. In June 2012, the court held a disposition hearing. Following the hearing, the court entered orders terminating Kristle's parental rights to her two children.

DISCUSSION

¶7 The sole issue before us is whether the circuit court erroneously exercised its discretion in restricting Kristle's cross-examination of Simmons. The scope of cross-examination is within the discretion of the circuit court. *State v. Mayhall*, 195 Wis. 2d 53, 64, 535 N.W.2d 473 (Ct. App. 1995); *see* WIS. STAT. § 906.11(1).² We will reverse a discretionary decision only when there is an

² WISCONSIN STAT. § 906.11(1) provides that:

The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to do all of the following:

- (a) Make the interrogation and presentation effective for the ascertainment of the truth.
- (b) Avoid needless consumption of time.

(continued)

erroneous exercise of discretion. *Id.* at 65. We search the record for reasons to sustain the court’s exercise of discretion. *State v. LaCount*, 2008 WI 59, ¶15, 310 Wis. 2d 85, 750 N.W.2d 780.

¶8 At trial, Kristle testified that she allowed Josh and JoLynn to live with her for approximately two weeks without the Department’s knowledge or approval. On cross-examination, Simmons testified that Josh and JoLynn were “concerning people” and “a safety threat” to the children. Simmons explained that: (1) Josh had two warrants out for his arrest and had been charged with violent crimes; and (2) JoLynn “had some issues with placement of her own children” because she had sold drugs out of her home.

¶9 On cross-examination, Kristle attempted to impeach Simmons’ credibility based on a permanency plan report in which she stated that Josh and JoLynn had “violent criminal records.” Under Kristle’s theory of the case, Josh and JoLynn were not “unsafe people” who had “violent criminal records” because neither had been convicted of a violent crime. However, Simmons testified that, regardless whether Josh and JoLynn had been convicted of violent crimes, they were not authorized to live with Kristle or have contact with her children because they were unsafe people. After Kristle asked Simmons numerous questions on this topic, the Department objected. The court sustained the objection and instructed Kristle to “[g]o on to something else.” Kristle continued to ask questions on this topic and the court instructed her multiple times to pursue a different line of questioning.

(c) Protect witnesses from harassment or undue embarrassment.

¶10 The next day, Kristle called Simmons to testify in an effort to establish that Josh and JoLynn did not have “violent criminal records.” During questioning, Simmons produced a criminal complaint that charged Josh with disorderly conduct. Kristle asked the following question:

Q: And what about [the criminal complaint] indicates to you that ... [Josh is] somehow violent?

A: The second count is a disorderly conduct and then it also indicates previous charges, I believe, indicating he’s been charged with theft, there’s two charges with theft, two bailjumping counts, resisting and obstructing, failure to report to jail, possession of a switch blade knife, possession of THC, and then this document also includes a ... felony bailjumping charge, new crime.

¶11 When asked whether Josh had been convicted of disorderly conduct, Simmons responded that, “I don’t believe I indicated anything about convictions, but charges.” Kristle also asked the following:

Q: Now, for a person to have a record, I mean a record is based upon convictions, correct, being convicted?

A: We screen people on the basis of safety, and the condition reads that all people who have access to the children ... would need prior approval, especially during visitation times for the children. So that is part of our screening process, and [Josh and JoLynn] were found not to be safe people.

¶12 After Kristle asked an additional question on this topic, the court instructed her to “[g]o on to something else.” Despite the court’s instruction, Kristle asked Simmons the following questions:

Q: All right. But not one of these charges [in the criminal complaint against Josh] in and of itself is violent, is that an accurate statement?

A: Resisting or obstructing an officer would be concerning to me. Possession of a switch blade would be concerning to me. And the content of this disorderly conduct is concerning to me, as well.

Q: A disorderly conduct we don't know whether he was convicted [of]?

The Court: [Defense counsel,] if you want to ask any more questions on that, I'll have to send the jury out

¶13 Kristle then asked Simmons whether JoLynn had been convicted of a crime. Simmons responded that, "I don't know if [JoLynn has] been convicted of any charges, but there are concerns that make her an unsafe person and she was not approved." After Kristle asked Simmons whether she had reviewed JoLynn's record, the Department objected and asked to be heard outside the presence of the jury. Once the jury was excused, the following exchange took place:

[The Department]: Judge, here's the issue that we have ... I believe [defense counsel is] now creating a situation where it looks like we don't have information [establishing that JoLynn is an unsafe person.] We do. We have a CHIPS petition. We have a CHIPS dispositional order about JoLynn's children

... [I]f [defense counsel] could get a release from JoLynn, I could give him the information that we have, which we obviously look at as part of [our] background checks....

The Court: And I think, [defense counsel], you're mistaken. A record doesn't mean conviction. They can look at anything of record to see whether a person is safe or not....

... I've already told you that your questioning was done, and you keep going into that.... I'm not going to order [the Department] to divulge confidential information, [so] go to some other line of questioning.

¶14 On appeal, as noted above, Kristle contends that she had two goals in cross-examining Simmons: (1) to contest the Department's finding that Kristle had exposed her children to unsafe people; and (2) to impeach Simmons' credibility as a witness. Kristle argues that she was not able to meet her goals because the court restricted her cross-examination of Simmons and failed to

“evaluate[] on the record whether restricting [her] ability to cross-examine Simmons affected [her] right to present a complete defense and right to a fundamentally fair proceeding.” For the reasons provided below, we disagree and conclude that the court did not erroneously exercise its discretion by restricting Kristle’s cross-examination of Simmons.

¶15 Our review of the record demonstrates that Kristle was provided a meaningful opportunity to cross-examine Simmons about the Department’s finding that Kristle had exposed her children to unsafe people. *See Robinson v. State*, 102 Wis. 2d 343, 352, 306 N.W.2d 668 (1981) (providing that “[t]he right to meaningful cross-examination is not to be equated with a successful cross-examination which tends to support the cross-examiner’s case”). Over the course of two days, Kristle was permitted to elicit testimony which established that: (1) Josh had warrants out for his arrest and had been charged with but not convicted of violent crimes; and (2) JoLynn had not been charged with a crime but “had some issues with placement of her own children” related to drugs. Although the Department was not required to show that Josh and JoLynn had been convicted of a violent crime or that they had “violent criminal records” to establish that they were “unsafe people,” the court gave Kristle wide latitude to question Simmons about the Department’s reasons for finding that Josh and JoLynn were unsafe.

¶16 Moreover, the court did not erroneously exercise its discretion by preventing Kristle from cross-examining Simmons about a CHIPS proceeding involving JoLynn. As noted above, Simmons testified on cross-examination that JoLynn was an unsafe person because she had “issues with placement of her own children.” The court did not allow Kristle to ask additional questions on that issue because CHIPS proceedings are confidential. *See WIS. STAT. §§ 48.396, 48.78(2)(a)*. However, the Department informed the court that, if Kristle obtained

a release from JoLynn, it would disclose its records related to the CHIPS proceeding involving JoLynn. Kristle did not obtain a release from JoLynn. We cannot conclude that the court erroneously exercised its discretion by preventing Kristle from cross-examining Simmons about confidential matters, particularly where, as here, Kristle was provided with an opportunity to present a meaningful defense but failed to take advantage of that opportunity.

¶17 Our review of the record also demonstrates that Kristle had a meaningful opportunity to impeach Simmons' credibility. Kristle's cross-examination of Simmons demonstrated that Simmons made errors when conducting background checks. For example, Simmons incorrectly reported that Josh had been convicted of violent crimes and that JoLynn had an open criminal case for distributing drugs. The jury's role was to evaluate Simmons' credibility in light of the incorrect statements and weigh the evidence to determine whether there were grounds to terminate Kristle's parental rights. *See K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 2007 WI 70, ¶38, 301 Wis. 2d 109, 732 N.W.2d 792 (stating that "[w]eighing testimony and evaluating credibility of witnesses are matters for the jury") (citation omitted). Ultimately, the jury determined that there were grounds to terminate Kristle's parental rights.

¶18 Accordingly, we conclude that the court properly restricted Kristle's questioning of Simmons because additional questioning would have been "needlessly duplicative and cumulative in character." *State v. Speese*, 199 Wis. 2d 597, 605, 545 N.W.2d 510 (1996) ("When the probative value of evidence, including relevant evidence, is needlessly duplicative and cumulative in character, the circuit court need not admit it."); *see* WIS. STAT. § 904.03. As we have stated, Kristle asked Simmons whether Josh or JoLynn had "violent criminal records" several times on two different days of trial. Simmons did not dispute that neither

Josh nor JoLynn had been convicted of a violent crime. However, Simmons testified that, regardless whether Josh and JoLynn had “violent criminal records,” it was nonetheless true that Josh and JoLynn were not approved to have contact with the children and that they were unsafe. There is no reason to believe that Simmons would have responded any differently or provided new evidence had she been asked additional questions on this topic. Accordingly, we believe that the court acted reasonably in restricting Kristle’s cross-examination of Simmons to “[a]void needless consumption of time.” WIS. STAT. § 906.11(1)(b).

¶19 Even assuming for present purposes that the court erred in restricting Kristle’s cross-examination of Simmons, we conclude that any error was harmless. To decide whether an error is harmless, we must determine “whether the error ‘affected the substantial rights of a party.’” *Martindale v. Ripp*, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698; *see* WIS. STAT. § 805.18(2). An error affects the substantial rights of a party when there is “a reasonable possibility that the error contributed to the outcome of the action.” *Weborg v. Jenny*, 2012 WI 67, ¶68, 341 Wis. 2d 668, 816 N.W.2d 191 (citation omitted). We review the entire record to determine whether an error contributed to the outcome of the action. *State v. Patricia A.M.*, 176 Wis. 2d 542, 556-57, 500 N.W.2d 289 (1993); *see also Waukesha Cnty. v. Steven H.*, 2000 WI 28, ¶¶58-60, 233 Wis. 2d 344, 607 N.W.2d 607 (concluding that a court’s procedural error may not justify overturning a termination order when the record establishes grounds for the termination of parental rights).

¶20 The record before us demonstrates that there was strong evidence from which a jury could find that grounds existed for the termination of Kristle’s parental rights, aside from the undisputed evidence that Josh and JoLynn lived with Kristle for approximately two weeks without Department approval. Several

examples will suffice. First, Kristle admitted that she allowed the children to have prohibited contact with Jason and lied to the Department about this contact. Kristle further admitted that Jason had a history of significant drug use, including the use of methamphetamines. Kristle admitted that Sydney saw her father after he attempted to overdose on drugs and later told her to lie to the Department and “say it was a dream.” Additionally, Kristle conceded that she allowed her children to have prohibited contact with Jason’s mother and that Jason had introduced other “unsafe people” into her life, who were probably involved in criminal activity. Thus, a substantial quantum of evidence was presented at trial establishing grounds for the termination of Kristle’s parental rights, other than evidence that Josh and JoLynn lived with Kristle for a brief period and had contact with her children. Therefore, even assuming that the court erroneously exercised its discretion, we conclude that the error was harmless.

CONCLUSION

¶21 In sum, we conclude that the court did not erroneously exercise its discretion in restricting Kristle’s cross-examination because Kristle was provided a meaningful opportunity to cross-examine Simmons. Alternatively, we conclude that, even assuming the court erred in restricting Kristle’s cross-examination, the error was harmless. Accordingly, we affirm.

By the Court.—Orders affirmed.

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

