COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 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. 2013AP1886
2013AP1887

Cir. Ct. Nos. 2012TP79
2012TP80

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

No. 2013AP1886

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

NANCY M.,

RESPONDENT-APPELLANT.

No. 2013AP1887

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

NANCY M.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Dane County: PETER ANDERSON, Judge. *Affirmed*.

¶1 BLANCHARD, P.J.[1] This is a termination of parental rights (TPR) proceeding involving two children. Nancy M. appeals a decision of the circuit court denying her motion for a new trial in the grounds phase of the proceedings. She argues that the circuit court erred in allowing testimony during the grounds phase bench trial on the topic of her alleged failure to bond with her children, even though the court stated that it would not consider this testimony during the grounds phase. She contends that this error warrants a new trial. I conclude that, assuming without deciding that the circuit court erred in conditionally admitting this testimony, any error was harmless. Accordingly, I affirm the decision of the circuit court denying Nancy M.'s motion for a new trial.

BACKGROUND

TPR Proceedings Generally

¶2 Wisconsin uses a two-part statutory process for the involuntary termination of parental rights. ***Sheboygan Cnty. DHHS v. Julie A.B.***, 2002 WI

[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.

95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402. The first phase is a fact-finding hearing "to determine … whether grounds exist for the termination of parental rights." *See* WIS. STAT. § 48.424(1)(a). The court must determine that grounds for termination exist on clear and convincing evidence. ***L.K. v. B.B.***, 113 Wis. 2d 429, 441, 335 N.W.2d 846 (1983). If the court determines that grounds exist, the court must find the parent unfit. Sec. 48.424(4).

¶3 The second phase of the TPR proceeding is the dispositional hearing, where the focus shifts to the best interest of the child. ***Julia A.B.***, 255 Wis. 2d 170, ¶28. Based on that interest, the court may dismiss the petition or terminate parental rights. *See* WIS. STAT. § 48.427(2), (3). While the nature of the parent-child relationship is a factor to be considered in ascertaining the best interest of the child at the dispositional phase, it is not a factor that the court considers during the grounds phase. *Compare* WIS. STAT. § 48.426(3)(c) (whether the child has a "substantial relationship" with the parent is a factor in determining whether it is in the best interest of the child to terminate that relationship) *with* WIS. STAT. § 48.415 (setting out grounds for termination).

Facts Here

¶4 Nancy M. is the biological mother of Matthew M. and Christopher M. The Dane County Department of Human Services (the Department) filed petitions to terminate Nancy M.'s parental rights as to Matthew and Christopher, alleging as grounds "continuing need of protection or services" under WIS. STAT. § 48.415(2). In the grounds phase, Nancy M. waived her right to trial by jury, and the case proceeded to a trial by the court.

¶5 On the second day of the grounds trial, the circuit court solicited testimony from a Department social service specialist assigned to Nancy M.'s case

regarding the extent of Nancy M.'s bonding with Christopher and Matthew. The Department and guardian ad litem interjected that this line of questioning was not relevant to the grounds phase of the TPR proceeding, although they observed that it would later be relevant in the dispositional phase, in the event that grounds were found. Counsel for Nancy M. objected to this line of questioning.

¶6 The circuit court agreed that the specialist's testimony regarding bonding was not relevant to the grounds phase of the TPR. However, the court explained that it would allow the testimony on the premise that the court would merely "store" the testimony and then "pull it back out" in the event that the TPR proceeded to the dispositional phase. I interpret the court to have invited this testimony on the explicit basis that the court was only conditionally admitting the testimony, and would not consider it during the grounds phase of the TPR, but would consider it only in the event that the proceedings reached the dispositional phase. Nancy M. does not appear to have a contrary interpretation of the court's statements on this issue.

¶7 The specialist offered his opinion that Christopher and Matthew were "not sufficiently attached" to Nancy M. He based this opinion on the children's "interactions with" Nancy M., which he summarized as follows:

> Just their failure at following [Nancy M.'s] directions, calling [their caregiver at their current placement, as opposed to Nancy M.,] "Mom," referring to [Nancy M.] sometimes by her first name, further communication between the two [and their] interactions [during] the visits, and I believe one of [Nancy M.]'s comments during the visit at the mall in which she said, "If they were my children, they wouldn't be acting this way."

¶8 On the following day of trial, the circuit court informed the parties that it had reconsidered the propriety of conditionally admitting the specialist's

testimony during the grounds phase, and decided that the court had gotten "too creative procedurally." The court explained that, even though it had invited the testimony merely "to reserve it for later use," it would "strike" this testimony. My interpretation of the record is that, in saying that it was "striking" the testimony, the court was effectively indicating, yet again, that it would not be relying on this testimony in connection with the grounds phase. Nancy M. does not appear to have a different interpretation. The court also stated that it was retrospectively sustaining Nancy M.'s objection to admission of this testimony during the grounds phase.

¶9 At the close of the grounds trial, the circuit court found grounds to terminate Nancy M.'s parental rights and found Nancy M. unfit pursuant to WIS. STAT. § 48.424(4). A dispositional hearing was then held, pursuant to WIS. STAT. § 48.426, after which the circuit court terminated Nancy M.'s parental rights to both children. During the dispositional phase, similar testimony regarding bonding was offered and considered by the court, without objection by Nancy M.

¶10 Nancy M. filed a notice of intent to pursue post-termination relief, and then filed a pro se notice of appeal. Based on a finding of indigence, the circuit court appointed Nancy M.'s current counsel. This court then dismissed Nancy M.'s pro se appeal without prejudice and provided Nancy M. a new deadline for filing a notice of appeal. Nancy M., through her counsel, filed a no merit appeal, but then reversed course and ultimately filed a motion for a new trial, raising the issue presented here.

¶11 Nancy M. moved for a new trial on the grounds that the court had improperly heard the bonding testimony during the grounds phase. The court denied this motion, deciding that if it was error to conditionally admit the bonding

testimony, such error did not prejudice Nancy M., and thus a new trial was not required. The court specifically found that "the one place" during the entire proceedings at which the court had relied on bonding testimony "was when I was assessing the harm of termination of parental rights." Nancy M. now appeals the denial of her motion for a new trial.

DISCUSSION

¶12 Nancy M.'s sole argument on appeal is that the circuit court committed prejudicial error by conditionally admitting the bonding testimony during the grounds phase of the TPR proceeding, even though the court originally admitted it on a "reservation" basis and subsequently reaffirmed that it would not consider the testimony during the grounds phase. Nancy M. argues that this error warrants a new trial.

¶13 Whether to grant a motion for a new trial is a discretionary decision of the circuit court. *See* ***Haskins v. State***, 97 Wis. 2d 408, 419, 294 N.W.2d 25 (1980). Likewise, a decision regarding the admission of evidence also rests in the circuit court's discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. A circuit court's discretionary decision will not be overturned if there is a rational basis for that decision. ***Id.***, ¶29.

¶14 A circuit court's error in admitting certain evidence does not necessarily require a new trial. *See* ***id.***, ¶30. A new trial will not be granted for an error unless the error "affected the substantial rights of the party" that is seeking the new trial. ***Id.***; *see also* WIS. STAT. § 805.18(2). "For an error 'to affect the substantial rights' of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Martindale***, 246 Wis. 2d 67, ¶32.

¶15 Nancy M. does not argue that the record demonstrates that the court was influenced by the bonding testimony in considering any identifiable factor at issue during the grounds phase. Instead, she argues that, by its nature, the negative bonding testimony necessarily contributed to the circuit court's finding of grounds to terminate, because it had to have tainted the circuit court's overall opinion of Nancy M. as a parent, and as a result, the circuit court was not able to give Nancy M. the "benefit of the doubt" in its decision on grounds. Nancy M. argues that the inevitable general taint that had to have arisen from this evidence could not be cured by the court's multiple announcements that it would not be considering the evidence during the grounds phase.

¶16 To support her argument for a new trial, Nancy M. points to cases in which our supreme court has determined that allowing inadmissible evidence to be heard by jurors can be an error that cannot be cured by later "striking" the evidence, that is, by telling the jurors to disregard the evidence. *See*, *e.g.*, ***Fischer v. State***, 226 Wis. 390, 401, 276 N.W. 640 (1937); ***Alsheimer v. State***, 165 Wis. 646, 649, 163 N.W. 255 (1917). The concern is heightened in TPR proceedings, Nancy M. adds, because these proceedings affect fundamental rights. She points to case law stating that TPR proceedings "require heightened legal safeguards against erroneous decisions," *see* ***State v. Bobby G.***, 2007 WI 77, ¶63, 301 Wis. 2d 531, 734 N.W.2d 81, and from this argues that it is insufficient to "strike" erroneously admitted evidence of the type conditionally admitted here.

¶17 The first problem with Nancy M.'s argument is that the court made clear that the bonding evidence was not admitted as evidence to be considered in the grounds phase. The court's original goal was to take evidence out of order, in case it was needed for the dispositional phase. If the court had not revisited the issue the next day, it still would have been clear from the record that the court was

not going to consider this evidence during the grounds phase. The court ended up having second thoughts about the wisdom of taking the evidence out of order, but the court never suggested that it was going to consider this evidence as part of the grounds phase of the proceedings. Therefore, I question whether the court committed any error at all.

¶18 A second problem with Nancy M.'s argument is that the authority she cites applies to trials to juries, and Nancy M.'s case was tried to the court. In other words, even assuming without deciding that there was error, the authority on which she relies comes from the wrong procedural context. In a trial to the court, even if evidence is improperly admitted, it is presumed that the error is harmless unless it is clear that, but for such evidence, the court's decision would probably have been different. *See* ***Ray v. State***, 33 Wis. 2d 685, 689, 148 N.W.2d 31 (1967) ("[T]he admission of improper evidence is to be regarded as harmless unless it clearly appears that but for that evidence the finding would probably have been different."); *see also* ***Taugher v. Hardware Mut. Cas. Co.***, 235 Wis. 55, 58-59, 292 N.W. 777 (1940) (presumption that the circuit court disregarded inadmissible evidence). "Error in admitting evidence in a bench trial will not be presumed to have prejudiced the trial judge. The error is harmless if it does not appear to have influenced the judge's decision." 6A JAY E. GRENIG, WISCONSIN PLEADING AND PRACTICE § 55:35 (5th ed. 2013) (footnotes omitted).

¶19 As to Nancy M.'s argument that, because this is a TPR proceeding, which requires "heightened legal safeguards," the "striking" of the erroneously admitted testimony here was insufficient, she cites to no authority in support of this proposition. That is, Nancy M. fails to explain why the test stated above, namely, whether the court's decision would have been different but for the erroneously admitted evidence, should not apply in the TPR context. Nor does she

explain what other test might apply. She simply asserts that "heightened legal safeguards" require a new trial here. I need not consider arguments that are not fully developed and unsupported by legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶20 Assuming without deciding that the court committed error in conditionally admitting the bonding testimony during the grounds phase, Nancy M. fails to persuade me that the court's decision would probably have been different if the bonding testimony had not been erroneously admitted.

¶21 The alleged ground for termination for both Christopher and Matthew was continuing need of protective services. *See* WIS. STAT. § 48.415(2). In particular, the issue was whether Nancy M. had failed to meet any of her conditions of return and whether there was a substantial likelihood that she would not meet those conditions within nine months of the fact-finding hearing. *See* § 48.415(2)(a)3. The circuit court found that Nancy M. failed to meet two of the conditions of return, and that there was a substantial likelihood that she would not meet those two conditions within nine months of the fact-finding hearing. The two conditions of return on which the circuit court based its decision required Nancy M. to:

> B. Have a legal source of income sufficient to care for the children and provide the Department with proof of income or assets upon request.
>
> ….
>
> I. Stay in touch with and cooperate with the Department and with the supervisor of your family contacts on a regular and consistent basis including, but not limited to, cooperating with scheduled and unscheduled home visits ….

¶22 Nancy M. calls this case a "close call." I disagree. There was ample evidence before the circuit court to support the circuit court's findings that Nancy M. had failed to meet both of these conditions of return. For example, as to Condition B., the circuit court found that Nancy M. had never provided the Department with proof of her income. This finding is supported by testimony from a Department social worker that Nancy M. had failed to respond to numerous requests for information concerning her employment. The court's finding that it was substantially likely that Nancy M. would not meet this condition in the following nine months is supported by evidence from the same social worker that Nancy M. was highly unresponsive to Department requests, including numerous attempts by the Department to obtain information regarding her employment, and by evidence that Nancy M. suffered from psychological problems that manifested as undue suspiciousness of others and inflexibility.

¶23 In addition to Condition B., the court also found that Nancy M. had failed to meet Condition I. because she had failed to cooperate with the Department on numerous occasions. There was ample evidence presented at trial to support the court's finding that Nancy M.'s "uncooperativeness … was remarkable and unsettling." Nancy M. failed on numerous occasions to allow the Department to conduct a home visit. The Department made at least a dozen requests to conduct a home visit, but Nancy M. refused to make arrangements for any visits. On three occasions when Nancy M. did schedule a home visit, she either cancelled the visit or was not home at the scheduled time. On one occasion when Nancy M. offered to allow a home visit, she was unable or unwilling to schedule a date when asked to do so by the Department. Nancy M. also refused to provide the Department with a current home address, and, as previously discussed, failed to provide the Department with required information on her income and

employment. That Nancy M. was unlikely to meet this condition during the following nine months is supported by testimony that, as with Condition B., she was consistently uncooperative with the Department at all relevant times.

¶24 In addition to the evidence that supports the circuit court's decision, there is also evidence that the circuit court did in fact give Nancy M. the "benefit of the doubt" in regard to its findings on numerous other conditions of return. To highlight one example, the circuit court did not determine that there was clear and convincing evidence that Nancy M. had violated Condition E., which required Nancy M. to "[c]ooperate with the family contact plan and have regular and successful visits with [her] children …." The court determined that, although Nancy M. had cancelled some of the visits and some of the visits with her children had been "bumpy," he would find in her favor on that condition of return.

¶25 In sum, the record reflects sufficient evidence on which the circuit court could find that Nancy M. had violated Conditions B. and I. in the absence of testimony regarding her bonding with Christopher and Matthew. There is also evidence that, despite the bonding testimony, the circuit court in fact gave Nancy M. the benefit of the doubt in its finding of grounds. Nancy M. has failed to persuade me that, but for this bonding testimony, the circuit court's findings would have been different.

¶26 Nancy M. also argues that the circuit court erroneously exercised its discretion in denying her motion for a new trial because it did not consider all the factors that it was required to consider. Specifically, Nancy M. argues that the circuit court failed to "examine the error in the context of the due process interest at stake and the need for 'heightened legal safeguards'" in a TPR proceeding. *See* ***Bobby G.***, 301 Wis. 2d 531, ¶63. I find this argument difficult to distinguish from

Nancy M.'s argument regarding the "heightened legal safeguards" that I have already addressed and rejected. In any case, Nancy M. fails to cite to legal authority supporting her argument that the "heightened legal safeguards" discussed in ***Bobby G.*** must be considered in a circuit court's discretionary determination of whether to grant a new trial. *See* ***Pettit***, 171 Wis. 2d 627, 646-47. On review of a circuit court's discretionary decision, such as whether to grant a new trial, the circuit court's decision will not be overturned if there is a rational basis for that decision. *See* ***Martindale***, 246 Wis. 2d 67, ¶29. As explained above, the record amply supports the circuit court's decision that any error in admitting the bonding testimony, assuming error, would not have resulted in prejudice to Nancy M.

CONCLUSION

¶27 For the reasons above, I affirm the decision of the circuit court denying Nancy M.'s motion for a new trial.

By the Court.—Orders affirmed.

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