

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 19, 2016

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 No. 2015AP2098

Cir. Ct. No. 2014TP177

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

M. K.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
REBECCA G. BRADLEY and DAVID SWANSON, Judges. *Affirmed.*

¶1 KESSLER, J¹ M.K. appeals from the order terminating her parental rights to her son, M.K.-K. She also appeals from the order denying her postdispositional motion.² M.K. contends that the petition to terminate her parental rights should be dismissed because the September 4, 2013 order extending the original CHIPS dispositional order did not contain all of the conditions she needed to meet for the return of her child. She also argues that: the trial court erred when it entered a directed verdict on the first special verdict question (“Question 1”); she was denied her right to a fair trial as a result of the directed verdict; and counsel was ineffective. We reject all of M.K.’s arguments and affirm.

BACKGROUND

¶2 M.K.-K., born on July 24, 2005, is the non-marital child of M.K. and B.S.-C., who passed away. On May 20, 2011, the State filed a petition, alleging that under WIS. STAT. § 48.13 (2013-14), the child was a child in need of protection or services. The petition contained numerous pages, detailing multiple referrals to the Division of Milwaukee Child Protective Services (DMCPS) and the results of subsequent investigations. The petition detailed the uninhabitable environment M.K. maintained, including, but not limited to: little to no walking space in the home because the floors were covered with soiled materials, clothes, broken furniture pieces and a working chainsaw, among other things; a bad smell; no space to prepare food; bottles of urine, junk and dirt throughout the house; a

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

² The Honorable Rebecca G. Bradley presided over the trial and entered the order terminating M.K.’s parental rights. The Honorable David Swanson entered the order denying M.K.’s postdispositional motion.

filthy basement with no walking space, a rancid smell, and a toilet so dirty that the color could not be determined. The petition also stated that the child and his siblings alleged that M.K.'s uncle, who lived in the basement, sexually abused them, but M.K. did not believe the children despite being aware of a previous abuse allegation against her uncle. M.K. admitted that the children reported the alleged abuse to her, but that she still left the children with the uncle when she needed to leave the house.

¶3 A CHIPS dispositional order was entered on September 22, 2011. The order stated that despite reasonable efforts to prevent the children's removal, M.K. had not "enhanced her diminished protective capacities that renders it unsafe for the child to reside in the mother's care." The order stated three conditions M.K. was to satisfy for M.K.'s return: (1) meet multiple goals for behavioral change (the goals were listed); (2) maintain a relationship with her son by regularly participating in visitation with the child; and (3) demonstrate an ability and willingness to provide a safe level of care for the child.

¶4 The order was extended twice, first on October 8, 2012, and again on September 4, 2013. The first extension order restated all of the conditions M.K. was to meet for her child's return. The second extension order did not specifically list all of the conditions, but incorporated the conditions from the previous orders.

¶5 The State ultimately filed a petition to terminate M.K.'s parental rights and the matter proceeded to trial, where multiple witnesses reiterated the findings articulated in the State's petition. Lorah Green, an investigator with the DMCPs, testified that in May 2011, after receiving a referral that M.K.-K. and his siblings told their mother they were abused, but the mother didn't believe them, she (Green) went to M.K.'s home. Green testified in detail about the unsanitary

conditions of the home, essentially corroborating the findings in the State's petition. Green also stated that M.K. admitted that the children reported sexual contact with M.K.'s uncle who lived in the basement, and that M.K.'s sister made a similar allegation against the uncle when she was child. Green stated that she determined that M.K.'s son and his siblings were not safe in their mother's home and requested that the children stay with their maternal grandmother. Green testified that she visited the children at the home of their maternal grandmother, where the grandmother expressed concern about the children being abused. Green immediately put a safety plan in place, requiring the children to remain with their maternal grandmother while the DMCPD investigation continued.

¶6 Cassie Henry, the family case manager handling M.K.'s case, stated that she attempted to help M.K. meet the necessary conditions for her son's return. Henry acknowledged each of the conditions of return and testified that M.K. did not meet them, telling the court that the most significant condition required M.K. to receive individual therapy, which M.K. had not done to a "significant extent." Henry also testified that M.K. violated the terms of the safety plan by having her boyfriend present at some of her visitation sessions with her son, and by having unsafe equipment at her residence. M.K. knew her boyfriend was not to attend the visitation, but stated that because her son gave her a hard time during the visits, it was "helpful to have a man in her life." Henry testified that she did not believe M.K. had met any of the conditions for the return of her son.

¶7 M.K. also testified, telling the court that she was aware individual therapy was necessary to institute the behavioral changes necessary for her son's return, but that she never attended regularly. M.K. also understood that she had to maintain a clean and safe environment for her child as a condition to his return.

M.K. acknowledged each condition of return and indicated that she understood what they were.

¶8 After the testimony was completed, outside of the presence of the jury, the guardian *ad litem* told the court that Exhibit 6, the second extended CHIPS order, did not contain the second and third conditions M.K. was to meet for the return of her child. The court agreed that the extension order appeared incomplete, but noted that Exhibit 5, the first CHIPS extension order was complete and listed all of the conditions for return. The guardian *ad litem* also noted that Exhibit 8, the original CHIPS dispositional order, was complete. The parties ultimately stipulated that Exhibit 8, the original CHIPS order, contained all of the conditions for return and was an accurate version of the original CHIPS order.

Special Verdict.

¶9 To prove that M.K.-K. was a child in need of protection of services, the State was required to prove four elements, which were reflected in the special verdict questions: (1) the child has been adjudged to be a child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under WIS. STAT. § 48.345; (2) the agency responsible for the care of the child and the family has made a reasonable effort to provide the services ordered by the court; (3) the child has been outside the home for a cumulative total period of six months or longer pursuant to such orders and the parent has failed to meet the conditions established for the safe return of the child to the home; and (4) there is a substantial likelihood that the parent will not meet the conditions within the nine-month period following the fact-finding hearing. *See* WIS. STAT. § 48.415(2)(a).

¶10 Prior to deliberations and outside of the presence of the jury, the State moved for a directed verdict on the first special verdict question, which asked: “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?” M.K.’s counsel did not object. The circuit court granted the State’s motion, stating:

We have spent a lot of time establishing that there is indeed an order and it is not disputable that the first element of continuing CHIPS has been established. [The child] was adjudged to be in need of protection or services and placed outside the parental 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.

¶11 The jury determined that the State met its burden on the remaining three questions. At the dispositional hearing, the circuit court determined that termination of M.K.’s parental rights was in the best interest of her son.

Postdispositional motion and hearing.

¶12 M.K. filed a “Notice of Intent to Pursue Post-Dispositional Relief” and a Notice of Appeal. We granted M.K.’s motion for remand for an evidentiary hearing on November 17, 2015.

¶13 M.K. then filed a motion for postdispositional relief with the circuit court, arguing that Exhibit 6, the last CHIPS extension order, failed to comply with WIS. STAT. § 48.356(6) because it did not contain the requisite termination of parental rights warnings or all of the conditions for her child’s return. M.K. also argued that the circuit court erroneously answered Question 1 of the special verdict form, thus depriving her of her right to a fair trial, and that her counsel was

ineffective for not objecting to the admission of Exhibit 6 and to the State's motion for a directed verdict on Question 1.

¶14 At a hearing on the motion, the circuit court found that M.K. was properly notified about the conditions of her child's return and not prejudiced by the incomplete September 2013 order because the original CHIPS order and the first extension order both contained the conditions for return.

¶15 The circuit court also found that there was sufficient evidence to support the court's answer to Question 1 of the special verdict. Accordingly, the court found that M.K.'s counsel was not ineffective. This appeal follows.

DISCUSSION

¶16 On appeal, M.K. argues that the circuit court erred in terminating her parental rights because: (1) the last CHIPS extension order M.K. received before trial did not comply with the statutory notice requirements; (2) Question 1 of the special verdict form should not have been answered "yes" by the court because the State did not prove that answer by clear and convincing evidence; (3) in turn, M.K. was denied her right to a jury trial on Question 1; and (4) her trial counsel was ineffective.

I. Notice Requirements.

¶17 M.K. argues that the September 2013 extension order did not contain written notice of the conditions for return of her child. M.K. claims that WIS. STAT. §§ 48.356(2) and 48.415(2)(a)1. require written notice of the conditions to be included in the September 2013 extension order, which was the last order issued prior to the commencement of the termination of parental rights action. We conclude that the notice M.K. received satisfies the statutes under the facts of this

case and that M.K. admitted that she knew and understood the conditions for her child's return.

¶18 WISCONSIN STAT. § 48.356 reads, in relevant part:

(1) Whenever the court orders a child to be placed outside his or her home ... 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 or denies visitation under sub. (1) shall notify the parent or parents ... of the information specified under sub. (1).

In other words, § 48.356(2) requires any written order placing a child outside of the home, pursuant to certain statutes, to notify the parent of any grounds for the termination of parental rights and the necessary conditions for the return of the child to the home. *See id.*

¶19 WISCONSIN STAT. § 48.415 sets forth the potential grounds for termination of parental rights. Subsection (2) explains the continuing-need-of-protection-or-services ground, as relevant here, thusly:

Grounds for termination of parental rights shall be one of the following:

....

(2) CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services, which shall be established by proving any of the following:

(a) 1. That the child has been adjudged to be a child ... in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders ... containing the notice required by s. 48.356(2)....

To wit, contrary to WIS. STAT. § 48.356(2), § 48.415(2)(a)1. explicitly states that only one or more of the court orders needs to notify the parent of the grounds for termination and the conditions of return. *See* § 48.415(2)(a)1.; *see also* § 48.356(2).

¶20 Relying on *Waukesha County v. Steven H.*, 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607, M.K. argues that the September 2013 order did not comply with the requisite statutory notice requirements. In *Steven H.*, none of the orders Steven H. received, except the final extension order, included a notice that he was in danger of having his parental rights terminated. *Id.*, ¶¶7-8. The Wisconsin Supreme Court addressed “whether Wis. Stat. §§ 48.356(2) and 48.415(2) require that each and every order placing a child outside his or her home contain the written notice prescribed by § 48.356(2) in order for the termination of parental rights to proceed.” *Steven H.*, 233 Wis. 2d 344, ¶16. The court found that the notice requirements were satisfied because the last order, issued at least six months before the State filed its termination petition, contained the requisite notice to Steven H.:

Wis. Stat. § 48.356(2) and 48.415(2) do not require that each and every order removing a child from his or her home contain the written notice prescribed by § 48.356(2) in order for the termination of parental rights to proceed. We conclude that Wis. Stat. §§ 48.356(2) and 48.415(2) require that the last order specified in § 48.356(2) placing a child outside the home, which must be issued at least six months before the filing of the petition to terminate parental rights, must contain the written notice prescribed by § 48.356(2). This interpretation of § 48.356(2) and 48.415(2) ensures that a parent receives the written notice required by § 48.356(2) in a timely manner and does not vitiate a termination of parental rights proceeding when one or more previous orders fails to contain the statutorily prescribed written notice. Although we conclude that the petition to terminate parental rights need not be dismissed because of the failure of an order in this case to contain the prescribed

notice, the better practice is to include the written notice required by § 48.356(2) in all orders to which that statute applies.

Steven H., 233 Wis. 2d 344, ¶3.

¶21 The *Steven H.* court also discussed the purposes of the notice requirements, stating:

The notice required by Wis. Stat. §§ 48.356(2) and 48.415(2) is meant to ensure that a parent has adequate notice of the conditions with which the parent must comply for a child to be returned to the home. The notice is also meant to forewarn parents that their parental rights are in jeopardy. In this case *Steven H.* received notice one year before the filing of the petition to terminate parental rights and was thus adequately informed of the steps he had to take to avoid termination of parental rights and was given time in which to take those steps.

Steven H., 233 Wis. 2d 344, ¶37.

¶22 Here, M.K. had sufficient notice of the conditions necessary for her child's return. Both the original CHIPS dispositional order and the first extension order contained the complete set of conditions. The September 2013 order, though incomplete, specifically incorporated the conditions by stating that “[a]ll conditions of the dispositional order/consent decree remain in effect[.]” Moreover, M.K. does not argue that she was not aware of the conditions, nor does she indicate that she was confused by the incomplete September 2013 extension order. Indeed, at trial, M.K. acknowledged all of the conditions necessary for her son's return and indicated that she understood them all. The circuit court appropriately found that M.K. had proper notice of the conditions of her child's return.

Special Verdict.

¶23 M.K. argues that the circuit court erred when it answered “yes” to Question 1 pursuant to the State’s motion for a directed verdict, depriving her of a complete trial on the continuing CHIPS issue. She argues that the State did not prove that answer by clear and convincing evidence. We disagree.

¶24 ““A motion for a directed verdict should be granted only where the evidence is so clear and convincing that a reasonable and impartial jury properly instructed could reach but one conclusion.”” *Door Cty. Dep’t of Health & Family Servs. v. Scott S.*, 230 Wis. 2d 460, 465, 602 N.W.2d 167 (Ct. App. 1999) (citation omitted).

¶25 Question 1 asked whether the child was placed outside of his home for a cumulative total of six months or longer pursuant to one or more court orders containing the required termination of parental rights notice. The circuit court had sufficient information to answer this question. It is undisputed that the child had been placed outside of his home since May 2011. Both the original CHIPS dispositional order and the first extended order contained this information. M.K. also confirmed this at trial. By the time the trial started, in April 2015, the child had been out of his maternal home for almost four years. No evidence controverts this fact. Accordingly, there was clear and convincing evidence, provided both by documentation and testimony, that the child had been placed outside of his home for a total of six months or longer pursuant to one or more court orders.

Ineffective Assistance of Counsel.

¶26 Finally, M.K. contends that her counsel was ineffective for failing to recognize that Exhibit 6, the September 2013 extension order, was incomplete and

for failing to argue the lack of notice as a defense. M.K. also argues that counsel was ineffective for failing to object to the State's motion for a directed verdict. As we have discussed, M.K. was not prejudiced by the incomplete extension order because M.K. had actual notice of the conditions of her child's return. We have also concluded that the State proved by clear and convincing evidence that the directed verdict was appropriate in these circumstances. There was no dispute that the child had been out of his home since May 2011. Accordingly, counsel was not ineffective for failing to object.

¶27 For the foregoing reasons, we affirm the circuit court.

By the Court.—Orders affirmed.

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

