COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2005

Cornelia G. Clark
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. 2005AP383
2005AP384

Cir. Ct. Nos. 2003TP268
2003TP269

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

NO. 2005AP383
CIR. CT. NO. 2003TP268

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MARY K.,

RESPONDENT-APPELLANT.

NO. 2005AP384
CIR. CT. NO. 2003TP269

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MARY K.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JOSEPH R. WALL, Judge. *Affirmed*.

¶1 CURLEY, J.[1] Mary K. appeals the orders terminating her parental rights to two of her minor children: Lefty, born in 1990, and Kedar,[2] born in 1996. Mary K. contends that the trial court committed prejudicial error during the jury trial by admitting into evidence objected-to testimony concerning an older child, Serita, who was not named in the termination of parental rights petition. She argues that although the evidence in question was clearly relevant and could not have been excluded as "other acts" evidence, it was more prejudicial than probative, and, therefore, the trial court erroneously admitted the testimony. This court disagrees with her contentions and affirms.

I. BACKGROUND.

¶2 In 1998, Mary K. and her five children began living as transients and frequenting homeless shelters. She was chronically unemployed, unable to maintain an apartment for more than a few months at a time, and unable to

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

[2] There are inconsistent spellings of several names throughout the record. For simplicity, this opinion has adopted the versions that appear in the jury trial transcripts from December 17, 2003.

independently provide food or clothing for her children. On February 1, 1999, the two youngest of Mary K.'s five children, Lefty[3] and Kedar,[4] were found to be in need of protection or services, and were placed outside of her home. They were returned to the care of Mary K. only for a brief period of time in 1999, after which they were again removed. Lefty and Kedar have not returned to live with their mother since, and the CHIPS orders for the children have been extended annually.

¶3 On March 30, 2003, a petition was filed requesting the termination of Mary K.'s parental rights to Lefty and Kedar pursuant to WIS. STAT. § 48.415(2) (2003-04).[5] The petition alleged that due to her "substantial non-compliance with the court-ordered conditions" for the return of Lefty and Kedar, it was substantially unlikely that Mary K. would "meet the conditions of return in the next 12 months." The petition listed specific instances of Mary K.'s non-compliance with the court-ordered conditions, such as her failure to complete treatment programs, her failure to obtain a suitable residence for the children, and her failure to consistently cooperate with social workers.

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[3] Lefty's alleged father, Melvin D., was never involved in these proceedings. The trial court terminated his parental rights after finding him in default due to his abandonment of Lefty.

[4] Kedar's adjudicated father, Emmanuel G., contested the termination of parental rights petition, but is not a party to this appeal. His parental rights to Kedar were also terminated.

[5] The petition also requested the termination of the parental rights of Kedar's father, Emmanuel G., and of Melvin D. or any unknown father of Lefty, pursuant to WIS. STAT. §§ 48.415(1)(a)3 (abandonment), and 48.415(6) (failure to assume parental responsibility). As previously mentioned, the parental rights of both Emmanuel G. and Melvin D. were subsequently terminated and are not subject to this appeal.

All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 A jury trial was held regarding the petition in December 2003. The State presented, along with other evidence, the testimony of three case managers who had been involved with Mary K.'s family at some point from 1999 on. The most recently-assigned case manager testified, in part, that it was his belief "that based on four years of documented history ... Mary will be unable to obtain a safe and suitable home within the next twelve months." He further testified that it was his belief that "Mary will not be in a position [within the next twelve months] to have extended visits with her children ... [,or] have the understanding of … the special needs of her children" as she had not attended their therapy sessions—which are court-ordered conditions of having Lefty and Kedar returned to her.

¶5 The State also briefly questioned the case manager regarding Mary K.'s older daughter, Serita:

> Q: Now, she had had a child, an older child by the name of Serita returned to her just before you were assigned to the case, correct?
>
> A: That is correct.
>
> Q: And is it true that in March of 2003 you visited [Mary K.'s] apartment at 1909 North 36th Street?
>
> A: That's correct, on March 10th, 2003.
>
> Q: And was Serita there?
>
> A: She was not present in the home.
>
> Q: And can you tell the jury, please, what [Mary K.] told you about where Serita was?

¶6 Defense counsel objected to the relevance of this line of questioning, as Serita was not named in the petition.[6] After a sidebar conference, during which the State agreed to limit the scope of questioning, the objection was overruled.

¶7 The State continued with one final question concerning Serita:

> Q: "[Case manager], is it true that as of your visit to the home on March 10th of 2003 that Serita was no longer living with [Mary K.]?"
>
> A: "That is correct."

Later, the trial court explained, outside of the jury's presence, its reasoning in admitting the testimony:

> Well, I think just to add to the record I was a little concerned about getting into the fact she was essentially sent out of state. I thought that had some prejudicial impact. I think … how the State did cut back on that evidence was very reasonable and blunted any potential prejudicial impact. I think there is relevance to[o]—in terms of the fourth element of the continuing CHIPS, there's advance [sic] as to how a parent has done with other children and whether the parent has successfully parented, has taken on that responsibility, and how the parent has done with that responsibilit[y], and here we have evidence that goes right to that, in fact.

¶8 At the conclusion of the trial, the jury found that sufficient grounds existed to terminate Mary K.'s parental rights. At the subsequent dispositional hearing on September 20, 2004, the trial court terminated Mary K.'s parental rights. Mary K. now appeals.

[6] Any other evidence introduced during the jury trial concerning Serita was not objected to; therefore, Mary K. is deemed to have waived any appeal as to any such evidence.

II. ANALYSIS.

¶9 On appeal, Mary K. argues that evidence regarding Serita was improperly admitted, inviting the jury to infer that she was unable to successfully parent any child, and thus, requests a new fact-finding hearing. The State argues that the evidence was highly relevant, "limited in scope[,] and not overly prejudicial to Mary K.," and therefore properly admitted.

¶10 The decision to admit or exclude evidence lies within the discretion of the trial court—this court reviews the trial court's decision "to admit or exclude evidence in a termination trial under the erroneous-exercise-of-discretion standard." ***State v. Quinsanna D.***, 2002 WI App 318, ¶19, 259 Wis. 2d 429, 655 N.W.2d 752. A decision to admit or exclude evidence will be upheld so long as the trial court had a "reasonable basis" for its decision and it was made in accordance with accepted legal standards and the facts of record. ***La Crosse County DHS v. Tara P.***, 2002 WI App 84, ¶6, 252 Wis. 2d 179, 643 N.W.2d 194.

¶11 The accepted legal standard for the admission of evidence is relevance. WISCONSIN STAT. § 904.01 defines relevant evidence as that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence may be excluded if the trial court determines, in its discretion, that any probative value of the evidence is "substantially outweighed by the danger of unfair prejudice." *See* WIS. STAT. § 904.03.

¶12 The history of a parent's conduct is "relevant to predicting a parent's chances of complying with conditions in the future." ***Tara P.***, 252 Wis. 2d 179, ¶13. Indeed, in determining whether "there is a substantial likelihood" that a

parent will not meet the requisite conditions for the return of his or her children, "a fact finder must necessarily consider the parent's relevant character traits and patterns of behavior, and the likelihood that any problematic traits or propensities have been or can be modified in order to assure the safety of the children." ***Id.***, ¶18. In the present case, the trial court expressly stated that the testimony regarding Serita was relevant to the likelihood of Mary K. complying with the CHIPS order, a fact that is "of consequence in the determination of the action." *See* WIS. STAT. § 904.01. Moreover, the trial court addressed Mary K.'s objection to the evidence at length and circumvented the danger of unfair prejudice by limiting the scope of testimony concerning Serita.

¶13 Although Mary K. asserts that the testimony regarding Serita allowed the jury to infer that she could not successfully parent any child, this court is not persuaded that the evidence was unfairly prejudicial. The State presented ample evidence to support the termination of parental rights petition, and only briefly referenced Serita. Moreover, the record does not suggest that the evidence regarding Serita created the inference that Mary K. was unable to successfully parent any child. The trial court properly exercised its discretion in admitting this relevant evidence. For the reasons stated, the trial court's orders are affirmed.

By the Court.—Orders affirmed.

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