COURT OF APPEALS
DECISION
DATED AND FILED

February 16, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2422 **Cir. Ct. No. 2015TP98**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO J. B.-A., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

J. B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] J.B. appeals the circuit court's order terminating her parental rights to J.B.-A. based on the "continuing CHIPS" ground. J.B. argues: (1) that the court erred in qualifying a social worker to give expert opinion testimony on the element of whether there was a substantial likelihood that J.B. would not meet return conditions within the nine-month period following the fact-finding hearing; (2) that there was insufficient evidence to support the jury's finding on this element; and (3) that the court erred in interpreting statutory language describing the element of whether the parent had "failed to meet the conditions." For the reasons below, I affirm.

Background

¶2 The Dane County Department of Human Services petitioned to terminate J.B.'s parental rights to J.B.-A., alleging as the sole ground for termination that J.B.-A. was in continuing need of protection or services (CHIPS). *See* WIS. STAT. § 48.415(2). In order to establish the continuing CHIPS ground as alleged in the petition, the Department needed to prove the following four elements:

> (1) that J.B.-A. was adjudged to be in need of protection or services and was placed or continued in placement outside J.B.'s home for a cumulative period of six months or longer pursuant to one or more court orders containing the termination of parental rights warnings required by law;
>
> (2) that the Department has made a reasonable effort to provide services ordered by the court;

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

(3) that J.B. has failed to meet the conditions established for the safe return of J.B.-A. to her home; and

(4) that there is a substantial likelihood that J.B. will not meet the conditions for the safe return of J.B.-A. within the nine-month period immediately following the conclusion of the fact-finding hearing.

See § 48.415(2)(a); WIS JI—CHILDREN 324A.

¶3 At the fact-finding hearing, the circuit court directed a verdict on the first element. As to the remaining elements, the jury found that the Department met its burden, thus establishing continuing CHIPS as the ground for termination. The case proceeded to a dispositional hearing at which the court exercised its discretion to terminate J.B.'s parental rights to J.B.-A. I reference additional facts in the discussion below.

Discussion

A. Social Worker as Expert on Whether There Was a Substantial Likelihood That J.B. Would Not Meet Return Conditions in the Nine-Month Period Following the Fact-Finding Hearing

¶4 J.B. argues that the circuit court erred in qualifying a social worker to give expert opinion testimony on the fourth element—whether there was a substantial likelihood that J.B. would not meet return conditions in the nine-month period following the fact-finding hearing. The jury heard the social worker offer opinions that J.B. was substantially likely *not* to meet return conditions in that period.

¶5 J.B. argues more specifically that the circuit court failed to engage in the type of *inquiry* required to qualify the social worker as an expert witness under WIS. STAT. § 907.02, as set forth in ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579, 592-95 (1993), and other case law interpreting and applying

the ***Daubert*** standard.[2] J.B. may also mean to argue that the social worker did not in fact have the type of specialized knowledge required to be treated as an expert.

¶6 The Department contends that the circuit court reasonably exercised its discretion to qualify the social worker as an expert. In addition, the Department in effect makes a harmless error argument, albeit not labeled as such. The Department points to extensive evidence, apart from the social worker's opinion testimony, supporting a finding that there was a substantial likelihood that J.B. would not meet return conditions in the nine-month period following the fact-finding hearing.

¶7 I assume, without deciding, that the circuit court erred in qualifying the social worker as an expert on this topic. Nonetheless, as I now explain, I conclude that the claimed error was harmless.

¶8 The supreme court in ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, 246 Wis. 2d 1, 629 N.W.2d 768, stated the harmless error test as follows:

> [T]here must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue. A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome. If the error at issue is not sufficient to undermine

[2] WISCONSIN STAT. § 907.02(1) provides:

> **Testimony by experts. (1)** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

> the reviewing court's confidence in the outcome of the proceeding, the error is harmless.

Id., ¶28 (citations omitted). Thus, the crux of the inquiry is whether the claimed error was "sufficient to undermine the reviewing court's confidence in the outcome of the proceeding." *See* ***id.***

¶9 Here, there are three reasons why the claimed error does not undermine my confidence in the outcome.

¶10 First and foremost, regardless of the social worker's opinions on whether J.B. was likely to meet return conditions in the future, there was overwhelming evidence to support the jury's finding on this fourth element. As is sometimes true in continuing CHIPS cases, the most compelling evidence of that element here was extensive factual evidence describing the parent's long history of failing to meet conditions up to the present time, despite assistance efforts by the government. *See* ***La Crosse Cty. Dep't of Human Servs. v. Tara P.***, 2002 WI App 84, ¶14, 252 Wis. 2d 179, 643 N.W.2d 194 (parent's "long history of failing to take advantage of state-offered mechanisms to obtain housing and employment training, considered in conjunction with her current failure to meet the stable housing and employment conditions, [was] evidence tending to show that [the parent] is unlikely to meet these conditions in the future").

¶11 J.B. cannot seriously dispute that the trial record here abounds with this type of evidence. The evidence included that:

- Over the two-and-one-half-year period leading up to the fact-finding hearing, J.B. failed to meet conditions of return requiring that she refrain from using alcohol or illegal drugs. For example, J.B. showed up at Department offices under the influence of alcohol and drugs; was once asked to leave a group treatment session because she attended while under the influence of an opiate; and recently informed a case manager that she was still using opiates every three or four days.

- Throughout 2016, J.B. failed to meet a condition requiring her to provide a urine sample for drug and alcohol analysis upon request. J.B. complied with only 2 of 25 requested samples.

- Over the two-and-one-half-year period leading up to the fact-finding hearing, J.B. failed to meet a condition requiring her to undergo recommended treatment programs. In particular, J.B. failed to complete several alcohol and drug treatment programs recommended or approved by the Department.

- J.B. failed to meet a condition requiring that she undergo a court-ordered psychological evaluation, despite having had approximately two years to complete this condition and assistance from the Department in identifying psychologists who could conduct the evaluation.

- J.B. failed to meet a condition requiring that she not commit law violations or be incarcerated. Since the time the return conditions were imposed, J.B. was found guilty of both disorderly conduct and OWI, and spent several brief periods in jail.

- The Department made a variety of efforts to provide pertinent services and other assistance to J.B., including referral to various programs, assistance with housing and employment, payment for transportation and transportation services, facilitation of supervised visitation with J.B.-A., and parenting education.

¶12 My second reason for concluding that the claimed error was harmless pertains to the social worker's opinion testimony itself. Looking to the particular testimony that J.B. cites, it appears that the Department could have offered similar testimony from the social worker as *lay* opinion. *See* WIS. STAT. § 907.01.[3] The complained-of opinion testimony does not appear to be based on

[3] WISCONSIN STAT. § 907.01 provides:

> **Opinion testimony by lay witnesses.** If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are all of the following:
>
> **(1)** Rationally based on the perception of the witness.

(continued)

specialized knowledge, but instead on common-sense opinions, based on J.B.'s behaviors, that any reasonable person might have. Moreover, the testimony reflected an inference that the jurors surely would have drawn on their own, namely, that J.B.'s ongoing failure to meet return conditions, including in particular drug and alcohol abuse-related conditions, was a powerful indicator that J.B. was unlikely to meet return conditions in the nine-month period following the fact-finding hearing.[4]

> **(2)** Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.
>
> **(3)** Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02(1).

[4] The social worker's opinion testimony that J.B. repeatedly cites in her briefing was this:

> Q Now, understanding that it's the jury's ultimate decision, do you have an opinion as to whether there's a substantial likelihood that [J.B.] will meet the conditions of return related to drugs and alcohol within … nine months of this hearing?
>
> A Yes.
>
> Q And what is your opinion?
>
> A My opinion is that based on the amount of time that we've worked with [J.B.]—we worked with her for about three years—there have been significant concerns of her drug use, and we've been very concerned about that, given how that impacts her ability to safely care for her child.
>
> We've offered a number of programs and supported her through—to participate in some of those programs, and this drug and alcohol—her drug and alcohol treatment—she has not completed or complied with. So given the number of years that we've been working on this, [J.B.] has not complied with the treatment.

(continued)

¶13 Third, I see no other reason to think that the jury's finding on the fourth element was the product of its belief that the social worker's opinions deserved special status as *expert* opinions. During closing arguments, neither the Department's attorney nor the guardian ad litem referred to the social worker's opinions as "expert" opinions or even spent much time referencing those opinions. Instead, both emphasized that the best predictor of J.B.'s future behavior was J.B.'s past and present behavior, and both expressed or implied that the jury should rely on its common sense to predict whether J.B. would be likely to meet return conditions going forward.

¶14 To the extent J.B. argues that the claimed error here was *not* harmless, my reasoning above addresses her arguments, except for one that I address now. J.B. argues that, in addressing harmless error, I should compare her case to ***United States v. Haines***, 803 F.3d 713 (5th Cir. 2015). This comparison is not helpful to J.B. In ***Haines***, the court concluded that a similar claimed error *was harmless*. *See* ***id.*** at 728.

> Given where [J.B.] is currently—there has been the most recent urine analysis for alcohol use, which is very concerning to me in regards to her ability to … be successful in her treatment. So based on those issues, I don't believe, in my opinion, that it is likely that [J.B.] will be successful with this … in the next nine months.
>
> Q And stated conversely: Is there a substantial likelihood that she will not be successful in the next nine months?
>
> A That's correct.

As indicated in the text, the social worker also testified that J.B. was substantially unlikely to meet other conditions in the nine-month period following the fact-finding hearing.

B. Sufficiency of the Evidence that There Was a Substantial Likelihood that J.B. Would Not Meet Return Conditions in the Nine-Month Period Following the Fact-Finding Hearing

¶15 J.B. argues that the evidence was insufficient to support the jury's finding on the fourth element. J.B. acknowledges that, in sufficiency challenges, courts view the evidence in a light most favorable to the verdict. *See, e.g.*, ***Grand View Windows, Inc. v. Brandt***, 2013 WI App 95, ¶23, 349 Wis. 2d 759, 837 N.W.2d 611.

¶16 I agree with the Department that J.B.'s sufficiency of the evidence argument clearly lacks merit. As shown by my harmless error analysis above, there was more than sufficient evidence to support the jury's finding on the fourth element. J.B.'s argument to the contrary appears to be based on an incorrect premise, namely, that the social worker's opinion testimony was the only evidence to support the fourth element.

C. Interpretation of Statutory Language Describing the Third Continuing CHIPS Element of Whether The Parent Has "Failed to Meet the Conditions"

¶17 In J.B.'s final argument heading, she asserts that the circuit court "restricted" her case presentation, but, as far as I can tell, J.B. actually attempts to resurrect a statutory interpretation argument that she initially raised before the circuit court as part of her request for jury instructions. This statutory interpretation argument, as we shall see, relates to the third continuing CHIPS element requiring that the parent "has failed to meet the conditions established for the safe return of the child to the home." *See* WIS. STAT. § 48.415(2)(a)3. I do not discern any merit to J.B.'s interpretation of the statute. Below, I discuss this topic, but do not resolve that matter. Instead, I ultimately reject J.B.'s argument based

on harmless error. That is, even assuming that her statutory interpretation argument has merit, I conclude that any related error was harmless.

¶18 J.B. interprets the statutory language referring to whether a parent "failed to meet the conditions" as referring to whether the parent failed to meet the conditions "as a whole," meaning, according to J.B., that the parent may fail to meet "any one condition" without necessarily failing to meet "the conditions." In the circuit court, J.B. proposed a jury instruction, and sought to make argument, along these lines.

¶19 The circuit court denied J.B.'s request, interpreting the statute to mean that a failure to meet even *one* condition is a failure to meet "the conditions." The court provided the jury with the standard instructions, which, notably, do *not* expressly state the circuit court's interpretation of the statute but instead simply track the statutory language. *See* WIS. STAT. § 48.415(2)(a)3.; WIS JI—CHILDREN 324A. The court allowed J.B. to argue that she had met some return conditions but prevented J.B. from arguing that she had met "enough" conditions to allow for the safe return of J.B.-A.

¶20 As to the correct way to interpret the statute, I acknowledge that the statutory phrase "failed to meet the conditions" could be clearer. The legislature could have written more clearly by using a phrase such as "failed to meet any one or more conditions," assuming that is what the legislature meant. But to interpret the statute as J.B. does—as requiring something less than compliance with each and every condition—provides no logical stopping point as to *how many* conditions a parent must fail to meet before the parent has "failed to meet the conditions" within the meaning of the statute. J.B. appears to draw the line at failing to meet some number of conditions greater than zero, but if failing to meet

one or a couple of conditions is okay, then why not perhaps several or even almost half? J.B. never explains.[5]

¶21 Regardless, even if I assume for argument's sake that the circuit court erred in rejecting J.B.'s proposed jury instruction and argument, this claimed error, like the claimed expert opinion-related error here, was harmless. *See* ***State v. Williams***, 2015 WI 75, ¶51, 364 Wis. 2d 126, 867 N.W.2d 736 ("[E]rrant jury instructions are subject to harmless error analysis."); ***State v. Bjerkaas***, 163 Wis. 2d 949, 963, 472 N.W.2d 615 (Ct. App. 1991) (error in limiting argument will not be reversed unless the error affected the verdict).

¶22 It strains reason to think that the jury would have reached a different verdict had it heard J.B.'s proposed instruction and argument. That is, I have no doubt that the jury would have reached the same verdict even if it had been instructed, or J.B. had been allowed to argue, that the jury should consider the conditions "as a whole"; that failure to meet "any one condition" was not necessarily a failure to meet "the conditions"; or that J.B. had sufficiently met the conditions. This case was not a close call as to whether J.B. did or did not fail to meet "the conditions," regardless how the statute is interpreted. Rather, as already demonstrated, there was overwhelming evidence that J.B. failed to meet many conditions, including drug and alcohol abuse-related conditions that went to the heart of J.B.'s ability to safely care for J.B.-A.

[5] J.B. argues that ***Kenosha County Department of Human Services v. Jodie W.***, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845, supports her interpretation of the statute. It is true that the court's decision in ***Jodie W.*** can be seen as excusing parents from meeting certain conditions of return that are "impossible" to meet, at least in the context of a parent's incarceration, in order to avoid an unconstitutional application of the statute. *See* ***id.***, ¶¶3, 40-56. But I do not see how ***Jodie W.*** supports the proposition that, as a matter of statutory interpretation, a parent who fails to meet one or more conditions has not "failed to meet the conditions."

Conclusion

¶23 For the above reasons, I affirm the circuit court's order terminating J.B.'s parental rights to J.B.-A.

By the Court.—Order affirmed.

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