COURT OF APPEALS
DECISION
DATED AND FILED

October 2, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-1143

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DWIGHT J.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

¶1 CURLEY, J.[1] Dwight J. appeals the order terminating his parental rights to his daughter, Ebony M., after a jury found that he had failed to assume

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

his parental responsibilities. The trial court subsequently found that Dwight J. was an unfit father and that the termination was in Ebony M.'s best interests. Dwight J. argues that the trial court erroneously exercised its discretion when it permitted the State to introduce evidence that he was incarcerated as a result of a federal drug conviction. Moreover, he submits the introduction of this information falls outside the harmless error rule because it deprived him of a fair trial. The trial court's ruling that Dwight J.'s drug conviction and drug dealing were admissible was a proper exercise of discretion because his conduct was relevant to deciding whether Dwight J. had failed to assume his parental responsibilities to Ebony M. Thus, this court affirms.[2]

I. BACKGROUND.

¶2 On September 17, 1999, the State filed a petition seeking to terminate the parental rights of Dwight J. to Ebony M. The petition alleged that Dwight J. had failed to assume parental responsibility for her as defined in WIS. STAT. § 48.415(6).[3] This action followed a six-year-old order, renewed annually, finding Ebony M., born on November 22, 1989, a child in need of protection or services and placing her in a foster home. Dwight J., who at the time the petition was filed was incarcerated in a Texas prison, had been adjudicated her father in July 1990.

[2] Because of this court's ruling on the first issue, it is unnecessary to address Dwight J.'s second issue. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (if decision on one point disposes of appeal, appellate court need not decide other issues raised).

[3] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise indicated.

¶3 Dwight J. opposed the petition and the matter was set for a jury trial. At a pretrial hearing, the State indicated that it planned to introduce evidence "regarding the reason he is incarcerated." Dwight J. objected and the trial court permitted the State to introduce this type of evidence based on the "guidance provided in [Matter of] SueAnn [A.M.]." Consequently, at trial, the jury heard that Dwight J. was currently incarcerated for a federal drug conviction and that he had been dealing large amounts of drugs worth more than $100,000 prior to his arrest and conviction. The jury found that the State had proved Dwight J. had failed to assume parental responsibility for Ebony M. Based upon the jury's verdict, the trial court found that Dwight J. was an unfit parent and, at a dispositional hearing, the trial court determined that it was in Ebony's best interests to terminate Dwight J.'s parental rights.

II. ANALYSIS.

¶4 Dwight J. argues that the trial court erroneously exercised its discretion in allowing the State to present evidence to the jury that he had been convicted of a federal drug offense. Dwight J. also contends that the introduction of this evidence could not fall the "harmless error" rule embodied in WIS. STAT. § 805.18 because the evidence "deprived [him] of his right to a fair trial."

¶5 The trial court's determination to admit or exclude evidence is a discretionary decision that will not be upset on appeal absent an erroneous exercise of discretion. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992).

¶6 Dwight J. submits that the trial court erroneously exercised its discretion because its ruling runs afoul of WIS. STAT. § 906.09, entitled:

"Impeachment by evidence of conviction of crime or adjudication of delinquency." This court disagrees.

¶7 WISCONSIN STAT. § 906.09 reads:

> **Impeachment by evidence of conviction of crime or adjudication of delinquency. (1)** GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible. The party cross-examining the witness is not concluded by the witness's answer.
>
> **(2)** EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
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> **(3)** ADMISSIBILITY OF CONVICTION OR ADJUDICATION. No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the judge determines pursuant to s. 901.04 whether the evidence should be excluded.
>
> **(5)** PENDENCY OF APPEAL. The pendency of an appeal therefrom does not render evidence of a conviction or a delinquency adjudication inadmissible. Evidence of the pendency of an appeal is admissible.

Case law interpreting the statute has limited the type of information that can be adduced about a person's criminal convictions. Generally, one can be asked only whether he or she has been convicted of a crime and, if so, how many times. *See* ***Vorth v. Buser***, 83 Wis. 2d 540, 266 N.W.2d 304 (1978). However, this use of a criminal conviction applies only when one seeks to attack the credibility of a witness. *See* ***id.*** at 544 (stating that impeaching evidence of conviction of a crime is inappropriate and inadmissible prior to the time that any issue of credibility has arisen). Further, the language in the preamble to the statute, which reads: "General rule. For the purpose of *attacking the credibility* of a witness…," clearly

indicates the statute's directive applies to the impeaching of a witness's credibility.[4] Here, the information surrounding Dwight J.'s conviction was not introduced to show that Dwight J.'s testimony should not be believed because he had been convicted of a crime; rather, it was introduced because it was relevant to the State's contentions that, under the facts then existing, Dwight J. failed to "exercise significant responsibility for the daily supervision, education, protection and care of [Ebony M.]," and to prove that Dwight J. was an irresponsible parent because "[Dwight J.] [] neglected or refused to provide care or support for [Ebony M.]". Thus, the jury had a right to know the factual circumstances involved when Ebony M. was younger.

¶8 The correct statute governing this situation is WIS. STAT. § 904.04(2), which permits the introduction of other crimes, wrongs, and acts, when the evidence is introduced for a specific purpose. Section 904.04(2) provides:

> **(2)** OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted

[4] This court also determines that if WIS. STAT. § 906.09 did apply to this case, Dwight J.'s contention that his criminal convictions should have been excluded because "its probative value is substantially outweighed by the danger of unfair prejudice" is not persuasive. The State had a right to introduce evidence of Dwight's whereabouts for the ten years of Ebony's life. Dwight J. conceded this fact. He proposed that the court instruct the jury that he was incarcerated, but not tell the jury what specific crime he had committed. Thus, under Dwight's proposal, the jury would have known of his status as a prisoner, they simply would not have known what he was convicted of.

Further, the fact that the jury learned that Dwight J. was convicted of drug trafficking was not the type of crime likely to induce unfair prejudice; that is, evidence "[having] a tendency to influence the outcome by improper means" or "appeal[ing] to the jury's sympathies, arous[ing] its sense of horror, provok[ing] its instinct to punish" or otherwise "caus[ing] a jury to base its decision on something other than the established propositions in the case." *See* ***Christensen v. Economy Fire & Casualty Co.***, 77 Wis. 2d 50, 61, 61 n.11, 252 N.W.2d 81 (1977).

> in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Here, details of Dwight J.'s lifestyle and drug conviction were admitted to prove Dwight's knowledge of his daughter's existence, his failure to assume his parental responsibilities when he was free to do so, and the fact his intentional acts led to his incarceration, preventing him from exercising his parental rights. The trial court's ruling merely allowed the State to explore what the father did for a living, whether his lifestyle was conducive to caring for his child, as well as to investigate whether he had any financial resources, and, if so, whether he used them to support his child. In this instance, that evidence translated into learning that Dwight J. rarely cared for or contacted his daughter, that he earned money from his illicit drug operation that could have been used for Ebony M.'s support but he failed to do so, and that his conduct resulted in his failure to play a major (or any) role in Ebony's life.

¶9 In so concluding, this court also extrapolated from the holdings of two cases—***Matter of SueAnn A.M.***, 176 Wis. 2d 673, 500 N.W.2d 649 (1993); and ***In Interest of Baby Girl K.***, 113 Wis. 2d 429, 335 N.W.2d 846 (1983). In ***SueAnn***, a case terminating a father's parental rights, the supreme court rejected the presumptive father's challenge to the sufficiency of the evidence that his incarceration after SueAnn's birth prevented him from exercising his parental rights. ***SueAnn A.M.***, 176 Wis. 2d at 681-85. In the earlier case, ***Baby Girl K***., our supreme court affirmed the termination of a father's parental rights, finding that the statute permitted termination even though the father had been incarcerated since the fifth month of Baby Girl K.'s mother's pregnancy. ***Baby Girl K.***, 113 Wis. 2d at 438-42. Evidence submitted during this trial included the fact that the father had "apparently supported himself quite well by dealing in drugs and

'robbing places.'" ***Id.*** at 432-33. No objection was raised to the introduction of the father's criminal activities or the crime for which he was convicted, including a conviction that occurred prior to the baby's birth. By implication, the supreme court approved the introduction of evidence setting forth the actual crimes that the fathers were convicted of and allowed the introduction of the details of their undesirable lifestyles during the child's early childhood. For the reasons stated, this court affirms the order.

By the Court.—Order affirmed.

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