COURT OF APPEALS
DECISION
DATED AND FILED

March 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3360-NM **Cir. Ct. No. 01-TP-67**

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

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

MARY G.,

RESPONDENT-APPELLANT,

DAVID B.,

RESPONDENT.

APPEAL from an order of the circuit court for Brown County: J.D. MCKAY, Judge. *Affirmed.*

¶1 CANE, C.J. Mary G. appeals an order terminating her parental rights to her son, Shannon G. Appellate counsel filed a no merit report pursuant to

WIS. STAT. RULE 809.32 and ***In re Ashley A.T.***, 218 Wis. 2d 160, 579 N.W.2d 293 (Ct. App. 1998). Mary G. received a copy of the report and has filed a response.

¶2 The no merit report discusses three issues: (1) Whether sufficient evidence supports the verdict, (2) whether the trial court erroneously exercised its discretion in terminating parental rights, and (3) whether the trial court erroneously denied Mary's motion for mistrial.

¶3 Mary responds to the no merit report, stating that she loves her son, has cooperated with social services, and has a residence and a job. She asks the court to give her a chance to raise her son. Based upon our independent review of the record, we conclude that the no merit report accurately describes the record and analyzes the issues. Because the record reveals no issues of arguable merit, we affirm the order.

BACKGROUND

¶4 In June 2001, a petition for termination of parental rights was filed, alleging that Shannon, born out of wedlock in 1995, had been placed in foster care as a child in need of protection and services (CHIPS), since March 2000. It further alleged that the child had been placed outside the home for more than six months and Brown County Department of Human Services had made a reasonable effort to provide the services ordered, but that Mary had failed to meet the conditions necessary for the child's safe return to her home. The petition stated

that grounds existed under WIS. STAT. § 48.415(2) to terminate Mary's parental rights.[1]

[1] WISCONSIN STAT. § 48.415 reads in part:

> **Grounds for involuntary termination of parental rights.** At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:
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> ….
>
> **(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 or an unborn 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 s. 48.345, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356(2) or 938.356(2).
>
> 2. a. In this subdivision, "reasonable effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case.
>
> b. That the agency responsible for the care of the child and the family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court.
>
> 3. That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.

¶5 At the August 29 and 30, 2001, jury trial, Mary testified that she signed the original CHIPS petition resulting in the order establishing the conditions for Shannon's return. Mary had been homeless at the time, having left an abusive relationship, and Shannon had been placed in a receiving home. At the time Shannon was taken into custody, he was developmentally delayed and, at age four, was still in diapers. While in foster care, he thrived and at the time of the trial, he was age appropriate and healthy in all respects.

¶6 The record shows that Mary, age fifty-one, suffered from a generalized anxiety disorder and an obsessive-compulsive personality disorder, which interfered with her ability to maintain safe housing and stable employment. Mary had involved herself in two successive abusive relationships. Mary testified at trial that Shannon's father, David B., had hit both her and Shannon. She left the relationship to reside at "Golden House," a family violence center. Yet, after Shannon was placed in foster care, Mary returned to live with David.[2]

¶7 Approximately eight months later, Mary moved into a woman's friend's home. Three months later, in February 2001, Mary met another man with whom she decided to live. This man was violent, abusive and had a drinking problem.

¶8 Mary's social worker offered to help her move out, but Mary declined. Mary lived with this man until June, at which time she moved into an apartment with a woman she had known for just one week. In August, approximately four weeks before the termination trial, Mary obtained a two-bedroom apartment with assistance from the housing authority. Mary also secured

[2] David B.'s parental rights were voluntarily terminated.

employment at a department store, where she earned $7.50 an hour and worked approximately thirty hours per week.

¶9 At trial, a psychologist who evaluated Mary testified that she had basic independent living skills but needed structure and support to function as a parent and hold full-time employment. Mary's psychiatric social worker testified that she helped Mary obtain medications and arrange psychiatric appointments. Mary's counselor testified that Mary presented battered woman's syndrome and had made little progress, except to take her medication. Mary's job case manager testified that although she provided supportive services to help Mary gain employment, Mary's personality disorders interfered with her ability to maintain stable employment.

¶10 A second psychologist who examined Mary testified to her anxiety and obsessive personality disorders. Mary's parenting instructor testified that Mary was unable to meet the objectives of the parenting program and, in her opinion, would not meet them within another year. Mary's psychotherapist testified that Mary had not met the objectives of the treatment plan and would not likely meet them within one year. A psychiatrist who treated Mary from April 1998 to the time of trial also testified that Mary suffered from an anxiety disorder and obsessive-compulsive personality disorder and had tried different medications.

¶11 Melissa Blom, Mary's social worker, testified that she provided Mary with parenting and counseling services but Mary made little progress. She testified that Mary's medications did not seem to help. Blom observed Mary's bruises from the abusive males with whom Mary lived, but was reluctant to leave. Blom testified that Mary had not satisfied certain conditions required for Shannon's return to her custody, namely, that Mary remain in individual therapy

until successfully discharged, that she demonstrate appropriate parenting skills and provide appropriate housing. Based upon Mary's lack of progress over the last seventeen months, Blom believed Mary would be unable to satisfy the conditions within the next twelve months. Blom noted that Mary had obtained suitable housing and employment just a few weeks before trial, but was not convinced Mary would be able to maintain them.

¶12 There was no dispute that Mary loved her son and that her son was bonded to her. She visited him once a week and talked to him once a week, in compliance with the CHIPS order. She took her medications and felt that she could supervise him. She testified that she would not let bad relationships be part of her or Shannon's life. It appeared undisputed that Mary seemed generally compliant and agreeable but despite her efforts had not met the conditions necessary for Shannon's safe return to her home.

¶13 The jury returned a verdict finding that (1) Shannon had been adjudged in need of protection or services and placed outside the home for six months or longer pursuant to a court order containing a termination of parental rights notice required by law; (2) the department made reasonable efforts to provide the court-ordered services; (3) Mary failed to meet the conditions for Shannon's safe return home; and (4) there was a substantial likelihood that Mary would not meet the conditions within one year from the date of trial.

¶14 At the dispositional hearing, Blom testified that the department had evaluated an appropriate family who had made a commitment to the department to accept Shannon into their home and, should parental rights be terminated, would pursue adoption. Blom acknowledged that Shannon had bonded with Mary, who had a substantial relationship with him. Blom noted that Shannon had not

exhibited any behavior problems in the foster home and is attached to his current foster parents. His current foster parents would not, however, be able to adopt him.

¶15 Blom also testified that after a year of intensive services, it was apparent that Mary would not complete the court-ordered conditions. Consequently, Blom had inquired whether Mary's family would be able to provide care for Shannon. However, no family members were able to take him. Blom acknowledged that at the time of trial Mary was leading a stable lifestyle. This indicated to Blom that until that time, Mary had been resisting the department's recommendations.

¶16 Blom further stated that Shannon was at a critical developmental stage and to delay adoption into a permanent home would be harmful to him. She testified that not only had Mary made poor choices, she did not have the skills necessary to raise her son and granting additional time for her to comply with the court's order would put Shannon in an impermanent situation, causing him more trauma.

¶17 Mary testified that she loved her son, and wanted to provide a good home for him and care for him. She explained that she had a suitable home and job and wanted to be a good parent.

¶18 The trial court recognized Mary's love for her child. Nonetheless, the evidence demonstrated that despite her love, twenty percent of Shannon's childhood had been in turmoil. It concluded that Mary's lack of ability to parent, not her lack of love, caused her to fail in parenting him. The court found that more delays in finding a permanent home for Shannon would greatly harm him. It found that there was considerable likelihood that he would be adopted, given his

age and health. The court considered his substantial relationship with his mother. It also observed that he had a relationship with his foster family. The court believed that Shannon's ability to form relationships indicated that he would be able to enter into a more stable and permanent family relationship with an adoptive family.

¶19 The court determined that Shannon's need for a stable predictable home on a long-term basis militated in favor of an adoptive placement. The court concluded that Shannon's best interest called for termination of parental rights. The court also determined that Mary was unfit as a parent for Shannon.

DISCUSSION

¶20 The no merit report correctly determines that any challenge to the sufficiency of the evidence to support the verdict would be without arguable merit. "Grounds for termination must be proven by clear and convincing evidence." ***In re SueAnn A.M.***, 176 Wis. 2d 673, 682, 500 N.W.2d 649 (1993). "A jury's verdict must be affirmed if there is any credible evidence to support it." ***Kinship Inspection Serv., Inc. v. Newcomer***, 231 Wis. 2d 559, 570, 605 N.W.2d 579 (Ct. App. 1999). Here, there was no dispute that Shannon had been adjudged in need of protection and services and placed outside the home for six months or longer pursuant to a court order containing termination of parental rights notice required by law. The jury was entitled to believe the testimony of the various witnesses to the effect that Mary had not met the conditions necessary for Shannon's return despite the department's reasonable efforts to assist her. Also, the jury could have found from the testimony that Mary had made little progress and that it was not likely that she would satisfy the court-ordered conditions in another twelve

months. Consequently, an argument that there was no credible evidence to support the verdict would lack arguable merit.

¶21 Next, the record discloses that a challenge to the court's discretionary determination to terminate Mary's parental rights would lack arguable merit. The court must consider all the circumstances and exercise discretion as to whether a termination of parental rights would promote the child's best interests. ***In re J.L.W.***, 102 Wis. 2d 118, 131, 306 N.W.2d 46 (1981). The standard and factors the court must consider are set out in WIS. STAT. § 48.426(3):

> **(1)** COURT CONSIDERATIONS. In making a decision about the appropriate disposition under s. 48.427, the court shall consider the standard and factors enumerated in this section and any report submitted by an agency under s. 48.425.
>
> **(2)** STANDARD. The best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter.
>
> **(3)** FACTORS. In considering the best interests of the child under this section the court shall consider but not be limited to the following:
>
> (a) The likelihood of the child's adoption after termination.
>
> (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
>
> (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
>
> (d) The wishes of the child.
>
> (e) The duration of the separation of the parent from the child.
>
> (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the

> child's current placement, the likelihood of future placements and the results of prior placements.

¶22 The record demonstrates that the court considered the appropriate factors and applied the best interest of the child standard. Any argument that the court failed to reasonably exercise its discretion would be frivolous within the meaning of WIS. STAT. RULE 809.32.

¶23 Next, the record fails to disclose any arguable merit to an appeal based upon the court's denial of Mary's motion for a mistrial. Mary moved for a mistrial based on testimony of a victim's advocate at a family violence center, the "Golden House," where Mary resided for a short time. The victim's advocate testified that Mary had been asked to leave Golden House because "Mary had threatened to kill Shannon." The victim's advocate testified that Mary admitted making this threat. Mary also objected to Blom's testimony that Mary would be unlikely to meet the court-ordered conditions within one year.

¶24 The court's decision to admit evidence and the court's decision whether to grant a mistrial are addressed to trial court discretion. ***In re Michael R.B.***, 175 Wis. 2d 713, 723, 499 N.W.2d 641 (1993); ***State v. Mendoza***, 101 Wis. 2d 654, 659, 305 N.W.2d 166 (Ct. App. 1981). The trial court articulated a rational basis for admitting the objected-to testimony. The court explained that Mary's statement to the victim's advocate in which she admitted threatening Shannon was an admission and not hearsay. *See* WIS. STAT. § 908.01(4)(b). Because the record discloses a rational basis for the court's determination, a challenge to its discretionary decision would lack arguable merit.

¶25 Similarly, a challenge to Blom's opinion testimony would lack arguable merit. Blom testified to her education, training and experience and was

qualified to testify to her opinion regarding her client's parenting skills. *See* ***State v. Hollingsworth***, 160 Wis. 2d 883, 896-97, 467 N.W.2d 555 (Ct. App. 1991). Accordingly, any challenge based upon the court's decision to admit her opinion testimony would lack arguable merit. Because the record fails to disclose grounds for mistrial, an appeal relying on this basis would lack arguable merit.

¶26 Turning to Mary's response, we conclude that it does not identify an issue of arguable merit. Mary recounts her testimony concerning the progress she has made. Because the fact-finder, not this court, judges the weight and credibility of testimony, Mary's version of the facts does not support an appellate argument. *See* ***Gedicks v. State***, 62 Wis. 2d 74, 79, 214 N.W.2d 569 (1974). Mary also complains that confidential information was used against her. Mary does not identify the confidential information in question. In any event, the record discloses that her therapists and counselors did not testify until Mary had waived her privilege.

¶27 The no merit report accurately describes the record and analyzes the issues in all material respects. Our independent review of the record fails to disclose any potential issue of arguable merit. Therefore, we affirm the order terminating Mary's parental rights and discharge attorney Len Kachinsky of further obligation to represent Mary in this matter.

By the Court.—Order affirmed.