COURT OF APPEALS
DECISION
DATED AND FILED

February 4, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3137 **Cir. Ct. No. 01 TP 84**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MICHELLE A.H.,

RESPONDENT-APPELLANT.

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

¶1 FINE, J. Michelle A.H. appeals from the trial court's order terminating her parental rights to her son, Mykelle J.H. The only issue she raises on appeal is her assertion that the trial court erroneously exercised its discretion in admitting into evidence a tape recording of a telephone message that she left on

the answering machine of the foster mother where Mykelle was staying at the time. The message was abusive and full of vulgarities, and was meant for Mykelle.[1] Michelle A.H. contends that the trial court should have excluded the evidence under WIS. STAT. RULE 904.03 because, in her view, the evidence was too prejudicial. We affirm.

¶2 Mykelle was five years old at the time of the jury trial held on the State's petition to terminate Michelle A.H.'s parental rights to Mykelle. Michelle A.H. was twenty-one. After a two-day trial, the jury found that Mykelle was a child in continuing need of protection or services, *see* WIS. STAT. § 48.415(2), and that Michelle A.H. failed to assume parental responsibility for Mykelle, *see* WIS. STAT. § 48.415(6). On August 21, 2002, the trial court determined that termination was in Mykelle's best interest and entered the order from which Michelle A.H. appeals.

[1] The tape was played for the jury, which was also given a transcribed copy. The transcribed copy, which Michelle A.H. does not contend is not accurate, is as follows:

> This message is for Mykelle. This is your momma. Fuck that bitch ugly ass Sheila. Fuck what they talking about. Don't go over Jill house no fucking more. You tell that bitch Jill and all them other people you do not want to go their house. If Rosie got a problem with it, Oh Well you can move out of Rosie house. Don't go over them people house no more because if you do you ain't gonna be able to come to mine. Don't go over them people house. Don't listen to them. So what! If they make you go over their house, you go over their and you mess their house up and you act up and you tell them that you want to go home. Cause if you don't, you ain't gonna go home you gonna be with them people. Now if you wanna be with them people, then go over there, but if don't want to don't go over there. They can't make you do nothing you don't wanna do. I love you and I'll see you later OK and I can't talk to you cause that bitch hung up on me.

¶3 During her testimony, Michelle A.H. admitted that she made the call and agreed that "leaving a vulgar, obscene message for [her] five-year-old son at his [then] current foster placement [was an] interference with his foster placement." She told the jury that she had immediately called back and left a message that apologized. Interference with the child's foster placement violated a court order following a dispositional hearing at which Mykelle was found to be a child in need of protection or services.

¶4 In admitting the evidence, the trial court addressed whether the evidence was relevant to a material issue in the case—namely, whether Michelle A.H. violated any of the conditions established for Mykelle's return to her and, also, whether Michelle A.H. would be able to correct her parenting deficiencies and provide a minimally appropriate home for Mykelle. *See* WIS. STAT. § 48.415(2)(a)3 (jury to consider whether "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 trial). The message went to those matters because, as the trial court noted, it was "a very inappropriate, unhealthy thing for a child to hear" and the message was relevant to the jury's determination of whether Michelle A.H. could, in the trial court's words, provide "a safe and suitable, healthy environment for a child to grow up in and flourish." Michelle A.H. does not contend that the message that she left on the foster mother's answering machine was not relevant.

¶5 The trial court also addressed the requirement in WIS. STAT. RULE 904.03 that relevant evidence should be excluded if the trial court concludes that the danger of "unfair prejudice" "substantially outweigh[s]" the "probative value" of that evidence. The trial court explained, quoting from a recent decision by the

Wisconsin Supreme Court, that the danger of "'[u]nfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.'" *See* ***State v. Sullivan***, 216 Wis. 2d 768, 789–790, 576 N.W.2d 30, 40 (1998). Focusing on Michelle A.H.'s message which, as noted, was left for Mykelle, the trial court opined that it did not "think that this arouses a sense of horror and I don't think it provokes an instinct to punish" Michelle A.H., and that it would not "cause a jury to base its decision on something other than the established propositions in the case."

¶6 Michelle A.H.'s brief on appeal recognizes that whether to admit or exclude evidence is within the trial court's discretion. *See* ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983). We will uphold a trial court's discretionary determination if it is "consistent with the facts of record and established legal principles." ***Lievrouw v. Roth***, 157 Wis. 2d 332, 358–359, 459 N.W.2d 850, 859–860 (Ct. App. 1990). Although Michelle A.H. may disagree with the trial court's exercise of discretion, the trial court's analysis of the legal issue presented by the admissibility of evidence through the gate erected by WIS. STAT. RULE 904.03 reveals that it applied the law correctly. In sum, the trial court's decision was within the proper ambit of its discretion: it "articulated a reasonable explanation" for its decision, which it based "on the proper facts and law governing the issue." *See* ***State v. Oberlander***, 149 Wis. 2d 132, 144, 438 N.W.2d 580, 584 (1989).

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.[2]

[2] The court commends all counsel (including the guardian *ad litem*) for submitting excellent briefs.