COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1043 **Cir. Ct. No. 02TP000365**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

IOLA H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

¶1 SCHUDSON, J.[1] Iola H. appeals from the circuit court order terminating her parental rights to her daughter, Jasmine W., following a jury trial and a dispositional hearing. She argues that the circuit court erred in admitting evidence of her prior criminal convictions at her jury trial. This court rejects her argument and affirms the order terminating her parental rights to Jasmine.

I. BACKGROUND

¶2 The relevant facts are undisputed. On May 22, 2002, the State filed a petition to terminate Iola's parental rights to Jasmine, alleging that she had abandoned her daughter and had failed to assume parental responsibility for her. In addition, the petition alleged that Jasmine was a child "in continuing need of protection or services." *See* WIS. STAT. § 48.415(1)(a)(2), (2) & (6).[2]

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version.

[2] As material here, WIS. STAT. § 48.415 provides:

> **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:
>
> (1) Abandonment.
>
> (a) Abandonment, which, subject to par. (c), shall be established by proving any of the following:
>
> ….
>
> 2. That the child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by s. 48.356 (2) or 938.356 (2) and the parent has failed to visit or communicate with the child for a period of 3 months or longer.

(continued)

(b) Incidental contact between parent and child shall not preclude the court from finding that the parent has failed to visit or communicate with the child under par. (a) 2. or 3. The time periods under par. (a) 2. or 3. shall not include any periods during which the parent has been prohibited by judicial order from visiting or communicating with the child.

(c) Abandonment is not established under par. (a) 2. or 3. if the parent proves all of the following by a preponderance of the evidence:

1. That the parent had good cause for having failed to visit with the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.

2. That the parent had good cause for having failed to communicate with the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.

3. If the parent proves good cause under subd. 2., including good cause based on evidence that the child's age or condition would have rendered any communication with the child meaningless, that one of the following occurred:

a. The parent communicated about the child with the person or persons who had physical custody of the child during the time period specified in par. (a) 2. or 3., whichever is applicable, or, if par. (a) 2. is applicable, with the agency responsible for the care of the child during the time period specified in par. (a) 2.

b. The parent had good cause for having failed to communicate about the child with the person or persons who had physical custody of the child or the agency responsible for the care of the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.

….

(2) Continuing need of protection or services. Continuing need of protection or services, which shall be established by proving any of the following:

(continued)

(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.

(am) 1. That on 3 or more occasions the child has been adjudicated to be in need of protection or services under s. 48.13 (3), (3m), (10) or (10m) and, in connection with each of those adjudications, has been placed outside his or her home pursuant to a court order under s. 48.345 containing the notice required by s. 48.356 (2).

2. That the conditions that led to the child's placement outside his or her home under each order specified in subd. 1. were caused by the parent.

….

(6) Failure to assume parental responsibility.

(a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have never had a substantial parental relationship with the child.

(continued)

¶3 Iola contested the petition and requested a jury trial. Prior to trial the State moved to admit, under WIS. STAT. § 906.09(1), evidence of Iola's prior criminal convictions. Iola did not dispute that she had two criminal convictions, one for child abuse and the other for arson. She objected, however, to their admission at trial, contending that the convictions were irrelevant because neither crime implicated her veracity. The trial court rejected her argument and permitted the State to ask Iola how many times she had been convicted of a crime.

¶4 After a three-day trial, the jury returned unanimous verdicts finding all grounds as pled in the TPR petition. On November 14, 2002, the trial court held the dispositional hearing and concluded that it was in Jasmine's best interests to terminate Iola's parental rights to her.

II. ANALYSIS

¶5 Iola contends that the trial court erred in admitting evidence that she had two criminal convictions. Specifically, she contends that the trial court erroneously exercised discretion in failing to "determine[] pursuant to s. 901.04 whether the evidence should be admitted," and that because of the court's error, she was unfairly prejudiced. This court rejects her contention.

> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

¶6 This court reviews a trial court's decision to admit or exclude evidence in a termination-of-parental-rights trial under the erroneous-exercise-of-discretion standard. ***La Crosse County Dep't of Human Servs. v. Tara P.***, 2002 WI App 84, ¶6, 252 Wis. 2d 179, 643 N.W.2d 194, *review denied*, 2002 WI 48, 252 Wis. 2d 152, 644 N.W.2d 688 (Wis. Apr. 22) (No. 01-3034, 3035). This court will uphold a trial court's decision to admit evidence if the court exercised discretion in accordance with accepted legal standards and the facts of record. ***Id.*** Further, "where the trial court fails to set forth its reasoning in exercising its discretion to admit evidence, the appellate court should independently review the record to determine whether it provides a basis for the trial court's exercise of discretion." ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

¶7 WISCONSIN STAT. § 906.09 permits the admission of prior convictions for impeachment purposes.[3] The statute reflects the presumption that

[3] WISCONSIN STAT. § 906.09 provides, in relevant part:

> **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.
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> **(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.
>
> **(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.

"one who has been convicted of a crime is less likely to be a truthful witness than one who has not been convicted." ***Nicholas v. State***, 49 Wis. 2d 683, 688, 183 N.W.2d 11 (1971). When deciding whether to admit evidence of prior convictions, a trial court should consider: (1) the lapse of time since the conviction; (2) the rehabilitation of the person convicted; (3) the gravity of the crime; and (4) the involvement of dishonesty or false statement in the crime. ***State v. Kruzycki***, 192 Wis. 2d 509, 525, 531 N.W.2d 429 (Ct. App. 1995); *see also* ***State v. Gary M.B.***, 2003 WI App 72, ¶¶26-27, __ Wis. 2d __, 661 N.W.2d 435. These factors are weighed in a balancing test to determine whether the probative value of the prior conviction evidence is "substantially outweighed by the danger of unfair prejudice." WIS. STAT. § 906.09(2).

¶8 Here, the record supports the trial court's discretionary decision to admit evidence of Iola's past convictions. The record establishes that the trial court heard the parties' arguments regarding the admissibility of evidence concerning Iola's criminal history. The State presented an offer of proof that Iola had two convictions dating from the 1980's for child abuse and arson. In support of its offer, the State argued that the offenses were serious and led to Iola's incarceration. The State deemed this particularly important because Iola violated conditions of her parole for these convictions and was revoked and re-incarcerated—once while she was pregnant with Jasmine, and then again after Jasmine was born.

¶9 While failing to state its reasoning,[4] the trial court's decision was sound. Iola's convictions were relevant to and potentially probative of her

[4] This court reminds the trial court to articulate the bases for its rulings, for the benefit of the parties at trial and of this court on review.

veracity. The petition alleged that Iola had failed to assume responsibility for Jasmine, that she had abandoned her and that, as a result, Jasmine was a child in continuing need of protection or services. To prove these grounds and, in particular, to prove that Jasmine was in continuing need of protection or services, the State had to establish, by clear and convincing evidence, a substantial likelihood that Iola would not meet the conditions for Jasmine's return within the next twelve months. *See* WIS. STAT. 48.415(2)(a)3. Evidence of Iola's convictions countered her testimony that she had "good cause" for failing to visit Jasmine. Clearly Iola's convictions could aid the jury's assessment of whether she would meet the conditions for return in the next twelve months. After all, "[i]t is readily apparent that a history of parental conduct may be relevant to predicting a parent's chances of complying with conditions in the future, despite failing to do so to date." ***Tara P.***, 252 Wis. 2d 179, ¶13.

¶10 Moreover, even if the admission of the fact that Iola had two criminal convictions was improper, any error was harmless. *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶¶28-29, 246 Wis. 2d 1, 629 N.W.2d 768. WISCONSIN STAT. § 805.18(2) provides in pertinent part:

> No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of . . . error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

For an error to affect the substantial rights of a party, a reasonable possibility must exist that it contributed to the outcome of the action or proceeding at issue. ***State v. Dyess***, 124 Wis. 2d 525, 543, 547, 370 N.W.2d 222 (1985). A reasonable possibility of a different outcome is a possibility sufficient to "undermine

confidence in the outcome." ***Id.*** at 544-45 (quotation omitted). If the error at issue is not sufficient to undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless. ***Evelyn C.R.***, 246 Wis. 2d 1, ¶28.

¶11 Here, no reasonable possibility exists that the evidence of Iola's convictions resulted in the termination of her parental rights to Jasmine. The overwhelming evidence of Iola's poor parenting provided ample support for the jury's finding. Testimony established that Iola had physically abused Jasmine and then lied to doctors concerning Jasmine's physical injuries. In addition, evidence established that Iola, without telling where she was going, left Jasmine in a neighbor's care so that she could go gambling for two days. In fact, Iola admitted that she had abandoned Jasmine and acknowledged that she had not met her court-ordered conditions. In addition, the jury learned that Iola: (1) had serious mental-health issues, resulting in four suicide attempts; (2) had abused two of her other children who were now removed from her care; and (3) remained adamantly opposed to receiving counseling for her own victimization. In light of the magnitude of these facts, the admission of the number of Iola's criminal convictions was of relatively little consequence.

By the Court.—Order affirmed.

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