COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2012AP1538
2012AP1539
2012AP1540
2012AP1541

Cir. Ct. Nos. 2010TP345
2011TP78
2011TP79
2011TP246

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

AMANDA G.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

AMANDA G.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

AMANDA G.,

RESPONDENT-APPELLANT

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

AMANDA G.,

RESPONDENT-APPELLANT

APPEALS from orders of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Affirmed*.

¶1 KESSLER, J.[1] Amanda G. (mother) appeals the orders terminating her parental rights to four of her children: Armary A., Till O., Avril O., and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Crystal G. She argues that the trial court erroneously denied her motion for a mistrial because the jury, during the fact-finding phase of the termination proceedings, heard prejudicial testimony. Specifically, Amanda argues that a statement from the children's case worker during her testimony referring to the children's foster parents as "adoptive resources," violated Amanda's due process rights to a fair trial. We conclude, as did the trial judge, that the improper statement during testimony was a harmless error not requiring a mistrial. We therefore affirm the trial court's refusal to grant a mistrial.

BACKGROUND

¶2 On October 10, 2008, Crystal G., Till O., and Avril O., were detained by the Bureau of Milwaukee Child Welfare ("the Bureau"). On March 12, 2009, the three children were found to be children in need of protection and services. Armary A. was born on April 1, 2009 and was detained by the Bureau on April 10 of that same year. The State filed petitions to terminate Amanda's parental rights to all four of the children.[2] The petitions alleged failure to assume parental responsibility, contrary to WIS. STAT. § 48.415(6), and continuing need of protection or services, contrary to WIS. STAT. § 48.415(2). After various pretrial proceedings, including joinder of all petitions for trial, the matters proceeded to a jury trial as to grounds for termination. The jury trial took four days.

¶3 On the third day of trial, the State called Mallorie Hebeker, the case manager for Amanda's children. Hebeker provided testimony as to the amount of interaction the children had with Amanda, including whether Amanda attended the

[2] The State filed a petition to terminate Amanda's parental rights to Armary on December 22, 2010. Petitions for Avril and Till were filed on March 9, 2011. A petition for Crystal was filed on July 27, 2011.

children's appointments, visited, sent gifts and/or called them on the phone. The testimony to which Amanda objects occurred on direct examination when Hebeker gave the following testimony:

> Q[:] ... Does [Amanda] have phone calls with [the children]?
>
> A[:] She – The jury was also provided with a forty-seven page transcript of the interview. when the—it depends here the kids were placed. When Till and [another child] were placed with Miss [D.] in a treatment foster home, she did call them a lot. She had a good relationship with Miss [D.]. They communicated pretty openly. Since the kids have been in their current placement, the foster parents requested that she did not know their phone number, just because they are an adoptive resource. And so the kids were responsible for initiating phone calls, and then they would just do a star 67. And the kids don't express that they want to call on a regular basis.
>
> Q[:] So right now she can't call them; correct?
>
> A[:] Correct. Right.

There was no further testimony, from any of the witnesses, as to whether the children had a potential "adoptive resource."

¶4 After the State rested its case, trial counsel for Amanda moved for a mistrial based on Hebeker's testimony regarding the foster family's status as an adoptive resource. Specifically, trial counsel argued that the jury "isn't supposed to hear the 'A' word, and in this case they clearly did." The State opposed the motion, arguing that Hebeker's statement was simply a "misstatement," that there was a "complete flow" to her testimony, and that "adoption" was not a "magic word," especially since the jurors had been questioned by the court during *voir dire*, without objection, as to whether any of them had ever adopted.

¶5 The trial court denied the motion, stating:

> Well we've got two and a half days of trial in. It was information that at best was gratuitous. It was not in direct response to the question. It is improper. It has some potential prejudice. I think it's—you know, during voir dire there was some discussion about adoption. These cases don't occur in a vacuum. There is stuff all over the tube about adoption all the time.
>
> We have two ministers on the jury or at least one left. I don't know if we have both of them on there or not. We have nurses. We have people who know—intelligent, educated people. I think it's—we'd be disingenuous to say that this is something that's knocking their socks off.
>
> On the other hand, if I—and my feeling is to deny the motion for mistrial. But if I do, [trial counsel] is going to have the opportunity to talk—to put the witness back on the witness stand and pretty much free reign on stuff around—you know, these are the same foster parents, as I understand it, that are alleged to have made statements negative to mom.

¶6 This appeal follows.

DISCUSSION

¶7 On appeal, Amanda argues that the trial court erroneously denied her motion for a mistrial because testimony about adoptive resources during the fact-finding trial violated her due process rights to a fair trial. We are not persuaded.

¶8 A trial court addressing a motion for a mistrial "must decide, in light of the entire facts and circumstances, whether the defendant can receive a fair trial" despite the claimed error. ***State v. Ford***, 2007 WI 138, ¶29, 306 Wis. 2d 1, 742 N.W.2d 61. The court must grant the motion if it determines that the claimed error is sufficiently prejudicial to warrant a mistrial. *See* ***id.*** We review a trial court's decision to deny a motion for a mistrial for an erroneous exercise of discretion. ***State v. Patterson***, 2009 WI App 161, ¶33, 321 Wis. 2d 752, 776 N.W.2d 602.

¶9 Here, Amanda's motion for a mistrial was based on one statement describing the children's foster parents as a potential "adoptive resource." We review a trial court's decision to admit or exclude evidence for an erroneous exercise of discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Where evidence is erroneously admitted, we conduct a harmless error analysis to determine whether the error affected the substantial rights of the party. ***Id.***, ¶30. An error is harmless if there is no reasonable possibility that the error contributed to the termination of Amanda's parental rights. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). Applying these principles to the totality of the evidence admitted at trial, we conclude that this error was harmless. The trial court properly denied Amanda's motion for a mistrial.

¶10 The State had to prove that Amanda did not meet the conditions for the return of her children. Over the course of a four-day jury trial, the State called three mental health professionals who were working with Amanda, a representative from the Bureau, Hebeker, and Amanda. Amanda's motion for a mistrial was based solely on Hebeker's one statement. However, Hebeker said nothing which implied that the jury should consider whether the children have an adoptive resource when it determined whether Amanda's parental rights should be terminated. Rather, her statement was made in the context of discussing the amount of interaction Amanda had with her children by way of visits, sending gifts, and making phone calls. The jury heard testimony from multiple witnesses—there was only one brief mention of a potential adoptive resource. The statement was not emphasized; in fact, a review of the transcript indicates that the statement was ignored in the jury's presence as the trial continued.

¶11 Contrary to trial counsel's argument that the "'A' word" is not to be said in front of a jury, the jury was questioned, without objection, about whether any members had ever adopted children prior to trial. The "'A' word," therefore, had already been used in front of the jury. The record does not suggest that Hebeker's one statement, made in the context of whether the children receive phone calls from their mother, contributed in any significant way to the jury's decision. In light of the entire trial record, we conclude that there is no reasonable possibility that Hebeker's statement contributed to the termination of Amanda's parental rights.

¶12 For the foregoing reasons, we affirm the trial court.

By the Court.—Orders affirmed.

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