COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-2529 **Cir. Ct. No. 03TP000450**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CORINA D.,

RESPONDENT-APPELLANT,

STEVEN L.,

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed*.

¶1 KESSLER, J.[1] Corina D. appeals from an order terminating her parental rights to Autumn L. Corina argues that the evidence did not support the jury's findings that there were grounds to terminate her parental rights. She also argues that the trial court erroneously admitted evidence of Corina's lack of cooperation with the rules of probation. We reject her arguments and affirm the order.

BACKGROUND

¶2 Autumn is the non-marital child of Corina and Steven L. In October 2000, Corina was arrested on an outstanding warrant. At the time of her arrest, she was in a vehicle with another man and woman, and twenty-two-month-old Autumn. Police found two vials of crack cocaine in Autumn's jacket. Corina admitted that one of the vials was hers. Corina was arrested and Autumn was placed with Autumn's maternal aunt.

¶3 In December 2000, Autumn was found to be in need of protection and services. She has resided outside her parents' homes since that time, first at her aunt's home and later in a foster home.

¶4 The State filed a petition to terminate Corina's and Steven's parental rights to Autumn. Both parents contested the termination. A jury was asked to determine whether there were grounds to terminate Corina's and Steven's parental rights.[2] *See* WIS. STAT. § 48.424. The jury found four independent grounds for

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

[2] The jury found a basis to terminate Steven's parental rights, and his rights were ultimately terminated. However, his rights are not at issue in this appeal and will not be addressed further.

terminating Corina's parental rights: (1) abandonment, three-month period, *see* WIS. STAT. § 48.415(1)(a)2.;[3] (2) abandonment, six-month period, *see* WIS. STAT. § 48.415(1)(a)3.; (3) continuing status as child in need of protection or services (CHIPS), *see* WIS. STAT. § 48.415(2); and (4) failure to assume parental responsibility, *see* WIS. STAT. § 48.415(6). The trial court held a dispositional hearing and, exercising its discretion, terminated Corina's parental rights. *See* WIS. STAT. §§ 48.426 and 48.427. This appeal followed.

DISCUSSION

¶5 Wisconsin has a two-part statutory procedure for the involuntary termination of parental rights. "In the first, or 'grounds' phase of the proceeding, the petitioner must prove by clear and convincing evidence that one or more of the statutorily enumerated grounds for termination of parental rights exist." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. "A finding of parental unfitness is a necessary prerequisite to termination of parental rights, but a finding of unfitness does not necessitate that parental rights be terminated. Once the court has declared a parent unfit, the proceeding moves to the second, or dispositional phase, at which the child's best interests are paramount." ***Id.***, ¶26.

¶6 Corina's appeal concerns alleged errors in the first part of the two-part process: the fact-finding hearing. First, she argues that the evidence did not support the jury's findings that there were grounds to terminate her parental rights. In the alternative, she seeks a new trial on grounds that the trial court erroneously

[3] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

admitted evidence of Corina's lack of cooperation with the rules of probation.[4] We address these arguments in the order in which they occurred at the trial, beginning with the admission of evidence.

I. Admission of evidence of Corina's lack of cooperation with probation rules

¶7 Corina contends the trial court erroneously allowed the admission of evidence regarding Corina's lack of cooperation with her rules of probation. She argues that this evidence, although relevant, should have been excluded pursuant to WIS. STAT. § 904.03 because its probative value was substantially outweighed by the danger of unfair prejudice.

¶8 We review the trial court's ruling on the admission of evidence for a proper exercise of discretion. ***State v. Miller***, 231 Wis. 2d 447, 467, 605 N.W.2d 567 (Ct. App. 1999). "To sustain a discretionary ruling, we need only find that the trial court examined the relevant facts, applied a proper standard of law and, using a rational process, reached a reasonable conclusion." ***Id.***

¶9 Pursuant to WIS. STAT. § 904.03, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See* ***id.*** Here, the State filed a motion *in limine* seeking to admit evidence of Corina's "failure to cooperate with the conditions of probation." The motion stated:

> Both [parents] have failed on probation since the birth of this child. Failure to comply with the rules of probation is

[4] Corina does not explicitly state that she seeks a new trial, only that she asks this court to reverse and remand for further proceedings. However, we recognize that the practical effect of a successful argument with respect to the erroneous admission of evidence, if it were not harmless error, would be to retry the case.

> relevant in determining the likelihood they will meet the conditions of return within the next year. Under the terms of probation, [the parents] have conditions which they are required to meet, many of which are similar to the conditions of return under a [CHIPS] order. For example, the parents must maintain contact with their probation officer and must maintain contact with Bureau social workers, the parents must complete AODA treatment under both as well. Additionally, a specific condition of return is that the [parents] resolve all criminal charges and cooperate with their probation or parole officer. Said evidence is also relevant to the allegation that the [parents] have failed to assume parental responsibility for the child. The parents[']failure to comply with probation put them at risk of being incarcerated and therefore, unable to provide for the child.

¶10 The guardian ad litem agreed with the State's request, noting that "failure to comply with conditions which are similar, or almost identical to the CHIPS conditions, will assist a jury in determining whether they have met the conditions in the past, and whether they will meet them in the future in the next 12 months." Corina objected to the State's motion, arguing that it is "unfairly prejudicial to a person to say that they ought to be terminated because possibly in the future, based upon past conduct, they might be incarcerated again."

¶11 The trial court took the matter under advisement and, on the day of trial, heard additional oral argument. This argument included references to two termination of parental rights cases, ***State v. Quinsanna D.***, 2002 WI App 318, 259 Wis. 2d 429, 655 N.W.2d 752, and ***State v. Tara P.***, 2002 WI App 84, 252 Wis. 2d 179, 643 N.W.2d 194, both of which upheld a trial court's admission of evidence concerning a parent's criminal activities and acts. Here, after considering the arguments, the trial court explicitly agreed with the reasons advanced by the State and the guardian ad litem, and ruled that the evidence was relevant and admissible.

¶12 We conclude that the trial court properly exercised its discretion. The State and guardian ad litem explained how evidence of Corina's failure to meet the conditions of probation, many of which were the same as in the CHIPS order, were relevant to predicting Corina's chances of complying with conditions in the future. The State and guardian ad litem also explained why the evidence was relevant with respect to Corina's alleged failure to assume parental responsibility. After considering these arguments on two occasions, the trial court adopted the reasoning of the State and the guardian ad litem, which is consistent with established law in the area. *See, e.g.,* ***Tara P.***, 252 Wis. 2d 179, ¶13 ("It 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…."). In short, the trial court properly examined the relevant facts, applied a proper standard of law and, using a rational process, reached a reasonable conclusion. *See* ***Miller***, 231 Wis. 2d at 467. Therefore, the evidence was properly admitted and no new trial is necessary. *See* ***id.***

II. Challenge to the sufficiency of the evidence

¶13 Corina's brief indicates that she believes "[t]he evidence did not support the finding that there were grounds to terminate [Corina's] parental rights." However, she offers specific arguments with respect to only two of the grounds: continuing CHIPS status of her child and failure to assume parental responsibility. The State and guardian ad litem argued, first in a motion for summary disposition[5] and again in their brief, that Corina has failed to challenge

[5] By order dated November 8, 2004, this court denied the State and guardian ad litem's motion for summary disposition after concluding that the already-expedited appeals process would best suit resolution of the case.

the jury's verdict on abandonment grounds. They contend that as a result of this failure, the order terminating her parental rights must be affirmed even if Corina's arguments are successful on appeal. Therefore, they seek summary disposition in their favor.

¶14 This court disagrees that Corina has failed to challenge all four bases for the termination. Corina has argued that the admission of evidence of her failures on probation justified a new trial on *all* grounds. While she did not argue the issue concerning the sufficiency of the evidence for the two grounds of abandonment in detail, we decline to consider the issue waived. Instead, we have carefully reviewed the trial transcript, examining the evidence presented with respect to all four grounds for termination, keeping in mind that this court gives significant deference to jury verdicts on appeal, and may not overturn them "if there is any credible evidence" that supports what the jury has found, giving to the jury's finding every reasonable supporting inference. ***Quinsanna D.***, 259 Wis. 2d 429, ¶30. We conclude that there is sufficient evidence to sustain the jury's verdict on all four grounds, any one of which is sufficient to affirm the order terminating Corina's parental rights.

A. Abandonment

¶15 The jury found that there were two grounds for termination based on abandonment. WISCONSIN STAT. § 48.415 provides in relevant part:

> **48.415 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.

3. The child has been left by the parent with any person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of 6 months or longer.

….

(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.

¶16 At the close of the evidence, Corina did not dispute that the State had proven that she failed to visit or communicate with Autumn for periods of three and six months. *See* WIS. STAT. § 48.415(1)(a)2., 3. Thus, the only factual determinations for the jury to make on abandonment grounds were whether Corina had good cause for failing to visit or communicate with Autumn, the Bureau of Milwaukee Child Welfare ("Bureau"), and Autumn's caregiver. *See* WIS. STAT. § 48.415(1)(c). Because the jury found that Corina had not established good cause for failing to visit Autumn, one of the three requisite elements of good cause, it did not make specific findings with respect to her failures to communicate.

¶17 Counsel for Corina argued at trial that the good cause for her failure to visit or communicate was her lack of "genuine sophistication." Counsel also noted that when Steven tried to contact the foster parent directly, he was told he had to communicate through the assigned caseworker, implying that even if Corina had called the foster parent, she likewise would have been told to communicate directly with the caseworker. Finally, counsel also asserted that Corina's continuing addiction to drugs prevented her from communicating with Autumn.

¶18 The State disagreed that continuing addiction to drugs constituted good cause. It also asserted that Corina "could have through reasonable efforts found out where her child [was] located or how she could be contacted, but she didn't do it."

¶19 The burden was on Corina to prove good cause by a preponderance of the evidence. *See* WIS. STAT. § 48.415(1)(c). We cannot conclude that the jury's finding that Corina failed to satisfy this burden is clearly erroneous. The jury could reasonably find that addiction to drugs and a lack of sophistication did

not constitute good cause for failing to visit Autumn, reasoning that even if the foster parent discouraged direct contact between her and the parents, Corina could have contacted the caseworker and made arrangements to visit with Autumn. Therefore, we affirm the jury's finding with respect to both allegations of abandonment.

B. Continuing CHIPS status of child

¶20 The third ground for termination found by the jury was Autumn's continuing CHIPS status. WISCONSIN STAT. § 48.415 provides in relevant part:

> **48.415 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:
>
> ….
>
> **(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.
>
> (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.

¶21 At the close of the evidence, Corina did not dispute that the State had proven that Autumn was placed outside the home for at least six months and that Corina had failed to meet the conditions established for Autumn's safe return. Thus, the jury was asked to determine whether the Bureau made a reasonable effort to provide the services ordered by the court, and whether there was a substantial likelihood that Corina would meet the conditions for return within the twelve-month period following the trial. The jury found that reasonable efforts were made and that there was not a substantial likelihood that Corina would meet the conditions for return within twelve months.

¶22 The State presented evidence that the Bureau had provided Corina with referrals to parenting and nurturing classes, AODA treatment programs, individual therapy, family counseling, domestic violence counseling and other services. Corina herself testified that she had not participated in any of those services. She also testified that six months prior to trial, she was released to attend AODA treatment at the Community Correctional Center. She attended the

program for one day. She left the next day to get some clothes and never returned. Instead, she "got high" on crack cocaine and was ultimately returned to jail, where she remained at the time of trial.

¶23 Corina argues on appeal that the evidence did not support the jury's finding that she could not meet the conditions for return. She relies on testimony that she would be released from jail within two months and that she had already found a job and a place to stay "away from her old lifestyle." She also testified that she had completed multiple programs at the House of Corrections, including Alcoholics Anonymous and Bible studies. Corina contends that she was "willing and able to work on her conditions to meet the needs of Autumn."

¶24 It is for the jury, not the appellate court, to determine the credibility of witnesses and to weigh the evidence. "Where there are inconsistencies within a witness's testimony or between witnesses' testimonies, the jury determines the credibility of each witness and the weight of the evidence." ***State v. Sharp***, 180 Wis. 2d 640, 659, 511 N.W.2d 316 (Ct. App. 1993). The jury's finding that there was not a substantial likelihood that Corina would meet the conditions for return within twelve months is supported by credible evidence that she had consistently failed to meet numerous conditions for over three years and that her continuing drug use made it difficult for her to meet the conditions. Therefore, the jury's finding is affirmed.

C. Failure to assume parental responsibility

¶25 The fourth ground for termination found by the jury was Corina's failure to assume parental responsibility. WISCONSIN STAT. § 48.415 provides in relevant part:

> **48.415 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:
>
> ….
>
> **(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.
>
> (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.

¶26 The State was required to prove that Corina "never had a substantial parental relationship" with Autumn. *See* ***id.*** In considering whether Corina had failed to assume parental responsibility, the jury was instructed, consistent with WIS. STAT. § 48.415(6)(b), to consider a range of factors when evaluating the presence of a substantial parental relationship, such as whether she "ever expressed concern for or interest in the support, care or well-being of the child" and "neglected or refused to provide care or support for the child." *See* WIS JI—CHILDREN 346.

¶27 At first blush, Corina's argument that there could not be sufficient evidence to support the jury's finding is understandable, because the jury heard

evidence that Corina loves Autumn and provided her with food and shelter for twenty-two months. However, this court rejected a similar argument in ***Quinsanna D.***, where the parent argued that undisputed evidence of her daily care for her children prevented a finding that she had never had a substantial parental relationship with the children. 259 Wis. 2d 429, ¶¶29, 32. We explained:

> [A] substantial parental relationship consists of the acceptance and exercise of significant responsibility for not only the daily supervision of a child, but also the acceptance and exercise of significant responsibility for, among other things, the protection and care of the child. Here, the jury reasonably could have inferred that, because Quinsanna's daily supervision of [her children] included her daily exposure of them to her own drug use and drug house, she had not exercised significant responsibility for their protection and care.

Id., ¶32 (quotation marks and internal citations omitted).

¶28 As in ***Quinsanna D.***, the jury in this case heard evidence concerning Corina's daily crack cocaine use. Corina herself testified that she smoked crack cocaine while supervising her children, including one day when she and Steven smoked crack in a hotel room. A fire started in the adjacent room where Corina's three children were sleeping. She and Steven had to run in and rescue the children. In addition, there was evidence that when Corina and Steven were both briefly incarcerated, they left Autumn in the care of a fellow drug user whose last name they did not know. The jury also heard Corina testify about the incident that led to Autumn's removal from her home, where police found Corina, two friends and Autumn in a car with crack cocaine.

¶29 Based on this testimony, there was sufficient evidence for a jury to find that although Corina had provided care for Autumn for twenty-two months, exposing Autumn to drug abuse on a daily basis showed that Corina had not

exercised "significant responsibility" for Autumn's "protection and care." *See* WIS. STAT. § 48.415(6)(b); *see also* ***Quinsanna D.***, 259 Wis. 2d 429, ¶32.

CONCLUSION

¶30 This court rejects Corina's challenge to the sufficiency of the evidence for each of the four grounds for termination. We also deny her request for a new trial, having concluded that the trial court did not erroneously admit evidence of Corina's probation status. The order terminating Corina's parental rights to Autumn is therefore affirmed.

By the Court.—Order affirmed.

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