COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP234 **Cir. Ct. No. 2007TP26**

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

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

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DAVID P. E.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County: SCOTT L. HORNE, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] David P.E. appeals the circuit court's order that terminated his parental rights to his son, Jesse J.E. David argues that he is entitled to a new trial because the circuit court erroneously admitted evidence that he pressured Jesse's mother to have sexual intercourse with him. David also argues that he is entitled to a new dispositional hearing because the court failed to make reference to one of the factors it was required to consider at disposition under WIS. STAT. § 48.426(3). We reject David's arguments and affirm the circuit court's order.

Evidence That David Pressured Jesse's Mother To Have Sexual Intercourse

¶2 The La Crosse County Department of Human Services sought termination of David's parental rights on the ground of a continuing need for protection or services under WIS. STAT. § 48.415(2)(a). At trial, the questions for the jury included whether the Department made a reasonable effort to provide services ordered by the court, whether David failed to meet the conditions established for the safe return of Jesse to David's home, and whether there was a substantial likelihood that David would not meet the conditions within a nine-month period following trial. *See* § 48.415(2)(a)2.

¶3 The conditions for return included that David:

- not threaten or intimidate the social worker, foster parents, or treatment providers, including that he not be verbally abusive or make threats or demands;
- remain free of incarceration, comply with any rules of probation, and commit no violations of federal, state, or municipal law;

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

- establish and maintain a clean, stable, and safe home for a minimum of six months;
- have a regular source of income;
- keep track of and be on time for all scheduled appointments with the social worker and other service providers;
- participate in and demonstrate progress in recommended parenting education services and demonstrate parenting skills in a variety of areas; and
- maintain consistent contact with Jesse as scheduled by the Department.

¶4 During the course of trial, one of the social workers assigned to Jesse's case testified that Jesse's mother "felt that she was being pressured into having intercourse with [David]." The social worker further testified that "the doctor recommended that they not do that because she needed time to heal because she'd just had a baby."

¶5 David's attorney objected to this evidence as irrelevant and as not being based on personal knowledge. The circuit court overruled the objection subject to a cautionary instruction. The court explained to the jury that the evidence would be admitted for the limited purpose of understanding the rationale behind the conditions of return and how a treatment plan is developed. The court specifically warned the jury that the evidence was not to be used for any other purpose "such as assessment of general character and so on." At the close of trial, the court gave another, similar cautionary instruction.

¶6 As indicated earlier, David argues that he is entitled to a new trial because the circuit court erroneously admitted this evidence. We disagree that a

new trial is necessary because we agree with the Department that the admission of this evidence, if error, was harmless.[2]

¶7 We recently summarized the harmless error test as follows:

> The supreme court has stated that an error is harmless if the State—the beneficiary of the error—proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." The supreme court has also used the formulation that an error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." These tests are equivalent in that an error does not contribute to the verdict if the court concludes that beyond a reasonable doubt a rational jury would have reached the same verdict without the error.

State v. Harrell, 2008 WI App 37, ¶37, __ Wis. 2d __, 747 N.W.2d 770 (citations omitted). We independently determine whether evidentiary error is harmless or prejudicial. ***State v. Keith***, 216 Wis. 2d 61, 69, 573 N.W.2d 888 (Ct. App. 1997).

¶8 The jury heard extensive and compelling evidence that David failed to meet many of the conditions for return and that he would be unlikely to meet those conditions in the near future. This evidence included testimony that David resisted or refused available services. For example, David refused a community program that would help him clean up his home, which was described as "dirty" and "unkempt."

[2] David also argues that his counsel was ineffective for failing to make a more complete objection to this evidence. We need not address David's ineffective-assistance-of-counsel claim. Our conclusion that any error in admitting the evidence was harmless subsumes that claim. *See* ***State v. King***, 205 Wis. 2d 81, 97, 555 N.W.2d 189 (Ct. App. 1996) ("We have already established that the admission of … statements implicating King was harmless beyond a reasonable doubt. Therefore, King was not denied effective assistance of counsel.").

¶9 The jury also heard evidence that David was not fully cooperative with his parent visitation monitor or with the parent support worker's attempts to improve his parenting skills. At one point, David pretended he was sleeping when the parent support worker was trying to present issues of parent education. David also asked the parent support worker, "How would you like it if I looked up your address and stole your son?"

¶10 In addition, the jury heard testimony that David missed many scheduled visits with Jesse. David would sometimes refuse visits and, at one point, had missed two months of visits. In the five months leading up to trial, David had missed eleven of twenty-one offered visits. During the months leading up to trial, it was "more frequent" that David would miss visits. At the time of trial, David had not had a visit for over a month.

¶11 The jury also heard testimony that the visits between David and Jesse needed to be supervised due to safety concerns. David's interaction with Jesse during the visits was minimal and problematic. A psychologist who evaluated David testified that, in his opinion, the prognosis for David making changes that would improve his ability to parent was poor.

¶12 The jury also heard evidence that, over a six-month period, David attended only one of the Department's "staffings," a monthly meeting with the social workers, parents' attorneys, treatment providers, and the parents if they wished to attend.

¶13 In addition, one of the social workers testified that David held false beliefs that there was a county conspiracy against him, that the social worker was trying to bribe him into adoption, and that the social worker received a kickback on the side for a termination of parental rights.

¶14 The psychologist who evaluated David testified that David showed antisocial traits, explaining to the jury that an individual with antisocial personality has significant tendencies toward the violation of the rights of others and often positions himself to take advantage of others or to harm others to meet his own needs. There was also evidence that David had previously been diagnosed with "psychotic disorder." Finally, the jury heard that David had previously faced criminal charges, including for arson.

¶15 David does not dispute that the jury could validly consider all of this evidence in making the determinations it was required to make. He also does not argue that he was able to undercut the bulk of this evidence through cross-examination or otherwise. David did not testify, and he called only one witness, his sister. Her testimony was brief and, as relevant here, consisted of her description of instances of positive interactions between David and Jesse during two or possibly three supervised visits that she attended.

¶16 Pressuring someone into sexual intercourse is a serious matter that is not to be minimized. We are not persuaded, however, in light of all of the other evidence the jury heard, that a social worker's brief testimony that David pressured Jesse's mother to have sexual intercourse soon after Jesse's birth contrary to doctor's orders materially affected the jury's verdict. This is particularly true given the circuit court's cautionary instructions to the jury.

¶17 David asserts in a one-sentence argument that there was evidence that he had met "some" of the return conditions and that he could successfully perform parental tasks. He does not, however, point to evidence supporting this assertion. Moreover, his argument fails to recognize that meeting "some" of the return conditions is not the standard.

¶18 In sum, we are satisfied beyond a reasonable doubt that, with or without the evidence that David pressured Jesse's mother to have sexual intercourse, a rational jury would have reached the same verdict. Accordingly, we conclude that the admission of this evidence, if error, was harmless.

Circuit Court's Failure To Reference One Of The WIS. STAT. § 48.426(3) Factors

¶19 David argues that the circuit court erroneously exercised its discretion when terminating his parental rights at the dispositional hearing because the court failed to expressly reference on the record one of the factors that the court was required to consider under WIS. STAT. § 48.426(3), namely, the health of the child. He asserts that this error requires a remand to the circuit court for a new dispositional hearing. We disagree that a new dispositional hearing is necessary.

¶20 WISCONSIN STAT. § 48.426 provides that the court "shall consider" each of several specified factors before terminating a parent's rights to his or her child.[3] The supreme court has interpreted this requirement to mean that the circuit

[3] WISCONSIN STAT. § 48.426 provides more fully as follows:

> **(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.

(continued)

court "should explain the basis for its disposition, on the record, by alluding specifically to the factors in WIS. STAT. § 48.426(3)." ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶30, 255 Wis. 2d 170, 648 N.W.2d 402. "[T]he record should reflect adequate consideration of and weight to each factor." ***State v. Margaret H.***, 2000 WI 42, ¶35, 234 Wis. 2d 606, 610 N.W.2d 475.

¶21 David relies primarily on ***Margaret H.*** In that case, the supreme court remanded for a new dispositional hearing after the circuit court failed to consider all relevant factors under the statute. ***Id.***, ¶¶31, 35-36, 40. The supreme court also made clear, however, that remand for a new dispositional hearing is not always required. *See* ***id.***, ¶¶37-38.

¶22 Given the circumstances of David's case, remand for a new dispositional hearing is not appropriate. David already received a postjudgment hearing at which he raised the same argument he raises now. The judge presiding at that hearing was the same judge that presided at the dispositional hearing. At

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> (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.

the postjudgment hearing, the judge reminded the parties that the Department represented at disposition that Jesse was in "relatively good" health with the exception of minor issues, which the judge had been made aware of. David then conceded that his argument for a new trial was "very technical" and that he was not suggesting that Jesse's health was actually an issue.

¶23 Based on this concession, the circuit court reasoned that, had it specifically addressed Jesse's health on the record at disposition, it would have stated that there was no issue in that regard and determined that Jesse's health was not a significant factor. The court concluded that its decision at disposition would, therefore, have been the same. Neither ***Margaret H.*** nor any other authority that we know of requires a new dispositional hearing under these types of circumstances.

By the Court.—Order affirmed.

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