COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2009

David R. Schanker
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. 2009AP1872
2009AP1873

Cir. Ct. Nos. 2008TP23
2008TP24

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

NO. 2009AP1872

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

WOOD COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

GARY V.,

RESPONDENT-APPELLANT.

NO. 2009AP1873

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

WOOD COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

GARY V.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Gary V. appeals the circuit court's orders terminating his parental rights to his children, Kory G.V. and Kourtney M.V., after a jury found three separate grounds for termination. He argues that there was insufficient evidence to support each of the three grounds. Gary V. also argues that he should receive a new trial because the circuit court erroneously admitted testimony that a social worker was fearful of Gary V. and because the prosecutor's closing argument invited the jury to decide the case on an improper basis. I reject Gary V.'s arguments, and affirm the orders.

Background

¶2 Gary V.'s children were placed outside the home and found in need of protection or services (CHIPS) in circuit court orders dated July 28, 2007. The Wood County Department of Social Services subsequently petitioned for termination of Gary V.'s parental rights. After a fact-finding hearing, the jury found grounds for termination. The circuit court terminated Gary V.'s parental

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

rights to the children, and Gary V. appealed. Additional facts will be referenced as needed below.

Discussion

Sufficiency Of The Evidence

¶3 The three grounds for termination found by the jury correspond to WIS. STAT. § 48.415(2), (4), and (6) and are, respectively, continuing CHIPS, continuing denial of periods of physical placement or visitation, and failure to assume parental responsibility. Gary V. argues that the evidence was insufficient to support the jury's findings on each of the three grounds.

¶4 When reviewing the sufficiency of the evidence, this court applies a highly deferential standard of review and will sustain the jury verdict if there is any credible evidence to support it. ***State v. Quinsanna D.***, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 655 N.W.2d 752. To the extent Gary V.'s sufficiency-of-the-evidence argument raises a question of statutory interpretation, however, this court's review is *de novo*. ***State v. Volk***, 2002 WI App 274, ¶34, 258 Wis. 2d 584, 654 N.W.2d 24.

¶5 I begin with Gary V.'s argument regarding the continuing-denial-of-periods-of-physical-placement-or-visitation ground under WIS. STAT. § 48.415(4). Because I reject that argument, I need not decide whether the evidence was sufficient to support the jury's findings on the other two grounds. Gary V. does

not suggest any reason why there would need to be more than one valid ground for termination.[2]

¶6 WISCONSIN STAT. § 48.415(4) provides:

> CONTINUING DENIAL OF PERIODS OF PHYSICAL PLACEMENT OR VISITATION. Continuing denial of periods of physical placement or visitation, which shall be established by proving all of the following:
>
> (a) That the parent has been denied periods of physical placement by court order in an action affecting the family or has been denied visitation under an order under s. 48.345, 48.363, 48.365, 938.345, 938.363 or 938.365 containing the notice required by s. 48.356(2) or 938.356(2).
>
> (b) That at least one year has elapsed since the order denying periods of physical placement or visitation was issued and the court has not subsequently modified its order so as to permit periods of physical placement or visitation.

¶7 The focus here is on subsection (a), and, more specifically, on whether Gary V. "has been denied visitation under an order." The pertinent orders are the July 28, 2007 CHIPS orders. Those orders included the following provision:

> Gary will follow the visitation schedule established. He will attend as frequently as recommended in the best interest of the child. He will be on time for visits and be present at all visits unless excused ….

[2] Gary V. moved on October 29, 2009, to file a corrected reply brief. I grant the motion and have considered the corrected brief, but the correction is not pertinent to the grounds on which I have decided this case.

> At this time, the Wood County Department of Social Services is requesting that visits between Gary and the children be put on hold. This would happen until Gary is able to meet with the recommendation that visits occur in a therapeutic setting at first due to the fact that the children do not have a relationship with Gary at this time.

¶8 Gary V. argues that the evidence was insufficient because the CHIPS orders did not actually deny visitation. He argues that the orders only put unsupervised visits "on hold" and contemplated that visits "would happen."

¶9 I disagree with Gary V.'s interpretation of the CHIPS orders. The orders do not say that visits "would happen." Rather, the orders plainly provide that what "would happen" is that there would *not* be visitation unless Gary V. was able to have visits with his children in a therapeutic setting. If Gary V. was not able to have such visits, the effect of the orders was to deny visitation.

¶10 Gary V. concedes that no visits occurred, but makes a factual assertion that the reason for this was the *Department's* failure to establish the type of visits that the order would have allowed. Gary V. neither supplies record citations to support his assertion nor provides relevant legal authority explaining why the assertion, if true, is dispositive. Thus, I could deem his argument inadequate and decline to analyze the sufficiency-of-the-evidence issue further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to address inadequately developed arguments). I will, however, briefly consider the merits of what seems to be Gary V.'s argument.

¶11 Gary V.'s argument appears to be that it would be an incorrect interpretation of WIS. STAT. § 48.415(4) or fundamentally unfair to rely on § 48.415(4) as the ground for termination of parental rights if actions by the

Department prevented him from establishing visits in a therapeutic setting or if establishing such visits was not within his control.

¶12 The problem with this argument is that the jury heard at least some evidence supporting a reasonable inference that the lack of visits resulted primarily from Gary V.'s own failures. For example, the jury heard evidence that Gary V. had not "met the conditions or the recommendations of the therapist to proceed with those contacts," meaning the type of visits allowed under the CHIPS orders. Although there may have been conflicting evidence, it was for the fact finders to choose among that evidence and any competing reasonable inferences to be drawn from the evidence. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990); ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982). Accordingly, I reject Gary V.'s argument that the evidence was insufficient to show a continuing denial of visitation by court order under WIS. STAT. § 48.415(4).

Testimony That Social Worker Was Fearful Of Gary V.

¶13 Gary V. argues that a new trial is required because the circuit court admitted irrelevant and unfairly prejudicial testimony that the social worker assigned to his case was fearful of him. In particular, Gary V. objects to a portion of the social worker's testimony in which she explained that, when she met with Gary V. in her office, she would leave her door open and have male staff members outside because she was fearful of Gary V. Gary V. argues that this testimony should not have been admitted because it had a tendency to influence the jury by improper means, portraying him as an angry, out-of-control man who could not be trusted around his children.

¶14 Assuming without deciding that the circuit court erroneously admitted this evidence, I nonetheless conclude that such error was harmless. Apart from this testimony, the jury had ample evidence that Gary V. had a serious problem controlling his anger and might be prone to violence.

¶15 For example, the jury heard evidence that Gary V. became so loud and defensive in an abuse-prevention group that other members were "kind of shocked." Similarly, the jury learned that, when the group facilitators met separately with Gary V. about his behavior in the group, Gary V. became angry, made "concerning" gestures, walked out and slammed a door, and then stared through a window at the female facilitator in a manner that she believed was intended to intimidate her. The jury also learned that Gary V. refused to take responsibility for his violent behavior toward his wife and a police officer.

¶16 Gary V. does not argue that any of this evidence was improperly admitted. The social worker's testimony about her fear of Gary V. was inconsequential when compared with this other evidence, and I am confident that it would not have affected the outcome in light of the other evidence the jury heard. *See* ***State v. Harris***, 2008 WI 15, ¶¶42-43, 307 Wis. 2d 555, 745 N.W.2d 397 (stating various tests for harmless error, including whether it is clear beyond a reasonable doubt that the error did not contribute to the verdict or that a rational jury would have made the same determination absent the error).

Prosecutor's Closing Argument

¶17 Gary V. argues that he should receive a new trial in the interest of justice because the prosecutor's closing argument invited the jury to decide the case on an improper basis.[3] *See* WIS. STAT. § 752.35. I disagree.

¶18 Gary V. relies primarily on a portion of the prosecutor's closing argument in which the prosecutor told the jury what she would have done if she were Gary V. and her parental rights were at stake. Gary V. argues that the prosecutor's closing argument was an improper opinion that Gary V. failed to form a substantial parental relationship with his children and failed to meet all of the CHIPS conditions.

¶19 Putting aside whether the prosecutor's closing argument was improper, I see no reason why it would have materially influenced the jury's verdict on the denial-of-periods-of-physical-placement-or-visitation-by-court-order ground for termination. Rather, the prosecutor's closing argument pertained to the other two alleged grounds, failure to assume parental responsibility and continuing CHIPS. As already indicated, Gary V. has not suggested any reason why there would need to be more than one valid ground for termination, and I have already decided that the jury validly found grounds for termination based on the continuing denial of visitation by court order under WIS. STAT. § 48.415(4). Accordingly, the prosecutor's closing argument is not a reason to grant a new trial in the interest of justice.

[3] Gary V. concedes that he failed to object to the pertinent part of the prosecutor's closing argument at trial.

By the Court.—Orders affirmed.

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