COURT OF APPEALS
DECISION
DATED AND RELEASED

August 21, 1997

NOTICE

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

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No. 97-1656

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

IN RE THE TERMINATION OF PARENTAL RIGHTS OF MICHELLE E. J., A PERSON UNDER THE AGE OF 18: LA CROSSE COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

ELIZABETH A. J. AND JAMES L. J.,

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

DYKMAN, P.J.[1] Elizabeth A.J. and James A.J. appeal from an order terminating their parental rights to Michelle E.J., their minor daughter. They argue that: (1) the trial court erred in admitting into evidence a videotape of their

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

home; and (2) social services failed to provide them with necessary and desired services. We conclude that the trial court properly exercised its discretion in admitting the videotape. We also conclude that relevant to this proceeding was not whether social services provided necessary and desired services, but whether social services made a diligent effort to provide services ordered by the court. Because the jury's finding that social services made a diligent effort to provide court-ordered services is supported by credible evidence, we affirm the trial court's order.

BACKGROUND

Michelle E.J., the daughter of Elizabeth A.J. and James A.J., was born on November 1, 1991. Sharon Kemp, a social worker for the La Crosse County Human Services Department, visited Elizabeth and James on February 9, 1993, after receiving a referral regarding the possible neglect of Michelle in her parents' home. After her assignment to the case, Kemp provided voluntary services to Elizabeth and James. Among these services, Kemp provided a parent aide to work with the family three or four times a week. After twenty-six parent aide visits to the home, Kemp determined that the parents were not benefiting from these services. Kemp discontinued the parent aide and on March 19, 1993, assigned a safety monitor to make unscheduled visits to the home to see if the child was safe.

On March 23, 1993, Kemp inspected the parents' residence and found it to be filthy and unsafe. Kemp told Elizabeth and James that if the condition of the residence continued, Michelle would be removed to emergency foster care. On April 5, 1993, Kemp returned to the residence with Nora Rannenberg, an intake social worker, and they determined that it was unsafe for

Michelle to remain in the house. On that date, Michelle was removed from her parents' care and placed in emergency foster care. On April 6, 1993, Kemp, Rannenberg and a police officer returned to the home and videotaped the residence.

On May 24, 1993, the circuit court found that Michelle was a child in need of protection or services because her parents neglect, refuse or are unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the child's physical health.[2] The court transferred the legal custody of Michelle to the La Crosse County Human Services Department for one year and placed the child at a licensed foster home. The court informed Elizabeth and James of the conditions necessary for Michelle to be returned to their home. Among these conditions, the parents needed to undergo psychological and alcohol and other drug abuse (AODA) evaluations and receive necessary treatment. They also needed to cooperate with the visitation schedule and successfully complete an appropriate parenting class. Furthermore, the parents needed to demonstrate their ability to provide a safe environment for Michelle by establishing and maintaining a residence to be inspected three times a month for health and safety concerns.

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[2] Section 48.13, STATS., provides:

> The court has exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court, and:
>
> ….
>
> (10) Whose parent, guardian or legal custodian neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child.

On May 18, 1994, the circuit court determined that Michelle continued to be in need of protection or services and extended the dispositional order until May 24, 1995. Among the conditions for the return of the child to their home, the parents needed to demonstrate progress in family therapy and marriage counseling; demonstrate their ability to independently parent Michelle; and establish and maintain a stable place of residence that is clean and free of any health or safety hazards.

On August 7, 1995, the court extended the dispositional order for another year, again finding that Michelle continued to be in need of protection or services.[3] The conditions for the return of Michelle to her parents' home remained substantially the same. On August 6, 1996, the order was extended for another six months because Michelle was still in need of protection or services. Again, the conditions for the return of the child to Elizabeth and James did not change substantially.

On September 27, 1996, a petition was filed to terminate the parental rights (TPR) of Elizabeth and James pursuant to § 48.415(2), STATS. This section 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:
>
> ….

[3] The record does not account for the time lapse between the May 24, 1995 expiration date of the previous order and the August 7, 1995 effective date of this order.

> (2) CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services, which shall be established by proving all of the following:
>
> (a) That the child has been adjudged to be 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 ….
>
> (b) 1. In this paragraph, "diligent 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, the level of cooperation of the parent and other relevant circumstances of the case.
>
> 2. That the agency responsible for the care of the child and the family has made a diligent effort to provide the services ordered by the court.
>
> (c) That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders; and that the parent has failed to demonstrate substantial progress toward meeting the conditions established for the 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.

Prior to trial, Elizabeth filed a motion in limine to exclude the April 6, 1993 videotape of their home from evidence, arguing that it was not relevant and that its probative value, if any, was substantially outweighed by the danger of unfair prejudice. The court denied the motion, finding that the videotape was directly relevant to the issue of whether Elizabeth and James made substantial progress toward correcting the conditions that existed at the time Michelle was removed from the home.

After a trial, which included a showing of the videotape, the jury found that the La Crosse County Department of Human Services made a diligent effort to provide the services ordered by the court; that Elizabeth and James had

failed to demonstrate substantial progress toward meeting the conditions established for the return of Michelle to their home; and that there was a substantial likelihood that Elizabeth and James would not meet these conditions within twelve months. Following a dispositional hearing, the court terminated the parental rights of Elizabeth and James to Michelle. Elizabeth and James appeal.

VIDEOTAPE

Elizabeth and James argue that the trial court erred in showing the April 6, 1993 videotape to the jury. The decision to admit or exclude evidence lies within the sound discretion of the trial court. ***State v. Jackson***, 188 Wis.2d 187, 194, 525 N.W.2d 739, 742 (Ct. App. 1994). To properly exercise its discretion, the trial court must apply the relevant law to the applicable facts in order to reach a reasonable conclusion. ***Id.*** We reverse the trial court's evidentiary ruling only when it has erroneously exercised its discretion. ***Id.***

The parents first contend that the videotape was unfairly prejudicial. Under § 904.03, STATS., evidence that is otherwise relevant "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Regarding photographs, our supreme court has stated:

> While reasonable persons looking at the photographs as a part of a record may have differing opinions in regard to whether they were cumulative, inflammatory, or prejudicial, the judgment is essentially one to be exercised by the trial judge. He, better than anyone else, in light of the evidence, can make the determination that the photographs will assist the jury in a rational and dispassionate determination of the facts. Where a trial judge has applied the appropriate discretionary standards, this court will not reverse his decision unless it appears that, in light of the record as a whole, his conclusion was wholly unreasonable or if the circumstances indicate that the only purpose of the photographs was to inflame or prejudice the jury.

Hayzes v. State, 64 Wis.2d 189, 200, 218 N.W.2d 717, 723 (1974). We see no reason to apply a different standard to videotapes.

The trial court's admission of the videotape was not unreasonable, and the videotape was shown for a purpose other than to inflame or prejudice the jury. Relevant to the proceedings was whether the parents had failed to demonstrate substantial progress toward meeting the conditions established for the return of Michelle to their home. *See* § 48.415(2)(c), STATS. Among these conditions was that Elizabeth and James maintain a residence that was clean and free of any health and safety hazards. The videotape showed the condition of the home when Michelle was removed. Sharon Kemp subsequently testified as to the condition of the various residences that Elizabeth and James lived in after Michelle was removed. The videotape provided a starting point for the jury to determine whether Elizabeth and James made progress toward maintaining a clean, healthy and safe residence. Because the tape was relevant and was not shown solely to inflame or prejudice the jury, we conclude that the trial court did not erroneously exercise its discretion in showing it to the jury.

In support of their contention that the trial court erred in admitting the videotape, Elizabeth and James offer several other arguments. None of these arguments were raised, however, in their motion to exclude the videotape from evidence. "Motions must be stated and argued with particularity." ***State v. Caban***, ___ Wis.2d ___, ___, 563 N.W.2d 501, 505 n.3 (1997). Furthermore, we generally do not address arguments raised for the first time on appeal. ***Wirth v. Ehly***, 93 Wis.2d 433, 443, 287 N.W.2d 140, 145 (1980). Elizabeth and James argue, however, that we may address their claims under § 752.35, STATS. This statute allows us to reverse a circuit court order, regardless of whether the proper

motion or objection appears in the record, when the real controversy was not fully tried or when it is probable that justice has for any reason miscarried and we can conclude that a new trial would probably produce a different result. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 26-27, 456 N.W.2d 797, 809 (1990) (Bablitch, J., concurring). We will examine the remainder of the arguments under this standard.

Elizabeth and James contend that their due process rights were violated when the videotape was shown to the jury. They attempt to analogize the showing of the videotape to the jury to the showing of a single suspect to persons for the purpose of identification, a practice which has been "widely condemned." *See* ***Stovall v. Denno***, 388 U.S. 293, 302 (1967). A court may exclude a pretrial identification from evidence when the procedure for identifying a suspect is unnecessarily suggestive and unreliable. ***State v. Kaelin***, 196 Wis.2d 1, 9, 538 N.W.2d 538, 540-41 (Ct. App. 1995). Because the videotape was "unnecessarily suggestive" that the condition of their residence has not changed over four years, the parents argue that the showing of the videotape to the jury violated their due process rights.

Elizabeth and James do not cite any case that has used the "unnecessarily suggestive" standard for determining whether to admit a videotape or photograph into evidence, and we see no reason to apply it here. An identification procedure is unnecessarily suggestive when it gives rise to a substantial likelihood of misidentification. ***Id.*** at 10, 538 N.W.2d at 541. We do not see how the videotape would cause the jury to misidentify the apartment.

By arguing that the videotape unnecessarily suggests that the condition of their residence has not changed and that the videotape distorts the condition of the apartment, what the parents really argue is that the tape's

probative value is substantially outweighed by the danger of misleading the jury, requiring its exclusion under § 904.03, STATS. We have already concluded that the trial court did not erroneously exercise its discretion in showing the videotape to the jury because the tape is relevant to whether Elizabeth and James had made substantial progress toward maintaining a clean, healthy and safe residence. Therefore, we reject this argument.

Elizabeth and James next argue that they were deprived of their constitutional rights to due process and a fair trial when the videotape was taken without their permission and without informing them that the tape would be used at a trial to terminate their parental rights. The parents correctly note that TPR proceedings affect fundamental liberty interests protected by the Fourteenth Amendment. *See* ***Santosky v. Kramer***, 455 U.S. 745, 753-54 (1982). They also correctly assert that TPR proceedings are subject to strict judicial scrutiny. *See* ***In re Amanda A.,*** 194 Wis.2d 627, 639, 534 N.W.2d 907, 911 (Ct. App. 1995). We remain unconvinced, however, that they were denied any process to which they were due.

Elizabeth and James cursorily allege that the filming of the video was the fruit of an illegal search and seizure in violation of the Fourth Amendment, a taking of a visual image in violation of the Fifth Amendment, and "a form of iconographic self-incrimination," also in violation of the Fifth Amendment. Because they do not cite any authority to support their argument, we will not address it. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

Moreover, there is no evidence of record to support the contention that the videotape was filmed without permission. Elizabeth and James simply

allege that the video was filmed illegally because there is no document of record in which they gave human services the right to film a videotape of their home, no record indicating that they were informed that the film could be used against them, and no search warrant in the record. But the absence of proof in the record that Elizabeth and James gave human services permission to videotape their residence does not establish that the video was filmed illegally. In their motion in limine, Elizabeth and James did not argue for the suppression of the videotape because it was illegally obtained. They only argued that it was irrelevant and unfairly prejudicial. Therefore, the department of human services would have had no reason to offer evidence establishing the legality of the taping.

NECESSARY OR DESIRED SERVICES

Elizabeth and James argue that they did not receive services necessary for the return of Michelle to their residence. In support of their argument, they cite § 48.069(1), STATS., which provides:

> (1) The staff of the department, the court, a county department or a licensed child welfare agency designated by the court to carry out the objectives and provisions of this chapter shall:
>
> ….
>
> (c) Make an affirmative effort to obtain necessary or desired services for the child and the child's family and investigate and develop resources toward that end.

The question of whether the parents received "necessary or desired services" under § 48.069(1)(c), STATS., was not at issue at the TPR hearing. The jury was never asked to answer this question, and we are not a fact-finding court. *See* ***Wurtz v. Fleischman***, 97 Wis.2d 100, 107 n.3, 293 N.W.2d 155, 159 (1980). Therefore, even if the question of whether Elizabeth and James received

"necessary or desired services" was relevant to the proceedings, we would not be able to answer this question on appeal as a matter of first impression.

Rather, at issue during the TPR proceedings was whether the agency responsible for the care of the child and the family made a diligent effort to provide the services ordered by the court. *See* § 48.415(2)(b), STATS. The jury found that diligent efforts to provide court-ordered services had been made. We will uphold the jury's finding that the county department of human services made a diligent effort to provide services ordered by the court if it is supported by credible evidence. *See* ***Foseid v. State Bank***, 197 Wis.2d 772, 782, 541 N.W.2d 203, 207 (Ct. App. 1995).

In its order finding Michelle to be in need of protection or services and in its subsequent extension orders, the court provided that Elizabeth and James needed to undergo psychological and AODA evaluations and receive necessary treatment; successfully complete an appropriate parenting class; demonstrate progress in family therapy and marriage counseling; demonstrate their ability to independently parent Michelle; and establish and maintain a stable place of residence that is clean and free of any health or safety hazards.

At trial, Sharon Kemp was asked, "[D]uring the course of this case would you state the services that you or your department have provided or coordinated?" She responded:

> Social work services involves referrals, besides face-to-face contacts which I had, referrals to other services like evaluations, psychological evaluations, the drug and alcohol evaluations, therapy evaluations, and treatment. Parent-aide services were always a part of this case …. Judy Steinfadt did the majority of the services, visitation in the home, at the grandparents' home, at the department, at Children's Service Society. The parent aide would do transportation of Shelly to and from these visits as well as

> supervising them, doing parent skills, teaching or training during those visitations.
>
> The parents were referred to and did attend parenting class at the Family Resource Center in La Crosse. Marriage counseling they did attend. Other services that the department provided for the child was foster care placement, medical assistance for her medical needs, and ongoing monitoring of the progress in the case were there any.

Additionally, Judy Steinfadt, a parent aide at Children Service Society, testified that she visited the parents from September 1993 to September 1996 to monitor the cleanliness of their residence and to provide services. Steinfadt gave Elizabeth and James feedback on what needed to be improved in their residence and tried to teach them parenting skills.

The testimony of Kemp and Steinfadt provided credible evidence upon which a reasonable jury could find that the county department of human services made a diligent effort to provide the services ordered by the court. Because the jury's finding is supported by credible evidence, we uphold the trial court's order.

Elizabeth and James argue that they should have been provided with a housekeeper to teach them how to take care of their home and with a sophisticated teacher to teach them the skills necessary to raise a child. However, Sharon Kemp testified that she believed Elizabeth and James had received all of the services necessary to enable them to comply with the conditions of the court order. To make a diligent effort, the county did not need to provide Elizabeth and James every conceivable service. Rather, a "diligent effort" is "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, the level of cooperation of the parent and other relevant circumstances of the case."

Section 48.415(2)(b)1, STATS. The jury's finding that human services made a diligent effort to provide Elizabeth and James the services ordered by the court is supported by credible evidence.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.