

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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Nos. 97-1841 & 97-1842

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 97-1841

**IN THE INTEREST OF SHENANDOAH, A.S.,
A PERSON UNDER THE AGE OF 18:**

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

ONEIDA TRIBE OF INDIANS OF WISCONSIN,

INTERVENOR-RESPONDENT,

v.

KIM A. S.,

RESPONDENT-APPELLANT.

No. 97-1842

**IN THE INTEREST OF SHAYNON F.S.,
A PERSON UNDER THE AGE OF 18:**

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

ONEIDA TRIBE OF INDIANS OF WISCONSIN,

INTERVENOR-RESPONDENT,

V.

KIM A. S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
SUE E. BISCHHEL, Judge. *Affirmed.*

HOOVER, J. Kim A.S. appeals an order terminating his parental rights to his minor children, Shenandoah A.S. and Shaynon F.S. Kim raises five issues on appeal: whether (1) the court erroneously exercised its discretion by denying his motion to suppress a videotape; (2) the court erroneously exercised its discretion by not instructing the jury that Kim did not live at the residence when the videotape was made; (3) the court erred by allowing a social worker, Sue Steinfeldt, to testify as an expert witness; (4) the court violated Kim's Fourth Amendment rights by forcing him to submit to two preliminary breath tests during trial without finding him in contempt; (5) and the court was biased against Kim and erred by giving undue weight to irrelevant and improper facts. This court rejects each of Kim's arguments, and affirms the trial court's order.

On November 14, 1996, the Brown County Human Services Department¹ filed a petition for the involuntary termination of parental rights to

¹ The Intervenor, Oneida Tribe of Indians of Wisconsin, essentially adopts the positions the County advances on appeal.

Shashoni L.D., Shenandoah A.S., and Shaynon F.S. Kim A.S. was Shenandoah and Shaynon's father. The three children's mother, Sherry, conceded grounds to terminate rights to all three of her children, as did Shashoni's father, Samuel F.D. Kim contested termination to Shenandoah and Shaynon.

The record reflects a long and detailed history of County involvement with the children. It began providing services to Sherry and the three children in 1990 because of Sherry's drug and alcohol addiction and commensurately poor parenting. Kim, who was involved in these efforts, often resided with Sherry. Social workers continued to respond to reports of child neglect and parental alcoholism. The County was also actively involved in 1991 and 1993 when Sherry was pregnant and using drugs and alcohol. During these times, Sherry and Kim had trouble keeping a stable residence and, when they had one, the conditions were described as squalid. Both parents also left the children unattended or unsupervised, and there was concern that the youngest child's medical needs were not being met.

In October and November 1993, social workers began receiving reports that the children were going to day care extremely filthy, without diapers, and with untreated rashes and infections. Sherry was using drugs and alcohol daily. She was suspected of selling drugs. When Kim asked the social workers to do something about Sherry, who was intoxicated, they replied that it was his responsibility to get help and to get the kids out of the environment. He replied, "I can't do it. I don't know what to do. She doesn't listen to me." On November 16, 1993, social workers again went to the residence. Reportedly, the house was filthier than ever and completely cockroach infested. Kim was again told to do something, and he answered he could not.

Shortly thereafter, the social workers returned to the residence to take custody of the children, but Sherry had fled with two of them, leaving Shenandoah with a neighbor. He was placed in emergency foster care. The trial court placed Shenandoah with Kim on the condition that Sherry not reside with him. Sherry finally surrendered the other children, and Shaynon was also placed with Kim.

In early February 1994, a CHIPS disposition was entered, formally placing Shenandoah and Shaynon with Kim. Conditions imposed on Kim included: AODA assessment and follow through with aftercare treatment; absolute sobriety; participation in a parenting class; no unsupervised contact between the children and Sherry; adequate supervision and appropriate caretakers at all times; and cooperation with County Human Services and the Oneida tribe. However, in the spring of 1994, Sherry again lived with Kim and the children. She soon became the primary caretaker, complaining that Kim was drinking again. In the summer of 1994, Sherry began drinking as well, and conditions in the home deteriorated. Social workers received reports that the children were being left alone in the house and unsupervised in the park.

On July 25, 1994, Sherry signed a voluntary placement agreement. Both children were eventually placed in foster care. In September 1995, Kim and Sherry were again living together. They were allowed unsupervised visits with the children at Kim's home on Fridays from 10:30 a.m. to 5 p.m. However, by October, both were drinking again. Evidence also emerged that an older sibling sexually abused one of the children during visitations.

Neither parent appeared at an extension hearing held January 11, 1996. Visitations were suspended, but were eventually reinstated at a neutral site

for one and one-half hours per week. Kim attended visitation sporadically and, apparently, when he did attend, his participation with the children was minimal. The County decided to seek termination of parental rights as part of its permanency plan on August 27, 1996.

The County sought termination of Kim's parental rights pursuant to § 48.415(2)(c), STATS., alleging he failed to demonstrate substantial progress toward meeting the conditions enumerated in the February 3, 1994, CHIPS order and was unlikely to do so in the next twelve months. The case was tried to a jury on March 3-4, 1997. During the trial, the court permitted a videotape of the conditions of the children's home to be admitted. Under the Indian Child Welfare Act, 25 U.S.C. §§ 1901, *et seq.*, seven special verdict questions were submitted to the jury for each child. All were returned in favor of the County, with no dissenting jurors. At disposition, the trial court terminated Kim's parental rights to both children, and the final order was filed on May 7, 1997.

I. VIDEOTAPE

A. Relevance

Kim first argues that the court erroneously exercised its discretion by denying his motion to suppress the videotape of the interior of the house in which the children were living. He asserts that it was irrelevant because he had moved out of the house a month prior to the taping. Kim also claims that the tape was prejudicial. He finally asserts surprise, having not been advised of its existence until the pretrial conference, which was held one week before trial.

Whether to admit evidence is a matter within the discretion of the trial court. *State v. Evans*, 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App.

1994). A trial court properly exercises its discretion when it examines the relevant facts, applies the proper standard of law, and engages in a rational decision-making process. *State v. Bunch*, 191 Wis.2d 501, 506-07, 529 N.W.2d 923, 925 (Ct. App. 1995). When a trial court does not articulate its reasoning, the appellate court may independently examine the record to determine if it provides a basis for the trial court's exercise of discretion. *State v. Pharr*, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983).

This court concludes that the trial court did not erroneously exercise its discretion by admitting the videotape into evidence. First, it properly determined that the tape was relevant. It demonstrated the conditions in which the children were living when initially removed from the home. More significantly, it was relevant to Kim's parenting abilities. Kim cannot successfully argue that after only one month's absence he had no responsibility for conditions in the home or their likely effect on the children. He was aware of the conditions his children were subjected to and yet he failed to do anything about them.

B. Suppression

Kim claims the court erred by not excluding the videotape, which was produced at the February 25 final pretrial, six days before the trial commenced. The basis for the suppression motion was surprise; he did not ask for a continuance.²

Kim does not show how the County's delay in producing the videotape prejudiced his case. He received a copy six days before trial, affording him more than sufficient time to review the twelve-and-one-half-minute tape. He does not explain how he would have investigated the video, or how an investigation would help his case. In addition, he had ample time to contest its admissibility. The court did not err by denying Kim's motion to suppress on the basis of surprise.

C. Unfair Prejudice

Finally, Kim claims that the trial court erroneously exercised its discretion by concluding that the videotape was not unduly or unfairly prejudicial. A court must exercise discretion by weighing the probative value of evidence against its prejudicial effect. *Kelly v. State*, 75 Wis.2d 303, 319, 249 N.W.2d 800, 808 (1977). Relevant evidence will not be excluded simply because it is prejudicial; it must be *unfairly* prejudicial. *Johnson v. Kokemoor*, 199 Wis.2d 615, 636, 545 N.W.2d 495, 503 (1996). Evidence is unfairly prejudicial when it threatens fundamental goals of accuracy and fairness by misleading the jury or by influencing it to decide the case upon an improper basis. *State v. Hall*, 196 Wis.2d 850, 881, 540

² Section 904.03, STATS., provides the general rule authorizing the court to exclude relevant evidence: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

"Surprise is not listed as a specific ground for exclusion of evidence. This court has recognized that a continuance will generally be a more appropriate remedy for surprise than exclusion." *State v. O'Connor*, 77 Wis.2d 261, 287-88, 252 N.W.2d 671, 682 (1977).

N.W.2d 219, 232 (Ct. App. 1995), *rev'd on other grounds*, 207 Wis.2d 54, 557 N.W.2d 778 (1997).

Kim does not claim that the videotape inaccurately reflects the house's condition. He claims that the conditions reflected were such as to arouse the jury's sense of horror and promote its desire to punish. The tape shows dirty dishes piled in the sink, garbage, a large number of beer cans, clothes and food on the floor, and cockroach infestation. This renders the tape potent evidence of Kim's poor parenting skills being, as the court noted, the best depiction available of the squalor that led to the children's removal from the home. Its capacity to accurately portray the children's living environment does not make it unfairly prejudicial, but rather enhances its probative value. The tape did not cause the jury to decide the case on extraneous considerations, *see State v. Murphy*, 188 Wis.2d 508, 524 N.W.2d 924 (Ct. App. 1994), but upon a contested material issue, the parent's ability to meet his children's needs. That the tape might reveal offensive living conditions does not mean that its prejudicial value substantially outweighs its probative value. Therefore, the trial court properly admitted the videotape into evidence.

II. JURY INSTRUCTION

Kim claims an erroneous exercise of discretion when the court refused to give a jury instruction informing the jury that he did not live at the children's residence when the videotape was made. The trial court has broad discretion in deciding which instructions will be given. *Farrell v. John Deere Co.*, 151 Wis.2d 45, 60, 443 N.W.2d 50, 54 (Ct. App. 1989).

The trial court did not err by refusing to give the instruction. The jury heard evidence and argument that Kim did not live in the house. The jury was thus aware of his position. Melissa Blom, a social worker, testified that Kim

was present at the house the day before the video was made when another social worker stopped at the home. Blom testified that she believed he lived there. The conflicting evidence created a fact question for the jury. An instruction directing the jury on a disputed fact issue would have been inappropriate. *Nothem v. Berenschot*, 3 Wis.2d 585, 590, 89 N.W.2d 289, 292 (1958).

III. EXPERT TESTIMONY

Sue Steinfeldt, a social worker assigned to Kim's family, testified that returning the children to his custody would cause them serious emotional or physical damage. Kim argues that the court “failed” to exercise discretion by permitting Steinfeldt to give opinion evidence without first being qualified as an expert.³ This court rejects the argument. The trial court considered Steinfeldt's qualifications, deemed them sufficient to make her testimony relevant, and concluded that such testimony could assist the jury.

Kim repeatedly complains that Steinfeldt “was never qualified as an expert” pursuant to § 907.02, STATS. Evidently Kim believes that the proponent of opinion evidence must engage in a formal, but undisclosed, procedure so as to “qualify” a witness as an expert.⁴ It is, however, evidence of “knowledge, skill, experience, training or education” that renders a witness qualified to express an opinion. *Id.* Aside from laying a proper foundation, there is no formal rubric one

³ He also suggests that it was improper to allow the witness to express an opinion on an ultimate fact question. Section 907.04, STATS., resolves this objection against Kim: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

⁴ As stated in Kim's brief: "[T]he petitioner never made an offer of proof or a request that she be qualified as an expert." "The petitioner never offered her as an expert, made an offer of proof or requested that she be considered an expert."

must satisfy to offer expert evidence. Qualification is not a process, but a circumstance, based upon the witness' background.

The court heard evidence concerning Steinfeldt's education and training. It learned of her background, which included many years experience working with Kim and his family. The evidence was sufficient in the court's view to qualify her as an expert on the likely effects upon the children of returning them to the appellant's care. The court further concluded that opinion evidence on this issue could assist the trier of fact, the other consideration the court must entertain before a witness may testify as an expert.⁵ These facts demonstrate a proper exercise of discretion.

IV. BREATH TEST/ FOURTH AMENDMENT

Kim asserts that the court's order that he twice submit to breath tests during the trial without first finding him in contempt violated his Fourth Amendment right against illegal search and seizure. This argument is immaterial. Kim fails to address how this relates to the termination issue or what possible remedy this court could provide. This appeal does not present the proper forum to seek redress for this alleged violation.

V. DECISION TO TERMINATE

Finally, Kim contends that the trial court erroneously exercised its discretion when it ordered his parental rights terminated. He asserts that the court exhibited bias against him and gave undue weight to irrelevant and improper

⁵ "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" Section 907.02, STATS.

evidence. Kim argues that the court's bias was demonstrated by the order requiring him to take a second test when there was no evidence of intoxication, and by its statements to Kim at the dispositional hearing. He further contends that the court gave undue weight to the videotape and relied on other irrelevant and unsubstantiated facts in terminating his parental rights.

When a jury finds grounds to terminate parental rights, the court must determine whether termination is appropriate. Sections 48.424(3) and 48.427, STATS. The trial court must consider all the circumstances and exercise its sound discretion as to whether termination would promote the best interests of the child. *In re J.L.W.*, 102 Wis.2d 118, 131, 306 N.W.2d 46, 52 (1981). The court's determination to terminate parental rights will not be upset unless it is clearly erroneous. *In re Brandon S.S.*, 179 Wis.2d 114, 150, 507 N.W.2d 94, 107 (1993).

The court's decision to terminate Kim's parental rights was not clearly erroneous. The facts supporting termination were overwhelming.⁶ The jury had no reasonable doubt that returning the children to Kim would cause "serious emotional or physical damage" The court agreed. Kim does not contest this conclusion, and his contentions are insufficient to rebut it.

Kim fails to establish either judicial bias or undue reliance upon improper and irrelevant evidence. Whatever reliance the court placed upon the videotape was proper; it was relevant evidence of his parenting ability. The

⁶ In addition to concluding that all of the dispositional factors in § 48.426, STATS., supported termination, the evidence adduced at the hearing and summarized at the beginning of this decision amply support the trial court's conclusion that Kim had "failed miserably to comply with [the] dispositional order." The court's characterization is indicative not of bias, but of the depth of Kim's failure.

court's consideration of Kim's trial demeanor was equally proper.⁷ Determining the best interests of the child in termination of parental rights proceedings depends on first-hand observation and experience with persons involved. *Id.* Kim's demeanor, his alcohol consumption, prevarication and apparent sleeping during the trial, and his implied lack of interest indicated by asking the court if he could leave during the trial all inform on which disposition is consistent with the children's best interests. In any event, the record does not support the view that the termination order resulted primarily from the factors and circumstances Kim complains of, or from undue reliance on any one. Rather, it shows that the court considered all of the circumstances relevant to disposition.

In conclusion, this court is satisfied that the trial court properly exercised discretion by admitting the videotape and opinion evidence and by declining to direct the jury on an issue of disputed fact. The record further demonstrates that the court's order terminating Kim's parental rights was predicated upon proper consideration of the overwhelming evidence supporting the statutory factors for termination.

By the Court.—Order affirmed.

⁷ There are many instances where courtroom demeanor is germane. Examples include at sentencing, *State v. Rodgers*, 203 Wis.2d 83, 552 N.W.2d 123 (Ct. App. 1996); when finding summary contempt, *Oliveto v. Circuit Court*, 186 Wis.2d 323, 519 N.W.2d 769 (Ct. App. 1994), *rev'd on other grounds*, 194 Wis.2d 418, 533 N.W.2d 819 (1995); and in assessing a defendant's competency to proceed, *State v. Debra A.E.*, 188 Wis.2d 111, 523 N.W.2d 727 (1994).

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

