COURT OF APPEALS
DECISION
DATED AND FILED

November 2, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-2090

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO DINENA E. AND LATRINA E., PERSONS UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JOHN E.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] John E., father of Dinena and Latrina E., appeals from an order terminating his parental rights on the grounds that he failed

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

to assume parental responsibility. John claims that the trial court erroneously exercised its discretion in admitting evidence of his two escapes from a minimum-security prison and in admitting evidence of the periods of time he was incarcerated. Because the trial court did not erroneously exercise its discretion in admitting evidence of John's two escapes or in admitting evidence of the periods of time he was incarcerated, this court affirms.

I. BACKGROUND

¶2 Dinena and Latrina were born as non-marital children to Stephanie G. on January 5, 1991, and June 19, 1992, respectively. Stephanie died on January 22, 1994.

¶3 A CHIPS petition as to Dinena and Latrina was filed on June 2, 1995, and in the petition, John was named the adjudged father of Dinena and the alleged father of Latrina. The children were then placed outside the home pursuant to a dispositional order in September 1995, and this placement was continued by extension orders in December 1996 and October 1997. On April 8, 1998, the State filed a petition to involuntarily terminate the parental rights of John. In the petition, the State alleged that John had failed to assume parental responsibility under § 48.415(6), STATS. Before continuing, the trial court ordered that John and Latrina undergo DNA testing to determine the probability of John's paternity of Latrina. The test results indicated a probability of 99.99% that John was Latrina's father and, accordingly, the trial court ruled that John was Latrina's biological father.

¶4 John contested the termination of his parental rights arguing that he had not failed to assume parental responsibility for his children. The matter then proceeded to a jury trial.

¶5 Prior to the commencement of the jury trial, the trial court heard the parties' motions *in limine*. In its motions, the State moved the trial court to allow evidence regarding John's two escapes as well as his periods of incarceration. John's trial counsel objected, but the trial court ruled that the evidence would be allowed for the purpose of determining whether John had failed to assume parental responsibility.

¶6 The jury trial was held on March 15-17, 1999, and it concluded with the jury finding that John had failed to assume parental responsibility for Dinena and Latrina. Subsequently, the trial court found John unfit and ordered the termination of his parental rights. He now appeals.

II. DISCUSSION

¶7 John claims that the trial court erroneously exercised its discretion, and he supports this claim with two examples. First, he claims that the trial court erroneously exercised its discretion when it allowed evidence of his two escapes. Second, he claims that the trial court erroneously exercised its discretion in allowing evidence of his periods of incarceration. In reviewing these claims, this court recognizes that the admissibility of evidence lies within the discretion of the trial court, which must be exercised in accordance with accepted legal standards and the facts of the record. *See* ***Michael R.B. v. State***, 175 Wis.2d 713, 720, 499 N.W.2d 641, 644 (1993). Such rulings are reviewed with deference. *See* ***id.*** at 720, 499 N.W.2d at 644.

A. Admission of Evidence of John's Two Escapes.

¶8 John claims that the trial court should not have admitted evidence regarding his two escapes from a minimum-security prison. During motions *in*

limine, he objected to the introduction of evidence that he had, on two occasions, escaped from a minimum-security prison, however, the trial court overruled his objection and decided to allow the State to introduce the evidence of his escapes. John argues that this evidence is inadmissible other acts evidence under § 904.04(2), STATS.,[2] and that the trial court erroneously exercised its discretion by allowing it to be introduced at trial. This court concludes that the trial court did not erroneously exercise its discretion in admitting this evidence.

¶9 To begin, the State did not introduce the evidence of John's escapes to prove that John's other acts, his escapes, were consistent with his character of not having a substantial parental relationship with his children. This evidence was not offered to show that, because John escaped from prison, he had a bad character. As a result, § 904.04(2), STATS., does not apply.

¶10 The State presented the evidence of the two escapes because it was relevant[3] to the central issue of the trial: whether he had failed to assume parental responsibility. Because the escape evidence was relevant to the question of whether he had assumed parental responsibility, it was admissible unless he could show that it was unfairly prejudicial, or that it would create confusion, or that it was a waste of the trial court's time. *See* § 904.03, STATS. John failed to demonstrate that any of these factors applied in this case; thus, the trial court was not required to exclude the evidence.

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[2] Section 904.04(2), STATS., precludes the admission of evidence of other crimes, wrongs or acts "to prove the character of a person in order to show that the person acted in conformity therewith."

[3] Relevant evidence means evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Section 904.01, STATS.

¶11 To show that John had failed to assume parental responsibility for his children, the State needed to prove that he has never had a substantial parental relationship[4] with his children. Section 48.415(6)(a), STATS. The State argues that it introduced the escape evidence to demonstrate John's inability to parent his children because of his unavailability. In addition, the State argues that the escapes demonstrate a lack of commitment to his children. The guardian ad litem adds an additional argument that John's deliberate criminal conduct prevents him from exercising the duties he owes to his children and that his deliberate criminal conduct is, in effect, an evasion of, and a failure to accept, his parental responsibilities. The trial court agreed that the escape evidence was admissible to show that John had failed to assume parental responsibility for his children and, upon review, this court finds no error in the exercise of the trial court's discretion.

B. Admission of Evidence of John's Periods of Incarceration.

¶12 John next claims that the trial court should not have admitted evidence regarding the periods of time that he was incarcerated. As he did with the escape evidence, John objected during motions *in limine* to the introduction of evidence regarding his periods of incarceration. The trial court overruled this objection and decided to allow the State to introduce evidence of the periods of incarceration. Again, John argues that this evidence is inadmissible other acts evidence under § 904.04(2), STATS., and that the trial court erroneously exercised its discretion by allowing it to be introduced at trial. This court concludes that the trial court did not erroneously exercise its discretion in admitting this evidence.

[4] A substantial parental relationship is defined as the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. Section 48.415(6)(b), STATS.

¶13 The evidence of the periods of incarceration was not offered to prove that John's other acts, inferred from his periods of incarceration, were consistent with his character of not having a substantial relationship with his children. They were not offered to prove that, because he had committed crimes, he was of bad character. So again, § 904.04(2), STATS., does not apply in this case.

¶14 The State introduced the evidence of John's periods of incarceration because it was, like the escape evidence, relevant to the central issue of the trial: whether he failed to assume parental responsibility. The State argues, and the Wisconsin Supreme Court has held, that a parent's incarceration is a proper consideration at trial in a "failure to assume" case. ***L.K. v. B.B.***, 113 Wis.2d 429, 438, 335 N.W.2d 846, 851 (1983).[5] Accordingly, this court concludes that the trial court properly exercised its discretion in admitting evidence of John's periods of incarceration.

By the Court.—Order affirmed.

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

[5] In reply, John points out that ***L.K. v. B.B.***, 113 Wis.2d 429, 335 N.W.2d 846 (1983) was decided prior to the amendment of § 48.415(6)(a)2. and (b), STATS. The amendment removed the requirement of "an opportunity to establish a substantial parental relationship" in sub. (a)2. and the language "even though the person has the opportunity and ability to do so" from sub. (b). *See* ***Ann M.M. v. Rob S.***, 176 Wis.2d 673, 683-84 & n.5, 500 N.W.2d 649, 654 & n.5 (1993). This amendment, however, does not prohibit introduction of such evidence, nor does it alter the reasoning reached in ***L.K.*** that incarceration of the parent is a relevant factor in failure to assume cases.