COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-2163

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

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

LINCOLN COUNTY,

PETITIONER-RESPONDENT,

V.

APRIL G.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Lincoln County: GARY L. CARLSON, Judge. *Affirmed.*

¶1 HOOVER, P.J. April G. appeals an order terminating her parental rights to her daughter, Cheyenne A.G. April requests that this court, in its discretion, grant her a new trial because irrelevant and inflammatory evidence admitted at trial prevented the real controversy from being tried. Because the

evidence was properly admitted and directly relevant to the elements for terminating April's parental rights and the County's evidence supporting the existence of grounds for termination was overwhelming, the issue before the jury was not clouded and the real controversy was tried. Accordingly, the order is affirmed.

¶2 On June 3, 1996, April gave birth to Cheyenne. On January 8, 1997, the County took Cheyenne into temporary physical custody due to April's inadequate babysitting arrangements. Cheyenne was subsequently placed in foster care. In March 1997, the County initiated ch. 48, STATS., proceedings claiming that Cheyenne was a child in need of protection or services (CHIPS). A dispositional order, entered in August, imposed conditions that April had to satisfy in order for Cheyenne to be returned to her from foster care. In August 1998, that order and its conditions for return were extended for another year.

¶3 In March 1999, the County sought to terminate April's parental rights. A jury trial resulted in a verdict finding grounds for termination. At the dispositional hearing, the court ordered April's parental rights to Cheyenne terminated. April appeals that order.

¶4 This appeal is directed to this court's discretionary authority to grant a new trial on the grounds that the real controversy was not fully tried. *See* § 752.35, STATS.[1] April contends that irrelevant and inflammatory evidence

[1] Section 752.35, STATS., provides, in pertinent part:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and … remit the case to the trial court … for a new trial ….

(continued)

prevented the real controversy from being tried.[2] Improperly admitted evidence is one circumstance that can prevent the full trial of a controversy. ***State v. Wyss***, 124 Wis.2d 681, 735, 370 N.W.2d 745, 770-71 (1985). To command reversal, erroneously admitted evidence must so cloud a crucial issue that it may be fairly said that the real controversy was not fully tried. ***State v. Hicks***, 202 Wis.2d 150, 160, 549 N.W.2d 435, 439-40 (1996).

¶5 This court first examines whether the evidence complained of was properly admitted. April's primary contention is that Cheyenne's physician, Dr. David Lange, and one of her social workers, Kari Lazers, were permitted to testify concerning examples of April's bad parenting that predate the filing of the CHIPS action.

¶6 To determine whether the evidence was relevant, this court examines whether it had a "tendency to make the existence of any 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. The evidence therefore must have addressed one of the elements for a termination of parental rights, based upon the continuing need for protection or services, summarized in WIS J I—CHILDREN 323:

> First, that (child) was adjudged in need of protection or services and placed or continued in placement outside the home of (parent) for a cumulative period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law. …

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[2] April did not object to the introduction of this evidence at the time of trial and therefore does not, and cannot, directly challenge the admissibility of this evidence on appeal. She waived the objection. *See* § 901.03(1), STATS.

> Second, that (agency) has made a diligent effort to provide the services ordered by the court. "Diligent effort" means an earnest and conscientious effort to take good faith steps to provide those services, taking into consideration the characteristics of the parent or child, the level of cooperation of the parent, and other relevant circumstances of the case. You may find the agency's effort was diligent even though there were minor or insignificant deviations from the court's order. …
>
> Third, that (parent) has failed to demonstrate substantial progress toward meeting the conditions established for the return of (child) to the home. …
>
> Fourth, that there is a substantial likelihood that (parent) will not meet the conditions of return within the twelve-month period following the conclusion of this hearing. "Substantial likelihood" means that there is a real and significant probability rather than a mere possibility that (parent) will not meet the conditions for the return within that time period.

Id.; *see also* § 48.415(2), STATS.

¶7 April contends that her pre-CHIPS parenting is irrelevant. She asserts its "only possible relevancy ... was its probative value toward the fourth element" (likelihood parent will meet conditions for return). She further claims its probative value "is negligible as to this issue as a matter of law" because a "person's decision-making framework changes so fundamentally after she … is put under a formal CHIPS court order (with the requisite termination warnings)." She is wrong for two reasons.

¶8 First, this court rejects her suggestion that a CHIPS order somehow serves as a wake-up call and, as a result, everything previous to the order should be ignored when predicting her future behavior. Her suggested inference ignores the observation that the longer the pattern of similar conduct exists, the more likely it is that the conduct is habitual. Additionally, the CHIPS order had little or no effect on April's parental decision-making or skills. There was testimony that

April's parenting skills actually deteriorated after the CHIPS order was entered. The evidence pre- and post-CHIPS order was, at best, uniform. Her pre-CHIPS parenting was therefore relevant to predicting whether April would meet the conditions necessary for Cheyenne's return.

¶9 Second, April's pre-CHIPS parenting is also relevant to both the second and third elements. It was critical that the jury know what April's and Cheyenne's characteristics were. To determine whether the County made a diligent effort to provide the court-ordered services. Similarly, to assess whether April made substantial progress toward meeting the conditions established for Cheyenne's return, the jury had to be informed concerning where the progress was meant to begin. This court concludes that April's pre-CHIPS parenting was relevant to each element the jury assessed.[3]

¶10 April next asserts that even if her pre-CHIPS parenting was relevant, it was inadmissible because its probative value was substantially outweighed by the danger of unfair prejudice. Evidence is unfairly prejudicial only "when it threatens the fundamental goals of accuracy and fairness of the trial by misleading the jury or by influencing the jury to decide the case upon an improper basis." ***State v. DeSantis***, 155 Wis.2d 774, 791-92, 456 N.W.2d 600, 608 (1990).

¶11 Although evidence of her pre-CHIPS parenting was prejudicial because it was probative of her incompetence as a parent, it was not unfairly prejudicial. The evidence was probative of each element the jury assessed. It

[3] The parties stipulated that Cheyenne had been placed outside the home for at least six months, therefore that element was not before the jury.

addressed April's capacity for safe parenting, the precise issue the jury had to decide in the case.

¶12 April claims that evidence of her pre-CHIPS parenting is inadmissible character evidence. Generally, character evidence may not be admitted to prove a person acted in conformity with a particular personality trait. *See* § 904.04, STATS. However, the second element the County had to prove was whether it had made a diligent effort to provide the services ordered, taking into account April's characteristics. Where character is an essential element of a case, specific instances of a person's conduct bearing on her character are admissible. *See* § 904.05(2), STATS.;[4] ***State v. Pence***, 150 Wis.2d 759, 768, 442 N.W.2d 540, 544 (Ct. App. 1989). Therefore evidence of April's pre-CHIPS parenting was properly admitted.

¶13 April next contends "that other improper and inflammatory evidence was also admitted at the trial without objection, including irrelevant evidence, opinion testimony and hearsay of unknown reliability." She contends the evidence "constituted further, unfair character assassination" and "served to make an unfair appeal to sympathy for Cheyenne's 'best interests'."

¶14 April first complains that Dr. Lange, and two social workers, Lazers and Sherry Elias, gave opinion testimony. She does not state specifically what

[4] Section 904.05(2), STATS., provides:

> SPECIFIC INSTANCES OF CONDUCT. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.

error was committed by permitting them to testify as to their opinions.[5] If specialized knowledge will assist the jury, a properly qualified expert may testify in the form of an opinion. Section 908.02, STATS. April does not contend that the witnesses had no specialized knowledge that would assist the jury or that any of the three witnesses were not qualified to testify as experts to the opinions they gave. This court declines to abandon its neutrality by developing April's argument for her. *See* ***State v. Flynn***, 190 Wis.2d 31, 58, 527 N.W.2d 343, 354 (Ct. App. 1994).

¶15 April next asserts that testimony about her second child being placed in foster care and testimony about bruises discovered on Cheyenne after visiting April were irrelevant. She does not explain why this testimony is irrelevant, other than to say it is. Both events occurred within April's post-CHIPS order time frame. Both events are directly relevant to April's progress toward meeting the conditions for Cheyenne's safe return.

¶16 April also complains that Lazers referred to a hearsay report relating to April calling Cheyenne vulgar names, giving her excessive medication and threatening her. The hearsay report, however, was not introduced to prove that these incidents in fact occurred. Rather, Lazers was simply giving context to the reason she met with April on a given date. In addition, April confirmed some of the report's allegations and denied others.

[5] April suggests that the witnesses provided opinion evidence as to Cheyenne's best interests. The context of the opinions, however, was that the County had exhausted its options to return Cheyenne to April and that it was unlikely that April would meet the conditions for Cheyenne's return within the next twelve months.

¶17 Finally, April contends that the County improperly appealed to the jury to consider Cheyenne's best interests during rebuttal of April's summation. This court disagrees. The County asked the jury, "do you really believe that a fourth year is the right thing for Cheyenne?" The rebuttal addressed April's progress toward meeting the conditions for Cheyenne's return and was supported by the record. In addition, the trial court instructed the jury in detail on the elements of the case and the evidence they could consider. Even if the County's argument was intended to encourage the jury to decide the case on an improper basis, any prejudice that may have resulted was presumptively cured by the jury instructions. *See* ***In re D.S.P.***, 157 Wis.2d 106, 117, 458 N.W.2d 823, 828 (Ct. App. 1990).

¶18 Although some evidence was received and argument made that could be characterized as addressing Cheyenne's best interests, this court cannot say that this evidence and argument so clouded the crucial issues in this case that the real controversy was not tried.[6] The evidence and comments concerning Cheyenne's best interests were infrequent and brief. The jury was also presented with overwhelming evidence that each element of the County's case for terminating April's parental rights was satisfied. Both social workers testified that the County had exhausted the services it could provide to facilitate Cheyenne's return to April's home and that it was unlikely that anything would change in another twelve months.

[6] The evidence and argument, had objection been made, would have been stricken. *See* ***In re C.E.W.***, 124 Wis.2d 47, 61, 368 N.W.2d 47, 54 (1985) (the best interests of the child are not relevant to determining whether grounds for termination exist).

¶19 There was extensive evidence that April failed to meet the conditions for Cheyenne's safe return. Lazers and Elias periodically visited April's apartment, and in the course of those visits found the apartment cluttered and filthy. Scissors, electric cords and other dangerous items were left within Cheyenne's reach. April had to be prompted to do normal parenting and seemed unable or unwilling to provide balanced meals for Cheyenne.

¶20 April also failed to fulfill her court-ordered counseling requirement, missing approximately one-half of the appointments. The psychologist closed April's file noting no progress toward her treatment goals.

¶21 This court's power of discretionary reversal is appropriate only in exceptional cases. ***Vollmer v. Luety***, 156 Wis.2d 1, 11, 456 N.W.2d 797, 802 (1990). This is not such a case. The claimed irrelevant and inflammatory evidence was admissible and directly relevant to the elements for terminating April's parental rights. Any inappropriate evidence or argument did not unduly prejudice the jury because of the County's overwhelming evidence supporting the grounds for termination of April's parental rights. This court concludes that the issue before the jury was not clouded and the real controversy was tried. Accordingly, the order is affirmed.

By the Court.—Order affirmed.

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