

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 29, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 00-1423

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

IN THE INTEREST OF JOSEPH C.B.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

ANGELA J.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
RICHARD J. DIETZ, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Angela J. appeals the termination of her parental rights to her son, Joseph C.B.² She contends that the trial court erred by upholding the jury verdict when there was evidence of inappropriate conduct by the jurors and the evidence did not support the jury's findings. Angela also asserts that the court erroneously exercised its discretion by, among other things, failing to consider the substantial relationship between Joseph and Angela and between Joseph and his sister. The order is affirmed.

BACKGROUND

¶2 Joseph was born to Angela on October 29, 1996. On December 7, 1999, after a two-day jury trial, the court terminated Angela's rights to Joseph. The jury found that (1) the child was in need of protection or services under WIS. STAT. § 48.415(2); and (2) Angela had failed to assume parental responsibility pursuant to § 48.415(6).

¶3 In December 1997, a CHIPS³ order had been entered outlining conditions for Angela to meet. The court had imposed five conditions for Joseph's return to Angela's care. The first required Angela to complete an AODA program and to follow the recommended post-program treatment. The second required her to stay completely sober during the term of the CHIPS order and for at least six months before Joseph's return. The third condition required Angela to complete a parenting class and to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e). All statutory references are to the 1997-98 version.

² The trial court also terminated the parental rights of the child's father, Richard B., Jr. Richard has not appealed the ruling, so the court omits discussion of his verdict.

³ CHIPS is an acronym for "child in need of protection or services." See WIS. STAT. § 48.415(2).

demonstrate appropriate parenting techniques. The fourth required Angela to demonstrate financial stability by being gainfully employed and securing appropriate housing for Joseph for at least three months before his return. The fifth condition required Angela to cooperate with Joseph's foster care placement and with the visitation schedule.

¶4 Although Angela completed the AODA program, she testified that she had relapsed to drug and alcohol use in April and August of 1998 and April and June of 1999. She completed a parenting program; however, she used alcohol and illicit drugs while Joseph was in her care. She testified that she maintained an apartment for the time required and was working, with some breaks between jobs, from April 1998 until June 1999, when she was incarcerated. The State did not refute this testimony. The State asserts that Angela's relapses prevent her from properly supervising Joseph, not that she failed to cooperate with the placement and visitation.

¶5 The CHIPS order additionally imposed four general conditions for its duration. It ordered Angela to (1) comply with all conditions of her probation and not violate the law; (2) follow through on all recommendations for Joseph's medical and dental treatment and appointments upon his return to her; (3) enroll in intensive in-home counseling, complete programming, and follow all recommendations; and (4) cooperate with the department.

¶6 Angela concedes that she violated the first general condition when she relapsed to using illicit drugs and alcohol. Because Joseph was not returned to her, the second condition was inapplicable. The third general condition was satisfied because

Angela participated in counseling and successfully completed an AODA program in February 1999. Angela testified that although she requested non-AODA counseling, she did not receive it. Because she cooperated with the department, the fourth general condition was also satisfied.

¶7 The December 1997 CHIPS order notified Angela of the conditions under which her parental rights could be terminated. These include when a child is in continuing need of protection or services as defined in WIS. STAT. § 48.415(2)⁴ and when a parent fails to assume parental responsibility as set forth in WIS. STAT. § 48.415(6).⁵ Angela does not dispute that she was notified of these conditions and understood them.

⁴ WISCONSIN STAT. § 48.415(2) provides:

Grounds for termination of parental rights shall be one of the following:

....

(2) CONTINUING NEED OF PROTECTION OR SERVICES ... shall be established by proving any of the following:

1. That the child has been adjudged to be a child ... 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 under s. 48.345, 48.347, 48.357, 48.363 [or] 48.365 ... containing the notice required by s. 48.356 (2)

[2.]b. That the agency responsible for the care of the child and the family ... has made a reasonable effort to provide the services ordered by the court.

....

3. 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 meet the conditions established for the safe 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.

⁵ An additional ground for terminating parental rights is “[f]ailure to assume parental responsibility, which shall be established by proving that the parent ... ha[s] never had a substantial parental relationship with the child.” WIS. STAT. § 48.415(6)(a).

¶8 The jury found that Angela failed to assume parental responsibility for Joseph. The jury also independently found that Joseph was a child in need of protection or services who had been placed outside the home for a cumulative period of six months or longer pursuant to a court order. The jury found that the CHIPS order had notified Angela of the conditions that would cause her parental rights to be terminated and that the department made reasonable efforts to provide court-ordered services. The jury concluded that Angela failed to meet the court's conditions that would have allowed Joseph to return to her home and that Angela was not substantially likely to meet the conditions within one year of the trial.

¶9 After the verdict, the jury foreperson wrote a letter to the court alleging that the initial vote was in Angela's favor, nine to three, on the question whether Angela had a substantial relationship with Joseph. He stated that the reason for disagreement was distinguishing between having a relationship and correctly performing parental duties. The foreperson believed the evidence showed that Angela did have a relationship with Joseph. He asserted that the three jurors would not change their minds, so he proposed a compromise that would have ten jurors vote in favor of Angela lacking a relationship with Joseph and two dissenting. In the letter, the foreperson indicated his belief that it was error for him to propose the compromise instead of discussing it "until 10 persons could agree ... or having a 'hung' jury on that point" He next explained why he dissented on several questions. He asserted that the jury would have been better off had it had the CHIPS order to review during deliberations, but he explained that the jury decided not to ask for the order to avoid further delay.

¶10 After considering the competence of the evidence in the letter, motions after verdict and testimony at the disposition hearing, the court approved the jury's findings and entered an order terminating Angela's parental rights to Joseph.

DISCUSSION

JURY TRIAL ISSUES

¶11 After the jury trial, Angela moved for a mistrial and a judgment notwithstanding the verdict. The trial court's decision to deny these motions was discretionary and will not be overturned absent an erroneous exercise of discretion. *See Dostal v. Millers Nat'l Ins. Co.*, 137 Wis. 2d 242, 253, 404 N.W.2d 90 (Ct. App. 1987). The court properly exercises its discretion if it bases its decision on reasonable grounds and a proper legal foundation. *See id.* This court will not set aside the judgment or grant a new trial unless the error, if the trial court erred, affected the substantial rights of the appellant. *See WIS. STAT. § 805.18(2)*. The substantial rights of the appellant are not affected unless there is a reasonable possibility that but for the error, the final result would have been different. *See Jones v. State*, 226 Wis. 2d 565, 597, 594 N.W.2d 738 (1999).

The Foreperson's Letter

¶12 Because several arguments rest upon information provided by the foreperson, information the court did not admit, we address this evidentiary issue first. Angela claims that the letter shows that the jury was concerned more with the length of the deliberations than the quality of the verdict. She concludes that this is an improper

consideration that tainted the jury's verdict. She does not argue that the foreperson should have been called as a witness to allow for cross-examination. Rather, she appears to argue that the foreperson's letter should have been admitted into evidence. Because the letter impermissibly discloses matters during the course of the jury's deliberations, it cannot serve as the basis for relief. This court therefore rejects Angela's argument.

¶13 WISCONSIN STAT. § 906.06(2) provides that jurors are incompetent to testify

as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.

There is an exception, however: “[A] juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.”

Id. Extraneous prejudicial information includes information, other than the general knowledge a juror is expected to possess, which a juror obtains from a non-evidentiary source and brings to the jury's attention. See *State v. Eison*, 194 Wis. 2d 160, 174, 533 N.W.2d 738 (1995). In *Eison*, the court found extraneous information was presented to the jury when a juror brought two wrenches, not admitted into evidence, into deliberations in order to mimic the metal on the gun allegedly used in the case. See *id.* at 170. In *State v. Yang*, 196 Wis. 2d 359, 364-65, 538 N.W.2d 817 (Ct. App. 1995), a juror asked the police officer who testified in the case how the department handles cases where an interpreter is needed and presented that information to the jury during deliberations. That information was

not presented as evidence at trial. *See id.* at 367. The court found that extraneous information had infected the jury's deliberations. *See id.*

¶14 After examining the foreperson's letter, this court concludes that the trial court did not err by disregarding the letter. No extraneous evidence was introduced to the jury as in the examples noted above. The compromise discussed in the juror's letter is a matter that occurred during deliberations and reflects the jury's mental process. It therefore is not competent evidence under WIS. STAT. § 906.02(2).⁶ Even if it were competent evidence, the vote only affected one independent ground for terminating parental rights. The jury also determined that Joseph was a child in need of protection or services and that Angela was not substantially likely to meet the conditions required by the CHIPS order within one year of the fact-finding hearing. Therefore, the compromise vote on whether Angela had a substantial relationship with Joseph would not warrant reversal of the court's final determination terminating parental rights. *See* WIS. STAT. § 805.18(2).

Sufficiency of the Evidence

A. No Credible Evidence

¶15 Angela claims that the verdict should be overturned because it is not supported by credible evidence and that substantial evidence supports a different verdict. *See Fehring v. Republic Ins. Co.*, 118 Wis. 2d 299, 305, 347 N.W.2d 595 (1984),

⁶ Because this court concludes that no extraneous evidence was presented to the jury during deliberations, it does not proceed to the next step in the analysis: determining whether that extraneous evidence potentially prejudiced the jury. *See State v. Eison*, 194 Wis. 2d 160, 172-73, 533 N.W.2d 738 (1995).

overruled on other grounds by DeChant v. Monarch Life Ins. Co., 200 Wis. 2d 559, 576, 547 N.W.2d 592 (1996).

¶16 This court will uphold a jury verdict if there is any credible evidence to support it. *See Fehring*, 118 Wis. 2d at 305. This court does not review the record for evidence that supports a verdict that the jury did not reach. *See Morden v. Continental AG*, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. Joseph had been removed from his parents' home when he was less than a year old. His out-of-home placement continued, such that he had lived away from his parents more than with them. Angela had repeatedly used illicit drugs and alcohol while she was attempting to regain custody. She had even used a controlled substance while Joseph was in her care. This evidence supports the jury's finding that she failed to assume parental responsibility.

¶17 Joseph had been the subject of a CHIPS order from November 25, 1997, until the fact-finding hearing on November 11, 1999. Angela admitted that she had not met the conditions of the CHIPS order. The conditions required her to hold employment and to secure housing appropriate for a child for at least three months before Joseph's return. Several employees testified that the department had provided counseling and parenting classes and helped Angela obtain money for an apartment security deposit. Nonetheless, at the time of the trial, she was serving a four-year sentence with four months served and three months credited. The evidence supported the jury's finding that Joseph continued to be in need of protection or services.

¶18 Joseph had been placed outside his parents' home for a cumulative period of more than six months. The evidence demonstrated that the department made

reasonable efforts to provide the court-ordered services. Because of her past behavior pattern and her prison sentence, the jury was entitled to find that Angela was substantially unlikely to meet the CHIPS order conditions within one year of the fact-finding hearing.⁷

B. Perverse Verdict

¶19 Angela contends that the verdict was perverse, clearly contrary to the evidence, and should have been disregarded. *See Dostal*, 137 Wis. 2d at 254. She contends that the evidence showed that she had completed most of the CHIPS conditions and that she would likely complete the rest of them within a year. Further, she asserts that the verdict was inconsistent because the jury found that Joseph's father had established a substantial relationship with Joseph, while Angela had not.⁸ This is inconsistent, she asserts, because Joseph's father had been incarcerated longer than she had and therefore had spent less time with Joseph. She further contends that the verdict was also perverse because the jury members improperly rushed through deliberations and failed to request additional information when they believed it would help them, as evidenced by the foreperson's letter.

¶20 A verdict is perverse if it "reflects highly emotional, inflammatory or immaterial considerations, or an obvious prejudgment with no attempt to be fair." *Id.* In *Dostal*, a dog bite case, defense counsel made repeated references that the plaintiff's parents were more concerned with recovering money than they were with their son's

⁷ Even though she may have been eligible for parole in March 2000, at the time of the trial the jurors would only have been able to speculate whether she would be released.

injuries. *See id.* at 254. Further, defense counsel had emphasized that the plaintiff's father had shot to death a family watchdog "because the animal had become 'too friendly.'" *Id.* at 255. Consequently, the court concluded that the jury had been prejudiced and that the verdict was perverse. *See id.*

¶21 This case involves no similar inflammatory, emotional or immaterial considerations or obvious prejudgment. Further, for the reasons stated above, the foreperson's letter is inadmissible. This court cannot, therefore, consider whether the jury was influenced by what Angela perceives as its desire to conclude deliberations. As discussed above, the jury based its conclusions upon substantial evidence. The jury verdict was not perverse. The trial court properly exercised its discretion by approving the jury verdict.

C. New Trial in the Interest of Justice

¶22 In addition, Angela contends that the trial court should have granted a new trial in the interest of justice because the jury findings are against the great weight and clear preponderance of the evidence, even if the findings are supported by credible evidence. *See Sievert v. American Family Mut. Ins. Co.*, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993). Angela argues that she was close to completing her conditions. She had learned lessons from each relapse that would help her stay away from drugs and alcohol in the future. Angela testified that she was eligible for parole in March 2000 and, if released, would still have had seven months from the date of the fact-

⁸ This court presents Angela's arguments as she made them. Angela included an inconsistency argument within her presentation of how the verdict was perverse.

finding hearing to satisfy the conditions. She notes that the evidence demonstrated that she had established a substantial relationship with Joseph. Finally, because of the nature of parental rights, Angela contends that this court should weigh the foreperson's letter heavily when considering whether the verdict was proper. This court is not persuaded.

¶23 The trial court may order a new trial in the interest of justice when the jury findings are against the great weight and clear preponderance of the evidence, even though the findings are supported by credible evidence. *See id.* The trial court is in the best position to observe and evaluate the evidence. *See id.* An appellate court will only disturb that decision if the trial court has clearly abused its discretion. *See id.* As discussed above, the trial court reasonably concluded that the jury had based its verdict on substantial evidence. For the reasons that follow, we conclude that the trial court reasonably applied the proper legal standard to the facts when it upheld the jury's verdict and denied the motion for a new trial.

DISPOSITIONAL HEARING ISSUES

¶24 Angela claims that the trial court erred by failing to properly exercise its discretion at the dispositional hearing held pursuant to WIS. STAT. § 48.427. She concedes that the court addressed the statutory factors for terminating parental rights. She asserts, however, that the court ignored the evidence of her substantial relationship with Joseph and, further, failed to recognize that Joseph's relationship with his sister would be legally severed. She also contends that the court's decision fails to provide Joseph with more stability than he had with Angela.

¶25 The trial court judge has discretion to terminate parental rights. *See In re Michael I.O.*, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). An appellate court will sustain the trial court's determination if it properly exercises its discretion. *See In re Brandon S.S.*, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). A circuit court properly exercises discretion when it applies the correct standard of law to the facts at hand. *See In re Nadia S.*, 219 Wis. 2d 296, 305, 581 N.W.2d 182 (1998).

¶26 The circuit court must apply the standard and factors set forth in WIS. STAT. § 48.426 when determining the disposition after a fact-finding hearing for parental rights termination. The best interests of the child are paramount. *See WIS. STAT. § 48.426(2)*. The best interests of the child are determined by examining, among other things, the likelihood of the child's adoption after termination, the child's age and health, whether the child has substantial relationships with the parent or other family members and if it would be harmful to sever those relationships, the wishes of the child, how long the child has been separated from the parent, and whether a new environment will provide a more stable and permanent family relationship. *See WIS. STAT. § 48.426(3)*.

¶27 The trial court applied the best interests standard and the above factors in reaching its decision. The court informed Angela that when the interests of the child and of the parent diverge, then the court must set aside the parent's interests. The court explained that Angela's parental rights were not being suspended merely because she was incarcerated. The court found that the reports supported that Joseph was adoptable in the event the court terminated Angela's parental rights. He was healthy and about three years old at the time of the fact-finding hearing. He was removed from his father's home on October 14, 1997. Angela was staying at a treatment home at that time. Joseph had

been out of the home approximately two of his three years. Given the substantial time that he had been removed from the home and the credibility and demeanor of the witnesses, the court found that terminating parental rights would not be harmful to Joseph. Finally, as discussed above, substantial evidence supported the jury's verdict that Angela did not have a substantial relationship with Joseph.

¶28 Angela challenged these findings for two reasons. First, the court failed to consider the legal severance of Joseph from his sister. A recent Wisconsin Supreme Court case discusses relationships with siblings. *See In re Darryl T.-H.*, 2000 WI 42, 234 Wis. 2d 606, 610 N.W.2d 475. The analysis of WIS. STAT. § 48.426(3)(c), however, does not turn on whether terminating parental rights severs a legal relationship with the siblings. *See Darryl T.-H.*, 2000 WI 42 at ¶18. It turns on whether it severs emotional and psychological connections to the child's birth family. *See id.* at ¶19. No evidence shows that Joseph has a substantial relationship with his sister; the jury did not make findings on this issue.

¶29 Second, Angela asserts that the court failed to recognize that relatives were not definitely going to adopt Joseph. This argument is without merit. WISCONSIN STAT. § 48.426(3)(a) does not require the court to determine whether a particular adoption is likely. Rather, the court must make a determination whether the child is likely to be adopted following the termination of parental rights. The court found that Joseph is likely to be adopted and Angela presented no evidence to the contrary.

¶30 Angela argues that the court failed to exercise its discretion when it terminated her parental rights. The trial court has discretion to enter a jury verdict or set

it aside if the evidence does not support it. *See* WIS. STAT. § 805.15(1). By entering the jury verdict and terminating parental rights, the court did exercise its discretion, albeit against Angela. Angela has not identified any reason that would convince this court that the trial court erroneously exercised its discretion when it evaluated Joseph's best interests.

By the Court.—Order affirmed.

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

