COURT OF APPEALS
DECISION
DATED AND FILED

September 8, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 00-1538

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO COBRAETY L. R., A PERSON UNDER THE AGE OF 18:

WOOD COUNTY DEPARTMENT OF HEALTH AND FAMILY SERVICES,

PETITIONER-RESPONDENT,

V.

TERRY L. R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Wood County: FREDERIC W. FLEISHAUER, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] Terry L.R. appeals an order terminating his parental rights to his son, Cobraety L.R., born November 9, 1997. The jury found that two grounds for termination existed, abandonment and Cobraety's continuing status as a child in need of protection and services. On appeal, Terry claims two errors: (1) the circuit court's directing a verdict on special verdict question no. 1, and (2) the guardian ad litem's comments to the jury during closing arguments about the best interests of the child standard. Because we find no merit in either contention, we affirm the order of the circuit court.

BACKGROUND

¶2 Cobraety was born November 9, 1997 to Terry and Gina R. He is the third of three children born of this marriage, and he was placed in foster care shortly after his birth. Terry did not see Cobraety at all between December of 1997 and July of 1999, even though a petition to terminate his parental rights was filed by Wood County Department of Health and Family Services (the County) on June 22, 1999 and personally served on him on June 28, 1999.

¶3 The fact-finding portion of the proceeding was tried to a jury. However, in response to the County's motion, the court answered the following special verdict questions in the affirmative:

> Question 1: Has Cobraety [R.] been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1997-98). Additionally, all further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

> Question 2: Did Terry [R.] fail to visit or communicate with Cobraety [R.] for a period of three months or longer?

Terry objects to the first question having been answered in the affirmative by the court, but he does not object to the answer to the second question. The jury concluded that Terry had no good reason for failing to visit or communicate with Cobraety during that period of time, that the County had made a diligent effort to provide services to Terry to enable the return of his child, and that there was a substantial likelihood that Terry would not be able to meet the conditions necessary for Cobraety's return within the twelve-month period following the trial of the matter. During closing arguments, the guardian ad litem made comments to the jury about the best interests of the child standard to which Terry now objects. However, he did not object to those remarks during the trial.

DISCUSSION

Standard of Review.

¶4 We review a grant of a directed verdict to determine whether the circuit court was "clearly wrong." ***Leen v. Butter Co.***, 177 Wis. 2d 150, 155, 501 N.W.2d 847, 849 (Ct. App. 1993) (citation omitted). We review whether the trial court erroneously exercised its discretion in the latitude that it gave counsel during closing arguments. *See* ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784, 789 (1979).

Directed Verdict.

¶5 The circuit court directed a verdict that the statutory warnings had been given, which is an issue the State was required to prove in order to terminate Terry's parental rights. Because the rules of civil procedure apply to termination

of parental rights proceedings, a circuit court may direct a verdict if the evidence warrants it. *See* ***Door County Dep't of Health & Family Servs. v. Scott S.***, 230 Wis. 2d 460, 465, 602 N.W.2d 167, 170 (Ct. App. 1999). A circuit court may direct a verdict only when the evidence presented is so clear and convincing that a reasonable jury, properly instructed, could make only one finding. *See* ***Leen***, 177 Wis. 2d at 155, 501 N.W.2d at 848. In resolving the issue of whether a properly instructed jury could have made only one finding, we view the evidence in the light most favorable to the party against whom the verdict was directed. *See* ***id.*** at 155, 501 N.W.2d at 849.

¶6 When the County moved for a directed verdict, Terry's counsel objected. He contended that the jury should determine whether Terry had actually received the statutory warnings required by WIS. STAT. § 48.356. The County contends that actual receipt of the warnings is not required, but only that the written order placing the child outside of the home contains notice of the potential grounds for termination and the conditions that must be met before the child can be returned to the parent.[2] Section 48.356 states in relevant part:

> (1) Whenever the court orders a child to be placed outside his or her home … the court shall orally inform the parent or parents who appear in court … of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child … to be returned to the home ….
>
> (2) In addition to the notice required under sub. (1), any written order which places a child … outside the home … shall notify the parent or parents … of the information specified under sub. (1).

[2] We do not decide which position is correct because, as we explain later in this opinion, under either view the evidence presented showed the circuit court's directed verdict was not clearly wrong.

¶7 The circuit court found that, based on the testimony which was presented at trial, there was no factual dispute about whether the written orders placing Cobraety outside the home had given the requisite warnings. We begin our review of this finding by noting that there were a number of attorneys who represented Terry at various points in the proceedings. Trial exhibit no. 2, which is the circuit court's dispositional order of January 6, 1997, and contains the requisite warnings, shows that Attorney Paul Goetz appeared on December 22, 1997, as "Attorney for parents." That same exhibit states that "[I]nvoluntary TPR Warnings were given to Terry and Gina [R.]." While the document does not reflect that either Terry or Gina attended that hearing, they were represented by counsel, which representation was appropriate to protect their interests. *See* ***A.S. v. State***, 168 Wis. 2d 995, 1003, 485 N.W.2d 52, 54 (1992).

¶8 Mary Christensen, the social worker who had worked with Terry's family for years and was present at the hearing that preceded the issuance of the dispositional order, testified that the order would have been mailed to Terry and his wife, Gina. Furthermore, even though Terry said he was unsure of whether he actually received the dispositional order, our independent review of the record shows that Terry knew what tasks the order required of him if he were to regain custody of his son. Therefore, he must have been given notice of the conditions he had to meet in order to obtain the return of his child. For example, he was asked:

> Q. Mr. [R.], you are familiar with the court order setting conditions for the return of Cobraety; is that correct?
>
> A. Yes, ma'am.

Subsequent to that question and answer, Terry's attorney went through every condition contained in the dispositional order necessary to Terry's reunification with his son. For each condition, Terry tried to describe what he had done to

comply with the terms of the order. Therefore, by his own testimony, there can be no dispute that he had notice of the conditions contained in the January 1997 dispositional order and had taken steps, according to his view of his conduct, to comply with the order's requirements. Accordingly, the circuit court's finding that Cobraety had been placed outside of the home by an order that contained the statutory warnings is not clearly wrong.

Closing Arguments.

¶9 Terry next complains that the guardian ad litem made an inappropriate statement to the jury when he said:

> I think based on the evidence that I've heard, it's my recommendation that it's in the best interests of Cobraety [R.], who was born November 9, 1997, that the parental rights of Gina [R.] and Terry [R.] be terminated.

Specific objections to comments before the jury should be made at trial in order to permit the circuit court to appropriately exercise its discretion. *See* ***D.B. v. Waukesha County Human Servs. Dep't***, 153 Wis. 2d 761, 766, 451 N.W.2d 799, 800 (Ct. App. 1989). However, here no objection was made at trial to the guardian ad litem's statement. Therefore, there was no way that the trial court could either instruct the jury or take any other action to correct any problem that may have been caused by the guardian ad litem's statement. Because no objection was made at trial, this issue has been waived and may not be raised for the first time on appeal. *See* ***Anderson v. Nelson***, 38 Wis. 2d 509, 514, 157 N.W.2d 655, 658 (1968). Additionally, even if we were to review this unobjected-to statement under the plain error doctrine, *see* ***Waukesha County Dep't of Soc. Servs. v. C.E.W.***, 124 Wis. 2d 47, 55 n.4, 368 N.W.2d 47, 51 n.4 (1985), the contention that the statement of the guardian ad litem warrants a reversal has no merit. This is so

because the guardian ad litem was simply giving his view of the evidence to the jury; he was not asking the jury to consider the best interests of the child as a part of its deliberations. *See* ***Scott S.***, 230 Wis. 2d at 469, 602 N.W.2d at 171. Accordingly, we conclude no reversible error occurred.

CONCLUSION

¶10 Because the circuit court's granting a directed verdict on special verdict question no. 1 was not clearly wrong and because Terry waived his right to object to a statement of the guardian ad litem to the jury, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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