**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 4, 2003**

Cornelia G. Clark
Clerk of Court of Appeals

**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.**

**Appeal Nos. 02-2472, 02-2473, 02-2474, 02-2475, 02-2935, 02-2936, 02-2937 & 02-2938**

**Cir. Ct. Nos. 01 TP 320, 01 TP 321, 01 TP 322, 01 TP 323, 01 TP 320, 01 TP 321, 01 TP 322 & 01 TP 323**

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

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**NO. 02-2472**
**CIR. CT. NO. 01 TP 320**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO AMANDA N., A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**RENEE D.,**

**RESPONDENT-(IN T.CT.),**

**JOHNNY N., SR.,**

**RESPONDENT-APPELLANT.**

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**NO. 02-2473**
**CIR. CT. NO. 01 TP 321**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO**

**JOHNNY N., JR., A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**RENEE D.,**

**RESPONDENT-(IN T.CT.),**

**JOHNNY N., SR.,**

**RESPONDENT-APPELLANT.**

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**NO. 02-2474**
**CIR. CT. NO. 01 TP 322**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO KASSANDRIA N., A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**RENEE D.,**

**RESPONDENT-(IN T.CT.),**

**JOHNNY N., SR.,**

**RESPONDENT-APPELLANT.**

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**NO. 02-2475**
**CIR. CT. NO. 01 TP 323**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO DOMINIQUE N., A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**RENEE D.,**

**RESPONDENT-(IN T.CT.),**

**JOHNNY N., SR.,**

**RESPONDENT-APPELLANT.**

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**NO. 02-2935**
**CIR. CT. NO. 01 TP 320**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO AMANDA N., A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**RENEE D.,**

**RESPONDENT-APPELLANT,**

**JOHNNY N., SR.,**

**RESPONDENT-(IN T.CT.).**

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**NO. 02-2936**
**CIR. CT. NO. 01 TP 321**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO JOHNNY N., JR., A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**RENEE D.,**

**RESPONDENT-APPELLANT,**

**JOHNNY N., SR.,**

**RESPONDENT-(IN T.CT.).**

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**NO. 02-2937**
**CIR. CT. NO. 01 TP 322**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO KASSANDRIA N., A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**RENEE D.,**

**RESPONDENT-APPELLANT,**

**JOHNNY N., SR.,**

**RESPONDENT-(IN T.CT.).**

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**NO. 02-2938**
**CIR. CT. NO. 01 TP 323**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO DOMINIQUE N., A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**RENEE D.,**

**RESPONDENT-APPELLANT,**

**JOHNNY N., SR.,**

**RESPONDENT-(IN T.CT.).**

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APPEAL from orders of the circuit court for Milwaukee County: JOSEPH R. WALL, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Renee D. and Johnny N., Sr. appeal from orders terminating their parental rights to four children: Amanda N., Johnny N., Jr., Kassandria N. and Dominique N.[2] Renee and Johnny raise two issues: (1) whether the trial court erroneously exercised its discretion in admitting evidence of the abuse of a fifth child; and (2) whether the trial court erroneously exercised its discretion when it refused to declare a mistrial when the State failed

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2) (1999-2000).

[2] These appeals dispose of eight cases, numbers: 02-2472, 02-2473, 02-2474, 02-2475, 02-2935, 02-2936, 02-2937 and 02-2938. The former four cases represent the four children and termination of the rights of the father. The latter four cases represent the four children and the termination of the rights of the mother. The cases were consolidated for purposes of appellate disposition.

to turn over discovery material. Because the trial court did not erroneously exercise its discretion in either instance, this court affirms.

## BACKGROUND

¶2 On August 9, 2001, the State filed a termination of parental rights petition with regard to the four children of Renee and Johnny: Amanda (born 12/2/89), Johnny Jr. (born 1/28/91), Kassandria (born 4/25/95) and Dominique (born 8/11/99). The petition alleged three grounds for terminating Renee's rights to the four children: (1) abandonment; (2) failure to assume parental responsibility; and (3) the children remained in continuing need of protection or services. The same three grounds were asserted for terminating Johnny's rights to Amanda, Johnny Jr., and Kassandria. However, with respect to Dominique, the petition only alleged that Johnny had failed to assume parental responsibility. This was because Dominique's paternity had not yet been established.

¶3 In April 1999, Amanda, Johnny Jr. and Kassandria were removed from the home and never returned. The reason for their removal was the presence of venereal warts and sexually transmitted diseases acquired by some of the children. Dominique was placed outside of the parents' home immediately upon birth.

¶4 A trial was set for April 2002. Before that time, the State filed a motion seeking to admit evidence that Renee and Johnny had abused a fifth child in the household, Bobby B. The trial court allowed the evidence for the limited purpose of showing that neither parent would likely comply with the terms and conditions for return of the other four children within the next year. The trial court gave cautionary instructions whenever testimony on this subject was introduced.

¶5 After the trial began, the State discovered it had failed to turn over nearly 1100 pages of records from a prior social service agency. Renee and Johnny moved for a mistrial for the discovery violation. The trial court denied the motion because most of the new documents were cumulative of other records, because many of the records related to Bobby and not the children involved in the instant petition, and because the violation was not intentional. Instead of granting the mistrial, the trial court adjourned the trial, and gave Renee and Bobby forty hours to review the documents. The trial court also ordered the State to produce any witnesses discovered in the documentation that the parents wanted to question.

¶6 The jury found that grounds existed to terminate the parental rights of Renee and Johnny. At the dispositional hearing, the trial court ruled it was in the children's best interests to terminate the rights of the parents. Orders terminating their rights were entered. Renee and Johnny appeal from those orders.

## DISCUSSION

### *A. Evidence.*

¶7 Renee and Johnny both claim the trial court erroneously exercised its discretion when it allowed the State to introduce evidence about the abuse of Bobby, an older child of Renee. They claim the admission violates WIS. STAT. § 904.04 (1999-2000).[3] This court disagrees.

¶8 Evidentiary decisions are upheld on appeal unless the trial court erroneously exercised its discretion. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340

[3] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

N.W.2d 498 (1983). If the trial court considered the pertinent facts, applied the correct law and reached a reasonable conclusion, this court will conclude that it properly exercised its discretion. ***Id.*** Here, this standard was satisfied.

¶9 In 1995, Bobby was removed from Renee's and Johnny's home as a child in need of protection or services because he was being physically abused. The State requested admission of evidence of Bobby's abuse to show that it was unlikely that Renee would satisfy the conditions required for the return of the other four children within the next twelve months. The State intended to call Bobby as a witness to have him testify about the abuse he suffered while in the house. The trial court limited this testimony in time and scope, allowing only testimony of Bobby's abuse when the other children were in the home. Further, the trial court gave a limiting instruction every time the evidence was introduced, cautioning the jury that this testimony could only be used in considering whether the parents were likely to comply with the conditions for return of the children within the next twelve months.

¶10 In rendering this decision, the trial court applied the correct analysis for "other acts" evidence, consistent with WIS. STAT. § 904.04 and the three steps set forth in the case law governing this area. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). The trial court first determined that the evidence was offered for an acceptable purpose and relevant on the issue of whether the parents would comply with the conditions required for the return of the children. Next, the trial court analyzed the evidence under WIS. STAT. § 904.03 and concluded that the probative value of the evidence was not outweighed by undue prejudice. The trial court's analysis was reasonable.

¶11 Renee and Johnny argue that the "Bobby" evidence was pure character evidence and would undoubtedly convince the jury that because they allegedly abused Bobby, they must also have abused the other four children. This court disagrees. The evidence, which was limited by the trial court, was relevant and not unduly prejudicial for the purpose of showing that the parents were not likely to satisfy the conditions required for the return of the four children because they had never satisfied the conditions for Bobby's return in a longer period of time. According to ***La Crosse County DHSS v. Tara P.***, 252 Wis. 2d 179, 643 N.W.2d 194 (Ct. App. 2002), this type of evidence does not violate WIS. STAT. § 904.04:

> The other acts evidence statute is directed at preventing fact finders from unnecessary exposure to character and propensity evidence in the context of determining whether a party committed an alleged act. Exposure in this context endangers the longstanding principle that persons should be found liable based on evidence of the particular alleged act, not based on bad character or propensity to commit the type of act alleged. That concern is not applicable here. In determining whether "there is a substantial likelihood" that a parent will not meet conditions for the return of his or her children, a fact finder must necessarily consider the parent's relevant character traits and patterns of behavior, and the likelihood that any problematic traits or propensities have been or can be modified in order to assure the safety of the children.

***Tara P.***, 252 Wis. 2d at 189 (citation omitted). In ***Tara P.***, this court upheld the trial court's decision to admit evidence of the bad condition of the mother's home to show that there was a substantial likelihood she would not meet the conditions of return within the next twelve months. ***Id.*** at 185. Similarly, the trial court in the instant case allowed evidence showing the parents were unlikely to satisfy the conditions of return. Moreover, the evidence was limited and any prejudice

arising therefrom was cured by a repeated cautionary instruction.[4] *See* ***State v. Anderson***, 230 Wis. 2d 121, 132-33, 600 N.W.2d 91 (Ct. App. 1999).

¶12 Further, Renee and Johnny complain that the "Bobby" evidence was admitted through other witnesses and that Bobby never testified personally. This fact does not change this court's conclusion that the trial court properly exercised its discretion.

*B. Mistrial.*

¶13 Next, the parents contend that the trial court should have granted a mistrial when it was disclosed that the State failed to comply with discovery requests. This court disagrees.

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[4] The cautionary instruction provided:

> [THE COURT:] … Ladies and Gentlemen, I want you to remember that this petition in front of you concerns the four [N.] children.
>
> You've heard some testimony-- and you're going to hear additional testimony in this case-- that Mr. [N.] and Miss [D.] abused a fifth child, the older child here, Bobby [B.].
>
> If you find that this conduct did occur, you are to consider this evidence only as background evidence and as evidence as to whether there's a substantial lik[e]lihood that these parents here will not meet the conditions for the safe return of the four [N.] children, within the twelve-month period following the conclusion of this trial.
>
> You may not consider this evidence regarding Bobby for any other purpose. You are not to use this evidence to conclude that if they did abuse Bobby, they must have abused the [N.] children.

¶14 A trial court's decision to declare a mistrial is discretionary. ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). Thus, this court will uphold the decision unless the trial court erroneously exercised its discretion. Here, the record reflects that the trial court considered the pertinent facts, applied the correct law, and reached a reasonable decision.

¶15 The parents contend that the discovery violations should have resulted in a mistrial. Specifically, the parents argue that the State failed to turn over records used to refresh the recollection of the children's therapist, Carolyn Lenyard. These records were not introduced as substantive evidence and were not obtained by the State prior to trial. The State obtained an order from the court to obtain the records for Lenyard's preparation, as she had retired before this case went to trial. The parents could have obtained these records on their own before trial if they felt that it was necessary for the case. Thus, there was no basis to order a mistrial with respect to these records. Moreover, no one objected during trial when these records were produced. Accordingly, the parents cannot now complain about this alleged discovery violation.

¶16 The next alleged records violation pertains to therapist/witness Randall Potter, who provided treatment to Renee and Johnny. Again, this therapist was listed as a witness, and Renee and Johnny could have easily requested a copy of his records had they felt it was important to their case. Further, the trial court cured any prejudice for the delay in obtaining these records by allowing the parents to recall Potter after having an opportunity to review the records.

¶17 The main focus of the mistrial motion, however, centered on the 1100 pages of newly discovered records, which the State produced on the second

day of trial. The trial court ruled that an adjournment, rather than a mistrial, was the appropriate remedy for the discovery violation. The trial court allowed the parties forty hours to review these documents. After the opportunity for review, the trial court noted that ninety-five to ninety-eight percent of those records pertained to Bobby, a child not on the petition, and who did not testify in the case. Further, the records were cumulative to other documents already produced. The trial court also found that the late discovery of those documents was not intentional and did not prejudice the parents. The trial court pressed the parents to demonstrate any prejudice as a result of the violation. The parents' only response was that they discovered five witnesses within the records who they wanted to call to testify. As a result, the trial court ordered the State to produce those five witnesses, which the State did.

¶18 The trial court handled this document snafu in a reasonable manner. The trial court's solution to the newly discovered material conserved substantial judicial resources and showed a demonstrated commitment to, and concern for, the four children who were assaulted and abused by their parents. At the time the motion for a mistrial was made, the children had already testified regarding the abuse. The trial court's decision permitted the parents a fair opportunity to respond to the records without burdening the children and the other witnesses in this case. There was no erroneous exercise of discretion.

*By the Court.*—Orders affirmed.

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