COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2004

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. 03-1002
03-1003
03-1004
03-1005

Cir. Ct. Nos. 01TP000076
01TP000077
01TP000078
01TP000079

STATE OF WISCONSIN

IN COURT OF APPEALS

DISTRICT II

NO. 03-1002

IN RE THE TERMINATION OF PARENTAL RIGHTS TO JARQUITA D. O. E., A PERSON UNDER THE AGE OF 18:

KENOSHA COUNTY DEPARTMENT OF CHILD & FAMILY SERVICES,

PETITIONER-RESPONDENT,

V.

CORNELIUS N. F.,

RESPONDENT-APPELLANT,

MARY F. R.,

RESPONDENT.

NO. 03-1003

**IN RE THE TERMINATION OF
PARENTAL RIGHTS TO BRIDGETTE L. F.,
A PERSON UNDER THE AGE OF 18:**

KENOSHA COUNTY DEPARTMENT OF CHILD & FAMILY SERVICES,

PETITIONER-RESPONDENT,

V.

CORNELIUS N. F.,

RESPONDENT-APPELLANT,

MARY F. R.,

RESPONDENT.

NO. 03-1004

**IN RE THE TERMINATION OF
PARENTAL RIGHTS TO DRENA S. F.,
A PERSON UNDER THE AGE OF 18:**

KENOSHA COUNTY DEPARTMENT OF CHILD & FAMILY SERVICES,

PETITIONER-RESPONDENT,

V.

CORNELIUS N. F.,

RESPONDENT-APPELLANT,

MARY F. R.,

RESPONDENT.

NO. 03-1005

**IN RE THE TERMINATION OF
PARENTAL RIGHTS TO WILLIAM C. F.,
A PERSON UNDER THE AGE OF 18:**

KENOSHA COUNTY DEPARTMENT OF CHILD & FAMILY SERVICES,

PETITIONER-RESPONDENT,

V.

CORNELIUS N. F.,

RESPONDENT-APPELLANT,

MARY F. R.,

RESPONDENT.

APPEAL from a judgment of the circuit court for Kenosha County: ALLAN B. TORHORST, Judge. *Affirmed.*

¶1 BROWN, J.[1] Cornelius N. F. appeals from a judgment terminating parental rights to his four children. Although, after the first day of jury trial, he

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

decided not to contest the issue of abandonment as grounds for termination, he now claims that the trial court did not engage in the proper colloquy regarding his no contest decision and also failed to make a finding of unfitness. We hold that the colloquy was more than adequate. We further hold that although the circuit court did not thereafter expressly say that Cornelius was unfit following the colloquy, this is a technical error which did not affect Cornelius' substantial rights. We affirm.

¶2 When a parent in a termination of parental rights decides to enter a no-contest plea, WIS. STAT. § 48.422(7) imposes four obligations on the circuit court before accepting the admission. One of the obligations is that the circuit court must make such inquiries as will satisfactorily establish a factual basis for the admission. ***Id***. Another obligation is that the admission is made voluntarily and understandingly. ***Id***. In ***Waukesha County v. Steven H.***, 2000 WI 28, 233 Wis. 2d 344, ¶42, 607 N.W. 2d 607, our supreme court determined that appellate review of whether the circuit court has met its obligation will be governed by the same procedure as announced in ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W. 2d 12 (1986). The ***Steven H.*** court described the process thusly:

> Steven H. must make a prima facie showing that the circuit court violated its mandatory duties and he must allege that in fact he did not know or understand the information that should have been provided at the § 48.422 hearing. If Steven H. makes his prima facie showing, the burden shifts to the county to demonstrate by clear and convincing evidence that Steven H. knowingly, voluntarily and intelligently waived the right to contest the allegations in the petition. Under ***Bangert*** (citations omitted), a court may examine the entire record, not merely one proceeding, and look at the totality of the circumstances to determine whether the circuit court's procedures and determinations are sufficient.

Steven H., 233 Wis. 2d 364, ¶42.

¶3 Cornelius claims that the WIS. STAT. § 48.422 colloquy was deficient in that it did not determine any factual basis for the admission. He further asserts that the colloquy failed to establish whether the plea was voluntary. His assertions require us to review the record. The record shows that a jury trial not only commenced, but that a full day of trial took place. During that first day of trial, Cornelius was present when the circuit court instructed the jury that the case was a fact-finding proceeding on a petition to terminate Cornelius' parental rights. Cornelius obviously heard the court informing the jury that the petition alleged how the children had been placed outside the home by court order and Cornelius had failed to visit or communicate with the children for a period of three months or longer. Cornelius also must have heard the circuit court further inform the jury these alleged facts are grounds for termination based on the concept of abandonment. Cornelius also doubtlessly heard the court additionally tell the jury that its responsibility was to determine whether the facts alleged in the petition had been proved.

¶4 Cornelius also must have heard opening arguments from both the county's attorney and his own counsel regarding what each side hoped to prove by the evidence as regards to the allegations in the petition. In that regard, he must have heard the prosecutor tell the jury that evidence would show how the children have been out of the home for five years and Cornelius has not had any authorized contact with three of the children for five years and the fourth for almost four years.

¶5 Finally, Cornelius was subjected to adverse examination as the first witness for the county. He was cross-examined on the issue of his alleged abandonment. It was established that Cornelius knew the children had been out of

the home for about five years and that since then he has not been responsible for their day-to-day care, i.e., getting them ready for school, taking them to the doctor, going to teacher's conferences, or been involved in their extracurricular activities. He admitted he did not know what school the children attended. He further admitted that although he was now incarcerated, he did know where they resided but made no attempt to correspond with them. He agreed that he had been given written conditions that he needed to meet in order to avoid termination of his rights and that such conditions had been given to him during CHIPS proceedings involving the children which included, among other things, supervised visitation. Cornelius admitted that some of the conditions were never met, although he appeared to blame the county's department of social services rather than himself. In all, Cornelius was on the stand answering to and defending against the abandonment allegations for at least two hours.

¶6 The next day, the prosecutor opened the record with an accounting of how Cornelius and his attorney spent some time pondering the matter shortly before the end of testimony on the first day and a considerable amount of time after testimony had been completed about how he wanted to proceed. The decision to plead no contest was made late that afternoon. The prosecutor told the court that Cornelius "would agree that grounds would exist as it related to the—a three month period and that he wanted to set the matter for a contested disposition in front of your Honor." Cornelius' attorney was then asked if this was correct and she answered in the affirmative. Cornelius himself was then asked if this was correct and he answered, "Yes. Yes sir." The following colloquy then took place:

> THE COURT: What this essentially means is you are admitting that grounds actually exist under 48.415(1a) that you did not communicate or visit with the children, meaning each of the children, not necessarily during the

> same time, but for each of the children for a period of three months. Do you understand what the statute—how the statute reads?
>
> CORNELIUS: Yes Sir.
>
> THE COURT: Okay. And that's really what you're admitting exists. Is that your understanding?
>
> CORNELIUS: Yes Sir.

¶7 A discussion then took place as to the drafting of a written stipulation and order to such effect by the prosecutor. Then the court said: "[T]he Court will find that the testimony that was given in open court on the record establishes the 48.415(1a) grounds, and I will, based upon that testimony, make that finding."

¶8 Cornelius interprets the record to say that the circuit court never established the factual basis for the admission of fact. He is wrong. The circuit court not only garnered Cornelius' understanding about what the statute says, but it also expressly found that the testimony given in open court the day before provided the factual basis. WISCONSIN STAT. § 48.422(3) states that if the petition is not contested, the court shall hear testimony in support of the allegations in the petition. The court heard testimony, albeit before the plea rather than after. The testimony established the factual basis for the plea. Thus, the factual basis was not

merely based on Cornelius' admission that facts existed but on the testimony of record.[2]

¶9 Cornelius also faults the circuit court for not expressly finding that the admission was voluntary. In particular, he faults the trial court for not asking whether any promises were made to him and whether anybody threatened or coerced him. While it is true that the court did not ask questions about the voluntary nature of his change of heart and although our supreme court has, in both the ***Steven H.*** and ***Evelyn C.R.***[3] cases, admonished the circuit courts to follow the procedures delineated in WIS. STAT. ch. 48, the law does not require reversal unless it is established that the error affected the substantial rights of the party. ***Steven H.***, 233 Wis. 2d 344, ¶60; ***Evelyn C.R.***, 246 Wis. 2d 1, ¶¶24, 28.

¶10 Thus, we must search the record to determine if there is a reasonable possibility that the error contributed to the outcome of the action. *See* ***Evelyn C.R.***, 246 Wis. 2d 1, ¶28. Another way of saying it is that the error must undermine our confidence in the outcome of the termination proceeding. ***Id.***, ¶35. After review, our confidence in the outcome is not affected by the court's error.

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[2] Cornelius makes a big issue of the apparent failure by the prosecuting attorney to prepare a stipulation concerning his admission of the facts pertinent to abandonment, as the trial court requested the prosecuting attorney to do. But, since the trial court made a finding on the record that the first day's testimony established the factual basis and also garnered Cornelius' admission of the factual basis on the record, lack of a written stipulation to that effect was not essential. As we read the record, the trial court deemed a written stipulation to be helpful because there was a different record with respect to each child and the trial court wanted each record to have the written stipulation. The stipulation thus seemed to be more designed toward record housekeeping than designed for the purposes of securing proof of Cornelius' admission. As we have already stated, the record shows such admission without the need for a written stipulation.

[3] ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, 246 Wis. 2d 1, 629 N.W. 2d 307 (Ct. App. 2000).

The record shows that Cornelius heard the prosecutor recount for the court the history leading up to his change of heart about contesting the abandonment issue. He heard the prosecutor tell the court how Cornelius and his attorney had discussed strategy for a significant period of time the day before. And when asked whether it was true that he was now going to forego a contest of the facts, Cornelius said, "Yes. Yes Sir." By this statement, Cornelius was telling the court and the world that it was true that he had entered into significant discussions with his attorney after the first day of trial and was now intent on pleading no contest to the factual issue of abandonment but would still contest the dispositional phase. The record adequately shows not only his understanding of the allegations, but also that he obviously put a lot of thought into his decision to proceed in the manner he did. And it was not as if he was giving up. He was merely deciding to concentrate on the disposition phase of the termination proceeding. Therefore, the record shows how he voluntarily and understandably decided to no longer contest the abandonment issue.

¶11 Moreover, Cornelius has failed to make any offer of proof that there were promises or threats made to him causing him to feel coerced into making the decision that he did. Rather, he merely complains that the circuit court is duty-bound to ask him about threats and promises in the apparent hope that the failure to ask, standing alone, will suffice to garner a reversal. That is not the law. Cornelius was duty-bound to convince us that the failure to ask him about whether there were any promises or threats made to him mattered. He has not presented us with anything. His claim fails.

¶12 Cornelius has one other issue. He asserts that the failure by the circuit court to make an express statement on the record that he is unfit dooms the

validity of the judgment terminating his parental rights. It is true that WIS. STAT. § 48.424(4) states, in pertinent part, that "[i]f grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit…. The court shall then proceed … to hear evidence … related to the dispositions." It is also true that this express statement was not made by the circuit court.

¶13 Again, WIS. STAT. § 805.18(1) applies to TPR proceedings. Therefore, we must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties. Here, it is evident from the record that Cornelius was no longer interested in disputing whether his actions and nonactions involving his children made him an unfit parent. Rather, he was more interested in trying to persuade the court that despite his present unfitness, he was still deserving of being a parent to his children. His substantial rights were in fact heard and adjudicated. Those rights were unaffected by the technical error of the court.

By the Court.—Judgment affirmed.

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