COURT OF APPEALS
DECISION
DATED AND FILED

June 15, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0673 **Cir. Ct. No. 02TP000435**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO PRECIOUS H.S., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CHRISTOPHER M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

¶1 SCHUDSON, J.[1] Christopher M. appeals from the order terminating his parental rights under WIS. STAT. § 48.415(6) for failure to assume parental responsibility for his daughter, Precious H.S., following a jury trial and a dispositional hearing.[2] He argues that the circuit court erred in allowing the jury to consider evidence of his criminal conduct in determining whether he had failed to establish a substantial parental relationship with his daughter. This court rejects his argument and therefore affirms the order terminating Christopher's parental rights.

I. BACKGROUND

¶2 The essential facts are undisputed. On June 25, 2002, the State filed a petition to terminate Christopher's parental rights. At the June 9, 2003 pretrial

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-2002). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] As material to this appeal, under WIS. STAT. § 48.415(6), grounds for involuntary termination of parental rights include:

> FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility, *which shall be established by proving that the parent … of the child ha*[*s*] *never had a substantial parental relationship with the child.*
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider … factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child.

(Emphasis added.)

conference, the State moved to introduce the substantive nature of Christopher's criminal conduct and his failure to comply with extended supervision. The court granted the motion over defense counsel's objections, reasoning that the evidence was relevant to the jury's assessment of whether Christopher was "really committed to establishing a substantial parental relationship" with Precious.

¶3 At the trial, evidence established that Precious was born on December 23, 2000, weighing four pounds and testing cocaine-positive. Her mother, Sheryl S., also tested positive for cocaine and other drugs. As a result, Precious was detained upon release from the hospital.

¶4 Christopher M. admitted to having unprotected sexual intercourse with Sheryl but denied having any knowledge about the pregnancy until sometime in July 2000, just prior to his imprisonment for pandering. During his incarceration, Christopher failed to ensure Sheryl was taking care of herself during the pregnancy, and failed to support her financially.

¶5 Christopher testified that after he learned of Sheryl's pregnancy, he attempted to contact her but received no response. Milwaukee Bureau of Child Welfare Social Worker Tricia Heinritz testified that when she informed Christopher of Precious's birth, she advised him to pursue parenting classes and drug treatment so that he would be prepared for parenting upon his release from prison. Heinritz also testified that although Christopher seemed to be committed to fulfilling these conditions at the time of their initial conversation, he failed to follow through or notify her of any difficulties he encountered.

¶6 Christopher was released from custody April 16, 2002. At the time of Christopher's release, Jenni Schmeling was the social worker assigned to Precious. According to Schmeling, Christopher never contacted her until July 24,

2002, the date of the initial appearance for the TPR petition. At that time, Schmeling offered Christopher a variety of services but, she testified, Christopher declined.

¶7 Trial testimony also established that after his release from prison, Christopher was given conditions of his extended supervision. Christopher acknowledged that he was aware that any violation would not only jeopardize his liberty, but would also jeopardize his relationship with his daughter. Nevertheless, on August 23, 2002, Christopher committed substantial battery, fracturing three bones in the victim's face. As a result, Christopher's extended supervision was revoked.

¶8 Christopher admitted that he had committed the substantial battery. While denying selling drugs, he said that he committed the offense because he believed the victim owed him money for drugs. Trial evidence also established that during the five and one-half months Christopher was out of custody, he never established any relationship with Precious. Although he paid $300 toward her support, he never sent Precious any gifts, met her, or cared for her.

¶9 On June 26, 2003, the jury, with one dissenter, found that Christopher had failed to assume parental responsibility for Precious. On July 24, 2003, the trial court determined that it was in the child's best interests to terminate Christopher's parental rights.

II. ANALYSIS

¶10 Christopher contends that he was unfairly prejudiced by the circuit court's decision to admit substantive evidence of his criminal conduct. This court disagrees.

¶11 Whether the circuit court erred in admitting a parent's criminal conduct at a termination-of-parental-rights trial presents an evidentiary question, which is reviewed under the erroneous-exercise-of-discretion standard. ***State v. Pharr,*** 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). The basic principles of relevancy, materiality and probative value apply to proof of questions of fact in termination proceedings. *See* WIS. STAT. § 48.299(4)(b).[3] Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *See* WIS. STAT. § 904.01, WIS. STAT. § 904.02, and WIS. STAT. §904.03.[4] This court will uphold a trial court's decision to admit evidence if the

[3] WISCONSIN STAT. § 48.299(4)(b), provides in relevant part:

> The court shall apply the basic principles of relevancy, materiality and probative value to proof of all questions of fact. Objections to evidentiary offers and offers of proof of evidence not admitted may be made and shall be noted in the record.

[4] These statutes provide:

> **904.01 Definition of "relevant evidence".** "Relevant evidence" means evidence having any 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.

(continued)

court exercised discretion in accordance with accepted legal standards and the facts of record. ***LaCrosse County DHS v. Tara P.***, 2002 WI App 84, ¶ 6, 252 Wis. 2d 179, 643 N.W.2d 194, *review denied,* 2002 WI 48, 252 Wis. 2d 152, 644 N.W.2d 688 (Wis. Apr. 22, 2002) (Nos. 01-3034, 01-3035).

¶12 Christopher argues that he was prejudiced by the court admitting evidence of the substantial battery. He maintains:

> [T]he details of [his] crime tended to show that he was capable of violence. Assuming arguendo that fact is of any consequence to the action here (a point counsel does not concede), as the trial court noted, this evidence had the potential to lead the jury to conclude, "He's a drug dealer who beats people up …" or … that he was "the vilest of the vile." Allowing any juror to come to that conclusion was inherently unfair because, even if true, it showed nothing about [Christopher's] relationship, or lack of it, with his daughter.

The State responds:

> Christopher M. knew that the State was seeking to terminate his parental rights. He was also aware that the Bureau of Milwaukee Child Welfare social workers were attempting to assist him and determine whether he could be a suitable placement for the child. Despite this,

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> **904.02 Relevant evidence generally admissible; irrelevant evidence inadmissible.** All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.
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> **904.03 Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

> Christopher made the conscious decision to engage in further criminal behavior. By doing so, Christopher demonstrated that Precious was not a priority in his life[;] engaging in criminal activity was.

Precious's guardian ad litem agrees with the State. They are correct.

¶13 As this court has explained, in a TPR case, when incarceration for willful criminal acts is the reason a parent is not physically available to assume parental responsibility, the criminal conduct should not be ignored. ***State v. Quinsanna D.***, 2002 WI App 318, ¶ 23, 259 Wis. 2d 429, 655 N.W.2d 752, *review denied*, 2003 WI 16, 259 Wis. 2d 105, 657 N.W.2d 709 (Wis. Jan. 17, 2003) (nos. 02-1919 and 02-1920) (citing ***L.K. v. B.B.***, 113 Wis. 2d 429, 445, 335 N.W.2d 846 (1983)). A circuit court cannot "ignore the fact that any roadblock to establishing a [parental] relationship with [the child] caused by [the parent's] arrest, bond, and conviction was produced by [the parent's] own conduct." ***Id.*** (citing ***Ann M.M. v. Rob S.***, 176 Wis. 2d 673, 685, 500 N.W.2d 649 (1993)). Needless to say, the nature and seriousness of an offense may have a bearing on a jury's view of whether the criminal conduct demonstrated a parent's unwillingness to accept responsibility for a child. *See* WIS. STAT. § 48.415(6)(a) & (b).

¶14 Therefore, after conducting a balancing test under WIS. STAT. § 904.03, a court may, in its discretion, admit information about the criminal conduct. Here, after hearing argument, the circuit court concluded that Christopher's criminal conduct was relevant to whether he had met, or could timely meet, the CHIPS conditions for Precious's return to his care. As in ***Quinsanna D.***, Christopher's criminal history and incarceration were used to show that: (1) he knew the consequences of his actions; (2) he nevertheless chose to engage in additional criminal behavior; and (3) he willfully jeopardized his

relationship with his daughter. Consequently, this court concludes that the circuit court properly exercised discretion in admitting the evidence.

¶15 Christopher also contends, however, that, pursuant to WIS. STAT. § 906.09, the *admissible* evidence of his criminal record should have been limited to the fact and number of his convictions. This court disagrees. As this court explained in ***Quinsanna D.***, evidence of a parent's criminal record is not governed by WIS. STAT. § 906.09 (use of criminal convictions for impeachment) where the evidence is relevant to whether the parent is able to assume parental responsibility. ***Quinsanna D.***, 259 Wis. 2d 429, ¶¶ 21-23. As this court observed:

> [Section 906.09] relates only to the use of criminal convictions for impeachment—"[f]or the purpose of attacking the credibility of a witness." WIS. STAT. § 906.09(1). In this case, however, the State was not introducing Quinsanna's convictions to impeach her credibility. Instead, as the prosecutor asserted when arguing for admission of the evidence, the drug offenses "relate[d] specifically to the reason" Keyon and Teyon were removed from Quinsanna's home, and the theft and obstructing offenses were relevant to whether Quinsanna had assumed parental responsibility for the twins.

Id. The same rationale applied here; consequently, WIS. STAT. § 906.09 was not applicable.

By the Court.—Order affirmed.

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