COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 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. 04-2402
04-2403
04-2404

Cir. Ct. Nos. 04TP000007
04TP000008
04TP000009

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

NO. 04-2402

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ANDREA M.S.,

RESPONDENT-APPELLANT,

DAVID S.,

RESPONDENT-CO-APPELLANT.

NO. 04-2403

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ANDREA M.S.,

RESPONDENT-APPELLANT,

DAVID S.,

RESPONDENT-CO-APPELLANT.

NO. 04-2404

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ANDREA M.S.,

RESPONDENT-APPELLANT,

DAVID S.,

RESPONDENT-CO-APPELLANT.

APPEALS from orders of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Andrea M.S. and David S. appeal orders terminating their parental rights to their three children, Ashley, Rebecca and Cassandra. They also appeal an order denying their motion for a new trial based on newly discovered evidence. Andrea and David argue (1) there was insufficient evidence that the Brown County Department of Human Services made reasonable efforts to provide services, or that Andrea and David could not meet conditions for return of the children within twelve months, and (2) there is newly discovered evidence regarding their ability to obtain low-income housing. David further argues that his due process rights were violated when the court admitted evidence obtained after an earlier CHIPS order that failed to comply with the warnings requirement. We disagree with all these arguments and affirm the orders.

BACKGROUND

¶2 The children were placed in foster homes in April 2001, pursuant to CHIPS orders under WIS. STAT. § 48.13(8) and (10). However, the initial CHIPS orders failed to satisfy the requirement under WIS. STAT. § 48.356(2) that parents be warned of the grounds for termination of their parental rights and conditions for return of the children. On March 27, 2003, the court extended the CHIPS orders and Andrea and David were given the proper warnings.

¶3 The County filed petitions on January 16, 2004, to terminate Andrea's and David's parental rights to all three children. The County alleged the children were in need of continuing protection or services and that Andrea and

[1] These appeals were consolidated on September 16, 2004, and are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

David were unlikely to satisfy conditions for return of their children within twelve months. There were eight conditions Andrea and David had to satisfy.

¶4 A motion hearing took place on April 23, 2004. David moved to exclude evidence obtained prior to the March 27, 2003, order because he was not warned of the conditions necessary for return of the children until that time. The court denied David's motion:

> Insofar as there may be conduct at any time within the reasonable past that may have a bearing on the likelihood of meeting the conditions in the subsequent CHIPS order, that could be admissible, but I think I would have to prohibit testimony concerning whether or not that conduct would put [David] out of compliance with the earlier order of the Court, the earlier conditions that were imposed.
>
> I think the case law is pretty clear that prior conduct can be relevant, can be admissible, but I think that has to be couched in terms of how that conduct would relate to any conditions existing in this order. … I think testimony regarding conduct can come in, but it has to be related to the conditions in this order.

¶5 A jury trial took place on May 5-7, 2004. The jury found grounds to terminate under WIS. STAT. § 48.415(2). Two jurors dissented, each on different verdict questions. The trial court subsequently terminated both Andrea's and David's parental rights. Two weeks later, David filed a motion for a new trial, arguing he and Andrea had obtained low-income housing because they had prevailed on an appeal of a denial of subsidized housing. Andrea later joined the motion.

¶6 A hearing on the motion occurred on August 25, 2004. Andrea testified they had been denied housing in April, after which they filed a grievance. The grievance was successful and they were granted subsidized housing benefits. They moved into an apartment on July 19, 2004. The housing manager for

Forward Services, the company that manages the program, testified about the program. She stated that it is designed to provide assistance for up to twelve months. As part of the program, Andrea and David were eligible for rent assistance, plus vouchers for gas, furniture and medical benefits.

¶7 The court ruled the new housing was not new evidence. It stated that at the time of the trial, Andrea and David knew they had filed a grievance and could have testified to that effect. Ultimately, the court denied the motion.

DISCUSSION

A. Sufficiency of the Evidence

¶8 Our review of a jury's verdict is narrow. We will sustain the verdict if there is any credible evidence to support it. ***Meurer v. ITT Gen. Controls***, 90 Wis. 2d 438, 450, 280 N.W.2d 156 (1979). In applying this narrow standard of review, we consider the evidence in a light most favorable to the jury's determination. ***Id.*** It is the jury's role, not an appellate court's, to balance the credibility of witnesses and the weight given to the testimony of those witnesses. ***Id.*** To that end, we search the record for credible evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not. ***Gonzalez v. City of Franklin***, 137 Wis. 2d 109, 134, 403 N.W.2d 747 (1987).

1. The County's efforts to provide services

¶9 Andrea and David argue there was insufficient evidence from which the jury could conclude the County made reasonable efforts to provide court-ordered services to them. They point out evidence from which the jury could have

concluded that the County failed to provide services. For example, a witness for Andrea and David, social worker Terri Rahman, testified that the County had not made a reasonable effort to provide Andrea and David services.

¶10 However, Andrea and David ignore our standard of review. We must look for evidence to support the verdict. ***Id.*** The social worker assigned to the case, Joan Slempkes, testified regarding services the County provided Andrea and David. These included assigning Slempkes to the case, making Slempkes available to them on a regular basis, providing Andrea and David with referrals to parenting classes and counseling, and providing information about housing services. Slempkes remained in contact with the parenting instructor to evaluate Andrea's and David's progress, and she called Andrea and David when they missed appointments. Finally, she regularly provided Andrea and David with a written outline of their progress on the conditions they had to meet for return of their children. From Slempkes's testimony, the jury could conclude the County made reasonable efforts to assist Andrea and David.

2. Meeting conditions for return of the children within twelve months

¶11 Andrea and David argue there was insufficient evidence to show they would not meet the conditions for return of their children within twelve months. One condition was that they provide adequate housing for their children. Again, Andrea and David ignore our standard of review and point only to evidence from which they believe the jury could have found they would meet the conditions within twelve months. However, we look for evidence to support the jury's verdict. ***Id.*** The jury heard evidence that the children were removed from the home in April 2001. In three years they had not obtained adequate housing. In

fact, the parents were living in a Motel 6 at the time of the trial because they had been evicted from the home they were renting. Andrea and David did not notify Slempkes of the eviction even though it was required by the CHIPS order. From this testimony the jury could reasonably conclude Andrea and David would not obtain adequate housing within twelve months.

¶12 Andrea and David were also required to successfully complete a parenting program. The children were removed from the home in April 2001. By the time of the trial, in May 2004, Andrea and David had completed only the first two phases of a three-phase program. David had trouble completing the parenting program because of his incarceration. Both Andrea and David also missed scheduled parenting classes and did not reschedule them when asked by Slempkes to do so. From this testimony, the jury could conclude that Andrea and David were not likely to meet this condition within twelve months.

B. Newly Discovered Evidence

¶13 Andrea and David argue they are entitled to a new trial based on newly discovered evidence relating to their eligibility for housing assistance. We will grant a trial based upon newly discovered evidence if Andrea and David establish by clear and convincing evidence that:

> (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking to discover it; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the testimony introduced at trial; and (5) it is reasonably probable that, with the evidence, a different result would be reached at a new trial.

See ***State v. Carnemolla***, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999).

¶14 When reviewing a trial court's decision concerning a motion for a new trial based upon newly discovered evidence, we determine whether the trial court properly exercised its discretion. ***State v. Brunton***, 203 Wis. 2d 195, 201-02, 552 N.W.2d 452 (Ct. App. 1996). "However, whether due process requires a new trial because of newly-discovered evidence is a constitutional question subject to independent review[.]" ***State v. Kimpel***, 153 Wis. 2d 697, 702, 451 N.W.2d 790 (Ct. App. 1989).

¶15 Here, the trial court determined that Andrea's and David's ability to receive housing assistance was not newly discovered evidence. The court stated:

> All of the evidence existed prior to the trial. There could have been testimony specifically from [Andrea S.] that, in fact, she had applied under the grievance procedure, that she was denied—they were denied eligibility because of something that, in fact, did not exist. And the jury could have heard testimony from representatives of Forward Service Corporation concerning the grievance process and what is likely to occur in the event that a mistake was made in determining eligibility.

Andrea and David argue they could not have testified regarding the likelihood of success of having the housing decision overturned.

¶16 We conclude the court properly exercised its discretion. It is true that Andrea and David could not have stated with certainty what the outcome of their grievance would be. However, they could have presented evidence regarding what the result would be if they were successful. More importantly, as the trial court stated, they could have presented evidence from which a reasonable jury could find that their grievance would likely succeed. Andrea and David chose not to do so.

¶17 The court also determined that it was not reasonably probable the jury would have changed its verdict if it had known of the grievance. There was testimony that the assistance Andrea and David received was only for up to twelve months. It could have been for as little as one month. From this, the jury could still have concluded that Andrea and David would not have met the housing condition within twelve months. Therefore, we agree with the court's conclusion that evidence regarding Andrea's and David's housing situation was not newly discovered evidence warranting a new trial.

C. Due Process

¶18 David argues that he "was not aware under the prior CHIPS orders that his conduct could result in the termination of his parental rights" and therefore "permitting evidence of that conduct is fundamentally unfair." It is undisputed that prior to March 2003, David had not been warned of the conduct that could lead to termination of his parental rights. For that reason, the court disallowed the use of David's conduct prior to March 2003, to prove whether he met conditions set up in the prior CHIPS order. However, David does not explain how he was harmed by admission of evidence of past conduct to show whether he has met the conditions of the current CHIPS order, in which he received the proper warnings. Because David's argument is insufficiently developed, we do not address it. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995).

By the Court.—Orders affirmed.

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