COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2010

A. John Voelker
Acting 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. 2010AP1717
2010AP1718

Cir. Ct. Nos. 2009TP73
2009TP74

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

NO. 2010AP1717

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

JEFFREY J. AND SHANNON J.,

PETITIONERS-RESPONDENTS,

V.

DAVID D.,

RESPONDENT-APPELLANT.

NO. 2010AP1718

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

JEFFREY J. AND SHANNON J.,

PETITIONERS-RESPONDENTS,

V.

DAVID D.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Brown County: MARC A. HAMMER, Judge. *Affirmed*.

¶1 PETERSON, J.[1] David D. appeals orders terminating his parental rights to Jonathan D. and Nathaniel D., his biological sons. David argues the circuit court erroneously denied him the right to subpoena and elicit testimony from Jonathan and Nathaniel at the dispositional hearing. We disagree and affirm.

BACKGROUND

¶2 On May 4, 2006, a jury convicted David of three counts of first-degree intentional homicide for killing Jonathan and Nathaniel's mother and maternal grandparents. David was sentenced to life imprisonment without the possibility of release. David appealed, and we affirmed the judgment of conviction. *See* ***State v.*** [***D.***], No. 2008AP683-CR, unpublished slip op. ¶1 (WI App Dec. 9, 2008). The supreme court denied David's petition for review.

¶3 After David's arrest, the trial court awarded permanent custody of Jonathan and Nathaniel to Jeffrey J. and Shannon J., the children's uncle and aunt. On December 1, 2009, Jeffrey and Shannon petitioned the court to terminate David's parental rights to the children. Jeffrey and Shannon filed motions for

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

partial summary judgment at the grounds stage, arguing David had intentionally killed the children's mother, a ground for termination under WIS. STAT. § 48.415(8). The trial court granted the motions, finding that David's murder convictions were grounds for termination as a matter of law.

¶4 Jonathan and Nathaniel were not present at the partial summary judgment motion hearing. At the end of the hearing, Jeffrey and Shannon asked whether the court would "continue to waive the boys' appearance" at the dispositional hearing. The court indicated it was not prepared to enter an order regarding the children's future appearances. David's attorney stated:

> I can tell you in talking to my client he would like them to be here and at the very least he would like them to potentially have an *in camera* discussion with the Court [as] to what their wishes are. I know that [the guardian ad litem] definitely is going to communicate, you know, their positions and their wishes, but I think my client is going to want them to be here.

The court responded:

> I'll consider it as we get closer to hearing. If your client is saying I want these children to have access to the decision maker, but … I'm willing to minimize a potential emotional impact by letting [them] talk privately with the judge … I'd encourage the guardian ad litem to consider that as an option as opposed to testimony.

¶5 Afterwards, David subpoenaed Jonathan and Nathaniel to provide testimony at the dispositional hearing, and the guardian ad litem moved for a protective order quashing the subpoenas. The guardian ad litem attached a letter from the children's therapist, stating:

> My opinion is it would … be detrimental to Jonathan and Nathan to depose them for this legal action. They have not seen their father in person since the homicides and having to see him in court could be harmful. Testifying in court could be retraumatizing. Having to verbalize their answers

> of detaching from their Dad in a scary legal setting could be traumatic to them.

¶6 At the hearing on the motion for protective order, the court decided it would not require Jonathan and Nathaniel to testify in court, but instead would examine them *in camera*. The court allowed David to submit a list of questions he wanted the court to ask the children.

¶7 At the beginning of the dispositional hearing, David asked that his counsel be permitted to participate in questioning Jonathan and Nathaniel in chambers. The court indicated it would not allow David's counsel to question the children, but would allow the parties' attorneys to be present during the questioning. The parties then discussed David's proposed questions—forty-eight in all—and the court struck six it deemed irrelevant, repetitive, or inappropriate.

¶8 In chambers, the court interviewed fifteen-year-old Jonathan, then thirteen-year-old Nathaniel. The interviews were on the record, but the children were not sworn in. The court conducted the interviews in an informal, conversational style. Both children stated they wanted their father's rights terminated, they wanted to be adopted by Jeffrey and Shannon, and they did not want to have contact with their father until some point in the future. The court asked David's counsel if he had any concern about the style and substance of the interviews, and counsel replied, "No, Your Honor. I thought it was good. Excellent."

¶9 Following the *in camera* interviews of the children, David's counsel met with David to relay the children's testimony and determine whether David wanted the court to ask follow-up questions. David's counsel reported back to the

court that David had no follow-up questions and was grateful for the children's feedback. David's counsel further stated:

> I told [David] I think the kids did a good job on answering the questions from the judge. I thought the judge did an excellent job in, you know, maintaining communication with the kids and asking them questions, and we got a lot of feedback. … I think [David] was satisfied and he indicated to me there were no other questions that he would want posed to either of the boys.

¶10 After Jonathan and Nathaniel's interviews, the dispositional hearing proceeded in the courtroom. The children's therapist testified they did not want to see their father and they wanted the court to terminate his parental rights. She also gave her opinion that termination would be in the children's best interests. Shannon, Jeffrey, and David also testified. Additionally, the court received into evidence the deposition transcript of Susan Steinfeldt, a Lutheran Social Services supervisor who had conducted a study of Jeffrey and Shannon's home. Steinfeldt testified Jonathan and Nathaniel were happy with Jeffrey and Shannon and wanted Jeffrey and Shannon to adopt them. She also testified adoption would be appropriate.

¶11 The court then considered the factors enumerated in WIS. STAT. § 48.426(3) and found termination of David's parental rights was in the children's best interests. Accordingly, the court entered dispositional orders terminating David's parental rights. David appealed the court's orders, and we consolidated the appeals of the two children's cases.

DISCUSSION

¶12 David argues the trial court's decision to examine the children *in camera* violated his common law right to confrontation and his statutory right to

present evidence.[2] We conclude the court's decision to question the children *in camera* did not violate David's rights.

¶13 David correctly points out that no person has a right to refuse to be a witness absent a recognized privilege. *See* WIS. STAT. § 905.01(1), (2). David is also correct that no privilege allows a witness to refuse to testify based on a claim of emotional harm. *See* ***State v. Gilbert***, 109 Wis. 2d 501, 505, 326 N.W.2d 744 (1982). However, in this case, the children did not refuse to be witnesses, inasmuch as they were examined by the trial court and answered specific questions posited by David's counsel. Thus, what David really objects to is the procedure used to elicit the children's testimony.

¶14 David argues that the Wisconsin legislature outlined an alternate method for examining child witnesses who may be traumatized by testifying in court and that the trial court did not follow this method. *See* WIS. STAT. § 967.04(7). Section 967.04(7) provides that "any party may move the court to order that a deposition of a child who has been or is likely to be called as a witness be taken by audiovisual means." If the child is between twelve and fifteen years old, before granting a motion under § 967.04(7) the court must find that the interests of justice warrant the alternative method of examination. Section

[2] WISCONSIN STAT. § 48.427(1) states that any party to a termination of parental rights action "may present evidence relevant to the issue of disposition, including expert testimony, and may make alternative dispositional recommendations to the court."

WISCONSIN STAT. § 805.07(1) states, "Subpoenas shall be issued and served in accordance with ch. 885. A subpoena may also be issued by any attorney of record in a civil action or special proceeding to compel attendance of witnesses for deposition, hearing or trial in the action or special proceeding."

967.04(7) lists ten factors a court may consider in determining the interests of justice.

¶15 David argues the trial court erred by not following the procedure outlined in WIS. STAT. § 967.04(7). However, the video deposition protocol set forth in § 967.04(7) is only one of a wide array of possible examination methods that pass legal muster. David recognizes this by referencing other statutorily or judicially accepted procedures for eliciting testimony from minors in potentially injurious settings. *See*, *e.g.*, WIS. STAT. § 972.11(2m); ***Maryland v. Craig***, 497 U.S. 836 (1990); ***State v. Thomas***, 150 Wis. 2d 374, 442 N.W.2d 10 (1989). Furthermore, the Wisconsin Supreme Court has refused to "advocate or give [its] approval to any particular solution" as to how courts should procure testimony from minors in potentially traumatic circumstances. ***Gilbert***, 109 Wis. 2d at 518. Instead, the supreme court has urged that trial courts and parties use "their collective intellectual resources" to devise ways for children to testify with minimal trauma. ***Id.***

¶16 David also argues there was no basis for the trial court's determination that Jonathan and Nathaniel could not testify in the normal manner, pursuant to David's subpoena. He argues the trial court did not make a required finding that the alternate procedure was "necessary to protect the child witness from the trauma of courtroom testimony …." *See* ***Thomas***, 150 Wis. 2d at 387.

¶17 However, the trial court stated it was satisfied that facing David in person would cause emotional harm to the children. This suggests the court found that the alternative procedure was necessary to protect the children from emotional trauma. The court's finding was based on a letter from the boys' therapist which stated that seeing David in court "could be harmful," that "[t]estifying in court

could be retraumatizing," and that "[h]aving to verbalize their answers of detaching from their Dad in a scary legal setting could be traumatic to them." The therapist's letter provided sufficient basis for the court to conclude the alternate procedure was necessary to protect Jonathan and Nathaniel from emotional harm.

¶18 Furthermore, we must be mindful that this was not a run-of-the-mill termination of parental rights proceeding. Rather, this was a case where David had murdered the children's mother and grandparents. Surely, under these circumstances, the trial court could reasonably conclude the children would suffer emotional harm if they were made to confront their father face-to-face for the first time since his arrest.

¶19 Additionally, while David contends the trial court's alternate examination procedure violated his common law right to confrontation, this right is not absolute. Even in the criminal context, where the right is more clearly defined, courts balance the right to confrontation against protection of the child witness and otherwise ensure there is a legitimate purpose for the inquiry. Our supreme court has stated:

> An essential function of the right of confrontation, identified under federal law, is to secure for the accused the opportunity for cross-examination. However, it has been noted that this confrontation is "not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but rather for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." 5 Wigmore, [Evidence] Sec. 1395 [(Chadbourn rev. 1974)].

State v. Thomas, 144 Wis. 2d 876, 891-92, 425 N.W.2d 641 (1988) (citation omitted), *aff'd*, 150 Wis. 2d 374, 442 N.W.2d 10 (1989).

¶20 Here, David informed the trial court he was satisfied that all the necessary questions were covered with the children during the *in camera* interviews. The only reason David wanted the children to be physically present in the courtroom was to satisfy his own personal desire for face-to-face contact. At the dispositional hearing, David's counsel stated:

> In talking to my client last evening, he indicated he would very much like to see the boys in any way, shape, or form, even if it's from a distance. I'm going to make the request on the record and, obviously, it's the Court's discretion.
>
> ….
>
> Your Honor, …. I think you were going to reserve ruling on this, whether or not my client could see the children from a distance? I know I asked for that, and I thought you said … [you would] reserve ruling on that for later.

The trial court ruled, "I'm not prepared to accept any degree of harm for the sole and express purpose of your client's self-gratification upon seeing his children. I can understand it. I feel the same way. But as a sitting circuit court judge, I cannot allow it." David's counsel then met with David in private, relayed the children's responses, and informed the court that David had no follow-up questions.

¶21 The above colloquy between the trial court and David's counsel demonstrates that David's wish to confront Jonathan and Nathaniel had everything to do with his desire to gaze upon them, even from afar, and nothing to do with any legitimate evidentiary issue. The court examined the children *in camera*, asking them questions posited by David's counsel. The interviews allowed the court to discern the children's wishes. David had no complaint about the style or substance of the interviews, and afterwards he thanked the court for providing him feedback from the children. The court then considered the standards and factors

set forth in WIS. STAT. § 48.426 before finding that termination of David's parental rights was in the children's best interests. Because David does not raise any legitimate evidentiary concern about this process, we conclude it did not violate his common law right to confrontation.

¶22 Finally, even if we were to conclude the trial court erred by not allowing the children to testify in open court, the error was harmless and did not affect David's substantial rights. We will not set aside a judgment on the ground of error unless we conclude the error complained of has affected the substantial rights of the party seeking to set aside the judgment. WIS. STAT. § 805.15(2). For an error to affect the substantial rights of a party, there must be a reasonable possibility that the error contributed to the outcome of the proceeding at issue. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome. ***Id.*** at 544-45 (quotation omitted).

¶23 The trial court's decision to examine Jonathan and Nathaniel *in camera* does not undermine our confidence in the outcome of the dispositional hearing. The purpose of a dispositional hearing is to determine whether termination of parental rights is in the child's best interests. *See* WIS. STAT. § 48.426(2). In determining the best interests of the child, the court considers:

> (a) The likelihood of the child's adoption after termination.
>
> (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
>
> (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
>
> (d) The wishes of the child.

> (e) The duration of the separation of the parent from the child.
>
> (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

WIS. STAT. § 48.426(3).

¶24 Here, the evidence entered at the dispositional hearing allowed the trial court to consider adequately the factors enumerated in WIS. STAT. § 48.426(3). The court heard testimony regarding the children's likelihood of adoption. *See* WIS. STAT. § 48.426(3)(a). Both Jeffrey and Shannon testified unequivocally they would adopt the children if David's rights were terminated. The court considered the age and health of the children, and found they had become emotionally healthier since they were removed from David's home. *See* WIS. STAT. § 48.426(3)(b). The court also heard testimony that the children did not have substantial relationships with David or his family and had not seen David for four-and-a-half years. *See* WIS. STAT. § 48.426(3)(c), (e). Jeffrey, Shannon, Jonathan, Nathaniel, and the children's therapist all testified that terminating David's parental rights would result in a more stable and permanent family relationship. *See* WIS. STAT. § 48.426(3)(f).

¶25 Moreover, the court had ample evidence of the children's wishes. *See* WIS. STAT. § 48.426(3)(d). Jonathan and Nathaniel's therapist testified they wanted David's parental rights terminated. The guardian ad litem also told the court the children wanted David's rights terminated. Steinfeldt testified the boys were happy with Jeffrey and Shannon and wanted to be adopted. Jonathan and Nathaniel also expressed their wishes to the court directly during the *in camera* interviews.

¶26 After considering the factors set forth in WIS. STAT. § 48.426(3), the trial court determined termination was in the children's best interests and terminated David's parental rights. This decision was based on ample evidence. Even if the trial court's method of examining Jonathan and Nathaniel was erroneous, the error does not undermine our confidence in the outcome of the dispositional hearing. We therefore conclude any error was harmless.

By the Court.—Orders affirmed.

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