COURT OF APPEALS
DECISION
DATED AND FILED

September 8, 2011

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 No. 2011AP1524 **Cir. Ct. No. 2010TP13**

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

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

ROCK COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

JENNIFER B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed.*

¶1 LUNDSTEN, P.J.[1] Jennifer B. appeals an order of the circuit court terminating her parental rights to her child, Mercedes F. Jennifer argues that the circuit court erred when, at the grounds phase, it improperly admitted evidence, including testimony by Mercedes' therapist about Mercedes' mental health diagnosis and treatment. Jennifer contends that the evidence was either irrelevant to the grounds phase or, if relevant, was unduly prejudicial. She asserts that reversal and remand for a new trial is warranted. I disagree, and affirm the circuit court.

Background

¶2 Jennifer B.'s child, Mercedes F., was born on January 26, 2003. In May 2008, Mercedes was placed in protective custody. At the time of Mercedes' removal, Jennifer was incarcerated and, prior to being incarcerated, was also a heavy heroin user. Jennifer was subsequently released from custody at some point during the summer of 2008. Mercedes remained out of Jennifer's home, and, on September 8, 2008, the circuit court issued a CHIPS order based on "Neglect/Inadequate Care" that placed Mercedes outside of the home. The CHIPS order contained warnings informing Jennifer that, if she did not meet certain conditions for Mercedes' return, her parental rights were subject to termination. The conditions included that Jennifer "remain drug and alcohol free."

¶3 During the pendency of the CHIPS order and a CHIPS extension order, Jennifer was taken into custody for two separate periods for probation violations based on her drug use. She was in custody for a drug-related probation

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

violation from June 2009 to November 2009, and again from March 2010 to September 2010. She went through a drug treatment program during both custodial periods.

¶4 The Rock County Human Services Department filed a termination petition on March 29, 2010, citing the continuing-need-of-protection-or-services termination ground found in WIS. STAT. § 48.415(2). After a two-day trial in mid-December 2010, a jury returned a unanimous verdict finding that the termination ground was met. After a dispositional hearing, the circuit court found that it was in Mercedes' best interests for Jennifer's parental rights to be terminated, and the court entered an order terminating Jennifer's parental rights. Jennifer appeals.

Discussion

¶5 Jennifer argues that the circuit court erred when it allowed certain testimony, including testimony about Mercedes' mental health needs, to be presented at the grounds phase. Jennifer asserts that the evidence was either irrelevant or, if relevant, was unduly prejudicial and should have been excluded. Jennifer contends that reversal and remand for a new trial is warranted. I am not persuaded.

¶6 "When reviewing the circuit court's evidentiary rulings, the applicable standard is whether the court appropriately exercised its discretion." ***Reuben v. Koppen***, 2010 WI App 63, ¶30, 324 Wis. 2d 758, 784 N.W.2d 703. Evidence is relevant when it has "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." WIS. STAT. § 904.01. 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." WIS. STAT. § 904.03.

¶7 The termination ground at issue here was the continuing need of protection or services, found in WIS. STAT. § 48.415(2)(a). The jury was required to find that the ground's four elements were satisfied by clear and convincing evidence. *See* ***id.***[2]; *see also* WIS JI—CHILDREN 324A. Two of these elements are pertinent to this appeal, and were stated in the following verdict questions: "Has Jennifer [B.] failed to meet the conditions established for the safe return of the child to her home?" and "Is there a substantial likelihood that Jennifer [B.] will not meet these conditions within the nine-month period following the conclusion of this trial?"

[2] WISCONSIN STAT. § 48.415(2)(a) states that the continuing need of protection or services ground is established where the following is proven:

> (a) 1. That the child has been adjudged to be a child or an unborn child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356(2) or 938.356(2).
>
> 2. ….
>
> b. That the agency responsible for the care of the child and the family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court.
>
> 3. That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 9-month period following the fact-finding hearing under s. 48.424.

¶8 These questions referred to conditions for Mercedes' return that were provided to Jennifer in conjunction with the CHIPS orders placing Mercedes out of Jennifer's home. The conditions for return included the following:

> 1. The mother must remain drug and alcohol free. The mother will submit to urine screens …. The mother will take any prescription medication only as directed by her treating physician.
>
> 2. The mother must maintain a safe, stable and sanitary residence, suitable for children, that is drug and alcohol free. The mother must not allow individuals involved in criminal activity or drug and alcohol use to reside or congregate in her home.
>
> 3. The mother must demonstrate the ability to meet the child's physical, educational, medical, and emotional needs on a daily basis.

Jennifer had to meet all of these conditions for Mercedes to be returned to her.

¶9 Thus, the jury was asked to evaluate (1) whether Jennifer had failed to meet any of these conditions during the pendency of the CHIPS orders, *and* (2) whether there was "a substantial likelihood" that Jennifer would continue to fail to meet any of these conditions for the next nine months. *See* WIS. STAT. § 48.415(2)(a)3. Both Jennifer and the County framed the main dispute at trial as whether there was a substantial likelihood that Jennifer would not meet the conditions in the next nine months.

¶10 Much of Jennifer's argument on appeal is based on her view that testimony from Mercedes' therapist about Mercedes' mental health problems "concerned only Mercedes and did not directly relate to Jennifer meeting her conditions of return." She argues that, accordingly, the evidence was either irrelevant or should have been excluded under WIS. STAT. § 904.03's balancing test.

¶11 Jennifer points to the following evidence as objectionable. The therapist described Mercedes' mental health diagnosis and, in particular, described Mercedes as having attention deficit hyperactivity disorder and post-traumatic stress disorder. The therapist summarized what post-traumatic stress disorder is and talked about the program that Mercedes was enrolled in, a "day treatment program" for children with trauma issues. The therapist also explained that the type of treatment that Mercedes was receiving was "intensive" and required her to be in "a safe and supportive environment." The therapist stated that Mercedes was taking, for example, Adderall and anxiety medication, and would become "very agitated" and "act out aggressively" if not taking the medications. As part of her trauma-related treatment of Mercedes, the therapist also explained that she obtained from Jennifer background information in an effort to shed light on Mercedes' issues. The therapist testified that the background history revealed that Mercedes had witnessed domestic violence and drug use, and that Jennifer had a drug problem.

¶12 In addition, the therapist stated that Mercedes had been engaging in sexualized behavior, such as trying to "act kind of seductive with the older boys" and encroaching on the boundaries of her peers. The therapist stated that these behaviors had improved as of late when Mercedes ceased attending one-on-one play sessions with Jennifer.

¶13 Jennifer makes the following contentions about this testimony.

¶14 First, Jennifer asserts that it is significant that the therapist, in providing this testimony, did not in all instances "directly relat[e]" the information "to whether [Jennifer] understands [Mercedes'] issues." Jennifer's apparent proposition is that, for this testimony to be relevant, *the therapist* was required to

directly testify about Jennifer's ability to deal with Mercedes' mental health and behavior issues. Jennifer's premise is flawed.

¶15 The question for the jury was whether there was a substantial likelihood that Jennifer would not "meet the child's physical, educational, medical, and emotional needs on a daily basis" within the next nine months. To answer this question, the jury needed to know what Mercedes' needs were, including her mental health needs. Further, the therapist's testimony revealed that some of the likely causes of Mercedes' problems related to Jennifer. That information was plainly relevant to whether Jennifer could meet Mercedes' needs in the future. Similarly, Mercedes' treatments were relevant because it was established that Mercedes needed a stable environment and regular medication for her treatment to be effective, and it was in dispute whether Jennifer could provide the needed level of stability and attention necessary to regularly medicate Mercedes.

¶16 Also, as a general matter, there is no requirement that a single witness provide every piece of the puzzle for that witness's testimony to be relevant. Here, in addition to the therapist at times drawing a connection between Mercedes' needs and Jennifer's abilities and habits, other witnesses provided information about Jennifer's abilities and habits, which the jury could have properly used to determine whether Jennifer would meet Mercedes' needs.

¶17 Second, Jennifer seems to take the position that, simply because some of this evidence is *also* relevant at the second phase of a termination proceeding—the dispositional hearing addressing the best interests of the child—then that evidence is automatically not relevant to the grounds phase. *See* ***Sheboygan Cnty. Dep't of Health & Human Servs. v. Julie A.B.***, 2002 WI 95,

¶¶24-30, 255 Wis. 2d 170, 648 N.W.2d 402 (describing the two-phase structure of termination of parental rights proceedings). Jennifer is mistaken. The cases that Jennifer cites merely point out that the focus of the two phases shifts from, first, a determination of parental fitness to, second, a determination of a child's best interests. *See, e.g.*, ***id.*** Evidence relevant to these two phases often overlaps, for example, when, as here, the grounds phase requires an exploration of a child's needs.

¶18 Third, Jennifer contends that "[i]nformation from years previous about how the child potentially developed her mental health issues" is not relevant. This plainly is not true. In a case addressing the same termination ground, we explained that "the facts occurring prior to a CHIPS dispositional order are frequently relevant to the issues at a termination proceeding." *See* ***La Crosse Cnty. Dep't of Human Servs. v. Tara P.***, 2002 WI App 84, ¶10, 252 Wis. 2d 179, 643 N.W.2d 194; *see also* ***id.***, ¶12. The present case provides an example of just such a situation, where a prediction of Jennifer's future ability to meet Mercedes' needs is the focus of the proceeding and there is reason to believe that past events, when Mercedes was in Jennifer's care, have contributed to Mercedes' problems.

¶19 This leaves Jennifer's argument that the evidence, even though relevant, should have been excluded as unfairly prejudicial. Jennifer's only explanation of this unfair prejudice is that the jury, having been made aware of Mercedes' "issues," would tend to feel "sympathy" for Mercedes.

¶20 Jennifer's argument lacks development. She does not explain why this "sympathy" *for Mercedes* equates to unfair prejudice *to Jennifer*. That is, regardless whether the jury felt sympathy for Mercedes, Jennifer does not explain

how that would have prejudiced her with regard to the topic at issue—whether Jennifer could meet Mercedes' needs. As I have explained, the mental-health-related evidence Jennifer complains about was directly relevant to the key dispute. Jennifer does not meaningfully explain how any unfair sympathy would have substantially outweighed the legitimate and substantial probative value of this evidence—I conclude that it did not.[3] *See* WIS. STAT. § 904.03; *see also* ***State v. Johnson***, 184 Wis. 2d 324, 340, 516 N.W.2d 463 (Ct. App. 1994) ("In most instances, as the probative value of relevant evidence increases, so will the *fairness* of its prejudicial effect.").

¶21 I turn my attention to a different aspect of the therapist's testimony that Jennifer argues was improperly admitted—the therapist's statement that Jennifer had previously voluntarily terminated her rights to another child. The County, in its questioning of the therapist, did not elicit testimony on this topic. Rather, when the therapist revealed this information, she was explaining another topic that was the subject of the questioning. This questioning concerned the fact that the therapist had sought information from Jennifer about Mercedes' past and Mercedes' possible exposure to drug use. During this testimony, the following exchange took place:

> [County]: Did the mother acknowledge to you that she had a problem with drug use?
>
> [Therapist]: Yes.
>
> [County]: What did she tell you about her drug use?

[3] Jennifer also complains about the County's discussion of Mercedes' needs in its closing argument, but this complaint adds nothing to Jennifer's argument. To the extent the County discussed Mercedes' needs in its closing argument, it was in light of whether Jennifer would likely meet those needs going forward.

> [Therapist]: Um, she told me that she just started using drugs after, um, she, um, gave up her youngest daughter for termination voluntarily. And then that's what escalated her drug use.

Jennifer's attorney objected, and the court overruled the objection. The questioning then moved on. Shortly thereafter, out of the presence of the jury, the court reconsidered its ruling and discussed giving a curative instruction to the jury regarding the voluntary termination testimony. Jennifer ultimately declined a curative instruction. Apart from what I have quoted above, there was no other mention of the prior voluntary termination before the jury.

¶22 Assuming that allowing testimony on the voluntary termination evidence was error, I conclude that its admission was harmless. Error is harmless when there is no "reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." *See* ***Martindale v. Ripp***, 2001 WI 113, ¶32, 246 Wis. 2d 67, 629 N.W.2d 698. "A reasonable possibility of a different outcome is a possibility sufficient to 'undermine confidence in the outcome.'" ***Id.*** (citation omitted).

¶23 First, the circuit court offered to give a curative jury instruction, and Jennifer declined the offer. This may have been a reasonable strategic decision, but Jennifer passed on a procedure that presumptively would have cured the prejudice she now complains of. *See* ***State v. Collier***, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998) ("Potential prejudice is presumptively erased when admonitory instructions are properly given by a trial court."). Given this passed-up opportunity, Jennifer does not explain why this court should now grant her a new trial.

¶24 Second, this statement alerted the jury that Jennifer had voluntarily terminated her parental rights previously, but did not include meaningful detail, except that, *after* that event, Jennifer's drug use escalated. For all the jury knew, Jennifer might have acted responsibly in that prior situation. Thus, so far as the jury knew, there was no important connection between the voluntary termination mentioned and the present *involuntary* termination.

¶25 Third, there was a great deal of other evidence showing that Jennifer would not meet the conditions of return in the next nine months. The conditions for return included that Jennifer meet Mercedes' needs, provide a stable home, and that Jennifer not use drugs. At trial, Jennifer conceded that she had a recurring drug problem, and, in particular, was addicted to heroin. Jennifer also acknowledged that, when using heroin, she was unable to effectively care for Mercedes.

¶26 Jennifer's main argument at trial was that she was on the road to recovery and that, therefore, there was not a "substantial likelihood" that she would return to drugs in the next nine months. Jennifer essentially took the position that drug use was the only thing standing in the way of her meeting Mercedes' needs and providing a stable home, and that, accordingly, there was also not a "substantial likelihood" that she would fail to meet these other conditions during the next nine months. Jennifer pointed to the facts that she was currently self-enrolled in a drug treatment program, that she had, even with her relapses, greatly reduced her intake of heroin from her heavy daily use when Mercedes was first removed, and that she had currently been off of drugs for two months.

¶27 It is true that one witness agreed that Jennifer's prospects "of a positive outcome" from treatment were "better this time than last time." However, the same witness explained that there was a risk of relapse at any time. Further, the "better this time than last time" statement was not a statement that Jennifer was *unlikely* to relapse. Common sense would have informed the jury that just two months off of drugs was a poor indicator that Jennifer had conquered her long-time drug issues.

¶28 It was undisputed that from the time of Mercedes' removal to the time of trial—a span of approximately two-and-one-half years—Jennifer repeatedly relapsed into drug and alcohol use and did so knowing that it meant that Mercedes would not be returned to her. For example, Jennifer admitted to using drugs from approximately December 2008 to June 2009, at which time she was jailed for violating her probation and subsequently was placed in a treatment program. She was released in November 2009. Jennifer then had two recent relapses. First, in February 2010, she used heroin for "a few weeks," which resulted in another probation revocation, her incarceration, and another treatment program while in custody. In September 2010 she was released, only to relapse again in October 2010, when she used heroin on at least a couple of occasions. This most recent relapse occurred *after* the filing of the termination petition in this case and only about two months prior to the trial. Thus, when she most recently relapsed, Jennifer would have known that a hearing was imminent on her parental fitness, but she nonetheless was unable to stay off of drugs.

¶29 Given the October 2010 relapse, a counselor (involved in Jennifer's treatment that ended in September 2010) described Jennifer's prognosis as "fair, at best" and in fact probably "poor." Together with this, Jennifer did not dispute testimony to the effect that she had not been drug-free for any consecutive nine-

month period, as far back as age 13, except perhaps for time spans overlapping with when she was incarcerated. Jennifer was twenty-five years old at the time of trial and, thus, Jennifer's nine-month-of-no-relapse theory ran contrary to her pattern over the last twelve years.

¶30 Apart from this, there was also significant evidence showing that Jennifer could not meet the other return conditions even if she stayed off drugs for the next nine months. For example, there was evidence that Jennifer had shown insufficient signs of being able to or willing to cope with Mercedes' behavioral and mental health issues and other needs. There was testimony that Jennifer showed lack of insight into Mercedes' needs, that Jennifer was focused instead on herself, that Jennifer would appear to sleep when visiting Mercedes, and that Jennifer had untreated mental health problems that prevented her from meeting Mercedes' needs.

¶31 Jennifer was also required to provide a stable home as a return condition. There was no substantial dispute that Jennifer had not been in a position to provide a stable home during the pendency of the CHIPS orders. Again, Jennifer's theory was that, going forward, she could provide a stable home. However, the undisputed facts at trial cut against Jennifer's theory. At the time of the hearing, she lived with her grandmother and did not have a job. Jennifer acknowledged knowing that her grandmother had stated that she would force Jennifer to move out if Jennifer violated her probation conditions. Regardless, Jennifer admitted that very recently she had violated her probation conditions by having contact with an individual who was also on probation and with whom she was specifically forbidden to have contact. In the event her grandmother forced her to move out, Jennifer provided little indication of how she would provide a stable living environment, simply stating that she would probably have to go to a

transitional living program home. This and other evidence did not paint a picture of a stable home going forward.

¶32 For these reasons, I conclude that there was no reasonable possibility that reference to the prior voluntary termination, if error, contributed to the outcome.[4]

¶33 Jennifer challenges another statement made by the therapist—that Mercedes had, on a particular occasion, stated that she wanted to stay in her foster placement and be adopted. The therapist stated this when asked to explain why Jennifer and Mercedes' one-on-one "play time" visits had recently ended. The therapist responded that Mercedes had asked to stop attending these visits with Jennifer and at the same time had told the therapist that she wanted to be adopted. In its responsive briefing, the County argues that Jennifer has forfeited any objections to this testimony because she did not object to it at trial. Consistent with this, the record does not reveal a contemporaneous objection. Jennifer did not file a reply brief and, accordingly, does not present an argument disputing the County's contention, nor does she otherwise explain in her opening brief how an objection to this evidence was preserved.[5] Accordingly, I conclude that Jennifer has forfeited any argument regarding this adoption-wish testimony.

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[4] Jennifer highlights as significant that the jury returned a unanimous verdict in "just 20 minutes or so." Jennifer asserts that "[t]his supports the fact that the incredibly prejudicial information … was incredibly sympathy invoking to the point that the jury did not even take the time to thoroughly discuss each question before answering them." Apart from asserting this, Jennifer does not explain how the quickness of the verdict has legal significance. In any event, the quickness is consistent with the jury viewing its decision as clear-cut based on the properly admitted evidence I have summarized.

[5] I note that, at one point earlier in the therapist's testimony, Jennifer lodged "a continuing objection to anything regarding [Mercedes]" during testimony about Mercedes' post-traumatic stress disorder treatment. This general objection was properly overruled for the reasons (continued)

¶34 Further, even if I were to disregard forfeiture, I would nonetheless conclude that this evidence does not support reversal based on a harmless error analysis. As with the voluntary termination information, this information was neither elicited by the County's questioning nor referenced by the County during argument to the jury. And, as explained above, the other evidence of Jennifer's drug use and inability to meet Mercedes' needs, which was the focus of the trial, was compelling. I would, therefore, conclude that any error was harmless.

¶35 Finally, I note that Jennifer may also mean to argue that reversal is warranted based on the discretionary power to reverse in the interest of justice when "it appears from the record that the real controversy has not been fully tried." *See* WIS. STAT. § 752.35. Jennifer does not present a separate discussion on this topic, and the reasons discussed above show that discretionary reversal is not warranted.

Conclusion

¶36 For the reasons discussed, I affirm the circuit court.

By the Court.—Order affirmed.

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

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explained in this opinion, and it was insufficiently specific to stand as an objection to the later adoption-wish testimony.