COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 5, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3591

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

IN RE THE INTEREST OF ASHLEY W.,
A CHILD UNDER THE AGE OF 18:
JOHN H. HEIDE, GUARDIAN AD LITEM,

Petitioner-Respondent,

v.

FRANCIS M.,

Respondent-Appellant.

APPEAL from a judgment and an order of the circuit court for Brown county: WILLIAM M. ATKINSON, Judge. *Affirmed.*

LaROCQUE, J. Francis M. appeals a judgment and an order that involuntarily terminated his parental rights (TPR) to his daughter, Ashley W. (d.o.b. 2/24/92). Francis argues that the trial court erred by admitting evidence of his past sexual misconduct, that the evidence was insufficient for the jury to reach its factual findings, and that the trial court improperly exercised its discretion by failing to dismiss the petition at the dispositonal hearing. Because the trial court did not abuse its discretion when it held that Francis' prior sexual misconduct was relevant to determine whether he had met court imposed conditions for retaining his parental rights and because the evidence was

sufficient to support the factual findings of the jury and the TPR by the trial court, we affirm the judgment and order.

Francis was adjudicated the natural father of Ashley on March 3, 1993. Ashley was placed outside her mother's home in February 1992, more than one year before the parental determination designating Francis as her father was made. Ashley was briefly returned to her mother and placed again in a foster home where she has continued to reside.

Ashley's guardian ad litem filed a TPR petition[1] pursuant to § 48.415(2), STATS.,[2] alleging that Francis failed to demonstrate substantial progress toward meeting the conditions for return of his daughter ordered in a prior CHIPS proceeding. Francis expressed his desire to contest the petition and requested a jury trial on the merits.

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[1] Although an employee of the Brown County Human Services Department signed the petition, the County did not appear by counsel at trial or file a brief.

[2] Section 48.415, STATS., provides in part:

Grounds for termination of parental rights shall be one of the following:

....

(2) Continuing need of protection or services. Continuing need of protection or services may be established by a showing of all of the following:

(a) That the child has been adjudged to be 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, 48.357, 48.363 or 48.365 containing the notice required by s. 48.356 (2).

(b) That the agency responsible for the care of the child and the family has made a diligent effort to provide the services ordered by the court.

(c) That the child has been outside the home for a cumulative total period of one year or longer pursuant to such orders or, if the child had not attained the age of 3 years at the time of the initial order placing the child outside of the home, that the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders; and that the parent has failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.

The conditions imposed upon Francis included the following:

Abstain from any and all criminal activities.

Francis did not comply with this condition because he violated the terms of his probation. Francis was on probation for a 1993 third-degree sexual assault conviction in which he admitted to having intercourse with his developmentally disabled girlfriend without her consent. Francis was incarcerated as a result of his probation violation.

Comply with family court order as to payment of support, birth, and related expenses.

Francis acknowledges that he did not comply with this condition.

Complete an AODA assessment and follow through with any treatment recommendations.

Francis had the assessment but failed to complete the treatment recommendations.

Participate in and complete a parenting program.

Francis did not participate in a parenting program but alleges his failure to do so was a result of his incarceration.

Participate on a weekly basis in a Father's Group Program.

Francis enrolled in the program, missed several sessions and was unable to complete the program because of his incarceration.

Participate in and successfully complete an anger management course.

Francis acknowledges that he did not comply with this condition.

Participate in an assessment to determine if he has treatment issues regarding sexual assaults and follow through with any treatment recommendations.

Francis acknowledges that he did not comply with this condition.

Demonstrate that he is capable of financially supporting Ashley by maintaining an appropriate apartment, having no more than one roommate, seeking employment and demonstrating that he is eligible and receiving public funds sufficient to meet the needs of a small child such as Ashley.

Francis acknowledges that he did not comply with this condition.

The issues for the jury at trial were whether Francis failed to demonstrate substantial progress toward meeting all the conditions for the return of Ashley and whether there was a substantial likelihood that Francis would not meet the conditions within one year after the TPR. The parties stipulated that the other criteria of § 48.415(2), STATS., were met. The court denied Francis' pretrial motion in limine to prevent the jury from hearing any testimony about his past sexual misconduct.[3] The jury found against Francis on both issues.

[3] In addition to the 1993 conviction, Francis was charged and convicted of sexual assault when he was a juvenile for assaulting his two younger sisters. After several months of treatment, he admitted that he had sexual contact with his sister again. Francis also admitted to a social worker that he had sexual feelings about his new girlfriend's young children.

Francis first raises the issue whether his juvenile records should not have been released per § 48.78, STATS., in his reply brief. If an appellant fails to discuss an alleged error in his main brief, he cannot do so in his reply brief. ***In re Estate of Bilsie***, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 n.2 (Ct. App. 1981). However, we note that § 48.35(1)(b)2, STATS., may allow the records to be used as evidence against Francis at the TPR proceeding.

After the jury verdict, the court held a hearing to determine what disposition is in Ashley's best interests.[4] Francis noted that the court had discretion to postpone terminating his parental rights to give him another chance to fulfill the conditions of the juvenile court. The trial court refused to do so and found that it was in Ashley's best interests to terminate Francis' parental rights. Francis appeals on grounds that the court should have excluded evidence about his past sexual misconduct, that insufficient evidence existed to support the jury's verdict, and that the trial court abused its discretion by terminating his parental rights.

Evidentiary determinations are a matter of trial court discretion. ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). This court will uphold a discretionary decision if it can find a reasonable basis for it. ***State v. Kuntz***, 160 Wis.2d 722, 745-46, 467 N.W.2d 531, 540 (1991). To be upheld, a discretionary determination must be reasonable and based upon the facts in the record and the applicable law. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

Section 904.02, STATS., provides that relevant evidence is generally admissible, but that irrelevant evidence is not admissible.[5] Section 904.03, STATS., gives the trial court discretion to exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice ...."

Francis argues that evidence of his prior sexual misconduct is not relevant. The trial court determined that the evidence was relevant because it would be impossible for the members of the jury to determine if Francis was complying with the conditions and the chance Francis had to comply with the conditions in the future if they did not understand Francis' history of sexual misconduct and his progress in that area.

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[4] At the hearing, Ashley's biological mother, Kathy W., expressed her intention to voluntarily terminate her parental rights, on the condition that Francis' parental rights were terminated. A guardian ad litem for Kathy filed a brief in support of the termination of Francis' parental rights. The record indicates that Ashley will likely be adopted by her foster parents.

[5] Section 904.01, STATS., defines relevant evidence as "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."

One condition requires that Francis abstain from any and all criminal activities. Francis' admission that he still has sexual feelings for young children and a long history of sexual assaults provides relevant evidence that there may be a substantial likelihood that he may not be able to comply with this condition. Another condition requires Francis to participate in a sexual assault assessment program and follow through with any treatment recommendations. Knowledge of Francis' history of sexual misconduct helps the jury understand this condition and evaluate Francis' current compliance and chance of following through with the treatment recommendations. The trial court did not abuse its discretion by concluding that the evidence was relevant.

Francis argues that even if the evidence is relevant, the trial court abused its discretion by admitting the evidence because it was unduly prejudicial. Unduly prejudicial evidence is that which threatens the fundamental goals of accuracy and fairness by misleading the jury or influencing the jury to decide the case on an unfair basis. ***State v. DeSantis***, 155 Wis.2d 774, 791-92, 456 N.W.2d 600, 608 (1990). The trial court acknowledged the prejudicial effect of the evidence, but determined that its relevance outweighed the prejudicial effect. We conclude that the trial court did not abuse its discretion because it considered all the necessary facts and its decision to include the evidence was rational. *See* ***Hartung***, 102 Wis.2d at 66, 306 N.W.2d at 20.

Francis also argues that § 906.09, STATS., bars the introduction of his criminal conviction and juvenile adjudications. We reject this argument because § 906.09 governs the introduction of evidence to impeach the credibility of a witness. Francis' criminal conviction and juvenile adjudications were introduced for the purpose of proving the substantive issue regarding his compliance with the conditions, not to impeach his testimony.

We conclude that evidence of Francis' sexual misconduct was properly admitted because the trial court did not abuse its discretion when it determined that the evidence was relevant and not substantially outweighed by danger of unfair prejudice and because Francis did not identify a specific rule that excludes the evidence.[6]

[6] Francis first raises the issue whether § 904.04, STATS., barred the introduction of his sexual

Next, Francis argues that the jury did not have sufficient evidence to reasonably conclude that Francis failed to demonstrate substantial progress toward meeting the conditions for Ashley's return. This court reviews questions of fact under the clearly erroneous standard. ***Racine v. Weisflog***, 165 Wis.2d 184, 190, 477 N.W.2d 326, 329 (Ct. App. 1991); § 805.17(2), STATS. The jury is the ultimate arbiter of credibility, and the appellate court will view the evidence in the light most favorable to the verdict. ***Roach v. Keane***, 73 Wis.2d 524, 536, 243 N.W.2d 508, 515 (1976).

We reject Francis' argument because the record provides ample evidence that he did not make substantial progress toward meeting the conditions. According to a report prepared by an employee of the Brown County Human Services Department two months before trial, Francis failed to comply with his parole rules and regulations, which was a violation of the condition prohibiting him from engaging in criminal conduct. The report also indicated Francis did not complete alcohol and drug treatment, a parenting class, a sex offender treatment program and an anger management course. Further, the report found that Francis failed to prove that he is financially capable of supporting Ashley. We conclude that sufficient evidence supports the jury's finding that Francis failed to make substantial progress toward meeting the conditions.

Francis also notes that his incarceration prevented him from meeting many of the conditions and that he is no longer incarcerated. Despite Francis' release from prison, sufficient evidence supports the jury's conclusion that there was a substantial likelihood Francis would not meet the conditions within one year. A psychologist who evaluated Francis testified that, in his opinion, Francis' personality traits would make it extremely difficult for him to substantially comply with the conditions. The jury could also reasonably infer that Francis would be incapable of financially supporting Ashley because he has a poor work history and has been unable to remain in a residence suitable to raise Ashley. Further, the jury could infer that Francis could be incarcerated again within a year because of his past sexual misconduct and his acknowledgment that he is still sexually attracted to minors.

(..continued)
assault conviction and juvenile adjudications in his reply brief. If an appellant fails to discuss an alleged error in his main brief, he cannot do so in his reply brief. ***In re Estate of Bilsie***, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 n.2 (Ct. App. 1981).

Finally, Francis argues that the trial court erred by improperly exercising its discretion to terminate his parental rights. The trial court held a dispositional hearing pursuant to § 48.427, STATS., after the jury determined that grounds to terminate Francis' parental rights existed. The primary consideration at the dispositional hearing is the best interests of the child. Section 48.426(2), STATS. However, the court must also find that the evidence of the parent's unfitness is so egregious it warranted termination.[7] ***In re K.D.J.***, 163 Wis.2d 90, 103, 470 N.W.2d 914, 920 (1991). Evidence may meet the statutory grounds for dismissal, but still not warrant termination. ***Id.*** In that situation, the trial court has discretion to dismiss the petition. Section 48.424(4), STATS.

According to Francis, the trial court improperly solely relied on the best interests of the child in determining its disposition and failed to find that Francis' conduct was so egregious it warranted termination. At the disposition hearing, the court stated

> At this time, the child has no substantial relationship with her father. In fact, [Ashley] doesn't realize that [Francis] is her father at all. Clearly, this child needs to get into a permanent and stable relationship. There is no hope of that occurring with [Francis].
>
> ....
>
> Even a small likelihood of future placement would provide a better future than what [Francis] could provide for that child. Given his past history, his current condition, there is just no likelihood of him providing a stable environment for this child.

The comments of the court indicate it was convinced Francis' conduct was sufficiently egregious to warrant termination. It would be a waste of judicial resources to send the case back for a specific declaration to that effect. *See* ***K.D.J.***, 163 Wis.2d at 109, 470 N.W.2d at 922.

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[7] The due process clause requires this finding of egregiousness because it would be unconstitutional to break up a family "'for the sole reason that to do so was thought to be in the children's best interest.'" ***In re K.D.J.***, 163 Wis.2d 90, 114, 470 N.W.2d 914, 924 (1991) (*quoting* ***Quillon v. Walcott***, 434 U.S. 246, 255 (1978)).

By the Court. – Judgment and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.