

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

May 24, 1996

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, STATS.

**NOTICE**

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

**No. 96-0843**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

**IN THE INTEREST OF DAVID S.,  
HEATHER S. and ERIC S.,  
CHILDREN UNDER THE AGE OF 18:**

**MARNAE S.,**

**Appellant,**

**v.**

**STATE OF WISCONSIN,**

**Respondent.**

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

SULLIVAN, J. Marnae S. appeals from an order for termination of her parental rights. She presents two issues for review – whether the trial court erroneously exercised its discretion when it admitted photographs into

evidence, and whether it properly instructed the jury.<sup>1</sup> This court rejects her arguments and affirms.<sup>2</sup>

## I. BACKGROUND.

Marnae and David S. are the parents of three children—David, Jr. (born March 21, 1983); Heather (born April 9, 1984); and Eric (born February 23, 1986). David Jr. and Heather were found to be Children in Need of Protection or Services in December 1985. *See* § 48.13(10), STATS. Eric was found to be a Child in Need of Protection or Services in April 1987.

On February 7, 1994, a Petition for Termination of Parental Rights was filed. The parents contested the petition. A jury trial was held on July 24-27, 1995. The jury returned a verdict finding continuing Need of Protection or Services as to all three children, as to each parent. The trial court entered an order terminating the parental rights of both Marnae and David S. Only Marnae S. appeals this order. The children's *guardian ad litem* supports the trial court's order.<sup>3</sup>

## II. ANALYSIS.

Marnae S. first challenges the trial court's admission of photographs during the trial.

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<sup>1</sup> In her reply brief to this court, Marnae S. asks this court, under its discretionary power of review, *see* § 752.35, STATS., to reverse because “the real controversy has not been fully tried.” She argues in her reply brief that there was a miscarriage of justice and that her counsel was ineffective. This court will not review these issues because they were raised for the first time in Marnae S.'s reply brief. *See State v. Foley*, 142 Wis.2d 331, 345 n.7, 417 N.W.2d 920, 927 n.7 (Ct. App. 1987).

<sup>2</sup> This appeal is reviewed by one judge, pursuant to § 752.31, STATS.

<sup>3</sup> We note that the *guardian ad litem* argues that the trial court did not erroneously exercise its discretion in admitting the photographs, nor err in the form of the verdict and instructions.

In September 1985, police and a social worker, James Cox, visited Marnae and David's apartment. Cox testified that the family had just moved from the apartment. The police officer took twelve photographs of the apartment showing its condition. Feces were on the kitchen floors and walls, as well as dried food on the floor and sinks. David S.'s explanation for the apartment's condition was that they (the parents) had "trashed" the apartment due to their landlord's alleged unfair treatment of them.

During the trial, the trial court admitted the photographs, ruling that they were relevant to show why the State became involved with the children. There is no evidence in the record that the photographs were published to the jury. Marnae S. argues that the trial court erroneously exercised its discretion by failing to properly conduct a RULE 904.03, STATS., balancing test.

Whether to admit evidence is a matter within the wide discretion of the trial court, and we will reverse such determinations only upon an erroneous exercise of that discretion. *State v. Evans*, 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of *unfair* prejudice." RULE 904.03, STATS. (emphasis added). Evidence is unfairly prejudicial if it has a tendency to influence the outcome by improper means or if it appeals to a jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise causes the jury to base its decision on something other than the propositions in the case. See *Bittner v. American Honda Motor Co., Inc.*, 194 Wis.2d 122, 147-48, 533 N.W.2d 476, 486 (1995).

While the basis for the trial court's evidentiary ruling is not extensively discussed by the trial court, there is nothing in the record from which this court can conclude that there was an erroneous exercise of discretion. The trial court reasoned that the photographs would assist the jury in understanding the reason for State involvement with the family. Further, although the trial court acknowledged that the evidence was prejudicial, it did not conclude that it was *unfairly* prejudicial. See RULE 904.03, STATS. The record shows a reasoned discretionary decision; hence, there was no erroneous exercise of that discretion. See *State v. Jackson*, 188 Wis.2d 187, 194, 525 N.W.2d 739, 742 (Ct. App. 1994) ("A proper exercise of discretion consists of the court applying

the relevant law to the applicable facts in order to reach a reasonable conclusion.”).

Marnae S. next challenges the trial court's instructions to the jury. She argues that the trial court did not instruct the jury that they should individually consider whether each parent's rights should be determined. She argues the trial court should have charged the jury with the standard instructions. As both the State and the *guardian ad litem* point out, however, Marnae S. never raised this issue at trial. They argue that she waived this issue pursuant to § 805.13(3), STATS.<sup>4</sup>

This court agrees; thus, we will not review the issue. See *State v. Syed Tagi Shah*, 134 Wis.2d 246, 251-52 n.4, 397 N.W.2d 492, 495 n.4 (1986) (failure to object to errors in proposed instructions constitutes waiver even if the instruction misstates the law).

*By the Court.* – Order affirmed.

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

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<sup>4</sup> Section 805.13(3), STATS., states in relevant part:

(3) INSTRUCTION AND VERDICT CONFERENCE. At the close of the evidence and before arguments to the jury, the court shall conduct a conference with counsel outside the presence of the jury. At the conference, or at such earlier time as the court reasonably directs, counsel may file written motions that the court instruct the jury on the law, and submit verdict questions, as set forth in the motions. The court shall inform counsel on the record of its proposed action on the motions and of the instructions and verdict it proposes to submit. Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. *Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.*

(Emphasis added.)