COURT OF APPEALS
DECISION
DATED AND FILED

June 9, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP750 **Cir. Ct. No. 2004TP45**

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

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

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

RODNEY W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Reversed and cause remanded.*

¶1 VERGERONT, J.[1] Rodney W. appeals the circuit court order terminating his parental rights to his child, Rodneeya, born November 11, 1998. Rodney contends the circuit court wrongly deprived him of his right to a jury trial by granting summary judgment in favor of the Department on the grounds alleged for termination—abandonment and failure to assume parental responsibility—without following summary judgment procedure or affording him due process. He also contends the court erroneously exercised its discretion in denying his motion to vacate that judgment.

¶2 We conclude that WIS. STAT. § 802.08, governing summary judgments, does not authorize the procedure used in this case to determine grounds for termination when Rodney did not appear for jury selection. We also conclude that the procedure used was not authorized by other statutes, given that Rodney's counsel did appear and that Rodney violated no court order in not appearing. Finally, we conclude the error was not harmless. We therefore reverse the order terminating Rodney's parental rights and remand for further proceedings. Because of this ruling, it is unnecessary to address the court's order denying Rodney's motion to vacate the summary judgment.

BACKGROUND

¶3 On June 22, 2004, the Rock County Human Services Department petitioned to terminate the parental rights of both Rodney and Rodneeya's mother to their child. Concerning Rodney, the petition alleged that he had abandoned the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

child within the meaning of WIS. STAT. § 48.415(1)(a)2 and 3[2] in that he had not had any contact with the child since at least July 17, 2003, and did not have good

[2] WISCONSIN STAT. § 48.415(1)(a)2 and 3 provide:

> **(1)** ABANDONMENT. (a) Abandonment, which, subject to par. (c), shall be established by proving any of the following:
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> ….
>
> 2. That the child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by s. 48.356 (2) or 938.356 (2) and the parent has failed to visit or communicate with the child for a period of 3 months or longer.
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> 3. The child has been left by the parent with any person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of 6 months or longer.
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> (b) Incidental contact between parent and child shall not preclude the court from finding that the parent has failed to visit or communicate with the child under par. (a) 2. or 3. The time periods under par. (a) 2. or 3. shall not include any periods during which the parent has been prohibited by judicial order from visiting or communicating with the child.
>
> (c) Abandonment is not established under par. (a) 2. or 3. if the parent proves all of the following by a preponderance of the evidence:
>
> 1. That the parent had good cause for having failed to visit with the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.
>
> 2. That the parent had good cause for having failed to communicate with the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.
>
> 3. If the parent proves good cause under subd. 2., including good cause based on evidence that the child's age or condition would have rendered any communication with the child meaningless, that one of the following occurred:

(continued)

cause for the lack of contact. The petition also alleged that Rodney had failed to assume parental responsibility within the meaning of § 48.415(6).[3] Both parents appeared without counsel at the initial appearance on July 12, and the court instructed them how to obtain counsel. Rodney appeared with counsel on July 26, 2004, entered a denial to the petition's allegations concerning him, and requested a jury trial.[4] The child's mother did not appear and the court entered a default

> a. The parent communicated about the child with the person or persons who had physical custody of the child during the time period specified in par. (a) 2. or 3., whichever is applicable, or, if par. (a) 2. is applicable, with the agency responsible for the care of the child during the time period specified in par. (a) 2.
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> b. The parent had good cause for having failed to communicate about the child with the person or persons who had physical custody of the child or the agency responsible for the care of the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.

[3] WISCONSIN STAT. § 48.415(6) provides:

> **(6)** FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have never had a substantial parental relationship with the child.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

[4] WISCONSIN STAT. § 48.422(4) provides that "[a]ny party who is necessary to the proceeding or whose rights may be affected by an order terminating parental rights shall be granted a jury trial upon request if the request is made before the end of the initial hearing on the petition."

concerning her. The court set the date of October 4 at 10:00 a.m. for jury selection and stated the trial would be held on October 6 and 7.

¶4 On October 4, 2004, Department counsel and Rodney's counsel appeared, but not Rodney. Department counsel asked that the court schedule the trial for October 25 as trial number 2; Rodney's counsel stated he was agreeable with that. Department counsel explained that Rodney had been excluded as the father of another child of Rodneeya's mother, whose case was going to be tried at the same time as Rodneeya's case but now would not be. The court stated that jury selection would occur on October 25 at 10:00 a.m. as the number 2 trial. Rodney's counsel stated that he had had discussions with Rodney and "I would expect him to be present for a jury selection."

¶5 The court sent out a notice on October 4, 2004, stating that jury selection was scheduled for 10:00 a.m. on October 25, 2004, and the jury trial would take place on October 27-28, 9:30 a.m. The notice was sent to Rodney's counsel, but not to Rodney personally.

¶6 On October 13, 2004, the Department filed a motion for summary judgment stating that if Rodney did not appear for jury selection on October 25, 2004, at 10:00 a.m., the Department, by its counsel, would appear and move the court for summary judgment in favor of the Department. The motion referred only to the ground of abandonment alleged in the petition, not to the ground of failure to assume parental responsibility. An accompanying motion stated if Rodney did not appear at that time, the Department would move for an order modifying the

time requirements of WIS. STAT. § 802.08.[5] The attached affidavit of a social worker for the Department, Sandra Gray, averred that Rodney met with her on July 7, 2003, and attended visitation with his child on July 10, 17, and 31, 2003, but had no further contact with his child since July 31, 2004. Gray averred that between August 1, 2003, and the date of the filing of the petition, Rodney did not contact her, did not leave voice mail messages, and never explained why he did not attend visitations with his child after July 31, 2003.

¶7 When court convened on October 25, 2004, at 10:15 a.m., Rodney was not present; his counsel was. The Department asked the court to grant its motion for summary judgment on abandonment grounds. Rodney's counsel asked that the court not enter an order for default or for summary judgment but instead set the matter for the next available trial date. Rodney's counsel stated that Rodney had shown up a day late the last time the matter was set for trial and did talk to him about the summary judgment motion and said he could provide information that would raise an issue regarding whether he had abandoned his child and whether there was good cause for him not having contact with his child. In response to the court's question, counsel said that he had sent Rodney a letter notifying him of that day's trial date.

¶8 The court took up the summary judgment motion. It concluded that, because nothing controverted Gray's affidavit, the Department was entitled to

[5] WISCONSIN STAT. § 802.08(2) provides that "[u]nless earlier times are specified in the scheduling order, the motion shall be served at least 20 days before the time fixed for the hearing and the adverse party shall serve opposing affidavits, if any, at least 5 days before the time fixed for the hearing."

summary judgment. The matter was then set for a dispositional hearing on December 3, 2004.

¶9 On November 23, 2004, Rodney, through counsel, filed a motion to vacate the summary judgment. The motion stated: Rodney appeared at 1:30 p.m. on October 25, 2004; "[o]n information and belief, he made contact with Bailiff Bliss at that time"; Rodney informed counsel he thought he was to appear at 1:30 p.m., not 10:00 a.m.; and he contacted counsel shortly after the missed court appearance. The motion also stated that Rodney had informed counsel there was a factual dispute to be resolved by a jury because he did try to contact the Human Services Department between August 1, 2003 and June 22, 2004, but did not get a response from the Department and gave up; he did not have the money to hire an attorney and advocate for his rights. The motion asserted that Rodney's failure to show up constituted excusable neglect and that the summary judgment motion was held in less than twenty days from the filing of the motion, contrary to WIS. STAT. § 802.08(2).

¶10 The disposition hearing was held on December 17, 2004. Rodney appeared with his counsel, who asked the court to first address the motion to vacate the summary judgment. Counsel asked that the court allow Rodney to testify and provided the court and opposing party with Rodney's affidavit. In his affidavit, Rodney averred as follows: after July 31, 2003, he wanted his visits with his child to occur separately from her mother's visits because her mother got upset with his girlfriend during the visits; he called the Department to try to get such visits, but no one returned his calls; he gave up; he did not have the money to hire an attorney; he feels there was good cause for not having visits with his child after July 31, 2003: he appeared on October 25 at 1:30 p.m.; he thought court had

been scheduled for that time; and the bailiff saw him outside the court room at that time.

¶11 After reading Rodney's affidavit, the court heard argument from his counsel and the Department's counsel. The Department's counsel conceded that Rodney's affidavit set forth facts conflicting with Gray's affidavit but asserted that the affidavit was filed too late and asked the court not to vacate the summary judgment.

¶12 The court denied Rodney's motion to vacate. The court first determined there was no excusable neglect. The court found that on October 4, when the October 25 date and time was set, Rodney was not present, and there is no indication in the file that a notice went directly to him of the October 25 date, but it was nonetheless incumbent on him to make an appearance on a timely basis and he did not do that on October 25. The court stated that 1:30 p.m. on Mondays, when Rodney appeared, is the time the court schedules CHIPS[6] and TPR[7] appearances on a routine basis and Rodney would have made his other appearances at that time. However, the court stated, that was "just by luck or happenstance" and was not a basis for excusable neglect. The court noted that "[i]f the jury would have been here or if we had needed to pick a jury at that time, he would not have made his appearance."

¶13 The court then determined that the summary judgment was properly granted because the Department had filed a motion to reduce the twenty-day-

[6] CHIPS is the acronym for "child in need of protection or services" in chapter 48 of the Wisconsin Children's Code.

[7] TPR is the acronym for termination of parental rights.

minimum time period in the statute from the time of the motion to the hearing on the motion; the motion was filed thirteen days before it was heard; and there was no affidavit timely filed to controvert Gray's affidavit.

¶14 At the dispositional hearing that followed, the court heard testimony about Rodney's relationship with his daughter, as well as other testimony bearing on her best interests. On the issue of Rodney's contacts with his daughter and with the Department, Lee Ann Petersen, a social worker with the Department, testified as follows. She supervised Rodney's visits with his daughter; she did not observe him to behave inappropriately during the visits; and his daughter appeared happy to see him. She recalled that there was a conflict about the visitation because Rodneeya's mother did not want Rodney's girlfriend to be at the visitations, and Rodney asked to see his daughter separately from her mother. She testified: "We had phone contact for a few times after that and then I didn't ever hear from him again." In her discussions with Rodney, he appeared to be interested in having contact with his daughter.

¶15 Rodney testified as follows. He had lived in the same household with his child for a few months before the CHIPS proceedings. He was subsequently living in Georgia and returned by bus for visits with his child. He asked the social worker for visits separate from the child's mother because of "negative stuff" between the mother and his girlfriend. He traveled to Rock County two to three times to talk about the problem, but no separate visits were established, and he did not have enough money to hire an attorney to help him. He felt the social workers did not help him have visits with his daughter. He loved his daughter; he did not want his parental rights to be terminated; he would visit her if his parental rights were not terminated; and he wanted to be allowed to work toward getting her back.

¶16 The court decided that grounds existed to terminate Rodney's parental rights for abandonment and failure to assume parental responsibility, that he was unfit, and that it was in the child's best interests to terminate his parental rights. The court stated that the facts set forth in the petition and the reports "in and of themselves set forth clear and convincing evidence that facts do exist to get to a dispositional hearing, where we are today, if we were to have a trial"; and the court "reaffirm[ed] the findings [it] made concerning default [by Rodney]…." The court also terminated the parental rights of Rodneeya's mother.

ANALYSIS

¶17 On appeal, Rodney challenges the court's order granting summary judgment on the ground that it did not comply with the notice provisions in the summary judgment statute or with due process and was used in violation of the admonitions in ***Steven V. v. Kelley H.***, 2004 WI 47, ¶5, 271 Wis. 2d 1, 678 N.W.2d 856. The issues Rodney raises present questions of law, which we review de novo. *See* ***id.***, ¶20. Although our analysis differs somewhat from Rodney's, we agree that the procedure the Department used, which the court accepted, is not authorized by WIS. STAT. § 802.08.

¶18 Summary judgment procedure, established in WIS. STAT. § 802.08, is a method for determining whether there are disputed issues of fact that necessitate a trial. ***Maynard v. Port Publications, Inc.***, 98 Wis. 2d 555, 562, 297 N.W.2d 500. In ***Steven V.***, the court held that neither the TPR statutes nor the requirements of due process preclude the use of summary judgment procedure in TPR cases at the unfitness stage—that is, the first stage, at which the petitioner must prove by clear and convincing evidence that one or more of the statutorily

enumerated grounds for termination of parental rights exits. 271 Wis. 2d 1, ¶¶23, 33, and 44. The court stated:

> Summary judgment is a legal conclusion by the court, and, if carefully administered with due regard for the importance of the rights at stake and the applicable legal standards, is just as appropriate in the unfitness phase of a TPR case where the facts are undisputed as it is in any other type of civil action or proceeding which carries the right to a jury trial. Summary judgment procedure requires notice, an opportunity to respond, and a hearing, and imposes on the moving party the burden of demonstrating both the absence of any genuine factual disputes and entitlement to judgment as a matter of law under the legal standards applicable to the claim. Wis. Stat. § 802.08(2) and (3).

Id., ¶35 (footnote omitted). The court observed that certain statutory grounds might typically lend themselves to summary judgment because they involve proof of government documentary evidence—e.g., continuing denial of periods of physical placement or visitation, provable by a court order, WIS. STAT. § 48.415(8)—and other grounds might typically involve factual disputes because the grounds involve adjudication of the parent's conduct vis-a-vis the child—e.g., abandonment, § 48.415(1), and failure to assume parental responsibility, § 48.415(6). ***Id.***, ¶¶36, 37. However, the court emphasized, whether summary judgment is proper is to be determined on a case-by-case basis. ***Id.***, ¶37 n.4. There is thus no question, as Rodney recognizes, that summary judgment may be appropriate where the petition alleges, as here, abandonment and failure to assume parental responsibility.

¶19 However, the Department's motion for summary judgment in this case was conditioned on Rodney not appearing for jury selection. The premise of the motion, then, was not that a trial was unnecessary because Rodney would not be able to present facts that would controvert those in Gray's affidavit; but, rather,

that if Rodney did not appear for jury selection, judgment should be entered in the Department's favor based on Gray's affidavit. WISCONSIN STAT. § 802.08 does not provide for this procedure. Although the motion was described as a summary judgment motion, it was in effect a motion for a sanction if Rodney did not appear—the sanction being that he would have no opportunity for the jury trial he had requested and, instead, entry of a determination of abandonment would be entered based on Gray's affidavit.

¶20 The Department's filing of this "conditional" summary judgment motion put the proceedings on the wrong track when Rodney did not appear at 10:00 a.m. on October 25 for jury selection. The court should have taken up Rodney's counsel's request for a continuance, within the framework of WIS. STAT. § 48.315(2), which requires that extensions beyond the time requirements in the chapter may be granted only upon a showing of good cause and in open court.[8] If the court in the proper exercise of its discretion decided that there was not good cause to postpone jury selection to a later date, perhaps it might have decided that a short delay to give counsel the opportunity to attempt to contact Rodney would have been appropriate. In any case, if the court decided in the proper exercise of its discretion that there was no good cause and jury selection should begin as scheduled, that is what should have happened. We observe that, had this latter scenario occurred, since the trial itself was not scheduled to occur until October 27, there would have been an opportunity for Rodney's counsel to contact Rodney before the jury trial began.

[8] WISCONSIN STAT. § 48.422(2) requires that the fact-finding hearing be held within forty-five days of the initial hearing. The court had found good cause for continuing the October 4th date until October 25th.

¶21 However, instead of either delaying, continuing, or going ahead with jury selection, the court granted the Department's motion for summary judgment based on Gray's affidavit. The Department argues that this was proper because Rodney had notice of its motion for summary judgment through his counsel and thus could have submitted an affidavit to controvert Gray's. However, because of the conditional nature of the motion, if Rodney planned on appearing for the jury selection, as his later affidavit says he did, there would be no need to file an affidavit in opposition to Gray's. In addition, the Department's position that Rodney could have filed an affidavit to avoid summary judgment is at odds with the fact that jury selection and a jury trial were already scheduled. Plainly, the Department does not mean that its motion gave Rodney the option of either appearing ready for trial on October 25 or, instead, filing an affidavit in opposition to Gray's and having the trial at some other time. In any event, under WIS. STAT. § 48.315(2) the trial could not be postponed without the court's finding in open court that there was good cause for doing so.

¶22 As we have stated above, the effect of the summary judgment in this context was a sanction for Rodney's failure to appear for jury selection. Of course, a court does in certain circumstances have the authority to sanction a party for a failure to appear, and that authority also exists in TPR proceedings. *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶17, 246 Wis. 2d 1, 629 N.W.2d 768. For example, if a defendant does not appear at a trial, a default judgment may be entered against the defendant. WIS. STAT. § 806.02(5). However, this does not apply when the defendant's counsel appears, because that constitutes an appearance of the defendant. ***Evelyn C.R.***, 246 Wis. 2d 1, ¶17. Another example

is when a party has been ordered to appear; in that case the court has both inherent authority and authority under WIS. STAT. §§ 802.10(7), 804.12(2)(a), and 805.03[9] to sanction the party. 246 Wis. 2d 1, ¶17. Sanctions in such situations may include entering an order that certain designated facts are established or that the disobedient party may not support or oppose designated claims. ***Id.***; WIS. STAT. § 804.12(2)(a)1 and 2. However, in this case, the Department does not refer us to

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[9] WISCONSIN STAT. § 802.10(7) provides:

> SANCTIONS. Violations of a scheduling or pretrial order are subject to ss. 802.05, 804.12 and 805.03.

WISCONSIN STAT. § 804.12(2)(a)1 and 2 provide:

> **(2)** FAILURE TO COMPLY WITH ORDER.
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> (a) If a party or an officer, director, or managing agent of a party or a person designated under s. 804.05 (2) (e) or 804.06 (1) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under sub. (1) or s. 804.10, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
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> 1. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
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> 2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

WISCONSIN STAT. § 805.03 provides:

> **Failure to prosecute or comply with procedure statutes**. For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12 (2) (a).

any order that Rodney appear at jury selection on October 25 at 10:00 a.m., and we have located none.[10]

¶23 We conclude that WIS. STAT. § 802.08 does not authorize the court to determine that there are grounds for termination based on Gray's affidavit solely because Rodney did not appear at the scheduled jury selection. Given that Rodney's counsel did appear and that there was no order that Rodney personally appear, we are aware of no other statute or case law authority that would authorize the court to do what it did. We therefore conclude the court erred in granting the Department's motion based on Gray's affidavit.[11] We next consider whether this error was harmless.

¶24 The supreme court has applied a harmless error analysis in TPR proceedings: ***Evelyn C.R.***, 246 Wis. 2d 1, ¶¶27-35, and ***Waukesha County v. Steven H.***, 2000 WI 28, ¶4, 233 Wis. 2d 344, 607 N.W.2d 607. In ***Evelyn C.R.***, the parent did not appear at a fact finding as ordered and the circuit court granted a determination of abandonment based on the allegations of the petition. ***Id.***, ¶9. The parent did not challenge the propriety of the court's sanction based on her conduct, ***id.***, ¶26, but did contend that the court nonetheless had the duty under WIS. STAT. ch. 48 and the Fourteenth Amendment to take evidence establishing the ground by clear and convincing evidence. ***Id.***, ¶¶25-26. The supreme court

[10] We also observe, that for the imposition of the severe sanctions of dismissal of a plaintiff's case or not allowing a defendant to put in evidence, the court must find that the disobedient party's conduct was egregious. *See* ***Smith v. Golde***, 224 Wis. 2d 518, 526, 592 N.W.2d 287 (Ct. App. 1999).

[11] Because we conclude that WIS. STAT. § 802.08 does not authorize this procedure, we do not decide whether, as Rodney contends, the court lacked authority to allow the Department's motion to be heard on less than twenty days' notice.

agreed that the circuit court erred; however it found the error was harmless because at the disposition hearing the circuit court took evidence sufficient to support a determination of abandonment and weighed the facts prior to reaffirming the determination of abandonment. ***Id.***, ¶¶32-35.

¶25 In ***Steven H.***, the supreme court concluded that the circuit court erred in not taking testimony on the allegations of the petition when the parent did not contest them but did not admit them. However, the supreme court concluded the parent was not prejudiced because evidence at other hearings provided a factual basis for the allegations in the petition, and it therefore affirmed. 233 Wis. 2d 344, ¶¶56-59.

¶26 This case differs from both ***Evelyn C.R.*** and ***Steven H.*** because Rodney is contending that the circuit court erred in precluding him from having a jury trial. In those cases, in contrast, the circuit court's error was failing to take evidence for its own determination of unfitness after a correct decision that the parent had no right to a trial—either because a default judgment against the parent was properly granted (***Evelyn C.R.***) or the parent did not contest the petition (***Steven H.***). A sufficient evidentiary basis for the determination of unfitness therefore made that circuit court error harmless in those cases.

¶27 It is true that the circuit court in this case heard Rodney's testimony on his efforts to arrange visitation with his daughter at the disposition hearing and "reaffirmed the findings [the court] made concerning default on [Rodney]." We understand the court to mean either that it did not credit Rodney's explanations of his efforts to obtain separate visitation or that it found his efforts did not constitute good cause for failing to visit under WIS. STAT. § 48.415(1) or he did not have a substantial parental relationship under § 48.415(6). While these findings are

supported by the evidence, we cannot say that no reasonable fact finder could determine otherwise. Thus, we cannot say that the court's factual determinations based on testimony at the deposition hearing made the court's error harmless—the error being the failure to either delay, continue, or go ahead with jury selection, and instead granting the Department's motion for summary judgment based on Gray's affidavit. Accordingly, we conclude the court's order terminating Rodney's parental rights must be reversed.

By the Court.—Order reversed and cause remanded.

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