COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1040 **Cir. Ct. No. 2004TP75**

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

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ERIC A.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed.*

¶1 DEININGER, P.J.[1] Eric A. appeals an order that terminated his parental rights to his five-year-old daughter. Eric claims the trial court erred in denying his motion for a mistrial after the child's guardian ad litem made allegedly improper statements in her closing argument to the jury. We conclude that the circuit court did not erroneously exercise its discretion in denying Eric's motion for a mistrial. Accordingly, we affirm.

BACKGROUND

¶2 The Dane County Department of Human Services filed a petition to terminate Eric's parental rights to his daughter after the child had been placed outside the parental home for more than a year under a CHIPS[2] order. *See* WIS. STAT. § 48.415(2). The case was tried to a jury over five days. The jury concluded, with two dissents, that the grounds for termination under § 48.415(2), continuing need for protection or services, had been established.

¶3 During her closing argument to jurors, the child's guardian ad litem said, among other things, the following:

> …[T]his case was about having Jennifer go back to her dad, to live with her dad, that that's what this was all about…. These are Eric A[]'s conditions of return so that Jennifer can come home to him.
>
> [Reviews conditions from CHIPS order and evidence regarding Eric's failure to meet them, concluding that "eight conditions of return were not met."]

[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.

[2] Child In need of Protection or Services. *See* WIS. STAT. § 48.13.

> I was going to take some construction paper and make 13 different little sets of glasses and put a picture of a child on the lenses so that you could look at this case through Jennifer's eyes, but I ran out of construction paper so I can't do that. *But I would ask you to look at this case through Jennifer's eyes.* This is her father. Who has been the obstacle for this case going forward through Jennifer's eyes? Her father. He has not met the conditions of return. Despite the fact that the Court ordered certain things for the Department of Human Services to do and they did them, he still has not met those conditions of return.
>
> ….
>
> *If you were Jennifer* and you're waiting to see your dad, and your dad is involved in a TV program and comes late, *what is your conclusion as to how that affects Jennifer*? Or the other example [Eric] gave in terms of why he was late to so many things was that he was involved on his computer. *What message is that to Jennifer?*

(Emphasis added.)

¶4 Eric's counsel immediately moved for a mistrial, arguing that the guardian ad litem had "told the jury twice to think about how Jennifer would view this case. That's inflammatory and it's illegal." The court directed the attorneys to continue with their closing arguments, and it addressed the motion after the jury had retired to deliberate.

¶5 The court reviewed a transcript of the guardian ad litem's argument and discussed the context within which the challenged comments were made. The court concluded that it could not "find any one of those comments in and of themself grounds for a mistrial and I really can't find them taken as a whole sufficient to state that on the strength of this record to date we have to have another trial because Eric has been denied a fair trial due to the guardian ad litem's closing statements." The court denied the motion for a mistrial.

¶6 At a subsequent dispositional hearing, the court concluded that terminating Eric's parental rights was in his daughter's best interest and entered an order terminating his parental rights. Eric appeals, citing as his only claim of error the circuit court's failure to grant a mistrial.[3]

ANALYSIS

¶7 Whether to grant a mistrial is a matter for the trial court's discretion, and we accord great deference to a trial court's decision on a motion for mistrial. *See* ***State v. Foy***, 206 Wis. 2d 629, 644, 557 N.W.2d 494 (Ct. App. 1996). We review discretionary decisions to determine whether the trial court examined the relevant factors, applied the appropriate standard of law and engaged in a rational decision-making process. *See* ***id.***

¶8 The parties seemingly agree that the supreme court's discussion and holding in ***Waukesha County Dep't of Social Serv. v. C.E.W.***, 124 Wis. 2d 47, 368 N.W.2d 47 (1985), is central to the claim of error in this case. The court concluded in ***C.E.W.*** "that at the fact finding stage, the fact finder—here the jury—does not consider the best interests of the child standard." ***Id.*** at 61. The court went on to explain that a guardian ad litem for children whose rights are sought to be terminated may participate fully in the fact-finding proceedings, and specifically, that the guardian ad litem "has a right … to argue the facts to the jury at the fact finding stage." ***Id.*** at 70. The supreme court, however, added the

[3] The department also petitioned to terminate the parental rights of the child's mother. She chose to voluntarily terminate her rights. The termination of only Eric's parental rights are before us in this appeal.

following caveat: "The guardian ad litem cannot, of course, invoke the best interests of the child in statements to the jury." ***Id.***

¶9 Eric argues that his daughter's guardian ad litem invoked the best interests of the child when she asked jurors to "look at this case through Jennifer's eyes," and when she asked jurors to consider how Eric's actions affected Jennifer. These comments, in Eric's view, warranted a mistrial.

¶10 Eric implicitly contends that any argument "invoking the best interests of the child" before the jury in a termination of parental rights fact-finding proceeding is grounds for a mistrial. The supreme court did not say that in ***C.E.W.***, however. The question was not before the court in that case. Nonetheless, because the department does not argue otherwise, we will assume without deciding that, if the guardian ad litem "invoke[d] the best interests of the child in statements to the jury," ***C.E.W.***, 124 Wis. 2d at 70, a mistrial should have been granted. We conclude, however, that the circuit court did not erroneously exercise its discretion in determining that, taken in the context of her entire argument, the guardian ad litem did *not* "invoke the best interests of the child" in her statements to the jury.

¶11 We have previously considered whether a guardian ad litem's references to the "best interests of the child" during argument in a TPR trial constituted grounds for ordering a new trial. *See* ***Door County Dep't of Health & Family Serv. v. Scott S.***, 230 Wis. 2d 460, 467-68, 602 N.W.2d 167 (Ct. App. 1999). In that case, the guardian ad litem told jurors that the guardian ad litem believed "in the best interests of that little girl Kristeena, that she is entitled to have you look very carefully and answer—these questions in the way that is absolutely clear from the testimony today." ***Id.*** at 468. In closing argument, the

guardian ad litem told jurors that he was "here because my mission is to try to protect Kristeena's … best interests, to try and help you understand what is in the best interests of Kristeena …." ***Id***. Although we expressly did not decide whether the guardian ad litem's language violated the ***C.E.W.*** rule, we did comment that any error was not prejudicial. ***Id.*** We said this:

> Only when the court or the GAL instruct the jury that it should consider the best interests of the child is there reversible error. Here the GAL did nothing to imply that the jury should consider the child's best interests in reviewing the evidence, but rather that her best interests require the jury to answer the questions from the evidence…. Therefore, we believe the GAL's reference to the best interests of the child was harmless and does not make the result unreliable.

Id. at 469 (citation omitted).

¶12 In this case, as in ***Scott S.***, the guardian ad litem did not ask the jury, either expressly or implicitly, to reach its verdict based on its view of the child's best interests.[4] We agree with the trial court's determination that the guardian ad litem's request that jurors view some of Eric's actions "through the child's eyes," or to consider their effect on or message to Jennifer, was the guardian ad litem's way of emphasizing the significant failures on Eric's part to meet the conditions for the return of the child to his home. The guardian ad litem apparently felt the need to emphasize the significance or Eric's shortcomings

[4] Unlike in ***Scott S.***, the guardian ad litem in this case made no reference whatsoever to "the best interests of the child." Eric argues in his reply brief that we may not conclude that the "best interests of the child" standard was not invoked solely on the basis that the guardian ad litem did not use those specific words. We agree with Eric that, if "a fair reading of the argument invokes the best interests' standard, then the argument should be deemed improper." Our conclusion is that a "fair reading" of the challenged comments requires that they be viewed in context, not in isolation, and that when so viewed, they cannot be fairly read to invoke the standard.

because she perceived that Eric had attempted to minimize them in his testimony. Immediately after asking jurors to "look at this case through Jennifer's eyes," the guardian ad litem noted that "Eric testified he didn't think he needed to do any of that…. He didn't think he had any deficiencies that the Department could help him with in terms of being a better parent."

¶13 We thus reject Eric's contention that, "[b]y invoking Jennifer's point of view," the guardian ad litem asked it to apply the best interests of the child standard in reaching its verdict. Before making the challenged comments, the guardian ad litem listed the various conditions for Jennifer's return to the parental home and stated her view that the evidence "shows clearly that one, two, three, four, five, six, seven, eight conditions of return were not met." Then, following the challenged comments, the guardian ad litem cited the evidence of Eric's personality disorder and his unstable living arrangements, urging jurors to infer that he would be unable to meet the conditions for return within the next twelve months. She concluded by asking jurors to "consider every piece of evidence that you have heard very carefully."

¶14 We conclude the trial court did not err in determining that the guardian ad litem's closing argument to the jury, when viewed in its entirety, did not provide grounds for a mistrial. In the context of the argument that preceded and followed the challenged comments, those comments may easily be read, as the trial court read them, as a caution to jurors not to minimize the significance of Eric's actions and omissions when deciding whether he had met the conditions for the child's return. In short, the guardian ad litem's request for jurors to view the case "through Jennifer's eyes," and her two references to how Eric's actions might have affected Jennifer or what message it may have sent to her, did not violate the

supreme court's directive that a guardian ad litem "cannot … invoke the best interests of the child in statements to the jury." ***C.E.W.***, 124 Wis. 2d at 70.

¶15 The circuit court ruled on the mistrial motion before jurors had rendered their verdict. We and the parties now have the benefit of that verdict, and Eric argues that this was a close case, as evidenced in part by the fact that there were two dissenting jurors.[5] He does not, however, argue that there was insufficient evidence to support the jury's answers to the verdict questions, or that the jury instructions or verdict form referred to or somehow suggested that jurors should consider the "best interests of the child." Because we conclude that the guardian ad litem's comments in this case did not violate the directive in ***C.E.W.***, and because Eric cites no other error, we do not address the impact, if any, that the challenged comments may have had on the outcome of the trial.

¶16 In sum, we conclude that the circuit court did not erroneously exercise its discretion when it determined that the guardian ad litem's comments, taken in context, addressed "the issue of putting [Eric's] needs ahead of her needs." The guardian ad litem did not invoke the best interests of the child standard or request jurors to render a decision based on it. We thus affirm the

[5] We note that the two jurors specifically dissented to only one of the questions on the verdict, the second, which asked whether the Dane County Department of Human Services had made "a reasonable effort to provide the services ordered by the court." The two dissenting jurors did not participate in answering the remaining two questions, which were the questions to which the guardian ad litem addressed the challenged comments (whether Eric had failed to meet the conditions established for the child' return to his home, and whether there was a substantial likelihood that Eric would not meet the conditions within the next twelve months). We cannot know whether the dissenters would have joined or dissented from the "yes" answers to these questions that were agreed to by the remaining ten jurors. The existence of the dissents thus provides little insight into the jury's perception of the weight of the evidence supporting its answers to questions three and four of the verdict.

court's determination that the guardian ad litem's comments, either individually or taken as a whole, did not result in Eric having been denied a fair trial.

CONCLUSION

¶17 For the reasons discussed above, we affirm the appealed order.

By the Court.—Order affirmed.

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