COURT OF APPEALS
DECISION
DATED AND FILED

June 13, 2017

Diane M. Fremgen
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 Nos. 2017AP558
2017AP559

Cir. Ct. Nos. 2015TP342
2015TP343

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO B.M.R., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

F. J. R.,

RESPONDENT-APPELLANT.

IN RE THE TERMINATION OF PARENTAL RIGHTS TO B.H.T., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

F. J. R.,

RESPONDENT-APPELLANT.

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

¶1 BRASH, J.[1] F.J.R. appeals an order terminating her parental rights for two of her biological children, B.M.R. and B.H.T. She argues that the trial court did not appropriately instruct the jury regarding the suspension of a visitation order issued by the court with regard to B.M.R., and seeks to vacate the termination of parental rights order for both children. We affirm.

BACKGROUND

¶2 B.M.R., born September 26, 2011, and B.H.T., born June 21, 2013, are the biological children of F.J.R. B.M.R. was removed from the home of F.J.R. in April of 2013 by the Bureau of Milwaukee Child Welfare (BMCW)[2] due to the lack of an adult in the home who was capable and willing to perform parental duties. A.T., the adjudicated father of the children, also lived in the home at the time; he and F.J.R. had a history of domestic violence incidents, which were witnessed by the children.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The Bureau of Milwaukee Child Welfare (BMCW) has since been renamed The Division of Milwaukee Child Protective Services. Since the agency was still the BMCW at the time of these proceedings, all references will be to the BMCW.

¶3 At the time B.M.R. was removed from the home, F.J.R. was approximately six months pregnant with B.H.T. F.J.R. consumed significant amounts of alcohol on a daily basis, which the BMCW advised her was negatively affecting her ability to assume parental responsibilities. Both F.J.R.'s and A.T.'s behavior was stated on the Order for Temporary Physical Custody as being "dangerously impulsive." Furthermore, F.J.R. had a history known to the BMCW because three of her older children had previously been temporarily removed from her home under Children in Need of Protection or Services (CHIPS) orders, and her parental rights had been terminated in March of 2009 for her oldest child. Additionally, B.H.T. was removed from the home shortly after her birth. Overall, there were at least twenty referrals to child welfare authorities relating to F.J.R. and her children, dating back to 2006.

¶4 CHIPS orders for both B.M.R. and B.H.T. were entered on August 13, 2013, based on the "severe mental health and substance abuse issues" of F.J.R. The CHIPS orders included, among other conditions, provisions for establishing visitation plans with both children. The orders were both initially set to expire on April 23, 2015, but were both extended to April 23, 2016.

¶5 Under the CHIPS orders, F.J.R. received services relating to domestic violence, alcohol treatment, therapy for behavioral issues, and parenting assistance. B.M.R. also received therapy during this time for "extremely disruptive and violent behaviors," which were observed by her therapists and included self-harm as well as sexualized conduct indicative of sexual abuse.

¶6 Petitions for the Termination of Parental Rights (TPR) for B.M.R. and B.H.T. were filed on December 17, 2015. In the petitions, the State alleged two grounds for termination: (1) continuing need of protection and services,

pursuant to WIS. STAT. § 48.415(2); and (2) failure to assume parental responsibility, pursuant to WIS. STAT. § 48.415(6). The case was initially set for trial for May 2016.

¶7 While these TPR petitions were pending, the State filed a motion in February 2016 to temporarily suspend visitation between F.J.R. and B.M.R. only, on the grounds that B.M.R.'s behavioral issues increased both before and after her visits with F.J.R. In fact, B.M.R.'s behavior problems had escalated to the point where she was involuntarily hospitalized in December 2015.

¶8 At a hearing on March 22, 2016, regarding the State's motion, the State proposed changing the supervised visitation between F.J.R. and B.M.R. to therapeutic visits, where a therapist is present to supervise the visits. The trial court subsequently ordered therapeutic visits in addition to the supervised visitation. However, after several therapeutic visits, B.M.R.'s therapist advised the court that it was in the best interest of B.M.R. that all visits with F.J.R. be temporarily suspended in an attempt to determine the cause of B.M.R.'s disruptive and violent behavior before and after these visits. As a result, the court, on May 3, 2016, ordered that all visits between F.J.R. and B.M.R. be temporarily suspended due to B.M.R.'s escalating behavior issues.

¶9 This matter proceeded to trial on August 29, 2016. At the time the trial court was instructing the jury prior to deliberations, it included an instruction relating to parental visitation; specifically, the instruction stated that the rights of parents to visit their children who are the subject of a TPR petition can be suspended or limited by court order. The trial court further instructed the jury not to take into consideration a suspension or limitation of visitation, except for

purposes of determining whether the BMCW had properly facilitated any permitted visitation.

¶10 The jury returned a verdict finding grounds for termination existed on both counts of both petitions, and the trial court entered findings of "unfitness." After the dispositional hearing, the trial court issued an order terminating the parental rights of F.J.R. on November 15, 2016.[3] This appeal follows.

DISCUSSION

¶11 F.J.R.'s sole issue on appeal centers on the State's motion and the trial court's order suspending visitation between F.J.R. and B.M.R. F.J.R. contends that the suspension indicates that the State did not make a good faith effort to provide the services as required under the CHIPS order. F.J.R. asserts that the suspension precluded her from meeting the conditions set forth in the order and, as a result, she could not demonstrate that she was able to assume parental responsibility of B.M.R. Therefore, she claims that the trial court erred when it instructed the jury not to consider the suspension when making its decision relating to that basis for the TPR petition. We disagree.

¶12 F.J.R.'s first allegation, that the State did not act in good faith when it moved to suspend the visits, is misguided. The BMCW is the agency charged with providing services to parents so that they can meet the goals and conditions set forth in CHIPS orders, which generally includes establishing a visitation plan.

[3] The parental rights of A.T. were also terminated at that time, on grounds of failure to assume parental responsibility and abandonment. He never appeared at these proceedings.

The State, on the other hand, is charged with litigating TPR petitions, and is not responsible for providing the services set forth in CHIPS orders.

¶13 Setting aside that point, a visitation plan was in fact established in this case at the time the CHIPS order was entered in August 2013. In fact, F.J.R. enjoyed regular visits with B.M.R. for well over two years. Visitation continued even after therapeutic visits were instituted due to B.M.R.'s disruptive behavior, until the court ordered that all visits be completely suspended on May 3, 2016, due to B.M.R.'s escalating behavioral issues. Furthermore, the jury found that the BMCW had made "a reasonable effort to provide the services ordered by the court to assist the parent in meeting the conditions for the safe return of the child." On review we give "significant deference" to jury verdicts, and "may not overturn them 'if there is any credible evidence' that supports what the jury has found, giving to the jury's finding every reasonable supporting inference." ***State v. L.D.***, 2005 WI App 264, ¶9, 288 Wis. 2d 485, 709 N.W.2d 879 (citation omitted).

¶14 Moreover, the State was well within its province in filing the motion to temporarily suspend visitation. Pursuant to WIS. STAT. § 48.42(1m)(c), a court may grant an injunction prohibiting parental visitation or contact with a child if it is determined to be "in the best interests of the child." ***Id.*** B.M.R.'s therapist affirmatively stated that she believed B.M.R.'s disruptive behavior was triggered by her visits with F.J.R., and she recommended that the visits be suspended. Therefore, the motion for temporary suspension, as brought by the State and granted by the trial court, was entirely reasonable as it was based on the best interests of B.M.R., and was in no way contrary to either the CHIPS order or statutory procedure.

¶15 In that same vein, F.J.R. contends that the visitation suspension was prohibitive of her ability to show that she would be able to assume parental responsibility as required by the TPR petition and WIS. STAT. § 48.415(6). As just discussed, F.J.R. had almost three years of regular supervised visitation with B.M.R., along with the therapeutic visits that were added to the visitation plan, prior to the suspension of visitation. Additionally, even after suspension was granted, F.J.R. was afforded the opportunity to participate in therapy to assist her in understanding the causes of B.M.R.'s behavior, with the possibility that the suspension would be lifted if B.M.R.'s behavior improved. Consequently, F.J.R.'s argument is not compelling.

¶16 Furthermore, while F.J.R. had utilized the services offered to her under the CHIPS orders with some success, there was ample evidence that she had failed to meet other conditions of the CHIPS orders, in particular relating to alcohol abuse and controlling her "extraordinary impulsivity." These issues, together with her "demonstrated history of lack of parenting capacity," supports the jury's findings, and the trial court's ultimate determination that F.J.R. was unable to provide "safe and nurturing parental care" for B.M.R. and B.H.T., either "independently or with continued social service support."

¶17 F.J.R.'s final argument, that the trial court's jury instruction relating to the suspension of parental visitation was improper, fails as well. The jury instruction in question was not a standard instruction, but rather was added by the trial court when it went "off script" while instructing the jury prior to deliberations. This instruction explained that during the pendency of a TPR petition, the court may suspend or limit parental visits, and that such an action is "based on standards and factors the law mandates be considered." The trial court further explained that the jury was "not to consider court orders suspending or

limiting visitation or communication in any way" when determining the verdict, except to consider whether the BMCW made sufficient efforts to facilitate the visitation that was permitted.

¶18 "The trial court has broad discretion in instructing the jury and we will not find error as long as the instructions adequately cover the applicable law." ***State v. Robinson***, 145 Wis. 2d 273, 281, 426 N.W.2d 606 (Ct. App. 1988). In other words, where a discretionary decision is "the result of a rational mental process" and is "reasoned and reasonable," we will not reverse. ***Id.***

¶19 The jury instruction was reasonable given the circumstances of this case. F.J.R.'s visits had in fact been suspended while the TPR petition was pending, and thus the jury instruction was directly relevant to the circumstances of this case. Further reasoning behind the content of the instruction can be traced back to the hearing on May 3, 2016, and the trial court's decision to temporarily suspend visitation. The court discussed the need to balance the best interests of B.M.R. with the rights retained by the parent unless or until a finding of "unfitness" is made. The trial court noted F.J.R.'s feelings regarding the temporary suspension, and how she likely believed it would adversely affect her case. Nevertheless, the court found that, based on the totality of the circumstances, the temporary suspension was warranted.

¶20 We find this to be a "reasoned and reasonable" basis for the jury instruction. Therefore, we affirm the trial court's order terminating the parental rights of F.J.R. for B.M.R. and B.H.T.

By the Court.—Order affirmed.

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