COURT OF APPEALS
DECISION
DATED AND FILED

October 2, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP976 **Cir. Ct. No. 2006JC5**

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

IN THE INTEREST OF DOROTHY J. C., A PERSON UNDER THE AGE OF 18:

TAYLOR COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

DOROTHY J. C.,

INTERESTED PARTY-RESPONDENT,

V.

WAYNE C. AND JERRI C.,

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for Taylor County: GARY L. CARLSON, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Wayne and Jerri C. appeal an order placing their daughter Dorothy outside the home following a jury finding that Dorothy was a child in need of protection and services. They argue: (1) the trial court erred by permitting impeachment of Jerri's credibility with the substance of a prior criminal conviction; (2) the guardian ad litem improperly invoked the best interest standard in statements to the jury; (3) the trial court erred by permitting cross-examination and argument by three attorneys aligned in interest; (4) the trial court improperly excluded evidence that would have established the defense of reasonable parental discipline; and (5) a new trial should be granted because the real controversy was not fully tried. We reject these arguments and affirm.

BACKGROUND

¶2 On May 19, 2006, Taylor County filed a petition with the trial court alleging Dorothy was a child in need of protection and services due to physical abuse. The petition alleged that when Dorothy's parents came to Dorothy's school on May 16 to take Dorothy home, Jerri threw Dorothy to the cement sidewalk, knelt on top of her, punched her in the head, and then both parents punched Dorothy multiple times.

¶3 Prior to trial, the court held a hearing on motions filed by Dorothy. Dorothy asked the court to exclude any reference that she committed crimes, inflicted injuries to herself, or had a history of being uncontrollable. The court granted that motion. Dorothy also requested an order determining the number of convictions usable to impeach witnesses' credibility under WIS. STAT. § 906.09.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

The court ruled that Wayne's prior conviction could not be used for impeachment purposes, but Jerri's prior conviction could be used.

¶4 Additionally, Dorothy requested an order allowing her to inquire, on cross-examination, into Jerri's conviction for encouraging her daughter, Sammi, to provide false statements to Sammi's probation agent. While Dorothy requested the evidence be admitted as a specific instance of conduct under WIS. STAT. § 906.08(2), the court analyzed the issue as impeachment by evidence of conviction of a crime under WIS. STAT. § 906.09. The court stated:

> This is a 906.09 issue.
>
> ….
>
> The issue here is whether or not Jerri, if she testifies, is testifying truthfully to the jury. Evidence that she has been convicted of a crime, within a year or so, in which she encouraged, if not advised, her daughter to provide false statements to a probation agent indicates in the court's mind a willingness on Jerri's part … to either bend the truth or be untruthful.

The court granted the motion.

¶5 The jury found that Dorothy was a victim of abuse. On September 13, the court entered a dispositional order placing Dorothy outside her parents' home.

DISCUSSION

¶6 The parents first argue the trial court erred by permitting impeachment of Jerri with the substance of her criminal conviction. We review a trial court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We sustain discretionary determinations provided the trial court

examined the relevant facts, applied the proper standard of law and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. ***Goberville v. Goberville***, 2005 WI App 58, ¶7, 280 Wis. 2d 405, 694 N.W.2d 503.

¶7 If evidence is erroneously admitted, we "must conduct a harmless error analysis to determine whether the error 'affected the substantial rights of the party.'" ***Martindale***, 246 Wis. 2d 67, ¶30 (citation omitted). An error is not harmless where there is a reasonable possibility the error contributed to the outcome of the trial. *See* ***State v. Moore***, 2002 WI App 245, ¶16, 257 Wis. 2d 670, 653 N.W.2d 276. A reasonable possibility is a possibility which is sufficient to undermine our confidence in the outcome. *See* ***id.***

¶8 The trial court relied on WIS. STAT. § 906.09 to allow admission of evidence that Jerri was convicted of a crime for encouraging her daughter, Sammi, to provide false statements to her probation agent. Section 906.09 provides, "For the purpose of attacking the credibility of a witness, evidence that the witness had been convicted of a crime or adjudicated delinquent is admissible." However, the scope of the inquiry is limited. ***State v. Sohn***, 193 Wis. 2d 346, 353, 535 N.W.2d 1 (Ct. App. 1995). "The witness may be asked if he or she has ever been convicted of a crime and, if so, how many times. If the witness's answers are truthful and accurate, then no further inquiry may be made." ***Id.***

¶9 At trial, Dorothy's counsel first asked Jerri if she had been convicted of a crime. Jerri replied that she had. Counsel then asked Jerri how many times she had been convicted. Jerri responded that she had one conviction. Then counsel asked, "And was that conviction for encouraging your older daughter to lie to a probation agent. Is that correct?" Jerri replied, "That's correct."

¶10 While the first two questions were appropriate under WIS. STAT. § 906.09, the question regarding the nature of the crime was not. *See* ***Sohn***, 193 Wis. 2d at 353. However, WIS. STAT. § 906.08(2) allows cross-examination of a witness concerning specific instances of conduct that are probative of truthfulness and not remote in time. Counsel's question asked if Jerri had encouraged her daughter to lie to a probation agent. This question was about a specific instance of conduct.[2] The incident was only a year old, and was clearly probative of Jerri's truthfulness. Therefore, it would have been admissible under § 906.08(2) and any error in the court's § 906.09 analysis was harmless.

¶11 Additionally, there is no reasonable possibility that the outcome of the trial would have been any different without the evidence. Jerri's version of events was not supported by any of the other witnesses' testimony. Jerri testified that Dorothy fell to the ground as a result of a struggle and that she did not intentionally throw her daughter to the ground. She further stated Dorothy banged her own head against the sidewalk, and she only slapped Dorothy after Dorothy bit her.

¶12 The witnesses who viewed the incident stated that Jerri purposely threw Dorothy to the ground and hit her. A teacher who witnessed the event stated that Jerri "twisted Dorothy around, threw her down on the sidewalk, narrowly

[2] In their reply brief, the parents contend, "no specific act of misconduct reflecting on Jerri C[.]'s character for truthfulness was ever elicited…. The only thing the jury heard is that Jerri C. was convicted of the crime and what is specifically prohibited by Sec. 906.09 and relevant case law." On the contrary, the actual title of the crime Jerri was convicted of is "Encouraging Parole/Probation Violation." If counsel had inquired if Jerri had been convicted of Encouraging Parole/Probation Violation, counsel's question would have been a violation of § 906.09, and not allowable as a specific instance of conduct under § 906.08(2). The question asked on cross-examination inquired into the specific instance of misconduct - encouraging her daughter to lie to a probation agent.

missing her head on the concrete bench." The teacher stated there was no way it was accidental. The teacher further stated that Jerri hit Dorothy in the head at least twice with a closed fist. The teacher did not see Dorothy take any aggressive acts toward her parents. Two students also testified that Jerri threw Dorothy to the ground and hit her. Another teacher testified that he observed Jerri slapping and hitting Dorothy. Finally, a social worker who met with Jerri following the incident stated that she observed no injury to Jerri's fingers and Jerri did not mention having been bitten. The social worker also stated that out of forty-four statements from students, not one of the statements mentioned seeing Dorothy bite her mother. The evidence of abuse is overwhelming. Even if Jerri's credibility had not been impeached, no evidence supported her account. There is no reasonable possibility of a different outcome and, therefore, the error is harmless. *See* ***Moore***, 257 Wis. 2d 670, ¶16.

¶13 The parents also argue the guardian ad litem improperly invoked the best interest standard in statements to the jury, the trial court erred by permitting cross-examination and argument by three attorneys aligned in interest, and the trial court improperly excluded evidence that would have established the defense of reasonable parental discipline. However, the parents did not object to the guardian ad litem's statements during trial. Likewise, they did not object to the cross-examination and argument by the three attorneys. Finally, they did not oppose Dorothy's motions to prohibit evidence that she had inflicted injuries to herself in the past, had a history of being uncontrollable, and that the principal was going to call police to have Dorothy removed from the school on the day of the incident. There is no indication in the record that the parents intended to present a defense of reasonable parental discipline. An appellate court will generally not review an issue raised for the first time on appeal. *See* ***Jackson v. Benson***, 218 Wis. 2d 835,

901, 578 N.W.2d 602 (1998). The parents have waived these issues and we will not address them. *See* ***State v. Edwards***, 2002 WI App 66, ¶9, 251 Wis. 2d 651, 642 N.W.2d 537 (parties waive any objections to the admissibility of evidence when they fail to object before the trial court).

¶14 Finally, the parents ask us to grant a new trial because the real controversy was not fully tried. We only exercise our power of discretionary reversal in exceptional cases. ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 13, 15, 456 N.W.2d 797 (1990). As stated above, the evidence overwhelmingly supports the jury's finding of abuse. Not a single witness observed Dorothy act aggressively toward her parents. No witness corroborated Jerri's testimony. This is not the type of exceptional case to warrant a reversal.

By the Court.—Order affirmed.

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