COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-2908

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

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

DODGE CO. DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

RACHEL W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed.*

¶1 DYKMAN, P.J.[1] Rachel W. appeals from an order terminating her parental rights to her daughter, Savanna M.A. She asserts that the trial court erred in admitting five hearsay statements at trial. We conclude that by not objecting to four of those statements, Rachel W. has waived her objections to them. As to the fifth statement, we conclude that the statement was not hearsay. The trial court therefore did not erroneously exercise its discretion in admitting it. We therefore affirm.

¶2 The Dodge County Human Services and Health Department (the department) petitioned to terminate Rachel W.'s parental rights to her daughter, Savanna M.A. Rachel W. contested the petition, and a jury trial ensued. A jury found that the department had proven the requirements for the termination, and the court concluded that it was in Savanna M.A.'s best interest that Rachel W.'s parental rights be terminated. Accordingly, it entered an order doing so.

¶3 Because Rachel W. contends that the trial court erred in admitting certain hearsay testimony, we must examine portions of the transcript to determine what occurred, and whether the statements to which Rachel W. objects are hearsay. Before doing so, however, we must consider the standard by which we review asserted errors in admitting testimony. We conclude that because evidentiary matters such as hearsay are decided within the trial court's discretion, we are to review its decision for erroneous exercise of discretion. *See* ***State v. Sveum***, 220 Wis. 2d 396, 405, 584 N.W.2d 137 (Ct. App. 1998). This is a deferential review. We are to look for reasons to sustain the trial court when its

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000).

order rests on legal discretion. ***Dunn v. Fred A. Mikkelson, Inc.***, 88 Wis. 2d 369, 380, 276 N.W.2d 748 (1979).

¶4 The first hearsay evidence of which Rachel W. complains occurred during the testimony of Lori Viola, a social worker employed by the department. She had been Savanna's caseworker for seven years at the time of trial, and had known Rachel W. during that time as well. The department's attorney asked Viola:

> Q: Was there any referral for other psychological or psychiatric services made for Rachel in addition to the family-based team that you talked about or the in-home team?
>
> A: At one point the in-home team in working with her as well as the parent aide were reporting that they felt she was suffering from depression because she seemed to do well—
>
> [Attorney for Rachel W.]: Your Honor, I'm going to object to this in that it's hearsay.

The court dismissed the jury, and had a discussion with the attorneys for Rachel W. and the department. The court asked the attorney for the department: "Why isn't that hearsay?" The attorney responded:

> Your honor, if it was admitted for the truth of the fact that she was depressed, it might be hearsay, but what's at issue here is whether or not the Department made reasonable efforts to provide the services ordered by the Court. In that regard, the information that Lori Viola had provided to her by the various service providers certainly influenced the kinds of decisions she made in terms of how services were going to be offered and referrals that were going to be made. I don't care and I don't think it matters for the purposes of this hearing whether or not, for instance, [Rachel W.] was depressed. What matters is, is that Lori was—Viola was told that there were symptoms that looked like that and she made a referral. That's what matters in this particular instance. It's not being introduced for the truth of the assertion that she was depressed.

¶5 After hearing Rachel W.'s attorney's response to this explanation, the trial court said: "The objection to this question is overruled. I believe that it does not go in this case to the truth of the matter asserted."

¶6 The trial court did not erroneously exercise its discretion in overruling the hearsay objection. WISCONSIN STAT. § 908.01(3) (1997-98),[2] describes hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, *offered in evidence to prove the truth of the matter asserted*." (Emphasis added). The supreme court explained this in ***Auseth v. Farmers Mut. Auto. Ins. Co.***, 8 Wis. 2d 627, 630, 99 N.W.2d 700 (1959):

> If the statement is not offered to prove the truth of the fact asserted, then the only thing material is whether the statement was made. As to that fact, there is no more objection to permitting a witness to testify as to what he heard said than as to what he may have observed, and he may be cross-examined as to both.

¶7 Rachel W. does not directly contest the court's determination that the evidence regarding Rachel W.'s depression was not hearsay because it was not offered to prove that Rachel W. suffered from depression. Instead, she asserts:

> The court ruled that information that was transmitted to the petitioner from a person with personal knowledge would be admitted as admissible evidence, so long as the petitioner made an entry in her notes with regard to that conversation. The Court ruled that this would be a hearsay exception pursuant to Section 908.03(6), Stats. [Records of regularly conducted activity].

¶8 That is not what the trial court did. What Rachel W. refers to is a colloquy the trial court had with counsel *after* overruling Rachel W.'s hearsay

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

objection. That dialogue, while perhaps interesting as a hypothetical discussion of WIS. STAT. § 908.03(6), the exception to the hearsay rule concerning records of regularly conducted activity, had nothing to do with the objection previously made and overruled. Instead, the dialogue was about other hearsay concerns that might be raised with regard to Viola's records as the trial progressed. The court noted that it would hear future objections to the department's attempts to use § 908.03(6) as they came up. The court explained:

> The objection to future questions concerning compliance with attending or not attending, I do believe that the—that 908.03(6) may be a basis for the admission of that. We're going to have to take 'em one at a time…. But we'll wait to see whether or not the foundation can be laid.

¶9 While the court might have told the department that it was wasting time by speculating on what the future might bring, we see no error in the discussion that occurred. The court did *not* rule that the department could introduce any evidence it wanted as long as the evidence was contained in some document. Nor did the trial court say that if a person with personal knowledge made a statement to an employee of the department which was reduced to a record, the record was admissible. What the trial court *did* say was that it would wait until an objection to rule on the objection.

¶10 In her reply brief, Rachel W. contends:

> The [trial] court clearly stated in its ruling that if an individual with personal knowledge made a statement to the Petitioner, and the Petitioner then, in the course of her regularly conducted activity, made an entry into her notes, that entry would be a hearsay exception.

First, the trial court's discussion of WIS. STAT. § 908.03(6) was not a ruling. Section 908.03(6) defines an exception to WIS. STAT. § 908.02, the statute that

prohibits hearsay as a general rule. It is not possible to predict whether a document will or will not meet the requirements of the exception until a party seeks to introduce a memorandum, report, or data compilation that contains hearsay. Second, the four other instances of hearsay testimony of which Rachel W. now complains occurred without objection. Had Rachel W. objected to the hearsay, the trial court would have had the opportunity to consider the objection and rule on it. Hearsay is competent evidence and is admissible unless objected to. ***Virgil v. State***, 84 Wis. 2d 166, 185, 267 N.W.2d 852 (1978). The failure to object in a timely fashion constitutes waiver. ***Beacon Bowl, Inc. v. Wisconsin Elec. Power Co.***, 176 Wis. 2d 740, 790, 501 N.W.2d 788 (1993). Rachel W. has waived her objection to the four statements she now contends are hearsay.

¶11 Rachel W. agrees that she failed to object to the four other instances of hearsay, but asserts that she either was not required to object because her previous objection was overruled or that she may have had a duty not to object. She cites no authority for these assertions. In ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980), we said that propositions unsupported by legal authority are inadequate, and do not comply with WIS. STAT. RULE 809.19(1)(e). We concluded that in the future we would refuse to consider such arguments. ***Id.*** at 546. We see no reason to depart from ***Shaffer*** now.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4 (1999-2000).