COURT OF APPEALS DECISION DATED AND FILED

February 27, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.**

No. 00-3207

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MICHELLE S.,

RESPONDENT-APPELLANT.

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

¶1 FINE, J. Michelle S. appeals from an order terminating her parental rights to Gabriella M., following a jury verdict finding that she failed to assume her parental responsibilities with respect to the child. She claims that the

trial court erred: 1) in telling the jury that it "must consider the facts and circumstances as they existed during" the time that Michelle S. was pregnant with Gabriella through the date that the petition for termination of parental rights was filed; 2) in admitting into evidence Michelle S.'s actions while she was pregnant with Gabriella; 3) in not suppressing statements made by Michelle S. to a social worker when the social worker did not first warn her of the rights listed under WIS. STAT. § 48.243(1); and 4) in permitting the State to call witnesses even though the State's witness list was filed late. We affirm.

¶2 A court may enter an order terminating parental rights only if one or more statutory grounds for such termination are found to exist, and then only if termination of parental rights is in the child's best interest. WIS. STAT. §§ 48. 415; 48.424 & 48.426. One of the grounds for termination of a person's parental rights is the person's failure to assume parental responsibility. The statute material to this case provides:

> **Grounds for involuntary termination of parental rights.** At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:
>
> ...
>
> **(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.

WISCONSIN STAT. § 48.415. The jury determined that Michelle S. failed to assume her parental responsibilities in connection with Gabriella. Michelle S. does not challenge the sufficiency of the evidence to support that finding, but, as noted, asserts that the trial court erred in four respects. We address her contentions in turn.

1. Instructions and evidence.

¶3 Michelle S.'s first two claims of trial-court error have three separate components: A) She contends that the trial court should not have instructed the jury that it "must consider the facts and circumstances as they existed during" the time that Michelle S. was pregnant; B) She contends that the trial court should not have admitted evidence that during the time she was pregnant with Gabriella she was a drug user and a prostitute; and C) She contends that the trial court should have permitted her to introduce evidence of circumstances subsequent to the filing of the petition to terminate her parental rights to Gabriella.

A) Jury instruction.

¶4 A trial court has broad discretion in giving to a jury the legal principles that must guide it in reaching a verdict. ***State v. Herriges***, 155 Wis. 2d 297, 300, 455 N.W.2d 635, 637 (Ct. App. 1990). The core of Michelle S.'s argument that her behavior during her pregnancy with Gabriella and how that affected Gabriella should not have been considered by the jury is her contention that the word "child" in WIS. STAT. § 48.415(6) refers to children who are born

and not children in their mothers' wombs. In support of that argument, she points to WIS. STAT. § 48.02(2), which defines the word "child" as meaning, as material here, "a person who is less than 18 years of age," noting that ***State ex rel. Angela M.W. v. Kruzicki***, 209 Wis. 2d 112, 561 N.W.2d 729 (1997), held that this does not include an unborn child. Additionally, she points out that where the legislature intended to refer to a child prior to birth it did so by using the phrase "unborn child." WIS. STAT. § 48.02(19).

¶5 Michelle S.'s argument misses the point of § 48.415(6). As the trial court cogently pointed out, what a parent does before birth can have grave consequences on the health and welfare of the child. In this case, there was evidence that: Michelle S. abused cocaine and marijuana during her pregnancy; Gabriella tested positive for both cocaine and marijuana when she was born; Gabriella suffered substantial health problems as a result of her mother's pre-natal ingestion of cocaine and marijuana; and Michelle S. prostituted herself while she was pregnant with Gabriella. As recognized in ***L.K. v. B.B.***, 113 Wis. 2d 429, 439, 335 N.W.2d 846, 851 (1983), "[m]edical authorities have long recognized that prenatal care is important to the eventual health and well-being of an infant ... [b]ecause what happens to a fetus in utero can have a significant impact upon the quality of life a child will have after birth." Accordingly, "a parent's action prior to a child's birth can form a sufficient basis for determining whether that parent has established a substantial parental relationship with the child." ***Ibid.*** (father). Thus, § 48.415(6) specifically provides that one of the factors that can be considered as to whether a father has assumed parental responsibility is whether he "has ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy." Certainly, the same test applies to the mother—a deliberate disregard for her own health during pregnancy when that affects the

well-being of the child is an appropriate factor to be considered by the jury. Although ***Angela L.M.*** held that a woman could not, under the statutes as they then existed, be detained in order to protect her unborn child, it recognized that ***L.K.***'s holding that pre-birth actions are material to whether a parent has assumed parental responsibility did not turn on whether the word "child" encompassed children in the womb. ***Angela L.M.***, 209 Wis. 2d at 133–134, 561 N.W.2d at 739. The trial court's instructions to the jury accurately reflected Wisconsin law.

B) Evidence of Michelle S.'s pre-birth behavior.

¶6 Given our determination that the trial court did not erroneously instruct the jury to consider Michelle S.'s pre-birth behavior in deciding whether she assumed her parental responsibility in connection with Gabriella, it follows that the trial court did not erroneously exercise its discretion in admitting evidence of that behavior. *See* **State v. Pharr**, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983) (whether to admit or exclude evidence is within trial court's discretion).

C) Post-petition circumstances.

¶7 Michelle S. complains that the trial court erred in not permitting, during the fact-finding hearing, the jury to consider evidence of post-petition circumstances, arguing that the jury should be able to consider a parent's attempt to make, in her word, "amends." Michelle S. does not, however, indicate what circumstances she wanted the jury to consider—what the nature of the "amends" was. This is, therefore, an undeveloped argument that we will not address. *See* ***Barakat v. Department of Health & Soc. Servs.***, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments). Stated another way, we cannot determine whether the trial court erroneously exercised its discretion in excluding

evidence and limiting the jury to pre-petition circumstances unless we know what Michelle S. wanted the jury to consider. *See* WIS. STAT. RULE 901.03(1)(b) (offer of proof required).

2. Suppression of statements made by Michelle S.

¶8 Michelle S. contends that the trial court erred in not suppressing statements she made to a social worker because the social worker did not first comply with WIS. STAT. § 48.243(1). This section provides:

> **Basic rights: duty of intake worker**. **(1)** Before conferring with the parent, expectant mother or child during the intake inquiry, the intake worker shall personally inform parents, expectant mothers and children 12 years of age or older who are the focus of an inquiry regarding the need for protection or services that the referral may result in a petition to the court and of all of the following:
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> (a) What allegations could be in the petition.
>
> (b) The nature and possible consequences of the proceedings.
>
> (c) The right to remain silent and the fact that silence of any party may be relevant.
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> (d) The right to confront and cross-examine those appearing against them.
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> (e) The right to counsel under s. 48.23.
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> (f) The right to present and subpoena witnesses.
>
> (g) The right to a jury trial.
>
> (h) The right to have the allegations of the petition proved by clear and convincing evidence.

¶9 There is no dispute but that the social worker did not comply with this section, and the trial court was, appropriately, upset. Although whether a violation of § 48.243(1) requires the suppression of statements is a legal issue that we review *de novo*, ***State v. Thomas J.W.***, 213 Wis. 2d 264, 268–269, 570 N.W.2d 586, 587 (Ct. App. 1997), the trial court correctly declined Michelle S.'s

invitation to extend the rationale underlying ***Miranda v. Arizona***, 384 U.S. 436 (1966), to civil termination-of-parental rights cases.

¶10 Unlike a criminal proceeding, a termination-of-parental-rights case is not designed to punish the person who may make a statement that is not preceded by the required warnings, but, rather, to protect children who might suffer if the parental rights of their birth parents with respect to them were not terminated. We have previously recognized that where punishment of the person giving a statement is not the goal of the proceeding, suppression is not an appropriate remedy when the required warnings are not given. ***Thomas J.W.***, 213 Wis. 2d at 273–276, 570 N.W.2d at 589–590. The overarching concern of the termination-of-parental-rights procedure to safeguard and advance the interests of children militates against applying a ***Miranda***-like remedy of suppression where the warnings required by WIS. STAT. § 48.243(1) are not given. *See* ***Thomas J.W.***, 213 Wis. 2d at 274–276, 570 N.W.2d at 590 (proceeding involving child in need of protection or services under the Children's Code, WIS. STAT. ch. 48). Stated another way, we will not punish the child because a social worker did not follow the law.

3. State's witnesses.

¶11 Michelle S. complains that the trial court erred when it permitted the State to call witnesses even though the State did not comply with the pre-trial order that it name its witnesses by a certain date. Whether to relieve a party of a deadline within which to name witnesses is a matter left to the trial court's discretion. ***Carlson Heating, Inc. v. Onchuck***, 104 Wis. 2d 175, 180–182, 311 N.W.2d 673, 676–677 (Ct. App. 1981). Here, the State, which had indicated that it would be able to give to Michelle S. a list of witnesses by a certain date,

explained that the commitment was based on an overly optimistic analysis of the case's complexity; the prosecutor explained to the trial court that she later learned that "this case was a lot more complicated because of the mother's history." The trial court accepted this explanation and noted that Michelle S. was not prejudiced by what was a mere five-day delay. Michelle S. has not demonstrated on this appeal how she was prejudiced by the delay. Indeed, she, too, was permitted to file her witness list late.

By the Court.—Order affirmed.

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