COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

Nos. 01-0298
01-0299
01-0300
01-0301

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

NO. 01-0298

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JOSEPH W.D., SR.,

RESPONDENT-APPELLANT.

NO. 01-0299

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JOSEPH W.D., SR.,

RESPONDENT-APPELLANT.

NO. 01-0300

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JOSEPH W.D., SR.,

RESPONDENT-APPELLANT.

NO. 01-0301

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JOSEPH W.D., SR.,

RESPONDENT-APPELLANT.

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

¶1 SCHUDSON, J.[1] Joseph W.D., Sr. (Joseph), appeals from the trial court order, following a jury trial, terminating his parental rights to Melonie D., Valorie D., Darnell D., and Nicolas D. He argues that the trial court erred in precluding him from calling his son, Joseph W.D., Jr. (Joseph Jr.), as a witness at the trial, due to his failure to name Joseph Jr. as a witness pursuant to a pretrial order. This court affirms.

I. BACKGROUND

¶2 The essential facts relevant to resolution of this appeal are not in dispute. In 1996, Melonie, Valorie, Darnell, and Nicolas were found to be children in need of protection or services and were placed in foster care. In 1999, the State filed petitions to terminate the parental rights of Joseph and the children's mother. The State alleged that Joseph, who had been incarcerated during some of the intervening period, had abandoned Melonie, Valorie, and Darnell, *see* WIS. STAT. § 48.415(1)(a)2, and had failed to assume parental responsibility for Nicolas, *see* WIS. STAT. § 48.415(6).

¶3 On February 29, 2000, the trial court ordered the parties to file witness lists by thirty days prior to the June 12 trial date.[2] In March 2000, the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e), (3) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] Joseph's trial counsel subsequently moved for adjournment of the trial. On June 1, 2000, the trial court granted the motion, setting the new trial date for September 5.

State served Joseph with a discovery demand and a set of interrogatories that asked him, among other things, to name all persons he intended to call as witnesses at the termination trial. Failing to comply with the court's order, and failing to return the interrogatories for over five months, Joseph named only one witness: Bureau of Milwaukee Child Welfare worker Ann Balow. In the intervening period, the State had scheduled Joseph for a deposition; Joseph, however, failed to appear. As a result, the State moved the trial court to enter default judgment for Joseph's noncompliance with discovery. The court took the motion under advisement. The court, however, having previously found Joseph in contempt for disobeying a court order, noted that "he has been nothing more than an obstructionist in this case."

¶4 On September 5, 2000, the day scheduled for the termination trial, the children's mother voluntarily agreed to the termination of her parental rights to the four children. Counsel for Joseph then indicated, for the first time, his intention to call Joseph Jr. to testify. Joseph was deposed that afternoon, and the trial was delayed a day.

¶5 After the State had completed its presentation of evidence except for its adverse examination of Joseph, the trial court, the State, and the guardian ad litem first learned of what the trial court characterized as Joseph's "conduit communication theory of defense." Over the objections of the State and the guardian ad litem, the trial court heard Joseph Jr.'s testimony, outside the jury's presence, through an offer of proof.

¶6 Joseph Jr., who was fifteen years old at the time of the trial, offered his testimony in support of Joseph's "conduit communication" theory—that

Joseph had not failed to assume parental responsibility for Nicolas or abandoned the other three children because, through letters and photos he had sent to Joseph Jr., he had maintained contact with them. Joseph Jr.'s testimony, however, was, for the most part, rambling and vague. In fact, it is somewhat difficult to locate portions of his testimony that might be deemed sufficiently specific to support Joseph's "conduit communication" theory. The following, however, might be considered the *most* specific and supportive portion of Joseph Jr.'s testimony: (The quotations, often awkward, are exactly as they appear in the transcript, except for the words in brackets.)

> Q [Joseph's counsel]: General question. And what did [your father] write to you about?
>
> A [Joseph Jr.]: I'll request about like his main focus was like how was Darnell, Nicolas doing. For me to give them pictures of the knows, so they can know of him.
>
> His other main focus was on the girls and how we all doing in school and all of our birthdays, send us a card, letters, gifts. I don't know how he did it. But we got gifts for Christmas. His other main focus was make sure that we had good education.
>
> Q: How did he do that?
>
> A: He would always write us. Ask us how we doing. Tell us that we know if he was there. We wouldn't mess up in school. He also tell us to do good at school. Try hard. He did to see about helping some. He also asked us what is our dream job, future.
>
> Q: Was he in some way able to communicate with you to Darnell, Nicolas and the girls?
>
> A: Yes.
>
> ….
>
> Q: And how did you do that?
>
> A: I visiting, whenever I seen them at visitation if my mother send me a letter I asked them if foster parents was it okay or whatever for them, was it okay, you know, for me to give them a little letter, pictures and give my brother. I give them each pictures of my father. He had a blue pair of pants and a white T-shirt on when he was incarcerated. He

> gave me two pictures. I give them to my brother, each one of them had. I gave pictures to my sister, what all my sisters basically get. And he constantly write me letters like you asked. I got some here right.

Although Joseph Jr. referred to letters from his father, none was read or introduced at the offer of proof. And although Joseph Jr. referred to the frequency with which Joseph wrote, he could not specify whether Joseph wrote during some of the years during which he allegedly had failed to assume parental responsibility for Nicolas and had abandoned the other three children.

¶7 The trial court took Joseph's motion, to allow Joseph Jr. to testify, under advisement, considered the issue and law overnight, and returned the next morning with its decision. Emphasizing that, generally, in termination proceedings, it "tend[ed] to open the gates fairly wide" and even take what might be termed "a pro-parent approach simply for fear that not doing so would cause a TPR reversal on technical issues," the trial court denied Joseph's motion. The court explained, in part:

> If [Joseph] had appeared [for the deposition originally scheduled] and if he had advised [the parties] at that point of this conduit communication theory of defense they would have had at least some opportunity to investigate those assertions and respond to those assertions. And instead what we've got is that on what should have been the second day of trial late in the afternoon as the State is preparing to close its case except for adverse examination of father, we're discovering this theory of defense.…

The trial court elaborated that, with notice of the defense theory, the State and the guardian ad litem would have been able to interview witnesses and investigate whether the defense had merit.

¶8 The trial court, therefore, concluded that although Joseph Jr.'s testimony had "some probative value," albeit "pretty limited," its value was

overcome by the prejudice to the other parties. The court considered that Joseph's tardy request to call Joseph Jr. to testify "happened in the context of a gross or extreme or egregious pattern of discovery noncompliance." The court emphasized that if Joseph Jr. was allowed to testify, the State and the guardian ad litem would be left with no opportunity to interview potential witnesses who might be able to impeach his testimony. The court termed the prejudice "extreme," and condemned such "trial by ambush" as "extremely unfair."

II. DISCUSSION

¶9 A parent has the right to meaningfully participate in a termination-of-parental-rights proceeding. ***D.G. v. F.C.***, 152 Wis. 2d 159, 167, 448 N.W.2d 239 (Ct. App. 1989). A party's right to meaningfully participate in legal proceedings, however, does not encompass the authority to ignore court orders and present witnesses and evidence, regardless of the danger of unfair prejudice to other parties. *See* WIS. STAT. § 904.03.[3] Sometimes, exclusion of evidence, possibly even the entirety of a witness's testimony, may be appropriate. *See* ***id.***; *see also* WIS. STAT. § 804.12(2)(a)2.[4]

[3] WISCONSIN STAT. § 904.03 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[4] WISCONSIN STAT. § 804.12(2)(a)2, in relevant part, provides:

> If a party … fails to obey an order to provide or permit discovery, … the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: … An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence[.]

¶10 Whether a trial court's exclusion of a witness's testimony was appropriate is reviewed under the standards summarized by the supreme court in ***Magyar v. Wis. Health Care Liab. Ins. Plan***, 211 Wis. 2d 296, 564 N.W.2d 766 (1997):

> The circuit court has the discretion to exclude the testimony of a witness if a party is prejudiced by opposing counsel's failure to name that witness. The circuit court's exercise of discretion will be upheld absent an erroneous exercise of discretion.
>
> The court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and reaches a reasonable conclusion using a demonstrated rational process. If the circuit court bases the exercise of its discretion upon an error of law, its conduct is beyond the limits of discretion.

Id. at 302 (citations omitted). Additionally, this court is mindful that a trial court, in determining whether to permit an undisclosed witness to testify, must consider "whether the surprise was unfair, and, if so, whether the unfair surprise outweighed the probative value of the evidence." ***Id.*** at 304. Here, this court cannot conclude that the trial court erroneously exercised discretion.

¶11 Joseph first argues that the trial court failed to apply the proper legal standard. He contends that the trial court improperly found that the State and the guardian ad litem were unfairly surprised by his intent to call Joseph Jr. as a witness and, instead of properly weighing "whether the unfair surprise outweighed the probative value" of Joseph Jr.'s testimony, *see* ***id.***, improperly based its decision on what it termed the "gross or extreme or egregious pattern of discovery noncompliance by the father." Thus, Joseph maintains, the trial court "punished [him] for not appearing for a scheduled deposition" and "punished [him] for previously violating court orders about contact with the children." The record belies Joseph's claim.

¶12 The trial court did comment on the case history of Joseph's noncompliance with discovery, but that history was relevant to "whether [Joseph's] surprise was unfair." *See* ***id.*** If, after all, Joseph's nondisclosure of Joseph Jr. had been inadvertent, any "unfairness" of Joseph's conduct might have been deemed less extreme. But, even more importantly, the record establishes that, in addition to commenting on the case history, the trial court carried out the required balancing test. It reasonably deemed the probative value of Joseph Jr.'s testimony "pretty limited," and it reasonably related how and why the revelation of the "conduit communication" defense, in the midst of trial, would effectively disable the State and the guardian ad litem.

¶13 Joseph does not directly challenge the trial court's finding that the probative value of Joseph Jr.'s testimony was "pretty limited." He does, however, look to the other side of the scale, asserting that the trial court's finding of "unfair surprise" was "without any basis" because the children's mother had named Joseph Jr. as a potential witness and "[o]ne could expect that a father would call one of his children as a witness in a case such as this." This court is unconvinced.

¶14 The mother's naming of Joseph Jr. as a potential witness did not satisfy Joseph's notice obligations under the pretrial order. The mother and Joseph were distinct parties—*each* subject to the pretrial order, and *each* at liberty to offer witnesses and evidence. Moreover, Joseph has failed to offer any argument to specifically explain why, in this case, his "conduit communication" theory of defense, and his intention to call Joseph Jr. as a witness, should have been apparent to the parties simply because the children's mother had listed Joseph Jr. as a potential witness. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not consider "amorphous

and insufficiently developed" argument). Obviously, parents in a termination action have distinct standing and may pursue distinct theories.

¶15 This court appreciates that "the drastic measure of excluding a witness should be avoided by giving the surprised party more time to prepare, if possible" and, "[a]ccordingly, continuance is usually the more appropriate remedy for surprise." ***Magyar***, 211 Wis. 2d at 303-04. Here, however, the case already was before the jury; a continuance could have jeopardized the trial. Further, as the guardian ad litem notes, the termination petitions had been pending for over a year, the trial had been adjourned once before, and "any further delay would cause delay in achieving permanency for the children."

¶16 When reviewing a trial court's decision to exclude a witness due to noncompliance with a pretrial disclosure order, this court must "look for reasons to sustain the circuit court's discretionary decision." *See* ***Magyar***, 211 Wis. 2d at 305. Here, the reasons are many and substantial. The trial court did indeed "examine[] the relevant facts, appl[y] a proper standard of law, and reach[] a reasonable conclusion using a demonstrated rational process." ***Id.*** at 302.

By the Court.—Order affirmed.

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