COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-1656

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JEWEL C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed*.

¶1 BROWN, J. The State sought to terminate Jewel C.'s parental rights to Zonay M.L., Jewel's daughter. The ground for termination was that

Jewel had failed to assume parental responsibility for Zonay pursuant to WIS. STAT. § 48.415(6)(a) (1999-2000).[1] Jewel's defense was that he had no knowledge that he was the father and therefore could not have "failed" to assume parental responsibility. In support of this defense, Jewel arranged for the testimony of Zonay's mother, who was prepared to tell the jury that she had informed Jewel at the time of the pregnancy that he was not the father. The State objected to this testimony on grounds that it was cumulative and irrelevant. The trial court held that it was cumulative. The jury ruled against Jewel, and he appeals. This court sustains the trial court's ruling that the testimony was cumulative.

¶2 Jewel also complains that the State brought out the specifics of other acts evidence against him during the disposition stage, namely, an old sexual assault conviction. The rule is that evidentiary rules do not apply in disposition proceedings. Besides, this fact was not a major reason why the court ordered termination and the issue is therefore inconsequential. This court affirms.

¶3 First, a word about the briefs of all the parties. This court sits mainly as an "error-correcting court" and reviews the record to address any alleged "errors" of the trial court. ***Cook v. Cook***, 208 Wis. 2d 166, 188-89, 560 N.W.2d 246 (1997). The parties have gone on at length about whether the birth mother's testimony, concerning her telling Jewel that he was not the father, was even relevant. But the trial court did not sustain the State's motion to exclude the testimony on relevancy grounds. The trial court excluded the testimony only on

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

the grounds that it was cumulative. Whether the trial court erroneously exercised its discretion in so holding is the issue before this court, not whether the proffered testimony was relevant.

¶4 And as to *that* precise issue, this court holds that there was no misuse of discretion. As we stated at the outset, Jewel's defense was that he had no knowledge that he was the father and therefore could not have failed to assume parental responsibility as a matter of common sense. While the State, and later the guardian ad litem, argued that this was not a viable defense, the trial court allowed Jewel to present this defense. To that end, Jewel was allowed to state, several times, that the birth mother told him he was not the father. Not only that, neither the State nor the guardian ad litem disputed that such was the case. Therefore, there was no need for the mother's testimony. The trial court so found. It observed that the jury had already heard how the relationship between Jewel and the birth mother had ended when she told Jewel that he was not the father. The trial court held:

> If Miss [L.'s] only testimony is going to be that she told Mr. [C.] she [sic] was not the father, that's in the record. That will just duplicate things. If there's something else you intend to elicit from her, I'll entertain that; but I think if she's just going to duplicate testimony that is in this record unrefuted at this point, it would be duplicative.

¶5 Jewel contends that there is a difference between testimony that is "cumulative" and testimony that is "corroborative." He cites case law to the effect that if there is evidence that strengthens the credibility of a story rather than simply repeating what has already been established, then the testimony is corroborative and should be included. Jewel's attempt to pigeonhole the birth mother's proffered testimony into that category known as "corroborative" evidence fails. Jewel's credibility regarding what the mother told him was never

at issue. The fact that he was told he was not the father was accepted by the State and the guardian ad litem. The issue which was tried was not what he was told by the birth mother, but what he did about it after being told. As to that specific issue, there was some impeachment evidence. But the mother's offered testimony would not have corroborated Jewel's testimony in that regard at all. Belatedly, Jewel now argues that the mother's testimony would have also been helpful to corroborate his testimony on matters not related to what she told him about being pregnant. But that was not part of the proffer and we will not entertain it.

¶6 Jewel also contends that at the disposition stage, the State asked Jewel during cross-examination whether it was true that he had previously been convicted of a sexual assault. This was unobjected to by counsel and Jewel answered that the conviction was ten to fourteen years ago. Now, Jewel claims that this was plain error which prejudiced the disposition order. Plain error is when the error is so plain and fundamental as to affect a person's substantial rights. ***State v. Neuser***, 191 Wis. 2d 131, 140, 528 N.W.2d 49 (Ct. App. 1995). It is an error which is "both obvious and substantial" or "grave" and is "reserved for cases where there is the likelihood that the [error] … has denied a defendant a basic constitutional right." ***State v. Vinson***, 183 Wis. 2d 297, 303, 515 N.W.2d 314 (Ct. App. 1994).

¶7 The rule of law in Wisconsin is that the common law and statutory rules governing the presentation of evidence do not apply in a dispositional hearing. WIS. STAT. § 48.299(4)(b). The court instead is guided by the basic principles of relevancy, materiality and probative value. Thus, there is no plain error here. There is no "obvious" and "substantial" error that has affected Jewel's fundamental rights. Rather, such information is relevant to a court's assessment of a parent's fitness. *See* ***R.D.K. v. Sheboygan County Soc. Servs. Dep't***, 105

Wis.2d 91, 98-99, 111, 312 N.W.2d 840 (Ct. App. 1981). On this ground alone, the issue completely lacks merit. Moreover, there is no indication that the trial court keyed on such information in making its decision. Rather, the trial court was much more interested in the fact that the child had been in alternative care since birth, that neither parent was in a position to care for the child and that the child needed permanency in her young life. We affirm the order.

By the Court.—Order affirmed.

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