COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal Nos. 01-2977
01-2978
01-2979
01-2980

Cir. Ct. Nos. 00-TP-74
00-TP-75
00-TP-76
00-TP-77

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

01-2977
IN RE THE TERMINATION OF PARENTAL RIGHTS TO
PRESTON T., A PERSON UNDER THE AGE OF 18:

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PETER T.,

RESPONDENT-APPELLANT.

01-2978
IN RE THE TERMINATION OF PARENTAL RIGHTS TO
BRANDON T., A PERSON UNDER THE AGE OF 18:

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PETER T.,

RESPONDENT-APPELLANT.

01-2979
IN RE THE TERMINATION OF PARENTAL RIGHTS TO ASHTON T., A PERSON UNDER THE AGE OF 18:

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PETER T.,

RESPONDENT-APPELLANT.

01-2980
IN RE THE TERMINATION OF PARENTAL RIGHTS TO ALYSSA T., A PERSON UNDER THE AGE OF 18:

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,
V.

PETER T.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed*.

¶1 DEININGER, J.[1] Peter T. appeals orders terminating his parental rights to four children. He claims the trial court erred in admitting evidence of events which occurred prior to the CHIPS[2] dispositional order which formed the basis for the termination proceedings. We conclude the trial court did not err in its evidentiary ruling, and accordingly we affirm the appealed termination orders.

BACKGROUND

¶2 Peter's sole claim of error relates to the trial court's denial of his motion in limine which sought to exclude evidence of "events, facts, or matters occurring prior to the entry of the CHIPS dispositional order in this matter." Accordingly, it is not necessary for us to provide a lengthy account of the factual background underlying the termination of parental rights (TPR) proceedings.

¶3 La Crosse County petitioned to terminate Peter's parental rights, as well as those of the mother, to four children. The children had initially been removed from the parental home on September 2, 1999, based on a social worker's investigation of a report that the children were severely neglected. The juvenile court entered a CHIPS dispositional order on December 16, 1999, setting forth some twelve conditions for the return of the children to the parental home. The County began termination proceedings in December 2000, alleging that the

[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 unless otherwise noted.

[2] Children in need of protection or services (CHIPS). *See* WIS. STAT. § 48.13.

children were in continuing need of protection or services, pursuant to WIS. STAT. § 48.415(2).

¶4 The allegations were tried to a jury in June 2001. Prior to the trial, the court denied motions in limine brought by both parents which sought to exclude from evidence any testimony or exhibits relating to "events, facts or matters occurring prior to the entry of the CHIPS dispositional order in this matter." During the fact-finding hearing, the mother's counsel objected to a statement by the social worker during her testimony that "there had been prior referrals" of Peter's family to social services agencies when they had lived in Minnesota before moving to La Crosse. The court sustained this objection, but later denied a motion for mistrial based on the worker's reference to the Minnesota referrals. The jury returned a verdict finding that the County had established the elements for termination of Peter's rights to all four children, and the court subsequently entered orders terminating his rights. Peter appeals the orders.

ANALYSIS

¶5 Although Peter mentions the denial of his motion for a mistrial, his arguments on appeal focus on the trial court's denial of his motion in limine, a matter that is committed to the trial court's discretion. ***Johnson v. Kokemoor***, 199 Wis. 2d 615, 635-36, 545 N.W.2d 495 (1996). Accordingly, the question is not whether this court would have granted the motion, but whether the trial court appropriately exercised its discretion. ***State v. Alsteen***, 108 Wis. 2d 723, 727, 324 N.W.2d 426 (1982). A trial court's decision to admit or exclude evidence will not be upset on appeal if it has "'a reasonable basis'" and was made "'in accordance with accepted legal standards and in accordance with the facts of record.'"

Lievrouw v. Roth, 157 Wis. 2d 332, 348, 459 N.W.2d 850 (Ct. App. 1990) (citation omitted).

¶6 The sole authority on which Peter premises his appeal is a footnote in an opinion of this court in which we addressed whether a county could rely on the doctrine of issue preclusion with respect to findings made in a CHIPS dispositional order during subsequent termination of parental rights proceedings. ***S.D.S. v. Rock County Dep't of Soc. Servs.***, 152 Wis. 2d 345, 354-58, 448 N.W.2d 282 (Ct. App. 1989). Specifically, Peter asserts that we "held" in ***S.D.S.*** that "the facts of neglect established in a CHIPS proceeding are 'not an element of or relevant to termination under sec. 48.415(2)(c).'" We reject Peter's contention that our discussion in ***S.D.S.*** required the court in this case to exclude all evidence of events occurring prior to the CHIPS dispositional order.

¶7 First, we note that our observations in the footnote on which Peter relies can hardly be said to be our "holding" in ***S.D.S.*** Under discussion was the relationship between the findings and standard of proof at CHIPS jurisdictional and dispositional proceedings, as opposed to what needs to be established and the standard of proof at a TPR fact-finding hearing. We concluded that, given the "heavier burden of proof at the factfinding hearing in the termination proceedings than … at the CHIPS dispositional proceedings," an exception to issue preclusion applies, and parents should thus be permitted to introduce evidence during the TPR fact-finding hearing that would challenge earlier findings made in the CHIPS dispositional order. ***Id***. at 357-58.

¶8 Then, in footnote 11, we observed that CHIPS dispositional orders include some findings made during both fact-finding proceedings in the CHIPS case, as well as those made at the CHIPS dispositional hearing. We also noted,

correctly, that the jurisdictional finding supporting the CHIPS disposition, "that the parent has neglected, refused, or been unable for reasons other than poverty to provide the child with necessary care so as to seriously endanger the physical health of the child, is not an element of or relevant to termination under sec. 48.415(2)(c)." ***Id***. at 358 n.11. Finally, we pointed out that of more relevance to matters at issue in termination proceedings are those findings typically made during dispositional proceedings in the CHIPS case, such as the conditions established for the return of the children to the parental home, and a parent's refusal or inability to meet those conditions. ***Id***.

¶9 Quite simply, we did not conclude, or even suggest, that events which pre-date the entry of a CHIPS dispositional order could never be relevant to disputed issues at a termination fact-finding hearing.

¶10 Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. Among the elements the County was required to prove, by clear and convincing evidence, were (1) "[t]hat the agency responsible for the care of the child and the family … has made a reasonable effort to provide the services ordered by the court"; (2) that "the parent has failed to meet the conditions established for the safe return of the child to the home"; and (3) that "there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following" the termination fact-finding hearing. WIS. STAT. § 48.415(2)(a)2.b and 3.

¶11 The trial court considered the potential relevance of pre-CHIPS-disposition events, and it concluded that evidence relating to such events may

indeed be of consequence to one or more of the cited elements in the termination proceeding:

> Well, one of the questions the jury is going to have to answer is whether or not the Department has made a reasonable effort to provide the services that were ordered by the Court. It's hard for them to answer that question if they don't know what the needs of the children were and what the Court has ordered.
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> ….
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> …I think it also goes to the fact of whether or not the conditions established for the safe return of the children have been met. I think it's relevant as to that issue, and I think it's also relevant as to whether or not there's a substantial likelihood that the parents will meet the conditions within the twelve months following this hearing.
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> It's difficult for the jury to understand or answer any of those questions unless they know what the needs of those kids are, what the condition is, and what the prognosis is.

¶12 We conclude that the trial court made its ruling "'in accordance with accepted legal standards and in accordance with the facts of record,'" ***Lievrouw***, 157 Wis. 2d at 348 (citation omitted), by considering the relationship of the evidence at issue to the elements to be proven by the County in the termination proceedings. We also conclude that the ruling had "a reasonable basis," ***id***., in that evidence of pre-CHIPS-disposition events might well have a tendency to make it more or less probable that there was a substantial likelihood of Peter's meeting the conditions for the return of the children to his home within the next twelve months.[3]

[3] In another section of our opinion in ***S.D.S. v. Rock County Department of Social Services***, 152 Wis. 2d 345, 354-58, 448 N.W.2d 282 (Ct. App. 1989), on which Peter relies, we (continued)

¶13 Peter argues in his reply brief, however, that "[t]he deplorable condition of the home and children and the parents' seeming indifference to it which the social workers initially found … is evidence from which the jurors could conclude the parents have a character trait for neglect, i.e., they are bad parents." Peter's assertion may well be true, but that does not mean that the trial court erred in concluding that evidence of this type was relevant and admissible in the termination proceedings. Peter acknowledges that the notion of unfair prejudice arising from "other acts" evidence arises most often in criminal cases, where it is improper for a jury to rely on "character" or "propensity" evidence when deciding whether the defendant did or did not commit a charged offense.[4] He asserts that the same rationale should apply in this case. We disagree. In determining whether "there is a substantial likelihood" that Peter will not meet the conditions for return of his children, the jury must of necessity consider his "character traits," and the likelihood that any problematic traits or propensities have been or can be modified in order to assure his proper parenting of the children.

¶14 We note in closing that the County also makes responsive arguments involving waiver, invited error, and a lack of prejudice relating to the admission of pre-CHIPS-disposition events. The principle basis for these arguments is that the only adverse evidence which Peter specifically cites in his opening brief is the single, brief reference to prior Minnesota referrals, to which Peter's counsel did

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employed similar reasoning in concluding that a "trial court must admit evidence of postfiling events on facts relevant to the 'substantial likelihood'" element in WIS. STAT. § 48.415(2).

[4] *See* WIS. STAT. 904.04(2) ("Evidence of other … acts is not admissible to prove the character of a person *in order to show that the person acted in conformity therewith*.") (emphasis added).

not object at trial. The County also asserts that Peter himself introduced evidence regarding pre-CHIPS-disposition events. Although there may be alternative grounds for us to affirm the trial court's evidentiary ruling, we conclude that it is not necessary for us to decide whether error was waived, invited or harmless. As we have discussed, there was no error.

CONCLUSION

¶15 For the reasons discussed above, we affirm the appealed orders.

By the Court.—Orders affirmed.

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