

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 2010

David R. Schanker
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 No. 2010AP816

Cir. Ct. No. 2008TP56

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

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

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

CALVIN M. M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: R. A.
BATES, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.¹ Calvin M. M. appeals an order terminating his parental rights to his son, Trenton M. Calvin argues that the trial court erred by admitting hearsay testimony that related in graphic detail an alleged incident in which Calvin assaulted Trenton M.'s mother, Katrina, and by denying his subsequent motion for a mistrial. We conclude that, assuming the testimony was improperly admitted, any such error did not compromise Calvin's right to a fair trial. Calvin conceded that he failed to meet the conditions for return of Trenton M., and therefore it was not necessary for the County to prove that Calvin committed domestic violence. In addition, despite the graphic nature of the objected-to testimony, the jury was not unduly prejudiced in light of other, admissible testimony also of a graphic nature about both this violent incident and another act of domestic violence by Calvin against Katrina. We therefore affirm.

¶2 Trenton M. was born on January 26, 2008, and was protectively placed outside the home two days later by the Rock County Department of Human Services because Calvin and Trenton's mother, Katrina, had a history of domestic violence. A dispositional hearing was held and an order finding Trenton to be a child in need of protective services was entered on March 17, 2008. On October 30, 2008, a petition was filed to terminate Calvin's parental rights to Trenton. Following a jury trial on October 14 and 15, 2009, and a dispositional hearing on November 9, 2009, Calvin's parental rights were terminated.

¶3 Calvin argues that the trial court misused its discretion when it admitted over his objection hearsay testimony from two officers about an alleged

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.21(2)(d) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

incident in which Calvin assaulted Katrina. Calvin argues that, given its graphic nature, the court's admission of this testimony was clearly prejudicial, and contends that the trial court erred in denying his motion for a mistrial.²

¶4 A trial court addressing a motion for a mistrial “must decide, in light of the entire facts and circumstances, whether the defendant can receive a fair trial” despite the claimed error. *State v. Ford*, 2007 WI 138, ¶29, 306 Wis. 2d 1, 742 N.W.2d 61. The court must grant the motion if it determines that the claimed error is sufficiently prejudicial to warrant a mistrial. *See id.* We review a trial court's decision to deny a motion for a mistrial for an erroneous exercise of discretion. *State v. Patterson*, 2009 WI App 161, ¶33, 321 Wis. 2d 752, 776 N.W.2d 602.

¶5 Here, Calvin's motion for a mistrial was based on the court's admission of hearsay testimony. We review a trial court's decision to admit or exclude evidence for an erroneous exercise of discretion. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Where evidence is erroneously admitted we conduct a harmless error analysis to determine whether the error affected the substantial rights of the party. *Id.*, ¶30. Applying these legal principles to the evidence admitted at trial, we conclude that, assuming the court erred by admitting the objected-to hearsay testimony, this error was harmless and therefore the trial court properly denied Calvin's motion for a mistrial.

² The Department notes that the trial court offered to give a curative instruction, and Calvin demurred. The Department argues that, by refusing the curative instruction, Calvin waived his right to challenge the court's admission of the alleged hearsay testimony, and its denial of his mistrial motion. The Department cites no authority, nor are we aware of any, for the proposition that refusal to accept a curative instruction results in waiver of a timely-made objection.

¶6 The testimony Calvin objected to related to an alleged incident of domestic abuse that occurred in August 2007. Officer Shane Punzel testified that Calvin and Katrina’s neighbors told him and two other officers that they “witnessed [Calvin] choking and punching [Katrina], the victim, outside of the residence, that he had to be physically restrained from assaulting her outside the house.” Lieutenant John Olsen testified that the neighbors told the officers that “the male had the female down on the front porch or cement stoop I believe it was, he was punching her in the face and choking [her].”

¶7 There are two reasons why we conclude admitting this apparent hearsay evidence was harmless error. We first observe that one of the elements the County had to prove at trial was that Calvin had not met all of the conditions for return. Calvin conceded that he had not met these conditions. Refraining from domestic violence was one of the conditions for return. His concession would appear to obviate the need for the County to prove that Calvin committed acts of domestic violence. Although Calvin does not tie his argument that the officers’ hearsay testimony was improperly admitted to any of the elements that the County was required to prove, he does argue that the County admitted this evidence to prove that he engaged in domestic violence. Since Calvin conceded that he failed to satisfy the conditions for return, it was no longer necessary for the County to prove that Calvin committed acts of domestic violence.

¶8 There is another reason why admitting the alleged hearsay testimony was harmless. The record contains more than sufficient evidence to prove that Calvin committed domestic violence on at least two occasions. Lieutenant Olsen provided the following admissible testimony about the August 2007 incident. He testified that he and two other officers, including Officer Punzel, observed Calvin lying on a bed holding Katrina when the officers first encountered Calvin. The

lieutenant observed that Katrina was motionless, staring blankly, and had a red, swollen face and a bleeding lip. He also testified that Calvin refused to let go of Katrina, and that he (the lieutenant) had to pull Katrina away from him. Officer Punzel testified that Calvin then fought with him (Punzel) and the other officers. Ultimately, one of the officers used a Taser on Calvin and they were able to get him into handcuffs. Calvin continued to fight with the officers, kicking Officer Punzel, and on arrival at the jail it was necessary to place Calvin in a restraint chair.

¶9 Katrina's mother, a police officer and a social worker testified about another incident of domestic violence that took place in July 2009. Katrina's mother testified that Katrina had left her an answering machine message at that time in which Katrina was screaming "Mom, mom, help me, ... I'm bleeding from my eye, and my leg," and kept saying "Mom, Mom, Mom." Officer Valerie Southwick testified that Katrina told her that during the incident Calvin looked at his six year-old son and said "This is what we do to women who don't behave" and then stood over Katrina while she was sitting in a recliner and punched her several times. Tricia Stilen, a county social worker, testified that Katrina told her that she sustained a bone fracture near her eye as a result of this assault. At trial Calvin did not, and does not on appeal, object to the introduction of this evidence.

¶10 Calvin argues that the objected-to testimony was particularly damaging because it was the only uncontroverted evidence that Calvin had assaulted Katrina. Assuming Calvin is correct, there is other probative evidence on this issue. As we noted, various sources, including Department staff, police officers, relatives and Katrina herself, gave detailed and corroborated accounts of alleged acts of violence by Calvin. In addition, Katrina herself admitted writing the following statement in her petition for a temporary restraining order filed after

the July 2009 incident: “I screamed so loud, that’s because he hit me, full force with his fist, got me in the eye really bad” and that “[h]e told his son ‘That is what you do to put a woman in her place when she is a slut and a bitch.’”

¶11 Moreover, the trial record reveals testimony about additional acts of violent, aggressive behavior by Calvin toward Katrina and others. In light of recurrent testimony about Calvin’s multiple acts of violence, the alleged hearsay testimony is but one disturbing account of an act of violence among many such disturbing accounts. Consequently, we conclude that any error arising from the court’s admission of the objected-to testimony was harmless.

By the Court.—Order affirmed.

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

