

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 10, 2011

A. John Voelker
Acting 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. 2010AP3091
2010AP3092**

**Cir. Ct. Nos. 2010TP12
2010TP13**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

No. 2010AP3091

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

DODGE COUNTY HUMAN SERVICES & HEALTH DEPARTMENT,

PETITIONER-RESPONDENT,

v.

JAMES R.,

RESPONDENT-APPELLANT.

No. 2010AP3092

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

DODGE COUNTY HUMAN SERVICES & HEALTH DEPARTMENT,

PETITIONER-RESPONDENT,

V.

JAMES R.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dodge County:
JOHN R. STORCK, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ James R. appeals orders of the circuit court terminating his parental rights to his children, Morpheus R. and Rowen R. James argues that the circuit court, at the grounds stage of the termination proceedings, erroneously excluded evidence relating to the motivation of Dodge County Human Services when filing the termination petitions. I disagree, and affirm the circuit court.

Background

¶2 This termination proceeding involved two biological children of James R. and Karen R.—Morpheus, born in July 2006, and Rowen, born in September 2007. Soon after Rowen’s birth in 2007, James was convicted of a felony for sexually assaulting a young girl he had been babysitting, and he was sentenced to eight years of initial incarceration followed by fifteen years of extended supervision. In 2008, while James was incarcerated, Morpheus and Rowen were removed from their mother’s home after a social worker observed

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

unsanitary conditions. The children were placed in a foster home, where they have remained.

¶3 In March 2010, Dodge County Human Services filed petitions to terminate the parental rights of James and the mother as to both children. The mother consented to the termination. As to James, the County sought termination based on the grounds stated in WIS. STAT. § 48.415(5). That section requires “that the parent has exhibited a pattern of physically or sexually abusive behavior which is a substantial threat to the health of the child who is the subject of the petition.” To support this ground, the State alleged that, in addition to the 2007 sexual assault, James had a conviction for felony sexual battery in 1999 for acts involving his then-stepson.² At the grounds hearing, it was also revealed that James had a misdemeanor conviction for fourth-degree sexual assault of a minor.

¶4 At the grounds hearing, James sought to admit testimony from a social worker about the County’s motivation for filing the termination petitions. The circuit court, however, excluded the evidence, reasoning that it was either irrelevant or, if relevant, was outweighed by the fact that it was a waste of time and confusing.

¶5 A jury found that the grounds for termination were satisfied. The circuit court subsequently found that termination was in the children’s best interests, and terminated James’s parental rights as to each child. James appeals.

² The 2007 conviction was based on allegations that he touched the vagina and put his mouth on the vagina of a four-year-old girl. The 1999 conviction was based on allegations that James caused a ten-year-old boy to perform fellatio on him. James testified at the hearing that all of these allegations were fabricated, but he confirmed that he pled no contest in both cases.

Discussion

¶6 James contends that the circuit court erred when it excluded testimony that he asserts would have supported his theories that (1) the County’s motivation for filing was unrelated to the termination grounds, and (2) the County did not believe that James was a substantial threat. I am not persuaded.

¶7 Evidence is relevant when it 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. A circuit court’s decision to admit or exclude evidence is reviewed under an erroneous exercise of discretion standard. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698.

¶8 The pertinent termination ground is found in WIS. STAT. § 48.415(5), which provides for termination in the following circumstances:

(5) CHILD ABUSE. Child abuse, which shall be established by proving that *the parent has exhibited a pattern of physically or sexually abusive behavior which is a substantial threat to the health of the child who is the subject of the petition* and proving either of the following:

(a) That the parent has caused death or injury to a child or children resulting in a felony conviction.

(b) That a child has previously been removed from the parent’s home pursuant to a court order under s. 48.345 after an adjudication that the child is in need of protection or services under s. 48.13(3) or (3m).

(Emphasis added.)

¶9 James’s argument is directed at the language in WIS. STAT. § 48.415(5) that requires that “the parent has exhibited a pattern of physically or sexually abusive behavior which is a substantial threat to the health of the child

who is the subject of the petition.” He argues that the circuit court erred when it did not allow him to present evidence relating to the County’s motivation for filing for termination. Specifically, James sought to introduce testimony from a County social worker. As demonstrated in an offer of proof, James would have presented the following testimony from the social worker: (1) prior to the County’s filing for termination, the children’s mother agreed to voluntarily terminate her parental rights; (2) also prior to the filing, the children’s foster parents expressed an interest in adopting the children; and (3) a “permanency plan,” produced by the County after the children were removed from the mother’s home in 2008, initially stated a goal of “reunification,” but later was changed to a goal of “adoption.”

¶10 Based on this testimony, James explains that he would have argued that the County’s real motivation for filing was not because the County believed he posed a substantial threat to the children, but rather to facilitate adoption. James points out that the County did not seek to terminate immediately when the children were born, or immediately when he was most recently convicted, but instead waited until adoption seemed likely. James’s underlying assumption is that the County’s motivation matters with respect to a factual determination of whether termination grounds are present. James is mistaken.

¶11 The factual question for the jury was whether James’s pattern of behavior demonstrated that he was a substantial threat to his children. The evidence he sought to admit would not have helped the jury answer this question. The County’s motivation has no bearing on whether the evidence of James’s past behavior meets the statutory standard. Thus, I agree with the circuit court that the evidence James sought to admit was irrelevant.

¶12 James also argues that his constitutional right to present a defense was violated when the circuit court excluded the social worker testimony. But this argument is premised on a proposition that I have already rejected, that the circuit court erred in excluding the evidence. See *Brown County v. Shannon R.*, 2005 WI 160, ¶¶53, 72, 286 Wis. 2d 278, 706 N.W.2d 269 (concluding reversal was proper where evidence was erroneously excluded so as to interfere with a parent’s due process right to present admissible evidence central to her defense).

¶13 Finally, James complains the circuit court gave an insufficient explanation when excluding the evidence. This is incorrect. The circuit court explained that evidence of the County’s motive was not relevant because it did not speak to whether James “exhibited a pattern of physically or sexually abusive behavior which is a substantial threat.” And, even if the circuit court had not provided a sufficient explanation, I would affirm because the record demonstrates that exclusion was proper.

Conclusion

¶14 For the reasons stated, the circuit court’s orders are affirmed.

By the Court.—Orders affirmed.

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

