COURT OF APPEALS
DECISION
DATED AND FILED

May 20, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

Appeal Nos. 03-0391, 03-0392

Cir. Ct. No. 02-TP-73
02-TP-74

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

03-0391

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

STEPHENIE ANN T.H.,

RESPONDENT-APPELLANT.

03-0392

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

STEPHENIE ANN T.H.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Brown County: J.D. MCKAY, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Stephenie Ann T.H. appeals orders terminating her parental rights to her children, Dutcher J.M. and Sacoyia A.M. Stephenie argues (1) the trial court should have granted her motion for a mistrial because a juror received extraneous information, and (2) the court erroneously exercised its discretion by failing to consider the wishes of the children as well as failing to apply the statutory criteria to Stephenie individually. We disagree with Stephenie's arguments and affirm the orders.

BACKGROUND

¶2 On July 25, 2002, the Brown County Department of Human Services filed a petition to terminate Stephenie's parental rights to Dutcher and Sacoyia. A petition was also filed to terminate the rights of the children's father. As grounds, the petition alleged that the children were in need of continuing protection or services, that they had been out of the home for six months or longer, and that the parents had not met the conditions of return and would not meet those conditions within twelve months following the fact-finding hearing.

¶3 A jury trial for both parents began on October 10, 2002. Evidence was presented showing that Stephenie had substance abuse problems and had been

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

in treatment at two facilites. Both parents were or had been on probation. One condition for return of the children was that Stephenie receive counseling if she maintained a relationship with the children's father. Additionally, there was evidence the father abused Stephenie and the children. The jury also learned that Stephenie and the children's father were not to have contact with each other pursuant to their probation agents' orders.

¶4 On the morning of the second day of the trial, a juror informed the court she had seen Stephenie and the father together at the mall the previous night. The juror expressed concern that this caused her to be biased. Stephenie moved for a mistrial. The County argued that the court should instruct the juror that the contact was not prohibited during the trial. The court agreed to do this and instructed the juror that the contact was not prohibited and that she should not discuss the incident with the other jurors. The juror then said that she would not be biased. The court denied the mistrial motion.

¶5 The jury found there were grounds for termination regarding both parents, with one juror dissenting. After a disposition hearing, the court terminated both parents' rights. Stephenie appeals.

DISCUSSION

Motion for mistrial due to juror prejudice

¶6 Stephenie argues that her right to an impartial jury was violated due to the extraneous information obtained by the juror. Stephenie contends this information had a reasonable probability of a prejudicial effect.

¶7 Extraneous information is information that is neither of record nor within the jurors' general knowledge. ***Castaneda v. Pederson***, 185 Wis. 2d 199,

209, 518 N.W.2d 246 (1994). As to the impropriety of the information, "[i]nformation not on the record is not properly before the jury." ***Id.*** at 210. Whether information is extraneous is a question of fact we will not overturn unless it is clearly erroneous. ***State v. Eison***, 194 Wis. 2d 160, 177, 533 N.W.2d 738 (1995). Whether extraneous information is so prejudicial as to require a verdict's reversal is a question of law we decide independently. ***Castaneda***, 185 Wis. 2d at 211-12. When a jury has been improperly exposed to or has considered extraneous information and there is a reasonable probability that the error would have a prejudicial effect on a hypothetical jury, a verdict should generally be set aside. ***Id.*** If the information is not prejudicial, however, the error is harmless, and no new trial is required. ***Eison***, 194 Wis. 2d at 179.

¶8 Here, the extraneous information is that the juror saw the parents together at the mall after the first day of trial. Stephenie argues this information was central to the purpose of the litigation. The County had to prove she was not meeting conditions for her children's return and was not likely to do so within twelve months. One of the conditions for the children's return was that Stephenie was to comply with all conditions of probation, including that she have no contact with the children's father. Another condition for the children's return was that Stephenie not have a relationship with the father unless she received relationship counseling. Because she chose not to continue the relationship, she was not receiving counseling. Therefore, she would not meet these conditions if she continued the relationship.

¶9 Further, Stephenie argues the curative instruction only compounded the problem because, even though the juror was told the contact was not improper, she was instructed not to tell any other jurors about it. Stephenie maintains the

average juror would believe the parents should not have been together, especially after being instructed not to tell anyone about what she saw.

¶10 However, the court instructed the juror that conduct between the parents was not improper during the course of the trial. Further, the court instructed the juror that what she saw "in no way should bias or prejudice you with regard to either [of the parents]." "Jurors are presumed to follow the court's instructions." ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998).

¶11 Additionally, we are not persuaded by Stephenie's argument that the hypothetical juror would continue to think there indeed was something wrong with what she saw, even after being instructed otherwise, simply because she was also instructed not to discuss it with the other jurors. Again, "Jurors are presumed to follow the court's instructions." ***Id.*** We therefore conclude that the hypothetical juror would not be prejudiced under these circumstances.

The circuit court's analysis of the statutory factors

¶12 Whether there is sufficient evidence to warrant the termination of parental rights is a matter vested to the circuit court's discretion. ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶26, 255 Wis. 2d 170, 648 N.W.2d 402. In making its decision, the court considers the best interests of the child. *See* WIS. STAT. § 48.426(2). Section 48.426(3) details the factors to be considered for determining the best interests of the child as the following:

> (a) The likelihood of the child's adoption after termination.
>
> (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.

> (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
>
> (d) The wishes of the child.
>
> (e) The duration of the separation of the parent from the child.
>
> (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

¶13 When discussing the statutory factors, the court stated that "The wishes of the children are not taken into account." Stephenie contends the court's statement that it was not taking the children's wishes into account was erroneous. While the court did not elaborate on its basis for this determination, the social worker's report states that because the children were only seven and two years old, they "have not been posed with questions pertaining to their future and a continued relationship with their parents." Certainly, at two years old, Sacoyia is too young to understand the circumstances or express any kind of opinion regarding the termination of her parents' rights. Dutcher has some special needs, including difficulty with speech, communication and motor skills. He is also likely unable to fully understand the situation or express his wishes as to whether termination is in his best interest. We interpret the court's statement to mean that, because of the children's ages, their wishes could not be taken into account. Therefore, the court did properly consider the statutory factor.

¶14 Stephenie also argues the court did not make a specific finding regarding the children's best interests, but merely listed the statutory factors and stated that they applied without adequate discussion of its reasoning. In addition, Stephenie argues the court failed to apply the factors to her individually. Instead,

she claims the court erred by making its finding as to both parents without distinguishing them. Stephenie contends she has separate conditions to meet from those of the children's father, and that treating both parents separately may have led to the termination of the father's rights only.

¶15 While the trial court's findings were cursory, the record shows the court considered the appropriate factors and applied them to the facts, taking into account the children's best interests. The court stated:

> These two parents have, from this court's perspective, been very selfish – Mr. M used the word himself – they've been very selfish in their relationship to these children. They have put their own wants and needs and desires above those of the children. These children have become second-class citizens in relationship to the perceived needs of the parents. Why that is, I can't really explain. It's just clear to me that that's been the case, and that's been the case for some period of time.
>
> These children demand stability of their parents, and they have to this point in time not received it. These children demand and have a right to expect stability in their own home, and to this point their expectations have come up very short.

¶16 The court then went on to discuss the statutory factors, finding it was likely the children would be adopted; the children were in good health; the children's relationships with their parents and other family members were not as substantial as the parents thought; the children had been separated from their parents for a long period of time; and that the children would be in a more stable environment if their parents' rights were terminated. The court therefore determined that termination of the parents' rights was in the children's best interest.

¶17 We are satisfied that the court did apply the appropriate legal standard to the facts of this case. It listed each of the factors and stated how they applied to the children. This was not just "merely repeating the statutory factors."

¶18 Further, there is no evidence that the court failed to distinguish between the parents when it applied the factors. The court's reference to "these parents," "these two parents" and "both parents" merely indicates that it concluded the factors applied equally to each parent. There is no requirement that the court repeat the same findings twice simply because both parents' rights are being terminated. We therefore conclude that the trial court did not erroneously exercise its discretion by terminating Stephenie's parental rights.

By the Court.—Orders affirmed.

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