COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0815 **Cir. Ct. No. 02-JV-71**

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

IN THE INTEREST OF STEPHANIE M.W.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHANIE M.W.,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Shawano County: EARL SCHMIDT and JAMES R. HABECK, Judges.[1] *Affirmed in part; reversed in part and cause remanded with directions.*

[1] The Honorable Earl Schmidt presided over the initial hearing. The Honorable James Habeck presided over subsequent proceedings.

¶1 HOOVER, P.J.[2] Stephanie M.W. appeals two orders. First, she appeals the order adjudicating her a juvenile in need of protection and services (JIPS) and ordering her to pay a forfeiture or alternatively write a letter of apology. Second, she appeals a post-disposition order denying her request for a competency evaluation. We conclude that the post-disposition motion was appropriately denied and that the JIPS adjudication was appropriately decided; thus, we affirm those orders. Because WIS. STAT. § 938.345(1)(c) explicitly prohibit imposing a forfeiture in a JIPS action, the disposition must be reversed and we remand for a new disposition.

BACKGROUND

¶2 Stephanie was a student at the Wittenberg-Birnamwood Elementary School. She was nine years old, in third grade, and enrolled in special education class for emotionally, not cognitively, disturbed students. While working one-on-one with her teacher, Kelly Schmidt, Stephanie created a paper fan and stated she was going to light it, throw it through a screen, and burn down the school. Then, her mother was going to get a cake and they would have a party.

¶3 A few minutes later, the teacher's aide went to the classroom and Stephanie repeated her threat. Shortly thereafter, Stephanie switched to working on a book about her future and repeated, for a third time, that she was going to burn down the school.

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

¶4 When Stephanie left for lunch, Schmidt informed the principal of the morning's events. They called the school's police liaison officer to the school. Stephanie's mother was contacted and brought in to discuss the situation with the officer, the principal, the teacher, and Stephanie. Stephanie would not talk to the officer, instead hiding under her coat.

¶5 Stephanie was suspended from school for two days and referred to Shawano County Social Services. Stephanie was charged under WIS. STAT. § 938.13(12), alleging she was a juvenile in need of protection and services based on her commission of a delinquent act while under ten years of age. The alleged delinquency was disorderly conduct for making threats.

¶6 Stephanie was represented by counsel at her initial appearance before Judge Schmidt, where counsel requested appointment of a guardian ad litem. The court denied the request because counsel's only apparent basis for the request was his speculation that Stephanie would not understand the language on the standard court forms. Counsel acquiesced, replying, "That's fine."

¶7 At the pretrial conference, Judge Habeck indicated he had reviewed the transcript of the initial appearance. Counsel made no request for Judge Habeck to revisit the guardian ad litem issue.

¶8 The fact-finding proceeded with testimony from Stephanie's teacher, the aide, the principal, and the liaison officer. Stephanie did not testify. The court concluded that Stephanie had made the threats constituting disorderly conduct and ruled she was in need of protection and services. The court ordered Stephanie to pay a forfeiture of $25 and a victim-witness surcharge of $20 or, alternatively, that she write letters of apology to the teacher and aide.

¶9 Stephanie then obtained appellate counsel, who brought a post-disposition motion for a competency hearing. The court denied the motion and Stephanie appeals.

DISCUSSION

Due Process and Competency

¶10 Stephanie's due process argument is directly related to her competency argument and we address them together. However, because her claim is that she was denied due process because she was tried while incompetent—that is, unable to understand her rights or participate in her defense—if we affirm the trial court on the competency issue, the due process argument will necessarily fail.

¶11 WISCONSIN STAT. § 938.30(5)(a) states in relevant part:

> If there is probable cause to believe that the juvenile has committed the alleged offense and *if there is reason to doubt the juvenile's competency to proceed* … the court shall order an examination under s. 938.295 and shall specify the date by which the report must be filed in order to give the district attorney or corporation counsel and the juvenile's counsel a reasonable opportunity to review the report. (Emphasis added.)

¶12 Whether there is evidence giving rise to a "reason to doubt" competency is a question left to the sound discretion of the trial court. ***State v. Weber***, 146 Wis. 2d 817, 823, 433 N.W.2d 583 (Ct. App. 1988). The determination is primarily a factual one and will be affirmed unless it is clearly erroneous. ***State v. Garfoot***, 207 Wis. 2d 214, 224-25, 558 N.W.2d 626 (1997). This is because an actual determination of competency is a judicial, not a clinical, inquiry. ***State v. Byrge***, 2000 WI 101, ¶48, 237 Wis. 2d 197, 614 N.W.2d 477.

Competency falls "within a discrete category in which the resolution of the legal issue is better left to the trial court." ***Id.***, ¶44.

¶13 Additionally, to avoid waiver, a party must raise an issue with sufficient prominence such that the trial court understands that it is called upon to make a ruling. ***In re Eugene W.***, 2002 WI App 54, ¶13, 251 Wis. 2d 259, 641 N.W.2d 467. Here, Stephanie's trial counsel raised the issue only twice and neither time was it raised "with sufficient prominence."

¶14 Trial counsel first raised the issue at the initial appearance, but it was in the context of requesting a guardian ad litem and not a competency hearing. The second time trial counsel raised the issue was at the close of the fact-finding hearing. Even then, it was a verbal footnote after Judge Habeck denied Stephanie's motion to dismiss based on Judge Schmidt's failure to appoint a guardian ad litem. Moreover, counsel conceded that because this was not a criminal matter, a competency hearing was not really necessary.

¶15 Following the dispositional hearing, Stephanie retained appellate counsel, who raised the competency issue in a post-disposition hearing. Appellate counsel's complaint was, like trial counsel's complaint, that because of her age Stephanie "doesn't know what I'm talking about."

¶16 First, we conclude that the issue of Stephanie's competence was not sufficiently preserved for appeal. Trial counsel never directly challenged her ability to proceed, certainly never asked the trial court for a competency hearing, and appears to have explicitly abandoned the issue. *See* ***State v. Rogers***, 196 Wis. 2d 817, 827-29, 539 N.W.2d 397 (Ct. App. 1995).

¶17 Second, we conclude that, in any event, the court concluded there was no reason to doubt her competency, a threshold requirement before proceeding with a competency hearing. The court ruled as follows:

> Well I would intend to go through a [competency] hearing with anyone that was incapable of understanding those kinds of situations, and frankly, I don't believe that's the situation here. I watched, we had people from the school here, they testified … about Stephanie[']s statement and actions], and I believe she understood everything she said there. I believe that also we all tend to use bigger words that are associated with our field of study. But so then you have to think when you talk to nine year olds about using more basic language, and I think Stephanie is entirely capable of understanding that.
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> … First of all, I heard from the old teachers in the old school. And then I would look over at Stephanie different times, and it seemed to me that she was tracking everything that was being talked about that day. I don't believe there was anything lacking. …
>
> Here is the report from [her new school] … This came about in mid October, it was available to the court in November. … She responds to verbal and material re-enforcements, she possesses a desire to want to act appropriately, she has been involved in some regular classes, because of her positive behavior. … Stephanie has done a good job with this process, and seems readily to work out issues as they arise. She just received a mid year progress report from her teachers which was overall positive.
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> Then I observed her demeanor in court. I think Stephanie is entirely capable of manipulating things. …
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> [The court noted that, in response to its order that Stephanie pay $25 or write a letter of apology, she wrote to the court. In the letter, she stated that she could not pay the money because she was only nine, did not have a job, and her mother could not pay it because she had just had surgery and needed the money for bills.]
>
> It's obvious to me from [her new school] she responds well to rewards for behaving well, and doesn't like it when she's punished. 99 percent of the juveniles that come into this court don't like it when they are punished. They do not

> like consequences for their actions. That's exactly what I see happening here. … I have absolutely nothing that convinces me that Stephanie is incapable of understanding what she needs to do.

¶18 Although both trial and appellate counsel stated they did not believe Stephanie understood them, the court chose not to accept the attorneys' opinions as credible evidence of Stephanie's alleged incompetence. Indeed, trial counsel's first complaint was mere speculation. Instead, the trial court considered the teachers' testimony regarding Stephanie's nonchalant demeanor when she made the threats, its own observations of Stephanie in court, and behavior reports from Stephanie's new school. Based on the record, we cannot say the circuit court decision was clearly erroneous, even if the issue had been properly preserved.

Appointment of a Guardian ad Litem

¶19 WISCONSIN STAT. § 938.235 (1)(a) states that the court "may appoint a guardian ad litem in any appropriate matter under this chapter." Use of the word "may" creates a presumption that the statute is permissive, vesting discretionary decision making power with the trial court. *See* ***McGuire v. McGuire***, 2003 WI App 44, ¶26, 260 Wis. 2d 815, 660 N.W.2d 308. Stephanie presents nothing to rebut the presumption that this decision is discretionary.[3] Thus, we affirm the trial court's decision unless it was the product of an erroneous exercise of discretion.

¶20 Trial counsel only requested the guardian ad litem "to protect the whole process" when opining that Stephanie would not be able to understand the

[3] In any event, WIS. STAT. § 938.235(1)(e) states that the trial court *shall* appoint a guardian ad litem if the child is ordered placed outside the home. Because this paragraph of the statute contains the mandatory "shall," we believe WIS. STAT. § 938.235(1)(a) is appropriately considered discretionary.

plea forms. The court specifically asked "why would we need a guardian ad litem?" Counsel simply replied it was up to the court. The court denied the request, and counsel replied, "That's fine. That's fine." On appeal, Stephanie contends the guardian ad litem was necessary to advocate and protect her interests. This is because her adversary counsel is supposed to abide by her wishes, which she could not articulate and might in any event contradict her best interests.

¶21 Again, the issue was improperly preserved for appeal. Counsel acquiesced to the trial court's determination that a guardian ad litem was unnecessary. Moreover, the appellate argument is premised on the idea that Stephanie could not understand the proceedings, an argument we have already rejected.

DISPOSITION

¶22 The trial court ordered Stephanie to pay a forfeiture and a victim-witness surcharge. In the alternative, Stephanie could write an apology. However, WIS. STAT. § 938.345(1)(c)[4] prohibits ordering a forfeiture or surcharge as part of the disposition in a JIPS proceedings.

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[4] WISCONSIN STAT. § 938.345 states in relevant part:

> (1) If the court finds that the juvenile is in need of protection or services, the court shall enter an order deciding one or more of the dispositions of the case as provided in s. 938.34 under a care and treatment plan except that the order may not do any of the following:
>
> ….
>
> (c) Order payment of a forfeiture or surcharge.

¶23 Stephanie also argues that a letter of apology is not an enumerated option for disposition. On this part of the disposition, however, we agree with the State: A letter may be ordered as part of supervision. Under WIS. STAT. § 938.34(2)(a), the juvenile can be placed under the supervision of an agency "under conditions prescribed by the court including reasonable rules for the juvenile's conduct, designed for the physical, mental and more well-being and behavior of the juvenile." A letter of apology is not an onerous condition.

¶24 Nonetheless, the disposition is reversed because of the prohibition on a forfeiture and surcharge. Thus, we remand the case for a new dispositional hearing. The adjudication order and the post-disposition order, however, are affirmed.

By the Court.—Orders affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

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