COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2003

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 No. 03-1083 **Cir. Ct. No. 01TP000410**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LAURA K-T.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOSEPH R. WALL, Judge. *Affirmed.*

¶1 CURLEY, J.[1] Laura K-T. appeals from the order terminating her parental rights to her daughter, Kayla T. She contends that: (1) the admission of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02).

evidence regarding the termination of her parental rights to an older child was prejudicial error; and (2) there was insufficient evidence to establish, as a ground for the termination of her parental rights, that she failed to assume parental responsibility within the meaning of WIS. STAT. § 48.415(6) (2001-02).[2] Because this court concludes that the trial court properly admitted evidence of an earlier case terminating Laura K-T.'s parental rights to another child, and there was sufficient evidence to establish Laura K-T.'s failure to assume parental responsibility, this court affirms.

I. BACKGROUND.

¶2 Kayla was born on February 11, 2000, and immediately taken into protective custody due to Laura K-T.'s mental health and substance abuse history. Kayla was found to be a child in need of protection or services, and the court accordingly entered a dispositional order placing her outside of the home of her mother, Laura K-T. In June 2001, the dispositional order was extended for one year.[3] Pursuant to WIS. STAT. § 48.356(2), the written orders signed by the court and provided to Laura K-T., contained written warnings regarding the possibility of the termination of her parental rights to her daughter.

¶3 On September 27, 2001, a petition was filed seeking the termination of Laura K-T.'s parental rights to Kayla. As grounds for termination, the petition alleged that Kayla remained in continuing need of protection or services and it was unlikely that Laura K-T. would meet the conditions established for her return

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[3] Laura K-T. contested the extension of the original CHIPS order.

within twelve months, pursuant to WIS. STAT. § 48.415(2), and that Laura K-T. had failed to assume parental responsibility for her daughter, pursuant to WIS. STAT. § 48.415(6). On September 10, 2002, Laura K-T. filed a motion *in limine* requesting the exclusion of "[a]ny evidence regarding [Laura K-T.]'s prior terminations of parental rights cases, either done voluntarily or involuntarily." The motion was subsequently granted in part and denied in part.[4] Soon thereafter a two-day jury trial was held to determine whether grounds existed to terminate Laura K-T.'s parental rights to Kayla. The jury found that evidence existed to support the above-mentioned grounds for the termination of her parental rights. A dispositional hearing was held, and the trial court ordered the termination of Laura K-T.'s parental rights to Kayla in November 2002.

II. ANALYSIS.

A. The trial court properly admitted evidence regarding Laura K-T.'s failure to meet the conditions for the return of an older child.

¶4 While Laura K-T. concedes that evidence of the history of a parent's conduct is "relevant to predicting a parent's chances of complying with conditions in the future," *see* ***La Crosse County DHS v. Tara P.***, 2002 WI App 84, ¶13, 252 Wis. 2d 179, 643 N.W.2d 194, she argues that "what was improper about the admission of the evidence [in this case] was the jury was also told the older child

[4] The trial court granted Laura K-T.'s motion *in limine* in part, as it did not admit evidence regarding cases from the 1980's and early 1990's involving Laura K-T.'s other children, having found the relevance of that evidence to have dissipated. The evidence that was admitted concerned a child born in 1997 and subsequently subject to TPR proceedings that resulted in the permanent termination of Laura K-T.'s parental rights.

had been taken from [her] at birth and never returned to her."[5] She argues that "[t]he fact the older child was permanently removed from [her] care was not relevant to the 'substantial likelihood' issue or any other element of the so-called 'continuing CHIPS' ground." Thus, she appears to be arguing that the actual fact that the child was never returned does not fall within the rubric of the "conduct" of the parent, and is thus not only irrelevant, but prejudicial.

¶5 "[This court] review[s] a trial court's decision to admit or exclude evidence in a termination trial under the erroneous-exercise-of-discretion standard." ***State v. Quinsanna D.***, 2002 WI App 318, ¶19, 259 Wis. 2d 429, 655 N.W.2d 752 (citation omitted). Further, "[this court] will not upset a circuit court's decision to admit or exclude evidence if the decision has 'a reasonable basis and was made in accordance with accepted legal standards and in accordance with the facts of record.'" ***Tara P.***, 252 Wis. 2d 179, ¶6 (quoting ***Lievrouw v. Roth***, 157 Wis. 2d 332, 348, 459 N.W.2d 850 (Ct. App. 1990) (citations omitted)).

¶6 The trial court admitted evidence regarding Laura K-T.'s failure to fulfill the conditions for the return of one of her older children on the ground that it was directly relevant to the substantial likelihood that she would not meet the court-ordered conditions within twelve months pursuant to WIS. STAT. § 48.415(2).[6] Before trial, in response to a question from the trial court regarding the evidence the State anticipated introducing, the State remarked:

---

[5] Although Laura K-T. concedes the relevance of the history of the parent's conduct, she mischaracterizes it as character evidence under WIS. STAT. § 904.05(2). As is noted below, this evidence was found to be directly relevant to the issue of whether there was a substantial likelihood that she would meet the court-ordered conditions, pursuant to WIS. STAT. § 904.01.

[6] The court stated:

(continued)

> That she was detained at birth in 1997, placed in an out-of-home placement. There were orders that were entered with conditions, that [Laura K-T.] never met those conditions, and that the child was never returned to her care. That would, essentially, be the story that I would tell in regards to [the other child].

¶7 The trial court, upon the agreement of the parties, instructed the jury as follows:

> [F]rom the next witness you will hear testimony regarding allegations of abuse or neglect of another child of [Laura K-T.]…. I've instructed you earlier on this. But as long as this witness is testifying, if you find this conduct did occur, you are to consider it as evidence only as to whether there is a substantial likelihood that [Laura K-T.] will not meet the court conditions established for the safe return to her home of the child, Kayla, within the 12-month period following the conclusion of this trial. You may not consider this evidence regarding [the other child] for any other purpose.

The following testimony was then presented:

> …
>
> Q: And before that, there was another child of [Laura K-T.] that was in the Child Welfare System; is that right?
>
> A: Yes.
>
> …
>
> Q: And that child was born in 1997; is that right?
>
> A: Yes.
>
> Q: Was that child removed from [Laura K-T.]'s care at birth, also?

> … I don't find that this evidence as to Nicole is Whitty evidence. So, I want the record to be clear that I don't consider it to be Whitty evidence. I do—Rather, I find it to be directly—direct evidence as to that element of the CHIPS condition.

A: Yes.

Q: And was that child placed in foster care?

A: Yes.

Q: Were there court orders entered for that child as well?

A: Yes.

Q: Did [Laura K-T.] ever meet the conditions of return for that child?

A: No.

Q: And was that child ever returned to her care?

A: No.

There were no objections made to this testimony. Trial counsel never objected to the jury instruction or the testimony, and did not specifically argue that the fact that the other child was not returned to Laura K-T.'s care was irrelevant regardless of the relevancy of her failure to meet the court-ordered conditions for the return of that child. Further, trial counsel only argued, in support of the motion *in limine* to exclude the evidence, that the evidence as a whole was prejudicial.

¶8 What trial counsel did argue was that "[i]f the court is going to agree to introduce any of the CHIPS evidence regarding [the other child], I am still asking that there be no mention in front of the jury that a voluntary TPR was done in regard to Nicole." Similarly, Laura K-T. argues, in this appeal, that the jury had "no business considering a previous court-ordered termination." However, as the testimony indicates, the fact that the other child's case resulted in a voluntary termination of parental rights was never disclosed to the jury.

¶9 Accordingly, the trial court's decision to admit the evidence has a reasonable basis and was made in accordance with an accepted legal standard –

relevance – and the facts of record. Thus, the trial court's admission of the evidence was not an erroneous exercise of discretion and will be upheld.

B. There was sufficient evidence to establish Laura K-T.'s failure to assume parental responsibility.

¶10 Laura K-T. argues that there was insufficient evidence to establish that she failed to assume parental responsibility within the meaning of WIS. STAT. § 48.415(6).[7] Particularly, she argues that since Kayla was removed from her care at birth and has remained in foster care ever since,

> as a matter of law where the State has removed the child from a parent at birth and never returned the child, thereby preventing the parent from exercising the "daily supervision" described in § 48.415(6)(b), Stats., it cannot then contend or prove the parent has failed to assume the responsibility the State has prohibited the parent from assuming. A parent cannot be penalized for failure to do something he or she is prohibited from doing.

[7] WISCONSIN STAT. § 48.415(6) states:

> (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have never had a substantial parental relationship with the child.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

In support of this proposition, Laura K-T. cites ***Carla B. v. Timothy N.***, 228 Wis. 2d 695, 704, 598 N.W.2d 924 (Ct. App. 1999), a case in which the issue was the interpretation of WIS. STAT. § 48.415(1)(b).[8] Laura K-T. is attempting to extend this rationale to her facts, and the evaluation of her alleged failure to assume parental responsibility within the meaning of WIS. STAT. § 48.415(6).

¶11 While the law requires the State to prove the parent failed to assume parental responsibility when the State removed the child from the parent at birth and never returned the child, WIS. STAT. § 48.415(6) does *not* require a showing that the parent "had the opportunity and the ability to assume parental responsibility for the child." ***Ann M.M. v. Rob S.***, 176 Wis. 2d 673, 683-84, 500 N.W.2d 649 (1993). "[T]he Wisconsin legislature has concluded that a person's parental rights may be terminated without proof that the person had the opportunity and ability to establish a substantial parental relationship with the child." ***Ann M.M.***, 176 Wis. 2d at 684. Thus, parents' rights may be terminated under § 48.415(6) even if they lacked the ability to establish a parental relationship. *See* ***id***. at 684. A "substantial parental relationship" means "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." Section 48.415(6)(b). In determining whether Laura K-T. has had a substantial parental relationship with her daughter, the jury was to consider "whether the person has ever expressed concern for or

[8] WISCONSIN STAT. § 48.415(1)(b) states:

> Incidental contact between parent and child shall not preclude the court from finding that the parent has failed to visit or communicate with the child under par. (a) 2. or 3. The time periods under par. (a) 2. or 3. shall not include any periods during which the parent has been prohibited by judicial order from visiting or communicating with the child.

interest in the support, care or well-being of the child, [and] whether the person has neglected or refused to provide care or support for the child." *See* ***id***. Laura K-T. was not prohibited from seeing her daughter. As indicated by § 48.415(6)(b), whether the parent has expressed interest in or concern for well-being of the child is a factor considered by the jury. Living under the same roof is not an implicit requirement, nor is it necessary for a parent to express interest in or concern for the child. Accordingly, Laura K-T.'s contention that she cannot be penalized for failing to do something she has been prohibited from doing is inaccurate and unsound.

¶12 In regard to the sufficiency of the evidence in general, "[a]ppellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it." ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. Thus, "[i]f we find that there is 'any credible evidence in the record on which the jury could have based its decision,' we will affirm that verdict." ***Id***., ¶39 (quoting ***Lundin v. Shimanski,*** 124 Wis. 2d 175, 184, 368 N.W.2d 676 (1985)). Accordingly, "appellate courts search the record for credible evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not." ***Id***. Moreover, "[o]nly when the evidence is inherently or patently incredible will [the court] substitute [its] judgment for that of the factfinder." ***State v. Saunders,*** 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995) (citation omitted).

¶13 Laura K-T. suffers from chronic undifferentiated schizophrenia. Testimony was presented indicating that "auditory and/or visual hallucinations, delusional thinking disorder[s], speech disorders, behavior and negative symptoms which include blunted affect, anhedonia, [and] poor socialization" are all symptoms of schizophrenia. There was also testimony presented that during

therapy sessions, Laura K-T. oftentimes would "be preoccupied with auditory hallucinations, looking off and responding to someone who wasn't there in the room or asking to be excused to go have a cigarette and then not returning to the session." Further, Laura K-T. testified that she had been in a mental health hospital for sixteen days the month before the trial.

¶14 Laura K-T. also has an alcohol problem. Her therapist testified that alcohol and marijuana abuse "actually makes symptoms worse even though the patient initially feels it helps her and provides some relief. It actually increases and worsens the symptoms they're experiencing and it leads to poor decision making on their part." There was also testimony presented indicating that Laura K-T. was not regularly attending her therapy sessions and at one point had taken herself off of her medication.

¶15 Kayla's foster mother testified that Laura K-T.'s contact with the foster family was erratic. She testified that there were times when they would not hear from Laura K-T. for months. She also testified that often, when Laura K-T. would call, she might begin the conversation asking about Kayla but then spend the rest of the phone call talking about her personal problems. The foster mother testified,

> One time she called and we were talking. I was telling her about something that Kayla had done. I can't exactly remember what it was but it was a milestone. And we were talking about it and in mid-sentence she cut in and said, "I really got sunburned this weekend." And then she started talking about that. Or every conversation I have had I can safely said that we've discussed her cat, even to a point of her having the cat meow on the phone.

Kayla's foster mother also testified that, at one point, when Kayla was six months old, Laura K-T. brought Kayla a sweater that was for a five-year old. She also

testified that when she attempted to update Laura K-T. on Kayla's condition and special needs during a period when there was no visitation, she showed little concern.

¶16 There was a significant amount of testimony presented detailing the supervised visits that Laura K-T. had with Kayla. On numerous occasions there was little or no interaction between Laura K-T. and her daughter. During several visits, Laura K-T. would not speak to Kayla for long periods of time, and would not respond when Kayla would speak to her. During one visit, Laura K-T. stared at the wall and spoke to "an unknown person sitting to her left." There was testimony presented that, during a supervised visit in January 2002, "she said that she had used marijuana and drank beer when she was pregnant with Kayla. She also said her 'pipe' was always with her[,] … that she had 'dealt' drugs[,] …. [and that] she and [her boyfriend] had been drinking beer but when she leaves him she's going to really party and drink vodka."

¶17 As indicated above, a "substantial parental relationship" means "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." Section 48.415(6)(b). In determining whether Laura K-T. has had a substantial parental relationship with her daughter, the jury was to consider "whether the person has ever expressed concern for or interest in the support, care or well-being of the child, [and] whether the person has neglected or refused to provide care or support for the child." *See* ***id***. There was ample evidence presented, only a sampling of which is noted above, to support the jury's finding that Laura K-T. failed to assume parental responsibility for Kayla. The lack of interaction with and concern for the child, the alcohol abuse during her pregnancy and after Kayla was born, both in and of itself and in addition to its effects on Laura K-T.'s schizophrenia, the behavior at the

supervised visits, and her mental health history all support the jury's finding in this regard. Because the jury's finding that Laura K-T. failed to assume parental responsibility is not clearly erroneous, it must be upheld.

¶18 Based upon the foregoing, the trial court is affirmed.

By the Court.—Order affirmed.

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