COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1800 **Cir. Ct. No. 02-TP-000039**

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

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

EAU CLAIRE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

SHERRINDA M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Sherrinda M. appeals an order terminating her parental rights to her son Devon. Her sole argument is that the real controversy has not been fully tried because she claims two comments by corporation counsel clouded the issue. We disagree and affirm the order.

Background

¶2 Devon had been adjudicated a child in need of protection or services in 2001. The CHIPS order was extended in 2002. A TPR petition was filed in November 2002 alleging that Sherrinda had abandoned Devon by virtue of his continued placement outside her home and her failure to communicate with him for over three months, contrary to WIS. STAT. § 48.415(1)(a)(2). The petition further alleged Devon's continued status as a child in need of protection or services. *See* WIS. STAT. § 48.415(2). The petition also noted that Sherrinda had failed to meet the conditions for Devon's return and it was substantially unlikely that she would meet the conditions within the twelve months that would follow the fact-finding hearing.[2]

¶3 The jury determined that there were grounds to terminate Sherrinda's parental rights. The case proceeded to disposition, and the court terminated her rights. Sherrinda appeals, arguing that corporation counsel's statements at the fact finding hearing "clouded the crucial issue."

[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.

[2] Among other reasons, Sherrinda is incarcerated until 2005.

Discussion

¶4 Sherrinda does not directly challenge the sufficiency of the evidence upon which the jury relied, nor does she directly challenge the disposition of the petition. Rather, she contends the real controversy was not tried at the fact-finding hearing because of two comments corporation counsel made. We disagree.

¶5 In his opening statement, corporation counsel said:

> But before I go down that road let me talk a little bit about what this trial is really about. It's really about Devon. It's concern about a little boy whose date of birth is March 8, 2001, a little boy who for his entire life has never lived with his mother. … This is a trial about whether or not the situation as exists today should continue or whether or not there are facts to proceed on to the next stage, which is terminate Sherrinda['s] … parental rights.

¶6 Sherrinda also takes issue with a statement corporation counsel made in his closing argument: "When you go in to decide today, when you go in to make your decisions on the two special verdicts, what I want to remind you about is this trial is really about Devon …. It's not about Sherrinda …."

¶7 This court has both inherent power and express statutory authority to reverse a judgment and remit a case for a new trial in the interest of justice. WIS. STAT. § 751.06; ***State v. Hicks***, 202 Wis. 2d 150, 159, 549 N.W.2d 435 (1996). A new trial may be ordered whenever (1) the real controversy has not been fully tried or (2) it is probable that justice has for any reason been miscarried. ***Hicks***, 202 Wis. 2d at 159-60. This discretionary authority is formidable and should be exercised sparingly and with great caution. ***In re Tainter***, 2002 WI App 296, ¶23, 259 Wis. 2d 387, 655 N.W.2d 538. Sherrinda argues only that the real controversy was not tried.

¶8 Situations in which the controversy may not have been fully tried arise in two factually distinct ways: (1) when the jury is erroneously not given the opportunity to hear important testimony that bears on an important issue of the case, and (2) when the jury has before it evidence not properly admitted that so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried.[3] ***Hicks***, 202 Wis. 2d at 160. Sherrinda does not argue that the jury did not hear important testimony. Thus, we must determine whether the real controversy in this case was not fully tried because the jury had before it improperly admitted evidence clouding a crucial issue.[4]

¶9 Sherrinda does not explain why corporation counsel's statements clouded any particular issue, especially in light of a record that, from our review, adequately supports the grounds alleged in the TPR petition.[5] We discern, however, that Sherrinda's focus is on jurisprudence indicating that, at fact finding, the child's welfare is not the overriding concern.

¶10 Although WIS. STAT. ch. 48, which governs termination of parental rights, has the child's best interests as a consistent objective throughout, the "best

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[3] We note that both ***State v. Hicks***, 202 Wis. 2d 150, 160, 249 N.W.2d 435 (1996), and the case it cites, ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985), use the phrase "evidence not properly admitted." Sherrinda changes this to read "improper matters heard by the jury." We disagree with her interpretation of the case law.

[4] We note that Sherrinda's attorney did not object to either of corporation counsel's statements at trial; this generally presents waiver as grounds for dismissing the case without addressing the merits. *See* ***Hansen v. Crown Controls Corp.***, 181 Wis. 2d 673, 697-98, 512 N.W.2d 509 (Ct. App. 1993). However, we decline to use waiver to dispose of this case.

[5] Our review of a jury verdict is narrow. ***In re Teyon D.***, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 655 N.W.2d 752. We sustain a jury verdict if there is any credible evidence to support it. ***Id.*** Moreover, if there is any credible evidence that leads to an inference supporting the verdict under any reasonable view, we do not overturn it. ***Id.*** In determining whether there is any credible evidence to support the jury, we search the record for supporting evidence. ***Id.***

interests of the child" standard does not prevail until the affected parent has been found unfit. ***In re Prestin T.B.***, 2002 WI 95, ¶22, 255 Wis. 2d 170, 648 N.W.2d 402. During the fact-finding phase, the parent's rights are paramount. ***Id.***, ¶24.

¶11 Sherrinda thus argues that the jury should not be told that Devon's best interests are involved in the fact-finding stage, that corporation counsel used the power of the County to turn the purpose of a fact-finding hearing on its head, that corporation counsel directed the jury to consider Devon's well-being and not Sherrinda's in reaching its verdicts, and that urging the consideration of sympathy for Devon to the exclusion of Sherrinda prevented the jury from considering the only issue: whether sufficient grounds existed under the particular statutory provisions. Sherrinda, however, faces two problems: the alleged error does not fit within our rubric for considering whether an issue has been fully tried, and her arguments are based on mischaracterization of corporation counsel's statements.

¶12 The real controversy in a case is not fully tried if the jury considers improperly admitted evidence. The problem here is that the attorneys' remarks are not evidence, and the court so instructed the jury twice. Jurors are presumed to follow the court's instructions. ***State v. Delgado***, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641 N.W.2d 490. Thus, we could conclude here that the jury considered no improper evidence.

¶13 More substantively, however, Sherrinda simply mischaracterizes corporation counsel's statements. In both situations, counsel's alleged improper statement came at the beginning of his presentation. After both statements, counsel went on to explain the evidence to the jury. Significantly, corporation counsel explained Sherrinda's actions and how they related to the grounds alleged in the petition. At no point did corporation counsel ever state that Sherrinda's

rights were unimportant or that Devon's rights somehow preempted hers. At no point did corporation counsel tell the jury to put Devon's interests first, or that Devon's well-being was the standard by which the jury should make its decisions.

¶14 Counsel should be allowed considerable latitude in argument, with discretion given to the trial court in determining the propriety of the argument. ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979).[6] Corporation counsel may comment on the evidence, detail it, argue from it to a conclusion, and state that the evidence convinces him and should convince the jury. *See* ***id.*** The line between permissible and impermissible argument is drawn where corporation counsel goes beyond reasoning from the evidence and instead suggests that the jury arrive at a verdict by considering factors other than the evidence. *See* ***id.***

¶15 It is impossible to have a fact-finding hearing without substantial reference to the child or children involved. By the very nature of the case, a prosecutor must detail how the parent and child have or have not interacted, especially when the grounds alleged for termination include abandonment. Corporation counsel's introductory statements in his opening and closing arguments, considered in their context, constituted nothing more than adversarial hyperbole. It is evident to us that invoking the child's name in argument—which, we reiterate, is not evidence—is a convention of advocacy, not a directive to a jury.

¶16 Moreover, in both arguments corporation counsel did not dwell on Devon. Instead, after briefly mentioning the child, he extensively detailed to the

[6] Of course, since Sherrinda did not object at the hearing, the circuit court was never called upon to exercise its discretion.

jury all of the County's evidence relating to Sherrinda's behavior, what this evidence meant, and how it related to the issues the jury would be deciding—exactly what corporation counsel is permitted to do under ***Draize***.

¶17 In reply to the County, rather than developing her argument, Sherrinda simply reiterates that "If the jury actually listened to corporation counsel, his arguments turned the purpose of a termination trial on its head." However, we presume the jury followed the court's instructions, not corporation counsel's arguments. ***Delgado***, 250 Wis. 2d 689, ¶17. The jury was properly instructed not to consider counsel's arguments as evidence, it was properly instructed on the law, and the evidentiary record supports its verdict. The issue whether grounds existed to terminate Sherrinda's parental rights to Devon was fully tried.

By the Court.—Order affirmed.

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