

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 22, 2004

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 Nos. 03-2675, 03-2676,
03-2677, 03-2678,
03-2679, 03-2680,
03-2681, 03-2682**

**Cir. Ct. Nos. 02TP000059, 02TP000060,
02TP000061, 02TP000062,
02TP000063, 02TP000064,
02TP000065, 02TP000084**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

No. 03-2675

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
TIERA J. K., A PERSON UNDER THE AGE OF 18:**

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

JANELLA R.,

RESPONDENT-APPELLANT.

No. 03-2676

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

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JANELLA R.,

RESPONDENT-APPELLANT.

No. 03-2677

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

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JANELLA R.,

RESPONDENT-APPELLANT.

No. 03-2678

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

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JANELLA R.,

RESPONDENT-APPELLANT.

NO. 03-2679

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

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JANELLA R.,

RESPONDENT-APPELLANT.

NO. 03-2680

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

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JANELLA R.,

RESPONDENT-APPELLANT.

NO. 03-2681

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

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JANELLA R.,

RESPONDENT-APPELLANT.

No. 03-2682

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

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JANELLA R.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Rock County:
RICHARD T. WERNER, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Janella R. appeals orders of the circuit court terminating her parental rights to her children, Tiera J.K., Quetta S.R., Alvino W.R., Jeremiah R.R., Kori J.R., Mateo D.R., Isaiah R., and Anthony D.R.

¶2 Janella argues that the circuit court erroneously refused to exclude testimony from an expert witness. Janella also contends that she is entitled to a new trial in the interest of justice. We disagree and affirm the orders of the circuit court.

Background

¶3 Janella's seven oldest children have been in foster care since December of 2000.² On November 15, 2001, these seven children were found to be in need of protection or services. The eighth child, born in December of 2001, has been in foster care since May of 2002. This child was found to be in need of protection or services on June 28, 2002.

¶4 On October 15, 2002, Rock County Human Services (RCHS) began proceedings to terminate Janella's parental rights to the seven oldest children on the grounds that Janella had failed to meet the return conditions in the permanency plan. On December 30, 2002, RCHS began proceedings to terminate Janella's parental rights to the eighth child on the grounds that Janella had failed to meet the return condition in the permanency plan. All eight cases were tried together.

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

² One of these seven children was returned to Janella's home in late April 2002, and then removed again in May 2002.

¶5 One of the central issues at trial was whether Janella was controlling her mental health symptoms as required by the return conditions of the permanency plans. In the permanency plans filed for the seven oldest children, the relevant return condition reads: “The mother must control her mental health symptoms so as to meet the needs of the child.” In the permanency plan filed for the eighth child, the relevant return condition reads: “The mother must be able to handle the ordinary stresses of life so as to meet the needs of the child.”

¶6 At trial, Nancy Carey, the RCHS case manager assigned to Janella since December 2000, testified that she regarded these two return conditions as being essentially the same. Carey stated that both conditions required Janella to “handle things in a way that’s going to be appropriate for the kids and safe for the kids. And ... a great part of that has to do with her mental health.”

¶7 On the first day of trial, evidence was presented that on April 18, 2001, Dr. Robert Kalember diagnosed Janella with adjustment disorder with disturbance of conduct, impulse control disorder NOS (not otherwise specified), and personality disorder NOS. Evidence was also presented that on September 26, 2001, Dr. Jeffrey Marcus diagnosed Janella with post-traumatic stress disorder.

¶8 On the second day of trial, the guardian ad litem sought to introduce the testimony of Dennis Luster, a Rock County crisis intervention supervisor, as an expert witness to “explain ... the definition of [the] diagnoses ..., the symptoms and the potential treatment.” Luster has a bachelor’s degree in social work and a master’s degree in guidance and counseling and has worked in the field of psychology for twenty-four years. Janella objected to the introduction of Luster’s testimony on the ground that its unfairly prejudicial nature would greatly outweigh

any relevance. In response to Janella's objection, the guardian ad litem explained his reasons for calling Luster as follows:

I'm not going to ask [Luster] any particular opinions about [Janella]. I'm bringing him in solely to educate the jury about these particular type[s] of mental illness, what types of symptoms there are and what treatments are available. I think that's appropriate because the first condition, at least in the first seven children, is that she has to deal with her mental health, and we need to provide the jury with some understanding about what treatment alternatives there are out there, and that will go to whether or not [Janella] has met that condition and whether she will be able to meet it in the next year.

¶9 The court overruled the objection, stating:

The purpose of an expert is to assist the jury in understanding something that might be outside their common realm of understanding or knowledge. Mr. Luster is proposed to be called to discuss or inform the jury about various terms from the psychiatric realm from DSM-IV and to explain what treatment alternatives might be available.

I think that while we've referred to posttraumatic stress syndrome here and certain other things relating to [Janella], nothing has really been explained to them about treatment or the effect of treatment, what's available. I think that that would assist the jury and to understand what has been discussed in that context by Ms. Carey, and I think further it is relevant because it does go to the issues in my estimation of whether [Janella] has failed to meet the return conditions that are set forth, and that is a return condition for the children concerning their mental health, and also, whether there's a substantial likelihood that she will not meet those conditions within the next 12 months. And for that basis, I think it's relevant. And also, I think an expert in that regard will be a benefit to the jury to educate the jury by understanding what these terms mean and what it means in context of this particular case, not [Janella] specifically, because I will sustain any objection if he gets into anything specific about [Janella], but it does relate to those return conditions, so I will allow his testimony.

Luster was then qualified, without objection, as an expert in the field of mental health. Luster explained the reports issued by Dr. Marcus and Dr. Kalember and defined the various terms used within those reports. He also generally described the possible treatments and symptoms of post-traumatic stress disorder, adjustment disorder with disturbance of conduct, impulse control disorder NOS, and personality disorder NOS. Luster did not offer any opinion as to Janella's mental health or to whether she had met or not met the return conditions.

¶10 Ms. Carey testified that Janella refused to go to counseling or to submit to another psychiatric evaluation and was unwilling to receive any services in the year prior to trial that would have assisted her in meeting the return conditions. Ms. Carey stated that there had been attempts made to provide Janella with in-home counseling with Stacy Farrington. Ms. Carey further testified that, while Janella was initially receptive to the idea of receiving in-home counseling services, Ms. Farrington was never actually able to provide the counseling because on the three attempts made by RCHS to provide the services, Janella became angry and agitated and told them to leave. According to Ms. Carey, during these visits, "Janella was very angry, very agitated, very loud" and, though no one told Janella that she was going to have to take medication and it was made clear to Janella that Ms. Farrington was not there to put Janella on medication, Janella would nonetheless become agitated by "issues of medication and that kind of stuff." Ms. Carey also testified that her attempts to just talk with Janella about the return conditions would end in argument.

¶11 At trial, Janella testified:

I will cooperate with the Department, but one thing I would like the Department [to] know is that I still disagree with

the medication part because I don't feel that I have a mental illness or any type of mental health issues where medication or any other treatment may be needed.

Janella also testified that if she were re-evaluated and the doctor prescribed medication, she would not take the medication.

¶12 On May 23, 2003, the jury found that grounds for termination existed. On June 20, 2003, the court entered orders terminating Janella's rights to all eight children. Janella appeals from these eight orders.

Discussion

Standard of Review

¶13 The circuit court's ultimate decision to terminate parental rights will be upheld unless there is an erroneous exercise of discretion. *David S. v. Laura S.*, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). We review a trial court's decision to admit or exclude evidence in a termination of parental rights trial under the erroneous exercise of discretion standard. *La Crosse County Dep't of Human Servs. v. Tara P.*, 2002 WI App 84, ¶6, 252 Wis. 2d 179, 643 N.W.2d 194, *review denied*, 2002 WI 48, 252 Wis. 2d 152, 644 N.W.2d 688 (Apr. 22, 2002) (Nos. 01-3034, 01-3035). This court will uphold a trial court's decision to admit evidence if the court exercised discretion in accordance with accepted legal standards and the facts of record. *Tara P.*, 252 Wis. 2d 179, ¶6. "[E]xpert testimony is admissible in Wisconsin if relevant and will be excluded only if the testimony is superfluous or a waste of time." *State v. Donner*, 192 Wis. 2d 305, 316, 531 N.W.2d 369 (Ct. App. 1995). "We will generally look for reasons to

sustain a trial court's discretionary decision." *Murray v. Murray*, 231 Wis. 2d 71, 78, 604 N.W.2d 912 (Ct. App. 1999).

Expert Witness

¶14 Both parties agree that a central issue to this case was whether Janella had met the return condition that required her to control her mental health symptoms. Janella does not dispute that Mr. Luster was properly qualified as an expert. Instead, Janella argues that Luster's testimony was irrelevant. Janella contends that because Mr. Luster gave general testimony explaining the various terms used in the diagnoses and the possible treatments, and because he did not examine Janella and, therefore, could not testify about Janella specifically, he presented nothing relevant to Janella's specific situation.

¶15 We agree with much of Janella's relevance argument. Luster testified to many mental health issues that were not tied in to Janella's particular situation. We do not agree, however, that all of Luster's testimony was irrelevant. Some of Luster's testimony could have assisted the jury in understanding the evidence that had been presented. The reports by Dr. Marcus and Dr. Kalember, as well as their findings, had already been referred to on the first day of the trial. The jury heard a number of complex psychiatric and medical terms. For example, on the first day of trial, the following exchange took place:

[JANELLA'S COUNSEL]: All right, are there diagnosis there -- diagnoses?

[CAREY]: Yes.

[JANELLA'S COUNSEL]: What are they?

[CAREY]: There's an Axis I was Adjustments Disorder With Disturbance of Conduct and Impulse

Control Disorder NOS. Axis II is Personality Disorder, NOS. Axis III was no diagnosis on Axis III. Axis IV was Code 4 severity severe, stressors placement of children in foster homes, unemployed, dependent on male friends and Axis V talks about the GAF at 50 and best in the past year was zero.

None of these terms were explained at the time this testimony was presented, but Luster's testimony provided definitions. Further, our review of the cross-examination of Luster reveals that Janella's attorney demonstrated that much of Luster's testimony was irrelevant to Janella's mental health issues.

¶16 Even if we assume that the admission of Luster's testimony was error, we conclude it was harmless error. An erroneous exercise of discretion does not result in reversal or a new trial unless "the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial." *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768 (quoting WIS. STAT. § 805.18(2)).

For an error to "affect the substantial rights" of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue. A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome. If the error at issue is not sufficient to undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless.

Id. (citations omitted).

¶17 The question that the jury had to answer was whether Janella was controlling her mental health symptoms and meeting the needs of her children. Mr. Luster offered no opinion on Janella's mental health, or on whether she was controlling her symptoms. With no testimony telling the jurors that Janella

suffered from many of the conditions described by Luster, there is no reason a rational juror would have concluded that Janella did in fact have one of the conditions described by Luster. To take one example, Janella complains that Luster explained a “50” score on the overall functioning axis. She explains that a “50” score indicates serious impairment, whereas Janella’s actual score, “55,” indicates moderate symptoms. But the problem here, if any, is not with Luster’s testimony or with the admission of that testimony. Without more, there is no reason to think that the jurors assumed they knew the difference between a “50” score and a “55” score. Moreover, this is the kind of testimony that is routinely dealt with during cross-examination in which the opposing attorney brings out the fact that the particular testimony does not apply to the facts at hand. Did that happen in this case? Janella does not tell us.

¶18 Finally, our review of the record satisfies us that there is no reasonable possibility that there would have been a different outcome had Mr. Luster’s testimony been excluded. There was compelling evidence that RCHS was attempting to provide Janella with services that would help her to meet the return condition and equally compelling evidence, sometimes from Janella herself, that she was unwilling to cooperate. Janella’s own testimony showed that she was unwilling to recognize that she had a problem and, therefore, was not willing to take steps to control her mental health symptoms.

New Trial in the Interest of Justice

¶19 Janella requests that we exercise our discretionary reversal power under WIS. STAT. § 752.35 and grant a new trial in the interest of justice. Most of Janella’s argument in this regard repeats arguments she made with respect to

Luster's testimony. Since we have already concluded that Luster's testimony does not warrant reversal, we similarly conclude that it does not warrant reversal in the interest of justice.

¶20 The only significant new topic raised in the context of Janella's request for a new trial in the interest of justice is her argument that a portion of Ms. Carey's testimony should have been stricken because it was highly prejudicial hearsay and was misleading. We disagree.

¶21 The key issue was whether Janella was controlling her mental health symptoms. Ms. Carey's testimony regarding a threat to a teacher had nothing to do with this because the incident took place in April of 2001 and the permanency plan was not devised until October of 2001. We also do not think that Ms. Carey's statement was misleading with regard to a time frame. The relevant testimony was as follows:

Q. What services have you attempted to make available to [Janella] in the last year?

A. The individual in-home counselling. We also have continued through the whole thing attempted to talk about getting psychology eval, and Janella vehemently refused to do that reporting that she's already done that several times. She was up on the fifth floor of the men – it was mental health unit in our building, and she – she was placed there after threatening to kill a teacher. And for Janella that was an evaluation that said what needed to be said. She had seen Dr. Marcus at Beloit Counseling Center and that was proof that she had done what she needed to do. And she didn't believe that she needed to take any other exam, evaluations or go to counselling. So she wasn't – she was refusing to do those.

It is clear that Ms. Carey is explaining that Janella was refusing to submit to another evaluation because there had already been several performed. Later, Ms.

Carey is asked: “And you’re aware by virtue of the records that you have reviewed in this case, that [Janella] found herself in the Health Care Center on the fifth floor on April 18th, 2001?” to which Ms. Carey responded in the affirmative.

¶22 Additionally, the Kalember report, which is dated April 18, 2001, explains that Janella was being admitted because she “made homicidal threats towards [her] son’s teacher.” Janella herself points to both the testimony and the document as evidence in the record that shows that the incident took place in April of 2001.

¶23 Accordingly, we deny Janella’s request for a new trial in the interest of justice.

By the Court.—Orders affirmed.

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

