COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2902 **Cir. Ct. No. 03TP000014**

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

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

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

STACEY A.M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County: DALE T. PASELL, Judge. *Affirmed.*

¶1 DEININGER, P.J.[1] Stacey A. M. appeals an order terminating her parental rights to her six-year-old daughter. She claims the trial court erred in

[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.

admitting evidence of the nature of the criminal conviction for which she is imprisoned. We disagree and affirm.

BACKGROUND

¶2 The instant action is the third proceeding La Crosse County has commenced to involuntarily terminate Stacey's parental rights to her daughter. In the first action in 1999, as in this one, the County alleged that Stacey's daughter had been placed outside her home pursuant to one or more CHIPS[2] orders for more than six months, Stacey had failed to meet the conditions for the child's return and it was substantially unlikely that she would meet those conditions within twelve months following the TPR[3] hearing. *See* WIS. STAT. § 48.415(2).[4]

¶3 The father of Stacey's daughter was eleven or twelve years old at the time of the child's conception. Stacey was twenty-four or twenty-five. As a result of her repeated sexual intercourse with the boy over a period of several months, Stacey was convicted of repeated sexual assault of a child under the age of thirteen years and of second-degree sexual assault. She received a twenty-two-year prison sentence followed by twenty years' probation in lieu of a stayed ten-year prison sentence. At the time of the TPR trial, Stacey was incarcerated at Taycheedah with a mandatory release date of September 18, 2012. Her court-ordered conditions of probation include that she have no contact with persons under the age of eighteen unless approved by her probation officer.

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[2] Children in Need of Protection or Services (CHIPS). *See* WIS. STAT. § 48.13.

[3] Termination of Parental Rights (TPR). *See* WIS. STAT. § 48.40(2).

[4] The present petition also alleged Stacey's failure to assume parental responsibility under WIS. STAT. § 48.415(6) as an additional basis for terminating her rights.

¶4 Prior to the trial on the instant petition, Stacey moved for an order prohibiting the County and all witnesses "from introducing any evidence as to specific acts of [her] criminal misconduct." She argued that "the reason for [her] imprisonment is not relevant" and the information would only serve to prejudice the jury against her. In addition, she noted that the judge who presided at the TPR trial on the County's first petition had ruled the information regarding the nature of her criminal offenses was "irrelevant," and she asserted that the County "is collaterally estopped from raising this issue as [it] was already decided in 1999."[5]

¶5 The trial court denied Stacey's motion in limine. The court concluded that the nature of Stacey's criminal offenses was "part and parcel" of the conditions spelled out in the CHIPS orders for return of the child to Stacey's home, Stacey's efforts to meet those conditions, and the likelihood that she would be able to meet them within a year after the TPR trial. Thus concluding that the nature of Stacey's criminal conduct was relevant to outcome-determinative issues, and implicitly concluding that the probative value of the evidence was not outweighed by the danger of unfair prejudice, the court denied the motion to exclude it. The court did not expressly address the issue of whether the exclusion of the evidence in the prior TPR trial precluded a redetermination of admissibility in this one.

[5] In the first TPR action in 1999, the jury found that the County had not established grounds under WIS. STAT. § 48.415(2) for terminating Stacey's parental rights. The Country filed a second petition in 2001 alleging grounds under § 48.415(9), parenthood as a result of sexual assault. The circuit court granted this petition but we reversed, concluding that the grounds under § 48.415(9) may be used only to terminate the rights of a father, not those of a mother even though she may have perpetrated the sexual assault. ***La Crosse County Dep't of Human Servs. v. Stacey A.M.***, No. 01-1723, unpublished slip op. at ¶21 (WI App Sept. 13, 2001).

¶6 On the morning of trial, the court limited the admissibility of the nature of Stacey's crimes to "sexual assault of a minor," prohibiting any mention of the specific age of the victim. The jury returned verdicts finding the County had established the grounds to terminate Stacey's parental rights, and the court subsequently entered an order doing so. Stacey appeals, citing as error only the trial court's decision to permit the jury to hear that she had been convicted for "repeated sexual assault of a minor."

ANALYSIS

¶7 Stacey first argues that the doctrine of issue preclusion bars the County from admitting evidence at the present TPR trial of the nature of her criminal convictions because it was not permitted to do so at the prior trial. She contends that the "fundamental fairness" factors weigh in favor of applying issue preclusion to prohibit the County from admitting the evidence. *See* ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 688-89, 495 N.W.2d 327 (1993). We find it unnecessary to address those factors, however, because the court's discretionary ruling to permit the County to inform the jury that Stacey's convictions were for the "repeated sexual assault of a minor" is not the type of judicial decision that is subject to a claim of issue preclusion.

¶8 "Issue preclusion refers to the effect of a judgment in foreclosing relitigation in a subsequent action of *an issue of law or fact* that has been actually litigated and decided in a prior action." ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550-51, 525 N.W.2d 723 (1995) (emphasis added). The RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982), puts it this way: "When an issue of fact or law is actually litigated and *determined by a valid and final judgment, and the determination is essential to the judgment*, the determination is

conclusive in a subsequent action between the parties, whether on the same or a different claim." (Emphasis added.) A trial court's discretionary ruling to admit or exclude certain evidence at trial, after determining its relevance and weighing its probative value against the danger of unfair prejudice, is *not* "an issue of fact or law," and neither is it determined "by a valid and final judgment" or "essential to the judgment."

¶9 Rather, the evidentiary ruling at issue in this case is a transitory one made during the course of litigation as opposed to being a necessary component of the final judgment. An evidentiary ruling may be reversed or modified by the trial court itself in response to subsequent events at trial, and, given our standard of review, we could well affirm it regardless of whether the court ultimately decided to admit or exclude a certain item of evidence. *See, e.g.,* ***Lievrouw v. Roth***, 157 Wis. 2d 332, 348, 459 N.W.2d 850, 855 (Ct. App. 1990) (noting that "[a] trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has a 'reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record'" (citation omitted)).

¶10 Moreover, comment j to § 27 of the RESTATEMENT (SECOND) OF JUDGMENTS explains that, in order for the doctrine of issue preclusion to apply to an issue, it must have been "recognized … by the trier as necessary to the first judgment." That cannot be said of the admissibility of evidence regarding the nature of Stacey's criminal convictions—the result of the first trial might easily have been the same regardless of whether that evidence was admitted or excluded from the first trial.

¶11 Support for our conclusion that the doctrine of issue preclusion has no role to play in the present dispute may be found in ***Jones v. State***, 47 Wis. 2d 642, 178 N.W.2d 42 (1970). The supreme court addressed in that case whether the doctrine of "res judicata"[6] could be employed to preclude the admission of an inculpatory statement by a defendant because a similar inculpatory statement made by the same defendant at the same time had been declared inadmissible under ***Miranda v. Arizona***[7] in a prior trial. ***Id***. at 655-57. The court explained that the preclusion doctrine "applies only where the previous determination reaches the ultimate issue of guilt or innocence." ***Id***. at 656. Relying on the reasoning of a California case, the court concluded that although the earlier "ruling settled the admissibility of the defendant's confession in the [earlier] case, it had no effect on a subsequent prosecution of the defendant for another crime." ***Id***. at 657.

¶12 The court in ***People v. Dykes***, 52 Cal. Rptr. 537 (Cal. Ct. App. 1966), quoted with approval in ***Jones***, concluded that a ruling barring the admission of certain evidence in a municipal court prosecution did not preclude a court from admitting the evidence in a subsequent criminal prosecution. In so doing, the court discussed the doctrine of "collateral estoppel," the term formerly applied to issue preclusion, and it relied on the RESTATEMENT (FIRST) OF JUDGMENTS § 68 (1942), the predecessor of § 27 of RESTATEMENT (SECOND) OF JUDGMENTS, which we have quoted above. ***Id*** at 540-41.

> A determination either of fact or law cannot be said to be an adjudication unless it settles a matter directly in

[6] "Res judicata" is the term formerly used to describe the "related" doctrine of "claim preclusion." *See* ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 549-50, 525 N.W.2d 723 (1995).

[7] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

> issue. A question of fact becomes an issue when it is one which must be determined before the ultimate decision can be reached. Whether the search of Dykes' car was legal was not an essential question of fact. It related only to admissibility of the evidence. Proof of possession of the guns in the car could have been made in many ways, but each fact sought to be proved in the process would not be a fact in issue or, in other words, a fact the existence of which was essential to the judgment. The municipal court judgment or the ruling suppressing the evidence determined an incidental question of law; but it determined no issue of law or fact which had to be decided before the court could determine the issue of guilt, namely, whether Dykes had the guns in his car.
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> ….
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> Only confusion and injustice would result from applying the doctrine of collateral estoppel to every ruling made preliminary to the receipt or rejection of offered evidence….
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> In a retrial, if there is one, admissibility of the People's evidence should be ruled upon as if offered for the first time.

Id. at 542.

¶13 We recognize that the holdings in ***Jones*** and ***Dykes*** are not precisely on point to the issue we decide here. The courts in both cases concluded that determinations of fact or law made in the course of a ruling on the admissibility of evidence are not amenable to the application of issue preclusion in a subsequent action. Here, the determination at issue is neither strictly one of law or of fact, but the exercise of trial court discretion in determining the admissibility of certain evidence based on its relevance and its potential for creating unfair prejudice. The ruling at hand is nonetheless one relating to the admissibility of evidence, an "incidental question," not one that was "essential to the judgment" in the 1999 TPR action. *See* ***id.***; RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). We conclude that the reasoning set forth in both ***Jones*** and ***Dykes*** provides valuable

guidance on the question of whether issue preclusion may be applied to a discretionary ruling on the admissibility of evidence.[8]

¶14 Stacey also argues that the trial court erroneously exercised its discretion in permitting the County to introduce evidence that her criminal convictions were for the repeated sexual assault of a minor. She asserts that this fact was of limited relevance and its probative value was substantially outweighed by the danger of unfair prejudice. *See* WIS. STAT. § 904.03. Specifically, she claims that the "evidence of an adult woman sexually assaulting a boy would inflame a reasonable person." Although we do not disagree with the quoted proposition, we conclude that the trial court did not err in admitting the evidence.

¶15 As we have discussed and Stacey acknowledges, assessing the relevance of proffered evidence and weighing its possible prejudicial effect under WIS. STAT. §§ 904.02 and 904.03 are discretionary determinations by the trial court. ***State v. Alsteen***, 108 Wis. 2d 723, 727, 324 N.W.2d 426 (1982). We will uphold the trial court's determinations when the court has considered the facts of the case and reasoned its way to a conclusion that is one a reasonable judge could reach and is consistent with applicable law. ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). The trial court did so here.

[8] We do not wish to suggest that a discretionary decision may never be subject to the doctrine of issue preclusion in a subsequent action. Some discretionary determinations may well be "essential" to "a valid and final judgment." RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). For example, a trial court's determination regarding property division made in "a valid and final judgment" of divorce, although a discretionary application of law to the facts as found, is unlike an evidentiary ruling in that it goes to the very heart of the matters pled and litigated. *See* ***People v. Dykes***, 52 Cal. Rptr. 537, 541 (Cal. Ct. App. 1966) ("In civil litigation issues, whether of fact or law, are created by the pleadings and the pretrial order or by questions which are litigated as issues ….").

¶16 Evidence is not unfairly prejudicial simply because it is adverse to a party; rather, evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis. *See* ***State v. DeSantis***, 155 Wis. 2d 774, 792, 456 N.W.2d 600 (1990). In narrowing its ruling to preclude any reference to the actual age of the victim of Stacey's assaults or to his being "under the age of thirteen," the court limited the prejudicial effect of the fact that she had sexually assaulted an eleven-year-old boy. Moreover, the court's initial oral ruling clearly establishes that it believed the nature of the offenses for which Stacey was imprisoned was highly probative of certain facts of consequence in the TPR action—whether Stacey had met the conditions for the return of her daughter to her home and whether she was likely to do so within twelve months of the trial:

> In particular, I think that the issues about past sexual abuse … and how they have a role in perhaps the incident that occurred here, the issues concerning … the child's knowledge of how she was conceived, the issues of no contact with other children, all of those revolve, I think, and are relevant to the issue of whether or not there is a substantial likelihood that [Stacey] would meet the conditions for the return of the child within 12 months after the conclusion of this hearing. And I don't see how we can artificially exclude them.
>
> I don't think that it's enough to say she's attending and has completed this and say to the jury, in effect, that she's going to keep working hard at it without the jury knowing what it is that she actually has to accomplish and the terms of her counseling.

¶17 In deciding that the probative value of the limited information that Stacey had been convicted of sexually assaulting "a minor" was not substantially outweighed by the danger of unfair prejudice, the court applied the correct law to the facts before it and reached a reasonable conclusion that a reasonable judge could reach. The fact that a different judge had earlier reached a different

conclusion does not mean that discretion was erroneously exercised on either occasion. *See* ***Alsteen***, 108 Wis. 2d at 727.

CONCLUSION

¶18 For the reasons discussed above, we affirm the appealed order.

By the Court.—Order affirmed.

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