

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 23, 2011

A. John Voelker
Acting 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. 2011AP2053 &
2011AP2054
STATE OF WISCONSIN**

**Cir. Ct. No. 2010TP22
2010TP23**

**IN COURT OF APPEALS
DISTRICT IV**

2011AP2053

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

NIKITA B.,

RESPONDENT-APPELLANT.

2011AP2054

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

NIKITA B.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County:
PATRICK J. FIEDLER, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Nikita B. appeals the circuit court’s orders terminating her parental rights to her two sons, Alexei B. and Gemini S. She contends there was insufficient evidence of a substantial likelihood that she would not meet the conditions for the return of her children within the next nine months. We conclude there was sufficient evidence. Accordingly, we affirm.

BACKGROUND

¶2 In February 2010 the Dane County Department of Human Services (“the Department”) filed petitions to terminate Nikita B.’s parental rights to her two sons, Alexei B., d/o/b March 10, 2005, and Gemini S., d/o/b June 8, 2008. The ground asserted in the petitions for terminating Nikita’s parental rights was based on WIS. STAT. § 48.415(2), which provides for termination of parental rights when the child is in “continuing need of protection or services.”

¶3 The petitions alleged that the children had been in foster care since August 2008 and that Nikita had failed to meet several of the conditions set out in

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) and (3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

a January 2009 court order for the return of the children to her home. The return conditions were:

- (1) Have a safe, suitable and stable home and legal source of income.
- (2) Show that you are interested in your child.
- (3) Have regular and successful visits with your child.
- (4) Keep your child safe and do not hurt your child or let anyone else hurt your child.
- (5) Show that you can care for and control your child properly and that you understand his needs.
- (6) Allow no contact between your child and the person who abused your child.
- (7) Stay in touch with and cooperate with your worker.
- (8) Complete any programs recommended by your worker unless the court otherwise orders.
- (9) Cooperate with your child's service providers when asked.
- (10) Sign all releases of information as requested.
- (11) Successfully complete any programs recommended in any court-ordered evaluation, unless the court orders otherwise.
- (12) Use no alcohol if the evaluation says you have an alcohol problem.
- (13) Use no illegal drugs or abuse prescription drugs.
- (14) Give a urine sample for drug and alcohol test if you are asked to do so. Any failure or refusal to give a urine sample will be considered a positive test by the court and your social worker.
- (15) Commit no law violations or be incarcerated.

¶4 A fact-finding hearing was held before a jury. For each child, the jury found that the Department had made reasonable efforts to provide the services

ordered by the court, that Nikita had failed to meet the conditions established for the safe return of the children to her home, and that there was a substantial likelihood she would not meet the conditions for return within nine months following the conclusion of the fact-finding hearing. The parties had previously stipulated that the children had been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice.

¶5 At the subsequent disposition hearing, the circuit court indicated that it had considered changing the jury's answer from "yes" to "no" on the question whether there was a substantial likelihood that Nikita would not meet the conditions for return within nine months following the fact-finding hearing. However, the court decided not to change the jury's answer. The court stated it had the impression that Nikita's efforts had improved up to and since the jury trial. Consequently, the court set the matter for a continued disposition hearing to take additional evidence. At the continued disposition hearing, the circuit court issued orders terminating Nikita's parental rights to Alexei and Gemini.² Nikita now appeals these orders.

DISCUSSION

¶6 In order to establish the grounds under WIS. STAT. § 48.415(2) for termination of parental rights, the Department must prove the following: (1) the child has been adjudged to be a child in need of protection or services and placed,

² Alexei's and Gemini's fathers each voluntarily terminated their parental rights.

or continued in a placement, outside his or her home for a total period of six months or longer pursuant to one or more court orders containing the notice required by law; (2) the agency responsible for the care of the child and the family has made a reasonable effort to provide the services ordered by the court; (3) the parent has failed to meet the conditions established for the safe return of the child to the home; and (4) there is a substantial likelihood that the parent will not meet these return conditions within the nine-month period following the fact-finding hearing. These elements must be proved by clear and convincing evidence. WIS. STAT. §§ 48.424(2), 48.31(1).

¶7 Nikita contends the circuit court erred when it continued the disposition hearing instead of dismissing the petition because, according to Nikita, the evidence was insufficient to support the jury's verdict that there was a substantial likelihood she would not meet the return conditions within nine months following the fact-finding hearing. For the following reasons, we disagree.

¶8 This court's review of a jury's verdict is narrow. *Morden v. Continental AG*, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. We affirm the jury's verdict if any credible evidence, under any reasonable view, leads to an inference supporting the jury's finding. *Id.* (citation omitted). The jury, not the appellate court, is to "balance the credibility of witnesses and the weight given to the testimony of those witnesses." *Id.*, ¶39 (citation omitted).

¶9 Applying this standard to the present case, we conclude the evidence, viewed most favorably to the jury's verdict, is sufficient for a reasonable jury to find there was clear and convincing evidence of a substantial likelihood that Nikita would not meet the return conditions within nine months following the fact-finding hearing.

¶10 At the fact-finding hearing, the Department presented five witnesses who testified regarding Nikita's difficulties in meeting some of the return conditions. In particular, the witnesses discussed Nikita's difficulty with the following conditions of return: completing programs recommended by her social workers, providing a safe home, and demonstrating that she understands her children's needs and can care for them. Two social workers specifically testified that, based on Nikita's past conduct and her cognitive difficulties, they believed there was a substantial likelihood that Nikita would not meet the conditions of return in the next nine months.

¶11 Diane Dengler was one of the social workers who testified that she believed there was a substantial likelihood that Nikita would not meet the conditions of return in the next nine months. Dengler testified that she explained to Nikita that Nikita's attendance at counseling sessions was part of the court's order; nevertheless, Nikita had difficulty attending counseling appointments, as well as other programs recommended by Dengler. Based on Nikita's history, Dengler questioned Nikita's commitment to pursue counseling. Dengler also testified that she was concerned about Nikita's ability to manage her own needs and those of her children. For example, Nikita's visits with her children were supervised. According to Dengler, Nikita was not prepared to spend time with her children and keep them safe without someone present. Dengler testified that another of Nikita's conditions for return was that she not use illegal drugs. However, Nikita once tested positive for marijuana and on another occasion refused to have a urinalysis test.

¶12 Dengler testified that, over the last eighteen months, there had "not been ... a real increase in [Nikita] cooperating and following through to the degree that we could say we're getting closer to moving to reunification." Dengler also

testified that the question whether Nikita would meet the conditions of return in the next nine months was “not a close call at all.”

¶13 Notley Maddox was the second social worker who had the opinion that there was a substantial likelihood that Nikita would not be able to meet the conditions for return within the next nine months. Maddox was a social service specialist who was assigned to supervise Nikita’s visits with her sons. He testified that he was concerned about Nikita’s ability to keep the children safe in light of Nikita’s difficulty focusing on the children.

¶14 Amber Vollrath, a family support therapist with the Early Childhood Initiative program, testified that Nikita was an inconsistent parent who sometimes had unrealistic expectations for her kids and sometimes seemed uninterested in them. She also testified that Nikita was unable to provide for the children safely in her home. Vollrath testified that Nikita told Vollrath that Nikita was involved with four different men, some of whom were physically violent or emotionally abusive.

¶15 Social worker Paula Kedzie testified that her biggest concern after working with Nikita was Nikita’s inability to understand that it is Nikita’s job to keep the children safe. Kedzie testified that she spoke with Nikita about having someone in her apartment who had committed a crime against a child, but Nikita responded that she had no problem with him being in the apartment and that it was none of Kedzie’s business. Kedzie also testified that Nikita told Kedzie that one of the fathers stopped by her apartment one day and he would not leave. He grabbed Nikita’s arm, so she punched him in the eye. Nikita stated that she was angry with the father for doing this in front of a child. When Kedzie recommended that Nikita change her locks, get a restraining order, or call the

police, Nikita stated that she did not feel she could tell people to leave her apartment.

¶16 Similarly, Patricia Wineke, a social service specialist, testified that she was concerned about certain safety issues. Wineke also testified that Nikita did not respect Alexei's lactose intolerance and had difficulty setting limits for the children.

¶17 Nikita contends this evidence was insufficient because, while Nikita concedes she had not met all the conditions of return, she contends she "had made strides in the months leading up to the trial." Nikita also contends that the testimony of certain witnesses—Vollrath, Wineke, and, to an extent, Kedzie—was based on dated information obtained shortly after the children were removed from Nikita's home, and that Vollrath and Wineke had little knowledge of what had occurred in the months leading up to trial.

¶18 We disagree with Nikita that the evidence is insufficient. Although Nikita met some conditions and may have made some progress, several witnesses testified to Nikita's difficulty with completing recommended programs, providing a safe home, and understanding her children's needs. Two social workers, including Maddox, whose testimony was, according to Nikita, "more up to date," testified that they believed Nikita would not be able to meet the conditions for return within the next nine months. Their testimony and the other testimony we have summarized is sufficient for a reasonable jury to find clear and convincing evidence of a substantial likelihood that Nikita would not be able to meet the conditions for return within the next nine months.

¶19 To the extent Nikita is arguing that the circuit court's statements that it had considered changing the jury's answer is relevant to this court's assessment

of the evidence, we disagree. The court ultimately concluded that, given the standard for changing a jury's answer, it was not proper to do so. *See* WIS. STAT. § 805.14(a) (“No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.”). The circuit court's decision to continue the disposition hearing does not, as Nikita may be suggesting, have a bearing on the standard this court employs when deciding a challenge to the sufficiency of the evidence presented to a jury.

CONCLUSION

¶20 We affirm the orders of the circuit court terminating Nikita's parental rights to her sons.

By the Court.—Orders affirmed.

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

