COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1087 **Cir. Ct. No. 02TP000583**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DERRICK J.,

RESPONDENT-APPELLANT.

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

¶1 FINE, J. Derrick J. appeals from the trial court's order terminating his parental rights to Dabresha J. It was uncontested that Dabresha had been adjudged a child in continuing need of protection or services and that she had been outside the parental home for more than six months. *See* WIS. STAT. § 48.415(2)(a)3. The jury found that Derrick J. had failed to assume his parental

responsibility to Dabresha, *see* WIS. STAT. § 48.415(6) and that he had "failed to meet the conditions established for" her to live with him and that there was a "substantial likelihood that [he] will not meet [those] conditions within the twelve-month period following the conclusion" of the trial, *see* § 48.415(2)(a)3. Derrick J. claims that the trial court erred in not excluding evidence relating to Wanda B., Dabresha's mother. He also contends that there was insufficient evidence to support both aspects of the jury verdict, and that the trial court erroneously exercised its discretion in entering the order of termination.[1] We affirm.

I.

¶2 Dabresha J. was born to Wanda B. in April of 2001. She had cocaine in her body when she was born and was immediately placed in foster care. At the time, Wanda B. had six other children in foster care. Wanda B.'s parental rights to Dabresha were terminated and she has not appealed.

¶3 Derrick J. is Dabresha's biological father. Between Dabresha's birth and the trial in October of 2003, there was substantial evidence from which the jury could find, and, indeed, the trial court found in the termination phase, that Derrick J. continued to live with Wanda B., even though his establishment of a residence separate from her was a condition of Dabresha being able to live with him. There was also substantial evidence from which the jury could find, and, again, the trial court found in the termination phase, that Derrick J.'s visits with Dabresha, all of which were supervised, were devoid of any real effort to form a

[1] Although Derrick J.'s reply brief was due on June 18, 2004, neither it nor a letter saying that no reply brief would be filed, *see* WIS. STAT. RULE 809.107(6)(c), has been received.

bonding relationship with the child. The following is an excerpt from the testimony of the social worker who supervised Derrick J.'s visits with Dabresha:

> Q Over the course of the biweekly visits that you've supervised has Dabr[e]sha's demeanor with Mr. J[.] changed at all.
>
> A Slightly. She doesn't cry when we bring her to the visit, so that has changed.
>
> Q I'm sorry, I need to clarify that you mean while transporting her she doesn't cry in the car?
>
> A She doesn't cry any more and recently in the past like probably three months or so, she has stopped crying when we get to the visit. It's not like she's crying when she arrives there and with him.
>
> Q Does she go to Mr. J[.] easily?
>
> A No.
>
> Q Does she appear to be happy or excited to see him when she sees him at the visitation site?
>
> A No.
>
> Q Does she need to be encouraged to go to him and have physical contact with him?
>
> A Yes, she does.

Also, the social worker recounted that unless she tried to involve Dabresha in play with Derrick J. during the visitations, "Dabresha pretty much plays by herself."

¶4 In its oral decision on termination, the trial court reflected whether there was a psychological bond between Dabresha and Derrick J.:

> I find it has not even been created, and it certainly can't be created just through visits, whether they're weekly or every other week or what have you or two hours every week. That is not an emotional or a psychological bond. It was never created here. Common sense would tell us that, but I think the evidence is overwhelming as to the quality of the interaction during the course of these visits. The quality of

> these does not show that bond. The fact that Dabresha does not talk about her father, does not ask about visits coming up, does not mention him, does not talk about him when the visits are over. All this evidence, which is really uncontroverted, shows that there is not a substantial relationship.
>
> ….
>
> And her contact with her father is artificial. In some cases it's regular, in some cases it's irregular. But it really has no qualitative aspect that I can find here other than visits. This is a visit dad and really nothing else.

The trial court opined that Dabresha has "at best a visitation relationship with her father."

II.

¶5 Termination of parental rights is a two-step process. First, a fact-finder decides whether there are facts that justify governmental interference in whatever relationship there is between the birth-parent and his or her child. WIS. STAT. §§ 48.415, 48.424. If there are grounds to terminate a person's parental rights to a child, then the trial judge determines whether those rights should be terminated. WIS. STAT. §§ 48.424(3), (4); 48.426; 48.427. We discuss Derrick J.'s contentions in their logical sequence.

A. *Evidentiary ruling*.

¶6 A trial court's decision to admit or exclude evidence is a discretionary determination and 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.'" ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983) (quoted source omitted). Derrick J. contends that Wanda B.'s history of drug use and her inability to care for her other children, although

relevant, *see* WIS. STAT. RULE 904.01, should have been excluded under WIS. STAT. RULE 904.03, which permits trial courts to exclude relevant evidence if, among other things, its "probative value is substantially outweighed by the danger of unfair prejudice." The key, of course, is that before this provision is implicated, the prejudice, the danger of which is assessed, must be "unfair." ***Lease Am. Corp. v. Insurance Co. of N. Am.***, 88 Wis. 2d 395, 401, 276 N.W.2d 767, 770 (1979) (evidence is unfairly prejudicial if it tends to influence outcome by improper means, appeals to jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes it to base decision on something other than established propositions in case). Here, as the trial court recognized, Derrick J. refused to break off his relationship with Wanda B. even though he had to do so before Dabresha could live with him. As the trial court expressed it in the termination phase:

> I find that Wanda B[.] was still living with [Derrick J.] as of this fall and that Mr. J[.] was not honest during his testimony today regarding that fact, nor was he honest during his trial testimony regarding that fact. He just could not make that break from Wanda B[.] for whatever reason, and he has been warned and told and given those [termination of parental rights] warnings.

Evidence of Wanda B.'s activities was not unfairly prejudicial because it gave context to why Derrick J.'s continued association with her was harmful to the child, and, also, why refusal to sever that relationship made it substantially unlikely that he would be able to take Dabresha into his home within the twelve months after the trial. *See* WIS. STAT. § 48.415(2)(a)3, quoted below. Moreover, it also permitted the jury to assess Derrick J.'s degree of interest in assuming his parental responsibilities for Dabresha. *See* WIS. STAT. § 48.415(6)(b), also quoted below. *See* ***State v. Shillcutt***, 116 Wis. 2d 227, 236, 341 N.W.2d 716, 720 (Ct.

App. 1983) (evidence may be admitted under WIS. STAT. RULES 904.04(2) and 904.03 to show context).

B. *Sufficiency of the evidence to establish grounds to terminate*.

¶7 As material here, WIS. STAT. § 48.415 provides:

> **Grounds for involuntary termination of parental rights.** At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:
>
> ….
>
> **(2)** CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services, which shall be established by proving any of the following:
>
> (a) ... 3. That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.
>
> ….
>
> **(6)** FAILURE TO ASSUME PARENTAL RESPONSIBILITY[.] (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.

¶8 We give significant deference to jury verdicts on appeal, and may not overturn them "if there is any credible evidence" that supports what the jury has found, giving to the jury's finding every reasonable supporting inference. ***State v. Quinsanna D.***, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 449, 655 N.W.2d 752, 761. Here, the jury was justified from the evidence in concluding that Derrick J. let his relationship with Wanda B. trump his professed love for Dabresha. Moreover, although he appeared for many of his supervised visits, and Dabresha gradually became accustomed to being with him, there was no evidence that Derrick J. ever sought to assume the "substantial parental relationship" addressed by WIS. STAT. § 48.415(6)(b). As we noted earlier, the remoteness of his ever establishing a "substantial parental relationship" also appropriately affected the jury's assessment of whether there was "a substantial likelihood" that Derrick J. would not meet the conditions to Dabresha living with him "within the 12-month period following the fact-finding hearing." *See* § 48.415(2)(a)3. The jury's verdict was fully supported by the evidence, and Derrick J.'s contention to the contrary is without merit.

C. *Termination*.

¶9 As we have seen, once a jury finds that there are grounds to terminate a person's parental rights to his or her children, the trial court must decide whether termination is in the children's best interests. The parents whose action or inaction results in a finding that there are grounds to terminate their parental rights have no special claim to the children in the best-interests phase. ***Richard D. v. Rebecca G.***, 228 Wis. 2d 658, 672–673, 599 N.W.2d 90, 97 (Ct.

App. 1999). Whether circumstances warrant termination of parental rights is within the trial court's discretion. ***Brandon S. S. v. Laura S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94, 107 (1993); ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855, 857 (Ct. App. 1996). We will not reverse a trial court's discretionary decision if the trial court applied the relevant facts to the correct legal standard in a reasonable way. ***Brandon S. S.***, 179 Wis. 2d at 150, 507 N.W.2d at 107. We review *de novo* whether the trial court has applied the correct legal standard. *See* ***Kerkvliet v. Kerkvliet***, 166 Wis. 2d 930, 939, 480 N.W.2d 823, 826 (Ct. App. 1992).

¶10 WISCONSIN STAT. § 48.426 sets the standards that, if appropriate, the trial court should consider in exercising its discretion in deciding whether termination of parental rights is in a child's best interests. It provides:

> **(1)** COURT CONSIDERATIONS. In making a decision about the appropriate disposition under s. 48.427, the court shall consider the standard and factors enumerated in this section and any report submitted by an agency under s. 48.425.
>
> **(2)** STANDARD. The best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter.
>
> **(3)** FACTORS. In considering the best interests of the child under this section the court shall consider but not be limited to the following:
>
> (a) The likelihood of the child's adoption after termination.
>
> (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
>
> (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
>
> (d) The wishes of the child.

> (e) The duration of the separation of the parent from the child.
>
> (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

¶11 Derrick J. does not contend that the trial court did not consider the appropriate factors. Rather, he argues that the trial court erroneously weighed the evidence in applying some of the factors. First, he argues that, as phrased in Derrick J.'s main brief on this appeal, Dabresha "would not be going to a more financially stable home" if the foster mother is allowed to adopt Dabresha because the foster mother was no longer employed and he was working. He also points out, without further elaboration, that he was "paying child support" for Dabresha. Focusing on these specific complaints only, *see* ***Vesely v. Security First National Bank of Sheboygan Trust Dept.***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593, 598 n.5 (Ct. App. 1985) (we will not address arguments that are neither made nor developed), we conclude that they are without merit.

¶12 First, there is no doubt from the record that Derrick J.'s relationship with Dabresha was, as the trial court found, one of visitation only—she never lived with him. Additionally, as the trial court also found, those visits were transitory; they never resulted in a connection that lasted in any significant way beyond the time they were in each other's presence, and, even then the connection was tenuous at best.

¶13 Second, the trial court addressed Derrick J.'s contention that the foster mother would not be able to provide a suitable home for Dabresha:

> [The foster mother] wishes, although she has lost her job, she wishes to get her certificate and start her own child care business which, of course, would be -- if that were to

> happen -- I don't know if it will, I can't give it much weight but for what weight that it has that would be a nice environment for Dabresha. This would occur in [the foster mother]'s home with the other children. There would be other children there for Dabresha. I find [the foster mother] to be very, very credible.

The trial court further opined, that Dabresha's living conditions with the foster mother "are excellent. They're just absolutely outstanding."

¶14 Third, although Derrick J. had, at the time of the October, 2003, trial been paying child support for approximately the preceding five or six months, with the payments being automatically deducted from his earnings, this does not outweigh, by any stretch, the other factors weighed and applied by the trial court.

¶15 The trial court considered all of the appropriate factors, and gave them the weight that a reasonable judge would. Accordingly, its decision that termination of Derrick J.'s parental rights to Dabresha was in her best interests was not an erroneous exercise of discretion.

By the Court.—Order affirmed.

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