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July 11, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2014AP943-NM
2014AP944-NM

State v. Kirsten S. (L. C. Nos. 2012TP158, 2012TP159)

Before Stark, J.[1]

Counsel for Kirsten S. filed a no-merit report pursuant to WIS. STAT. RULE 809.32, concluding there is no arguable basis for challenging orders terminating Kirsten's parental rights

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

to her children, Makenna C. and Bentley S.[2] Kirsten was advised of her right to respond to the report and has not responded. Upon this court's independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), no issue of arguable merit appears. Therefore, the orders terminating Kirsten's parental rights are summarily affirmed. *See* WIS. STAT. RULE 809.21.

On August 19, 2010, Makenna (born 06/10) was referred to the Bureau of Milwaukee Child Welfare (bureau) after she was admitted to Children's Hospital of Wisconsin with injuries—including three subdural hematomas, bruising to her arm and several bruises on her stomach—that were "inconsistent" with the causal explanations provided by Kirsten and her boyfriend, Anthony C.[3] Makenna was detained upon her discharge from the hospital and adjudicated as a child in need of protection or services (CHIPS) by order entered January 13, 2011.

Bentley (born 09/11) was detained the day after his birth, based on Kirsten's continued inability to provide a safe home for her children and proof that Kirsten used marijuana and made several attempts to obtain prescription medication during her pregnancy. Bentley was adjudicated as a child in need of protection or services on December 6, 2011. On June 8, 2012, the State filed the underlying petitions for termination of Kirsten's parental rights, alleging the continuing need for protection or services, and a failure to assume parental responsibility as to

[2] The orders also terminated the parental rights of the children's fathers. Termination of the fathers' respective parental rights is not the subject of these appeals.

[3] Later examinations revealed that Makenna also suffered retinal hemorrhaging and a fractured ankle that were not immediately apparent during her initial examinations. Anthony and Kirsten claimed the injuries were caused by an eighty-pound pit bull lying on top of Makenna. After an investigation, authorities were unable to determine who injured Makenna.

both children. Kirsten contested the grounds for termination and requested a jury trial. Kirsten subsequently made some progress in meeting the conditions of her children's return and, in August 2012, visits with the children transitioned from supervised to unsupervised. On September 10, 2012, the State moved to adjourn the scheduled jury trial in favor of a CHIPS order extension and trial reunification. The circuit court granted the adjournment request.

The children returned to Kirsten's home in November 2012 pursuant to a safety plan that involved weekly visits from a case manager and therapist, as well as communication with any daycare provider. In January 2013, Kirsten was charged with felony child abuse of Bentley.[4] The bureau consequently sought revocation of the trial reunification and the State sought to both withdraw the CHIPS order extension request and schedule the TPR jury trial. The matter proceeded to a four-day trial and the jury ultimately returned verdicts against Kirsten on both grounds for termination as to both children.[5] After a dispositional hearing, the court concluded it was in the children's best interest to terminate Kirsten's parental rights.

Any challenge to the proceedings based on a failure to comply with statutory time limits lacks arguable merit. All of the mandatory time limits were either complied with or properly extended for good cause, without objection, to accommodate the parties' varying schedules. The failure to object to a delay waives any challenge to the court's competency on these grounds.

[4] In May 2013, Kirsten was convicted upon her no contest plea to child abuse-recklessly causing harm, contrary to WIS. STAT. § 948.03(3)(b). The court withheld sentence and imposed two years' probation with one year in jail as a condition.

[5] Although two of the twelve jurors dissented on one of the elements establishing the "continuing need for protections or services" ground, the agreement of ten jurors is all that is necessary. *See* WIS. STAT. § 805.09 ("A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury."); ***Door Cnty. DHFS v. Scott S.***, 230 Wis. 2d 460, 465, 602 N.W.2d 167 (Ct. App. 1999) (The rules of civil procedure govern termination-of-parental-rights proceedings.).

See WIS. STAT. § 48.315(3). Moreover, scheduling difficulties constitute good cause for tolling time limits. *See* ***State v. Quinsanna D.***, 2002 WI App 318, ¶39, 259 Wis. 2d 429, 655 N.W.2d 752.

Any challenge to the jury's verdicts would lack arguable merit. When we review a jury's verdict, "we consider the evidence in the light most favorable to the jury verdict." ***Tammy W.-G. v. Jacob T.***, 2011 WI 30, ¶39, 333 Wis. 2d 273, 797 N.W.2d 854 (citing ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990)). If more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. ***Poellinger***, 153 Wis. 2d at 504.

Failure to assume parental responsibility is established "by proving that the parent … of the child [has] not had a substantial parental relationship with the child." WIS. STAT. § 48.415(6)(a). A "'substantial parental relationship' means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." WIS. STAT. § 48.415(6)(b). A jury is allowed to consider several factors and apply a totality-of-the-circumstances test. *See* ***Tammy W.-G.***, 333 Wis. 2d 273, ¶3. These factors include, but are not limited to, whether the parent has expressed concern for or interest in the support, care, or well-being of the child, and whether the parent has neglected or refused to provide care or support for the child. *See* ***id.***; *see also* WIS. STAT. § 48.415(6)(b). The State must make its case by clear and convincing evidence. WIS. STAT. § 48.31(1).

There is sufficient evidence from which a jury could conclude that Kirsten failed to assume parental responsibility for her children. Trial evidence showed that Kirsten did not accept and exercise significant responsibility for the daily supervision, education, protection and care of the children for the majority of their lives. Moreover, Kirsten was either personally

responsible for the physical abuse of her children or failed to protect them from such abuse. The jury reasonably found that the totality of the circumstances showed Kirsten's failure to assume responsibility.

The continuing need for protection or services ground is established by showing four things: (1) that the child was adjudged to be in need of protection and services and was placed outside the parent's home for a cumulative period of six months or longer pursuant to one or more court orders containing required termination warnings; (2) that the relevant agency—here, the bureau—made a reasonable effort to provide court-ordered services; (3) that the parent failed to meet the conditions for the child's safe return to the home; and (4) that there is a substantial likelihood that the parent will not meet the conditions within the nine-month period following the fact-finding hearing. *See* WIS. STAT. § 48.415(2)(a)1.-3. As with failure to assume parental responsibility, the State bears the burden of making its case by clear and convincing evidence. *See* WIS. STAT. § 48.31(1).

Trial evidence established that the children had been placed outside Kirsten's home for more than six months. A case worker testified about the bureau's efforts to provide court-ordered services, and acknowledged that although Kirsten generally attended the supervised visits and maintained a relationship with her children, she started "to shut down" by the end of the visits and had not made progress in individual therapy or recognized her protective role. Based on a continued lack of engagement with services and with her children, the case worker opined that it was substantially unlikely Kirsten would meet the conditions for her children's safe return within the nine-month period following the fact-finding hearing. The record supports the jury's finding that the children were in continuing need of protection or services.

There is no arguable merit to a claim that the trial court erroneously exercised its discretion when it terminated Kirsten's parental rights. The court correctly applied the best interests of the child standard and considered the factors set out in WIS. STAT. § 48.426(3). The court considered the children's adoptability, age and health, noting the likelihood of adoption by their foster parents. The court also emphasized the children's need for a stable and permanent family relationship, noting the children did not have a substantial relationship with Kirsten and would not be harmed if that relationship were severed. The court's discretionary decision to terminate Kirsten's parental rights demonstrates a rational process that is justified by the record. *See* ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996).

This court's independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that that the orders are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Dennis Schertz is relieved of his obligation to further represent Kirsten S. in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals