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July 1, 2015

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

2015AP837-NM In re the termination of parental rights to D. R., a person under the age of 18: Fond du Lac County DSS v. M. M. (L.C. #2013TP32)

Before Gundrum, J.[1]

M. M. appeals from an order involuntarily terminating her parental rights to D. R.[2] On appeal, M. M.'s appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULES 809.107(5m) and 809.32, ***Anders v. California***, 386 U.S. 738 (1967), and ***Brown County v. Edward C.T.***, 218 Wis. 2d 160, 161, 579 N.W.2d 293 (Ct. App. 1998) (per curiam). M. M.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The parental rights of D. R.'s father are not at issue in this appeal and will not be addressed.

received a copy of the report and was advised of her right to file a response, but she has not done so. Upon consideration of the no-merit report and an independent review of the record, we conclude no issues would have arguable merit for appeal. We summarily affirm the order terminating M. M.'s parental rights, *see* WIS. STAT. RULE 809.21, accept the no-merit report, and relieve Attorney Leonard D. Kachinsky of further representation of M. M. in this matter.

M. M. was incarcerated when she gave birth to D. R. on June 5, 2007. The next day, the Fond du Lac County Department of Social Services (DSS) placed D. R. with the foster family with whom she still resided at the time of trial. In June 2013, the County filed the petition for the termination of parental rights (TPR) that underlies this appeal.[3] The grounds alleged were continuing Child in Need of Protection or Services (CHIPS) and failure to assume parental responsibility. *See* WIS. STAT. § 48.415(2), (6). A jury, with one dissenter, found that the State proved both grounds. The court entered a TPR order. This no-merit appeal followed.

The no-merit report first considers whether any procedural defects marred the proceedings. No arguable claim could arise from this point. The petition was in proper form. The court took great care to ensure that mandatory time limits were met or were extended for good cause and without objection. *See* WIS. STAT. § 48.315(1)(b), (2). M. M. was advised of her procedural rights, WIS. STAT. § 48.42, and given proper notice of matters along the way. Dispositional orders and extensions were reduced to writing and included written TPR warnings. *See* WIS. STAT. § 48.415(2)(a)1.

[3] Two prior petitions were filed and dismissed without prejudice due to procedural errors.

The report also examines whether the evidence was sufficient for the jury to find that grounds existed to terminate M. M.'s parental rights. "Grounds for termination must be prove[d] by clear and convincing evidence." ***Ann M.M. v. Rob S.***, 176 Wis. 2d 673, 682, 500 N.W.2d 649 (1993). This court gives significant deference to the jury's verdict and may not overturn it if any credible evidence supports what the jury has found. ***Deannia D. v. Lamont D.***, 2005 WI App 264, ¶9, 288 Wis. 2d 485, 709 N.W.2d 879.

To prove continuing CHIPS, the State had to establish that D. R. was adjudged CHIPS and placed outside the home for a cumulative total period of at least six months pursuant to one or more court orders containing the required TPR notice,[4] DSS made a reasonable effort to provide court-ordered services, M. M. failed to meet the conditions established for the safe return of D. R. to her home, and it was substantially likely that M. M. would not meet the conditions of return within nine months after the grounds-phase trial. *See* WIS. STAT. § 48.415(2)(a). To establish a failure to assume parental responsibility, the State had to prove that M. M. did not have a substantial parental relationship with D. R., *i.e.*, that M. M. had not accepted and exercised significant responsibility for D. R.'s daily supervision, education, protection, and care. *See* § 48.415(6).

M. M.'s social worker, case workers, a child support agency worker, and others testified that M. M.'s five older children were placed with their fathers; a human service agency was involved with some of her other children; M. M.'s eldest had been the subject of a CHIPS

[4] The parties stipulated to the first element and the trial court answered that element "yes" on the verdict. This does not constitute an improper withdrawal of the demand for a jury trial on an element. ***Walworth Cnty. HHS v. Andrea L.O.***, 2008 WI 46, ¶¶3-4, 309 Wis. 2d 161, 749 N.W.2d 168.

petition and was in a series of foster homes until he "aged out"; M. M. periodically was incarcerated after D. R.'s birth; M. M. moved to Milwaukee on her release from prison in 2010 although D. R. lived in Ripon; her employment was sporadic; she was thousands of dollars in arrears on child support for D. R. and another child, did not comply with budget counseling or meet the CHIPS condition that she meet regularly with a therapist, and, in violation of a CHIPS condition, she lived with and subsequently married a man without informing her social worker; she did not know the name of D.R.'s school, never spoke to D. R.'s teachers or asked to be involved in her counseling, school or extracurricular activities or to receive copies of school reports; she had loud, vulgar outbursts in public settings in D. R.'s presence, one leading to a disorderly conduct citation; she refused to sign releases so D. R. could receive therapy and did not return the release for D. R.'s Individual Education Plan (IEP); since 2009, she had not progressed beyond one one-hour supervised visit a month; DSS provided job-seeking and housing assistance, paid her rent, bought her glasses, gave her gas cards and Goodwill vouchers, took her shopping, and made referrals to various social service and charitable organizations; and a psychological examination indicated that M. M. had a personality disorder with antisocial, histrionic, and narcissistic features. As to D. R., she was seven at the time of trial, had lived with the same foster family since she was a day old, considered them her family, wanted them to adopt her, and suffered night terrors before and after visits with M. M.

M. M. was called adversely and testified in her own case. She testified that she cares for an elderly man and babysits, both for cash, does not make enough money to have to file income taxes, does not know her husband's income, did not know what it meant to make a budget, intends to begin therapy, signed and returned the IEP release, was told by her social worker that

she was not allowed to attend D. R.'s activities, did not know she could ask for extra visitation, and wants to do "whatever it takes" to be reunited with D. R.

It is exclusively for the jury to decide which evidence is credible and which is not, and how to resolve conflicts in the evidence. *See* ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). We search the record for evidence that supports the decision, accepting any reasonable inferences the fact finder could reach. ***State v. Quinsanna D.***, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 655 N.W.2d 752. The no-merit report correctly determines that any challenge to the sufficiency of the evidence for either ground would be without arguable merit.

Next, the report addresses whether the trial court erroneously exercised its discretion in making evidentiary rulings. Whether to admit or exclude evidence ordinarily lies within the trial court's discretion. ***La Crosse Cnty. DHS v. Tara P.***, 2002 WI App 84, ¶6, 252 Wis. 2d 179, 643 N.W.2d 194. This court will not disturb a trial court's discretionary decision if the record reflects the trial court's reasoned application of the appropriate legal standard to the relevant facts of the case. ***Id.***

After reviewing the entire record, including the more than 1100 pages of trial transcript, we are satisfied that the court's rulings reflect a proper exercise of discretion. The court allowed liberal argument from the parties and thoroughly explained its rationale. If any ruling was erroneous, given the abundance of evidence that TPR grounds existed, the error was harmless.

The report next examines whether a potential issue exists related to the trial court's reassembling of the jury to correct an irregularity in the verdict. Pursuant to ***State v. Coulthard***, 171 Wis. 2d 573, 492 N.W.2d 329 (Ct. App. 1992), no issue of arguable merit could be raised.

After the jury returned its verdict, the court asked the jurors, "Are these verdicts as turned in indeed the jury's verdict?" One by one, each juror answered, "Yes." Shortly after the court discharged the jury, the bailiff advised the court that a juror raised a concern about the verdict. The juror indicated he had dissented to certain questions but had forgotten to signify it on the verdict.[5] He answered "yes" when polled, he said, because, while it was not *his* verdict, it was the *jury's* verdict, and he thought that is what the court meant.

Although the juror said he was the only dissenting juror on any question, in an abundance of caution due to the nature of the case, the court determined that reassembling and repolling the entire jury panel was necessary. The soonest available date was ten days out due to scheduling conflicts, including on M. M.'s calendar. Jurors were contacted but no particulars were given. The court re-swore the panel, administered the oath given to witnesses, then asked each question, with each juror answering individually. *See* ***Coulthard***, 171 Wis. 2d at 583-84 (similar procedure approved in first-degree intentional homicide case where jury reassembled fifty-one days after being discharged, and higher burden and unanimity required). The court accepted the verdict. No arguable issue could arise.

[5] The jurors were instructed:

> At the bottom of the verdict, you will find a place provided where dissenting jurors, if there be any, will sign their names and state the answer or answers with which they do not agree. Either the blank lines or the space below them may be used for that purpose.

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Finally, the no-merit report considers whether a challenge could be raised in regard to the trial court's exercise of discretion in terminating M. M.'s parental rights to D. R. We agree with counsel that no meritorious challenge could be advanced.

The ultimate decision whether to terminate parental rights lies within the trial court's discretion. ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). The best interests of the child is primary. WIS. STAT. § 48.426(2). In considering the child's best interests, a trial court must consider: (1) the likelihood of adoption after termination; (2) the child's age and health; (3) "[w]hether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever those relationships"; (4) the child's wishes; (5) the duration of the parent's separation from the child; and (6) "[w]hether 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." Sec. 48.426(3).

The court carefully and thoughtfully addressed each statutory factor. Its well-reasoned decision explaining why termination of M. M.'s parental rights was in D. R.'s best interests reflects a proper exercise of discretion. *See* ***Gerald O.***, 203 Wis. 2d at 152. An appellate challenge would lack arguable merit.

Our independent review of the record reveals no other potential appellate issues. We see nothing remarkable in the voir dire. The trial court modified scheduling where necessary to keep the five-day trial on track. For example, it exercised its discretion to set time limits on closing arguments. *See* ***State v. Lenarchick***, 74 Wis. 2d 425, 457, 247 N.W.2d 80 (1976). M. M.'s

counsel preferred not to be limited but did not press an objection. The two hours allotted him proved fully adequate.

Finally, the trial court denied M. M.'s motion to dismiss at the close of the State's case on the basis that no jury could find that DSS made a reasonable effort to provide her with court-ordered services. A challenge to this ruling would be frivolous, as the jury made that finding.

We commend the trial court for the meticulous care it took to avoid error at every step of this difficult venture.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Leonard D. Kachinsky is relieved from further representing M. M. in this matter.

Diane M. Fremgen
Clerk of Court of Appeals