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July 10, 2018

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

2018AP779-NM State of Wisconsin v. E. L. (L.C. # 2017TP57)

Before Brennan, J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

E.L. appeals the order terminating his parental rights to his child, L.L. E.L.'s appellate counsel, Leonard D. Kachinsky, has filed a no-merit report pursuant to WIS. STAT. RULES 809.107(5m) and 809.32. E.L. was served with a copy of the report and advised of his right to file a response but has not done so. Upon consideration of the no-merit report and an independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), and RULE 809.32, this court concludes there are no issues that would have arguable merit for appeal. Therefore, the order terminating E.L.'s parental rights is summarily affirmed. *See* WIS. STAT. RULE 809.21.

L.L. was born on June 30, 2015. On February 2, 2016, L.L. was placed in out-of-home care and was never returned to either of her parents. On April 5, 2017, the State petitioned to terminate E.L.'s parental rights to L.L. As grounds for termination, the petition alleged L.L. was in continuing need of protection and services (continuing CHIPS) under WIS. STAT. § 48.415(2) and E.L. had failed to assume parental responsibility under § 48.415(6). Following trial, the jury found that grounds existed to terminate on both grounds.[2] The trial court then found E.L. unfit and concluded that termination was in L.L.'s best interests.

The no-merit report addresses whether there were procedural defects in the proceedings, and whether there would be any arguable merit to challenge the sufficiency of the evidence, the trial court's evidentiary rulings, or the trial court's finding that termination of E.L.'s parental

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The trial court affirmatively answered the first question on the special verdict form for the continuing CHIPS ground: i.e., whether L.L. was adjudged to be in need of protection and services and placed outside the home of E.L. for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law.

rights was in L.L.'s best interests. We agree with appellate counsel that there would be no merit to further proceedings or an appeal based on these or any other issues, as we will briefly explain below.

This court begins by noting that there were multiple delays and that the trial and the dispositional hearing were held outside of mandatory time limits. However, the trial court implicitly found good cause for continuing the matters.[3] WISCONSIN STAT. § 48.315(2) permits extensions of the mandatory time limits under the circumstances presented in this case. *See* ***id.*** In addition, E.L.'s failure to object to the continuances forfeits any challenge to the trial court's competency to act. *See* § 48.315(3). We additionally agree with counsel's conclusion that there were no errors in trial procedure that would entitle E.L. to a new trial.

Next, this court addresses whether the evidence was sufficient for the jury to find that grounds existed to terminate E.L.'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. *See* ***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 L.L. 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, the Division of Milwaukee Child

[3] The trial court expressly stated on a number of occasions that it was tolling the time limits; however, it did not expressly state that it was doing so for good cause. E.L. did not object and the extensions often benefitted him.

Protective Services (DMCPS) made a reasonable effort to provide court-ordered services, E.L. failed to meet the conditions established for the safe return of L.L. to his home, and it was substantially likely that E.L. 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 E.L. did not have a substantial parental relationship with L.L., i.e., that E.L. had not accepted and exercised significant responsibility for L.L.'s daily supervision, education, protection, and care. *See* Sec. 48.415(6).

E.L. testified that he was incarcerated when L.L. was detained and that he was aware there were conditions he needed to satisfy for her return. E.L. additionally testified that he was taken into custody seven more times after that. By way of explanation, E.L. claimed that L.L.'s mother kept calling his probation agent and having him locked up. Although at one point E.L. was out of custody for approximately six months, he did not meet any of the conditions required for L.L.'s return. At the time of the grounds trial, E.L. had had approximately seventeen visits with L.L. since she was detained.

The family case manager testified about E.L.'s failure to satisfy the conditions for L.L.'s return. She also testified about an incident where E.L. was angry and threatened to leave L.L. outside in November. When the case manager arrived at the home, she found E.L. outside with L.L., who appeared as if she had been in a soiled diaper for more than twenty-four hours. The case manager additionally testified to her efforts to set up services for E.L. and to E.L.'s missed visits with L.L. In his no-merit report, counsel correctly determines that any challenge to the sufficiency of the evidence would be without arguable merit.

This court notes that trial counsel did not object when the family case manager gave opinion testimony as to the likelihood that E.L. would be able to meet the conditions of return. Even if there was a viable ***Daubert*** challenge to this testimony,[4] the evidence against E.L. was overwhelming. He would not be able to establish prejudice on an ineffective assistance of counsel claim. *See* ***Strickland v. Washington***, 466 U.S. 668, 695-96 (1984) (explaining that if there is no reasonable probability that the jury would have reached a different verdict, then a defendant has not proven prejudice).

Additionally, this court considers 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 Cty. 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.*** Having reviewed the entire record, this court is satisfied that the trial court's rulings reflect a proper exercise of discretion. If any ruling was erroneous, given the abundance of evidence that TPR grounds existed, the error was harmless.

Finally, this court turns to the issue of whether there would be any merit to challenging the trial court's decision to terminate E.L.'s parental rights. The decision to terminate a parent's rights is discretionary and the best interest of the child is the prevailing standard. ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152-53, 551 N.W.2d 855 (Ct. App. 1996). The trial court considers multiple factors, including, but not limited to:

[4] *See* ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993).

> (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.

WIS. STAT. § 48.426(3).

There would be no merit to challenging the trial court's exercise of discretion. At the dispositional hearing on December 18, 2017, E.L. was not present because he had recently been taken into custody in Ozaukee County. The adjourned dispositional hearing took place two days later, and E.L. refused to be transported from Ozaukee County to the trial court for that hearing. Over E.L.'s trial counsel's objection, the trial court proceeded because it believed E.L. was manipulating the system. The decision whether to grant or deny an adjournment request is left to the trial court's discretion and will not be reversed on appeal absent an erroneous exercise of discretion. *See* ***State v. Wollman***, 86 Wis. 2d 459, 468, 273 N.W.2d 225 (1979). Here, there would be no arguable merit to challenging the trial court's decision to move forward with the dispositional hearing in E.L.'s absence.

The trial court made findings on the record and discussed each of the statutory factors except for the wishes of L.L., who was two and one-half years old at the time of the hearing.[5] While the trial court did not expressly reference L.L.'s wishes, it found that she was nurtured, supported, and protected in her placement—a home she had been residing in for the majority of her life with the adoptive parents of one of her siblings. Its explanation for why termination of E.L.'s parental rights was in L.L.'s best interests reflects a proper exercise of discretion. *See* ***Gerald O.***, 203 Wis. 2d at 152. An appellate challenge would lack arguable merit.

Based on an independent review of the record, the court concludes that there are no other potential issues warranting discussion. There is no basis for reversing the order terminating E.L.'s parental rights. Any further proceedings would be without arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the order terminating E.L.'s parental rights to L.L. is summarily affirmed. *See* WIS. STAT. RULE 809.21.

[5] Counsel incorrectly states in his no-merit report that the trial court did not specifically mention a substantial relationship of L.L. with E.L. or whether there would be harm in severing that relationship. The transcript reveals that the trial court specifically stated:

> [L.L.] does not have a substantial relationship with either of her parents. And I get it, [E.L.] says that's not true. But one can only conclude either from direct evidence or by inference that both of her parents' conduct and issues have had a pervasively negative impact on the welfare of this child.
>
> … [T]he only way to afford this child a chance to heal and to develop in an emotionally healthy and protective environment is through adoption.

IT IS FURTHER ORDERED that Attorney Leonard D. Kachinsky is relieved of any further representation of E.L. on appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals