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DISTRICT II

November 16, 2022

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Kenosha County Courthouse
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Kenosha, WI 53143-6506

Leann M. Wurtzinger
Electronic Notice

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

2021AP529

Leann M. Wurtzinger v. Christopher J. Cutts (L.C. #2011PA428PJ)

Before Neubauer, Grogan and Lazar, JJ.

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).

Leann M. Wurtzinger appeals from a child custody order awarding sole custody and placement to the child's father, Christopher J. Cutts, until Wurtzinger complies with a prior order directing her to undergo drug testing. Wurtzinger argues the circuit court erroneously exercised its discretion when it allowed Cutts to testify to hearsay, prohibited her from cross-examining Cutts, excluded evidence she sought to admit, and denied her the right to have physical cross-examination of a witness who appeared by phone. Based upon our review of the briefs and

Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We affirm.

Wurtzinger and Cutts had a nonmarital child, Peter.² The parties had repeated disputes about Peter’s custody and placement. In July 2020, a circuit court commissioner awarded Cutts sole custody and primary placement of the minor child until Wurtzinger could “prove 100% sobriety, hold a job for a significant period of time, and prove that her lifestyle is not detrimental” to Peter. The commissioner also restricted Wurtzinger’s placement time “to Zoom Chats three days a week.” After an evidentiary hearing in February 2021, the circuit court stayed Wurtzinger’s placement entirely. It found that Wurtzinger was “involved with drug usage, pornography, and exposure of the minor child to felons and criminal behavior, so as to create an unsafe environment for the minor child and place this minor child in harm.” The court required Wurtzinger to “provide a clean drug test” before having further contact with the child.

At the February hearing, Wurtzinger and Cutts appeared pro se. Peter’s Guardian ad Litem also participated. Cutts called Wurtzinger’s mother, Kerry Pospichel, who testified by phone because she lived out of state. Pospichel believed that Wurtzinger had an alcohol and drug problem and that “she needed to go get help[.]” When Wurtzinger cross-examined Pospichel, she asked her about a letter Pospichel wrote in 2016. Pospichel “vaguely remember[ed] writing it[.]” but because it was so long ago, she “could not really say what it says.” The circuit court initially said it was not going to allow the letter to come in because

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

² We use a pseudonym for the minor child.

Pospichel did not “remember writing it[,]” but it then had the letter marked as an exhibit and entered into the Record. Wurtzinger did not object to Pospichel appearing by phone.

Cutts next called Wurtzinger as a witness, and she admitted that she had owned a 2015 red Ford Fusion, that she posted a picture of naked breasts on Facebook with a reference to ““day drinking,”” that she accidentally sent Cutts a picture of “something sexual[,]” acknowledged a printout documenting police visits to her home fifteen times between April and July of 2020, and confirmed that there were photos of multiple men at her home, some of whose names she could not remember. She indicated in her testimony that one of the men was Laron Franklin, an individual who had previously been in prison.

Cutts also testified. He introduced Franklin’s “rap sheet” to show he was a dangerous person that Wurtzinger allowed to be around Peter. Cutts said that he would see “a large group of the same men” at Wurtzinger’s home when he would pick Peter up, and after he learned Franklin’s identity and criminal record, he “became suspicious” that the men were using “Wurtzinger’s home as a drug house.” When Cutts called the police, he was put in contact with “Detective Matt,” who “works for the Kenosha drug unit.” When Cutts started to testify about a conversation with Detective Matt, Wurtzinger made a hearsay objection that the circuit court sustained, and it instructed Cutts to testify to what he “observed[.]” After the instruction, Cutts testified to observing “many individuals basically living at” Wurtzinger’s house.

Cutts additionally testified about Wurtzinger’s car being in a “high-speed chase” in September 2020, that it “was being used to transport drugs,” and that the police “let the car go because it was reaching speeds in excess of 90 to 100 miles an hour[.]” Wurtzinger objected to

this as hearsay, but the circuit court said Wurtzinger could question Cutts about this during her cross-examination. Cutts had the police report from the incident and submitted it into evidence.

Cutts also testified about his belief that Wurtzinger “was using her house and car to run a drug enterprise” with the men Cutts saw “around [his] son all the time.” Cutts told the circuit court that ten different men at different times came to his house with Wurtzinger to pick Peter up. When Cutts tried to testify that Detective Matt believes Wurtzinger is “prostituting herself inside her home[,]” Wurtzinger objected, and the circuit court sustained the objection.

Wurtzinger then cross-examined Cutts, consisting of twenty-one pages in the transcript. The Guardian ad Litem also cross-examined Cutts, and this was followed by Wurtzinger’s direct testimony. At the conclusion of her direct testimony, the circuit court asked Wurtzinger if she had “any other testimony or exhibits” to mark. Wurtzinger responded that she did not and confirmed that she had no more evidence to present.

The Guardian ad Litem then recommended that it was in Peter’s best interest for Cutts to have sole custody and placement until Wurtzinger completes the drug test as ordered on July 23, 2020. The circuit court agreed with that recommendation and indicated that if Wurtzinger obtains “some sort of drug testing,” supervised visits and Zoom visits could resume. The court entered an order finding Wurtzinger failed to comply with the previously ordered drug testing, that her involvement with drugs and felons put Peter in harm, and that until she “provide[s] a clean drug test,” sole custody and placement will be with Cutts. Wurtzinger appeals.

Wurtzinger raises four claims of evidentiary error: (1) the circuit court allowed in hearsay; (2) it did not allow her to cross-examine Cutts; (3) it excluded a letter she wanted to

admit during Pospichel’s testimony; and (4) Pospichel’s appearance by phone prevented Wurtzinger from cross-examining her.

“Evidentiary decisions are reviewed under the erroneous exercise of discretion standard.” *Reynaldo F. v. Christal M.*, 2004 WI App 106, ¶16, 272 Wis. 2d 816, 681 N.W.2d 289. “If the trial court considered the pertinent facts, applied the correct law and used a rational process to reach a reasonable determination, we will uphold its ruling.” *Id.* “Evidence erroneously admitted is subject to the harmless error rule.” *State v. Harris*, 2008 WI 15, ¶85, 307 Wis. 2d 555, 745 N.W.2d 397. As our supreme court has explained:

[T]he improper admission of evidence is not grounds for reversing a judgment or granting a new trial unless, after an examination of the entire action, it shall appear that the error “affected the substantial rights of the party” seeking to reverse the judgment or secure a new trial. ... In order for an error to affect the substantial rights of a party ... “there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue.” ... “A reasonable possibility of a different outcome is a possibility sufficient to ‘undermine confidence in the outcome.’”

Weborg v. Jenny, 2012 WI 67, ¶68, 341 Wis. 2d 668, 816 N.W.2d 191 (footnote and citations omitted).

We reject each of Wurtzinger’s contentions either because the circuit court’s decision did not constitute an erroneous exercise of discretion or because, even if erroneous, it was harmless error. First, the Record reflects that when Wurtzinger made hearsay objections, the circuit court sustained them, with the exception of when Cutts testified about the high-speed chase involving Wurtzinger’s car. Even if the circuit court should have excluded Cutts’s testimony about the high-speed chase, its admission was harmless. There was substantial evidence in the Record about Wurtzinger’s drug use, including her mother’s testimony, which the circuit court found to be credible. The crux of the circuit court’s ruling here involved Wurtzinger’s failure to comply

with the drug test ordered in July 2020, when this hearing occurred in February 2021. The order appealed says visitation can resume if Wurtzinger provides a clean drug test. Thus, even if the circuit court had excluded additional parts of Cutts's testimony, there is no reasonable possibility of a different outcome because, to this court's knowledge, Wurtzinger still has not provided a clean drug test.

Second, the Record reflects that Wurtzinger cross-examined Cutts for a substantial amount of time. To the extent she may have had additional questions to ask Cutts after the Guardian ad Litem completed her questioning of Cutts, Wurtzinger should have told the circuit court she had more questions. There is nothing in the Record to support her claim that the circuit court prohibited her from cross-examining Cutts. There is also nothing to indicate the circuit court limited her cross-examination or denied any request to cross-examine. The circuit court specifically asked Wurtzinger if she had any additional evidence to present, and she told the court she did not.

Third, the Record reflects that the circuit court marked and admitted the letter Wurtzinger claims it excluded. Although the Record reflects that the circuit court characterized Pospichel's testimony as not remembering *writing* the letter instead of not remembering *the contents* of the letter, this is harmless because the circuit court admitted the letter into evidence, even though it did not allow Pospichel to testify about it directly.

Fourth, Wurtzinger claims the circuit court's decision allowing Pospichel to testify by phone prevented proper cross-examination. This claim, however, is based on Wurtzinger's claim that she could not show the letter to Pospichel. Again, this is harmless because the court

admitted the letter into the Record. Further, the letter at issue was from 2016 and hence had limited evidentiary value to add to the 2021 hearing that covered Wurtzinger's current behavior.

Accordingly, we conclude there is no merit to any of Wurtzinger's claims. The circuit court did not erroneously exercise its discretion in making its evidentiary rulings. And even if the court erroneously admitted hearsay testimony or improperly limited Wurtzinger's questioning of Pospichel as to the 2016 letter, both constitute harmless errors.

Therefore,

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 this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals