STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

APPEAL NOS. 2023AP2156, AND
2023AP2157
CIRCUIT COURT CASE NOS. 2022TP000059, AND
2022TP000060

In re the Termination of Parental Rights of
R.A.C. and R.F.,
Persons Under the Age of 18:

Kenosha County Division of Children & Family Services,
    Petitioner-Respondent,

v.

R.M.F.,
    Respondent-Appellant.

ON APPEAL FROM THE ORDERS TERMINATING THE PARETAL RIGHTS
ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE
BRUCE E. SCHROEDER PRESIDING
BRANCH 3

BRIEF OF PETITIONER-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not necessary.

STATEMENT OF THE CASE

Respondent-Appellant R.F. (hereinafter "father")

appeals from an order terminating his parental rights to

his children, R.A.C and R.F., which was entered by Judge

Bruce Schroeder of the Kenosha County Circuit Court on June

2, 2023. Judge Schroeder presided over a 4 day jury trial
which took place on April 17-20, 2023 wherein a jury
unanimously found that both children were in continuing
need of protection or services pursuant to Wis. Stat. §
48.415(2). The Court then held a disposition hearing on
June 1, 2023 and found that it was in the best interests of
the children to terminate the father's rights.

ARGUMENT

I.   JUDGE SCHROEDER'S INTRODUCTORY EXPLANATION OF THE
       CASE TO THE JURY PRIOR TO VOIR DIRE WAS NOT IMPROPER
       AND DID NOT CONSTITUTE A STRUCTURAL ERROR.

Before jury selection began, Judge Schroeder gave a
lengthy explanation of the nature of the case to the jury.
This explanation takes up almost all of pages 2 through 7
of the Respondent-Appellant's brief and will not be
reproduced in its entirety here. During the explanation,
Judge Schroeder pointed out that the "petitioner has
asserted a number of grounds" to terminate the father's
rights and it is up to the jury "to determine whether those
grounds exist." (R. 119, p. 24). Judge Schroeder then
summarized portions of an attachment to the Petition for
Termination of Parental Rights wherein the grounds were set
forth. He pointed out that "the burden of proof is on [the
petitioner] to prove by evidence which is clear, convincing

and satisfactory that the grounds are sustained". (Id.,
pp. 25-26).

Judge Schroeder explained to the jury that court
orders placed the children outside of the parental home and
those orders set forth conditions that the father would
have to meet for the return of his children. (Id., pp. 27-
32). It should be noted that all of the court orders were
introduced into evidence without objection, that the father
stipulated to everything that Judge Schroeder read to the
jury about those orders, and that the special verdict
question on this issue was later answered "yes" by the
Court with the father's consent.

At the very end of his comments, Judge Schroeder
informed the jury that the Petition for Termination of
Parental Rights alleged that grounds existed to terminate
the father's rights, that the Department made reasonable
efforts to provide the services ordered by the court, and
that the father failed to meet the conditions for return of
his children. (Id., pp. 32-33). He went on to say that
the Petition alleged that the father is an unfit parent and
that the Petition alleged that "it is in the child's best
interests to terminate the parental rights of each of these
parents; that's what the dispute is all about. As I have

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indicated, the pleas have been denial" and now a jury trial would commence. (Id. at 33).

The father asserts that Judge Schroeder's summary of the allegations in the Petition for Termination of Parental Rights constitutes a "structural error" which demands reversal. This argument lacks merit. Structural errors "'seriously affect the fairness, integrity or public reputation of judicial proceedings and are so fundamental that they are considered per se prejudicial.'" *State v. Travis*, 347 Wis.2d 142, 166 (2013) (citation omitted). The *Travis* Court noted that "[a] structural error is a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *Id.* at 166-67 (citation omitted). These types of errors "infect the entire trial process and necessarily render a trial fundamentally unfair." *Id.* at 167 (citation omitted). Structural errors have been found in only a "very limited class of cases". *State v. Ford*, 306 Wis.2d 1, 18 (2007) (citation omitted). The Wisconsin Supreme Court has explained that:

> The limited class of structural errors include:
> complete denial of the right to counsel, a biased
> judge, excluding members of the defendant's race from
> a grand jury, denial of the right to self-
> representation, denial of the right to a public trial,
> and a defective reasonable doubt instruction.

State v. Pinno, 356 Wis. 2d 106, 136 (2014).

Judicial bias is the only "structural error" that the father alleges occurred in this case. "There is a presumption that a judge has acted fairly, impartially, and without prejudice." *State v. Herrmann*, 364 Wis.2d 336, 348 (2015). To rebut this presumption, the father must show judicial bias by a preponderance of the evidence. *Id.* Courts have developed two tests for evaluating a judge's impartiality: a subjective and an objective test. *State v. Goodson*, 320 Wis.2d 166, 173 (Ct. App. 2009). The father has not argued that Judge Schroeder was subjectively biased.

Objective bias can occur where there is an appearance of bias such that a reasonable person would question the court's impartiality. *Id.* It can also occur where there are objective facts showing that the judge treated a party unfairly. *Id.* However, the United States Supreme Court has held that a judge's comments during a trial are rarely sufficient to demonstrate judicial bias: "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157, 127 L. Ed. 2d 474 (1994).

The father has not cited a single case where a judge's

comments to a jury constituted a "structural error".

Examples of judicial bias include a situation where a

judge was "friends" with a party on a social network and

failed to disclose this fact to the other parties (*In re

Paternity of B.J.M.,* 392 Wis.2d 49 (2020)); a judge

promising to sentence a defendant to the maximum sentence

if he violated probation (*State v. Goodson*, 320 Wis.2d 166

(Ct. App. 2009)); a drug court judge who told a participant

that he would go to prison if he failed drug court and then

later presided over the defendant's sentencing after

revocation and sentenced the defendant to prison (*State v.

Marcotte*, 392 Wis.2d 183 (Ct. App. 2020)). On the other

hand, a judge's reference to her sister's death in a car

accident when sentencing a defendant for homicide by

intoxicated use of a vehicle did not demonstration actual

bias. *State v. Herrmann*, 364 Wis.2d 336 (2015). Judge

Schroeder's explanation of the allegations in the Petition

and the Petitioner's burden of proof in this case does not

even begin to approach any of these cases.

When determining whether the father has met his burden

of showing objective bias, it is important to put Judge

Schroeder's comments in context. They occurred prior to

jury selection and prior to the jury being sworn. The

comments were an attempt to explain the case and the

process to the jury. There was no contemporaneous

objection to the comments. "Issues that are not preserved

at the circuit court, even alleged constitutional errors,

generally will not be considered on appeal." *State v.*

Huebner, 235 Wis. 2d 486, 492 (2000). By failing to object

during the trial, the father has waived this issue on

appeal.

The father complains that the Judge's statement that

"pleas have been denial" was "most likely lost on the jury

pool, especially coming at the tail end of the Judge's

verbose presentation." *Appellant's brief* at p. 7. This is

an interesting argument, since it applies equally to the

parts of Judge Schroeder's comments to which the father

objects. Judge Schroeder's comments begin on page 21 of

the April 17, 2023 transcript and continue on for 13 pages

without interruption. (R. 119, pp. 21-33). Judge

Schroeder spoke for 11 pages before he made the comments to

which the father objects. In his brief, the father

acknowledges that Judge Schroeder's "rambling explanation

seemed more confusing than enlightening…." *Appellant's*

brief at p. 9.

Despite this, the father asserts that Judge Schroeder

was not a passive decision-maker but rather acted as an

advocate who took an active role in trying the case for the
Petitioner. *Appellant's brief* at p. 8. This assertion is
unsubstantiated hyperbole. Judge Schroeder never told the
jury that either party was correct or should prevail in the
case, other than to answer questions 1 and 2 on the Special
Verdict form in favor of the Petitioner-Respondent with the
consent of all parties. Neither Judge Schroeder nor any
party ever argued to the jury that it was in the childrens'
best interests to terminate the father's parental rights.

Other than the comments prior to jury selection by
Judge Schroeder, the father has not identified any other
portion of the record to support his contention that the
judge was biased. The jury trial in this case lasted 4
days. Numerous witnesses testified, including the father,
and 33 exhibits were received into evidence. The father
has not argued that Judge Schroeder excluded any witness,
violated his rights in any other way, or made any other
improper comments.

The father admits that when the trial had concluded,
Judge Schroeder properly instructed the jury. *Appellant's
brief* at p. 14. In fact, Judge Schroeder instructed the
jury that if they had "an impression that I have an opinion
one way or another in this case", that they should
"disregard that impression entirely and decide the issues

solely as you view the evidence". (R. 44). Judge

Schroeder also instructed the jury that they should not

consider the best interests of the children when making

their decision. (*Id.*). Jurors are presumed to follow the

instructions that are given to them by the Court. *State v.*

Dorsey, 379 Wis.2d 386, 423 (2018). To the extent that

there was any error in the statements made by Judge

Schroeder, his instructions to the jury cured them.

II. JUDGE SCHROEDER'S COMMENTS REGARDING THE BEST INTERESTS OF THE CHILDREN WERE NOT IMPROPER.

The father also asserts that Judge Schroeder

"improperly injected the best interest of the child

standard into the fact-finding proceedings" when he

mentioned that "the petitioner has claimed that it is

contrary to the best interests of these children" to

maintain the father's relationship with them. *Appellant's*

Brief at p. 13. The father acknowledges, however, that

"[o]nly when the court or the GAL instruct the jury that it

should consider the best interests of the child is there

reversible error." *In re Kristeena A.M.S.,* 230 Wis.2d 460

(Ct. App. 1999) (emphasis added). That did not happen

here. Neither the judge nor any other party told the jury

to consider the best interests of the child. In fact, the

father admits that the Court specifically instructed the

jury not to consider the best interests of the child.
Judge Schroeder was clearly referencing claims made by the
petitioner and was not stating his own opinion or
preference. As a result, this claim lacks merit.

CONCLUSION

For the foregoing reasons, the Circuit Court's order
should be affirmed.

Dated at Kenosha, Wisconsin, this 10th day of
January, 2024.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained within Section 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 13 pages.

Dated this 10th day of January, 2024.

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