COURT OF APPEALS DECISION DATED AND RELEASED

February 17, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-3534

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

In the Interest of Alexis, T.M., a person under the age of 18:

TRACIE M.,

Petitioner-Respondent,

v.

ANDREW J.W.,

Respondent-Appellant.

APPEAL from a judgment of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed*.

EICH, C.J.[1] Andrew J.W. appeals from a judgment, entered after a jury trial, terminating his parental rights to Alexis T.M. The jury determined that Andrew had exhibited a pattern of abusive behavior, which threatened Alexis's health, and that he failed to establish a substantial parental relationship

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

with, and failed to assume parental responsibility for, the child—both of which are grounds for termination of parental rights under § 48.415, STATS. After a dispositional hearing, the trial court determined that termination was warranted and entered judgment accordingly.

On appeal, Andrew argues that: (1) because "at one point" he was Alexis's "primary care-taker," he cannot, as a matter of law, be found to have failed to assume parental responsibility; (2) the trial court lost authority to proceed with the termination proceedings when it failed to adjudicate his paternity prior to trial; (3) the evidence was insufficient to support the jury's verdict that he had exhibited a pattern of abuse toward Alexis; (4) in the alternative, we should exercise our discretion to order a new trial in the interest of justice under § 752.35, STATS.; and (5) the trial court erroneously exercised its discretion in ordering termination.

We reject Andrew's arguments and affirm the judgment.

I. Failure to Assume Parental Responsibility

Under § 48.415(6), STATS., "failure to assume parental responsibility" constitutes grounds for the involuntary termination of parental rights. Insofar as is relevant here, the term "substantial parental relationship" is defined as follows:

> [T]he acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child [or the mother during her pregnancy] and whether the person has neglected or refused to provide care or support.

Section 48.415(6)(b).

Andrew claims the "undisputed facts" indicate that he lived with Tracie M., Alexis's mother, prior to the child's birth; he was present at the birth; he continued to live with Tracie and Alexis and quit his job so he could spend more time with them; he came along on some occasions when Tracie took Alexis to the doctor; he frequently held and fed Alexis; and for a time, he planned to marry Tracie. He says that these facts "clearly establish as a matter of law that [he] had assumed parental responsibility for Alexis" and that, as a result, the jury's verdict must be set aside. We disagree.

Andrew has offered no authority for his argument's major premise: that when there is some evidence of parental contact—such as living with, holding and feeding the child, and accompanying her on doctor visits—all other factual issues disappear and the conclusion must follow, as a matter of law, that the parent has not failed to exercise parental responsibility. We are not surprised at the lack of authority for the proposition, for it is difficult to imagine that conduct such as Andrew describes would require such a ruling as a matter of law—even in the face of evidence suggesting that, at other times during the child's infancy, the parent engaged in a course of conduct that was highly detrimental to the child.

Nor does § 48.415(6), STATS., lend support to Andrew's position. It states that the listed factors may be considered in determining whether a parent has established a substantial parental relationship with the child; it does not require a finding one way or the other based upon the presence of absence of any one or more of the stated factors. And it expressly states that the court's consideration is not limited to the listed factors.

In this case, there was evidence that, on September 9, 1994, the date of Alexis's birth, Andrew quit his job, leaving the three of them to subsist on public assistance, and that he gambled away some of that money. And while Andrew did feed and hold Alexis in the early days of her life, he had insisted upon doing so, prohibiting Tracie from holding or feeding the child and relegating her to wash Alexis's diapers and clothing. On two occasions when Alexis was two to three weeks old, Tracie came home to find her crying, and Andrew's explanation was that she had squirmed out of his lap and fallen to the floor. A week or so later, Tracie found bruises on Alexis's back and, a week

after that, a bruise on her chin. Two days later, Alexis was taken by ambulance to the hospital after being home alone with Andrew. She was diagnosed with subdural hematoma consistent with shaken baby syndrome. It was also discovered she had suffered five broken ribs several days prior to the shaking incident. Andrew denied shaking her, stating that she had again jumped out of his lap and hit her head on the floor, after which she began having "seizures."

As a result of this last incident, Andrew was charged with recklessly causing great bodily harm to a child, convicted of the felony and sentenced to two and one-half years in prison. Shortly thereafter, Tracie filed the petition to terminate Andrew's parental rights.

The concept of a "parental relationship" is not a relationship based on contact alone—whether isolated or, as in this case, more or less continuous over a period of weeks. A parental relationship is one necessarily involving "`a full commitment to the responsibilities of parenthood'" and acceptance of "`some measure of responsibility for the child's future.'" ***Ann M.M. v. Rob S.***, 176 Wis.2d 673, 684, 500 N.W.2d 649, 654 (1993) (quoted source omitted).

The jury in this case was instructed that, to establish Andrew's failure to assume parental responsibility, Tracie was required to prove "to a reasonable certainty by evidence that is clear, satisfactory and convincing" that Andrew had failed to establish a substantial parental relationship with Alexis. It was also instructed, in the language of § 48.415(6)(b), STATS., that:

> The term "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, you may consider such factors, including, but not limited to, whether Andrew ... has ever expressed concern for or interest in the support, care or well-being of Alexis or her mother during pregnancy or whether Andrew ... has neglected or refused to provide care or support.
>
> ....

> In determining whether Andrew ... has assumed parental responsibility, you may consider whether he has assisted in assuring adequate care by providing Alexis with necessary food, clothing, health care, shelter, and protection, either directly or in the form of child support payments, and whether Andrew ... has assisted in assuring adequate and appropriate training, discipline and other guidance to assure that the child's emotional needs are met.

On this record, the jury could well determine, by the appropriate standard of proof, that Andrew did not establish a parental relationship with Alexis[2]—and the fact that there were positive, as well as negative, contacts does not bar the jury from so concluding.[3]

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[2] While Andrew couches his argument as one of law, which we should decide *de novo*, we see his challenge as primarily running to the sufficiency of the evidence. Much of his argument, for example, is that "the evidence in this case is uncontroverted that [he] had assumed parental responsibility ...." We review the sufficiency of evidence to support a verdict under a standard that is highly deferential to the jury's determination, reversing only in the absence of any credible evidence, or any reasonable inferences from the evidence, to support the verdict. If there is any credible evidence which, under any reasonable view, fairly admits of an inference that supports a jury's finding, that finding may not be overturned. ***Ferraro v. Koelsch***, 119 Wis.2d 407, 410-11, 350 N.W.2d 735, 737 (Ct. App. 1984), *aff'd*, 124 Wis.2d 154, 368 N.W.2d 666 (1985); § 805.14(1), STATS. Our task is to search for credible evidence to sustain a verdict, not for evidence that might sustain a verdict the jury could have reached but did not. ***Finley v. Culligan***, 201 Wis.2d 611, 631, 548 N.W.2d 854, 862 (Ct. App. 1996).

[3] Andrew also argues briefly that § 48.415(6), STATS., is unconstitutionally vague as applied to his situation. The argument is largely undeveloped and, more importantly, it was never raised in the trial court. *See* ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992) (court of appeals will generally not consider arguments raised for the first time on appeal); ***M.C.I., Inc. v. Elbin***, 146 Wis.2d 239, 244-45, 430 N.W.2d 366, 369 (Ct. App. 1988) (unexplained and undeveloped arguments need not be considered on appeal). Additionally, to the extent Andrew's argument goes to the claimed facial unconstitutionality of the statute, we may not review such claims absent notice to the attorney general. ***Johnson v. City of Darlington***, 160 Wis.2d 418, 428, 466 N.W.2d 233, 236-37 (Ct. App. 1991).

II. Failure to Adjudicate Andrew's Paternity

Andrew next argues that because the trial court never adjudicated him Alexis's father, which he claims is required by §§ 48.415(6)(a)2 and 48.423, STATS., the court lacked competency to order termination or his parental rights.

Section 48.415(6)(a)2, STATS., 1993-94, is the section under which the "parental responsibility" aspect of Andrew's case proceeded.[4] It provides as follows:

> (a) Failure to assume parental responsibility may be established by a showing that a child is a nonmarital child who has not been adopted or whose parents have not subsequently intermarried[,] ... *that paternity was not*

(..continued)

Even so, Andrew's argument appears to be that the statute inadequately warns him what conduct is to be pursued or avoided. He states, for example, "There is very little more that [he] could have done ... to assume parental responsibility for his illegitimate daughter," and that "[a] person of ordinary intelligence would not reasonably believe that someone who did the things [he] did ... could have his parental rights terminated for failure to assume parental responsibility." Alexis's guardian *ad litem* responded to the argument as follows:

> He could have worked and supported the child instead of quitting his job. He could have refrained from shaking the newborn infant to the point of inflicting ... injury. He could have refrained from breaking her ribs. He could have refrained from bruising her. He could have told the truth about these things when they happened, instead of delaying an admission (and a partial one at that) to a few days before the dispositional hearing .... He could have accepted responsibility for his conduct and ... sought help for whatever problems may have contributed to his act[ions].... Section 48.415(6) is not unconstitutional for failing to advise him of these things.

The guardian *ad litem*'s response is argumentative, to be sure, but it is not without support in the evidence presented to the jury in this case.

[4] Section 48.415(6)(a), STATS., 1993-94, was subsequently amended and subsection 2 was repealed, effective July 1, 1996.

> *adjudicated prior to the filing of the petition for termination of parental rights* and:
>
> 2. *That, although paternity to the child has been adjudicated under s. 48.423*, the father did not establish a substantial parental relationship with the child prior to the filing of a [termination] petition ... and has not assumed parental responsibility for the child.

(Emphasis added.) Andrew argues that, without a prior adjudication of paternity, "there was no basis for submitting the case to the jury" in the first place. He does not elaborate.

Although the parties do not inform us, apparently Andrew commenced a paternity action seeking a determination that he was Alexis's father. At a pretrial hearing, the parties stipulated that Andrew was Alexis's father for purposes of the termination proceedings and asked the court to withhold adjudication in the paternity action. As a result of the stipulation, the trial court found as fact—in the termination proceeding—that Andrew was Alexis's father.[5]

As for the statute, it provides that failure to assume parental responsibility may be established by a showing that: (1) the child is an unadopted, nonmarital child whose parents have not married; (2) "paternity was not adjudicated prior to the filing of the [TPR] petition"; and (3) either (a) the father had been given notice but failed to appear and never had a

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[5] As a result of the stipulation and finding, the trial court answered two preliminary questions on the special verdict:

> Was paternity adjudicated before November 30, 1995? Answered by the Court: NO
>
> Was paternity established since November 30, 1995? Answered by the Court: YES

The court also instructed the jury that, while "Alexis's paternity was not determined by a court before the filing of this petition[,] ... that paternity has since been established," and also that "[t]he Court has answered these ... questions because there is no dispute in the evidence as to these questions."

substantial parental relationship with the child, or (b) "although" paternity was adjudicated ... the father did not establish a substantial parental relationship with the child prior to the filing of a [TPR] petition." Section 48.415(6)(a), STATS., 1993-94.

Clauses (1) and (2) are in the principal section of the statute and they plainly indicate that § 48.415(6), STATS., 1993-94, is to apply to situations in which "paternity was not adjudicated" prior to the filing of the petition. Clauses (a) and (b) then provide alternatives for situations in which the father either failed to appear or, even though[6] having been adjudicated the father, failed to establish a parental relationship with the child. We see nothing in the latter clause to indicate that it was intended to override the basic premise of the statute, as expressed in its primary clause, that it is to apply generally to situations in which the putative father has not yet been adjudicated the child's father.

Indeed, Andrew's position, were we to adopt it, would lead to the result that a putative father, such as Andrew, who has appeared in the TPR proceedings but not yet been formally adjudicated the father, may not have his parental rights terminated for failure to assume parental responsibility no matter what facts may exist justifying termination. The statute as a whole is designed to apply when paternity has not been adjudicated, and the fact that the concluding subclause (subsection (6)(a)2) states that a portion of it may also apply where there has been a prior adjudication, does not negate that design.

We conclude, therefore, that the fact that Andrew's paternity had yet to be adjudicated at the time of trial does not affect the validity of the jury's verdict and the court's subsequent dispositional order.[7]

III. Sufficiency of the Evidence: Abuse

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[6] As Tracie points out, the word "although" is defined as "in spite of the fact that : even though." WEBSTER'S NEW COLLEGIATE DICTIONARY 76 (1991).

[7] Even if some legal or procedural error were established in this respect, it is difficult to see how Andrew could be prejudiced thereby, having stipulated in open court that he was Alexis's father for purposes of the termination proceedings.

Andrew next challenges the sufficiency of the evidence to support the jury's verdict that he had "exhibited a pattern of abusive behavior which is a substantial threat to Alexis'[s] health." Specifically, he challenges the existence of evidence that he engaged in "a pattern" of abuse, stressing that no direct proof existed that any of Alexis's injuries prior to the "shaken baby syndrome" incident, which formed the basis for the child abuse charge and conviction, resulted from abuse, as opposed to accident or inadvertence.

We have set forth the principles underlying our deferential review of jury verdicts. *See supra* note 2. We have also discussed much of the evidence relating to Alexis's various injuries—including the "shaking" incident for which she was hospitalized and the five broken ribs she suffered several days before. There was, in addition, medical evidence that the rib injuries were the result of the use of excessive force beyond that normally found in playing with a child; in other words, a person "would know" when he or she was using such force as would break an infant's ribs.

Andrew was vague as to the appearance and existence of the earlier bruises Tracie and others noticed on Alexis's body and could say only that Alexis squirmed out of his grasp and fell to the floor. We cannot say that no rational jury, considering all the evidence in the case—and being in a position to observe the demeanor of Andrew, Tracie and the other witnesses[8]—could answer the abuse question on the verdict in the manner it did.

IV. New Trial in the Interest of Justice

Andrew also asks us to exercise our discretionary powers under § 752.35, STATS., to order a new trial in the interest of justice on grounds that the real controversy was not tried. He maintains that the real controversy in the

[8] "Where there are inconsistencies within a witness's testimony or between witnesses' testimonies, the jury determines the credibility of each witness and the weight of the evidence." ***State v. Sharp***, 180 Wis.2d 640, 659, 511 N.W.2d 316, 324 (Ct. App. 1993). This is so because of the jury's opportunity to observe the demeanor of the witnesses. The principles limiting appellate review of jury verdicts "are grounded on the sound reasoning that the jury has the `great advantage of being present at the trial'; it can weigh and sift conflicting testimony and attribute weight to those nonverbal attributes of the witnesses which are often persuasive indicia of guilt or innocence." ***State v. Alles***, 106 Wis.2d 368, 377, 316 N.W.2d 378, 382 (1982) (quoted source omitted).

case was whether he was responsible for a pattern of abuse and that allowing the jury to also consider whether he had failed to establish a substantial parental relationship with Alexis resulted in the presentation of contradictory evidence that must have confused the jury. He states:

> The petitioner alleged on the one hand that Andrew never assumed responsibility for his child, and on the other argued that he, as primary caretaker, was responsible for the alleged pattern of abuse. The conflict and inconsistency that is inherent in such a presentation is obvious. By trying both issues, the jury had before it lines of evidence that were not relevant to the abuse allegation.

Andrew has not offered any specific arguments or evidence to suggest that trying the case on two grounds—child abuse and failure to establish a parental relationship—must necessarily result in confusion, contradiction or prejudice. We have already held that there is adequate evidence in the record to support the jury's findings as to both "counts." Andrew has not persuaded us that the concepts involved are so confusing in and of themselves that we must hold as a matter of law that the two cannot be tried together.

Andrew next argues that the trial court allowed considerable testimony that he had, at various times, threatened to kill himself. The record reveals, however, that much of the evidence came in without objection, and Andrew has not pointed us to any place in the record where the trial court made a ruling of which he complains.[9]

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[9] While testifying, Tracie was asked whether Andrew had exhibited any unusual behavior after Alexis's birth. She responded that, on three occasions, he locked himself in the bathroom or in Alexis's room and held a knife to his wrists; on another occasion, he threatened to cut his wrists with a long wood screw. It was only when Tracie testified that at some earlier time he had talked about burning down their trailer home that Andrew's counsel objected to the answer and moved to strike it. But he later withdrew the motion, stating that he was only objecting to "going into further acts such as this."

Later, while cross-examining one of Andrew's witnesses, Tracie's attorney asked whether she had ever known Andrew to be suicidal; she said no, and counsel asked, "Does it surprise you that I ask you that question about him being suicidal?" At that point,

Finally, Andrew argues that Tracie's attorney made improper and inflammatory remarks to the jury because he (1) improperly vouched for the credibility of one of the expert witnesses when he said the witness was "one of the most powerful experts I've heard"; (2) improperly injected his personal observations into the argument when, apparently commenting on Andrew's testimony that he only touched Alexis gently, he said: "if that caused [the injuries] I'd have a big problem with my children"; and (3) argued facts not in evidence when, arguing that Andrew was undeserving of the jury's sympathy because of his own family history, counsel made reference to patterns of substance and other abuse in families in general.[10]

(..continued)
Andrew's attorney objected—not on grounds that the question was irrelevant or prejudicial but that it was outside the scope of his direct examination—and the trial court properly overruled the objection on those grounds, sustaining the objection only as to the form of the question. Here, too, we do not see how Andrew can complain of the admission of evidence to which he did not object. The same thing happened when Tracie's attorney asked Andrew's mother a similar question; again, there was no objection—only a request for a sidebar conference that was not reported. Counsel then went on to elicit—again without objection—that Andrew had discussed the subject with her the night before and had told her he was on "suicide watch" while in the jail.

Andrew has failed to point out any ruling by the trial court on the evidence to which he now objects. It is hornbook law that the admission or rejection of evidence is discretionary with the trial court, ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982), and that a party will not be heard to complain that the trial court erroneously exercised its discretion when it was never asked to do so in the first place. ***State v. Gollon***, 115 Wis.2d 592, 604, 340 N.W.2d 912, 918 (Ct. App. 1983). Thus, we said in ***State v. Goodrum***, 152 Wis.2d 540, 549, 449 N.W.2d 41, 46 (Ct. App. 1989), that "[f]ailure to object during questioning waives alleged misconduct in the questioning."

[10] Counsel stated:

> I'm arguing ... that my dad had alcohol problems; I'm going to have alcohol problems and my child may have alcohol problems. Hopefully, the pattern will stop. My dad had a gambling addiction; I may have one and my children may have one. If my dad was abusive, I may be abusive and my child will be abusive.
>
> You draw your own experiences, read the paper every day; and

Andrew made no objections to any portions of counsel's closing argument—either during the argument or immediately afterwards, when counsel and the court met to discuss the concluding details of the trial. Just as failure to object to questioning of a witness waives the objection to the questions, so does a failure to timely object to alleged improprieties in closing argument waive review of such alleged errors. ***State v. Goodrum***, 152 Wis.2d 540, 549, 449 N.W.2d 41, 46 (Ct. App. 1989); ***Miles v. Ace Van Lines & Movers, Inc.***, 72 Wis.2d 538, 545, 241 N.W.2d 186, 189 (1976).

V. The Dispositional Order

Finally, Andrew argues that the trial court erroneously exercised its discretion in terminating his parental rights. He is correct that the disposition of a termination case is within the trial court's discretion. ***Jerry M. v. Dennis L.M.***, 198 Wis.2d 10, 21, 542 N.W.2d 162, 167 (Ct. App. 1995).

"We will not reverse a discretionary determination by the trial court if the record shows that discretion was exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). "[W]here the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree." ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (footnote omitted). Indeed, "`we generally look for reasons to sustain discretionary decisions.'" ***Id.*** at 591, 478 N.W.2d at 39 (quoted source omitted).

(..continued)

> part of where we're going in our society is saying: Judge, don't sentence me so rough, I did this, I murdered this person because I had a rough childhood. It's true. It causes sympathy. But at some point you have to say: Forget the victim argument, now you have to be your own person and not blame your heritage, not blame your upbringing, but what are we doing now? And, yes, I feel bad about that and I feel bad for Alexis; but that doesn't change what you're focusing on.

In termination cases, the child's best interest is the "prevailing factor" to be considered by the court, and in considering that question the court is to consider—but is not limited to—the following factors:

> "(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 is removed from the home.
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> (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.
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> (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 result of prior placements."

Jerry M., 198 Wis.2d at 21-22, 542 N.W.2d at 167 (quoting § 48.426(3), STATS.).

Andrew argues first that the trial court's reasons for ordering termination were so "conclusory" that discretion was never exercised. We disagree.

The court's explanation of the reasons underlying its decision, while important to the exercise of discretion,

> need not be a lengthy process. While reasons must be stated, they need not be exhaustive. It is enough that they indicate to the reviewing court that the trial court "under[took] a reasonable inquiry and examination

> of the facts" and "the record shows a reasonable basis for the ... court's determination."

State v. Schaller, 199 Wis.2d 23, 39, 544 N.W.2d 247, 254 (Ct. App. 1995) (quoting ***Burkes***, 165 Wis.2d at 590-91, 478 N.W.2d at 39).[11] Indeed, even when the trial court fails to adequately explain the reasons for its discretionary decision, "we will independently review the record to determine whether it provides a reasonable basis for the trial court's ... ruling." ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993).

In this case, after hearing all the testimony presenting during the trial, together with substantial testimony at the dispositional hearing, the trial court began by reciting the statutory factors, noting that they are not exclusive and, in particular, that the child's safety is not among them. The court went on to state:

> At trial a defining moment occurr[ed], the cross-examination of Andrew W.
>
> It was clear to the court from the deceptions, including continuing self-deception from Andrew['s] failure to address underlying psychological and educational needs, from the jury finding of a pattern of abuse by him, that Alexis'[s] safety is at risk ....
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> ....
>
> Dr. Palermo opined that Andrew ... did not present a danger to Alexis. Logically the Doctor's opinion remained unchanged with the additional

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[11] The supreme court has repeatedly stated that a major reason circuit courts are given discretionary authority over matters that involve evaluation of the circumstances surrounding a trial is that the circuit judge, being present, is in a much better position to understand what occurred than is an appellate court working from a cold trial transcript. The circuit judge is in a particularly good "on-the-spot" position to evaluate the relevant factors bearing on the credibility and evidentiary weight, such as a statement's likely impact or effect on the jury. ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis.2d 646, 657, 511 N.W.2d 879, 883-84 (1994).

> information [that Andrew] had caused bruising to the infant and/or broken ribs.
>
> The opinion is further diluted by the fact that the doctor did not see [Andrew]'s trial denial. He does note in [sic] Alexis'[s] best interest to have a relationship with a parent who presents a danger to her.
>
> Andrew ... and Alexis have been separated for the majority of her life because of his dangerous acts. She's not had the advantage of a relationship with the ... family.
>
> Neither the likelihood of adoption nor [the] wishes of the toddler are known factors today.
>
> And finally, looking at the last of the statutory factors, it's unlikely the child will enter into a more stable environment but that her present environment will continue and the court finds that to be a stable environment.
>
> Testimony ... from the petitioner indicates at [sic] petitioner's place of residence and therefore Alexis is not dependent on child support from the respondent nor are other changes anticipated on the [sic] status.

Responding to Andrew's argument that two parents are important to a child, the court noted that the case had proceeded "deliberately" and was "fully heard by the court and jury," and that while Andrew's interests "weigh[] heavily," they "are secondary to the child['s]." Continuing, the court stated: "While it is in Alexis'[s] best interest to have a father, it's not in her best interest to have a father who put her at great physical risk, who's not addressed the causative factors and who's not been a father to her." The court went on to conclude, "It's in Alexis'[s] best interest to grant the petition for termination of parental rights."

Andrew points to isolated comments by the court prior to hearing counsel's arguments—comments offered as its "initial feelings" in the case—in

which the court noted that this was not "the usual failure to assume case" because "during the early weeks [Andrew] jumped into parenting with both feet and maybe then some." Continuing, the court noted that considering the statutory criteria alone, Andrew "could successfully assume a parental role in those kinds of issues," but that,

> [o]n the other hand, the testimony of Dr. Lazoritz at trial [the physician testifying as to Alexis's injuries] rings very loud in my recollection. Not only the harm that was done but the potential for harm so certainly remarkable. And I was also struck by [Andrew]'s testimony ... regarding the actual events that caused Alexis'[s] hospitalization and thereby [his] responsibility for the injury ....
>
> ....
>
> So with those different considerations if I could have your argument ....

Andrew, pointing to the testimony of his expert witness, Dr. George Palermo, at the dispositional hearing indicating that Andrew admitted shaking Alexis because she was crying and he was upset and that she accidentally fell, argues that this establishes beyond doubt that he had accepted responsibility "for what happened [to Alexis]." He stresses Palermo's testimony that, in his opinion, he (Andrew) did not present a danger to the child. It follows, says Andrew, that the trial court erroneously exercised its discretion in terminating his parental rights.

The court, however, could well give greater weight to the evidence of abuse—including the jury's verdict and Andrew's child-abuse conviction—as representing a greater concern than Palermo would acknowledge. Indeed, the trial court expressly considered Palermo's testimony, questioning the logic underlying Palermo's holding to his view of Andrew as presenting no danger to Alexis in light of the "additional information [that Andrew] had caused bruising to the infant and/or broken ribs." As the court also indicated in its opinion, Palermo's testimony was "diluted" by the fact that he had not been present in court to hear Andrew deny having played any part in Alexis's injuries.

In short, the trial court assigned lesser weight to Palermo's testimony than to other evidence in the case, which, as the trier of fact, it has the right to do. ***Leciejewski v. Sedlak***, 116 Wis.2d 629, 637, 342 N.W.2d 734, 738

(1984); *see also* ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis.2d 646, 657, 511 N.W.2d 879, 883-84 (1994); *supra* note 11.

We have set forth the trial court's explanation of the reasons underlying its disposition in this case at considerable length because we believe it meets all the criteria for an appropriate—and appropriately explained—exercise of discretion.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.