COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal Nos. 2017AP1413
2017AP1414

Cir. Ct. Nos. 2016TP000302
2016TP000303

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO S.M.H., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

C. L. K.,

RESPONDENT-APPELLANT.

IN RE THE TERMINATION OF PARENTAL RIGHTS TO J.E.H., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

C. L. K.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

¶1 DUGAN, J.[1] C.L.K. appeals the circuit court's orders terminating his parental rights to his daughter, S.M.H., and his son, J.E.H.[2]

¶2 On appeal, C.L.K. contends that by granting a directed verdict for the State at the close of the State's case during the grounds phase of the proceedings without allowing him an opportunity to present any evidence, the trial court violated his due process right to present a defense, which constituted structural error. The State concedes that the trial court followed an incorrect procedure by granting a directed verdict at the close of the State's case. However, it contends the error is subject to harmless, not structural, error analysis and, because the evidence of abandonment was overwhelming, the error was harmless.

¶3 We agree that the trial court erred. However, we conclude that the error does not constitute a structural error. Therefore, the error should be analyzed under the harmless error analysis. Applying that analysis, we find that the error was harmless. We affirm the trial court's orders.

---

[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] C.L.K. filed separate notices of appeal from those orders. This court granted his motion to consolidate the appeals on August 9, 2017.

During the same proceedings, the trial court also terminated the parental rights of the mother, E.A.S., to S.M.H. and J.E.H. E.A.S consented to the termination of her parental rights. Those rulings are not before this court.

BACKGROUND

¶4 The following background provides context for the issues C.L.K. raises. C.L.K. is the father and E.A.S. is the mother of S.M.H., a seven-year-old girl, and J.E.H., a nearly six-year-old boy.

¶5 On about March 3, 2014, the children's mother, E.A.S., brought two-year-old J.E.H. to the Children's Hospital of Wisconsin with apparent third degree burns on both feet and both ankles from hot bath water. Surgical intervention was required because of the severity of J.E.H's burns.

¶6 On about March 3, 2014, the matter was reported to the Bureau of Milwaukee Child Welfare (BMCW) because the doctor suspected that E.A.S. might have dipped J.E.H. in the hot water.[3] E.A.S. was charged with child abuse and child neglect based on J.E.H.'s injuries.

¶7 An order of temporary physical custody was filed for S.M.H. and J.E.H. on March 19, 2014. They were placed with foster parents. The foster mother is the maternal aunt. S.M.H. and J.E.H. were each deemed to be a Child in Need of Protective Services (CHIPS) on March 24, 2014.

¶8 On May 8, 2014, E.A.S. was convicted of child abuse-recklessly causing great harm to J.E.H. On August 8, 2014, she was sentenced to four years of initial confinement followed by four years of extended supervision.

[3] The Bureau of Milwaukee Child Welfare (BMCW) has since been renamed the Division of Milwaukee Child Protective Services. The agency was known by its prior name when this case was initiated; therefore, all references will be to the BMCW.

¶9 On August 6, 2014, a dispositional order placing both children out of the parental home was entered. That order was extended on March 22, 2016. Since the removal, the children have continuously remained outside the parental home with the same foster parents.

¶10 On September 9, 2016, the State filed petitions to terminate C.L.K's parental rights to S.M.H. and J.E.H., alleging the statutory grounds of abandonment under WIS. STAT. § 48.415(1)(a)2. and failure to assume parental responsibility under WIS. STAT. § 48.415(6).[4]

---

[4] "Wisconsin has a two-part statutory procedure for an involuntary [TPR]." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. In the grounds phase, "the petitioner must prove by clear and convincing evidence" that at least one of the twelve grounds enumerated in WIS. STAT. § 48.415 exists. *See* WIS. STAT. § 48.31(1); ***Steven V.***, 271 Wis. 2d 1, ¶¶24-25. In the dispositional phase, the court must decide if it is in the child's best interest that "the parent's rights be permanently extinguished." *See* WIS. STAT. § 48.426(2); ***Steven V.***, 271 Wis. 2d 1, ¶27.

In order to prove the termination of parental rights ground of abandonment, the petitioner needs to show: (1) "[t]hat the child was placed, or continued in a placement, outside the parent's home by a court order" which contained the termination of parental rights notice required by law; and (2) that the parent "failed to visit or communicate with the child for a period of [three] months or longer." *See* WIS. STAT. § 48.415(1)(a)2.; WIS JI—CHILDREN 313. If the petitioner establishes each element by clear and convincing evidence, then under WIS. STAT. § 48.415(1)(c), the burden shifts to the parent to "prove all of the following by a preponderance of the evidence":

> 1. That the parent had good cause for having failed to visit with the child throughout the time period specified ….
>
> 2. That the parent had good cause for having failed to communicate with the child throughout the time period specified ….
>
> 3. If the parent proves good cause under subd. 2., including good cause based on evidence that the child's age or condition would have rendered any communication with the child meaningless, that one of the following occurred:
>
> a. The parent communicated about the child with the person or persons who had physical custody of the child during the time

(continued)

¶11 On March 23, 2017, the trial court conducted a grounds trial with respect to C.L.K.[5] The State called C.L.K. as its only witness. C.L.K. testified that when the children were first removed by BMCW, he was not involved with them and had not seen them for a couple months. He also testified that from July 2015 until September 2016, he had no contact with the children and that there was no reason not to have contact. He did not visit them, speak with them, or send them letters or text messages throughout that period. During that time period, C.L.K. also had no communication with the foster home, including no telephone calls made or letters sent. C.L.K. testified that a social worker led him to believe that he could not have the foster parents' contact information. He also testified that he did not have a phone that was "easily accessible" for him to use. However, the State introduced C.L.K.'s deposition testimony that he could have called the children during that time period, but did not.

¶12 C.L.K. also testified that he did not attempt to send letters to BMCW to be given to his children, he should have, and there was no reason for him not to have done so. C.L.K. also testified that, in the three years since his children had been removed from E.A.S.'s care, he had not been responsible for or involved in his children's daily care, supervision, protection or education.

> period specified … or, … with the agency responsible for the care of the child during the time period specified ….
>
> b. The parent had good cause for having failed to communicate about the child with the person or persons who had physical custody of the child or the agency responsible for the care of the child throughout the time period specified ….

See WIS. STAT. § 48.415(1)(c).

[5] C.L.K. waived his right to a jury trial.

¶13 After being questioned by the State and the guardian *ad litem*, C.L.K.'s attorney questioned C.L.K. regarding his defense that he was told that he could not have the contact information for the foster parents. C.L.K. testified that he had no other means of getting contact information for the foster home.

¶14 On redirect examination, C.L.K. admitted that he took no steps to get clarification from the BMCW on whether he could call the foster parents, he did not determine whether any such prohibition would apply to letters, and that he took no steps to make contact with the children during the relevant time period.

¶15 Following redirect examination, the trial court asked C.L.K. what specifically the social worker said to him that led him to believe that he could not have any information about his children or communicate with them. C.L.K. testified that when he asked for the foster parents' number so he could call the children, the social worker told him she was not allowed to give him any information. When the trial court asked C.L.K. about the statement's time frame, C.L.K. testified that the social worker refused to give him that information when he was having unsupervised visits, which he estimated to be sometime between 2013 and 2015. C.L.K. testified that his visits changed to supervised visits sometime in 2015 or 2016, and he was having supervised visits up until July 2015. Those visits ended in July 2015 when C.L.K. moved out of town to get a better job, but the job did not work out as planned, so he moved back.

¶16 The guardian *ad litem* then asked C.L.K. whether the social worker ever told him that he could not have visits. C.L.K. testified that the social worker never prohibited his visits, but that when he moved out of town, he did not know how to make it possible for him to continue those visits.

¶17 On re-cross examination, C.L.K. testified that he did not leave any forwarding information with the social worker when he moved out of town. However, C.L.K. testified that, because he knew a phone number where he could have been reached was on file with the BMCW, he believed the social worker could have reached him when he was out of town. The State rested and the guardian *ad litem* had no further evidence.

¶18 C.L.K.'s attorney then argued that, taking the evidence in the light most favorable to him, C.L.K. had a good reason for not having communication with the children over the time period at issue because of what was directly told to him by the social worker, and because he believed that the social worker could contact him.

¶19 The trial court stated that C.L.K. was arguing a motion that had not been made, although the court had suspected it would be coming. The State responded that it was going to interpret the trial court's statement as a motion for a directed verdict and argued that the evidence was overwhelming, specifically addressing the evidence of abandonment. The guardian *ad litem* agreed with the State that a directed verdict should be granted.

¶20 Then C.L.K.'s attorney stated, "[i]f this is not a directed verdict motion at this point then and the State rests its case in chief, then I'm going to ask to be able to put my client on the stand and finish our side of the case."

¶21 The trial court stated that it was "granting the implicit motion for a directed verdict" and that it was "addressing only the abandonment claim." The trial court stated:

> [C.L.K.] acknowledges that for a period far in excess of the three months under the statute while the children were in

placement under a warnings-compliant order devolving from a proceeding in which he was fully participatory and had a lawyer.—I might add a very good lawyer—that he failed to visit or communicate with his children in that he admits all of that and/or it's established by the CHIPS jurisdictional history.

¶22 The trial court further stated that:

The State has met its initial burden. And the burden of production of dissuasion as to the valid reason, good cause, switches to [C.L.K.]. He says that his good cause is that a social worker said to him that he—something to the effect of he should not have contact with the foster home. And because he was moving out of the community, that, therefore, there's good cause for not visiting or communicating with the children.

….

So I don't discount the fact that if a social worker said something along those lines to you it might dissuade a parent from visiting or communicating with your children in some measure, in your mind, subjectively, as your lawyer said. But even that, I sincerely question that.

¶23 In its analysis, the trial court emphasized:

You had the right of supervised visitation. You had a lawyer. You could have exercised that right of supervised visitation. Not all of that has been made clear to me. You moved out of the community, et cetera. I get that. *But not seeking clarification of that under the circumstances if you really wanted contact with your children, I just don't think you get anywhere near good cause for even the first question: Is there good cause for failing to visit or communicate with the children*?

There was nothing at that point that would have prevented you from writing a letter to the agency and saying, okay, I moved out of town, I don't have a lot of resources, I don't have a phone. I'm going to communicate. I'm going to send letters so that my children will be communicated with. You forward them on and keep me apprised of what's going on with my children. You had that avenue available to you.

> Even at your own instance, much less going back to Mr. Bridgeman and saying, they're telling me I can't write to them, they're telling me I can't call them, they're telling me I can't go there, what do I do about this—even if somehow you get to an objective good cause for not communicating with your children or visiting with your children, there is no good cause for going from July of '15 to September of '16 without even communicating in some fashion with the social workers about how they were doing.[6]

¶24 The trial court concluded:

> If there is any conceivable rationale—even viewing the evidence most favorably to [C.L.K.]—for not having visited or communicated with the children, there is no good cause for not having communicated with the people responsible for the care of the children—for that period; and, hence, the showing of abandonment is not rebutted. It has not been, it cannot be, given the admissions he's already made. So I do find grounds of abandonment.

The trial court then denied the motion as to the failure to assume responsibility ground and asked whether the State wanted to proceed on that ground. The State responded that it had no other evidence that it needed to put in. The trial court continued with the trial on the dispositional phase of the case.

¶25 On March 27, 2017, the trial court issued a written decision regarding the dispositional phase of the case and terminated C.L.K.'s parental rights, noting that although it was sympathetic to him and appreciative of his fervent desire to parent, the court's obligation was to C.L.K.'s children. Subsequently, the trial court entered orders terminating C.L.K.'s parental rights to S.M.H. and J.E.S. This appeal followed.

[6] Our review of the record does not indicate Mr. Bridgeman's role in these proceedings.

DISCUSSION

¶26 C.L.K. contends that the trial court erred as a matter of law when it directed the verdict for the State at the close of its grounds case and that such error was structural error because it was a complete denial of his right to present a defense. The State concedes that the trial court erred by directing the verdict but argues that it was harmless error because overwhelming evidence established that C.L.K. had abandoned his children.

Standard of Review

¶27 This appeal presents three questions of law that we review *de novo.* The first question of law for *de novo* review is whether the trial court had the authority to direct a verdict before the parent had an opportunity to present a defense in the grounds phase of a termination of parental rights case. *See* ***State v. Magett***, 2014 WI 67, ¶28, 355 Wis. 2d 617, 850 N.W.2d 42. The second question of law for *de novo* review is whether the trial court's finding that the State has established a ground for the termination of parental rights at the close of the State's case, "is structural error or subject to the application of harmless error analysis." *See* ***State v. Travis***, 2013 WI 38, ¶9, 347 Wis. 2d 142, 832 N.W.2d 491. The third question of law for *de novo* review is, if it is determined that harmless error applies, whether the error was harmless. *See* ***id.***

¶28 Although termination of parental rights proceedings are civil proceedings, the due process protections of the Fourteenth Amendment apply and "guarantees a parent the opportunity to be heard and present a defense." *See* ***Brown County v. Shannon R.***, 2005 WI 160, ¶¶11, 59, 67, 286 Wis. 2d 278, 706 N.W.2d 269. Nonetheless, violations of those protections do not necessarily

entitle a parent to a new trial. *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶35, 246 Wis. 2d 1, 629 N.W.2d 768; *see also* ***Waukesha Cnty. v. Steven H.***, 2000 WI 28, ¶¶ 58-60, 233 Wis. 2d 344, 607 N.W.2d 607.

The Trial Court Erred When It Directed the Verdict at the Close of the State's Grounds Case

¶29 As previously stated, the State concedes that the trial court did not have the authority to grant a directed verdict for the State after the close of the State's grounds case.[7] In making this concession, the State simply quotes WIS. STAT. § 805.14(4).

¶30 Although not cited by either party, ***Magett***, wherein the trial court dismissed the defendant's not guilty by reason of mental disease or defect plea before the responsibility phase in the second phase of a bifurcated criminal trial, provides guidance. *See* ***Magett***, 355 Wis. 2d 617, ¶62. There, our Supreme Court stated that under WIS. STAT. § 805.14(4) "[t]echnically, a [trial] court must hear 'all evidence' before directing a verdict."[8] *See* ***id.***, ¶65.

¶31 Thus, even though in this case the trial court heard at least some, if not all of C.L.K.'s defense case, we accept the State's concession that the trial court erred in directing a verdict. *See* ***id.*** (stating that "the [trial] court's action

[7] We are not bound by a party's concessions of law. *See* ***State v. Nelson***, 2014 WI 70, ¶27 n.7, 355 Wis. 2d 722, 849 N.W.2d 317.

[8] WISCONSIN STAT. § 805.14(4) provides:

> MOTION AT CLOSE OF ALL EVIDENCE. In trials to the jury, at the close of all evidence, any party may challenge the sufficiency of the evidence as a matter of law by moving for directed verdict or dismissal or by moving the court to find as a matter of law upon any claim or defense or upon any element or ground thereof.

was in 'legal liminality'— somewhere between a proper and improper grant of a motion to dismiss at the close of the 'plaintiff's' evidence" because the trial court had been "able to consider all credible evidence.") We also note that in ***Magett***, our Supreme Court applied harmless error analysis and concluded that, even if the dismissal or directed verdict was premature, the timing of dismissal did not affect the outcome of the case. *See* ***id.***, ¶66.

The Trial Court's Error is Not Structural

¶32 The second question is whether the error is structural. C.L.K. states that the manner in which the trial court proceeded "wholly denied … his constitutional due process right to present a defense" which is "structural error which requires automatic reversal." C.L.K. quotes, but does not analyze, the following statements in ***State v. Pinno***:

> Although "most constitutional errors can be harmless," there are a very limited number of structural errors that require automatic reversal. Structural errors are different from regular trial errors because they "are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." Structural defects affect "[t]he entire conduct of the trial from beginning to end." An error also may be structural because of the difficulty of determining how the error affected the trial.
>
> 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. Because denial of the right to a public trial has been labeled a structural error, defendants generally do not have to show prejudice when they bring a properly preserved claim of violation.

Id., 2014 WI 74, ¶¶49-50, 356 Wis. 2d 106, 850 N.W.2d 207 (footnotes, citations and parenthetical explanation omitted).

¶33 ***Pinno***'s list of "the very limited number of structural errors" includes: (1) the complete denial of the right to counsel; (2) a biased judge; (3) exclusion of members of the defendant's race from a grand jury; (4) the denial of the right to self-representation; (5) the denial of the right to a public trial; and (6) a defective reasonable doubt instruction. *See* ***id.*** The list does not include a trial court's granting of a directed verdict at the close of the state's case. However, C.L.K. does not attempt to draw analogy between his claimed error and any error on the list.

¶34 Furthermore, it is not accurate to say that in this case C.L.K. was "wholly" denied the right to present a defense. Rather, the record establishes that C.L.K.'s attorney questioned C.L.K. twice during the State's grounds case. In addition, we note that prior to the trial court's directed verdict decision, C.L.K.'s attorney stated, "[i]f this is not a directed verdict motion at this point then and the State rests its case in chief, then I'm going to ask to be able *to put my client on the stand and finish our side of the case*." (Emphasis added.) The record contains no indication that C.L.K. was prepared to call any other witness to testify during the grounds phase of case.[9] That inference is further confirmed by C.L.K.'s appellate reply brief which focuses solely on C.L.K.'s testimony.

¶35 In ***State v. Nelson***, our Supreme Court held that denial of a defendant's right to testify was subject to harmless error analysis. *See* ***id.***, 2014 WI 70, ¶43, 355 Wis. 2d 722, 849 N.W.2d 317. ***Nelson*** states that "[c]ourts should consider the following factors when determining whether the denial of the right to testify is harmless beyond a reasonable doubt: (1) the importance of the

[9] C.L.K. was also sole witness on his behalf in the dispositional phase of the case.

defendant's testimony to the defense case; (2) the cumulative nature of the testimony; (3) the presence or absence of evidence corroborating or contradicting the defendant on material points; (4) the overall strength of the prosecution's case." ***Id.***, ¶46.

¶36 In his reply brief, C.L.K. attempts to distinguish this case from ***Nelson*** stating "the record at least contained a minimal offer of proof" as to what Nelson's testimony would have been. However, this record also provides an indication of C.L.K.'s testimony as revealed by his trial attorney's cross and re-cross examination of C.L.K. during the State's grounds case. Thus, we conclude the claimed error is subject to harmless error analysis. *See* ***id.***, ¶¶29-30, 43.

The State has Established that the Trial Court's Error was Harmless

¶37 The third question is whether the trial court's error was harmless. The Wisconsin's harmless error rule is codified in WIS. STAT. § 805.18(2), which provides:

> No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

Id.

¶38 As stated in ***Evelyn C.R.***:

> 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. If the error at issue is not sufficient to undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless.

Id., 246 Wis. 2d 1, ¶¶28, 33, 36 (applying harmless error analysis and examining the entire record to trial court error in entering default judgment against the parent regarding issue of abandonment without taking evidence to support a finding by clear and convincing evidence that the parent had actually abandoned the child; ***Evelyn C.R.*** cited ***Steven H.***, 233 Wis. 2d 344, ¶¶ 51-54, 58-59, as having applied harmless error analysis and examining the entire record to a trial court error in finding that grounds existed to terminate parental rights based on the parent's waiver of the right to contest the petition without first taking testimony to support the allegations of the petition). We will examine the entire record and apply the ***Nelson*** harmless error factors. *See* ***id.***, 355 Wis. 2d 722, ¶46.

The Importance of C.L.K.'s Testimony to the Defense Case

¶39 With respect to the first ***Nelson*** factor—the importance of the testimony to the defense case—the record does not indicate that C.L.K. had any other witness present to testify in his own defense. *See* ***id.*** C.L.K.'s testimony would have been important to the defense case; however, during the State's grounds case, C.L.K.'s attorney had two opportunities to question C.L.K. and elicit his defense. As previously indicated, C.L.K. testified that he asked his social worker for the phone number for the foster parents, and she told him that he could not have the number. C.L.K.'s attorney then asked, "[w]hen you say that not able to have contact, you understand that you could have tried to get their information maybe from other means?" C.L.K. responded, "I didn't know any other means." C.L.K.'s attorney then asked, "[s]o did that prevent you from having contact with

your children," and C.L.K. said, "[y]es." By that testimony C.L.K. attempted to establish good cause for failing to communicate with his children during the fifteen-month time period.[10]

The Cumulative Nature of the C.L.K.'s Testimony

¶40 With respect to the second ***Nelson*** factor—the cumulative nature of the testimony—the sole witness for the defense was C.L.K. *See* ***id.*** He had the opportunity to testify in his own defense on the abandonment ground when he was cross-examined by his attorney. C.L.K. has not presented any affidavit or other document that even suggests he had any other facts to offer in his defense. Thus, in the absence of any additional proffered facts, we conclude that C.L.K.'s testimony on the abandonment issue would have been cumulative.

The Presence or Absence of Evidence Corroborating or Contradicting C.L.K on Material Points

¶41 With respect to the third ***Nelson*** factor—the presence or absence evidence of corroborating or contradicting C.L.K on material points—C.L.K. testified that sometime between 2013 and 2015 while he was having unsupervised visits the social worker told him that he could not have any information concerning where his children were located. *See* ***id.*** There is no testimony directly contradicting that testimony. However, as twice stated by the trial court, C.L.K. was represented by an attorney—"a very good lawyer"—who could have

[10] Although the failure to assume responsibility ground was not addressed during C.L.K.'s examination, the trial court found the evidence did not support that claim and denied the motion to terminate on that ground.

helped him to obtain the foster parent contact information or otherwise pursue his right to communicate with his children.

¶42 In addition, during the disposition phase of the case, C.L.K.'s current social worker testified that sometime during September of 2015 (not long after C.L.K. had moved to Green Bay), she became C.L.K.'s social worker. She testified that she called the phone number C.L.K. had provided to the BMCW, left a couple messages for him, and C.L.K. had returned her call in October 2015. She testified that she spoke to C.L.K. about wanting to restart his visits with the children and requested his mailing address. C.L.K. said he did not have a mailing address. The social worker asked C.L.K to contact her when he arranged a mailing address because, considering that he had not seen his children since July of 2015, she wanted to set up visits again. C.L.K. said he understood. Nonetheless, after that conversation, the social worker could not get in touch with C.L.K. again, even though she called his phone number each month. Eventually the number was disconnected. C.L.K. also testified during the disposition phase that, "I know I dropped the ball big time with being gone for that year."

¶43 This evidence undermines C.L.K's defense testimony because it suggests that he had avenues to obtain and maintain communication with his children. The trial court noted that he had a very good attorney who could have helped him. C.L.K. also knew that he had a right to have visits with his children. In the late summer or early fall of 2015, a new social worker also provided C.L.K., with the opportunity to resume contact with his children and the agency. Yet, he did not make any effort to follow up on those opportunities.

¶44 The evidence also suggests that the number that C.L.K. testified that he gave to the BMCW to reach him was disconnected sometime after October

2015. The September 2015 replacement of the social worker in charge of the case also suggests that C.L.K. had the chance to, again, ask for access to the foster parents' phone number or other contact information, but apparently he did not make any such inquiry.

The Overall Strength of the State's Abandonment Case

¶45 With respect to the fourth ***Nelson*** factor—the strength of the State's case—based on C.L.K.'s testimony the State's abandonment case was overwhelming. *See* ***id.*** During C.L.K.'s testimony on direct examination, he repeatedly admitted that he had not had any form of communication with his children, the social worker or the foster parents for about fifteen months. This period is five times greater than the three-month period of abandonment that the State was required to prove under WIS. STAT. § 48.415(1)(a)2. The following colloquy is illustrative of C.L.K.'s testimony:

[State]	Now, at one point you went over a year with no contact with your children; correct?
[C.L.K.]	Yes.
[State]	From about July of 2015 until September of 2016 you had no contact with the children.
[C.L.K.]	Correct.
[State]	You had no visits with them during that time period.
[C.L.K.]	Correct.
[State]	You didn't speak to them during that time period.
[C.L.K.]	Correct.
[State]	You didn't send them any letters during that time period.

[C.L.K.]	Correct.
[State]	You didn't send them any text messages during that time period.
[C.L.K.]	Correct.
[State]	You had no communication with them at all during that time period.
[C.L.K.]	No, I had not.

Indeed, when the State asked C.L.K. if he "[w]ould you agree that from July of 2015 through September of 2016 you completely had no contact with the children and there was no reason to do so?" C.L.K. responded, "[y]es." Thus, C.L.K.'s testimony establishes that he did not visit or communicate with his children for about fifteen months.

¶46 On redirect, the State also elicited the following testimony from C.L.K. regarding contact with the foster parents with whom his children had resided since the March 2014 incident: "I could have tried harder, yes. That's what I meant when I said I could have called. I could have tried harder to locate the number to call them. Yes, I could have done that." C.L.K. also admitted he did not take any additional steps to say he should be able to call, he assumed he could not send letters for his children to the foster parents, but he did not ask whether he could send letters, and did not make any steps to get in contact with the children.

¶47 Furthermore, as the trial court stated, C.L.K. had a very good attorney and C.L.K. knew that he had the right to visits with his children, but did not ask his attorney to get them set up. That attorney could have also tried to get the foster parent contact information for C.L.K. that the social worker said she could not provide.

¶48 The evidence was overwhelming that C.L.K. had no contact with his children for about fifteen months without any good reason and that evidence came from C.L.K., who was the State's sole witness during the grounds phase. Although we agree with the trial court's comment that the bureaucracy could be daunting, C.L.K. took no initiative to determine whether he could find another way to have contact with his children.

¶49 Moreover, C.L.K. did not even follow through to any degree when the newly assigned social worker reached out to him in September of 2015—he did not even provide her with his new phone number when that changed.

¶50 C.L.K.'s sole defense was the statement of a social worker (who was apparently no longer responsible for the case after September 2015), that he could not have the foster parents' phone number. C.L.K. has not provided this court with any other information, let alone described any potential evidence, regarding any other possible defense strategy. It may be that C.L.K. would have offered testimony regarding the other ground for termination of his parental rights; however, that would be irrelevant since only one ground need be proved to terminate parental rights.

¶51 In sum, having considered the entire record under the ***Nelson*** factors, we conclude that the trial court's error in directing the verdict at the close of the State's grounds case, was harmless error. Despite the directed verdict, the record provides a good indication of C.L.K.'s defense to the abandonment ground. Having considered that weak defense against the overwhelming strength of the State's case, the error in directing the verdict before the defense portion of grounds case is not sufficient to undermine our confidence in the outcome of the

proceedings. *See* ***Evelyn C.R.***, 246 Wis. 2d 1, ¶36. We cannot find that C.L.K. was prejudiced by the trial court's error. *See* ***Steven H.***, 233 Wis. 2d 344, ¶60.

CONCLUSION

¶52 For the reasons stated above, we conclude that the trial court erred when it directed the verdict in favor of the State on the abandonment ground for the termination of C.L.K.'s parental rights prior to C.L.K. testifying in the defense portion of the case. However, we conclude that the error is subject to harmless error analysis, and that the State has established that the error was harmless. Therefore, we affirm the termination of C.L.K.'s parental rights.

By the Court.—Orders affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)(4).