

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 20, 2005

Cornelia G. Clark
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. 2005AP2420
2005AP2421
2005AP2422**

**Cir. Ct. Nos. 2004TP267
2004TP268
2004TP269**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT 1**

**No. 2005AP2420
CIR. CT. NO. 2004TP267**

**IN RE THE TERMINATION OF PARENTAL
RIGHTS TO FANTAISHA A.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KARLA J.,

RESPONDENT-APPELLANT.

No. 2005AP2421
CIR. CT. No. 2004TP268

**IN RE THE TERMINATION OF PARENTAL
RIGHTS TO KENYA A.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KARLA J.,

RESPONDENT-APPELLANT.

No. 2005AP2422
CIR. CT. No. 2004TP269

**IN RE THE TERMINATION OF PARENTAL
RIGHTS TO KENNYTH A.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KARLA J.,

RESPONDENT-APPELLANT.

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

¶1 KESSLER, J.¹ Karla J. appeals from orders terminating her parental rights to Fantaisha A., Kenya A. and Kennyth A. The sole issue on appeal is whether the trial court erred when it gave the *falsus in uno* jury instruction based on Karla's false statements to the jury about her employment at a grocery store. We conclude that the trial court properly exercised its discretion in giving the instruction. Therefore, we affirm.

BACKGROUND

¶2 The State filed a petition to terminate Karla's parental rights to her three children.² The alleged grounds for termination were failure to assume parental responsibility, *see* WIS. STAT. § 48.415(6), and continuing need of protection or services (CHIPS), *see* § 48.415(2).

¶3 The case proceeded to trial. The State called Karla adversely. She testified that she worked at Jewel Osco. She said that she had worked there continuously since August 2004, and had never been fired. She testified that sometimes she worked on a part-time basis, and sometimes on a full-time basis. She added that she had worked forty hours the week before the jury trial started. Finally, she testified that her sole source of income and support was her job at Jewel Osco.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² The parental rights of the children's fathers are not at issue in this appeal and will not be addressed.

¶4 The State then called as its next witness the personnel coordinator at Jewel Osco. She testified that Karla: began employment at Jewel Osco on August 6, 2004; worked part-time, for a maximum of thirty hours a week; had not worked at Jewel Osco since December 13, 2004; and was not currently employed there.

¶5 Although several witnesses testified for the defense, Karla did not testify again. Before the case went to the jury, the State asked the trial court to give the *falsus in uno* jury instruction, *see* WIS JI—CIVIL 405, based on Karla's false testimony that she was still employed at Jewel Osco. Karla's counsel objected on grounds that Karla had never received an official letter of termination, citing testimony from the Jewel Osco employee that a termination letter that was sent to Karla was returned unopened.

¶6 The State countered that even if Karla had not received the termination letter, she knew she had not continued to work at Jewel Osco, and yet she testified that she was still working there. She even provided the detail that she had worked forty hours the week before trial, which was absolutely false. The trial court granted the State's request and gave the instruction, based on reasoning discussed later in this opinion.

¶7 The jury found that Karla had failed to assume parental responsibility for her children, that the children were subject to a continuing CHIPS order, and that Karla was unlikely to meet the conditions for their return within the next twelve months. After a dispositional hearing, the trial court concluded that termination was in the children's best interest. This appeal followed.

DISCUSSION

¶8 Karla argues that she is entitled to a new trial because the trial court erroneously exercised its discretion when it gave the *falsus in uno* jury instruction. This instruction provides: “If you become satisfied from the evidence that any witness has willfully testified falsely as to any material fact, you may, in your discretion, disregard all the testimony of such witness which is not supported by other credible evidence in the case.” WIS JI—CIVIL 405 (2001). This instruction permits, but does not require, a jury to disregard a witness’s testimony if he or she testifies falsely. *Ollman v. Wisconsin Health Care Liab. Ins. Plan*, 178 Wis. 2d 648, 658, 505 N.W.2d 399 (Ct. App. 1993).

¶9 As Karla notes, this instruction is disfavored. See *State v. Williamson*, 84 Wis. 2d 370, 395, 267 N.W.2d 337 (1978); see also *Ollman*, 178 Wis. 2d at 664 n.8 (expressing opinion of Court of Appeals that the instruction is not necessary). Nonetheless, application of the *falsus in uno* instruction “is not foreclosed if the appropriate circumstances are present.” *State v. Robinson*, 145 Wis. 2d 273, 281, 426 N.W.2d 606 (Ct. App. 1988); see also WIS JI—CIVIL 405 Comment (“This instruction should not be given routinely although the Committee believes its discretionary use is appropriate in some circumstances.”).

¶10 In Wisconsin, a *falsus in uno* instruction can be used “only in situations where a witness wilfully and intentionally gives false testimony relating to a material fact, and is not proper where there are ‘[m]ere discrepancies in the testimony that are most likely attributed to defects of memory or mistake.’” *Ollman*, 178 Wis. 2d at 659-60 (quoting *Williamson*, 84 Wis. 2d at 394). The instruction

should be given only if the trial court finds “something either in the appearance, demeanor, or manner of a witness while testifying, or such a conflict or contradiction between him and the other witnesses in the case, or such an inherent incredibility in the facts testified to by him, as would reasonably tend to show that the witness willfully swore falsely.”

Robinson, 145 Wis. 2d at 281-82 (quoting *Pumorlo v. City of Merrill*, 125 Wis. 102, 111, 103 N.W. 464 (1905)).

¶11 “The trial court has broad discretion in instructing the jury and we will not find error as long as the instructions adequately cover the applicable law.” *Id.* at 281. “If the discretionary decisions are the result of a rational mental process and are reasoned and reasonable we will not reverse.” *Id.*

¶12 Here, the trial court considered carefully whether to give the *falsus in uno* instruction, stating:

This is a discretionary instruction. It’s a pretty harsh instruction. I am given pause here by a couple things. One is [Karla’s] cognitive delays. The other is the interest at stake on the case. But, [Karla] I think knows the difference between the truth and a lie. And certainly she knows whether she was working last week 40 hours at Jewel Osco. So she definitely has the mental capacity for knowing the difference between the truth and a lie or exaggerations. This really isn’t an exaggeration; this is not an inconsistency; this is not an issue of confusion.... [The lie has to be related to] a material point. Here her employment is material. It really goes to the heart of some of the problems she’s had that has brought us to this point; and that is the depression, the loss of her residences, non-payment of rent, some of the poverty issues that have brought us here. If she was really working full-time, that would be an indication that she is not crippled by depression.... [T]hat would be evidence that she’s able to function as opposed to a lot of the other evidence we have heard where she’s just having a very difficult time functioning through the depression and other problems.... [I]t goes right to the core of a lot of the issues in this case.... It’s material on many different levels.

Then the question is whether it's willful and intentional.... [C]learly she knew that by saying she was working full-time all this time that it would better her in front of the jury. So it was willful and it was intentional, and there was definitely forethought in it.... I would note also that she's been late for court pretty much every day that we have had trial.... [T]uesday I asked her why she was late....

[She said I]t was job related.... [T]he inference to be drawn is she's testifying about this job that she has....

[T]here was certainly a willfulness about this. This is an instruction that should be given very, very rarely; but I think it is an instruction that is intended to be given when there has been a lie proven. And I think the state has really tied this down well.... There is not a lot of wiggle room in light of her testimony. In fact, I don't think there is any.

¶13 We conclude that the trial court did not erroneously exercise its discretion when it gave the *falsus in uno* instruction. There is no question that Karla lied about her Jewel Osco employment. Indeed, her brief states: "There is no doubt that Karla J.'s testimony that she was working at Jewel Osco during this trial was untrue." The trial court's finding that this lie was intentional and willful is not clearly erroneous. Karla's testimony was unequivocal, and it is a fair inference that she intended to lie so that the jury would be more likely to find in her favor. Finally, we agree with the trial court's conclusion that whether Karla was employed was relevant and material to whether the children were likely to be returned to her care within the next twelve months.

¶14 Karla argues that even though she lied, the trial court erred in using the instruction for three reasons. First, she argues that the instruction should not have been given because it allowed the jury to

disregard 125 pages of testimony over a 2-page lie. The trial court's decision to give this instruction was extremely damaging because it allowed the jury to disregard the majority of the evidence presented by Karla over a single

untruth—that she was still employed at Jewel Osco. Therefore, it was unreasonable for the court to have given the instruction.

We recognize that the instruction may have harmed Karla’s case. That is precisely why courts can offer the instruction only if the lie is related to a material issue. Whether Karla was employed—allowing her to provide for her family and demonstrate that she had the ability to function, despite depression and other obstacles—was a crucial fact in the case. It was appropriate to give the instruction.

¶15 Second, Karla argues that the instruction was confusing to the jury. Karla reasons that the instruction conflicts with other approved jury instructions, and that the general instruction on witness credibility and the weight of evidence should have been enough. In effect, Karla is offering a general argument against the use of the *falsus in uno* instruction. Our supreme court has rejected that general challenge; in the appropriate case, the instruction can be given. See *Williamson*, 84 Wis. 2d at 394; *Robinson*, 145 Wis. 2d at 281-82.

¶16 Finally, Karla contends that the trial court should not have given an instruction allowing the jury to disregard Karla’s entire testimony as false when the trial court itself found aspects of her testimony to be credible. We reject this argument. Karla provides no authority for the proposition that a *falsus in uno* instruction can only be given if the witness lies about everything, and we are aware of none. As explained above, the trial court applied the proper analysis and reached a reasonable conclusion. We discern no erroneous exercise of discretion.

By the Court.—Orders affirmed.

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

