

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 20, 2007**

A. John Voelker  
Acting 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. 2006AP1866  
2006AP1867**

**Cir. Ct. Nos. 2005TP64  
2005TP65**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

---

**No. 2006AP1866**

**IN THE INTEREST OF GENEVA C., A PERSON UNDER THE AGE OF 18:**

**BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,**

**PETITIONER-RESPONDENT,**

**V.**

**JAYSON C.,**

**RESPONDENT-APPELLANT.**

---

**No. 2006AP1867**

**IN THE INTEREST OF CIARA C., A PERSON UNDER THE AGE OF 18:**

**BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,**

**PETITIONER-RESPONDENT,**

**V.**

**JAYSON C.,**

**RESPONDENT-APPELLANT.**

---

APPEALS from orders of the circuit court for Brown County:  
WILLIAM M. ATKINSON, Judge. *Affirmed.*

¶1 PETERSON J.<sup>1</sup> Jayson C. appeals orders terminating his parental rights and orders denying his postjudgment motions. Jayson argues he should be granted a new trial because he was entitled to a jury instruction stating that the jury was not to find grounds to terminate his parental rights due to his failure to meet conditions of return based solely on his incarceration. We disagree and affirm the orders.

**BACKGROUND**

¶2 Geneva and Ciara C. had been out of their parental home since August 27, 2003. The children were taken into protective custody pursuant to CHIPS dispositional orders entered on December 11, 2003. Jayson, their father, was incarcerated when the children were removed but he was released shortly thereafter, on January 4, 2004. Jayson's probation was revoked in October 2004. He was then sent to prison and is expected to remain in prison until October 10, 2008.

---

<sup>1</sup> These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶3 On October 3, 2005, the County filed petitions for termination of parental rights alleging the children were in continuing need of protection or services. The petitions alleged Jayson had failed to meet the conditions of return in the CHIPS disposition orders. The court held a two-day jury trial on March 28 - 29. The jury found grounds to terminate Jayson's parental rights. On May 11, 2006, the court held a dispositional hearing and terminated Jayson's parental rights.

### DISCUSSION

¶4 Jayson argues he was entitled to a jury instruction consistent with the holding of *Jodie W.* that “[a] parent’s failure to fulfill a condition of return due to his or her incarceration, standing alone, is not a constitutional ground for finding a parent unfit.” See *Kenosha County DHS v. Jodie W.*, 2006 WI 93, ¶49, 293 Wis. 2d 530, 716 N.W.2d 845. In *Jodie W.*, the trial court found grounds for terminating parental rights solely because the parent was unable to meet a condition of return due to her incarceration. *Id.*, ¶¶10-11, 55. The supreme court held “a parent’s failure to fulfill a condition of return due to his or her incarceration, *standing alone*, is not a constitutional ground for finding a parent unfit.” *Id.*, ¶49 (emphasis added). However, the court also stated “[o]ur conclusions do not render a parent’s incarceration irrelevant .... a parent’s incarceration is not itself a sufficient basis to terminate parental rights.” *Id.*, ¶50.

¶5 Jayson cites no authority<sup>2</sup> to support an argument that he was entitled to a jury instruction for a legal proposition that did not exist at the time of his trial. He even concedes that because *Jodie W.* was not yet law at the time his case was decided, the circuit court did not commit error. We therefore perceive no grounds to reverse. Further, we will not find error with jury instructions “if its instructions given adequately cover the law applied to the facts” even though the court could have given other instructions. *State v. Amos*, 153 Wis. 2d 257, 278, 450 N.W.2d 503 (Ct. App. 1989). In this case, the court instructed the jury to consider “all evidence.” There was no suggestion that the jury should base its decision solely on Jayson’s incarceration. Finally, Jayson did not object to the instruction given at trial. Failure to object to a jury instruction constitutes waiver. WIS. STAT. § 805.13(3).

¶6 Even had *Jodie W.* been the law at the time of this case, Jayson has failed to prove it would have influenced the outcome because he concedes his incarceration affected several but not all of his return conditions. In *Jodie W.*, the parent’s rights were terminated after she entered a plea admitting she could not meet one condition of return due to incarceration. *Id.*, ¶¶10-11. In reviewing the case, the supreme court noted that Jodie made “significant progress toward meeting many of the other conditions of return.” *Id.*, ¶54. The supreme court concluded WIS. STAT. § 48.415(2)(a) was unconstitutional as applied to Jodie because the court found grounds to terminate Jodie’s parental rights “based on an impossible condition of return, *without*

---

<sup>2</sup> Under WIS. STAT. § 809.19(1)(e), proper appellate argument requires an argument containing the contention of the party, the reasons therefore, with citation of the authorities relied upon. See *State v. Shaffer*, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

*consideration of any other relevant facts and circumstances....” Id., ¶56*  
(emphasis added).

¶7 Jayson’s trial examined his ability to meet all of the conditions of return. The jury heard evidence of Jayson’s failure to complete conditions of return he had the opportunity to complete while incarcerated. The conditions included requiring Jayson to complete drug and alcohol counseling, parenting classes, and individual counseling. Jayson has not alleged he was unable to meet these conditions due to his incarceration.

¶8 Furthermore, there was evidence that Jason did little if anything to meet the conditions before he was incarcerated. Joan Slempek, a social worker, testified Jayson did not complete the AODA<sup>3</sup> aftercare program with Brown County; Jayson failed to complete the Jackie Nitschke Center AODA program, and made statements that he did not need to attend the Alcoholics’ Anonymous meetings. Jayson also failed to complete his alternative to revocation at St. Croix Boot Camp, with his discharge summary noting he “was one of the least cooperative inmates ever to attend [the program].” Jayson’s own expert testified that relapse for Jayson was “highly likely.” Slempek testified that of the twelve<sup>4</sup> conditions set forth by the court, Jayson had only met one. Jayson disagreed with Slempek, but the jury was entitled to find Slempek’s testimony more credible than Jayson’s. See *State v. Givens*, 217 Wis. 2d 180, 197, 580 N.W.2d 340 (Ct. App. 1998). Based on this testimony, Jayson has failed to demonstrate the jury

---

<sup>3</sup> AODA stands for: Alcohol and Other Drug Abuse.

<sup>4</sup> Only eleven of the twelve conditions are relevant to this case.

found grounds to terminate his parental rights solely due to conditions of return he could not meet because of his incarceration.

*By the Court.*—Orders affirmed.

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

