COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2938 **Cir. Ct. No. 2008TP28**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO NAVAEH M. E., A PERSON UNDER THE AGE OF 18:

WALWORTH COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ANDREA O.,

RESPONDENT-APPELLANT,

LYLE E.,

RESPONDENT.

APPEAL from an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

¶1 NEUBAUER, P.J.[1] Andrea O. appeals from a circuit court order terminating her parental rights to Navaeh M.E. on grounds of abandonment. Andrea challenges the sufficiency of the evidence upon which the jury concluded that she did not have good cause for failing to communicate with her daughter. Andrea argues that her incarceration coupled with Navaeh's young age made communication impossible and, therefore, constituted good cause for Andrea's failure to communicate. Based on our review of the record, we conclude that there is sufficient evidence to uphold the jury's determination. We affirm.

BACKGROUND

¶2 A petition for the termination of Andrea's parental rights was filed on August 19, 2008. As statutory grounds for the petition, the County alleged that Andrea had failed to meet the conditions of Nevaeh's return, WIS. STAT. § 48.415(2); Andrea had a prior involuntary termination of parental rights (TPR) to one of her children within three years of the CHIPS adjudication for Nevaeh, § 48.415(10); and Andrea had failed to communicate with Nevaeh for a period of three months or longer, § 48.415(1)(a)2.

¶3 The matter did not proceed to a fact-finding hearing until May 10, 2010.[2] At that time, a jury found that grounds existed for the termination of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Both Andrea and Nevaeh's biological father appealed from an initial termination of their parental rights to Nevaeh based on a collateral attack of a prior CHIPS adjudication. Andrea alleged that her plea in that CHIPS proceeding was uncounseled. *See* ***Walworth Cnty. DHHS v. Andrea O. and Lyle E.***, No. 2009AP1502, unpublished order at 2 (July 20, 2009). The matter was remanded for further fact finding, *see* ***id.***, and the termination was vacated. The termination proceedings then recommenced at a hearing on October 9, 2009. Navaeh's biological father voluntarily terminated his parental rights on May 7, 2010.

Andrea's parental rights. The special verdict returned by the jury reads in relevant part as follows:

> 1. Was NEVAEH [M.E.] placed, or continued in a placement, outside of Andrea[']s home pursuant to a court order which contained the termination of parental rights notice required by law?
>
> Answer: Yes (handwritten)
>
> 2. Did Andrea [] fail to visit or communicate with NEVAEH [M.E.] for a period of 3 months or longer?
>
> Answer: Yes (handwritten)
>
> **Questions 3-6 apply to the period of 3 months or longer as determined in question 2.**
>
> **Answer question 3 only if the answers to questions 1 and 2 are "yes."**
>
> 3. Did Andrea [] have good cause for failing to visit NEVAEH [M.E.] during that period?
>
> Answer: Yes (handwritten)
>
> **Answer question 4 only if the answer to question 3 is "yes.":**
>
> 4. Did Andrea [] have good cause for failing to communicate with NEVAEH [M.E.] during that period?
>
> Answer: No (handwritten)

On June 9, 2010, Andrea filed a motion under WIS. STAT. § 805.14(5)(c) to change the verdict answer to question 4 to "yes," and to enter judgment in favor of Andrea notwithstanding the verdict. Andrea argued, as she does on appeal, that the jury's response to question 4 was not "supported by any credible evidence or any reasonable inferences from the evidence." Andrea contended:

> The uncontradicted testimony is that [Nevaeh] was born on 09/06/2006, making her less than two and a half years old during the time period in question. There was no evidence that [Nevaeh] was able to read. And the uncontradicted

> testimony of DHS worker Larissa Gering was that she directed [Andrea] *not* to contact [Nevaeh] or her foster family directly. Due to [Nevaeh's] young age and [Andrea's] inability to correspond directly with [Nevaeh's] foster family, [Andrea] could not possibly communicate with [Nevaeh].

The circuit court denied Andrea's motion at a hearing held on June 18, 2010. The court determined that it could not find that the answers given by the jury were "internally inconsistent." The court stated, "[U]nder the circumstances in this particular case, there was a basis to say … that she did have a good cause for failing to visit with [Nevaeh] but didn't have good cause for failing to communicate." The court did not find the jury's answers "to be in any way contradictory." The court subsequently found Andrea to be an unfit parent and ultimately granted the County's petition to terminate her parental rights.[3] Andrea appeals.

DISCUSSION

¶4 WISCONSIN STAT. § 805.14(5) governs motions after verdict. Subsection (5)(c) provides: "*Motion to change answer*. Any party may move the court to change an answer in the verdict on the ground of insufficiency of the evidence to sustain the answer." The standard of review for a challenge to the sufficiency of evidence to sustain a jury verdict is set forth in § 805.14(1):

[3] There are two phases in an action to terminate parental rights. ***Kenosha Cnty. DHS v. Jodie W.***, 2006 WI 93, ¶10 n.10, 293 Wis. 2d 530, 716 N.W.2d 845. First, the court determines whether grounds exist to terminate the parent's rights. ***Id.*** In this phase, "the parent's rights are paramount." ***Id.*** (citing ***Sheboygan Cnty. DHHS v. Julie A.B.***, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402). If the court finds grounds for termination, the parent is determined to be unfit. ***Jodie W.***, 293 Wis. 2d 530, ¶10 n.10. The court then proceeds to the dispositional phase where it determines whether it is in the child's best interest to terminate parental rights. ***Id.***

> No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

See also ***Richards v. Mendivil***, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996) (in considering motion to change jury's answers to questions on the verdict, circuit court must view evidence in light most favorable to verdict and affirm verdict if it is supported by any credible evidence). When we review a circuit court's refusal to direct a verdict or its denial of a motion to change verdict answers, we must affirm if there is any credible evidence to support a jury's verdict. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 389-90, 541 N.W.2d 753 (1995). This is so even when that evidence is contradicted and the contradictory evidence is stronger and more convincing. *See* ***id.*** Motions challenging the sufficiency of evidence to support the verdict or an answer in a verdict are only to be granted if no credible evidence supports the verdict. ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 433-34, 509 N.W.2d 75 (Ct. App. 1993), *aff'd*, 190 Wis. 2d 623, 528 N.W.2d 413 (1995).

¶5 WISCONSIN STAT. § 48.415(1)(a)2. provides that abandonment shall be established by proving "[t]hat the child has been placed, or continued in a placement, outside the parent's home by a court order … and the parent has failed to visit or communicate with the child for a period of 3 months or longer." However, under § 48.415(1)(c), abandonment is not established if the parent proves by a preponderance of the evidence that good cause existed for the failure to visit or communicate. Relevant to § 48.415(1)(a) 2., the parent must prove:

> 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 period … or, if par. (a)2. is applicable, with the agency responsible for the care of the child during the time period specified in par. (a)2.
>
> 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 in par. (a)2 ….

Sec. 48.415(1)(c).

¶6 Andrea focuses on two time periods, also identified by the County, during which she did not communicate with Nevaeh: August 17 to November 28, 2007, and January 17 to early October 2008. Andrea acknowledges that both of those time periods exceed the three-month period of no visits or communication necessary to constitute abandonment under WIS. STAT. § 48.415(1)(a)2., and Andrea concedes that she did not visit or communicate with Nevaeh during those two periods. However, Andrea contends that she has met her burden of proving under § 48.415(1)(c) that she had good cause for having failed to communicate with Nevaeh during those periods due to her incarceration, namely that Nevaeh's age would have rendered meaningless any attempt at direct communication.

¶7 Here, the jury's verdict reflects its determination that Andrea had established good cause for failing to visit Nevaeh, but that she had not established good cause for failing to communicate with Nevaeh for a three-month period. In

assessing Andrea's challenge to the verdict answer, we have reviewed the record in its entirety; however, we focus on those facts that support the jury's verdict. *See* ***Weiss***, 197 Wis. 2d at 389-90 (we must affirm if there is any credible evidence to support a jury's verdict).

¶8 The record reflects that Andrea may have sent a letter to her caseworker, Gering, in May 2008, while incarcerated. She was then transferred to different correctional institutions and from June 24, 2008, until September 24, 2008—a ninety-three day period—Andrea did not initiate contact or communication with her caseworker or, as a result, Nevaeh. Gering testified that Andrea initiated contact again in October 2008 and confirmed that "it ha[d] been about six months with no contact from her whatsoever." Gering testified that during Andrea's incarceration there was nothing that prohibited her from contacting or communicating with the department.

¶9 Andrea's testimony as to her time in incarceration attempted to shed some light on the lack of communication: she was suffering from depression, she was on several medications, and she was in drug treatment programming. However, she acknowledged that the medications would not have prevented her from contacting Nevaeh and would not have impacted her ability to send letters. Andrea also testified that she was earning $15 per month while incarcerated and, while the correctional institutions did not provide envelopes and stamps upon request, those items were available for purchase. Although Andrea testified that she had attempted to call the department during her incarceration, she was impeached with contradictory deposition testimony.

¶10 Andrea's caseworker, Gering, acknowledged that at other times during incarceration, Andrea had sent letters to her at the department and that

Andrea had also sent letters to Nevaeh at her first foster placement. Gering also confirmed that Andrea was not permitted to write to Nevaeh at her foster placement, but instead, "all correspondence had to go through" Gering as the caseworker. Gering confirmed that she did not give Andrea self-addressed envelopes. While Gering's testimony confirmed some of Andrea's testimony and supported Andrea's contention that she demonstrated interest in Nevaeh, it did not negate the fact that a three-month period passed without communication from Andrea.

¶11 Finally, we reject Andrea's reliance on ***Deannia D. v. Lamont D.***, 2005 WI App 264, 288 Wis. 2d 485, 709 N.W.2d 879, in support of her contention that Nevaeh's age made direct communication impossible. In ***Deannia D.***, there was testimony that the father had written daily letters to his child's mother and child while he was incarcerated. ***Id.***, ¶¶2, 4. While there was also testimony that the content of the letters was never communicated to his child and he did not otherwise have contact with the social worker or agency, the fact remained that there was evidence before the jury of attempted communication through the child's mother. ***Id.***, ¶¶5, 8. In upholding the jury's verdict answer finding that the County failed to prove abandonment, the court noted that "[g]iven the young age of his daughter, it would have been impossible for him to write to her directly and expect her to retrieve the letters and read them herself. Clearly, he was dependent on third parties for his communications to reach his daughter." ***Id.***, ¶15. While Andrea relies on this statement as support for her position that her daughter's age provided good cause for the failure to communicate, it is clear that the court was addressing the method of communication, not a complete absence of communication.

¶12 Here, the record reflects this exchange between the County and Andrea:

> Q. You did the best as you could given your mental status, correct?
>
> A. That is not all that was going on, but yes.
>
> Q. That is not all that was going on you indicated?
>
> A. I had a lot going on and yeah.
>
> Q. But you still will admit there are periods of three months or longer which you had no contact or communication relating to Nevaeh?
>
> A. Yes.
>
> Q. And there was no reason for you other than your own personal decisions as to why not to contact?
>
> A. I had to get myself together before I initiated any contact with Nevaeh.

Unlike the facts presented in ***Deannia***, the jury in this case was not faced with conflicting testimony regarding attempts to communicate or a parent's belief that a third party was conveying the content of communication. Andrea conceded that she had not communicated with Nevaeh for a three-month period and there was credible evidence from which the jury could infer that this was not the result of her belief that Nevaeh's age would render the communication meaningless.

CONCLUSION

¶13 We conclude, based on the evidence presented at the hearing, that there was credible evidence to support the jury's finding that Andrea had failed to communicate with Nevaeh for a period of three months and that she failed to demonstrate a good reason for doing so.

By the Court.—Order affirmed.

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