COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP385 **Cir. Ct. No. 2010TP8**

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

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

FLORENCE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JENNIFER B.,

RESPONDENT,

EDWARD S., JR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Florence County: PATRICK J. MADDEN, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Edward S., Jr., appeals an order terminating his parental rights to Joseph S. on the grounds that Joseph was in continuing need of protection or services. Edward argues he was deprived of his right to a jury trial because the circuit court accepted his counsel's stipulation to the first element of continuing CHIPS without determining whether Edward personally assented to the stipulation. Edward also contends his trial counsel was ineffective because, at the close of evidence, there was insufficient evidence supporting the first element and thus trial counsel should not have entered into a stipulation.

¶2 We conclude that despite the stipulation, Edward received a jury trial on the first element. The jury was presented with ample evidence of the element, was instructed on the element, and answered a verdict question on the element. We also determine that even if the circuit court, not the jury, had answered the verdict question, any error would be harmless. We affirm.

BACKGROUND

¶3 Florence County filed a petition to terminate Edward's parental rights on the grounds of continuing CHIPS. *See* WIS. STAT. § 48.415(2)(a). Edward contested the petition and demanded a jury trial.

¶4 A jury trial was held on October 14, 2010. At trial, Laura Knott, the social worker supervising the case, testified that Joseph was born on April 20, 2009 and was immediately taken into protective custody. He has been in foster care his entire life. Knott explained the requirements for Edward's reunification

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

with Joseph were outlined in a formal court order that was entered in July 2009. Specifically, Knott explained Edward was ordered to participate in parent education, supervised visitation, psychiatric and counseling services, and case management services. He was also required to complete an alcohol and other drug assessment, follow through with any recommended treatment, and provide urinalysis samples when requested.

¶5 Edward testified he was aware that he was ordered by the court to receive services and knew, because he had been warned, that if he did not "shape up," he might have his parental rights terminated. The County never introduced the actual CHIPS order into evidence.

¶6 At the close of evidence, outside the presence of the jury, Edward's counsel and the County stipulated to the existence of the first element of the grounds of continuing CHIPS. The first element asks:

> Has (child) been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?

WIS JI—CHILDREN 324A (2009); *see also* WIS. STAT. § 48.415(2)(a). Although both attorneys assented to the stipulation on the record, Edward never personally assented and the court never engaged him in a colloquy regarding the stipulation.

¶7 The court subsequently instructed the jurors on the special verdict form:

> Your role as jurors will be to answer the following questions in the special verdict.
>
> One, has Joseph S[.] been adjudged in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more

> court orders containing the termination of parental rights notice as required by law?
>
> The attorneys have stipulated, and the Court has agreed that the answer to Question No. 1 is yes. The Court has inserted the word yes in Question No. 1.

The court also instructed the jury that "Florence County Human Services Department must prove the … four elements by evidence that is clear, satisfactory and convincing." The court then reiterated the four elements needed to prove the grounds of continuing protection and services and reminded the jury that the court had answered "yes" for question one.

¶8 Even though the circuit court wrote "yes" on the special verdict form, the jury nevertheless responded to the question. After the jury returned its verdict, the court, while reading the special verdict form, noted that as to the first question, "The Court answered yes, and the jury circled yes." After a dispositional hearing, the court terminated Edward's parental rights.

¶9 Edward filed a post-disposition motion, alleging ineffective assistance of counsel and sufficiency of the evidence. At a post-disposition hearing, Edward's trial counsel testified that she "truly believe[d] that [she] did talk to [Edward] at that time about … stipulat[ing] to the first element." She explained that the stipulation followed "a discussion earlier in chambers, and at that time I had told [the court and opposing counsel] what Edward and I had discussed or what I believed that we had discussed."

¶10 She explained that she had personally reviewed the court order, knew Edward had been given the required warnings, and knew Joseph had been removed from the parental home for more than six months. She conceded there was no evidence that she could have introduced on the first element to have

created a question of fact. She explained the theory used to defend the case did not involve the first element. Rather, the theory was that "Ed had never been given a chance to be a father. That the child had been removed … at the hospital." She agreed that her theory tied into the fourth element—that "Ed might be able to meet the requirements for reunification in the … months following the hearing."[2]

¶11 The court denied the post-disposition motion, reasoning this was "not a Question 1 case," Edward's trial counsel had a viable and alternative theory, the jury found there were grounds to terminate Edward's parental rights, and this finding was supported by the evidence.

DISCUSSION

¶12 On appeal, Edward argues the stipulation deprived him of his right to a jury trial on the first element, and his counsel was ineffective for entering into the stipulation without sufficient supporting evidence.

¶13 There are two cases central to resolving this issue: ***Walworth County DHHS v. Andrea L.O.***, 2008 WI 46, 309 Wis. 2d 161, 749 N.W.2d 169; and ***Manitowoc County HSD v. Allen J.***, 2008 WI App 137, 314 Wis. 2d 100, 757 N.W.2d 842. The County analogizes this case to ***Andrea L.O.*** and asks us to conclude that, regardless of the stipulation, Edward "ha[d] a jury trial on each … issue." In the alternative, the County asserts that if we determine the circuit court, not the jury, answered the first element and this was error, then pursuant to

[2] The fourth question on the special verdict form for termination of parental rights because of continuing need of protection or services asks: "Is there a substantial likelihood that (parent) will not meet these conditions within the nine-month period following the conclusion of this hearing?" WIS JI—CHILDREN 324A (2011); *see also* WIS. STAT. § 48.415(2)(a).

Andrea L.O., 309 Wis. 2d 161, ¶¶49-50, we should conclude this error was harmless because the evidence supporting the first element was "undisputed and indisputable."

¶14 In ***Andrea L.O.***, 309 Wis. 2d 161, ¶¶8-9, the parties entered into a stipulation on the first element at the commencement of trial. The court asked Andrea if she agreed to the stipulation, and she responded, "yes." ***Id.***, ¶9. During opening statements, the jury was told the first element was already decided. ***Id.***, ¶10. The court order was marked and received as an exhibit, and the social worker testified Andrea's child had been placed out of the home for twenty-four months. ***Id.***, ¶11. The court instructed the jury on the first element, but it informed the jury there was no dispute as to the first element and explained it had answered the question. ***Id.***, ¶14. During closing arguments, the County reminded the jury the first element had been decided. ***Id.***, ¶15. Nevertheless, the jury was provided with a blank special verdict form and wrote in "yes" for question one. ***Id.***, ¶16. Our supreme court determined,

> Andrea received a jury trial on the element regardless of the stipulation. The stipulation in this case does not constitute a withdrawal of the demand for a jury trial on an element. Despite the fact that the parties agreed to enter a stipulation regarding the first element of the ground for termination, the jury was presented with ample evidence of the element, was instructed on the element, and answered a verdict question on that element.

Id., ¶57.

¶15 Edward, however, contends this case is more factually analogous to ***Allen J.*** He urges us to conclude he was deprived of his right to a jury trial on the first element because the circuit court, not the jury, answered the verdict question. He also asserts that any error was not harmless because "the CHIPS documents

were not offered into evidence, [thus] Florence County failed to establish … the existence of the court order or its exact terms."

¶16 In ***Allen J.***, 314 Wis. 2d 100, ¶3, the parties also stipulated to the existence of the first element prior to trial. However, Allen never agreed to the stipulation on the record; the court order was never introduced into evidence; the social worker did not definitively testify as to how long the children had been removed from the home; and the court, not the jury, answered the verdict question. ***Id.***, ¶¶2-3, 14-15. We determined it was error for the circuit court to remove that element from the jury and the error was not harmless "for the simple reason that … there is sparse evidence in the record on the element. … [This] makes it impossible for us to find the element 'undisputed and indisputable.'" ***Id.***, ¶¶16-17 (quoting ***Andrea L.O.***, 309 Wis. 2d 161, ¶49). We remanded for a new trial. ***Id.***

¶17 We determine the factual situation presented in this case more closely resembles the situation presented in ***Andrea L.O.*** Similar to the jury in ***Andrea L.O.***, the jury in the present case heard uncontroverted testimony about the existence of the order, the length of time Joseph had been removed from the home, and Edward's concession that he was warned his rights would be terminated if he did not participate in the court-ordered services. The court also instructed the jury on the element, told the jury that the element was not disputed, and explained it was going to answer the first special verdict question. Similar to the jury in ***Andrea L.O.***, the jury here still answered the first special verdict question by circling "yes" on the verdict form. We conclude that, regardless of any stipulation, Edward received a jury trial on the first element because "the jury was presented with ample evidence of the element, was instructed on the element, and answered a verdict question on that element." *See* ***Andrea L.O.***, 309 Wis. 2d 161, ¶57.

¶18 However, assuming arguendo that only the court answered the first question and it was error to do so, we conclude any error was harmless. In ***Andrea L.O.***, our supreme court noted that "even in criminal cases, removing an element from jury consideration will not alone require a new trial where the element is undisputed and indisputable." ***Id.***, ¶50. In ***Andrea L.O.***, after determining Andrea had still received a jury trial on the first special verdict question, the court concluded:

> [T]here would be no error here even if the circuit court rather than the jury had decided the first element. … The stipulation addressed a single, undisputed, paper element where another element was the focus of the controversy at issue. Additionally, there was ample uncontroverted evidence to support the stipulated element.

Id., ¶58.

¶19 Edward argues the evidence supporting the existence of the court order with the required warnings is not "undisputed and indisputable" because the court order itself was never entered into evidence. He contends that without the court order, the evidence does not indisputably show he received the required warnings.

¶20 We disagree. Here, Knott's and Edward's testimony resulted in undisputed evidence of the existence of a court order removing Joseph from the home for more than six months and warning Edward that his rights could be terminated. Edward never contested the existence of the court order or argued that he was not properly warned. Instead, Edward admitted he was court ordered to receive services and was warned his rights would be terminated. Based on the uncontroverted evidence supporting the existence of the first special verdict question, we determine any error was harmless.

By the Court.—Order affirmed.

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