COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2011

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 No. 2010AP3011 **Cir. Ct. No. 2009TP20**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CEDRICK M.,

RESPONDENT-APPELLANT,

NIKISHA H.,

RESPONDENT.

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

¶1 CURLEY, P.J.[1] Cedrick M.[2] appeals the order terminating his parental rights (TPR) to Heaven M. Cedrick M. contends that the trial court "improperly denied his right to a jury trial on the abandonment and continuing CHIPS allegations," found in WIS. STAT. § 48.415, by directing a verdict on two of the jury verdict questions; he also contends that the allegation that he failed to assume parental responsibility, another ground for terminating his parental rights found in WIS. STAT. § 48.415(6), was unconstitutionally applied to him. This court affirms.

I. BACKGROUND.

¶2 Cedrick M.'s daughter Heaven M. was born to Nikisha H. on September 13, 2007, and was found to be a child in need of protection or services (CHIPS) in January 2008. Heaven M. came to the attention of the Bureau of Milwaukee Child Welfare (Bureau) when, in October 2007, a caseworker was in her mother's home monitoring two older children when Nikisha H. had a sudden psychotic breakdown which led to her involuntary hospitalization. At the time, Cedrick M., who was not home, had an open warrant for his arrest. After a temporary order was entered taking Heaven M. into protective custody, a dispositional order placed her outside the home of her parents, where she remained throughout the pendency of these proceedings.

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

[2] Cedrick M.'s name has two spellings in the record, the other being "Cedric." We use "Cedrick," the spelling that Mr. M. gave when testifying. The termination of parental rights petitions named both parents of Heaven M. The mother, Nikisha H., had her appeal resolved by way of a no-merit opinion and order.

¶3 The original petition requesting termination of Cedrick M.'s parental rights alleged that Cedrick M. had failed to assume parental responsibility for Heaven M.[3] Cedrick M. contested this petition. Months later, the assistant district attorney filed an amended petition and also filed petitions to terminate the parental rights of Nikisha H.'s two older children, one of whom was Cedrick M.'s child. The amended petition alleged that in addition to the ground of failing to assume parental responsibility for Heaven M., Cedrick M. also abandoned Heaven M. and Heaven M. was a child in continuing need of protection and services. Eventually the cases were consolidated and the matter went before a jury.

¶4 At the jury trial, numerous witnesses testified to Cedrick M.'s inability to meet the conditions for the return of Heaven M. A psychologist who had earlier evaluated Cedrick M. testified that Cedrick M. had significant mental health issues. In addition, testimony was given that Cedrick M. had a criminal record and had been accused of domestic abuse by Nikisha H. Furthermore, a Bureau caseworker testified that Cedrick M. had previously threatened both a caseworker, which resulted in a charge of disorderly conduct, and had also threatened Heaven M.'s foster mother. Cedrick M. also had a history of drug and alcohol abuse.

¶5 During the trial, the assistant district attorney introduced into evidence documents concerning the original detention of Heaven M. and the dispositional orders regarding her. At the close of testimony, the trial court alerted the parties that the court was going to answer two questions on the verdict forms

[3] During the proceedings, paternity testing results were received confirming that Cedrick M. was the father of Heaven M.

pursuant to WIS. STAT. § 805.14(4). The two questions were in fact very similar, and focused on whether Heaven M. was ajudged to be in need of protection or services and placed—or continued in placement—outside of the home of either Nikisha H. or Cedrick M. One of the questions constituted an element of the continuing CHIPS allegation; the other constituted one of the elements of the abandonment allegation. The trial court reasoned that there could be no dispute in the evidence as to these particular elements, and therefore the trial court answered them. No objection was raised to either question.

¶6 The jury returned a verdict finding that the State proved all three grounds for the termination of Cedrick M.'s parental rights and, as a result, the trial court found that Cedrick M. was unfit. Cedrick M. failed to appear at the dispositional hearing,[4] during which the trial court found that it was in Heaven M.'s best interest to terminate Cedrick M.'s parental rights. Shortly after the appeal was started, Cedrick M. sought leave to file a post-termination motion. This court granted the motion and remanded the matter back to the trial court. The trial court held a hearing and denied the motion. This appeal follows.

II. ANALYSIS.

A. The trial court properly directed a verdict.

¶7 Cedrick M. argues that the trial court improperly directed a verdict on two jury questions, and by doing so, denied him the right to a jury trial on two of the three grounds found by the jury to terminate his parental rights.

[4] Although Cedrick M. did not appear at the dispositional hearing, the record indicates that he was in a car in the parking lot at the time, and had refused to go inside.

Specifically, he argues that when the trial court answered the questions noted above, which asked whether the State proved that Heaven M. was placed or continued in placement outside Cedrick M.'s home under a court order that contained the termination of parental rights notice required by law, his right to a jury trial was violated. The trial court explained to the jury that the court answered those questions "[b]ecause there is no dispute in the evidence as to this question in each of those Special Verdicts, I have answered those questions 'yes.'" As noted, Cedrick M. did not object to the trial court's decision.

¶8 Before addressing the issues raised by Cedric M., it is important to understand the statutory scheme behind termination of parental rights cases. Wisconsin has a two-part procedure for the involuntary termination of parental rights. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. At the first, or "grounds" phase of the proceeding, the petitioner must prove that one or more of the statutory grounds for termination of parental rights exist. ***Id.***; *see also* WIS. STAT. § 48.31(1). There are twelve statutory grounds of unfitness for an involuntary termination of parental rights under WIS. STAT. § 48.415(1)-(10), and if a petitioner proves one or more of the grounds for termination by clear and convincing evidence, "'the court shall find the parent unfit.'" ***Steven V.***, 271 Wis. 2d 1, ¶25 (citing WIS. STAT. § 48.424(4)). "A finding of parental unfitness is a necessary prerequisite to termination of parental rights, but a finding of unfitness does not necessitate that parental rights be terminated." ***Steven V.***, 271 Wis. 2d 1, ¶26. "Once the court has declared a parent unfit, the proceeding moves to the second, or dispositional phase, at which the child's best interests are paramount." ***Id.*** "At the dispositional phase, the court is called upon to decide whether it is in the best interest of the child that the parent's rights be permanently extinguished." ***Id.***, ¶27.

¶9 Our supreme court has held that termination of parental rights cases are civil in nature. *See* ***M.W. v. Monroe Cnty. DHS***, 116 Wis. 2d 432, 442, 342 N.W.2d 410 (1984). Indeed, "the jury trial right ... is entirely statutory, not mandated by constitutional due process, and is therefore generally subject to the provision of the civil procedure code, including the summary judgment statute … unless the TPR statutes provide otherwise." ***Steven V.***, 271 Wis. 2d 1, ¶4. "The TPR statutes do not provide otherwise, either explicitly or implicitly." ***Id.***

¶10 The standard of review of a trial court's grant of a directed verdict is whether the trial court was "'clearly wrong'" in refusing to instruct a jury on a material issue raised by the evidence. ***Door Cnty. DHFS v. Scott S.***, 230 Wis. 2d 460, 465, 602 N.W.2d 167 (Ct. App. 1999) (citation omitted). "'A motion for a directed verdict should be granted only where the evidence is so clear and convincing that a reasonable and impartial jury properly instructed could reach but one conclusion.'" ***Id.*** (citation omitted).

¶11 Turning to Cedrick M.'s case, this court concludes that ***Door County DHFS v. Scott S.***, *supra*, is analogous to the facts in this case. In that case, the father contended that a trial court may not, as a matter of law, direct a verdict in any termination of parental rights case. ***Id.*** at 464. At trial, the court directed the verdict on the question of whether the daughter had been adjudged to be in need of protection or services and placed outside the home pursuant to one or more court orders. ***Id.*** This court disagreed with the father's position, stating that: "[b]ecause the rules of civil procedure apply to TPR proceedings, we conclude that the trial court did not erroneously direct the verdict." ***Id.*** at 465. That is exactly what occurred in Cedrick M.'s case.

¶12 In addition, WISCONSIN STAT. § 805.14(4), cited by the trial court in its written decision denying Cedrick M.'s post-termination motion, permits a directed verdict in civil trials at the close of all evidence:

> **(4)** 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.

Here, the trial court on its own motion directed a verdict. Cedrick M. acknowledges the statute, but argues that because no party asked for the directed verdict, the statute does not apply, and thus, the trial court erred. It is unclear whether a party asked the trial court in ***Scott S.*** to direct the verdict or whether it was done on the court's own motion. In any event, it would be a tortured reading of the statute to require one of the parties to actually ask for a directed verdict before the trial court would be legally permitted to do so.

¶13 Moreover, the trial court's use of directed verdicts in Cedrick M.'s case is similar to ***Steven V.***, *supra*, in which our supreme court validated the use of the summary judgment procedure in termination of parental rights cases. *See* ***id.***, 271 Wis. 2d 1, ¶5. In ***Steven V.***, the supreme court concluded:

> [P]artial summary judgment in the unfitness phase of a TPR case is available where the requirements of the summary judgment statute and the applicable legal standards in WIS. STAT. §§ 48.415 and 48.31 have been met. An order granting partial summary judgment on the issue of parental unfitness where there are no facts in dispute and the applicable legal standards have been satisfied does not violate the parent's statutory right to a jury trial under WIS. STAT. §§ 48.422(4) and 48.31(2), or the parent's constitutional right to procedural due process.

Id., ¶5. Thus, extrapolating from the ***Steven V.*** holding, this court concludes that if the more severe procedure of summary judgment, which eliminates the jury request entirely, is legally available to a trial court in a termination of parental rights case, then surely it is reasonable to assume that a directed verdict, which merely answers a question on the verdict, is a viable option.

¶14 Despite the case law and statutory support for the trial court's decision to direct a verdict, Cedrick M. argues that two cases call into question the correctness of directed verdicts in termination of parental rights cases. He cites ***Manitowoc County DHS v. Allen J.***, 2008 WI App 137, 314 Wis. 2d 100, 757 N.W. 2d 842, and ***Walworth County. DHHS v. Andrea L.O.***, 2008 WI 46, 309 Wis. 2d 161, 749 N.W. 2d 168, as support for his position. Both cases address the question of what impact a stipulation of an element has on a termination of parental right case. *See*, *e.g.*, ***Allen J.***, 314 Wis. 2d 100, ¶¶1-2. Because neither case is on point, this court disagrees.

¶15 In ***Andrea L.O.***, the mother's attorney advised the court that the mother was willing to stipulate to the fact that her son had been adjudicated as a child in need of protection or services for over six months. ***Id.***, 309 Wis. 2d 161, ¶¶2, 9. The mother affirmatively agreed after being questioned by her attorney. ***Id.***, ¶9. She also testified and acknowledged the CHIPS order. ***Id.***, ¶12. Despite the stipulation, the trial court instructed the jury on the verdict question that had been stipulated to and the verdict form did not reflect that the question had been decided by stipulation. ***Id.***, ¶13. The jury answered the question "yes." ***Id.***, ¶16. The issue on appeal was whether a stipulation to an element of the ground for termination in a TPR case constitutes a withdrawal of the demand for a jury trial on that element. ***Id.***, ¶18. If so, then did the trial court err in not personally

engaging the mother in a colloquy to determine whether the mother's withdrawal was knowing and voluntary? ***Id.***

¶16 Ultimately, the supreme court determined that because the jury answered the question, notwithstanding that the mother stipulated to the answer, this was not a case where a stipulation constituted a withdrawal of the jury demand. ***Id.***, ¶26. Cedrick M. seizes upon a remark found in the concurrence suggesting that the majority was "extending the ***Kelley H***. decision by giving circuit judges the authority to decide 'paper' elements in cases that do go to a jury, irrespective of whether there is a stipulation by or on behalf of the parent." ***Id.***, ¶64 (emphasis omitted). In response to this remark, the majority inserted a footnote stating:

> The concurrence maintains that we are "extending the [***Steven V.***] decision by giving circuit judges the authority to decide "paper" elements in cases that do go to a jury, *irrespective of whether there is a stipulation by or on behalf of the parent.*" Concurrence, ¶64 (emphasis in original). As we make clear in the text, the issue in the case is whether the circuit court is required to engage in a personal colloquy to ascertain whether a stipulation withdrawing the demand for jury trial is knowing and voluntary—*not* whether a circuit court may decide issues even where there is no stipulation.

Id., ¶41 n.6. Cedrick M. claims that this language prohibits the use of directed verdicts. This court disagrees. All the footnote does is state what is actually addressed in the decision and what is not addressed. Inasmuch as the issue in the case has nothing to do with directed verdicts, it is inapposite.

¶17 The same can be said for the ***Allen J.*** case. In that case, Allen J.'s attorney stipulated that an element had been satisfied. ***Id.***, 314 Wis. 2d 100, ¶1. On appeal, Allen J. argued that he did not personally agree to withdraw his jury demand on this element. ***Id.*** This court agreed and noted that there were "stark

factual differences between this case and ***Andrea L.O.***" ***Allen J.***, 314 Wis. 2d 100, ¶2. Missing from the record was "required documentary evidence." ***Id.*** In Cedrick M.'s case, no stipulation exists and the documentation supporting the trial court's directed verdict was in the record. Consequently, ***Allen J.*** is also inapposite.

B. Cedrick M. has waived his right to challenge the directed verdict on the basis that the State failed to prove that the documents supporting the trial court's decision were not "undisputed and indisputable."

¶18 Cedrick M. next argues that even if directed verdicts are appropriate in termination of parental rights cases, the trial court erred here because there is no indisputable proof in the record that Cedrick M. ever received the dispositional orders, and thus, he would have no knowledge of the required warnings. Cedrick M. extrapolates from language found in ***Andrea L.O.*** that before an element can be either stipulated to or a verdict directed it must be "'undisputed and indisputable.'" 309 Wis. 2d 161, ¶49 (citation omitted). Again, this court disagrees.

¶19 First, we observe that Cedrick M.'s lawyer did not object to the trial court's answering two of the verdict questions; thus, the issue can be deemed waived. Failure to object at the jury instruction or verdict conference stage "constitutes a waiver of any error in the proposed instructions or verdict." *See* ***LaCombe v. Aurora Med. Group***, 2004 WI App 119, 274 Wis. 2d 771, ¶5, 683 N.W.2d 532; WIS. STAT. § 805.13(3). Next, this court notes that Cedrick M. provides no citation to any case law or statutory authority for his argument that the evidence was not indisputable with regard to the questions the trial court answered, because the State failed to prove that Cedric M. ever received a copy of the CHIPS dispositional order. With regard to this argument, this court also

declines to address the issue because it was inadequately briefed. *See* ***State v. Flynn***, 190 Wis. 2d 31, 58, 527 N.W. 2d 343 (Ct. App. 1994).[5]

C. WISCONSIN STAT. § 48.415(6) was not unconstitutionally applied to Cedrick M.

¶20 Cedrick M.'s final contention is that the ground found in WIS. STAT. § 48.415(6), failure to assume parental responsibility, was unconstitutionally applied to him because he possessed a fundamental liberty interest in caring for Heaven M., and thus, the statute must withstand strict scrutiny and it did not.[6] Whether a statute and the application of a statute are constitutional are questions of law that we review independently. *See* ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶16, 333 Wis. 2d 273, 797 N.W.2d 854. In an as-applied challenge to a statute, we presume a statute is constitutional, but we do not presume that the State applied the statute in a constitutional manner. *See* ***Society Insurance v. LIRC***, 2010 WI 68, ¶27, 326 Wis. 2d 444, 786 N.W.2d 385. In ***Tammy W-G.***, our supreme court noted: "[p]arents who have developed a relationship with their children have a fundamental liberty interest in the 'care, custody, and control of their children.'" ***Id.***, ¶52 (quoting ***Troxel v. Granville***, 530 U.S. 57, 57 (2000)).

[5] Were this court to address it, this court would observe that dispositional documents in the case concerning Heaven M. contain the necessary warnings that were addressed in the jury questions answered by the trial court. Further, despite Cedrick M.'s many missed court appearances, the documents were sent to the address supplied by Cedrick M. and Cedrick M. never claimed to be unaware of the proceedings. Indeed he testified that he occasionally was sent material concerning this case.

[6] Originally, Cedrick M. argued in his post-termination motion that WIS. STAT. § 48.415(6) should not be treated as a stand-alone test for unfitness. However, Cedrick M. has abandoned this argument since the release of ***Tammy W-G. v. Jacob T.***, 2011 WI 30, 333 Wis. 2d 273, 797 N.W.2d 854.

> When a fundamental liberty interest is found, "any statute that impinges on that right must withstand strict scrutiny." Strict scrutiny requires a showing that the statute, as applied, is narrowly tailored to advance a compelling state interest….
>
> If there is no fundamental interest, the statute's application must withstand only a rational basis review. Rational basis is satisfied if the application of the statute bears a rational relation to a legitimate legislative objective.

Tammy W-G., 333 Wis. 2d at 273, ¶¶52-53 (citation omitted; one set of quotation marks omitted).

¶21 As the supreme court observed in ***Tammy W-G.***, this court observes that WIS. STAT. § 48.415(6) provides:

> FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child *have not* had a substantial parental relationship with the child.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of *significant responsibility* for the *daily* supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person *has* expressed concern for or interest in the support, care or well-being of the child, whether the person *has* neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person *has* expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

See also ***Tammy W-G***, 333 Wis. 2d 273, ¶21 (emphasis in ***Tammy W-G.***). This requires a fact finder to look at the totality of the circumstances occurring over the entire life of the child in order to determine whether a parent has assumed parental responsibility. ***Id.***, ¶7. Cedrick M. argues that the facts here are unlike those

found in ***Tammy W-G.*** because, "[i]n this case both biological parents, albeit for a short period of time, were working together to raise Heaven until the mother experienced a psychotic break." Cedric M. claims that because he had not yet been adjudicated as Heaven M.'s father, that was the only reason he was unable to have Heaven M. placed with him. He insists that under these facts he has "established a sufficient relationship with his child to be entitled to a strict application of the Children's Code." Thus, according to Cedrick M., the State must show that the application of the Children's Code was narrowly tailored to advance a compelling State interest. This court disagrees.

¶22 Cedrick M.'s recitation of the facts surrounding Heaven M.'s placement outside the home omits several relevant facts. First, on the day that Heaven M. was removed, Cedrick M. had a warrant out for his arrest for threatening a caseworker for his older daughter. In addition, as a result of an earlier psychological examination, Cedrick M., who was found to have a major mental illness, was required to undergo therapy to obtain custody of his older daughter, which he declined to do. The evaluation also detected that Cedrick M. abused drugs and alcohol and that he had violent episodes. Indeed, Nikisha H. accused him of domestic abuse. Further, the current caseworker testified that Heaven M. would not have remained in the home had she known that Cedrick M. was living there. In addition, Cedrick M. paid no child support, provided no material goods for Heaven M., and never attempted any form of communication with Heaven M. after she was placed outside the home. Based on these facts and applying the totality-of the-circumstances test, Cedrick M. never assumed parental responsibility for Heaven M., and a strict scrutiny test was not necessary in this case. *See* ***Tammy W-G.***, 333 Wis. 2d 273, ¶¶52-53. In applying the rational basis test to the failure to assume parental responsibility statute, this court is satisfied

that the statute was applied constitutionally. This is so because the application of the statute bore a rational relationship to a legitimate legislative objective; i.e., permanency for Heaven M. *See* ***id.***

III. CONCLUSION.

¶23 For the reasons stated, the order terminating Cedrick M.'s parental rights is affirmed.

By the Court.—Order affirmed.

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