COURT OF APPEALS
DECISION
DATED AND FILED

March 14, 2014

Diane M. Fremgen
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. 2013AP2445
2013AP2446

Cir. Ct. Nos. 2012TP37
2012TP38

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DELANO W.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DELANO W.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: JOHN J. DIMOTTO, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] Delano W. appeals the circuit court's orders terminating his parental rights to his children, Delanta W. and Delairra W. First, he contends that the circuit court violated his procedural due process rights by suspending his visitation with his children without notice prior to trial, and relatedly, that the court erroneously exercised its discretion in determining that the children's best interests required the suspension. Second, he argues that there was insufficient evidence to support the jury's verdict on the failure-to-assume-parental-responsibility ground. We reject all of his arguments and affirm.

BACKGROUND

¶2 Delanta, the child of Christina B. and Delano, was born in July 2009. Delanta was detained by the Bureau of Milwaukee Child Welfare ("the Bureau")

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[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). This court consolidated these appeals for purposes of briefing and disposition. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Pursuant to WIS. STAT. RULE 809.107(6)(e), this court is required to issue a decision involving termination of parental rights ("TPR") appeals within thirty days after the filing of the reply brief. We may extend that deadline pursuant to WIS. STAT. RULE 809.82(2)(a) for good cause. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995). Good cause is found and this court now extends the decisional deadline in these matters through the date of this decision.

on March 28, 2010, as a result of Christina's domestic violence call to the police. Christina reported that Delano threatened to kill her and punched her in the head while she was holding Delanta, causing Christina to black out. Christina suffered a broken nose and bleeding on the brain. At the time of the incident, Christina was pregnant with Delairra. Delano was taken into custody on March 28, 2010, and revoked on his extended supervision for twelve violations, including use of marijuana. At his TPR trial, Delano denied battering Christina and claimed an unknown female did it while he was present.

¶3 Delairra, also the child of Christina and Delano, was born in November 2010 and detained by the Bureau a few months after her birth. The Bureau instigated Child In Need of Protection and Services ("CHIPS") proceedings regarding both children and CHIPS orders were entered as to Delanta on November 1, 2010, and as to Delairra on June 16, 2011,[2] both with conditions for return.

¶4 The State filed TPR petitions as to Delano regarding both children on February 15, 2012.[3] At the time of the TPR filings, Delano was in custody again. Both petitions alleged TPR grounds of continuing CHIPS and failure to assume parental responsibility. *See* WIS. STAT. § 48.415(2) & (6).

[2] The Honorable M. Joseph Donald entered the CHIPS orders as to both children.

[3] The State also filed TPR petitions to terminate Christina's rights to Delanta and Delairra, but those petitions are not on appeal here. Additionally, the State filed a petition to terminate Christina's rights to a third child with another man. That case is also not before us on appeal.

¶5 The TPR cases were before the circuit court on March 28, 2012.[4] Delano appeared. The court granted Delano's motion to represent himself, appointed standby counsel for him and severed his two TPR cases from those of Christina's other child by a different father.[5] On May 15, 2012, Delano appeared by video conferencing and the court severed Christina's TPR trial regarding Delanta and Delairra from Delano's trial.

¶6 On July 13, 2012, at the scheduled permanency planning hearing, the court declined to enter a permanency plan, but granted the State's motion to suspend Delano's visitation with the children pending the jury trial as an emergency measure in the children's best interests. On August 16, 2012, Delano filed a "Motion for Rehearing" on the suspension of visitation and the court set a hearing for August 20, 2012. On that date, Delano presented his case but the court adjourned for the State to bring witnesses. The adjourned hearing was held September 18, 2012. Delano testified, as did the children's therapist, Trisha Wollin. The circuit court found that the best interests of the children compelled a suspension of visitation until the October 15, 2012 grounds jury trial.

¶7 The jury trial was held October 15-19, 2012. The jury found that the State had not proven the continuing CHIPS ground, but it found that the failure-to-assume-parental-responsibility ground was proven. The court then found that Delano was unfit. The dispositional hearing was held on April 30 and May 1,

[4] The Honorable John J. DiMotto presided over the TPR cases from March 28, 2012, forward after Delano filed a judicial substitution on the Honorable Christopher Foley.

[5] Delano continued to represent himself with standby counsel through the dispositional phase. On appeal, he is represented by different appointed counsel.

2013. The court found that the best interests of the children supported termination of Delano's parental rights and granted the TPR.[6] Delano subsequently appealed.

¶8 Additional facts will be developed as necessary below.

DISCUSSION

I. The Circuit Court's Order Suspending Visitation Was Proper.

¶9 Delano first contends that the circuit court's order suspending his visitation violated his procedural due process rights and was not a reasonable exercise of the court's discretion. He argues that he had no notice of the hearing at which his visitation was suspended, that he was excused from appearing and that he had no meaningful opportunity to be heard on the suspension of visitation. Additionally, he contends that the court's finding that the suspension of visits was in the best interests of the children was unsupported by the record because there was no new emergency and the court did not try other less restrictive options. Finally, he argues that the court shifted the burden to Delano to prove that he deserved visitation.

¶10 The State and the guardian ad litem ("GAL") counter that Delano had notice of the suspension hearing, that his appearance from that hearing was not excused and that he had a meaningful and timely opportunity to challenge the State's motion to suspend visitation. Additionally, they argue that the record shows that the circuit court's decision to suspend visitation was in the best interests of the children, was based on the proper law and a rational review of the

[6] Christina's parental rights to the children were also terminated at that time.

evidence, and was thus a proper exercise of discretion. We agree with the State and GAL and affirm.

¶11 Parents have a fundamental liberty interest in their parental relationship and are entitled to both substantive and procedural due process. *See* ***Dane Cnty. DHS v. PP.***, 2005 WI 32, ¶19, 279 Wis. 2d 169, 694 N.W. 2d 344. Procedural due process requires that a parent be given "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" ***Brown Cnty. v. Shannon R.***, 2005 WI 160, ¶64, 286 Wis. 2d 278, 706 N.W.2d 269 (citation omitted). Whether there has been a due process violation is a question we review independently of the circuit court. ***Monroe Cnty. DHS v. Kelli B.***, 2004 WI 48, ¶16, 271 Wis. 2d 51, 678 N.W.2d 831.

¶12 WISCONSIN STAT. § 48.42(1m) permits a circuit court to grant an injunction prohibiting the respondent from visitation during the pendency of a TPR if it is in the child's best interests. Section 48.42(1m)(c) states:

> Notwithstanding any other order under s. 48.355(3), the court, subject to par. (e), may grant an injunction prohibiting the respondent from visiting or contacting the child if the court determines that the prohibition would be in the best interests of the child.

Section 48.42(1m)(b) of that statute permits the circuit court to enter a temporary visitation order *ex parte* during the pendency of the TPR action:

> Subject to par. (e), the court may issue the temporary order ex parte or may refuse to issue the temporary order and hold a hearing on whether to issue an injunction. The temporary order is in effect until a hearing is held on the issuance of an injunction.

Any order under § 48.42(1m) temporarily suspending visitation stays in effect *until a hearing is held on the TPR petition*:

> An injunction under this subsection is effective according to its terms but may not remain in effect beyond the date the court dismisses the petition for termination of parental rights under s. 48.427 (2) or issues an order terminating parental rights under s. 48.427 (3).

See § 48.42(1m)(c).

¶13 Because a circuit court's decision temporarily suspending visitation requires the court's finding that suspension of visitation is in the child's best interests, it is a discretionary decision that we review under an erroneous exercise of discretion analysis.

> A determination of the best interests of the child in a termination proceeding depends on first-hand observation and experience with the persons involved and therefore is committed to the sound discretion of the circuit court. A circuit court's determination will not be upset unless the decision represents an erroneous exercise of discretion.

David S. v. Laura S., 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). We review for a proper exercise of discretion by examining the record to determine if the circuit court engaged in a "rational thought process based on examination of the facts and application of the relevant law." ***Id.***

A. Delano's due process rights were not violated.

¶14 The circuit court first ordered Delano's visitation suspended at the permanency planning hearing on July 13, 2012, kept that order in place after the August 20, 2012 hearing and then reiterated the order at the September 18, 2012 hearing.[7] Delano's due process claim is based on his arguments that: (1) he had

[7] Pursuant to WIS. STAT. § 48.38, which is part of the CHIPS section of the Children's Code, when a child has been removed from his or her home, the agency with responsibility for the services for that child must prepare a written permanency plan which specifies the services and goal for that child in terms of return to the child's home or placement of the child for adoption.

no notice of the permanency planning hearing on July 13, 2012; (2) even if he had notice, the circuit court had excused him from appearing at the hearing; and (3) the circuit court later admitted that it had excused Delano from the hearing. Delano argues that the due process violation continued at the subsequent two hearings because the court had already decided to suspend visitation and improperly shifted the burden to Delano to prove he deserved visitation. We conclude that the record shows Delano had notice, that he was not excused from the hearing and that the circuit court's memory of excusing Delano's appearance was incorrect.

1. Delano was told he must appear at the permanency planning hearing.

¶15 The record shows that the circuit court told Delano twice on March 28, 2012, that he must make all of his court appearances and one more time specifically told Delano that he should appear at the permanency planning hearing. The court first said: "and you got to make all your court appearances." The court noted that if Delano was still in custody, as he was on March 28, the court would produce him for court. In response, Delano advised the court that he would be released from custody in ninety days, to which the court responded for the second time that it was then Delano's responsibility to get to court:

> But if you are – once you are released from custody – and I think you're going to get out or so you think – once you've got your freedom on the street, then the obligation is on you to make all your court appearances.

Next, the court specifically advised Delano of the permanency planning hearing date, July 12, 2012, and that he should be present for it, stating: "If you're out of custody, you should come here on that date, although I don't adopt a specific plan."

¶16 Delano argues that the court's use of the word "should" excused Delano from appearing. We disagree. In context, it is clear that the court had just told Delano two times that he "must" make "all" of his court appearances and when Delano told the court he expected to be out of custody in ninety days, the court reiterated Delano's need to get himself to court. The only reasonable conclusion was that all court appearances were mandatory.

2. The circuit court did not excuse Delano from appearing at the permanency planning hearing.

¶17 Delano argues that on March 28, 2012, and May 15, 2012, when the circuit court excused Christina from appearing at the permanency planning hearing due to the impending birth of another child, the court was excusing him too. We disagree.[8]

¶18 The record shows Delano did not appear at the March 28, 2012 hearing during Christina's portion of the case and therefore could not have heard her being excused. Only after her part ended and the video conferencing connection with her was severed, did Delano make his appearance. Presumably, if Delano had been present at the start, he would have entered his appearance.

¶19 The record from the May 15, 2012 hearing clearly shows that Delano appeared by video conference and the connection to him was severed before Christina's portion was called and she was excused.

[8] There is confusion in the record regarding who was present at any given time in the hearing due to the fact that these TPR cases, as with so many at Children's Court, involved a family with three active TPR and CHIPS actions at the same time. The TPR and CHIPS cases involving Delanta and Delairra, and those involving Christina's third child, of whom Delano was not the father, were all scheduled at the same time on March 28, 2012, before the same judge. Although this grouped scheduling is understandable because there were overlapping parties, GAL, lawyers and witnesses, it created some confusion in the record.

¶20 Next, Delano argues that the circuit court *admitted* that Delano was excused from the permanency planning hearing. It is true that on August 20, 2012, the court stated that it had excused Delano from appearing at the July 13th permanency planning hearing. But the court's memory was incorrect. The record clearly shows that while the court had excused Christina from the hearing, it had not excused Delano. Three times on March 28, 2012, the circuit court found that Delano had been advised of the July 13, 2012 permanency planning date.[9]

¶21 We conclude that Delano had notice of the permanency planning hearing, was told he must appear and was not excused from appearing at the July 13, 2012 hearing despite the circuit court's confusion and incorrect statement to the contrary on August 20, 2012.

3. Delano had a meaningful opportunity to be heard on suspension of visitation.

¶22 We do agree with Delano, however, that even if he had notice of the July 13, 2012 permanency planning hearing, he had no notice that the court would

[9] Delano makes one last argument for excusal in his reply brief. He argues that the court's words, "Mr. W[.] represents himself. He knew of today's date. He's not here. Mr. Bockhorst is his standby counsel. I waived his appearance," could be interpreted to mean that the court waived *Delano's* appearance. We disagree for three reasons. First, that would strain English grammatical rules—the pronoun modifies the closest proper noun—which here is "Mr. Bockhorst." Second, as noted above, the record shows that the court had *repeatedly not waived* Delano's appearance. Third, after the disputed "his," the court went on to again state that Delano had not been excused.

hear the State's motion for suspension of visitation that day.[10] The State filed its motion only the day before and acknowledged that it had not served Delano with the motion because it had no address for him after his release from custody. Nonetheless, as noted above, Delano knew his children's cases would be before the court on July 13th, was told he must make all court appearance and was out of custody. At that hearing the court properly found that an emergency existed and that the children's best interests required suspension, stressing it would revisit that order if Delano filed a motion. Thus, we conclude he suffered no due process violation on July 13th.

¶23 Delano did file his own motion, entitled "Motion for Rehearing," on August 16, 2012. The court set it for a hearing on August 20, 2012, only four days after Delano's motion was filed. Delano appeared at the hearing on August 20th, as did his standby counsel. The court heard the State's reasons for requesting the suspension and testimony from the children's case manager Tricia Blum, and then it heard from Delano. Ultimately, the court found that it needed to hear from the experts "to tell me where they think the root of the problem is." But the court expressed its concern to afford Delano a timely hearing, stating:

> But I also said I'd give you a chance to be heard, and we were able to get you on for today for a hearing.… And the thing is this, I don't want to have to wait until October 2nd which is the final pretrial. I want to get this resolved

[10] The permanency planning hearing was held July 13, 2013. The discrepancy between the scheduled date of the 12th and the actual hearing date of the 13th is not explained by the record or the parties in briefing. However, there is a Notice of Hearing in the record, showing that the Notice of Hearing was issued May 22, 2012, to all parties advising them that the Permanency Plan Hearing would be held July 13, 2012 at 8:30 a.m. The Notice showed that it was being sent to Delano at the Milwaukee Secure Detention Facility on May 22, 2012. Because Delano does not make any argument, due process or otherwise, about the date discrepancy, and because of the proper Notice of Hearing, we need not address the discrepancy.

> sooner than later. The soonest we can do it is September 17th.

¶24 The adjourned hearing took place on September 18, 2012.[11] Delano was present. The State and GAL summarized the basis for the State's request for suspension of visitation in the best interests of the children. The court heard testimony from Wollin, the children's therapist. Delano had an opportunity to cross-examine Wollin and make his own statement. At the conclusion of the hearing, the court found again that the best interests of the children required a suspension of visitation until the trial, which was less than one month away.

¶25 Delano does not argue that the August 20th and September 18th hearings were not held quickly enough, but rather that his due process rights at those hearings were violated because the court had already made up its mind against him by those dates. As noted above, the court's comments demonstrate otherwise. The court scheduled those two hearings as expeditiously as possible, expressly acknowledging that it did not want to interfere with his right to visit, but that the children's best interests required hearing from the children's therapist, who was unavailable on such short notice. Delano had a timely and meaningful opportunity to be heard and present his case on August 20th and September 18th. Ultimately, the court concluded that the children's best interests compelled the suspension of visitation.

[11] There is no explanation in the record or briefs as to why the hearing was held September 18th, rather than the 17th, as the court had stated, but Delano does not claim a notice issue and was present on September 18, 2012, so we need not address the date discrepancy.

B. The circuit court properly exercised its discretion at all three visitation hearings in finding that the children's best interests required a suspension of visitation.

4. The July 13, 2012 best-interests-of-the-child decision.

¶26 The circuit court's July 13, 2012 best-interests-of-the-child decision was a proper exercise of the court's discretion. On review, we do not reverse a discretionary decision unless the court failed to engage in a "rational thought process based on examination of the facts and application of the relevant law." ***David S.***, 179 Wis. 2d at 150.

¶27 The court properly applied the best-interests-of-the-child standard to the State's request for suspension of visitation. *See* WIS. STAT. § 48.42(1m)(c). The court examined the facts the State presented regarding the children's anxiety behaviors when they last had visitation with Delano. The State described that Delanta would eat her blanket and stuff things up her nose, be overly aggressive, cry uncontrollably and have nightmares surrounding visitation. The State claimed these behaviors interfered with Delanta's health; for example, strings were found in her stool because she was eating inedible things. The State also reported that the children's therapists believed that the anxiety behaviors were connected to the visits with Delano because the behaviors stopped once the visits stopped on January 10, 2012, when Delano went into custody. The State argued that now that Delano was again out of custody, there was an urgency to suspend visitation to protect the children from these types of behaviors again. The GAL stated he had no objection to a temporary suspension until a suspension hearing could be scheduled.

¶28 The circuit court found the children's best interests required an emergency suspension of visitation. It reasoned that there was an emergency given the prospect of resumption of visitation now that Delano was out of custody.

¶29 Delano argues, however, that the record does not support that finding because there was no emergency and that the court failed to consider less restrictive options than suspension. Significantly, Delano cites no authority for the proposition that the circuit court must consider less restrictive alternatives, nor could he. The standard under WIS. STAT. § 48.42(1m)(c) is best interests of the children and the court made that finding here.

5. The August 20, 2012 best-interests-of-the-child decision.

¶30 On August 20, 2012, the State again advised the circuit court of the anxiety behaviors exhibited by the children during past visits with Delano, including Delanta's strange eating behaviors and Delairra's different anxiety behaviors, stating "Delairra has got issues not exhibited. I think she was exhibiting some anxiety, but she hasn't started eating the things of that nature that Delanta has."

¶31 Present with the State was Blum, the children's case manager, who reported that Delanta would object to visits when Blum would show up by saying: "No, no go with Tricia.… Don't want to go with Tricia.… No visit today." Blum explained that the Bureau tried therapeutic visits in the fall before Delano's reincarceration because of the anxiety displayed by the children, but the behaviors continued.

¶32 Delano presented his side of the story. He informed the court that he believed that the reported anxiety behaviors were unrelated to visits with him. He

challenged the suitability and motives of the foster mother. He pointed out that two visitation workers indicated his visits were "perfectly fine," and he claimed that he regularly visited his children.

¶33 The State acknowledged that the two visitation supervisors from the fall therapeutic visits did indicate that Delano acted appropriately during visits. However, the State pointed to the erratic nature of the visits due to Delano's incarcerations as part of the cause of the children's anxiety.

¶34 The circuit court found that it needed to hear from the children's therapists to determine what the root of the children's anxiety behaviors was, stating: "I don't want to harm the child, but I also don't want to deny Mr. W[.] his right to visit. So what I'm going to do is this, I want to hear from the therapist. I'm going to adjourn this for a hearing." Because the therapist could not appear on short notice, the court adjourned the hearing. The record demonstrates that the court adjourned the hearing to protect the children's best interests by hearing from their therapist, which is a proper exercise of discretion.

6. The September 18, 2012 best-interests-of-the-child decision.

¶35 The adjourned hearing took place on September 18, 2012. Delano was present and again presented his case. The State and GAL presented the testimony of Wollin, Delanta's therapist, who was present for both children's visits. The circuit court again concluded that the children's best interests required a suspension of visitation:

> I don't want to, and I'm sure you don't want to cause any trauma to the child in terms of visits between now and the, roughly, three to four weeks when we have the trial.
>
> At this juncture, I have to consider what's best for the [c]hild.

> The [c]hild doesn't want to go to the visits. The [c]hild has acted out, has needed to be dealt with.
>
> I'm not blaming you for this. I'm just saying, it's a fact of life.
>
> We are not going to harm these children. We will not reinstigate visits.

Thus, the circuit court applied the proper law, the children's best interests, in reaching its conclusion.

¶36 The court relied on the facts as testified to by Wollin, Delanta's therapist. Wollin advised the court that the State's and GAL's summaries of the children's anxiety behaviors were accurate. As to Delairra, Wollin testified that Delairra also exhibited anxiety but did not exhibit her sister's concerning eating behaviors. She testified that she concluded that the anxiety behaviors were due to the children's visits with Delano because "four or five weeks" after the visits stopped in January the children "had no more anxiety-based behaviors. And have not had any more. They've only occurred around the visitations." Wollin agreed that Delano had not done anything inappropriate during the visits, but when asked by the court as to the *cause* of the behaviors, Wollin testified that she believed that Delano's incarcerations caused Delanta to have no significant emotional bond with him.

¶37 Despite Delano's testimony that he had always been interested in the children, had good visits with them and had completed the batterer's and AODA programs, the circuit court concluded that the children's best interests required suspension of visitation. The court remarked on the nearness of the trial date: "It's not like we have a trial coming up in six months down the road. We have a trial coming up in less than one month." The court said that in the meantime, Delano could send letters and pictures to the case manager for the children.

¶38 In suspending visitation again after the September 18th hearing, the circuit court applied the proper law—the best-interests-of-the-child standard—and rationally determined based on the facts in the record that the children's best interests warranted the suspension. Thus, the circuit court properly exercised its discretion on all three occasions.

II. Sufficient Credible Evidence Supports the Jury's Failure-to-Assume-Parental-Responsibility Verdict.

¶39 Delano next argues that the evidence at the grounds jury trial failed to support the jury's verdict that he failed to assume parental responsibility for the children. He argues that his incarceration by itself cannot be used to establish failure to assume, citing WIS JI-CHILDREN 346B, and that his admitted marijuana usage is not evidence that he created a hazardous environment for his children, citing ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶43, 333 Wis. 2d 273, 797 N.W.2d 854.

¶40 Delano claims that he assumed parental responsibility for Delanta from her birth in July 2009 to his arrest for the domestic violence incident on March 28, 2010—approximately nine months—as well as her nine months in utero. He notes that the experts agreed he was appropriate during the visits he had between July 2011 and January 2012. Finally, he argues that the cards, gifts and a DVD he sent to the children through the Bureau show he was assuming parental responsibility.

¶41 The State and GAL counter that there was ample credible evidence to sustain the jury's finding. They argue that the credible evidence shows that Delano failed to form a "substantial parental relationship with the child" as set forth in the children's code, WIS. STAT. § 48.415(6)(a). They argue he repeatedly

chose to engage in criminal behavior, knowing that it would cause him to be arrested and revoked, and which did in fact cause him to be incarcerated and out of the children's lives. They argue that under the best view of Delano's efforts, he lived with Delanta for eight and one-half months and never lived with Delairra, had about fifteen visits with the children and sent the children five to seven cards, one DVD and a few toys. This, they argue, is clearly insufficient to demonstrate that Delano assumed a substantial relationship with either child. We agree.

¶42 A jury finding in a TPR trial will not be overturned if there is any credible evidence that, under any reasonable view, supports the verdict and removes the question from speculation. ***Sheboygan Cnty. DHHS v. Julie A.B.***, 2002 WI 95, ¶27, 255 Wis. 2d 170, 648 N.W.2d 402; *see also* WIS. STAT. § 805.14(1). The evidence is viewed in the light most favorable to the verdict. ***Tammy W-G.***, 333 Wis. 2d 273, ¶39. Failure-to-assume-parental-responsibility grounds involve consideration of the totality of the circumstances over the child's entire life. ***Id.***, ¶3. Only when the evidence is inherently or patently incredible will an appellate court substitute its judgment for that of the fact finder. ***Gauthier v. State***, 28 Wis. 2d 412, 416, 137 N.W.2d 101 (1965).

¶43 The failure-to-assume-parental-responsibility grounds are set forth in WIS. STAT. § 48.415(6)(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."

¶44 In the case of an incarcerated parent, the court may give, and did give here, the jury instruction WIS JI-CHILDREN 346B, which advises that "[i]ncarceration of a parent does not in itself establish failure to assume parental responsibility." The instruction tells the jury that it may consider factors such as:

"the nature of the underlying criminal behavior" and "whether the parent engaged in that behavior knowing that the resultant incarceration or potential incarceration would prevent or hinder the parent from assuming his parental responsibilities." *See* ***id.***

C. Credible evidence showed that Delano repeatedly chose criminal behavior which caused his incarceration and prevented him from assuming his parental responsibility.

¶45 The jury heard credible evidence of the history and causes for Delano's extensive incarceration from two of his extended supervision agents. Both testified that while Delano was under their supervision, he repeatedly broke the rules and was aware of the consequences of violations, namely, revocation or time off the streets. Yet, he continued to use marijuana and was found to commit other rules violations.

¶46 His parole agent, Julie Lyn Sorce, testified that between April 2011 and June 2012, while she supervised him, Delano failed to comply with his AODA treatment condition or the rule against marijuana use, was inconsistent in providing proof of job searches, did not complete his Batterer's Intervention Counseling and tested positive for marijuana eight of the eleven times he was screened. He mostly denied use of marijuana despite the positive screens. In the summer of 2011 he was taken into disciplinary custody twice for these violations and was incarcerated for about a week for each violation. He was then again arrested on January 10, 2012, for possession of marijuana, and incarcerated until July 3, 2012.

¶47 Jennifer Bartelt, Delanto's agent from June 2012 to March 2014, testified that during his January to July 2012 custodial period, Delano received an alternative to revocation ("ATR") in the form of intensive domestic violence and

alcohol and drug treatment programs at Milwaukee Secure Detention Facility ("MSDF"). She testified that after his release in July 2012, he missed some of his AODA aftercare meetings, missed three appointments with his agent and had not enrolled in parenting classes. Most notably, despite completing the ATR programs and testing negative for drugs the day he was released, he again tested positive for marijuana on September 27, 2012, which was after the circuit court's order suspending visitation and right before his jury trial date in this case.

¶48 This credible evidence supported the jury's verdict of failure to assume parental responsibility. The consequence of Delano's repeated criminal and rules violations was extensive incarceration and very little contact with his children. For example, Delano was arrested on March 28, 2010, when Delanta was eight and one-half months old. He was then revoked for twelve rule violations, including use of marijuana, and spent the next fourteen months in jail. Delairra was born during that time, in November 2010. She never lived with Delano. He was out of custody for eight months, had fifteen visits with the children and then was reincarcerated again in January 2012 due to continued use of marijuana.

¶49 Although he was again released from custody on July 3, 2012, Delano failed to come to court on July 13, 2012, for the permanency planning hearing, despite having notice of the hearing. He was only out of custody for two months before he was again incarcerated for marijuana use, even after completing an intensive alternative to incarceration program. So, by the time of trial, Delano was back in custody and had been incarcerated twenty-one months of Delanta's thirty-nine-month life and fourteen months of Delairra's twenty-four-month life. All of Delano's repeated incarceration took its toll on his relationship with the children. As the expert testified at the trial: "Due to his being in and out of their

life so many times due to his incarceration, they have not had a consistent ability to build a strong emotional bond with him."

¶50 Delano tries to argue that incarceration cannot be used for proof of his failure-to-assume grounds, citing to WIS JI—CHILDREN 346B. While that instruction does make clear that incarceration by itself does not establish the grounds of failure to assume, it does suggest other factors to be considered relating to the incarceration that can establish grounds of failure to assume. Two apply here.

¶51 The factor of WIS JI—CHILDREN 346B that is most pertinent is "whether the parent engaged in that behavior knowing that the resultant incarceration or potential incarceration would prevent or hinder the parent from assuming his parental responsibilities." As shown above, credible evidence established that Delano knew the rules and consequences of breach and continued to break them with criminal activity. Even after his release in July 2012, on the eve of trial when he was actively in litigation to get visits with his children, he was found to have used marijuana and was reincarcerated in September 2012.

¶52 Second, the *nature* of his underlying criminal behavior can establish a factor to support failure to assume parental responsibility. *See* WIS JI—CHILDREN 346B. The use of marijuana is the type of behavior that can be controlled. Indeed, Delano was offered treatment, but even after treatment, he chose to possess marijuana again.

¶53 Delano takes the position that his use of marijuana cannot be held against him, relying on ***Tammy W-G.***, 333 Wis. 2d 273, ¶43, because there the court said it did not create a hazardous environment for the child. Delano misses the point that *his continued use of marijuana caused him to be removed from his*

children's lives and that is a factor in whether he failed to assume parental responsibility.

D. There was credible evidence that the children's anxiety behaviors around visits with Delano demonstrated that they did not have a substantial parental relationship with him.

¶54 There was credible evidence at the jury trial from the children's case manager, Blum, the children's foster mother, and Delanta's therapist, Wollin, that the children displayed serious anxiety behaviors which the expert linked to their visits with Delano. These behaviors demonstrate that he lacked a substantial parental relationship with his children.

¶55 Margaret D. testified that she had been the foster mother for Delanta since March 30, 2010, and for Delairra since February 11, 2011. She said that Delanta did not want to go on the visits, that she would kick, scream and cry and that she had to forcibly be put into the car seat. She described that Delanta put objects up her nose and shredded blankets with her teeth after visits. She said she received five to ten cards or letters from Delano for the children, some clothes and some toys. She reported that Delanta has extreme food allergies that require special care, which Delano had not inquired about.

¶56 Blum testified that she had been the Bureau's family case manager since June 2010 and up through the trial. She said she discussed Delano's drug use with him and its negative impact on his children, but that he did not seem phased by it. In her two and one-half years on this case, Delano had been out of custody for approximately ten and one-half months.

¶57 Wollin testified that she had been Delanta's therapist since July 2011. Delanta had anxiety behaviors, including self-harm such as shredding her

blanket and shoving pieces up into her sinus cavity, nightmares, bedwetting and extreme fears which were all attributable to visits with Delano. Sometimes in therapy she would curl up into a fetal position, and just sit there until therapy was over. However, Wollin reported that there had been a drastic decrease in the anxiety-based self-harm behaviors once visits with Delano ended, and the behaviors did not resume until a visit again took place.

¶58 As to Delairra, Wollin testified that she observed a visit between Delano and both children in October 2011. When Delano entered the room, Delairra began to scream and cry and consistently came over to Wollin, who had up until then had very little contact with Delairra—perhaps thirty to forty-five minutes. Wollin testified that the child's preference for Wollin, who she hardly knew, to her own father, was of concern to the psychologist.

¶59 These three witnesses presented credible evidence of the children's severe anxiety behaviors, and Wollin's testimony was credible evidence that linked the children's anxiety to Delano's failure to assume parental relationships.

¶60 Delano tried to blame others for the children's anxiety behaviors. He suggested the foster mother was trying to keep the children for herself. He also tried to argue that the expert's testimony that he did nothing wrong in the visits rebuts the evidence of his failure to assume. However, the issue in a sufficiency-of-the-evidence review is not whether there is other credible evidence supporting a different result, but whether there is credible evidence supporting the jury's verdict. *See* ***Sheboygan Cnty. DHHS***, 255 Wis. 2d 170, ¶27; *see also* WIS. STAT. § 805.14(1). The expert's testimony that Delano's repeated incarcerations prevented his children's ability to bond with him is credible evidence on which the

jury could reasonably base its finding that he failed to form a substantial parental relationship.

¶61 Based on this credible evidence, the jury had sufficient evidence to find that Delano failed to assume parental responsibility for his children.

By the Court.—Orders affirmed.

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