COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2015

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 No. 2014AP2076 **Cir. Ct. No. 2012TP2**

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

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

HERSHULA B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: AMY R. SMITH, Judge. *Affirmed*.

¶1 KLOPPENBURG, J.[1] Hershula B., the mother of T. J., appeals an order terminating her parental rights to T. J. Hershula argues that the circuit court erred in denying her postdispositional relief after her parental rights were terminated following a jury trial. Hershula argues that this court should grant her a new trial for three reasons: (1) the circuit court erred when it directed verdict on the second special verdict question regarding whether Hershula failed to visit or communicate with T. J.; (2) her trial counsel was ineffective for failing to object to confusing jury instructions and for failing to object to the inclusion of the time period during which the County "prohibited" Hershula from contacting T. J.; and (3) she is entitled to a new trial in the interest of justice. I address and reject each of Hershula's arguments below, and therefore, I affirm.

BACKGROUND

¶2 In August 2013, the Dane County Department of Human Services filed an amended petition to terminate Hershula's parental rights. Dane County alleged:

> Hershula [B.] has abandoned [T. J.] by failing to visit or communicate for three months or longer, specifically she has failed to visit and communicate from November, 2011 until a no contact order was entered in the CHIPS case on April 22nd, 2013. Further, Hershula … failed to have good cause for failing to visit or communicate with [T. J.]. This abandonment represents multiple periods of three months and in contravention of [WIS. STAT. §] 48.415(1)(a) (2).

The matter of abandonment was tried to a jury in February 2014.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶3 The following facts were established at trial. In April 2010 T. J. was, per court order, removed from her mother's home and placed in foster care, where she has been since.

¶4 Hershula's county social worker testified that Hershula had not visited T. J. since November 30, 2011, and that Hershula did not communicate with T. J. after December 25, 2011, when Hershula talked to T. J. on the phone, until April 1, 2013. The social worker testified that the foster parents contacted her after Hershula called the foster parents and asked to talk to T. J. in April 2012, and that the social worker told the foster parents to ask Hershula to call the social worker to schedule a meeting to plan for reinitiating contact with T. J., and not to let Hershula talk to T. J. until Hershula met with the social worker. The social worker testified that she talked with Hershula by phone on May 3, 2012 and discussed meeting to talk about how best to reinitiate contact with T. J. because T. J. was very emotionally fragile; that they scheduled an office meeting for May 7; and that Hershula cancelled that meeting. The social worker testified that she had no contact with Hershula after May 7, 2012, until the social worker called Hershula in January 2013.

¶5 Hershula testified that her last visit with T. J. was on November 30, 2011 and that she had no visits with T. J. thereafter. Hershula acknowledged that she "knew that a way to see [T. J.] was to meet with [her social worker]," and that she did not meet with her social worker between November 30, 2011 and April 2013.

¶6 Hershula testified that during the period between May 1, 2012 and December 1, 2012, she did not talk, write, or send presents to, or have any other direct communication with, T. J. Hershula testified that T. J.'s foster parents,

upon instructions from Hershula's social worker, did not allow her to talk to T. J. after April 30, 2012, but that she more than once called T. J.'s foster parents and left messages for the foster parents to give to T. J. When asked about the type of messages she left, Hershula stated the following:

> I love her, I miss her – well, tell her, I don't want to- - I don't know how to say it. Like I was pretending to be my sister, so I would say, tell [T. J.] that her mom said she love her, she miss her, and you know, stuff like that, and then I just start calling like if it was too hot outside, I would call and say, like make sure you all give [T. J.] water as myself and then I call back and pretend to be my sister again.

¶7 A special verdict form was presented to the jury at the end of trial. The parties stipulated to the answer, "Yes," to the first verdict question: "Was [T. J.] placed, or continued in placement, outside Hershula [B.]'s home pursuant to a court order which contained the termination of parental rights notice required by law?"

¶8 The guardian ad litem moved for a directed verdict as to the second verdict question: "Did Hershula [B.] fail to visit or communicate with [T. J.] for a period of three months or longer?" Over Hershula's objection, the circuit court granted the motion and answered that question, "Yes."

¶9 The third question asked the jury, "Did Hershula [B.] have good cause for having failed to visit with [T. J.] from December 1, 2011 through

April 1, 2013?" The jury unanimously answered, "No."[2] The circuit court entered judgment consistent with the verdict.

¶10 At the subsequent dispositional hearing, the circuit court concluded that termination of Hershula's parental rights was in T. J.'s best interest, and therefore, ordered termination of Hershula's parental rights.

¶11 Hershula appealed the order terminating her parental rights and moved to remand for an evidentiary hearing pursuant to WIS. STAT. RULE 809.107(6)(am). This court remanded the case to the circuit court for postjudgment proceedings.

¶12 Upon remand, Hershula filed a motion to vacate the order terminating her parental rights and to request a new trial. The circuit court held a postjudgment evidentiary hearing, at which Hershula's trial counsel testified. The circuit court denied the motion, and Hershula filed this appeal.

DISCUSSION

¶13 "Wisconsin has a two-part statutory 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. "In the first, or 'grounds' phase of the proceeding,

[2] The jury did not answer the fourth, fifth and sixth questions, because the special verdict instructed the jury that it should do so only if its answer to the third question was "Yes," that Hershula did have good cause for having failed to visit with T. J. *See* WIS. STAT. § 48.415(1)(c) (abandonment is not established if the parent proves he or she had good cause not to visit or not to communicate with the child). The fourth question asked whether Hershula had good cause for having failed to communicate with T. J., and the fifth and sixth questions asked whether Hershula failed to communicate with Dane County about T. J., and, if so, whether she had good cause. In other words, the jury did not answer the questions about the failure to communicate because it found that Hershula had not shown good cause for her failure to visit T. J.

the petitioner must prove by clear and convincing evidence that one or more of the statutorily enumerated grounds for termination of parental rights exist." ***Id.*** "[I]f grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit." ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶18, 333 Wis. 2d 273, 797 N.W.2d 854 (quoted sources and internal quotation marks omitted). The second phase, the dispositional hearing, "occurs only after the fact-finder finds a WIS. STAT. § 48.415 ground has been proved and the court has made a finding of unfitness. In this step, the best interest of the child is the 'prevailing factor.'" ***Id.***, ¶19 (citations omitted).

¶14 Hershula's appeal concerns the first step, establishing the statutory ground of abandonment for termination of parental rights, specifically that Hershula failed to visit or communicate with T. J. for a period of three months or longer. *See* WIS. STAT. § 48.415(1)(a)2. Hershula argues that this court should grant her a new trial for three reasons: (1) the circuit court erred when it directed verdict on the second special verdict question regarding whether she failed to visit or communicate with T. J.; (2) her trial counsel was ineffective for failing to object to confusing jury instructions and failing to object to the inclusion of the time period when the County "prohibited" her from contacting T. J.; and (3) she is entitled to a new trial in the interest of justice. I address and reject each of Hershula's arguments below.

A. Directed Verdict on Whether Hershula Failed to Visit or Communicate With T. J.

¶15 The abandonment ground for termination that is at issue here is established by proving that "the child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by [law], and the parent has failed to visit or communicate with the child

for a period of 3 months or longer." WIS. STAT. § 48.415(1)(a)2. Abandonment is not established if the parent proves that he or she had good cause for having failed to visit or communicate with the child. WIS. STAT. § 48.415(1)(c).

¶16 Consistent with this statute, the verdict questions relevant to this appeal asked: (1) was T. J. placed or continued in placement outside Hershula's home; (2) did Hershula fail to visit or communicate with T. J. for a period of three months or longer; (3) did Hershula have good cause for having failed to visit T. J. from December 1, 2011 through April 1, 2013; and (4) did Hershula have good cause for having failed to communicate with T. J. from May 1, 2012 through December 1, 2012.

¶17 As noted above, the parties stipulated to the answer "Yes" to the first question of the special verdict, thereby establishing that T. J. was "placed, or continued in a placement, outside Hershula [B.]'s home pursuant to a court order which contained the termination of parental rights notice required by law." Hershula does not dispute on appeal that this first element of the abandonment ground was met. Nor does Hershula dispute that she did not visit T. J. for a period of three months or longer, as was asked in the second question of the special verdict. She also does not challenge the jury's answer to the third question of the special verdict—that she did not have good cause for failing to visit T. J. from December 1, 2011 through April 1, 2013. Rather, Hershula argues that the circuit court erred in directing verdict on the part of the second question that asked whether Hershula failed to "communicate with" T. J. for a period of three months or longer.

¶18 Hershula contends that her testimony that she had "indirect" communication with T. J. after April 2012 through messages left with T. J.'s foster

parents, presented a disputed fact as to whether Hershula communicated with T. J., and, therefore, the circuit court erred in directing the verdict on this question. I first address the issue of statutory interpretation raised by Hershula's argument, and I then address whether, applying the statute as properly interpreted to the evidence at trial, the circuit court correctly directed the verdict as to the second question.

¶19 Hershula argues that she "communicated with" T. J. within the meaning of WIS. STAT. § 48.415(1)(a)2. because she "communicated indirectly with" T. J. when she left messages with the foster parents about T. J. Statutory interpretation is a question of law that we review de novo. ***Barritt v. Lowe***, 2003 WI App 185, ¶6, 266 Wis. 2d 863, 669 N.W.2d 189.

> [S]tatutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning. Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as a part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.

State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, ¶¶45-46, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted). Furthermore, "[s]tatutes are interpreted to give effect to each word, to avoid surplusage, [and] to fulfill the objectives of the statute." ***State v. Popenhagen***, 2008 WI 55, ¶35, 309 Wis. 2d 601, 749 N.W.2d 611.

¶20 Under WIS. STAT. § 48.415(1)(a)2., a petitioner seeking to terminate parental rights must prove that the "parent has failed to visit or communicate with

the child for a period of 3 months or longer." As noted, the dispute here centers on the meaning of the phrase "communicate with the child." Hershula focuses on the word "communication," notes that the dictionary definition is "the imparting or exchanging of information or news," and argues that one can impart or exchange information indirectly, as she claims she did when she left messages about T. J. with the foster parents. However, Hershula ignores the word "with," which completes the statutory phrase. The dictionary defines "with" as a "function word to indicate one that shares in an action." WEBSTER'S NEW INT'L DICTIONARY 2626 (3rd ed. 1993). By this definition, "communicate with the child" means more than just communicating; it means that the child shares in the *action* of communicating. Thus, using Hershula's definition of "communication," the phrase means that the child shares in the *action* of "imparting or exchanging of information or news."

¶21 This plain meaning is supported by surrounding statutory sections regarding this particular abandonment ground, which distinguish instances where communication is "with the child" from instances where communication is "about the child with the person or persons who had physical custody of the child." *Compare* WIS. STAT. §§ 48.415(1)(a)2., 48.415(1)(c)2., 48.415(1)(c)3. ("with the child"), *with* WIS. STAT. §§ 48.415(1)(c)3.a. and b. ("about the child"). To adopt Hershula's argument—that messages left with T. J.'s foster parents constitutes communication with T. J.—would require this court to interpret the phrases "with the child" and "about the child with the person or persons who had physical custody of the child," as used in the statutes cited above, as having the same meaning. To give the different phrases the same meaning would fail to give effect to each word in the phrase "about the child" and render that phrase surplusage.

¶22 Accordingly, I conclude that the phrase "communicate with the child" in WIS. STAT. § 48.415(1)(a)2. means by its plain language that the child must share in the parent's *action* of communicating, and that Hershula's messages left with T. J.'s foster parents, as testified to here, do not constitute communication with T. J. within that meaning. I now address whether, consistent with this interpretation of the statute's plain language, the circuit court correctly entered a directed verdict on the question whether Hershula failed to communicate with T. J. for a period of three months or longer.

¶23 Generally, "the standard of review for a grant of a directed verdict is whether the [circuit] 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). "'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.*** (quoted source omitted).

¶24 Hershula testified that she did not talk to T. J., did not send cards or presents to T. J., did not write letters to T. J., did not text, Facetime or Skype with T. J., and did not have any communication with T. J. between May 1, 2012 and December 1, 2012. The only "communication" that Hershula argues she had with T. J. during this time period was in the form of messages that she testified she left with the foster parents about T. J. Hershula fails to point to any credible evidence that refutes the clear and convincing evidence showing that she failed to communicate with T. J., within the meaning of the statute, during the seven-month period between May 1, 2012 and December 1, 2012. Therefore, I conclude that the circuit court did not err in directing the verdict on the question of whether Hershula failed to communicate with T. J. for a period of three months or longer.

B. Ineffective Assistance of Counsel

¶25 Hershula argues that a new trial should be granted because her trial counsel was ineffective by failing to object to: (1) confusing standard jury instructions, and (2) the inclusion, in the period of abandonment, of time periods where the County "prohibited" Hershula from contacting T. J.

¶26 To establish an ineffective assistance of counsel claim, a parent whose parental rights have been terminated must show both that the counsel's performance was deficient and that counsel was prejudiced by the deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).[3] Trial counsel's performance is not deficient if counsel fails to raise an issue that has no merit. ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. To establish prejudice, the parent must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** at 697. If the appellate court concludes that the claimant has failed to prove one prong, the court need not address the other prong. ***Id.***

¶27 For the reasons set forth below, I conclude that Hershula fails to prove either of her ineffective assistance of counsel claims.

[3] The Wisconsin Supreme Court adopted the ***Strickland*** test to apply to proceedings for the involuntary termination of parental rights. *See* ***State v. Harvey***, 139 Wis. 2d 353, 375, 407 N.W.2d 235 (1987).

1. Confusing Standard Jury Instruction

¶28 Hershula argues that the burdens of proof stated in the standard jury instruction, Wis JI–Children § 313, were "confusing" and, therefore, her trial counsel was ineffective for failing to object to the use of that instruction. Specifically, Hershula contends that the jury instruction may have caused the first and second special verdict questions, which required the County to prove certain elements of abandonment by clear and convincing evidence, to be decided by a lower burden of proof.

¶29 Assuming without deciding that trial counsel's failure to object to use of the standard jury instruction constituted deficient performance, Hershula nevertheless fails to show that such deficiency prejudiced her here, where the circuit court, rather than the jury, answered the first and second special verdict questions. Hershula concedes that the circuit court was not likely to have been "misled by the confusing instruction." Hershula fails to explain how, in light of that concession, objection to the standard jury instruction could have affected the outcome of the trial. Therefore, I conclude that Hershula's trial counsel was not ineffective for failing to object to the use of the standard jury instruction.

2. Unconstitutional to Include Time Period in Which Hershula Was "Prohibited" by the County from Contacting T. J.

¶30 Hershula argues that her trial counsel was also ineffective for failing to object "that it is fundamentally unfair and a denial of due process [for the County] to allege that [Hershula] abandoned her child at a time when the [County] disallowed all contacts." In other words, Hershula argues that the alleged period of abandonment should not have included the time period after April 30, 2012, when, according to Hershula, the County "disallowed" her contact with T. J., and

that her trial counsel was ineffective for not objecting to its inclusion. This issue is important, because the period during which Hershula failed to visit or communicate with T. J. was from May 1, 2012 to December 1, 2012, which falls into the same period that Hershula argues the County "disallowed" contact. Thus, if this "disallowed" contact period is not included in the abandonment period, then the County did not prove abandonment as grounds for terminating Hershula's parental rights.

¶31 The County argues that it is not unconstitutional to include the "disallowed" contact period in the abandonment period, because the County had established "easily achievable conditions precedent to re-establishing visits" between Hershula and T. J. The County contends that Hershula had the "keys to the door," much like the father in ***Carla B. v. Timothy N.***, 228 Wis. 2d 695, 706, 598 N.W.2d 924 (Ct. App. 1999), but chose not to use them.

¶32 As explained below, I conclude that Hershula's argument has no merit, and therefore, trial counsel's performance was not deficient. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel is not ineffective for failing to make meritless arguments).

¶33 In ***Carla B.***, we interpreted WIS. STAT. § 48.415(1)(b), which provides, "The time periods under [the abandonment provision § 48.415(1)(a)2.] shall not include any periods during which the parent has been prohibited by judicial order from visiting or communicating with the child." The court order in ***Carla B.***, required that, before the father could reinstate visitation with his child, the father see a therapist and make such progress that the therapist could opine visitation would not be harmful to the child. 228 Wis. 2d at 706. We interpreted WIS. STAT. § 48.415(1)(b) to mean that "the parent cannot be penalized for failure

to do something which he or she is prohibited from doing," but we narrowly construed the meaning of "prohibited." ***Carla B.***, 228 Wis. 2d at 704. We concluded that the court order did not deny the father visitation, but rather, "create[d] a condition precedent that [the father] had to fulfill before he could exercise visitation." ***Id.*** at 706. Although ***Carla B.*** dealt with circumstances where there was a judicial order, its reasoning is persuasive here.[4]

¶34 Here, the county social worker told Hershula and the foster parents that Hershula could not have contact with T. J. until Hershula met with the social worker so that they could plan how best to reinitiate contact with T. J. because T. J. was emotionally fragile. The social worker, like the court order in ***Carla B.***, created a condition precedent that Hershula had to fulfill before she could reinstate visitation. Hershula acknowledged at trial that she "knew that a way to see [T. J.] was to meet with [her social worker]," and that she did not meet with her social worker between November 30, 2011 and April 2013. Hershula's social worker also testified that she did not receive any contact from Hershula after May 7, 2012

[4] Hershula attempts to distinguish ***Carla B.*** from this case in that ***Carla B.*** involved a court order that was accompanied by statutory procedural safeguards, unlike the social worker's requirement here that Hershula meet with the social worker before reinitiating contact with T. J. However, Hershula fails to support this contention with any legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). Nor does Hershula explain why the reasoning in ***Carla B.*** does not apply here, where the evidence showed that Hershula had the means to reinstate contact and chose not to do so.

until January 17, 2013. The only step that Hershula had to take in order to contact T. J. was to meet with her social worker to establish a plan for reinstating contact.[5]

¶35 Following the reasoning in ***Carla B.***, because Hershula had the "keys to the door" but chose not to use them, she was not "prohibited" by the County from contacting T. J. during the seven-month period between May 1, 2012 and December 1, 2012. *See* ***Carla B.***, 228 Wis. 2d at 706. Accordingly, I conclude that Hershula's argument is without merit, and that her trial counsel was not ineffective for failing to object to the inclusion of the "disallowed" contact period in the alleged abandonment period.

C. New Trial in the Interest of Justice

¶36 Finally, Hershula argues that a new trial should be granted in the interest of justice because the real controversy was not fully and fairly tried. This court is "authorized to grant a new trial in the interest of justice if [it is] convinced that a miscarriage of justice has occurred. However, this court ought not grant a new trial unless [it is] convinced to a reasonable certitude that if there were a new trial it would probably effect a different result." ***Farrell v. John Deere Co.***, 151 Wis. 2d 45, 86, 443 N.W.2d 50 (Ct. App. 1989).

[5] Hershula argues that the conditions the County required for reinstating visits made it impossible for Hershula to contact T. J. Hershula compares her circumstances to those found in ***Kenosha Cnty. DHS v. Jodie W.***, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845, such that "the impossibility of Hershula contacting her child while being prohibited from doing so makes the termination statute unconstitutional as applied to her." This argument is not persuasive for multiple reasons, but most notable here is the fact that the mother in ***Jodie W.*** was incarcerated and therefore unable to meet a condition of return. Here, Hershula only had to meet with her social worker in order to establish a plan for reinstating contact with T. J. This was not an impossible feat, and in fact, Hershula had taken this step before after she had been incarcerated in July 2011. Thus, Hershula fails to show that the condition precedent in her case was "incapable of performance." *See* ***Carla B.***, 228 Wis. 2d at 706 n.3.

¶37 Hershula makes no arguments besides those already rejected above for why the real controversy was not fully and fairly tried. Accordingly, she fails to show that there has been a miscarriage of justice entitling her to a new trial.

CONCLUSION

¶38 For the reasons set forth above, I affirm the circuit court's order terminating Hershula B.'s parental rights to T. J.

By the Court.—Order affirmed.

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