COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP197 **Cir. Ct. No. 2010TP196**

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

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

VERONICA K.,

PETITIONER-RESPONDENT,

V.

MICHAEL K.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MARSHALL B. MURRAY, Judge. *Affirmed.*

¶1 FINE, J. Michael K. appeals the order terminating his parental rights to Zachary K., who was born in September of 2003 when he and Veronica K. were married. We also have appellate jurisdiction over the trial court's denial

of Michael K.'s request for post-disposition relief alleging that his trial lawyer gave him constitutionally deficient representation. *See* WIS. STAT. § 808.04(8) ("If the record discloses that the judgment or order appealed from was entered after the notice of appeal or intent to appeal was filed, the notice shall be treated as filed after that entry and on the day of the entry.").

¶2 Unlike many actions seeking to terminate a person's parental rights, which are usually filed by the government, this matter was started by Zachary's mother, Veronica K. Veronica K.'s petition alleged that Michael K. both "abandoned" Zachary, and that he did not "assume a substantial parental relationship" with the boy. *See* WIS. STAT. § 48.415(1) ("Abandonment" permits a circuit court to determine whether termination of parental rights is in the child's best interests.), § 48.415(6) ("Failure to assume parental responsibility" permits a circuit court to determine whether termination of parental rights is in the child's best interests, and is proven by showing that the parent did not have "a substantial parental relationship with the child."). Veronica K. and Michael K. were divorced in Illinois in September of 2007 on Veronica K.'s petition. Veronica K. is now married to another person and the petition alleges that they want to "legally assume responsibility" for Zachary.

¶3 No one disputes on this appeal that Michael K. had serious drug-addiction problems, and that he has been incarcerated on and off following his March of 2003 marriage to Veronica K. Although the parties and the guardian *ad litem* have helpfully fully explored the Record, giving us a mosaic of the often turbulent and tragic circumstances of Zachary's life and those of his birth-parents, Michael K.'s arguments on appeal permit us to apply Occam's Razor because the scope of our review is set by the contentions that an appellant fully develops in

well-reasoned arguments. *See* ***League of Women Voters v. Madison Community Foundation***, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 140, 707 N.W.2d 285, 291.

¶4 In seeking to overturn the order terminating his parental rights to Zachary, Michael K. asserts on appeal that: (1) Michael K., appearing at the trial by video and audio transmission, was denied his due-process "right to meaningfully participate" in the trial because, at various times, as he contends in his brief, he "repeatedly complained that he could not hear the proceedings"; and (2) his trial lawyer gave him constitutionally deficient representation by not: (a) getting what his brief asserts was "evidence that Michael K. completed drug rehabilitation," (b) getting a copy of court records from Illinois, and (c) objecting to what his brief claims was a "prejudicial jury instruction." He also argues that the trial court erred in applying the law of abandonment. For the reasons we explain below, we affirm.

I.

¶5 Termination of parental rights is a two-step process. First, a fact-finder decides whether the facts justify governmental interference in whatever relationship there is between the birth-parent and his or her child. WIS. STAT. §§ 48.415, 48.424. If there are grounds to terminate a person's parental rights to a child, the trial judge then determines whether those rights should be terminated, WIS. STAT. §§ 48.424(3), (4); 48.426; 48.427, and the birth parent has no special claim to the child because the trial judge has to focus on the child's best interests, ***Richard D. v. Rebecca G.***, 228 Wis. 2d 658, 672–673, 599 N.W.2d 90, 97 (Ct. App. 1999). The jury here found that Michael K. both: (1) "failed to assume parental responsibility" for Zachary, and (2) abandoned Zachary in one of the ways "abandonment" is defined by the statute: "The child has been left by the

parent with any person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of 6 months or longer," WIS. STAT. § 48.415(1)(a)3, unless the parent shows "good cause" for the lack of contact, § 48.415(1)(c). Michael K. does not contend that the evidence does not support the jury's finding that he did not assume parental responsibility for Zachary. Michael K. also does not contend that the trial court erroneously exercised its discretion in concluding that termination of his parental rights to Zachary was in the boy's best interests. *See* ***Darryl T.-H. v. Margaret H.***, 2000 WI 42, ¶27, 234 Wis. 2d 606, 620, 610 N.W.2d 475, 481 ("The ultimate determination of whether to terminate parental rights is discretionary with the circuit court."). This narrows significantly the scope of our review.

¶6 All aspects but one of this appeal turn on whether Michael K.'s trial lawyer was constitutionally ineffective. *See* ***Oneida County Dep't of Social Servs. v. Nicole W.***, 2007 WI 30, ¶33, 299 Wis. 2d 637, 659, 728 N.W.2d 652, 663 (Persons whose parental rights are in jeopardy are entitled to effective assistance of counsel.). The applicable effective-assistance-of-counsel test is that set out in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Nicole W.***, 2007 WI 30, ¶33, 299 Wis. 2d at 659, 728 N.W.2d at 663. Thus, to establish that his or her lawyer was constitutionally ineffective in a termination-of-parental-rights case, a parent must show both: (1) deficient representation; and (2) prejudice. *See* ***Strickland***, 466 U.S. at 687. To prove deficient representation, the parent must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." *See* ***id.***, 466 U.S. at 690. To prove prejudice, the parent must demonstrate that the lawyer's errors were so serious that the parent was deprived of a fair trial and a reliable outcome. *See* ***id.***, 466 U.S. at 687, 694.

Further, we need not address both aspects of the ***Strickland*** test if the parent does not make a sufficient showing on either one. *See* ***id.***, 466 U.S. at 697. As we see below, Michael K. has not shown ***Strickland*** prejudice in connection with the fifteen page-reference instances that he claims on appeal shows that he was denied his right to participate meaningfully in the proceedings.

¶7 We now turn to Michael K.'s appellate contentions.

II.

A. *Michael K.'s alleged inability to hear the proceedings.*

¶8 There is no doubt but that a person whose parental rights may be terminated has a right to meaningfully participate in the termination-of-parental-rights proceedings. ***State v. Lavelle W.***, 2005 WI App 266, ¶2, 288 Wis. 2d 504, 508, 708 N.W.2d 698, 699–700. Michael K. was incarcerated during the trial and participated by an audio-video hookup. He claims that this prevented him from meaningfully participating because, his brief asserts, "[o]n at least 16 occasions, Michael K. complained that he could not hear the proceedings."

¶9 In determining whether a parent whose parental rights are in jeopardy has been prevented from meaningfully participating in a termination-of-parental-rights hearing, we credit a trial court's findings of fact unless they are clearly erroneous, WIS. STAT. RULE 805.17(2) (circuit court's findings of fact must be upheld on appeal unless "clearly erroneous"), and review *de novo* the ultimate legal question whether the parent was able to meaningfully participate, ***Lavelle***, 2005 WI App 266, ¶2, 288 Wis. 2d at 508, 708 N.W.2d at 700 (*de novo* review of legal issue). Significantly, though, Michael K.'s trial lawyer never asked the trial court to assess whether Michael K. was able to meaningfully participate in the

trial. Thus, we have been deprived of what the trial court could have found in assessing that contention. Accordingly, we analyze the Record in an ineffective-assistance-of-counsel context Michael K.'s appellate contention that he could not meaningfully participate. *See* ***State v. Beauchamp***, 2010 WI App 42, ¶14, 324 Wis. 2d 162, 176, 781 N.W.2d 254, 261 (unobjected-to error analyzed under ineffective-assistance-of-counsel standards even when a constitutional right is alleged).

¶10 The following are the instances where Michael K. claims, in his main brief, that he could not hear and, accordingly, that he was unable to meaningfully participate in the trial.[1]

(1) In the midst of jury selection, the jury was not present when, after a discussion with the guardian *ad litem* and Veronica K.'s lawyer that has no bearing on this appeal, the trial court asked Michael K., "when the jurors were telling us their backgrounds, were you able to hear once we moved the microphones?" Michael K. responded, "Say that again." The trial court repeated its question and Michael K. responded, "No, I didn't. I can hear some of them talk and some of them I couldn't. The ones that were a littler quieter voice, it was real hard to hear and it was just like a mumble to me. I couldn't actually make out what they were saying." The trial court noted that Michael K. did not have a copy of the jury list but indicated that he would "have an opportunity to speak to [his trial lawyer] prior to the jury selection and he has been taking copious notes on each of the jurors, okay?" Then:

[1] Michael K.'s reply brief purports to give some others. We do not, however, consider arguments that are made for the first time in a reply brief. ***Richman v. Security Savings & Loan Ass'n***, 57 Wis. 2d 358, 361, 204 N.W.2d 511, 513 (1973).

> THE COURT: Is this microphone on? You can't hear me?
>
> MR K[.]: Yeah.
>
> THE COURT: All right. What I said was is that your attorney has been taking notes on each of the jurors and he will have an opportunity to discuss those with you prior to the selection process, okay?
>
> MR K[.]: All right
>
> THE COURT: All right.

Michael K. has not shown how he was prejudiced by this exchange.

(2) During jury selection, the guardian *ad litem* asked the jurors to "please raise your hand if you can hear me[.]" A juror said, "I am having trouble." Then, after the guardian *ad litem* essentially asked that juror if he was "having trouble hearing me," the juror said "Now I can." The guardian *ad litem* then explained: "Mr. K[.], I asked them in a soft voice if they could hear me to find out who couldn't." Michael K. responded, "I can't hear you." The guardian *ad litem* then said, "Okay. If I talk in a more slightly lower [*sic* — "louder"?] voice, can you hear me okay?" The transcript indicates that the "Juror" responded, "Yes, Ma'am." Michael K. has not shown how he was prejudiced by this exchange.

(3&4) The following during Veronica K.'s adverse examination of Michael K. are the pertinent excerpts from the Record page reference (and the one before it) cited by Michael K.'s main appellate brief:

> [Veronica K.'s lawyer]: Mr. K[.] can you hear me okay?
>
> Mr. K[.]: Yes.
>
> Q: All right. What is your current address?
>
> A: Say that again.

> Q: What is your current address?
>
> A: Right here where I'm at?
>
> Q Right.
>
> …
>
> Q: We are here because Veronica K[.] started a termination of parental rights case by serving you with a summons and petition for termination of parental rights on or about July 16, 2010; is that correct?
>
> A: 20 what?
>
> Q: Ten, last year?
>
> A: Right.

At this point the trial court asked the courtroom deputy if there was a way of "turning up our mikes." Veronica K.'s lawyer then asked, "Can you hear me better now?" and Michael K. said, "It seems a little better," and Veronica K.'s lawyer's questions and Michael K.'s answers continue. Michael K. has not shown how he was prejudiced by these exchanges.

(5) The following exchange occurs some nine pages after those recounted in "(3&4)" above, and Veronica K.'s lawyer asked Michael K. about Veronica K.'s pregnancy with Zachary:

> Q: And then during the course of the pregnancy you were confined to jail for a period of time; is that correct?
>
> A: Say again.
>
> THE COURT: Well, you know what, let's have the deputy try to move the microphone to see if that is any better than my microphone. Is that better?
>
> THE WITNESS: Way better.

Michael K. has not shown how he was prejudiced by this exchange.

(6) Four pages later:

> Q: And after she came out of the hospital you say she lived with her sister-in-law; is that correct?
>
> A: What?
>
> Q: Did you hear me?
>
> A: No, what did you say?
>
> Q: And after she came out of the hospital I believe you indicated that she went to live with her sister-in-law and not with you; am I correct about that?
>
> A: No.

Veronica K.'s lawyer's questions and Michael K.'s answers continue, and Michael K. has not shown how he was prejudiced by this exchange.

(7) Eleven pages later there was this exchange during Veronica K.'s lawyer's examination of Michael K.:

> Q: Had you been contributing to the mortgage payments just prior to the foreclosure?
>
> A: Say that again.
>
> Q: Yes, just prior to Veronica being foreclosed upon in the condominium had you been supplying her with money to pay the mortgage?
>
> A: No.
>
> Q: Then from June of 2008 to November of 2008, another period of incarceration that you testified to, do you know where Veronica and Zachary were living? Do you know the answer?
>
> A: I didn't hear you.
>
> Q: Do you know where Zachary and Veronica were living between June and November of 2008
>
> A: No.

Michael K. has not shown how he was prejudiced by this exchange.

(8&9) Fifty-two pages later, during the re-direct examination of Veronica K.'s sister-in-law by Veronica K.'s lawyer the trial court started to ask Michael K. a question, but first asked, "Can you hear me?" Michael K. responded, "Barely but I can hear you." The trial court then asked someone to "[b]ring the microphone up to me, please," and then asked Michael K. "Can you hear me now, Mr. K[.]? "Michael K. responded "Yeah." A full page later, the trial court explained that the session "cannot go past 5 o'clock" and that they will break for the day. Michael K. said, "You're are breaking up." [*sic*] The trial court asked, "Can you hear me?" Michael K. said, "I can hear you." Michael K. has not shown how he was prejudiced by these exchanges.

(10) The next day, during Veronica K.'s lawyer's resumed examination of Michael K,. there was the following exchange:

> Q: All right, other than the claim that you gave her 20 percent of what you were making at the car dealership, have you given her any money for support since then?
>
> A: I can't hear you.
>
> Q: Have you given her any money for support since 2009, other than the car dealership money and the $200 you claim to have given her at Gurnee Mills?
>
> A: No, that's probably about right. I'm not for sure.

Michael K. has not shown how he was prejudiced by this exchange.

(11) The following exchange was during Veronica K.'s lawyer's direct-examination of her:

> Q: Miss K[.], what is your address.
>
> A: [gives address]

> Q: How long have you lived at that address?
>
> MR K[.]: I can't hear her.
>
> THE COURT: All right, why don't we try putting that microphone up there to see if it helps.
>
> [Veronica K.'s lawyer]: Why don't we test to see if you can hear better with that other microphone there?
>
> Q: State your name again.
>
> A: My name is Veronica K[.]
>
> [Veronica K.'s lawyer]: Can you hear that, Mr. K[.]?
>
> MR K[.]: Yeah, I can definitely hear that.

Michael K. has not shown how he was prejudiced by this exchange.

(12) The following exchange was during Michael K.'s direct-examination by his lawyer:

> Q: After Veronica gave birth to Zachary, did you live with Veronica at that time, or where did she go?
>
> A: You're breaking up.
>
> Q: Okay, I'll move this microphone. After the hospital and your son was born, where did you live?
>
> A: I lived in Hutchinson, and I also lived with my friend.

Michael K. has not shown how he was prejudiced by this exchange.

(13) Some five pages later in the transcript, the trial court asked Michael K. to "ask the deputy there to pull that camera back. Right now, all the jury can see is the top of your head." Michael K. responded, "He says he can't do it." The trial court then told Michael K. to ask the deputy to "being [*sic* "bring"?] it down a Little bit so we are not looking at the top of your head." (capitalization in

original). Michael K. responded, "It won't go down," and the trial court said, "Okay, we tried, let's continue." Contrary to the representation in Michael K.'s appellate brief, this is not an example of an instance of where "he could not hear the proceedings." Michael K.'s appellate lawyers are cautioned that the judicial process requires candor. In any event, Michael K. has not shown how he was prejudiced by this exchange.

(14) Twelve pages later, during Michael K.'s cross-examination by Veronica K.'s lawyer, there was the following exchange:

> Q: When you had weekend visits in 2007, how long after the visitation order was in place did you have those visits before you were incarcerated and you were in a work-release program?
>
> A: You are breaking up a little bit.
>
> Q: How long did you have visits with Zachary in 2007, before you were incarcerated or placed in a work-release program?
>
> A: I'm not sure on the exact amount actually.

Michael K. has not shown how he was prejudiced by this exchange.

(15) Five pages later, there was the following exchange at the start of Michael K.'s examination by the guardian *ad litem*:

> Q: This court order that you claim says that you can't have contact --
>
> A: I can't hear.
>
> Q: I'll move. What judge said that you can have no contact with Veronica K[.]?
>
> A: The judge that was in Illinois. I don't know his name.

Michael K. has not shown how he was prejudiced by this exchange.

(16) The following was when the trial court asked Veronica K.'s lawyer and the guardian *ad litem* whether they objected to an instruction that told the jury that it was not to hold the evidence of Michael K.'s illegal drug use and his incarceration to conclude that he "is a bad person." Veronica K.'s lawyer said he did not object. The guardian *ad litem* objected because she did not "think it was necessary." At that point, Michael K. said: "Your Honor, can you increase the volume? It's really hard for me to hear again." The trial court then asked, "Can you hear me now?" Michael K. responded, "Yep. Thank you." The trial court told everyone that it was "going to read [the instruction] over the objection of the Guardian *ad Litem*." Michael K. has not shown how he was prejudiced by this exchange.

¶11 As we pointed out in ***Lavelle***:

> [A]ny alternative to a parent's personal presence at a proceeding to terminate his or her parental rights *must*, unless either the parent knowingly waives this right or the ministerial nature of the proceedings make personal-presence unnecessary, be *functionally equivalent to personal presence*: the parent must be able to assess the witnesses, confer with his or her lawyer, and, of course, hear *everything* that is going on.

Lavelle, 2005 WI App 266, ¶8, 288 Wis. 2d at 513–514, 708 N.W.2d at 702–703. Although, as we have seen, there were times when Michael K. had trouble hearing what was said, those instances were relatively few and the trial court and the lawyers immediately fixed things. Further, as we see, Michael K. did not seem to hesitate when he had trouble hearing what was going on, and, contrary to the assertion in Michael K.'s reply brief that the trial court told him that he could "not 'interrupt the jury' during the remainder of the hearing," the trial court issued no such blanket order; the inference that Michael K.'s reply brief would have us draw is false. Rather, the trial court was discussing with him Michael K.'s desire to

have the deputy, who was out of Michael K.'s room, turn the air-conditioning down or off:

> THE COURT: All right, when he comes back, if you could just --- Is that central air where you are?
>
> Mr. K[.]: I really can't tell. I'll ask if he can shut it off so that I can hear better.
>
> THE COURT: All right. I don't want you to interrupt the jury when they are speaking *so I don't know if you can slip him a note* and ask him if that noise could be shutoff or the blower so that you can hear better and tell him that the Court asked him if he can do that, okay?

(Emphasis added.) The trial court did *not* tell Michael K. not to interrupt when he could not hear; it just wanted him not to speak to the deputy during jury selection, but, rather, "slip him a note."

¶12 Taken either separately or together, Michael K. has not shown how he was prejudiced either by his occasional difficulty in hearing or the occasional breakup of the audio. *See* ***State v. Thiel***, 2003 WI 111, ¶60, 264 Wis. 2d 571, 605, 665 N.W.2d 305, 322 ("Just as a single mistake in an attorney's otherwise commendable representation may be so serious as to impugn the integrity of a proceeding, the cumulative effect of several deficient acts or omissions may, in certain instances, also undermine a reviewing court's confidence in the outcome of a proceeding.").

B *Alleged failure of Michael K.'s trial lawyer to get what his brief asserts was "evidence that Michael K. completed drug rehabilitation."*

¶13 At the post-termination hearing, Michael K. testified that he had given to his trial lawyer a certificate that, according to Michael K.'s testimony, showed that Michael K. had completed a drug-treatment program. According to

Michael K,. his trial lawyer said that they were, as phrased by Michael K., "not here for that." Michael K.'s trial lawyer testified at the hearing that Michael K. had given him a "March 2009 document that came from a criminal facility and a counselor there that said that he had completed his incarceration and he had completed alcohol and drug counseling in that program."[2] Michael K. claims that this was ineffective representation because, he argues, the certificate would have contradicted a statement in an order entered by a Cook County, Illinois judge granting Veronica K.'s motion to transfer "adjudication and visitation issues" between her and Michael K. to Wisconsin. The order, however, recites the following:

> Prior to this Court granting removal of the minor child [Zachary], the Court entered an order on August 2, 2007 requiring MICHAEL to comply with a drug treatment program and present proof of his successful completion of said program prior to the Court entering any ruling on his request for visitation with the parties' minor child. The parties were before this Court on September 24, 2010 and at no time since the entry of the Court's order entered August 2, 2007 *has MICHAEL ever presented documentary proof that he successfully completed any drug treatment program*.

(Emphasis added, uppercasing in original.) Of course, Michael K.'s trial lawyer at the termination-of-parental-rights trial had nothing to do with whether Michael K. gave the Illinois judge the required "documentary proof." Michael K. contends, however, that his trial lawyer should have used the certificate to attack Veronica K.'s credibility at the trial because she read to the jury from the Illinois judge's order. But the order referenced what Michael K. did not do, not the truth of whether he had, in fact, completed "any drug treatment program." The certificate

[2] As we see below, the only "certificate" in the Record is one dated April of 2008.

did not contradict the order's assertion that Michael K. never "presented documentary proof that he successfully completed any drug treatment program." Further, the "certificate" Michael K. references in his appellate briefs is a "CERTIFICATE OF COMPLETION" that asserts that Michael K. had "SUCCESSFULLY COMPLET[ED] 120 DAYS OF SUBSTANCE ABUSE TREATMENT," but significantly was dated "ON THE 17TH OF APRIL IN THE YEAR TWO THOUSAND AND EIGHT." (Underlining and small capitals in original, bolding omitted.) April of 2008 (or even the March of 2009 date noted by Michael K.'s trial lawyer at the evidentiary hearing exploring whether he gave Michael K. effective representation) was, obviously well before entry of the Illinois court order, which, as we have seen, references a hearing the Illinois court held in 2010, and Michael K. has not shown why he did not present the certificate to the Illinois judge if, in fact, it was evidence that he was no longer using illegal drugs.

¶14 Michael K. also argues that his trial lawyer "had 13 months to investigate Michael K.'s claims of rehabilitation, but did not retain an investigator, seek documentation, or ask Michael K. if he discontinued his drug use." Michael K.'s appellate briefs, however, do not cite anything in the Record that shows that Michael K. had, in fact, "discontinued his drug use." *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994) (defendant who alleges a failure to investigate must allege with specificity what the investigation would have revealed and how it would have altered the outcome).

C. *Alleged failure of Michael K.'s trial lawyer to get copies of the Illinois court file that recounts the proceedings before that court transferred the case to Wisconsin.*

¶15 In his testimony at the post-termination hearing, Michael K.'s lawyer admitted that he had not gotten all of the documents in the Illinois court file relating to Michael K., Veronica K., and Zachary. He did say, however, that he "had most of them." Although Michael K.'s appellate briefs assert a number of things that the Illinois court file shows, they do not indicate *which were unknown to Michael K.'s trial lawyer* in light of the trial lawyer's uncontested testimony that he "had most" of the file. Further, Michael K.'s main appellate brief concedes that "Michael K was questioned about and testified to some" of the "facts" the brief contends were in the full Illinois court Record. The brief complains, however, that Michael K.'s "testimony remained uncorroborated, and Veronica K. testified to the contrary." In light of not showing: (1) what specific things were in the Illinois court Record that Michael K.'s trial lawyer did not know, and (2) how his failure to either know or use those things made the result of the trial unreliable, Michael K. has not shown ***Strickland*** prejudice.

D. *Alleged prejudicial jury instruction in connection with the verdict question asking whether Michael K. did not "assume a substantial parental relationship" with Zachary.*

¶16 Michael K. objects to the italicized part of the following jury instruction, given by the trial court in connection with how the jury was to evaluate Michael K.'s periodic incarceration:

> In determining whether an incarcerated parent has or does not have a substantial parental relationship with his child in addition to the considerations indicated in other

> parts of this instruction, you may consider the following factors and all other evidence bearing on this issue, the reason for the incarceration, the nature of the underlying criminal behavior, whether the parent engaged in that behavior knowing that the resulted [*sic*—"resulting"?] incarceration or potential incarceration would prevent or hinder him from assuming his responsibility, efforts to establish a substantial parental relationship despite incarceration including but not limited to whether the parent offered to pay for or pay child support and his financial ability or inability to do so, request for visitation with the child, and if permitted the success of and the quality of those visits, appropriate efforts to communicate with the child and with those responsible for the care and welfare of the child, whether such efforts were prohibited or impeded by other individuals, requests or absence of request for information relating to the child's education, health and welfare, responsiveness or lack of responsiveness of a parent to efforts, if any, of others to involve a parent in the life of the child, efforts or lack of efforts to enlist available and appropriate family members or friends in meeting the physical, financial and emotional needs of the child, the extent and the success of any such efforts *and the reason Michael K[.] was not available physically to establish a parental relationship with Zachary R[.] K[.] and whether it was a result of Michael K[.]'s arrests, bond and convictions caused by his own conduct.*

(Emphasis added.) Michael K., claims that his trial lawyer was constitutionally ineffective for agreeing to the italicized part of what the trial court told the jury. He argues that "it *presumes* that Michael K. did not establish a parental relationship." (Emphasis by Michael K.'s brief.) It does no such thing—clearly, an *incarcerated* parent cannot, by the very nature of *being locked up*, be "available *physically* to establish a parental relationship."[3] The instruction correctly told the jury how to assess Michael K.'s periodic incarceration in light of all the other

[3] We again caution Michael K.'s appellate lawyers to not argue a "bridge too far"—it, in our view, comes perilously close to violating the ethical rules that require full candor to tribunals and opposing parties.

appropriate factors. His trial lawyer was not ineffective for agreeing to the instruction.

¶17 Michael K. has not shown ***Strickland*** prejudice in connection with any of the alleged failings of his lawyer or his ability to fully participate at the trial, and this is true whether each is looked at separately or they are all lumped together. *See* ***Thiel***, 2003 WI 111, ¶60, 264 Wis. 2d at 605, 665 N.W.2d at 322.

E. *Alleged improper jury verdict question on "abandonment."*

¶18 Veronica K.'s petition to terminate Michael K.'s parental rights to Zachary alleged: "Michael []. K[.], the birth father, had contact with the child in June 2009. He has not communicated with the child in the form of letters, cards or telephone." Michael K.'s trial lawyer objected to the jury verdict question that asked: "Did Michael K[.] fail to visit or communicate with Zachary K[.] for a period of 6 months or longer from birth up to August 30, 2010." He argued that his right to prepare a defense was truncated by what he claims was an expansion of the pertinent six-month period to the time before August of 2009, and further, that the trial court did not tell the jury that it would have to agree on which six-month period it was using to answer that question. He also claims that the petition was unduly vague as to the alleged period of abandonment and that this, too, entitles him to a new trial.

¶19 As we have seen, however, the jury also determined that Michael K. did not "assume parental responsibility for Zachary," and Michael K. does not dispute that there was sufficient evidence to support the parental-responsibility verdict answer. There need be only one finding that there are grounds to assess whether termination is in a child's best interests. *See* WIS. STAT. § 48.415 ("Grounds for termination of parental rights shall be *one* of the following:")

(emphasis added). Accordingly, the jury's finding that Michael K. had not established a parental relationship with Zachary was sufficient for the trial court to move to the best-interests phase. We thus leave for another day the dispute over the requisite specificity required in a petition alleging abandonment and what the jury should be told. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed). ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").

¶20 We affirm.

By the Court.—Orders affirmed.

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