**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

September 23, 1997

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 97-2118**

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

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**IN RE THE TERMINATION OF PARENTAL RIGHTS OF PERRY J.N., A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**PERRY R.N.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

FINE, J. Perry R. N. appeals from an order terminating his parental rights to Perry J. N. He claims that the trial court erred in three respects. First, he contends that the trial court improperly instructed the jury that it could consider his escape from confinement in its determination of all the contested issues. Second, he claims that the subsequent-remedial-measures provisions of RULE

904.07, STATS., require reversal. Third, he argues that the trial court failed to give proper weight to the impending divorce of the couple that would be adopting Perry J. N. as a result of the termination of Perry R. N.'s parental rights.[1] We affirm.

Perry J. N. was born in February of 1990. His mother was sixteen and not married. Less than a year later, he was found to be a child in need of protection and services, and was placed with a foster family. Perry R. N. was adjudicated as the child's father in September of 1993. He has been incarcerated in the Wisconsin state prisons since July of 1990, and has a mandatory-release date of September 2, 1999.

A petition to terminate the parental rights of Perry J. N.'s mother and father was filed in April of 1996. An order terminating the mother's parental rights was entered on default, and is not at issue on this appeal.

A jury fact-finding hearing was held to determine whether there were grounds to terminate Perry R. N.'s parental rights to the child. *See* § 48.424, STATS. The jury found that there were. The trial court then determined that termination of Perry R. N.'s parental rights was in Perry J. N.'s best interests. We discuss Perry R. N.'s claims of trial-court error in turn.

1. *Jury Instruction.* One of the issues the jury had to decide was whether "the agency responsible for the care of the child and the family [the Milwaukee County Department of Human Services] has made a diligent effort to provide the services ordered by the court," § 48.415(2)(b)2, STATS., in assisting Perry R. N. in connection with his responsibilities to the child. An affirmative

[1] Perry J. N.'s guardian *ad litem* has filed a brief urging affirmance.

finding on this question was required before the jury could find that Perry J. N. was in "[c]ontinuing need of protection and services," which was the ground asserted for termination of Perry R. N.'s parental rights. *See* § 48.415(2).[2] The term "diligent effort" is defined by § 48.415(2)(b)1 as "an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child, the

[2] Section 48.415, STATS., provides:

> **Grounds for involuntary termination of parental rights.** At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:
>
> ….
>
> **(2)** CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services, which shall be established by proving all of the following:
>
> (a) That the child has been adjudged to be in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).
>
> (b) 1. In this paragraph, "diligent effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child, the level of cooperation of the parent and other relevant circumstances of the case.
>
> 2. That the agency responsible for the care of the child and the family has made a diligent effort to provide the services ordered by the court.
>
> (c) That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders; and that the parent has failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.

level of cooperation of the parent and other relevant circumstances of the case." In this connection, the State sought a jury instruction that told the jury that it could consider the fact that Perry R. N. had escaped from his correctional facility in June of 1995, and remained at large until September of 1995. The trial court agreed, and Perry R. N. did not object. The trial court instructed the jury as follows:

> Evidence has been received to the effect that the father, Mr. [Perry R. N.], has been convicted of criminal offenses. This evidence may be considered by you in weighing the testimony of that witness and in determining the witness' credibility, and except for the escape conviction may not be used for any other purpose. The evidence of Mr. [N.]'s escape conviction may also be considered in answering the questions before you in the special verdict form.

Perry R. N. claims on appeal that this was error.

Although Perry R. N. initially objected to letting the jury learn of his escape conviction, he acquiesced in the trial court's ruling that the evidence was admissible.[3] He also did not request a limiting instruction under RULE 901.06, STATS.[4] By not objecting to the trial court's instruction, Perry R. N. waived any claimed error. *See* RULE 805.13(3), STATS.[5]

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[3] [Perry R. N.'s lawyer]: Your Honor, my client has instructed me not to argue further against the admission of that--of that information; is that correct Mr. [N.]?

[Perry R. N.]: Correct.

[4] RULE 901.06, STATS., provides, as material here: "When evidence is admissible ... for one purpose but not admissible ... for another purpose, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

[5] RULE 805.13(3), STATS., provides:

> INSTRUCTION AND VERDICT CONFERENCE. At the close of the evidence and before arguments to the jury, the court shall conduct a conference with counsel outside the presence of the jury. At the conference, or at such earlier time as the court reasonably directs, counsel may file written motions that the

(continued)

2. *Subsequent Remedial Measures*. After the fact-finding hearing but before the dispositional hearing at which the trial court determined that it was in the best interests of the child that Perry R. N.'s parental rights be terminated, the trial court modified the conditions imposed on Perry R. N. in connection with another of his sons. The new order provided that Perry R. N.'s alcohol and drug assessment could be made either by the Milwaukee County Department of Human Services, as the initial order provided, or by the Department of Corrections. Although presented as an issue under RULE 904.07, STATS., Perry R. N.'s

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> court instruct the jury on the law, and submit verdict questions, as set forth in the motions. The court shall inform counsel on the record of its proposed action on the motions and of the instructions and verdict it proposes to submit. Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. *Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.*

(Emphasis added.) Apparently recognizing that the appellate record indicates that he waived any objection to the trial court's instruction, Perry R. N. seeks to invoke our discretionary power of reversal, presumably under § 752.35, STATS., although he cites a supreme court decision that exercised its powers of discretionary reversal under § 751.06, STATS.

Section 752.35, STATS., permits us to review unobjected-to trial court errors in two circumstances: 1) when "the real controversy has not been fully tried," and 2) if there has been a miscarriage of justice *and* if we "can conclude that a new trial would probably produce a different result." ***Vollmer v. Luety***, 156 Wis.2d 1, 27, 456 N.W.2d 797, 809 (1990) (Bablitch, J., concurring on behalf of six members of the court). We do not have the power to review unobjected-to trial court errors that go to the "integrity of the fact-finding process." ***Ibid.*** Although we thus have authority to review an unobjected-to but erroneous jury instruction under the "real controversy has not been tried" prong of § 752.35, STATS., which does not require that we also conclude that a new trial would most likely produce a different result, ***Vollmer***, 156 Wis.2d at 19–20, 456 N.W.2d at 805–806, Perry R. N. has not demonstrated that the trial court's instruction prevented the "real controversy" from being tried. There was evidence before the jury that Perry R. N.'s escape status interfered with the provision of services to him, at least during that period. Accordingly, we decline to relieve Perry R. N. of the RULE 805.13(3), STATS., waiver.

argument is in essence that the trial court erred by not considering the modification at the dispositional hearing.[6]

There are two problems with Perry R. N.'s argument.

First, RULE 904.07, STATS., does not apply here; it is the reification of the common-law view that a tortfeasor's negligence cannot be shown by the fact that the tortfeasor has eliminated the danger that resulted in the plaintiff's injuries. It is designed to encourage remedial measures by not increasing the likelihood that those measures will be taken as an admission of fault.

Second, Perry R. N.'s post-remedial-measures argument was not made to the trial court. Perry R. N.'s right to argue this matter on appeal was, accordingly, waived. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443, 287 N.W.2d 140, 145 (1980). Although this "waiver rule" is one of administration and is subject to exceptions where warranted, ***ibid.***, Perry R. N. has presented nothing that either excuses his not making this argument to the trial court or that warrants our consideration now. As explained below, the trial court's decision whether termination of parental rights is in the child's best interests is vested trial court's reasoned discretion. The trial court obviously knew about the modification and that the modification concerned one of the issues in the termination-of-parental-rights proceeding. There is nothing in the appellate record that indicates that the trial court did not give the modification whatever weight it deemed appropriate.

[6] Perry R. N. also complains that the trial court erred in not reconsidering "its decision not to render a judgment notwithstanding the verdict at the TPR trial." He never moved the trial court for that relief, however.

3. *Foster family divorce.* Perry R. N. argues that the trial court "underestimated the importance of the separation and impending divorce in the prospective adoptive family." We disagree.

A trial court's decision whether termination of parental rights is in the child's best interests is vested trial court's reasoned discretion. ***Brandon S.S. v. Laura S.***, 179 Wis.2d 114, 150, 507 N.W.2d 94, 107 (1993). The parameters of that discretion is set by § 48.426, STATS.[7] The appellate record reveals that the

[7] Section 48.426, STATS., provides:

> **Standard and factors. (1)** COURT CONSIDERATIONS. In making a decision about the appropriate disposition under s. 48.427, the court shall consider the standard and factors enumerated in this section and any report submitted by an agency under s. 48.425.
>
> **(2)** STANDARD. The best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter.
>
> **(3)** FACTORS. In considering the best interests of the child under this section the court shall consider but not be limited to the following:
>
> (a) The likelihood of the child's adoption after termination.
>
> (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
>
> (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
>
> (d) The wishes of the child.
>
> (e) The duration of the separation of the parent from the child.
>
> (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

trial court analyzed the facts of this case in light of the factors set out in § 48.426; Perry R. N. does not argue the contrary. The trial court also considered how foster family's marital problems would affect the child, and gave those problems the weight that it believed was appropriate. This record amply supports the guardian *ad litem*'s analysis: "The stress that the divorce may have caused the child is insignificant in comparison to the disruption and trauma that would have been caused by attempting to move him in with total strangers [Perry R. N.'s family] who had done little to establish a relationship with this child." Perry R. N. has not shown that the trial court erroneously exercised its discretion.

*By the Court*.—Order affirmed.

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