COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3537

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

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

JALAINA M.F.,

PETITIONER-APPELLANT,

V.

BLAKE W.A.,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Lafayette County: WILLIAM D. JOHNSTON, Judge. *Affirmed.*

EICH, C.J.[1] Jalaina M.F. appeals from a judgment, entered on a jury verdict, dismissing her petition to terminate the parental rights of Blake W.A. to their minor child, Devon T.P. The termination proceedings were grounded on

[1] This case is decided by a single judge pursuant to § 752.31(2)(e), STATS.

allegations that Blake W.A. had abandoned Devon T.P. within the meaning of § 48.415(1)(a)3, STATS., which provides as follows:

> (a) **ABANDONMENT** … [is] established by proving that:
>
> ….
>
> 3. 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 ….[2]

The first question of the special verdict asked: "Was the child, Devon T.P., left by Blake W.A. with a relative or other person?" The jury answered "no," and Jalaina M.F. argues on appeal that the answer is contrary to the evidence, which, she says, "clearly shows that Blake W.A. 'left' Devon" with her. She also argues that the trial court should have directed a verdict of abandonment. We disagree and affirm the judgment.

Section 805.14(1), STATS., provides that a motion challenging the sufficiency of the evidence to support a verdict (or an answer in a verdict) will be granted if "the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party."

Appellate review of a challenged jury verdict is quite properly limited to a search for credible evidence; we do not search for evidence that might

[2] Section 48.415(1)(c), STATS., states: "Abandonment is not established" if the parent can prove by a preponderance of the evidence that he or she had good cause for failing to visit or communicate with the child. The supreme court has said that an affirmative showing under § 48.415(1)(a)3 creates a "rebuttable presumption of abandonment," which may be challenged by evidence (under § 48.415(1)(c)) that the parent "has not disassociated herself [or himself] from [the child] or relinquished responsibility for [the child]'s care and well-being." ***Odd S.G. v. Carolyn S.G.***, 194 Wis.2d 365, 373, 533 N.W.2d 794, 797 (1995).

sustain a verdict the jury could have reached but did not. Rather, we look only for evidence supporting the verdict returned by the jury. ***Richards v. Mendivil***, 200 Wis.2d 665, 671, 548 N.W.2d 85, 88 (Ct. App. 1996). Thus, if the record contains any credible evidence that, under any reasonable view, fairly admits of an inference that supports a jury's finding, that finding will stand. ***Ferraro v. Koelsch***, 119 Wis.2d 407, 410-11, 350 N.W.2d 735, 737 (Ct. App. 1984); § 805.14(1), STATS. To overturn a verdict, we must be satisfied that, considering all the credible evidence—and all reasonable inferences that can be drawn from that evidence—in the light most favorable to the verdict, there is no credible evidence to sustain the challenged finding. ***Kuklinski v. Rodriguez***, 203 Wis.2d 324, 331, 552 N.W.2d 869, 872 (Ct. App. 1996). And if more than one inference can be drawn from the evidence, the inference that supports the jury's finding must be followed "unless the evidence on which that inference is based is incredible as a matter of law." ***State v. Poellinger***, 153 Wis.2d 493, 506-07, 451 N.W.2d 752, 757 (1990). Finally, we give special weight to the jury's finding where, as here, it has the specific approval of the trial court. ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis.2d 462, 472, 529 N.W.2d 594, 598 (1995).

Jalaina M.F. argues that the existence of a court order determining Devon's paternity, placing him with her and giving Blake W.A. periods of reasonable visitation establishes—apparently as a matter of law—that Blake W.A. "left" Devon with her within the meaning of § 48.415(1)(a)3, STATS. The argument is unclear, for it appears to assert that the only fact of importance in determining abandonment under § 48.415(1)(a)3 is how the child was initially left with the other person—yet the argument is supported by citations to, and quotations from, ***Rhonda R.D. v. Franklin R.D.,*** 191 Wis.2d 680, 530 N.W.2d 34 (Ct. App. 1995), where we held just the opposite: that § 48.415(1)(a)3 must be

interpreted in light of its manifest purpose which focuses on the parent's contact, or lack of contact, with the child, and not solely on the fact that the child had been placed with another person. ***Id***. at 705, 530 N.W.2d at 44.

The trial court rejected a similar argument advanced by Jalaina M.F. Aware that the paternity order granted Blake W.A. visitation rights, the court concluded that the evidence could support the jury's finding that he had not abandoned Devon. After discussing at some length Blake W.A.'s attempts to enforce his visitation rights, only to be frustrated by Jalaina M.F.'s actions, the court stated:

> The jury could reasonably infer from the demeanor of [Blake W.A.] and the witnesses who gave testimony that [he] never left or abandoned Devon, rather always sought to exercise his court ordered placement rights with Devon and was frustrated and prevented from doing so by conscious efforts and actions on the part of [Jalaina M.F.].
>
> From the foregoing, I conclude that there was … sufficient credible evidence to support [the jury's] answer to Question No. 1 … that the child … was not left by [Blake W.A.] with a relative or other person.

As we said in ***Rhonda R.D.***, "[A] parent does not abandon a child simply because the child lives with the other parent, pursuant to a custody order or otherwise." ***Id***. at 707, 530 N.W.2d at 45. The focus, rather, "is on the … parent's conduct once the child is living with the other parent." ***Id***. We believe ample evidence exists from which the jury could determine that Blake W.A. had attempted over a considerable period of time to exercise his visitation/temporary placement rights with Devon, and that Jalaina M.F. continually frustrated those attempts.

Devon was born in August 1988. Jalaina M.F. had not told Blake W.A. that she was pregnant and did not tell him of Devon's birth. A judgment declaring Blake W.A. to be Devon's father was entered in May 1988, giving him periods of physical placement with Devon: "reasonable visitation upon reasonable notice." Jalaina M.F. acknowledged at the time of the paternity judgment that she did not want any visitation between Devon and Blake W.A. There is little dispute that Blake W.A. had regular, every-other-weekend visits with Devon in 1992 and 1993. Blake W.A. testified that, beginning in 1993, whenever he called ahead for visitation, Jalaina M.F. would say she was busy and tell him to call again the following week.

In succeeding months, Blake W.A. said, he made several attempts, all with the same result, and by late 1993 he had become "frustrated" and stopped calling because he assumed the results would be the same. He testified that he also felt that because Jalaina M.F. had recently had another child and was planning to marry the father, he would have a better chance of re-establishing contact with Devon if he just "backed off and … maybe someday … things would resume to normal." He also testified that members of his family sent cards and letters to Devon, but he assumed Jalaina M.F. was intercepting the letters because a check that was sent to Devon was never cashed.

Blake W.A.'s mother, Janet A., confirmed Blake W.A.'s testimony regarding Jalaina M.F.'s continuing refusals to make visitation arrangements, stating that she called Jalaina M.F. once a week for ten consecutive weeks in mid-1993, and each time Jalaina M.F. said she had other plans and told her to call again. On cross-examination, Jalaina M.F. acknowledged that on one occasion when she met Blake W.A. at a tavern, she told him that he "could never see his

son again." And in the year before she filed the petition to terminate Blake W.A.'s parental rights, Jalaina M.F. obtained an unlisted telephone number and did not inform Blake W.A. because she did not want Devon to have a relationship with him.

In her reply brief, Jalaina M.F. argues that much of this evidence was disputed. She asserts, for example, that: (1) Blake W.A.'s testimony that he had regular weekend visitation with Devon over a period of time was "contradicted by the testimony" of herself and another witness; (2) "[t]here is also a dispute in the testimony" as to the number of times Jalaina M.F. refused Blake W.A.'s visitation attempts; (3) Blake W.A.'s statements that he had requested Devon's placement with him on an every-other-week basis after 1993 was "contradicted by [her own testimony]"; (4) whether Blake W.A. made other attempts to have placement after May 31, 1993—the last time she states he actually had visitation—was "disputed"; (5) the testimony that Blake W.A. and/or his mother called Jalaina M.F. on a weekly basis for more than ten weeks, attempting to schedule visits with Devon, was "not undisputed"; and (6) Blake W.A.'s evidence about sending letters and cards to Devon was "denied by Jalaina M.F."

It is a rare case where trial testimony is wholly uncontradicted, and, as we have noted above, our task is to search the record for evidence to support the jury's verdict, not for evidence that might support a verdict the jury did not reach. ***Staehler v. Beuthin***, 206 Wis.2d 610, 617, 557 N.W.2d 487, 489 (Ct. App. 1996). It is for the jury, not the appellate court, to determine the credibility of witnesses and to weigh the evidence: "Where there are inconsistencies within a witness's testimony or between witnesses' testimonies, the jury determines the credibility of each witness

and the weight of the evidence." ***State v. Sharp***, 180 Wis.2d 640, 659, 511 N.W.2d 316, 324 (Ct. App. 1993).

We are satisfied that the trial court correctly ruled that there was sufficient evidence in the record to support the jury's finding that Blake W.A. did not "abandon" Devon within the meaning of § 48.415(1)(a)3, STATS. And our holding in this respect necessarily rejects Jalaina M.F.'s arguments that the court should have directed a verdict in her favor on the issue.

By the Court.–Judgment affirmed.

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