COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1618 **Cir. Ct. No. 2014TP71**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO C. L. B., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

A. M. B.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MARK A. SANDERS, Judge. *Affirmed*.

¶1 CURLEY, P.J.[1] Andy[2] appeals from a trial court order terminating his parental rights to Catie and from an order denying his "Postremand Motion" (hereinafter, "postdisposition motion"). He argues that: (1) his stipulation/admission that Catie remained a child in need of protection or services was not knowing, intelligent, and voluntary; (2) that he received ineffective assistance of counsel; (3) that it is against public policy for a trial court to allow a foster parent to testify that he or she intends to allow an open adoption if parental rights are terminated; and (4) that he is entitled to a new trial in the interests of justice. For the reasons that follow, we affirm.

BACKGROUND

¶2 Andy is the biological father of Catie, who was born on May 18, 2010. Andy was incarcerated at the time of Catie's birth, and he remained incarcerated until early 2016—after the termination of his parental rights and the denial of his postdisposition motion. Catie has never resided with Andy, and Andy did not meet her until she was approximately eighteen months old.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). Accordingly, despite appellant's request for publication, this decision will not be published. WIS. STAT. RULE 809.23(1)(b)4. All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Additionally, pursuant to WIS. STAT. RULE 809.107(6)(e), this court is required to issue a decision resolving 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) upon our own motion or for good cause. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995). On our own motion, we now extend the decisional deadline in this matter through the date of this decision.

[2] The child and parent have been assigned pseudonyms in accordance with WIS. STAT. RULE § 809.19(1)(g) and for ease of reading.

¶3 On August 11, 2010, the Bureau of Milwaukee Child Welfare (BMCW), took temporary physical custody of Catie. She was approximately seven weeks old at that time. A Petition for Protection or Services was thereafter filed on August 13, 2010, and an Order for Temporary Physical Custody dated the same date placed her in Ms. J.'s home, where she remains.

¶4 Catie was found to be a child in need of protection or services (CHIPS) on October 11, 2010, and a CHIPS dispositional order was entered on that date. The CHIPS dispositional order was extended on October 10, 2011, and again on May 28, 2013. All of the dispositional orders set forth conditions for Catie's return, and the orders also set forth the warnings required by WIS. STAT. § 48.356(2).

¶5 As to Andy, the initial CHIPS order set forth numerous goals and conditions for return, including, but not limited to: (1) control his urges and impulses to use marijuana and other legal substances and complete an AODA assessment and recommended treatment and programs; (2) meet his daughter's basic care needs by providing shelter, food, and necessary care items, as well as managing the day to day household responsibilities, including making and keeping medical appointments; (3) maintain a relationship with Catie by regularly participating in successful visitation unless otherwise limited by the court; (4) demonstrate an ability and willingness to provide a safe level of care for Catie, including cooperating effectively with others needed to help care for Catie; and (5) cooperating with the BMCW by staying in touch with the ongoing case manager. The order further required Andy to "sign releases of information for the BMCW and DOC to coordinate services" while he was incarcerated. The October 11, 2010 order also contained an Addendum regarding conditions for incarcerated parents, which identified conditions for return including, but not limited to:

(1) participating in programs recommended by the correctional institution's social worker; (2) maintaining regular contact with the BMCW case worker; and (3) maintaining monthly contact with Catie through letters, cards, drawings, photographs, or other appropriate contact.[3]

¶6 On April 7, 2014, the State of Wisconsin filed a petition to terminate Andy's parental rights to Catie, alleging that she remained a child in continuing need of protection or services pursuant to WIS. STAT. § 48.415(2) and that Andy had failed to assume parental responsibility pursuant to WIS. STAT. § 48.415(6).[4] On May 1, 2014, Andy appeared for an initial appearance with his previously appointed counsel in the underlying CHIPS case, the trial court explained the allegations in the petition and Andy's rights, and the trial court set the matter over. Andy appeared again on June 10, 2014, with his appointed counsel for the termination proceedings, and the trial court again explained the grounds asserted in the petition, Andy's rights, and the bifurcated nature of termination of parental rights (TPR) proceedings and the potential outcomes.

¶7 Andy initially requested a jury trial; however, on the day of the trial, he advised the court that he wished to stipulate and admit that Catie was a child in continuing need of protection or services under WIS. STAT. § 48.415(2). The trial court engaged in an extensive colloquy with Andy and explained the elements of

[3] Both the October 10, 2011, and May 28, 2013 Orders for Extension of Dispositional Order contained the same conditions for return as set forth in the initial Dispositional Order, and the two extensions both referenced the inclusion of the addendum for incarcerated parents.

[4] The petition to terminate parental rights also sought termination of Catie's mother's parental rights. The mother's rights were terminated in conjunction with the proceedings related to Andy's case. The termination of her parental rights is the subject of a separate appeal, 2015AP1617, and is not addressed here.

the continuing need ground and Andy's trial rights. After concluding that Andy's stipulation to grounds was knowing, intelligent, and voluntary, the court accepted his stipulation to the continuing CHIPS ground. During the State's "prove up" of the continuing CHIPS ground, the court heard testimony from the ongoing case manager. Her testimony included the following: (1) that she worked with the Department of Corrections (DOC) to determine the services Andy was eligible for; (2) that she had contacted his social workers at the correctional institution; (3) that Andy's security level had been higher than allowed for participation in certain DOC programs; (4) that Andy had difficulty maintaining a lower security level and that he had been in and out of segregation; (5) that she had attempted to maintain contact with Andy via letters and phone conferences; (6) that Andy had not been able to meet the conditions for return; (7) that Andy had been unable to have visitations with Catie during periods of his incarceration due to his being placed in segregation; and (8) that to her knowledge, Andy had not regularly written to Catie. The court then found that the State had demonstrated all elements required for the continuing CHIPS ground and found Andy to be unfit. At that time, the State moved to dismiss the failure to assume parental responsibilities ground of the petition, which the court granted.

¶8 The dispositional hearing occurred on January 21, 2015, January 22, 2015, and February 17, 2015. After hearing testimony from multiple parties, including Andy, the court addressed the factors set forth in WIS. STAT. § 48.426(3) and determined that terminating Andy's parental rights was in Catie's best interests.

¶9 Andy filed a notice of intent to pursue postdispositional relief on March 4, 2015, and he filed a notice of appeal on August 5, 2015. He thereafter filed a Motion for Remand Pursuant to WIS. STAT. § 809.107(6)(am) on

September 4, 2015. In an order dated September 9, 2015, we granted the motion and remanded the matter to the trial court so that Andy could preserve a claim for ineffective assistance of counsel, raise the claim that his stipulation to grounds was not knowing, intelligent, and voluntary, and for related fact-finding on his claims.

¶10 In his postdisposition motion, Andy argued that he should be allowed to withdraw his admission to grounds because his trial counsel was ineffective and because the admission was not knowing, intelligent, and involuntary, that allowing a foster/potential adoptive parent to testify regarding intent to allow for continued contact with the biological family if parental rights are terminated is contrary to public policy, and that the order terminating his parental rights to Catie should be vacated. The evidentiary hearing on Andy's postdisposition motion commenced on November 24, 2015, and Andy and his trial counsel both testified. The trial court denied the postdisposition motion on November 30, 2015, and Andy appeals. Additional facts will be developed below as necessary.

ANALYSIS

¶11 Termination of parental rights cases consist of two phases: a grounds phase, at which the factfinder determines whether there are grounds to terminate a parent's rights, and a dispositional phase, at which the factfinder determines whether termination is in the child's best interest. *See* ***Sheboygan Cnty. DHHS v. Julie A.B.***, 2002 WI 95, ¶¶24-28, 255 Wis. 2d 170, 648 N.W.2d 402. During the grounds phase, "'the parent's rights are paramount.'" *See* ***id.***, ¶24 (citation omitted). "If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit." WIS. STAT. § 48.424(4). "Once the court has declared a parent unfit, the proceeding moves to the second,

or dispositional phase, at which the child's best interests are paramount." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶26, 271 Wis. 2d 1, 678 N.W.2d 856.

¶12 On appeal, Andy challenges the termination of his parental rights to Catie, arguing that: (1) his stipulation that Catie remained in continuing need of protection or services was not knowing, intelligent, and voluntary because he did not know that incarceration alone cannot be grounds to terminate his parental rights; (2) that his trial counsel was ineffective; (3) that it is against public policy for a trial court to allow a foster/adoptive parent to testify that he or she will allow an open adoption if parental rights are terminated; and (4) that we should grant a new trial in the interests of justice. We address each argument in turn.

I. Andy's stipulation to the continuing CHIPS ground for involuntary termination of parental rights was knowing, intelligent, and voluntary, and trial counsel was not ineffective.

¶13 Andy's first two arguments on appeal are: (1) that his stipulation to the continuing CHIPS ground was not knowing, intelligent, and voluntary because he had been incarcerated for the entirety of Catie's life and was unaware that according to ***Kenosha County Department of Human Services v. Jodie W.***, 2006 WI 93, ¶49, 293 Wis. 2d 530, 716 N.W.2d 845, incarceration alone cannot be grounds to terminate parental rights; and (2) that trial counsel was ineffective because he misinformed Andy that the law of ***Jodie W.*** did not apply to his case. Although Andy presents these as two separate arguments, we address them together because they ultimately present essentially the same question: whether Andy should be relieved from his stipulation to the continuing CHIPS ground.

¶14 A parent's stipulation to grounds for termination of parental rights must be knowing, intelligent, and voluntary. *See* ***id.***, ¶24. As relevant here, WIS.

STAT. § 48.422(7) requires that "[b]efore accepting an admission of the alleged facts in a petition, the court shall" do the following:

> (a) Address the parties present and determine that the admission is made voluntarily with understanding of the nature of the acts alleged in the petition and the potential dispositions.
>
> (b) Establish whether any promises or threats were made to elicit an admission and alert all unrepresented parties to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to them.
>
> ….
>
> (c) Make such inquires as satisfactorily establish that there is a factual basis for the admission.

WIS. STAT. § 48.422(7); *see also* ***Jodie W.***, 293 Wis. 2d 530, ¶25. The parent stipulating to grounds for termination of parental rights must also have knowledge of the constitutional rights he or she is giving up. *See* ***Jodie W.***, 293 Wis. 2d 530, ¶25.

¶15 Where a parent later challenges a stipulation to grounds for termination of parental rights, he or she must make a *prima facie* showing that the trial court failed to perform its mandatory duties of informing the party of his or her rights. *See* ***id.***, ¶26. Additionally, the challenging party "must allege that the party, in fact, did not know or understand the rights that he or she was waiving." ***Id.*** "If the party successfully makes a *prima facie* showing, the burden shifts to the county to establish by clear and convincing evidence that the parent 'knowingly, voluntarily and intelligently waived the right to contest the allegations in the petition.'" ***Id.*** (emphasis added) (citation omitted). Whether the parent has established a *prima facie* case that there were deficiencies in the colloquy and has alleged that he or she did not know of the rights given up by entering the

stipulation is a question of law we review *de novo*. *See* ***State v. Kywanda F.***, 200 Wis. 2d 26, 38-39, 546 N.W.2d 440 (1996).

¶16 It is undisputed on appeal that prior to accepting Andy's stipulation to grounds, the trial court engaged in the colloquy required by WIS. STAT. § 48.422(7) and informed Andy of his trial rights, explained that the stipulation would result in the court finding Andy to be an unfit parent, and that during the dispositional phase, his daughter's best interests would be the paramount consideration. Nevertheless, Andy argues that he should be allowed to withdraw his stipulation because it "was based on a perfunctory colloquy that allowed an unknowing admission." As we explain below, we conclude that Andy's stipulation to the continuing CHIPS ground was knowing, intelligent, and voluntary.

¶17 Despite Andy's contention, the trial court's colloquy was anything but perfunctory. At the outset, the court asked Andy about his background and confirmed that he was thirty years old, that he had obtained his GED while incarcerated, and that he reads very well and enjoys reading. The court then confirmed that Andy had received a copy of the petition, that he was able to understand the petition, and that he was able to discuss any issues he did not understand with his attorney. Next, the court explained the grounds alleged in the petition, which Andy confirmed that he understood. The court went on to explain that by stipulating to the continuing CHIPS ground, Andy would be giving up certain procedural rights, including the right to a trial, that he would be admitting that there was a ground for terminating his parental rights to Catie, that the State would present evidence supporting the ground, and that Andy would then be found to be unfit. When Andy questioned what the court meant by "unfit," the court provided a detailed explanation of the requirement that it would find Andy to be

unfit if there were grounds to terminate his parental rights. After the court's explanation, Andy confirmed that he understood the meaning and impact of the unfitness finding. The court also confirmed that Andy did not want to have a trial.

¶18 The trial court then explained that if it accepted Andy's stipulation, a dispositional hearing would occur to determine whether it was in Catie's best interests to terminate Andy's parental rights. The court also explained the alternatives to termination, and it emphasized that during the dispositional phase, the court would focus on Catie's best interests and not Andy's interests.

¶19 After explaining the procedural process, the court confirmed that no one had promised Andy anything in order to obtain his stipulation, that he had not been threatened in any way, that he had not taken any drugs, medication, or alcohol in the previous twenty-four hours, that he had not been diagnosed with a mental illness, that he was thinking clearly, that he understood everything that was occurring in court, and that he did not have any additional questions for either the court or his attorney. The court then asked: "Do you wish to agree, or stipulate, to the continuing need of protection or services ground alleged by the state." Andy responded, "Yes, sir." The court also confirmed with trial counsel that he had had sufficient time to discuss the matter with his client, that he had explained the petition, that he had explained his client's rights to him, that Andy had understood his discussions with counsel, that he had discussed the procedural process with his client, that he believed his client was entering the stipulation freely and voluntarily, and that he believed his client understood the rights he was giving up by stipulating to grounds. The court found that Andy was entering his stipulation freely, voluntarily, knowingly, and understandingly, and that the State offered sufficient evidence to support the continuing CHIPS ground.

¶20 Andy's argument that his stipulation was not knowing, intelligent, and voluntary rests almost entirely upon the holding in ***Jodie W.*** First, he argues that his stipulation was not knowing, intelligent, and voluntary because he was not advised of the law of ***Jodie W.*** In presenting this argument, Andy requests that we "adopt a rule that a parent who is incarcerated cannot knowingly, intelligently, and voluntar[il]y enter an admission to a petition alleging that he or she has not met the conditions for return in a termination of parental rights proceeding without being first informed that 'incarceration, standing alone, is not a constitutional ground for finding a parent unfit.'" We discern from this a request that we adopt a broad categorical rule that *the trial court* be required to advise an incarcerated parent that "incarceration, standing alone, is not a constitutional ground for finding a parent unfit." We decline to adopt such a rule, as each termination of parental rights case is highly dependent upon its own facts, and the trial court is simply not in a position to know, without detailed conversation with the parent, whether the law of ***Jodie W.*** actually does or does not apply in a given case. Andy points to no other alleged deficiency in the trial court's colloquy on appeal.[5] Accordingly, we conclude that the trial court complied with its mandatory duties regarding the colloquy prior to accepting Andy's stipulation, and Andy has therefore failed to make the required *prima facie* showing.

[5] In the "Factual Background" section of his brief, Andy states that he "misunderstood what would occur upon his admission" to the continuing CHIPS ground. We note that at the postdisposition remand hearing, Andy testified that he thought that by stipulating to grounds that "we was going to go back to a CHIPS case. That was my whole understanding." Andy does nothing to further advance this argument. Regardless, the record clearly establishes that during the plea colloquy, the trial court confirmed with Andy that he understood that stipulation to grounds could result in termination of his parental rights to Catie, that the court could ultimately dismiss the petition and continue the CHIPS order, or that the court could place Catie under guardianship.

¶21 Having declined Andy's request that we adopt a rule requiring the trial court to inform an incarcerated parent about the law of ***Jodie W.*** prior to accepting a stipulation to a continuing CHIPS grounds, and also having concluded that Andy did not make a *prima facie* showing that the colloquy was otherwise deficient, we turn to Andy's argument that trial counsel was ineffective for failing to properly advise him regarding the law of ***Jodie W.*** and whether it applied.

¶22 A parent is entitled to effective assistance of counsel in a termination of parental rights proceeding. ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). To prove ineffective assistance of counsel, the parent must establish both that counsel's performance was deficient and that the deficient performance prejudiced the parent. *See* ***id.*** at 1005; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If the parent fails to prove either prong, we need not address the other prong. *See* ***Strickland***, 466 U.S. at 700. Whether a parent received ineffective assistance of counsel presents a mixed question of fact and law. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will uphold the trial court's factual determinations unless they are clearly erroneous. ***Id***. at 634. Whether trial counsel's performance was deficient and whether it prejudiced the parent are questions of law we review *de novo*. *See* ***id***.

¶23 In order to establish deficient performance, the parent must show that trial counsel's acts or omissions were "outside the wide range of professionally competent assistance." *See* ***Strickland***, 466 U.S. at 690. There is a strong presumption that the parent received effective assistance and that trial counsel's decisions were justified in the exercise of reasonable professional judgment. *See* ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364; *see also* ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. "Reviewing courts should be 'highly deferential' to counsel's

strategic decisions and make 'every effort … to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" ***Domke***, 337 Wis. 2d 268, ¶36 (citation omitted). Counsel's performance was deficient only if the parent establishes that the challenged acts or omissions were objectively unreasonable under all the circumstances of the case. *See* ***Kimbrough***, 246 Wis. 2d 648, ¶35.

¶24 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.'" ***Pitsch***, 124 Wis. 2d at 642 (quoting ***Strickland***, 466 U.S. at 694). "It is not sufficient for the [parent] to show that his counsel's errors 'had some conceivable effect on the outcome of the proceeding.'" ***Domke***, 337 Wis. 2d 268, ¶54 (one set of quotation marks omitted; citation omitted). In the context of a request to withdraw a plea, as is the case here, the parent "must allege facts to show 'that there is a reasonable probability that, but for the counsel's errors, he would not have [stipulated to grounds] and would have insisted on going to trial.'" *See* ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citation omitted).

¶25 One of the elements for termination of parental rights based upon continuing CHIPS is that "the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 9-month period following the fact-finding hearing under [WIS. STAT. §] 48.424." WIS. STAT. § 48.415(2)(a)3. This is the element at issue in regard to Andy's argument that his stipulation to the continuing CHIPS ground was not knowing, intelligent, and voluntary.

¶26 Andy's argument is premised upon the fact that it was impossible for him to meet certain conditions of return due to his incarceration, and he emphasizes that he was unable to meet the following condition: that he "meet[] the basic care needs of his child by providing, shelter, food, and necessary care items. [Andy] manages the day to day responsibilities of the household including making and keeping medical appointments…[.]" He argues his trial counsel performed deficiently by informing him that ***Jodie W.***, which states that "a parent's failure to fulfill a condition of return due to his or her incarceration, standing alone, is not a constitutional ground for finding a parent unfit," *see* ***id.***, 293 Wis. 2d 530, ¶49, did not apply to his case. He also argues, albeit somewhat implicitly, that he would not have stipulated to grounds and instead would have proceeded to trial had trial counsel informed him that ***Jodie W.*** provided a defense. Andy also suggests that counsel's alleged failure to recognize that ***Jodie W.*** applied was ineffective because trial counsel failed to move for dismissal of any claims related to conditions of return that were not narrowly tailored based on Andy's incarceration. We conclude that Andy's reliance on the holding in ***Jodie W.*** is not justified by the facts of record in this case.

¶27 In ***Jodie W.***, the supreme court addressed whether a court may find a parent unfit under WIS. STAT. § 48.415(2)(a) "based *solely* on the parent's failure to meet an impossible condition of return" and concluded that "a parent's incarceration does not, *in itself*, demonstrate that the individual is an unfit parent. We further conclude that a parent's failure to fulfill a condition of return due to his or her incarceration, *standing alone*, is not a constitutional ground for finding a parent unfit." ***Jodie W.***, 293 Wis. 2d 530, ¶¶19, 49 (emphasis added; citation omitted). The ***Jodie W.*** court also stated, however:

> In light of the legislature's emphasis on "eliminating the need for children to wait unreasonable periods of time for their parents to correct the conditions that prevent their safe return to the family," *the amount of time a parent is unable to provide for his or her child due to the parent's incarceration can and should be considered* by the [trial] court as part of the court's evaluation of the relevant facts and circumstances.

Id., ¶46 (emphasis added; footnote omitted).

¶28 Trial counsel testified at the ***Machner***[6] hearing and stated that he discussed the two grounds pled in the petition with Andy and that he also explained Andy's statutory and constitutional rights. Counsel testified that he explained the law and that because of Andy's incarceration, it would be difficult to challenge and prevail on either of the grounds, although it was not impossible. Counsel further testified that he discussed possible defenses and explained that Andy could tell the court that he would be released from prison in the near future, that he had two other children with whom he had maintained contact, that he attempted to participate in programming while incarcerated, and that he kept in contact with Catie despite the challenges that arose due to his segregation status. Counsel also testified that he was familiar with ***Jodie W.*** and that he did discuss the ***Jodie W.*** issues with Andy, although he did not cite directly to the case during those discussions. On cross-examination, counsel explained that Andy's failure to complete conditions of return that were not impossible for him to meet while incarcerated distinguished Andy's case from ***Jodie W.*** and that it was his professional opinion that ***Jodie W.*** therefore did not apply.

[6] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶29 Trial counsel also explained that some of the conditions for return identified in the CHIPS dispositional order were problematic and that others were not. For example, counsel explained that Andy could have satisfied the condition that he complete an alcohol and drug assessment despite his incarceration, as well as that he could have completed an anger management program. Other conditions, such as the condition that he meet his daughter's basic care needs by providing shelter, food, and other necessary care items would be difficult to meet. Counsel further testified that he explained Andy's right to a trial and that Andy was "concerned about" coming to court because he did not want to spend time at court because he preferred to be at the institution.

¶30 Andy also testified at the ***Machner*** hearing. He stated that trial counsel explained that it would be difficult for him to succeed during the grounds phase because the State would only need to prove one of the two grounds asserted. He also testified that trial counsel did not specifically identify the ***Jodie W.*** case or explain that incarceration alone cannot be a ground to terminate parental rights. When asked if he had been told that there were defenses, Andy testified that his attorney told him that he could explain the contact he had with his daughter "and stuff like that" but that he did not believe he had been told of "legal" defenses.

¶31 Andy testified that trial counsel told him that it would be "impossible" to defeat the grounds asserted, that it was a "lose-lose situation regardless if I go to trial, but if I went to trial that the State would prove one if not both of the grounds … it just really wasn't a case I could beat because I was incarcerated and I have never been with my daughter," and that counsel "constantly was like no, they are going to prove one ground." Andy further testified that trial counsel told him that if he pled to grounds, it would be up to the judge whether to terminate his parental rights, although he also testified, without

further explanation, that he believed the case would return to CHIPS status. Although Andy testified that his attorney "told" him to stipulate to grounds, he also confirmed that whether to stipulate was ultimately his choice and that he was not forced to stipulate to grounds.

¶32 After hearing their testimony, the trial court addressed the holding of ***Jodie W.*** in its oral denial of Andy's postdisposition motion.[7] First, the trial court quoted the portion of ***Jodie W.*** at issue—that incarceration itself is not a sufficient basis to terminate parental rights and that other factors must be considered. The court then explained its understanding of ***Jodie W.***:

> What we're told in ***Jodie W.*** is you cannot draw a straight line from being incarcerated to having your parental rights terminated. What we are not told in ***Jodie W.*** is if you're incarcerated and because you're incarcerated you can't meet these other conditions for return, you're not being terminated because you're incarcerated, you're being terminated because you can't meet the conditions for return. They seem similar but they are importantly subtly different.

In considering Andy's ***Jodie W.*** argument, the trial court found that trial counsel did not provide Andy with a copy of ***Jodie W.*** or "detailed findings about the subtleties of the ***Jodie W.*** case and about how incarceration by itself can't lead to termination …." However, the trial court correctly pointed out that there are other factors that must be considered in regard to the application of ***Jodie W.*** and found that trial counsel *had* discussed potential defenses with Andy during their conversations.

[7] The court's oral ruling addressed both Andy's and the mother's postdisposition arguments. Although the court's discussion of the ***Jodie W.*** holding occurred in reference to the mother's ***Jodie W.*** argument, that discussion is equally applicable to Andy's argument.

¶33 In rejecting Andy's ineffective assistance of counsel argument, the trial court did not focus specifically on whether ***Jodie W.*** actually provided Andy with a defense. Instead, the court emphasized its conclusion that trial counsel had discussed potential defenses with Andy and that it had been Andy's decision to stipulate to grounds. The trial court pointed to letters Andy wrote to trial counsel stating that he did not want to have a trial, that he wanted to enter a plea because he did not want to come to court, and that he wanted to sign his parental rights over to Catie's mother because he believed, incorrectly, that it would help the mother's case. In concluding that trial counsel was not ineffective, the trial court stressed that a parent can choose to stipulate to grounds for termination of parental rights for whatever reason the parent wants and that testimony indicated that Andy chose to stipulate—at least in part—because he did not want to come to court because he believed that it was more important to remain at the prison.

¶34 We have reviewed the record and agree that trial counsel was not deficient for failing to advise Andy that, based on ***Jodie W.*** specifically, he could not be found unfit on the sole basis that he was incarcerated because that was not the sole basis that would have been before the judge or a jury regarding Andy's unfitness as a parent. In addition to failing to meet his daughter's basic care for providing shelter, food, and necessary care items and failing to manage the day to day responsibilities of the household, obviously due to his incarceration, testimony established that Andy also failed to regularly communicate or maintain visitation with Catie and failed to maintain a security and segregation status allowing him to participate in alcohol and drug treatment and anger management courses. These latter conditions were conditions of return that Andy *could have* performed while incarcerated but either chose not to or was unable to complete as the result of his own conduct while incarcerated. Stated otherwise, Andy's failure to meet his

daughter's basic care by providing shelter, food, and necessary items and failing to manage day to day responsibilities of the household did not "stand[ ] alone" as the sole reason for a finding of unfitness and termination. *See* ***Jodie W.***, 293 Wis. 2d 530, ¶49.

¶35 Similarly, trial counsel was not deficient for failing to file a motion seeking dismissal of claims related to conditions of return that were not sufficiently narrowly tailored so that Andy could meet them while incarcerated. The holding of ***Jodie W.*** does not apply in this case for the reasons stated herein, and therefore it cannot be said that counsel's failure to file a motion to dismiss based on ***Jodie W.*** was "outside the wide range of professionally competent assistance." *See* ***Strickland***, 466 U.S. at 690.

¶36 Because Andy has failed to establish that trial counsel performed deficiently in any respect, we need not consider the prejudice prong. Based on the record, we conclude that trial counsel did not provide ineffective assistance of counsel to Andy in regard to the applicability of ***Jodie W.*** to his case.

II. Trial counsel was not ineffective for failing to argue that WIS. STAT. § 48.415(6) was unconstitutional as applied to Andy.

¶37 Andy also argues that his trial counsel was ineffective for failing to argue that WIS. STAT. § 48.415(6), failure to assume parental responsibility, was unconstitutional as applied. First, he argues that to the extent possible due to his incarceration, he did establish a substantial relationship with Catie. Second, he argues that his substantive due process rights were violated because, due to his incarceration, it was impossible for him to "provide daily care and supervision." In regard to his substantive due process argument, Andy relies on ***Jodie W.*** for the proposition that incarceration alone cannot be grounds for finding a parent unfit.

Andy further argues that trial counsel's failure to object to this count was not harmless error because the presence of a second ground upon which the State sought to terminate his parental rights influenced his decision to stipulate to the continuing CHIPS ground. We disagree.

¶38 Whether a statute, as applied to a parent, violates the parent's constitutional right to substantive due process presents a question subject to independent appellate review. ***Monroe Cnty. DHS v. Kelli B.***, 2004 WI 48, ¶16, 271 Wis. 2d 51, 678 N.W.2d 831. We begin with the presumption of the statute's constitutionality. ***Id.*** Because termination of parental rights interferes with a fundamental right, strict scrutiny is applied to the statute. *See* ***id.***, ¶¶17, 23. Under this test, we determine whether the statute is narrowly tailored to advance a compelling State interest that justifies interference with the parent's fundamental liberty interest. ***Id.***, ¶17. The Wisconsin Supreme Court has already determined that the State's compelling interest in WIS. STAT. § 48.415 is to protect children from unfit parents, *see* ***id.***, ¶25, and the issue here is whether that statute, as applied to Andy is narrowly tailored to meet the State's compelling interest in protecting Catie, *see* ***id.***, ¶17.

¶39 In advancing his argument that termination of his parental rights pursuant to WIS. STAT. § 48.415(6) violates his substantive due process rights, Andy glosses over the fact that the failure to assume parental responsibility ground was dismissed after he stipulated to the continuing CHIPS ground. As we have already explained, Andy's stipulation to the continuing CHIPS ground was knowing, intelligent, and voluntary, and his trial counsel was not ineffective as to that ground. Because the State need establish only one of the grounds set forth in § 48.415 in order for the trial court to find that a parent is unfit, we need not

further address Andy's argument regarding the alleged constitutional violation and ineffective assistance of counsel claim as to § 48.415(6).

III. It is not against public policy for a trial court to allow a foster or potential adoptive parent to testify regarding intent to allow for an open adoption.

¶40 Andy next argues that it is against public policy for a trial court to allow a foster or potential adoptive parent to testify that he or she intends to allow the child to maintain contact with the biological family if parental rights are terminated because such testimony is illusory.[8] Andy also argues that he is entitled to a new dispositional hearing because the trial court erred in allowing and relying upon such testimony during the dispositional hearing. Again, we disagree.

¶41 The testimony at issue concerns Ms. J., Catie's foster parent and potential adoptive parent. At the dispositional hearing, Ms. J. testified that she would allow Catie's biological parents to continue contact with Catie if the court terminated their parental rights and she was thereafter allowed to adopt Catie. Andy argues that the trial court erred in admitting this testimony because it was more prejudicial than probative and against public policy because "the statement of the foster parent, even if well-intentioned, is entirely illusory and not binding."

[8] Despite amending his "foster parent" claim to an interest of justice claim from an ineffective assistance of counsel claim at the postdispositional hearing, Andy argues that trial counsel was ineffective for failing to object when the State asked the foster parent if she would allow the biological parents to maintain a relationship with Catie if she was ultimately allowed to adopt Catie. Andy does not further develop this argument and instead focuses primarily on his public policy argument. Because his ineffective assistance of counsel argument as to this testimony is undeveloped, we will not address it further. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Moreover, even if we did consider this argument, we would conclude that trial counsel was not ineffective for failing to object to this line of questioning because "[a]n attorney does not perform deficiently by failing to make a losing argument." ***State v. Jacobsen***, 2014 WI App 13, ¶49, 352 Wis. 2d 409, 842 N.W.2d 365.

¶42 Andy's argument that Ms. J.'s testimony was illusory and therefore against public policy is unpersuasive. Once the termination of parental rights proceeding moves to the dispositional phase, as it did here, the trial court must consider specific factors in determining whether it is in the child's best interests to terminate parental rights, *see* WIS. STAT. § 48.426(1), and the child's best interest is the prevailing factor that the court considers, *see* § 48.426(2). The specific factors the court must consider—but is not limited to considering—in determining the child's best interests are:

> (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.

WIS. STAT. § 48.426(3)(a)-(f).

¶43 The record reflects that the trial court properly and extensively addressed each of these factors at the dispositional hearing, as well as the availability of options other than termination of parental rights. The court acknowledged that terminating parental rights would cause some harm; however, the court ultimately concluded that termination of parental rights was in Catie's

best interests because: (1) she was likely to be adopted; (2) she described Ms. J.'s home as her home; (3) the length of separation from her biological parents had been almost her entire life; and (4) it was more likely that Catie would be in a stable and permanent relationship if adopted. Contrary to Andy's assertion, it is clear that the trial court did not "base its decision at disposition on information that is not binding and therefore illusory."

¶44 Our supreme court's decision in ***Darryl T.-H. v. Margaret H.***, 2000 WI 42, 234 Wis. 2d 606, 610 N.W.2d 475, confirms our conclusion. There, the trial court heard testimony from the potential adoptive parent, who testified that she would allow continued contact between the children and their biological family members if parental rights were terminated and she was allowed to adopt the children. ***Id.***, ¶9. The trial court considered her testimony; however, it ultimately denied the petition for termination, placing great weight on the grandmother's efforts to obtain placement and finding that it would be harmful to sever the childrens' relationship with their grandmother. *See* ***id.***, ¶10.

¶45 On appeal, the supreme court considered whether WIS. STAT. § 48.426(3)(c) requires an examination of the legal relationship between a child and the child's biological family or if the focus should instead be on the emotional connections between the child and biological family. *See* ***Margaret H.***, 234 Wis. 2d 606, ¶¶13, 16. The court concluded that § 48.426(3)(c) "unambiguously require[s] that a [trial] court evaluate the effect of a legal severance on the broader relationships existing between a child and the child's birth family. These relationships encompass emotional and psychological bonds fostered between the child and the family." ***Margaret H.***, 234 Wis. 2d 606, ¶21. In other words, a trial court must "assess the harmful effect of this legal severance on the emotional and psychological attachments the child has formed with his or her birth family." ***Id.***,

¶26. Such analysis "requires only that the [trial] court examine the impact of a legal severance on the broader relationships existing between a child and his or her family." ***Id.***, ¶29. The court went on to note that in evaluating § 48.426(3)(c), a trial court, in its discretion, "may afford due weight to an adoptive parent's stated intent to continue visitation with family members, although [the supreme court] cannot mandate the relative weight to be placed on this factor." ***Margaret H.***, 234 Wis. 2d 606, ¶29.

¶46 The supreme court remanded the case for further proceedings after determining that the trial court had failed to consider all of the factors set forth in WIS. STAT. § 48.426, and the court noted that on remand, the trial court could "certainly choose to examine the probability that [the adoptive parent] will be faithful to her promise" to allow the children to maintain contact with their biological family if the court terminated parental rights. ***Margaret H.***, 234 Wis. 2d 606, ¶¶9, 30-31. This type of analysis is precisely what happened in this case.

¶47 Andy dismisses ***Margaret H.***, arguing first that our supreme court's statement that a trial court may properly consider an adoptive parent's intent to allow a child to continue contact with the biological family is dicta, and second that no Wisconsin court "has ever considered the issue raised here: Whether or not a court may base its decision at disposition on information that is not binding and therefore illusory." We remain unpersuaded.

¶48 Regardless of whether the supreme court's statement in ***Margaret H.*** that "[i]n its discretion, the [trial] court may afford due weight to an adoptive parent's stated intent to continue visitation with family members," *see* ***id.***, 234 Wis. 2d 606, ¶29, is dicta, we find it unlikely that our supreme court would have

made such a statement if it believed that such consideration would violate public policy. Moreover, in its decision, our supreme court contemplated the unenforceability of a potential adoptive parent's promises to allow for continued contact with the biological family, stating that upon remand, the trial court could "certainly choose to examine the probability that [the adoptive resource] will be faithful to her promise, at the same time bearing in mind that such promises are legally unenforceable once the termination and subsequent adoption are complete." ***Id.***, ¶30. We see no reason to discount or deviate from those statements in this case, particularly given the similarity of the testimony at issue in ***Margaret H.*** to Ms. J.'s testimony.[9]

¶49 ***Margaret H.*** also clearly states that all factors set forth in WIS. STAT. § 48.426(3) must be considered and that no single factor is determinative as to the child's best interests; thus, even if the trial court finds that it would be harmful to sever the child's relationship with the biological family members, the trial court may nevertheless ultimately conclude, after considering all relevant factors, that termination of parental rights is in the child's best interests. *See* § 48.426(3); *see also* ***Margaret H.***, 234 Wis. 2d 606, ¶35 ("[E]xclusive focus on any one factor is inconsistent with the plain language of [WIS. STAT.] § 48.426(3)."). Here, the trial court addressed all of the required factors, used its

[9] We note that testimony from the postdispositional hearing belies Andy's argument that Ms. J.'s testimony was illusory. Specifically, Catie's mother testified that she had seen Catie once between termination in February 2015 and the postdispositional hearing in November 2015, that she had talked to Catie approximately once a week, and that Catie had called her on a few different occasions. Andy apparently did not have such contact during that time period, although it appears that was in large part due to his incarceration. In any event, at least as of late November 2015, Ms. J. *has* allowed contact to continue with Catie. While we cannot say with certainty whether that contact will continue, we remain unpersuaded that it is against public policy to allow the type of testimony at issue.

discretion in considering Ms. J.'s testimony, and ultimately concluded that termination of parental rights was in Catie's best interests. Because we conclude that the trial court complied with § 48.426(3) and did not err in considering Ms. J.'s testimony, Andy is not entitled to a new dispositional hearing.

IV. The interests of justice do not warrant a new trial in this matter.

¶50 Lastly, Andy argues that we should act pursuant to WIS. STAT. § 752.35 and reverse the trial court and remand for a new trial. Section 752.35 provides for discretionary reversal and states that we may reverse the order appealed from "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried" and that in such cases, we may remand for a new trial "as … necessary to accomplish the ends of justice." WIS. STAT. § 752.35. "The power to grant a new trial when it appears the real controversy has not been fully tried 'is formidable, and should be exercised sparingly and with great caution.'" ***State v. Sugden***, 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795 N.W.2d 456 (citation omitted). We only exercise our power to grant a discretionary reversal in exceptional cases. ***Id.***

¶51 Andy argues that the full controversy was not fully and fairly tried; however, in so doing, he relies on the same arguments that we have already rejected—that his stipulation was not knowing, intelligent, and voluntary, that his trial counsel was ineffective, that he had done everything he could while incarcerated to meet the conditions of return, and that the trial court erred in relying on the foster parent's apparent intent to allow for an open adoption if parental rights were terminated. Because Andy does not advance an argument that we have not already rejected, we decline to exercise our WIS. STAT. § 752.35 discretionary reversal power.

¶52 For the reasons stated, the order terminating Andy's parental rights and the order denying his postdisposition motion are affirmed.

By the Court.—Orders affirmed.

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