COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2005AP299
2005AP300

Cir. Ct. Nos. 02TP000560
02TP000561

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

NO. 2005AP299
CIR. CT. NO. 02TP000560

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

BRYANT U.,

RESPONDENT-APPELLANT.

NO. 2005AP300
CIR. CT. NO. 02TP000561

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

BRYANT U.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JOSEPH R. WALL, Judge. *Affirmed*.

¶1 FINE, J. Bryant U. appeals from orders entered by the trial court terminating his parental rights to Ciera U. and Tiera U., both born on July 10, 1996. The only issues presented by this appeal are: (1) whether the trial court erred in changing one of the jury's answers on the verdict; and (2) whether the trial court erred in answering a question the jury did not answer. We affirm.

I.

¶2 As material to this appeal, the State filed a petition seeking to terminate Bryant U.'s parental rights to Ciera and Tiera on the ground that he "failed to visit or communicate with the child[ren] for a period of 3 months or longer." WIS. STAT. § 48.415(1)(a)2. The jury found that Bryant U. had so failed. As material here, the statutes make it an affirmative defense if the "parent proves," by a preponderance of the evidence: (1) that he or she "had good cause" for not communicating with the child; and also (2) that either (a) the parent "communicated about the child" with either the person "who had physical custody of the child during" that period or the "agency responsible for the care of the child during" that period, or (b) the parent "had good cause" for not communicating with the custodial person or agency. § 48.415(1)(c).

¶3 As noted, the jury found that Bryant U. did not visit or communicate with Ciera and Tiera for at least three months. The jury also found, however, that he had "good cause" for not visiting or communicating with the children during that time. Additionally, the jury found that Bryant U. did "communicate about" Ciera and Tiera "with the people who had physical custody" of them "during that period." As a consequence of this answer, the jury did not answer the verdict question that asked whether he had "good cause" for not communicating about the children with the persons having physical custody of them.

¶4 On the State's motion, the trial court changed the answer to the question whether Bryant U. communicated "about" Ciera and Tiera during a four and one-half month period—from December 31, 2001, to May 15, 2002—holding that there was no credible evidence that he did. The trial court also determined that there was no proof of any "good cause" excusing Bryant U.'s failure to communicate about the children during that period.

II.

¶5 Termination-of-parental-rights proceedings are civil actions, and, accordingly, a trial court may change a verdict answer if there is an "insufficiency of the evidence to sustain the answer," WIS. STAT. RULE 805.14(5)(c), and direct a verdict if the evidence at trial does not sustain a party's burden of proof, RULE 805.14(4). *See* ***Door County Dep't of Health & Family Serv's v. Scott S.***, 230 Wis. 2d 460, 465, 602 N.W.2d 167, 170 (Ct. App. 1999). A trial court may not change a verdict answer, however, unless "there is no credible evidence to sustain" the jury's answer to that question. RULE 805.14(1). The same standard applies on a motion for a directed verdict; that is, there must be no credible evidence that would sustain a finding contrary to that sought by the movant. ***Ibid.***; RULE

805.14(4); ***Scott S.***, 230 Wis. 2d at 465, 602 N.W.2d at 170 ("'A motion for a directed verdict should be granted only where the evidence is so clear and convincing that a reasonable and impartial jury properly instructed could reach but one conclusion.'") (quoted source omitted); *see also* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 389–390, 541 N.W.2d 753, 761–762 (1995) ("When a circuit court overturns a verdict supported by 'any credible evidence,' then the circuit court is 'clearly wrong' in doing so. When there is *any* credible evidence to support a jury's verdict, 'even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict ... must stand.'") (emphasis and ellipses by ***Weiss***; quoted source and footnote omitted).

¶6 As noted, the first issue on this appeal is whether there is any credible evidence to support the jury's finding that Bryant U. communicated with persons who had physical custody of Ciera and Tiera during what the parties agree was the critical period between December 31, 2001, and May 15, 2002. The trial court determined that there was no such evidence, and, on our review, we agree.

¶7 "[I]t is the burden of the appellant to demonstrate that the trial court erred." ***Seltrecht v. Bremer***, 214 Wis. 2d 110, 125, 571 N.W.2d 686, 692 (Ct. App. 1997). Bryant U.'s appellate briefs, however, point only to his generalized testimony that, as phrased by his main brief:

- "even when he was incarcerated he attempted contact by phone and letter with the social worker on his children's case";
- "every time he wrote the social worker, he would ask for visits with his daughters'; and
- "[h]e testified he asked 'too many times' for information about his daughters that he couldn't even count on his hand how many times he asked about having visits with his daughters."

As the trial court presciently observed in its oral decision granting the State's motion to change the answer to the verdict question, these assertions, although they provide colorable cover for Bryant U.'s arguments, do not, when the record is analyzed, reference *any* evidence—or any reasonable inferences from the evidence—that during the relevant period Bryant U. contacted the persons having physical custody of Ciera and Tiera about them. We look at Bryant U.'s assertions in sequence.

A. *Attempted Contacts While Incarcerated.*

¶8 Bryant U. has been incarcerated many times. According to the appellate record, from July of 1996, when Ciera and Tiera were born, to March 1, 2004, when the trial started on the State's petition seeking to terminate Bryant U.'s parental rights to the children, Bryant U. was incarcerated as follows: (1) on March 13, 1997, he was sentenced to prison for thirty-six months; (2) on December 7, 1999, he was sentenced to jail for six months; and (3) on March 8, 2000, he was sentenced to prison for two years. His incarceration during part of the December 31, 2001, to May 15, 2002, period resulted from the revocation of his parole in February 2002, and he remained locked up until, according to his testimony, December 2002.

¶9 This is the testimony referenced by Bryant U.'s assertion recounted in the first bullet:

> Q And have you ever refused to communicate with your Worker?
>
> A No.
>
> Q And, in fact, you attempted to communicate with them even while you were incarcerated; correct?
>
> A Yes.

> Q And you did this by both phone and by letter?
>
> A Yes.

This testimony is not anchored to any dates or any specific period of incarceration. As the trial court noted in its oral decision, tying these attempts to communicate to the February to May period in 2002 when he was incarcerated as a result of the revocation of his parole is but pure speculation. Verdict answers may not be based on speculation. ***Merco Distrib. Corp. v. Commercial Police Alarm Co.***, 84 Wis. 2d 455, 459–461, 267 N.W.2d 652, 655 (1978). Moreover, and this is dispositive of this aspect of Bryant U.'s argument, as we have seen, WIS. STAT. § 48.415(1)(c)2a makes it an affirmative defense if "[t]he parent communicated" with the appropriate persons "about the child," and a jury question tracking § 48.415(1)(c)2a asked "Did Bryant U. communicate" about the children during the relevant period. (Emphasis added.) All that is established by Bryant U.'s testimony referenced in support of his appellate brief's assertion, as noted in the first bullet, was that he "attempted to communicate" with his social workers during unspecified periods of his incarceration. Under § 48.415(1)(c)2a, an "attempt" is not enough.

B. *Requests to Visit with Ciera and Tiera.*

¶10 The record referenced in connection with the assertion recounted in the second bullet, is not only not specific with respect to the critical period, the testimony, except for a throw-in not followed-up, refers only to Bryant U.'s in-person visits with his social worker in 2001:

> Q How many times did you have face-to-face contact with [the social worker] in 2001?
>
> A Oh, I don't know, about maybe five or six times.
>
> ….

> Q How many-- And, on how many of the visits during 2001, did you ask for visits with your daughters?
>
> A I believe every time I see her or every time I write her, I --
>
> Q During your visits with [the social worker], did you talk about Court-ordered conditions every single time?
>
> A In 2001?
>
> Q Yeah, in 2001.
>
> A Yeah, it was pertaining to programming.

This, too, is not evidence supporting the jury's finding that he communicated with the appropriate persons about Ciera and Tiera from December 31, 2001, to May 15, 2002.[1]

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[1] In his argument before the trial court, Bryant U. also contended that the following testimony supported the jury's verdict:

> Q And, in [*sic*] May 15, 2002, did you write to [the social worker]?
>
> A Yes, I did.
>
> Q And did you indicate whether or not you were willing to participate in the programs-- any of the programs you were directed to do?
>
> A Yes.
>
> Q And did you ask again for visitations with your daughters?
>
> A Yes, I did.

Bryant U.'s trial lawyer argued that although the "ask again for visitations with your daughters" question "just followed questions about May 15th, 2002 in that letter [*sic*]," the jury could have "conclude[d] that this was just a general question" not tied to the May 15 letter. The trial court appropriately rejected this argument, and Bryant U. does not repeat it on appeal.

C. *Asking for Information About Ciera and Tiera.*

¶11 The testimony referenced in connection with Bryant U.'s assertions recounted in the third bullet is:

> Q How many times had you asked for information about your daughters?
>
> A Too many times.
>
> Q Too many times?
>
> A Yeah.
>
> Q Did you ever receive the information you were asking for?
>
> A Wasn't the answers that I wanted.
>
> Q Were you-- Let me ask specifically. How many times did you ask about having visits with your daughters?
>
> A Couldn't even count them on my hand.
>
> Q And were you ever given visits?
>
> A No, I wasn't.
>
> Q How many-- How many times did you ask about their whereabouts?
>
> A I don't recall how many times I asked about that. But I was just given information that-- When I asked for visitations and stuff like that, I wasn't-- You know, the foster home that they was in, was undisclosed. And phone number, school, you know. And all that.

The only period to which testimony could possibly be anchored is his trial lawyer's prefatory question: "This-- this whole time period, 2000, 2001, 2002, when the girls were removed from the home, their grandmother-- from the grandmother, were you given the phone number and address of where they were living?" As the trial court noted, this is far too "general" to support the jury's

answer that Bryant U. communicated with the appropriate persons about Ciera and Tiera during the relevant period.

D. *Buying Things for Ciera and Tiera*.

¶12 Although not asserted by Bryant U. on appeal as a reason to overturn the trial court's changing the jury's answer, he testified that he learned in 2001 that he could buy things for the children, and:

> A But I had gotten locked back up in 2002, so-- And 2002 is when I started getting things for the children.
>
> Q And even when you were locked up, you arranged to have presents sent to them; correct?
>
> A Yes.

The jury, however, as we have seen, found that Bryant U. did not communicate *with* Ciera and Tiera during the relevant three-month period, and thus, necessarily, found that he did not arrange to send things to Ciera and Tiera during that time.

¶13 The second issue on this appeal is whether the trial court was justified in answering the question the jury did not answer, namely whether Bryant U. had "good cause" for not communicating with the appropriate persons "about" Ciera and Tiera. Although, as noted, Bryant U. has the burden on this appeal to show that the trial court erred, he has not pointed to *any* evidence in the record from which a jury could find the requisite good cause. Mere generalizations about the sanctity of jury trials does not suffice. *See* WIS. STAT. RULE 805.14(4) (trial court may grant directed verdicts).

By the Court.—Orders affirmed.

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