COURT OF APPEALS DECISION DATED AND FILED

May 1, 2019

Sheila T. Reiff
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 No. 2018AP1896

Cir. Ct. No. 2017TP60

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

IN RE THE TERMINATION OF PARENTAL RIGHTS TO A.J.E.S., A PERSON UNDER THE AGE OF 18:

E.M.K.,

PETITIONER-RESPONDENT,

V.

Z.T.R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed*.

¶1 NEUBAUER, C.J.[1] Z.T.R. appeals from an order terminating his parental rights to A.J.E.S. and challenges the circuit court's refusal to give WIS JI—CHILDREN 346A, which asks the jury to determine whether Z.T.R. knew or had "reason to believe" that he was the child's father before the DNA results confirmed that he was. Because the undisputed facts show that Z.T.R. had reason to believe that he was the father before the DNA results, we conclude the court did not err when it refused to give the requested instruction. We affirm.

BACKGROUND

¶2 In January 2017, Z.T.R. and E.M.K. met on an online dating site and soon began a sexual relationship. They did not use birth control. Both had children of their own and thus were aware that E.M.K. could become pregnant.

¶3 In late March or early April 2017, E.M.K. learned that she was pregnant. At about that time, she told Z.T.R. about the pregnancy via Facebook and that either he or another man was the father. Z.T.R. does not dispute that he had this knowledge and, indeed, having had sexual relations multiple times by this point, he testified that E.M.K.'s pregnancy did not "come as a great shock." He continued to see E.M.K., perhaps seven to ten more times. These visits usually consisted of smoking marijuana and having sex. The last time Z.T.R. saw E.M.K. before the birth was in October or November, when E.M.K. was clearly pregnant.

¶4 When asked if he ever inquired into E.M.K.'s doctor's appointments for the pregnancy, Z.T.R. testified, "I let her know that I wanted to go to them."

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

But she told him that he "would not be a part of" the child's life as she was putting the child up for adoption.

¶5 The child was born on December 1, 2017. Z.T.R. was not present. E.M.K. testified she advised Z.T.R. of her scheduled C-section via Facebook, which Z.T.R. denied seeing. Z.T.R. testified he was told that the child was due either December 5 or 6. E.M.K. testified she had sent a photo of the baby to Z.T.R. and he acknowledged receiving it but said there was no explanation as to who the baby was.

¶6 The first time Z.T.R. learned about the birth was when he visited E.M.K. at her apartment on December 15, 2017. Z.T.R. was there to get some marijuana. Z.T.R. did not ask how E.M.K. was feeling, did not ask how the baby was doing, if E.M.K. needed anything, or if he could provide any support.

¶7 Two days later, Z.T.R. was arrested and incarcerated for charges relating to operating a vehicle while revoked. He did not contact E.M.K. after his incarceration to inquire about the child, nor did he contact the person with placement of the child. Z.T.R. did not file a declaration of paternal interest nor initiate paternity proceedings.

¶8 Z.T.R. learned with certainty that he was the father on February 22, 2018, after receiving DNA results. He testified he then wanted to assert his parental rights, and he wanted his family members to take placement of the child until he got out of jail.

¶9 At trial, it was Z.T.R.'s contention that it was for the jury to decide whether he had "reason to believe" that he was the child's father before receiving

the DNA results, given that E.M.K. was dating another man who could also be the father. He asked that the court give WIS JI—CHILDREN 346A, which poses the verdict question: "Has (parent) failed to assume parental responsibility for (child), after knowing or having *reason to believe* that he was (child)'s father?" (Emphasis added.) This instruction contrasts with WIS JI—CHILDREN 346B, which was the instruction proposed by E.M.K. It queries: "Has (parent) failed to assume parental responsibility for (child)?"

¶10 The circuit court refused to give WIS JI—CHILDREN 346A. It reasoned as follows:

> I'm going to find that this is not the situation in which 346A was intended to apply. That is an [instruction for] a case in which, again, there's testimony from the father he did not know that he was the father of the child….
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> ….
>
> Both parties agree [in this case] that early on the father was told it was either he or another person so there's no dispute of fact that way.

¶11 In a postdisposition motion, Z.T.R. asserted it was error for the court to take the decision away from the jury as to whether he had reason to believe he was the father before February 2018. The court denied the motion, explaining as follows:

> To this Court, [WIS JI—CHILDREN] 346A dealt with where there was an issue as to knowledge of paternity and there wasn't any issue here as to whether [Z.T.R.] had reason to know he was the father and that's what it is. Did he have to know for sure he was the father? No. But was there reason to know that he was the father.
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> There was significant evidence about the relationship of the mother and [Z.T.R.] and his being notified early on that she was pregnant….

> To this Court, to try to put something else in an instruction as to the knowledge of the existence, he knew. He had knowledge of the existence. That instruction would have been confusing because it wasn't an issue in the first place. He knew that he could be the father so, to this Court, 346A wasn't applicable.
>
> ….
>
> He acknowledged he knew he could be the father. Was he certain he was the father? No. But did he have reason to believe he was the father? He knew that from the outset.

Z.T.R. appeals.

DISCUSSION

¶12 A circuit court has "wide discretion in issuing jury instructions based on the facts and circumstances of the case." ***State v. Vick***, 104 Wis. 2d 678, 690, 312 N.W.2d 489 (1981). The court's discretion in the selection of jury instructions and their wording should be used "to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence." ***Id.*** (citation omitted). However, while the submission of jury instructions is usually within the discretion of the circuit court, the particular question of whether the facts are sufficient to require the court to give a certain instruction is a question of law we review de novo. ***State v. Chew***, 2014 WI App 116, ¶7, 358 Wis. 2d 368, 856 N.W.2d 541.

¶13 Z.T.R. argues that the jury should have been read WIS JI—CHILDREN 346A and been allowed to decide if he had "reason to believe" that the

child was his at some point earlier than when the DNA tests identified him as the father.[2] We disagree.[3]

¶14 Put simply, Z.T.R. fails to explain on what basis a jury would conclude that he had no reason to believe he was the father. The standard of paternity applicable here is not certainty or even a high likelihood, but a "reason to believe." That standard was readily met. Z.T.R. admits he was told that E.M.K. was pregnant during a period in which, on multiple occasions, they were having unprotected sex. Having had children of their own, they knew they were capable of conception. These circumstances are reason enough to believe that he was the father.

¶15 Z.T.R. himself appeared to believe it. Her pregnancy did not "shock" him, they continued to have sexual relations for weeks after, and he saw her at a time when her appearance confirmed the pregnancy. In fact, he wanted to go with her to doctor's appointments for the pregnancy. Such a request is improbable from one who has no reason to believe the child is his. These facts plainly established a "reason to believe" that he was the father.

¶16 The only contrary fact noted by Z.T.R. is of the other man who also had sexual relations with E.M.K. Although this made the paternity of the child uncertain, it does nothing to negate the circumstances that already gave Z.T.R.

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[2] Z.T.R. also notes that an error in jury instructions may entitle a defendant to a new trial in the interest of justice under certain circumstances per WIS. STAT. § 752.35. Because we conclude the circuit court did not err in declining to give the instruction, we do not reach Z.T.R.'s new trial request.

[3] Despite the fact that WIS JI—CHILDREN 346A was not given, E.M.K.'s counsel nonetheless argued in closing that a father's responsibility first begins when they "know[] or ha[ve] reason to believe they might be the father."

reason to believe that he may be the father. Z.T.R. attempts to spin the fact of another man as meaning it was only "possible" that he was the father, and that a mere "possibility" is not enough. This is incorrect. That E.M.K. identified only one other possible father made the prospect that Z.T.R. was the father fixed and realistic. With no other evidence to disprove or diminish the chances that Z.T.R. was the father, the circuit court correctly concluded that Z.T.R. had a reason to believe he was the father and that there was no need to give WIS JI—CHILDREN 346A.

¶17 Z.T.R. notes that WIS JI—CHILDREN 346A, after it poses the verdict question, elaborates on the standard "reason to believe," primarily by listing several factors and questions to consider, e.g., the circumstances and likelihood of conception, what steps the defendant took to determine whether a child was conceived, and his knowledge about the birth.[4] *See* WIS JI—CHILDREN 346A. We fail to see the point, however. Z.T.R. does not point to any evidence, much less

[4] That portion of WIS JI—CHILDREN 346A reads as follows:

> In determining when a father had reason to believe he was the father of the child, you may consider the circumstances of and likelihood of conception; what efforts, if any, he did or reasonably should have undertaken to establish whether a child was conceived; his knowledge or lack of knowledge of the birth of the child; whether he did or did not file a declaration of paternal interest; his efforts or lack of efforts to establish paternity or assist authorities in establishing paternity; what efforts others, including the mother, relatives, child support enforcement or child welfare authorities made to establish paternity or apprise him of his paternity; his knowledge or lack of knowledge of those efforts; his responsiveness or lack of responsiveness to those efforts; any information that would lead him to believe that he was not the father of the child; any efforts to preclude him from determining that status or of the existence of the child and all other evidence bearing on that issue.

explain how any of these circumstances work in his favor or how any factor would disprove that he had a reason to believe he was the father. We do not address undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶18 Z.T.R. cites often to ***State v. Bobby G.***, 2007 WI 77, 301 Wis. 2d 531, 734 N.W.2d 81, arguing that the circuit court incorrectly interpreted and relied upon it. In ***Bobby G.***, the prospective father had no knowledge of the child's existence until the petition for termination of parental rights was filed. ***Id.***, ¶3. The primary holding of the case was that a court must consider the father's efforts undertaken "after he discovers that he is the father but before" the adjudication of rights. ***Id.***, ¶5.

¶19 Although somewhat difficult to follow, we construe Z.T.R.'s argument to be that the circuit court mistakenly believed that ***Bobby G.*** effectively holds that WIS JI—CHILDREN 346A is limited to a situation where the prospective father has no idea about the child until well after the fact and, for that reason, it refused to give the instruction here. We do not believe that this was the circuit court's interpretation. Reading the court's comments as a whole, it primarily pointed to the ***Bobby G.*** case for its contrast to this case: here, in addition to other facts, Z.T.R. was promptly told that E.M.K. was pregnant and that there was only one other possible father, whereas in ***Bobby G.***, the prospective father knew absolutely nothing about the existence of the child until the court proceedings started. The circuit court's point was that the instruction is factually unsupported in the former, but would be appropriate in the latter.

¶20 Finally, Z.T.R. refers to an unpublished opinion, ***Dane County DHS v. John L.-B.***, No. 2013AP462, unpublished slip op. (WI App May 16, 2013),

where we upheld a jury's decision that the father did not have reason to believe under circumstances, according to Z.T.R., that were less compelling than here. We disagree.

¶21 ***John L.-B.*** is a factually complicated case, but suffice it to say that the prospective father doubted his paternity because he not only believed that the mother was having sexual relations with other men (plural) during the relevant time, but that she told him that she could not get pregnant and "had lied to him on a range of issues over time." ***Id.***, ¶11-12. We rejected the argument that the circuit court should have directed a verdict on the "reason to believe" question and changed the jury's answer for several reasons: the petitioner did not develop its legal argument, a reviewing court looks at a jury's verdict with a high degree of deference and will sustain the verdict "if there is any credible evidence" to do so, and that a reasonable jury could conclude the father did not have reason to believe given the evidence, e.g., other prospective multiple fathers and the mother's credibility problems. ***Id.***, ¶47. The unpublished opinion has no practical application here.

By the Court.—Order affirmed.

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