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

May 3, 2001

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**

## NOTICE



**No. 01-0567**

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

---

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO REINALDO R.P.S., A PERSON UNDER THE AGE OF 18:**

**DANE COUNTY DEPARTMENT OF HUMAN SERVICES,**

**PETITIONER-RESPONDENT,**

**V.**

**REINALDO R.P.,**

**RESPONDENT-APPELLANT.**

---

APPEAL from an order of the circuit court for Dane County: DANIEL L. LaROCQUE, Judge. *Affirmed*.

¶1 DEININGER, J.[1] Reinaldo R.P. appeals an order terminating his parental rights to his six-year-old son, who is also named Reinaldo.[2] Reinaldo claims that the trial court erred in terminating his rights because (1) the jury's verdict "was insufficient" to support a termination of parental rights (TPR) order; (2) the services he was provided "were not sufficiently reasonable" to enable him to meet the conditions for the child's return to his home; and (3) he is "likely to meet" the conditions for the child's return within a year of the TPR disposition. We find none of these arguments persuasive and affirm the appealed order.

## BACKGROUND

¶2 The Dane County Department of Human Services petitioned to terminate the rights of both parents in March 2000.[3] The circuit court in 1997 had found the child, then three years old, to be in need of protection or services (CHIPS) and placed him in foster care, where he remained through the time of the TPR proceedings.

¶3 Reinaldo, having been incarcerated for some five years, had seen his son only twice, the last time when the child was about seven months old. Upon Reinaldo's release, the CHIPS court imposed the following conditions for the return of his son: "maintain a stable residence outside of incarceration which is

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] We will refer to the appellant as Reinaldo, and to the boy as "his son" or "the child."

[3] The child's mother could not be located for personal service of the TPR summons and petition, and the court terminated her rights by default after a copy of the summons and petition was mailed to the mother's last known address in California. The mother is not a party to this appeal and no issues regarding the termination of her rights are before us.

free from alcohol and drug abuse, violence and others who move in and out of the home"; "maintain employment or other legal source of income, contribute to [the child]'s support and show that he has adequate resources to meet [the child]'s needs"; refrain from violations of the law or any rules of parole supervision; follow a visitation schedule (if and when visitation was allowed); follow through on any recommendations resulting from psychological and AODA assessments; participate in a parent training program; demonstrate an understanding of the child's special needs; refrain from "any acts of intimidation or physical aggression"; and "cooperate with all service providers."

¶4 It is undisputed that Reinaldo complied with a number of the conditions for his son's return. He did undergo psychological and AODA assessments, which produced no treatment recommendations. He did complete a parent training class, although not until after the TPR proceedings were initiated. The department presented no evidence that Reinaldo had engaged in any violations of the law, or any aggressive or intimidating acts, and he apparently was not on parole. The supervising social worker testified, however, that Reinaldo had not maintained a stable residence or employment since his release from a halfway house, and that, although he met with her on numerous occasions, his attendance was not consistent and he did not demonstrate an understanding of his son's needs. Visitation between Reinaldo and his son was not initiated because of these deficiencies.

¶5 The child's therapist testified that she had seen the boy on 115 occasions over the past three years. She said that, owing to neglect, emotional and possibly physical abuse, as well as witnessing domestic violence in his mother's home, the boy had "special needs," including impulsivity, attachment issues, distractibility, and physical aggressiveness. The therapist summarized that "[h]e's

a very difficult child to manage behaviorally," and explained that he reacts negatively to transitions and changes in his life.

¶6 Reinaldo testified through an interpreter at trial. He is a forty-eight-year-old native of Cuba, who speaks only Spanish and has a hearing impairment and back problems. He has been in the U.S. since 1980 and receives social security disability benefits. His response to information from the social worker regarding his son's problems at school was:

> Well, I always told them that in this life nobody perfect. And kids that age are—they always have their little problems, you know. Nobody going to sit down and not—and be quiet and not say anything.

When asked why he did not approve of prescribed medication for his son, he replied:

> I'm 48 years old. And I've never taken any pills for anything, other than now for this infection. You know, I was like him when I was a child. I used to fight at school. I jump around all over the place. And my parents would yell at me. Majority of the children in Cuba are all like this way.

¶7 During deliberations, the jury sent the court a note inquiring, "Does [sic] the same 10 jurors have to aggree [sic] on all 3 Questions? We have 11 people agreeing to Question #3 the one person that Disagrees is Different from 2 of those that did not agree with Question #2."[4] After conferring with counsel, the

[4] The first of four questions on the verdict, asking whether the child had been placed outside of the parental home under a CHIPS order for six months or longer, was answered "yes" by the court. Question two inquired whether the department had made "a reasonable effort to provide the services ordered by the court." Question three asked whether Reinaldo "failed to meet the conditions established for the safe return of [the child] to Reinaldo[]'s home," and question four asked whether there was "a substantial likelihood" that he would be unable to meet the conditions within the twelve months following the hearing. *See* WIS. STAT. § 48.415(2).

court penned the following reply and instructed the bailiff to inform the jury to "read that":

> Read the sentence in the five-sixth verdict instruction:
>
> "If you can do so consistently with your role as a juror, at least the same ten jurors should agree to all the answers made."

¶8 After the jury returned and the court reviewed the special verdict, the court noted that a signature line for the foreperson had been omitted, and the foreperson was asked to sign the verdict, which he did. The court then reviewed the verdict with the foreperson, who acknowledged that he had initially recorded ten "yes" and two "no" on question two, but had then corrected the verdict to reflect an eleven-to-one split as the final vote on that question. The answer to question three was recorded as "'yes' all 12," and to question four "eleven 'yes,' one 'no.'" The identification of the dissenting jurors at the foot of the verdict showed that two different jurors had dissented, one to each of the divided verdict questions. The name of a third juror was crossed out, presumably the one who had initially dissented on question two but then changed his or her vote. The court sua sponte polled the jurors individually, and each verified that the verdict and votes as read by the court "correctly recites your verdict."

¶9 Reinaldo made no motions challenging the verdict or requesting the court to change the answers to any verdict questions. Following a dispositional hearing, the court entered an order terminating Reinaldo's parental rights to his son. On appeal, he challenges the sufficiency of the jury verdict and the evidence to support it, but not the court's discretionary dispositional decision to terminate his rights.

## ANALYSIS

¶10 Reinaldo's first challenge is to the verdict itself. He claims that we must set it aside because the court improperly allowed the bailiff to instruct the jury, and because of the foreperson's modifications on the verdict form to reflect the changed vote. He also claims error stemming from the lack of the foreperson's signature on the verdict form prior to the jury's return, and because a juror allegedly voted on verdict questions in which she should not have participated. We reject these challenges to the verdict returned by the jury.

¶11 First, with respect to the alleged error in allowing the bailiff to transmit the court's answer to the jurors' question, Reinaldo's argument demonstrates its own flaw. He claims that "[t]he bailiff may have said something which in fact altered the jury's response," but acknowledges "[w]e have no idea what the bailiff said to the jury." Precisely. One who claims that a jury's deliberations were tainted by extraneous information bears the burden of establishing what improper information was communicated to the jurors. *See* ***Castaneda v. Pederson***, 185 Wis. 2d 199, 211-12, 518 N.W.2d 246 (1994). Reinaldo has not met this burden, which initially would have required nothing more than inquiring of the bailiff what communications he had had with jurors during the course of his transmitting their question and the court's response.

¶12 Although Reinaldo does not challenge the substance of the court's reply to the jury's inquiry, we note that the court correctly assessed the possibility that the jury would return an improper verdict. If two jurors had dissented on one of the four questions, and a third had dissented to another, there would have been no verdict. *See* WIS. STAT. § 805.09(2) ("A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury. If more than one question must be answered

to arrive at a verdict on the same claim, the same five-sixths of the jurors must agree on all the questions."). The court expressed its concern that it did not want to give a "coercive" response to the jurors, and without objection, opted to call the jury's attention to the relevant language of the instructions they had already been given. Although the court initially proposed to have the bailiff "go back and tell them to read the five-sixth verdict language," it ultimately opted to instead forward its written response, quoted above. Reinaldo did not object to this procedure, and as noted, he has established no record of any improper communications or the rendering of "legal interpretations" by the bailiff, as he claims on appeal "may" have occurred. We conclude no error was committed in the court's response to the jury's question.

¶13 Likewise, we find no error in the fact that one juror apparently changed his or her mind during deliberations, and that indications of this appear on the face of the verdict that was returned. The court carefully reviewed each question on the verdict with the foreperson and obtained his acknowledgement to the responses that were made and modified on the verdict form. The court then, wisely, polled each juror to verify that the verdict as recited was in fact the verdict of each juror.

¶14 We conclude that the verdict form clearly communicates the final decision of the jurors, and that their answers to all questions were confirmed by the poll. There is no ambiguity, "perversity," or error resulting from the writings on the verdict form, as Reinaldo asserts. We also attach no significance to the fact that the foreperson affixed his signature to the verdict form after the jury returned to the courtroom. Reinaldo asserts that this was "not correct procedurally," but cites no authority for the proposition, nor for a claim that a tardy signature by a foreperson is grounds for setting aside a verdict.

¶15 Finally, we address what we can only term a puzzling argument regarding the number of jurors who responded to each question on the verdict. Following question two, the verdict form instructed: "If you answered question 2 'yes,' then answer the following question: …." A similar directive followed question three, requiring question four to be answered only if an affirmative answer was given to question three. Reinaldo reads the pronoun "you" in the preceding direction to be singular, addressing the instruction to each juror individually, rather than to the jury as a whole. Thus, according to him, the juror who dissented on question two should not have voted on questions three and four, and it is apparent that she did so because the answer to question three was reflected as "yes" by all twelve jurors, and to question four as eleven "yes" but with a different dissenter.

¶16 From this, Reinaldo would have us conclude that the questions and directions on the verdict form were "imprecise and ambivalent" because it was unclear whether a dissenter on one question could weigh in on subsequent questions. But, Reinaldo's argument that this confusion somehow vitiates a ten-person verdict has no merit. First, we do not necessarily agree that a juror who dissents on one question should not be permitted to answer a succeeding one. Second, we concur with the guardian ad litem that any claim of error stemming from the wording of the verdict form was waived when Reinaldo failed to object to the proposed verdict language at the instructions conference. WIS. STAT. § 805.13(3).

¶17 Most importantly, however, we conclude that it makes absolutely no difference to the final outcome whether a dissenting juror on a question participates in succeeding questions. Once a dissent is voiced to one question on the verdict by a juror, only one other juror may dissent to any succeeding question

in order to preserve a five-sixth verdict. If two other jurors do so, as we have discussed, the verdict fails. Put another way, the original dissenter's assent to questions three and four is irrelevant. The crucial point is that not more than one other juror dissented to either of the last two questions, such that there remained a block of ten jurors who voted "yes" on each question. It makes no difference whether they were ten out of eleven, or ten out of twelve, jurors voting on questions three and four.

¶18 We turn next to Reinaldo's challenges to the sufficiency of the evidence to support the jury's affirmative responses regarding the department's reasonable effort in providing services and the likelihood of Reinaldo's not meeting the conditions for his son's return. One who seeks to set aside a jury's verdict on grounds of insufficiency of the evidence faces a heavy burden. Reinaldo must convince us that there is "no credible evidence" to support the jury's findings. ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995). Our duty is to search the record to find precisely such evidence, accepting all reasonable inferences drawn by the jury. ***Heideman v. American Family Ins. Group***, 163 Wis. 2d 847, 863-64, 473 N.W.2d 14 (Ct. App. 1991). And, if we find credible evidence to support the verdict, the fact that it may arguably be "'contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict ... must stand.'" ***Weiss***, 197 Wis. 2d at 389-90 (citation omitted).

¶19 Reinaldo first argues that the department "did not make a reasonable effort to provide the services ordered by the court." As we have noted, it is not our role to decide de novo whether the department's effort was reasonable, but to determine whether there is evidence in the record from which the jury could so conclude. There is. The department's social worker testified to the provision of

each of the court-ordered services, and Reinaldo himself acknowledged many of them. Reinaldo also maintains that because of his language and hearing difficulties, and his different "cultural expectation," he required a higher level of service than was supplied to him. We observe, first, that the department provided evidence that it provided a Spanish interpreter during Reinaldo's visits with the social worker, and that he was provided a hearing device following a referral to the Division of Vocational Rehabilitation. Moreover, we agree with the guardian ad litem that if Reinaldo believed that the services being provided to him and his son were inadequate, his remedy was to request revisions to the CHIPS dispositional orders. There is nothing in the record indicating that he did so.

¶20 By the same token, the department also presented evidence from which the jury could conclude that it was unlikely that Reinaldo would meet the conditions for his son's return within a year of the TPR hearing. The social worker testified to Reinaldo's frequent moves, his inability to obtain or maintain employment, and his inconsistency in keeping appointments. The jury could have inferred that this pattern would continue, notwithstanding Reinaldo's stated good intentions. The jury could also have inferred from Reinaldo's own testimony that he did not understand the nature and extent of his son's special needs, and that he was unlikely to acquire that understanding anytime soon.

¶21 As the trial court noted at disposition, this was not a "black and white, open and shut case," and the court credited Reinaldo with having taken several of the steps necessary for the return of his son. The jury was informed of Reinaldo's language barrier and of his hearing problems, and it heard from him as to his love for his son and his desire to be with him. The jury was *not* informed, however, of the reason for his lengthy incarceration, and the department made no effort to vilify him before the jury. The jury could have simply concluded from

the evidence presented that Reinaldo's prolonged absence from his son's life, and the child's significant needs, coupled with Reinaldo's own apparent difficulties in reintegrating into the community following incarceration, rendered it substantially likely that Reinaldo could not safely be reunited with his father within the year following trial.

¶22 In short, having reviewed the record, we are not persuaded that the evidence presented at trial was insufficient to support the jury's answers on the verdict it returned.

## CONCLUSION

¶23 For the reasons outlined above, we affirm the appealed order.

*By the Court.*—Order affirmed.

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