COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0331 **Cir. Ct. No. 01-TP-36**

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

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

RACINE COUNTY HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DADRA L.,

RESPONDENT,

DONALD H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: RICHARD J. KREUL, Judge. *Affirmed*.

¶1 ANDERSON, J.[1] This is an appeal from an order by the circuit court terminating Donald H.'s parental rights to his son, Donavin H., pursuant to WIS. STAT. § 48.43. Donald argues that the circuit court erred when giving modified jury instructions because those instructions were misleading and prejudicial. We conclude that the modified jury instructions, taken as a whole, were not prejudicial or misleading, and the instructions adequately explained the law applicable to the facts. The order is affirmed.

¶2 The following facts are not in dispute. Donald has been a prisoner since September 29, 1996. His son was born on November 14, 1996. Donald has been in prison since before his son was born. From prison, he has inquired about his son via letters and phone calls to his son's foster parents and he has sent his son Christmas presents and birthday cards.

¶3 On May 2, 2001, Racine County Human Services (County) filed a petition in Racine county circuit court seeking to terminate Donald's parental rights to his son.[2] The County alleged that Donald had failed to assume parental responsibility as defined in WIS. STAT. § 48.415(6).[3] On May 31, 2001, after a jury trial, the court terminated Donald's parental rights to his son.

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[1] This is a one-judge appeal 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] The petition also sought to terminate the mother's rights.

[3] WISCONSIN STAT. § 48.415(6) provides in part that:

> (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have never had a substantial parental relationship with the child.

¶4 At trial, the County requested that the circuit court modify WIS JI—Children 346 instructions[4] to include the following sentence: "A person's parental

[4] WISCONSIN JI—Children 346 states:

> INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: FAILURE TO ASSUME PARENTAL RESPONSIBILITY [WIS. STAT. § 48.415(6)(a)]
>
> The petition in this case alleges that (parent) has failed to assume parental responsibility, which is a ground for termination of parental rights. Your role as jurors will be to answer the following question in the special verdict.
>
> 1. Has (_____) failed to assume parental responsibility for (child)?
>
> To establish a failure to assume parental responsibility, (petitioner) must prove to a reasonable certainty by evidence that is clear, satisfactory, and convincing that the parent or the person or persons who may be the parent of (child) have never had a substantial parental relationship with (child.)
>
> The term "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of (child). In evaluating whether (person) has had a substantial parental relationship with the child, you may consider factors, including, but not limited to, whether (person) has ever expressed concern for or interest in the support, care, or well-being of (child), whether (person) has neglected or refused to provide care or support for the child, and whether, with respect to a person who is or may be the father of the child, the person has ever expressed concern for or interest in the support, care, or well-being of the mother during her pregnancy.
>
> Before you may answer the special verdict question "yes," you must be satisfied to a reasonable certainty by evidence that is clear, satisfactory, and convincing that the question should be answered "yes." If you are not so satisfied, you must answer the question "no."
>
> SPECIAL VERDICT
>
> 1. Has (_____) failed to assume parental responsibility for (child)?
>
> Answer: _____
> Yes or No

rights may be terminated without proof that the person has the opportunity and ability to establish a substantial parental relationship with the child." The County argued that the addition of this sentence was important because:

> It used to be that you had to prove that a person had the opportunity and ability to establish a substantial parental responsibility, but that's not true anymore …. We've gone very quickly today. And I think that spelling out what the law says for them in a more clear and black and white sort of way is helpful to them. These facts comport with exactly what the evidence is. And I believe that it's helpful to the jury. It doesn't confuse them. It makes things clearer for them.

¶5 Donald's counsel objected to the addition of this sentence, stating: "To basically attempt to insert interpretations of the law into an instruction I think is erroneous." He also argued that the "committee accepted 346 without [adding this type of sentence]." For these reasons, Donald asked that the court reject any modification and that the pattern jury instruction be followed because it has "survived the test of time."

¶6 The circuit court adopted the modification, finding it to be appropriate because it clarified the applicable law with which to advise the jury. Donald appeals.

Standard of Review

¶7 "[T]he trial court has wide discretion in choosing the language of jury instructions and if the instructions given adequately explain the law applicable to the facts, that is sufficient and there is no error in the trial court's refusal to use the specific language requested …." ***State v. Herriges***, 155 Wis. 2d 297, 300, 455 N.W.2d 635 (Ct. App. 1990). In reviewing a trial court's jury instruction, we will consider whether the instruction, taken as a whole, was

prejudicial in that it either misled the jury or was an incorrect statement of the law. *See* ***Fischer v. Ganju***, 168 Wis. 2d 834, 849-50, 485 N.W.2d 10 (1992). However, "an erroneous jury instruction is not fatal unless we are satisfied that it is *probable*—not merely possible—that the error affected the jury's determination." ***Muskevitsch-Otto v. Otto***, 2001 WI App 242, ¶6, 248 Wis. 2d 1, 635 N.W.2d 611.

Discussion

¶8 On appeal, Donald renews his trial objections and adds that the modified jury instructions were misleading and prejudicial. He argues that the additional sentence modifying WIS JI—Children 346 is misleading because it focuses on an element that is no longer required. He contends that the jury should instead be instructed to focus on whether the elements existing in the current statute have been proven or not. Additionally, he argues that the modification is confusing because it directs the jurors' attention to the termination decision, which is not theirs to make. Furthermore, he maintains that because he never claimed he had been denied the opportunity to establish a relationship with his son, the modification of the instructions was not applicable to his case.

¶9 In response, the County correctly points out, and all parties now agree, that the added sentence conveys an accurate statement of the law. *See* ***Ann M.M. v. Rob S.***, 176 Wis. 2d 673, 684, 500 N.W.2d 649 (1993). In order to justify the modification, the County directs our attention to comments made by Donald's counsel during trial, comments which, the County contends, were made to convey to the jury that it was Donald's incarceration that prevented him from establishing a proper relationship with his son. During his opening statement, Donald's counsel said: "So the issue ultimately that will come before you at the close of the

testimony is, yes, he was in prison. Is that the grounds to terminate him? … And he's doing the best that he can with the resources available to him." During his closing statement, Donald's counsel added, "It's true, he did not change a diaper. Unfortunately there were those things in front of him that says no. Whose fault is that? Again [Donald] is in the Wisconsin Prison System."

¶10 The County contends that these statements "were thinly veiled attempts" to argue that Donald was unable because of incarceration to establish a parental relationship with his child. The County argued, and the circuit court agreed, that given these comments and the facts of the case, the jury needed clarification as to the role, if any, that Donald's incarceration should play in its decision, and that adding this sentence to the instructions provided the necessary clarification: "A person's parental rights may be terminated without proof that the person has the opportunity and ability to establish a substantial parental relationship with the child." We agree with the County that the "jury instruction [with this added sentence] is helpful to [a] jury because it removes from their focus the looming barrier of prison as it relates to the question of the appellant's opportunity to establish a relationship."

¶11 The circuit court appropriately tailored the jury instructions to the specific facts and the instructions reflected a correct statement of the law. Therefore, the circuit court did not err.

By the Court.—Order affirmed.

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