COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 2013

Diane M. Fremgen
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. 2013AP385
2013AP386
2013AP387

Cir. Ct. Nos. 2012TP1
2012TP2
2012TP3

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

NO. 2013AP385

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

LANGLADE COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

V.

LATOYA D.,

RESPONDENT,

MICHAEL P.,

RESPONDENT-APPELLANT.

NO. 2013AP386

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

LANGLADE COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

V.

LATOYA D.,

RESPONDENT,

MICHAEL P.,

RESPONDENT-APPELLANT.

NO. 2013AP387

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

LANGLADE COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

V.

LATOYA D.,

RESPONDENT,

MICHAEL P.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Langlade County: WILLIAM F. KUSSEL, JR., Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Michael P. appeals orders terminating his parental rights to his children: Dasaveon P., Mickiah P., and Davontae P. He argues insufficient evidence supports the jury's determination that he failed to assume parental responsibility. He also argues the failure to assume parental responsibility ground is unconstitutional as applied because the Langlade County Department of Social Services prevented him from assuming parental responsibility. We reject Michael's arguments and affirm.

BACKGROUND

¶2 Dasaveon, Mickiah, and Davontae were born to Michael and LaToya D. in July 2004, April 2006, and December 2007, respectively. Michael and LaToya were in a relationship and lived with each other and the children in Beloit.

¶3 In mid-2008, LaToya sent Dasaveon and Mickiah to Antigo to live with her mother, Belinda D. LaToya then sent Davontae to Belinda approximately one month later. Shortly thereafter, LaToya ended her relationship with Michael and moved to Belinda's house in Antigo. Michael came to visit the children one time in spring 2009. In October 2009, the children were removed from LaToya's care based on allegations of neglect. A circuit court subsequently found the children in need of protection and services, and the children were ultimately placed in foster care.

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 In 2010, Michael moved into Belinda's house in Antigo. He attended eight supervised visits with the children in the summer and the fall of 2010. Michael discontinued visits after he moved to Wausau in December 2010. He also had scheduled weekly phone calls with the children that occurred less than half of the time. Contact between Michael and his children was terminated sometime after August 2011, based on the recommendation of the children's counselor.

¶5 In February 2012, the County petitioned to terminate Michael's parental rights to Dasaveon, Mickiah, and Davontae.[2] The petitions alleged Michael had failed to assume parental responsibility of the children. Michael contested the petitions, and the court held a jury trial.

¶6 At trial, LaToya testified that when she, Michael, and the children lived together in Beloit, Michael did not provide for the children. She explained she cared for the children and took them to all of their appointments. LaToya then testified that, while in Antigo, Michael sent money "maybe once or twice" but otherwise did not provide financial or other support. Michael was also found in contempt for failing to pay child support for Dasaveon and Mickiah and was incarcerated for four months.[3]

[2] The County also petitioned to terminate LaToya's parental rights. LaToya voluntarily consented to terminate her parental rights, and the circuit court terminated her parental rights following a dispositional hearing.

[3] Michael was not adjudicated Davontae's father until after the petition for termination was filed. Michael testified, however, that at the time of Davontae's birth, he knew he was Davontae's father. He and LaToya agreed that LaToya would say she was unsure of the father's identity so Michael would not have to pay more child support.

¶7 As far as contacting the children, LaToya explained she would text or call Michael and he "had every phone number we had," but he would only contact her about the children "once in a blue moon." LaToya opined Michael was "not a father" toward the children because "[h]e's not there for 'em like he should be. He doesn't show them the love that he should or support that he should."

¶8 Belinda testified that when the children lived in her care, she supported them financially. Michael did not send any money, call, write or send gifts to the children. When Michael visited in 2009, Belinda observed, "[T]here was no interaction" between Michael and the children, "He was there physically." Belinda also testified that, although Michael occasionally supervised the children, Belinda could not recall him ever caring for, bathing, educating, or taking the children to medical appointments.

¶9 Social worker Stephanie Byer testified that she contacted Michael the day after the children were removed from LaToya's care. Byer asked Michael if he would be willing to take the children or if there were any appropriate relatives on his side that would be able to care for the children. Michael told Byer he would get back to her, but he never did.

¶10 The children's foster mother, Paula D., testified that when the children were placed with her and her husband, they were "wild," rambunctious, emotional, sad, and scared. The children did not eat with silverware, had no manners, jumped on furniture, broke toys, could not sleep at night, and hid at the bottom of their beds if they heard noises. Dasaveon and Mickiah had serious dental problems that required oral surgery and speech problems that required speech therapy. Davontae had no speech at all. Further, Dasaveon and Mickiah

received medication and counseling for diagnoses of attention deficit hyperactivity disorder, reactive attachment disorder, and posttraumatic stress disorder.

¶11 Paula explained that Michael never attended any medical appointments or school meetings, never inquired about the children's counseling, oral surgery or other challenges, and never wrote to the children. Michael did send a gift one time. Paula also testified that the children had scheduled weekly phone calls with Michael, but the phone calls occurred less than half of the time because "it was quite a challenge to try and get ahold of [Michael] on a weekly basis." When the phone calls did occur, Michael would not ask the children questions and Paula had to constantly prompt the children to "tell [him] this" or "tell [him] that." Each phone call would last "probably ten minutes at the tops."

¶12 Social worker Karen Purmort testified that she was the children's social worker after Byer. Purmort encouraged visitation and called and wrote to Michael about the need for him to maintain contact with his children. Michael, however, would "not give [Purmort] a time when he would come other than, 'I will come when I can.'" Purmort explained that when Michael finally began visiting the children in July 2010, he visited them only eight times in approximately twenty weeks. Because Michael did not visit the children on a weekly basis, Purmort was unable to progress the visitation schedule to include multiple weekly visitations.

¶13 Purmort explained that, during visits, the children were initially happy to see Michael, but the visits ended "badly for a lack of a better word." Michael did not know what to do with the children and "during the visits … [the children] stopped trying to gain attention from [Michael]." Purmort stated she

"never saw that kind of a connection between Michael and his children other than they were his children."

¶14 Purmort also had conversations with Michael about what he needed to do to get the children placed in his care. However, Michael made minimal progress on the court-ordered conditions for return. Further, at Michael's request, the County initiated two home studies to try to move the children to him, but neither study was completed because Michael "kept saying … he was working on his house and that he would let us know when it would be a good time for us to come … but he never called." Finally, when Michael moved from Antigo to Wausau, Purmort offered to drive him to Antigo and asked if there was anything she could do to help him satisfy the conditions for return. With the exception of one or two rides, Michael refused Purmort's assistance.

¶15 Michael testified he loved his children. When asked about LaToya's testimony that he was not taking care of the children's basic needs, he explained her testimony was incorrect because:

> Ever since Dasaveon, Mickiah and Davontae were born I was there. I changed diapers, … I cleaned, I made sure whatever they needed I was there. I worked. I paid child support – besides one time when I had to do four months in jail for Contempt of Court – other than that I was there with my kids from sunup till sundown. I never left my kids' side, never, and what make it so understanding is – I'm just gonna say this – you all really don't know who I am.

¶16 Michael explained that, once LaToya and the children moved to Antigo, "I always called Toya and asked when she's coming down with the kids so I could spend time with the kids." Later, when Michael found out his children had been removed from LaToya's care, he asked Byer to place the children with him.

¶17 Michael testified that, although the children were removed from LaToya's care in October 2009, he did not visit the children until July 2010 because no one told him about when visits or other appointments for his children were scheduled and he received "little help from Social Service." He explained he visited his children only eight times because that was how many visits were scheduled, and he disputed Purmort's testimony that visits were weekly. Michael also testified he had to end in-person visitation when he moved to Wausau. He explained he told Purmort he did not have transportation to the visits and she told him that was not her problem and offered no assistance. Finally, Michael testified Paula's testimony about the children's condition when they came into her care was untrue. He explained he taught his children manners, how to use silverware, and how to brush their teeth.

¶18 Wendy Waurio, Michael's former girlfriend, testified Michael always tried to see his children and purchased Christmas and birthday presents for them. Waurio also knew Michael loved his children and that he tried to send money to them.

¶19 The jury found Michael failed to assume parental responsibility of his children. Following a dispositional hearing, the circuit court terminated Michael's parental rights.

DISCUSSION

I. Sufficiency of the Evidence

¶20 Michael argues the evidence was insufficient to support the jury's determination that he failed to assume parental responsibility of his children. When reviewing the sufficiency of the evidence, we use a highly deferential

standard of review. ***State v. Quinsanna D.***, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 655 N.W.2d 752. We sustain the jury's verdict if there is any credible evidence to support it. ***Id.*** We search the record for evidence that supports the verdict, accepting any reasonable inferences the jury could reach. ***Id.***

¶21 Failure to assume parental responsibility is established by proof that the parent has not had a substantial parental relationship with the child. WIS. STAT. § 48.415(6)(a); ***State v. Bobby G.***, 2007 WI 77, ¶45, 301 Wis. 2d 531, 734 N.W.2d 81. "Substantial parental relationship" is defined by statute as "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." WIS. STAT. § 48.415(6)(b).

¶22 WISCONSIN STAT. § 48.415(6)(b) provides:

> In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the 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 expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

"[A] fact-finder must look to the totality-of-the-circumstances to determine if a parent has assumed parental responsibility." ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶22, 333 Wis. 2d 273, 797 N.W.2d 854. Further, "[w]hen applying [the totality-of-the-circumstances] test, the fact-finder should consider any support or care, or lack thereof, the parent provided the child throughout the child's *entire* life." ***Id.***, ¶73 (emphasis added).

¶23 On appeal, Michael argues the evidence was insufficient to support the failure to assume parental responsibility ground because the jury did not

"adequately account for" his relationship with his children while in Beloit and the subsequent barriers to contact and visitation. He points to his testimony that he cared for his children on a daily basis in Beloit and contends that, after the children moved to Antigo, he "maintained contact and interest in the children to the best of his ability." He also argues the child in need of protection or services ("CHIPS") orders hindered his ability to contact and visit his children. He asserts this evidence cannot amount to a failure to assume parental responsibility.

¶24 Michael, however, overlooks other evidence presented at trial that supports the jury's determination. LaToya testified Michael did not show the children love or support and that, while living in Beloit, she cared for the children and took them to their appointments. Michael was also incarcerated for failing to pay child support and chose not to admit he was Davontae's father in order to avoid paying more support. Belinda testified that, when the children were sent to her, Michael never called, wrote to, or provided financial support for the children. LaToya confirmed Michael's lack of interest in the children, noting that, once they moved to Antigo, Michael contacted her about the children "once in a blue moon." When Michael finally visited the children one year later, Belinda testified that Michael was detached and did not care for the children.

¶25 When the children were removed from LaToya's care, Byer testified she asked Michael if he would take the children, and Michael told her only that he would get back to her, but he never did. Purmort repeatedly asked Michael to visit and maintain contact with the children. When Michael did visit, Purmort noticed no connection between him and the children. Finally, Paula testified that it was difficult to get Michael on the phone to talk to his children, and when she did manage to contact Michael, he would not engage the children in conversation.

¶26 On these facts, it is clear that Michael did not have a "substantial parental relationship" with his children over the course of their lives. *See* WIS. STAT. § 48.415(6)(a). Although Michael did testify that he cared for his children when they lived in Beloit, always called and asked about his children when they lived with LaToya in Antigo, and was hindered by the County in getting the children placed with him and visiting them, this self-serving testimony does not mean insufficient evidence supported the jury's verdict. The jury is the arbiter of witness credibility and was free to reject Michael's account and accept opposing evidence. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659 (It is the role of the jury, not the appellate court, to assess the credibility of witnesses and the weight to be given to their testimony.). Based on the record, we conclude the evidence sufficiently supports the jury's determination that Michael failed to assume parental responsibility.

II. Constitutional Challenge

¶27 Michael next argues the failure to assume parental responsibility ground is unconstitutional as applied. Whether a statute is unconstitutional as applied presents a question of law subject to independent appellate review. ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, ¶22, 293 Wis. 2d 530, 716 N.W.2d 845. Michael argues the ground is unconstitutional as applied because the County prevented him from assuming parental responsibility and then petitioned to terminate his parental rights on that basis. In support, Michael analogizes his situation to the one in ***Jodie W.***

¶28 In ***Jodie W.***, the child was found to be a child in need of protection or services and was placed in foster care while the mother was incarcerated. ***Id.***, ¶¶4-5. The mother was given a list of conditions that she needed to complete so

the child could be returned to her care. ***Id.***, ¶6. One of the conditions for return was that she obtain a suitable residence. ***Id.***, ¶7. The county then petitioned to terminate the mother's parental rights on the basis that the mother, who remained incarcerated, had failed to satisfy the condition that she obtain a suitable residence. ***Id.***, ¶8.

¶29 Our supreme court determined a circuit court could not find grounds to terminate a parent's rights based solely on the fact that a parent had failed to meet an impossible condition of return. ***Id.***, ¶56. It concluded the mother's substantive due process rights were violated when grounds to terminate her parental rights were established solely by virtue of her status as an incarcerated person without regard for her actual parenting activities or the condition of her child. ***Id.***, ¶¶55-56.

¶30 Michael argues that, similar to ***Jodie W.***, the County, through the CHIPS orders, prevented him from assuming parental responsibility and then moved to terminate his parental rights on that basis. He argues it is "impossible or extremely difficult to exercise parental responsibility when a child [is] in the care and control of the government pursuant to a court order and the government set the conditions for the parent to have contact with the children and eventually reunite."

¶31 We reject Michael's arguments. Unlike the impossible housing condition imposed on the mother in ***Jodie W.***, nothing in the record indicates the County or the CHIPS orders made it impossible for Michael to "accept[] and exercise … significant responsibility for the daily supervision, education, protection and care of the child[ren]." *See* WIS. STAT. § 48.415(6)(b).

¶32 Rather, the evidence presented at trial shows the County actively encouraged and tried to assist Michael in assuming parental responsibility. When

the children were removed from LaToya's care, the County asked Michael if he would be willing to take the children. Instead of saying "yes," he told the worker he would get back to her, but he never did. Another social worker wrote and called Michael, telling him he needed to visit the children and remain in contact with them and asking Michael if there was anything she could do to help him. The foster mother also called Michael so he could speak with his children, but could get ahold of him less than half of the time. Despite the County's efforts, Michael had only sporadic contact with his children. That Michael did not sufficiently maintain contact with his children while they were in the County's care does not mean the County prevented him from assuming parental responsibility.

¶33 Further, contrary to Michael's suggestion, this is not a case where the only evidence of a parent's failure to assume parental responsibility occurred after the children were placed in the County's care. The evidence at trial showed that even before the children were removed from LaToya's care, Michael did not accept or exercise significant responsibility for them. We conclude the failure to assume parental responsibility ground is not unconstitutional as applied to Michael.

¶34 Finally, incorporated within his due process argument, Michael also states the County violated his right to due process because it should have pursued termination of his parental rights based on the continuing CHIPS ground instead of the failure to assume parental responsibility ground. He contends the County's unwillingness to pursue termination based on the continuing CHIPS ground, which would have required the County to prove in part that he would be unable to meet the conditions for return in the next nine months, violated his right to due

process because the jury should determine whether "reunification" between the parent and child is possible.[4]

¶35 We disagree. That the County did not elect to pursue termination of Michael's parental rights on the continuing CHIPS ground does not mean that Michael's right to due process was violated. WISCONSIN STAT. § 48.415 outlines ten grounds that each serve as a separate basis to terminate a parent's rights. *See* WIS. STAT. § 48.415(1)-(10). The County does not need to select a ground for termination based on the parent's preference. Moreover, we find curious Michael's assertion that the County should have pursued termination based on the continuing CHIPS ground because he states in his brief that "the evidence at trial might have tended to show" the continuing CHIPS elements.

By the Court.—Orders affirmed.

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

[4] To establish the continuing CHIPS ground, the petitioner must prove, pursuant to WIS. STAT. § 48.415(2)(a): (1) the child has been adjudged to be a child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under § 48.345; (2) the agency responsible for the care of the child and the family has made a reasonable effort to provide the services ordered by the court; (3) the child has been outside the home for a cumulative total period of six months or longer pursuant to such orders and the parent has failed to meet the conditions established for the safe return of the child to the home; and (4) there is a substantial likelihood that the parent will not meet the conditions within the nine-month period following the fact-finding hearing.