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January 17, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP1199-NM	In re the termination of parental rights to A.H.: State of Wisconsin v. J.W. (L.C. # 2016TP149)
2017AP1200-NM	In re the termination of parental rights to J.H.: State of Wisconsin v. J.W. (L.C. # 2016TP150)

Before Kessler, J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

J.W. appeals orders terminating his parental rights to twin girls, A.H. and J.H. Attorney Steven Zaleski, appointed counsel for J.W., filed and served a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), ***Brown Cty. v. Edward C.T.***, 218 Wis. 2d 160, 579 N.W.2d 293 (Ct. App. 1998), and WIS. STAT. RULES 809.107(5m) and 809.32. J.W. did not submit a response. We have considered counsel's no-merit report, and we have independently reviewed the consolidated records. We conclude that further proceedings would lack arguable merit, and we summarily affirm the orders terminating J.W.'s parental rights.

Background

A.H. and J.H. were born on May 31, 2006. They came to the attention of the Division of Milwaukee Child Protective Services[2] in April 2015 after Milwaukee police discovered the children living with their mother, B.H., and an older sibling in a pest-infested attic that lacked plumbing and furnishings. According to police, B.H. was intoxicated when the officers arrived at her home, and the officers found marijuana and alcohol within reach of the children. A.H. reported that B.H. had threatened suicide. The Division attempted to contact J.W., the twins' alleged father, but B.H. was unable to provide any contact information for him. When an initial assessment worker eventually located a telephone number for J.W., he agreed to meet with the worker but then stopped answering his telephone. The Division could not locate an available and appropriate relative to provide care for A.H. and J.H., and they were placed with a nonrelative.

[2] In 2015, the Division of Milwaukee Child Protective Services was known as the Bureau of Milwaukee Child Welfare. We refer to the agency by its current name.

In September 2015, the circuit court found A.H. and J.H. were children in need of protection or services and ordered that they continue in an out-of-home placement with a foster parent, T.D.

In May 2016, the State filed petitions to terminate J.W.'s parental rights to A.H. and J.H. As grounds, the State alleged that J.W. had failed to assume parental responsibility for the girls.[3] *See* WIS. STAT. § 48.415(6). At his initial appearance, J.W. requested genetic testing to determine whether he was the girls' biological father. After testing confirmed his paternity, he opposed termination of his parental rights. The matters proceeded to trial on January 3, 2017, and a jury found that J.W. had failed to assume parental responsibility for the girls. In March 2017, the circuit court conducted a dispositional hearing and found that terminating J.W.'s parental rights was in the best interests of A.H. and J.H.[4]

J.W. appealed to this court and requested a remand to circuit court to permit pursuit of postdisposition relief. *See* WIS. STAT. RULE § 809.107(6)(am). Following remand, J.W. moved for a new trial on the issue of whether he had failed to assume parental responsibility. In support, he showed that the circuit court records failed to establish that the potential jurors took an oath before jury selection began. In response, the State moved to correct the records with an amended transcript showing that the venire in fact was properly sworn. The circuit court granted the State's motion to correct the records, and denied J.W.'s motion for a new trial.[5] The circuit

[3] The petition to terminate J.W.'s parental rights also sought termination of B.H.'s parental rights. The order terminating B.H.'s parental rights is not before us.

[4] The Honorable Christopher R. Foley presided over the trial and dispositional hearing and ordered the termination of J.W.'s parental rights to A.H. and J.H.

[5] The Honorable Laura Gramling Perez considered the postdisposition motions and denied J.W.'s request for a new trial.

court returned the records, as corrected, to this court, and J.W.'s appellate counsel filed a no-merit report.

Compliance with Statutory Time Limits

We first consider whether J.W. could raise an arguably meritorious claim that the circuit court failed to meet mandatory statutory time limits and thereby lost competency to proceed. *See* ***State v. April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927. After a termination of parental rights petition is filed, the circuit court has thirty days to conduct an initial hearing and determine whether any party wishes to contest the petition. WIS. STAT. § 48.422(1). If a party contests the petition, the circuit court must set a date for a fact-finding hearing, which must begin within forty-five days of the initial hearing. WIS. STAT. § 48.422(2). If grounds for termination are established, the circuit court may delay the dispositional hearing until "no later than 45 days after the fact-finding hearing." WIS. STAT. § 48.424(4).[6]

When the statutory time limits cannot be met, continuances may be granted "only upon a showing of good cause in open court … and only for so long as is necessary, taking into account the request or consent of the district attorney or the parties and the interest of the public in the prompt disposition of cases." WIS. STAT. § 48.315(2). Failure to object to a continuance, however, "waives any challenge to the court's competency to act during the period of delay or continuance." WIS. STAT. § 48.315(3).

[6] The deadlines in WIS. STAT. §§ 48.422(1)-(2) and 48.424(4), are subject to an exception applicable to Native American children that is not relevant here.

In this case, the circuit court on several occasions granted continuances that extended the proceedings beyond the statutory deadlines, but J.W. did not object. Accordingly, J.W. cannot mount an arguably meritorious challenge to the circuit court's competency to proceed based on failure to comply with statutory time limits. *See* ***id.***

Elements of Failure to Assume Parental Responsibility

Under WIS. STAT. § 48.415(6), grounds exist to terminate parental rights if a parent failed to assume parental responsibility for a child. J.W. asked the circuit court to instruct the jury, in accordance with WIS JI—CHILDREN 346A, that the State must prove two elements to prevail in its claim that he failed to assume parental responsibility for A.H. and J.H.: (1) he knew or had reason to know that he was the children's father; and (2) he failed to assume parental responsibility for the children. *See* ***id.*** The State opposed J.W.'s request to give WIS JI—CHILDREN 346A. The State contended that WIS JI—CHILDREN 346 correctly states the law by requiring the State to prove only the single element of failure to assume parental responsibility. According to the State, the question of whether J.W. knew or should have known about his paternity was an affirmative defense that he must prove. The circuit court ruled in J.W.'s favor and instructed the jury in accordance with WIS JI—CHILDREN 346A. J.W. could not pursue an arguably meritorious challenge to this ruling. Principles of judicial estoppel prevent him from complaining on appeal that the circuit court took the position that he advocated. *See* ***State v. Washington***, 142 Wis. 2d 630, 635, 419 N.W.2d 275 (Ct. App. 1987).

Sufficiency of the Evidence as to Grounds for Termination

Whether grounds exist for the termination of parental rights is a question of fact. *See* WIS. STAT. § 48.415. The State must prove the existence of such grounds by clear and

convincing evidence. *See* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶¶3-4, 271 Wis. 2d 1, 678 N.W.2d 856. We review the sufficiency of the evidence to determine "whether there is any credible evidence to sustain the verdict." ***St. Croix Cty. DHHS v. Michael D.***, 2016 WI 35, ¶29, 368 Wis. 2d 170, 880 N.W.2d 107.

To prove the allegation that J.W. failed to assume parental responsibility for A.H. and J.H., the State presented four witnesses. We need to summarize the testimony of only two of them.

The State first called J.W. to testify. He said that he lived with B.H. for several months in 2005. He said that during those months, he had sexual relations with B.H. and did not use birth control. After J.W. moved out of B.H.'s home, she told him that she was pregnant, and she called him when she went into labor. J.W. went to the hospital where B.H. was delivering her babies because he thought they were his, although he did not know "for sure." He left, however, when he realized that another man was at the hospital with B.H. He did not ask the hospital staff any questions about how to establish himself as the father of the infants, and he did not file a declaration of paternal interest.

J.W. had no contact with A.H. and J.H. and took no steps to determine whether he was their father until he received notice of a court date sometime in 2008 requiring him to take a DNA test.[7] J.W. testified that he went to the courthouse as directed, but B.H. did not produce the girls for a DNA test and no DNA testing was conducted. Between 2008 and 2015, J.W. did not have any contact with A.H. and J.H., and he did not seek them out. He did not remember

[7] The records before this court do not reveal the precise nature of the 2008 litigation.

receiving a telephone call about the girls in April 2015, but he did acknowledge that in September 2015, he received a letter advising him that the girls were in foster care. He did not remember whether he responded to the letter.

J.W. testified that when he received notice that the State had instituted termination-of-parental-rights proceedings, he appeared for court and subsequently took a DNA test to determine whether he was the father of A.H. and J.H. The test confirmed his paternity, and he began visiting with the girls sometime during the summer of 2016. He said that he had visits once per week for four hours, and that he gave the girls a meal during each visit. He acknowledged that he did not meet the girls' daily needs for supervision and nutrition, that he did not provide a home for the girls, and that he had not been a father to them throughout their ten-and-a-half years of life.

The State also presented testimony from Epiphany Williams, the ongoing case manager. She described her unsuccessful efforts to contact J.W. during the year that preceded the commencement of the termination-of-parental-rights litigation in May 2016. She testified that J.W. participated in visits with the girls after the litigation began, but she described concerns about the nature of his contact with the girls. She said that he fell asleep during visits, used his telephone rather than interacting with the girls, and appeared unable to engage with them absent intense and repetitive coaching and assistance.

At the conclusion of the State's case, J.W. rested. He did not retake the stand or call any witnesses on his behalf.

The State's evidence was overwhelming and amply supported the jury's findings that J.W. knew or had reason to know that he was the father of A.H. and J.H. and that he failed to assume parental responsibility for them. Further pursuit of this issue would lack arguable merit.

Jury Selection

We next consider several matters related to selection of the jury that heard the grounds phase of the litigation. We first examine whether J.W. could pursue a new trial on the ground that the State used its peremptory strikes to remove African-American jurors from the jury pool in violation of ***Batson v. Kentucky***, 476 U.S. 79 (1986). The ***Batson*** court held that in a criminal case, the purposeful exclusion of jury members of the defendant's race offends the Equal Protection Clause of the United States Constitution. *See* ***id.*** at 86. The ***Batson*** rule was subsequently extended to apply to peremptory challenges in a civil proceeding. *See* ***State v. Joe C.***, 186 Wis. 2d 580, 585, 522 N.W.2d 222 (Ct. App. 1994).

Batson and its progency require a three-step analysis for determining whether the use of peremptory strikes violates the Equal Protection Clause. *See* ***Joe C.***, 186 Wis. 2d at 585. "First, the objecting party must make a *prima facie* showing of purposeful discrimination by showing that the opposing party has exercised peremptory challenges on the basis of race." ***Id.*** (italics added). If a *prima facie* showing is made, the opposing party, here, the State, must provide a race-neutral explanation for removing the jurors in question. *See* ***id.*** at 585-86. Third, the circuit court must determine whether the objecting party has established purposeful discrimination. *See* ***id.*** at 586.

J.W. raised a ***Batson*** challenge during jury selection, arguing that he was an African-American and that the State had used its peremptory challenges to remove the two potential

African-American jurors.[8] In response, the State explained that it removed one of the jurors because she voiced a strong opinion that the burden of establishing paternity rests with the birth mother in circumstances where the parents are not married. The State said that it removed the other juror because he did not volunteer any answers to the lawyers' questions, did not appear engaged in the selection process, and was an unknown quantity. Additionally, the State said it preferred jurors with children and both of the jurors in question were childless. The circuit court found that the State had provided valid reasons for its choices during jury selection and had defeated the suggestion of purposeful discrimination on the basis of race. We are satisfied that further proceedings in regard to this issue would lack arguable merit.

We next examine whether J.W. could make an arguably meritorious claim that his trial counsel was ineffective during jury selection. A parent is entitled to effective assistance of counsel in termination of parental rights proceedings. *See* ***A.S. v. State***, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992) (adopting for use in termination of parental rights cases the two-prong analysis described in ***Strickland v. Washington***, 466 U.S. 668 (1984)). To prove ineffective assistance of counsel, the parent must show both that trial counsel's performance was deficient and that the deficiency was prejudicial. *See* ***Strickland***, 466 U.S. at 687. We may consider either prong first, and if one prong is not satisfied, we need not consider the other. *See* ***id.*** at 697.

Trial counsel in this case disclosed during jury selection that J.W. had a criminal history from "a long time ago" and questioned the potential jurors about whether such a history would

[8] The circuit court removed a third African-American juror for cause after she said that her family had been investigated regarding allegations of child abuse or neglect and that the experience would impact her ability to be a fair and impartial juror.

affect their assessment of his testimony. The circuit court had previously ruled, however, that it would not permit the State to offer evidence of J.W.'s criminal history "either substantively or for impeachment purposes." Although counsel's disclosure therefore appears unwarranted, we are satisfied that J.W. cannot make an arguably meritorious claim that he was prejudiced by counsel's actions. First, none of the jurors indicated that a criminal history would affect the assessment of J.W.'s testimony. Second, the parties did not present any evidence that J.W. had a criminal history, and the judge expressly instructed the jury that "remarks of the lawyers are not evidence. If any remark suggested certain facts not in evidence, disregard that suggestion." We assume that juries follow instructions. *See* ***State v. Marinez***, 2011 WI 12, ¶41, 331 Wis. 2d 568, 797 N.W.2d 399. A limiting instruction such as the one given here is therefore presumed to erase any possible prejudice arising from an improper reference to a party's criminal history, particularly where the evidence against that party is overwhelming, "unless the record supports the conclusion that the jury disregarded the [circuit] court's admonition." *See* ***State v. Siguarroa***, 2004 WI App 16, ¶¶23-24, 27, 269 Wis. 2d 234, 674 N.W.2d 894. Our review of the records here reveals no reason to be concerned that the jurors disregarded their instructions. Further pursuit of this issue would lack arguable merit.

We have also examined whether J.W. can pursue an arguably meritorious claim that he is entitled to a new trial because the venire was not properly sworn before jury selection began. We agree with appellate counsel that he cannot do so. Although—as J.W. accurately alleged in his postdisposition motion—the original transcript of the jury selection does not reflect that the venire was given an oath, the State moved to correct the records and supported the motion with an affidavit from the court reporter who transcribed the jury selection proceeding. The court reporter averred that her stenographic notes show that the venire was duly sworn. She further

averred that she inadvertently omitted text reflecting administration of the oath when she prepared the official transcript. With her affidavit, the court reporter included a corrected transcript page reflecting that the potential jurors were sworn when they first entered the courtroom. J.W. did not offer a counter affidavit or other evidence to oppose the court reporter's averments. The circuit court therefor properly approved the substituted portion of the transcript. *See* ***State v. DeLeon***, 127 Wis. 2d 74, 81, 377 N.W.2d 635 (Ct. App. 1985). J.W.'s claim that he is entitled to a new trial has no support in the corrected records. Further pursuit of this issue would lack arguable merit.

Discretionary Decision to Terminate Parental Rights

We last consider whether J.W. could mount an arguably meritorious challenge to the decision to terminate his parental rights. The decision to terminate parental rights lies within the circuit court's discretion. ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). The prevailing factor is the child's best interests. WIS. STAT. § 48.426(2). In considering the best interests of the child, a circuit court must consider: (1) the likelihood of adoption after termination; (2) the age and health of the child; (3) "whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever those relationships"; (4) "[t]he wishes of the child"; (5) "[t]he duration of the separation of the parent from the child"; and (6) "[w]hether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements." WIS. STAT. § 48.426(3).

At the March 6, 2017 dispositional hearing, the State first presented testimony from T.D. She testified that she had served as the foster mother to A.H. and J.H. since August 22, 2015, that she wanted to adopt the children, and that she had no hesitation about doing so. She described the psychological disorders, language difficulties, and developmental delays the children displayed when they first came to live with her, and she described the progress they had made while in her care. T.D. further discussed the nature and extent of the contact that the children maintained with their biological parents and her own efforts to foster that contact. The State also presented testimony from Williams and from Kathryn Francher, Williams' supervisor and the successor ongoing case manager in these matters. Both Williams and Francher elaborated on the limited nature of J.W.'s interactions with A.H. and J.H., and both Williams and Francher described the girls' wish to be adopted by T.D. No other witnesses testified. At the conclusion of the testimony, the circuit court considered each of the statutory factors in light of the evidence presented.

The circuit court began its remarks by finding that the girls were adoptable and by acknowledging the "incredible commitment, care, concern, and love" that T.D. had for A.H. and J.H. The circuit court discussed the girls' mental health and found that, despite the psychological trauma they had experienced in their biological mother's home, they were socially engaged and functioning well with their peers, largely due to T.D. and the "benefits that have flowed to these children" from her commitment to them. The circuit court noted the testimony that the girls wanted T.D. to adopt them, and the circuit court deemed the girls' wishes "compelling" in light of the "bond that they've clearly developed with" T.D.

The circuit court considered the relationships that A.H. and J.H. had with J.W. The circuit court found that the interest J.W. took in the children was "important to them," but

nonetheless, he had "little relationship" with them and did "nothing at all" to engage with them until they were nearly ten years old and the State sought termination of his parental rights. Moreover, the circuit court credited T.D.'s testimony that she was open to J.W. continuing to play a role in the girls' lives after adoption. *See* ***Darryl T.-H. v. Margaret H.***, 2000 WI 42, ¶29, 234 Wis. 2d 606, 610 N.W.2d 475 (court may consider adoptive parent's promise to continue relationship with child's family of origin). The circuit court went on to recognize that the girls had a substantial relationship with their biological mother but concluded that the relationship was "extremely destructive," particularly in light of evidence that she cancelled many visits and was intoxicated when she did appear. Accordingly, the circuit court did not ascribe any harm to severing the girls' legal relationships with their biological parents.

Finally, the circuit court found that adoption would allow A.H. and J.H. a "safer, more nurturing, supportive, beneficial environment" with T.D., and the circuit court noted again that the girls had made remarkable developmental strides while in her care. Accordingly, the circuit court concluded that terminating J.W.'s parental rights served the best interests of the children.

The record shows that the circuit court properly exercised its discretion. The circuit court examined the relevant facts, applied the proper standard of law, and used a rational process to come to a reasonable conclusion. *See* ***Gerald O.***, 203 Wis. 2d at 152. An appellate challenge to the circuit court's decision to terminate J.W.'s parental rights would lack arguable merit.

Based on an independent review of the records, we conclude that no additional issues warrant discussion. Any further proceedings would be without arguable merit.

IT IS ORDERED that the orders terminating J.W.'s parental rights are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Steven Zaleski is relieved of any further representation of J.W. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Acting Clerk of Court of Appeals