COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 2001

Cornelia G. Clark
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.

Nos. 01-2164
01-2165
01-2166

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

NO. 01-2164

IN THE INTEREST OF RIKKI V.,
A PERSON UNDER THE AGE OF 18:

LANGLADE COUNTY,

PETITIONER-RESPONDENT,

V.

JESSI A.,

RESPONDENT-APPELLANT,

ANDRE A.,

RESPONDENT.

NO. 01-2165

IN THE INTEREST OF TRISHA V.,
A PERSON UNDER THE AGE OF 18:

LANGLADE COUNTY,

PETITIONER-RESPONDENT,

V.

JESSI A.,

RESPONDENT-APPELLANT,

ANDRE A.,

RESPONDENT.

NO. 01-2166

**IN THE INTEREST OF SEBASTIAN A.,
A PERSON UNDER THE AGE OF 18:**

LANGLADE COUNTY,

PETITIONER-RESPONDENT,

V.

JESSI A.,

RESPONDENT-APPELLANT,

ANDRE A.,

RESPONDENT.

APPEALS from orders of the circuit court for Langlade County: J. MICHAEL NOLAN, Judge. *Reversed and cause remanded.*

¶1 HOOVER, P.J.[1] Jessi A. appeals orders terminating her parental rights to Rikki V., Trisha V. and Sebastian A. Jessi raises four issues, contending that: (1) The jury was incorrectly instructed on the law with respect to consideration of evidence of post-filing events; (2) she should have received a separate trial from the father, Andre A.; (3) the evidence was insufficient to support the verdict because no extension order was placed into evidence; and (4) she was denied effective assistance of counsel. This court agrees that the jury was incorrectly instructed in the applicable law and that the error requires reversal of the termination orders. The matter is therefore remanded for a new trial.

BACKGROUND

¶2 On January 17, 1999, Jessi contacted the Langlade County Department of Social Services indicating that she had been evicted and needed assistance. She requested that her three children be placed in foster care because she could not care for them at that time. The department accepted voluntary placement and also commenced a CHIPS[2] proceeding. On March 24, 1999, the trial court found that the children were in need of protection and services. It entered dispositional orders providing for foster home placement, conditions for the children's return to the parents' home and a termination of parental rights warning.[3] The warning included a notice that the parents' rights could be

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted. This is a consolidated appeal from three separate cases ordering the termination of Jessi A.'s parental rights.

[2] CHIPS is an acronym for "child in need of protection or services." *See* WIS. STAT. § 48.415(2).

[3] WISCONSIN STAT. § 48.356 provides:

(continued)

terminated if a child is in continuing need of protection or services as defined in WIS. STAT. § 48.415(2).

¶3 On November 13, 2000, the department filed petitions to terminate Jessi's and Andre's parental rights to Rikki, Trisha and Sebastian. The petition alleged that the parents failed to meet the conditions established for the children's return home. After a two-day jury trial[4] at which both parents were represented by counsel, the jury returned verdicts finding grounds for terminating both parents' rights under WIS. STAT. § 48.415(2). At the April 30, 2001, dispositional hearing, the trial court entered orders terminating the parents' rights to each child. Jessi appeals these orders.[5]

> (1) Whenever the court orders a child to be placed outside his or her home, orders an expectant mother of an unborn child to be placed outside of her home or denies a parent visitation because the child or unborn child has been adjudged to be in need of protection or services under s. 48.345, 48.347 48.357, 48.363 or 48.365, the court shall orally inform the parent or parents who appear in court or the expectant mother who appears in court of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child or expectant mother to be returned to the home or for the parent to be granted visitation.
>
> (2) In addition to the notice required under sub. (1), any written order which places a child or an expectant mother outside the home or denies visitation under sub. (1) shall notify the parent or parents or expectant mother of the information specified under sub. (1).

[4] The case was tried on March 15 and 16, 2001.

[5] Andre does not appeal the orders terminating his parental rights.

DISCUSSION

¶4 Jessi's primary contention is that a jury instruction erroneously advised the jury that it could not consider evidence of events that occurred after the date the termination petition was filed, November 13, 2000. She claims that this was a misstatement of the law and that it was substantially prejudicial because she presented evidence that she had made positive improvements in her life since the petition was filed.

¶5 Before the jury was selected, the trial court stated that it assumed "that the appropriate date for the jury to consider" was the date the petitions were filed, November 13, 2000. The department's attorney responded, "correct," and the parents' attorneys were silent. At the conclusion of testimony, the court held a brief jury instruction and verdict conference. There was no discussion of the instructions' contents and no objection to the instructions the trial court proposed to give.

¶6 The trial court, using WIS JI—CHILDREN 180, instructed the jury, both orally and in writing, that

> In answering the questions in the special verdicts, you must consider the facts and circumstances as they existed on November 13, 2000, which was the date on which the petitions were filed. Your answers must reflect your findings as of that date.

Question number four on each special verdict required the jury to consider whether there was a substantial likelihood that the parents would not meet the CHIPS orders' conditions for return within the twelve-month period following the conclusion of the trial. The trial court instructed the jury with respect to this verdict question:

> In determining whether Jessi [A.] failed to meet the conditions established for the safe return of the children to home or whether there is a substantial likelihood that Jessi [A.] will not meet the conditions for the safe return of the children within the 12-month period following the conclusion of this hearing, you may consider the following.
>
> The length of time the children have been in placement outside her home, the number of times that the children have been removed from her home, her performance in meeting the conditions for return of the children, her cooperation with the social service agency, parental conduct during periods in which the children had contact with Jessi [A.] and *all other evidence presented during this hearing which assists you in making these determinations.* (Emphasis added.)

¶7 This court will not set aside the judgment or grant a new trial unless the error, if the trial court erred, affected the substantial rights of the appellant. *See* WIS. STAT. § 805.18(2).

¶8 A trial court has broad discretion in instructing the jury. ***State v. Danforth***, 125 Wis. 2d 293, 297, 371 N.W.2d 411 (Ct. App. 1985). Nevertheless, instructions should fully and fairly state the law that applies to the case. ***Id.*** Moreover, this court has substantial discretionary authority under WIS. STAT. § 752.35, "as that statute is liberally construed,"[6] to reverse the circuit court despite the appellant's failure to preserve the objection for appeal if the real controversy was not fully tried. ***Vollmer v. Luety***, 156 Wis. 2d 1, 12, 13, 15, 456 N.W.2d 797 (1990). When the real controversy has not been fully tried, an appellate court may exercise its power of discretionary reversal without finding

[6] ***Vollmer v. Luety***, 156 Wis. 2d 1, 15, 456 N.W.2d 797 (1990).

the probability of a different result on retrial. ***Id.*** at 16. This rule has been applied to an error in the jury instructions. ***Id.*** at 20.[7]

¶9 Question number four on each special verdict required the jury to consider whether there was a substantial likelihood that the parents would not meet the CHIPS orders' conditions within the twelve-month period following the conclusion of the trial. Jessi argues that events that occurred after the petition was filed were relevant to proving that there was a substantial likelihood that she would meet the conditions within twelve months after the hearing. She points to evidence that she had abstained from alcohol and drugs and had obtained employment. Further, Jessi testified that she had made plans to return to school so as to maintain a job, appropriate housing and secure finances. She advised the jury that she had severed her relationship with Andre and was "trying to turn my life around … trying to take the Lord into my life and be a better person." Jessi contends that her case was substantially prejudiced by the court's instruction that the jury could not consider this evidence as it relates to verdict question number four. This court agrees.

¶10 In ***In re T.M.S.***, 152 Wis. 2d 345, 348, 448 N.W.2d 282 (Ct. App. 1989), the county filed petitions to terminate the parents' parental rights to their three children. The parents were granted leave to appeal a pretrial order that, in pertinent part, prevented both the department and the parents from introducing

[7] The ***Vollmer*** decision cites a Wisconsin supreme court case where the court exercised its discretionary authority to reverse under WIS. STAT. § 751.06. The ***Vollmer*** court, however, recognized that its authority under that section is the same as the court of appeals under WIS. STAT. § 752.35. ***Vollmer***, 156 Wis. 2d at 17.

evidence concerning events that occurred after the termination petitions were filed. ***Id.*** at 348-49.

¶11 The court noted, referring to the "substantial likelihood" element that:

> To assess the likelihood that a parent will not meet certain conditions in the future may necessarily involve consideration of fresh facts occurring between the date the petition was filed and the hearing. Those facts include changes in the mental or physical health of the parent or the child or both. Failure to consider such postfiling changes could frustrate the legislative purposes of "preserving the unity of the family whenever possible," assisting "parents in changing any circumstances in the home which might harm the child or which may require the child to be placed outside the home," and providing for "termination of parental rights ... in the best interest of the child." Sec. 48.01(1)(b), (g), and (gr), Stats.

Id. at 359. The court thus held that the trial court erred by refusing to admit evidence of post-filing events on facts relevant to the "substantial likelihood" element. ***Id.*** This court is bound by published court of appeals precedent. ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

¶12 WISCONSIN JI—CHILDREN 180 is to be used only when the jury requires guidance on the question of the appropriate dates to which a verdict question is to be answered. *See* ***id.*** cmt. The jury instruction committee noted that a date or time period issue most likely arises with respect to jurisdictional grounds that are worded in the present tense. ***Id.*** For example, an element of the grounds for a TPR under WIS. STAT. § 48.415(3) is that the parent "is presently … an inpatient in a hospital." As the jury instruction committee recognized, "when the issue of timing does arise, it must be resolved by the court in the context of the particular jurisdictional ground at issue." WIS JI—CHILDREN 180.

¶13 The County nevertheless argues that the jury was instructed that it could consider "all evidence presented during this hearing" that would assist it in making the determinations relevant to verdict question four. It also notes that during her closing argument, Jessi's attorney brought to the jury's attention, without objection, evidence of Jessi's conduct after the date the petitions were filed. The County contends that "[t]he evidence referred to by [Jessi's attorney] was specifically included in the court's instruction that the jury consider all evidence presented during this hearing which assists them in deciding verdict question number four." It further asserts that "[t]he jury was specifically instructed to consider all relevant evidence …."

¶14 This court is unpersuaded that the jury would view the jury instruction regarding verdict question number four as superseding WIS JI—CHILDREN 180. Under the former, the jury was advised of the type of evidence it may consider in determining whether there was a substantial likelihood that Jessi would be able to meet the CHIPS orders' conditions within the twelve-month period following the TPR hearing. WIS JI—CHILDREN 180, on the other hand, provided the jury with an unequivocal statement regarding the relevant time frame for this evidence. Moreover, the State's failure to object to her counsel's allusions to Jessi's post-filing conduct did not correct the error. Juries are presumed to follow the instructions given. *See* ***State v. Grande***, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992). The jury here was given explicit, repeated instructions that in answering the special verdict questions, it *must* consider the facts and circumstances as they existed on the date the petitions were filed. "Your answers must reflect your findings as of that date."

¶15 While recognizing the parent's fundamental interests at stake,[8] this court is loathe to make a determination that extends the period before Rikki, Trisha and Sebastian may finally experience some lasting stability in their lives. Nevertheless, given Jessi's position that she would be able to meet the CHIPS order's conditions within twelve months after the hearing and the evidence supporting her defense that the jury was effectively instructed to disregard, this court cannot conclude that the jury instructions fully and fairly stated the law that applied to the case. Moreover, for the same reasons, this court further is compelled to hold under ***T.M.S.*** that the error in charging the jury under WIS JI CHILDREN 180 prevented the real controversy, Jessi's ability to prospectively meet the CHIPS' conditions, from being fully tried.[9] The trial court's order terminating Jessi's parental rights is therefore reversed, and the cause is remanded for a new trial.[10] *See* ***In re C.E.W.***, 124 Wis. 2d 47, 49, 368 N.W.2d 47 (1985).

By the Court.—Orders reversed and cause remanded.

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

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[8] "This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" ***Lassiter v. DSS***, 452 U.S. 18, 27 (1981) (citation omitted). "A parent's interest in the accuracy and injustice of the decision to terminate his or her parental status is, therefore a commanding one." ***Id.***

[9] "Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision." ***Id.***

[10] Because the jury instruction issue is dispositive, this court will not address Jessi's other contentions. ***Norwest Bank Wis. Eau Claire, N.A. v. Plourde***, 185 Wis. 2d 377, 383 n.1, 518 N.W.2d 265 (Ct. App. 1994) (only dispositive issues need be addressed).