COURT OF APPEALS
DECISION
DATED AND RELEASED

February 15, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 95-3075
95-3076
95-3077
95-3078

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

95-3075

IN THE INTEREST OF HOLLY O.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

KAREN A.O.,

Respondent-Appellant.

95-3076
IN THE INTEREST OF JEREMY C.T.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

Nos. 95-3075
95-3076
95-3077
95-3078

KAREN A.O.,

Respondent-Appellant.

95-3077
IN THE INTEREST OF MICHAEL A.T.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

KAREN A.O.,

Respondent-Appellant.

95-3078
IN THE INTEREST OF ANDREW J.T.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

KAREN A.O.,

Respondent-Appellant.

APPEAL from orders of the circuit court for Waupaca County: JOHN A. DES JARDINS, Judge. *Reversed and cause remanded.*

GARTZKE, P.J.[1] Karen O. appeals from orders terminating her parental rights to her four children, Jeremy, Andrew, Michael and Holly. Karen raises two issues: whether the Waupaca County department of social services used diligent efforts to provide services ordered by the court under § 48.415(2)(b), STATS., and whether termination of her parental rights was the proper disposition under § 48.427(3), STATS. We raised a third issue: whether the verdicts satisfy the five-sixths requirement in § 805.09(2), STATS., and we ordered supplemental briefing on that issue.

Because we conclude that the verdict fails to satisfy the five-sixths requirement, and because we conclude that Karen should not be bound by her failure to raise the issue in the trial court, we reverse the orders before us on appeal and remand for a new trial. Our disposition makes it unnecessary for us to review the remaining issues.

It is undisputed that on the tenth day of the trial the parties agreed to have twelve jurors plus the two alternate jurors decide the case. That means 12 of the 14 jurors must agree to satisfy § 805.09(2), STATS. That statute provides, "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 of the questions."

The jury returned a special verdict in each of the four cases. Each verdict asked the jury to answer six questions. The first and second questions asked whether the child had been previously adjudicated to be a child in need of protection or services and was placed outside the child's home pursuant to court orders for a cumulative period of one year or longer, and whether the court had entered at least one order containing a warning to the parents and had orally informed Karen O. of possible grounds for termination of her parental rights and other conditions necessary for the child to be returned home. All jurors answered yes to those questions. The fourth question asked

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS. This appeal has been expedited. RULE 809.107(6)(e), STATS.

whether the child had been placed outside of Karen O.'s home for a cumulative period of over one year. All jurors responded yes.

Some jurors dissented to the majority's answers to three questions. Question 3 asked whether the agency responsible for the care of the child and the family had made a diligent effort to provide services ordered by the court. The jury answered yes but jurors Rosenberg and Hartwig dissented. Question 5 asked whether Karen O. had substantially neglected, wilfully refused or been unable to meet the conditions established for the return of the child to the home. The jury answered yes but jurors Bushan and Hartwig dissented. Question 5 asked whether there is a substantial likelihood that Karen O. will not meet those conditions in the future. The jury answered yes but jurors Meddaugh and Rosenberg dissented. Thus, the same twelve jurors did not agree on any of the four verdicts.

During a telephone conference the attorneys for the parties informed this court that before the jury was discharged, the trial court held a bench conference with counsel, showed them the verdict, and called the dissents to their attention. No party requested that the jury be directed to deliberate further, and the trial court received the verdicts. Apparently at the conclusion of the motion hearing, no transcript was prepared. Karen filed post-verdict motions but did not raise the five-sixths issue.

Because Karen failed to raise the five-sixths issue in the trial court, she cannot raise it on appeal as of right. In short, she waived the right to appellate review. But the waiver rule is not absolute. It is a rule of judicial administration and does not deprive this court of the power to address the waived issue. ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980).

The State's power to terminate parental rights "is an awesome one, which can only be exercised under proved facts and procedures which assure that the power is justly exercised." ***In re Termination of Parental Rights to M.A.M.***, 116 Wis.2d 432, 436, 342 N.W.2d 410, 412 (1984). Although the trial

court, the State and Karen's counsel knew there was at least a problem with regard to the verdict, nothing was done about it, such as giving the jury another go at it. In our view, Karen's parental rights were not justly terminated if the verdict failed to meet the statutory five-sixths requirement. We exercise our discretion to address the issue.

In its supplemental brief, the State argues that the five-sixths rule has not been violated. The State asserts that answers to a verdict are reviewed to determine whether the jurors responses are consistent, citing ***Westfall Terwilliger v. Kottke***, 110 Wis.2d 86, 328 N.W.2d 481 (1983); ***Fondell v. Lucky Stores, Inc.***, 85 Wis.2d 220, 270 N.W.2d 205 (1978); ***Utecht v. Steinhagel***, 54 Wis.2d 507, 192 N.W.2d 674 (1972); ***McCauley v. Int'l Trading Company***, 268 Wis. 62, 66 N.W.2d 633 (1954); ***Fleischacker v. State Farm Mut'l Auto. Ins. Co.***, 274 Wis. 215, 79 N.W.2d 817 (1956); and ***Statz v. Pohl***, 266 Wis. 23, 62 N.W.2d 556 (1954). None of those cases involved termination of parental rights. The State asserts that a termination case, ***In Interest of C.E.W.***, 124 Wis.2d 47, 368 N.W.2d 47 (1985), is the closest in point. The ***C.E.W.*** court held a jury need not return consistent verdicts with regard to each of three children, and that "no logical reason [existed] for the circuit court to impose the requirement of unanimity across [the six] verdicts." ***Id***. at 72, 368 N.W.2d at 59. ***C.E.W.*** is not pertinent. Whether dissents had rendered the verdicts defective under the five-sixths rule was not an issue before the ***C.E.W.*** court.

The State confuses the consistency requirement with the five-sixths requirement in § 805.09(2), STATS. "An inconsistent verdict is a term of art used in describing jury answers which are logically repugnant to one another." ***Fondell v. Lucky Stores, Inc.***, 85 Wis.2d 220, 228, 270 N.W.2d 205, 210 (1978). If the jury returns inconsistent answers, the verdict must be set aside. Consistency has nothing to do with the five-sixths rule. This is shown by ***Utecht v. Steinhagel***, 54 Wis.2d 507, 196 N.W.2d 674 (1972).

The ***Utecht*** court found that a special verdict contained inconsistent answers, "and upon this ground alone a new trial must be ordered. We are of the further opinion the verdict must be set aside and a new trial ordered because the verdict does not comply with the five-sixths statute." ***Id***. at

516, 196 N.W.2d at 679. After discussing the five-sixths issue, the court returned to the question of an inconsistent verdict, when it said that the jury's answers to certain questions were "in irreconcilable conflict." ***Id***. at 518, 196 N.W.2d at 680. That quotation pertains to the consistency issue, not to compliance with the five-sixths requirement.

The State asserts that Karen's inability to meet the conditions established for the return of the children to her home is not inconsistent with the conclusion that the department exercised diligent efforts to reunite the family, and the jury's answers to those questions are not inconsistent with its finding that the mother would be unable to meet those conditions in the future. We need not review that reasoning. It has nothing to do with the five-sixths rule. "It has often been held that in order to have a good verdict, the same ten jurors must concur in the answers to all questions which are *necessary* to support a judgment." ***Fleischacker v. State Farm Mut'l Auto. Ins. Co.***, 274 Wis. at 218, 79 N.W.2d at 819 (emphasis added); ***McCauley v. Int'l Trading Co.***, 268 Wis. at 70, 66 N.W.2d at 638. The State concedes, as it must, that a negative response to any one of the questions in the special verdict would result in a dismissal of the petition. For that reason an affirmative response to each question in each verdict is necessary to sustain the orders terminating parental rights. An affirmative response is absent when the five-sixths rule is violated.

By the Court.—Orders terminating parental rights of Karen O. in docket numbers 95-3075, 95-3076, 95-3077 and 95-3078 reversed and a new trial ordered.

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