COURT OF APPEALS
DECISION
DATED AND FILED

August 5, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1215 **Cir. Ct. No. 02TP000128**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

NATISHA W.,

RESPONDENT-APPELLANT,

HOWARD G.,

RESPONDENT-CO-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOSEPH R. WALL, Judge. *Affirmed.*

¶1 CURLEY, J.[1] Natisha W. and Howard G. appeal from the order terminating their parental rights to their daughter, Jai G. Natisha W. contends that there was insufficient evidence to establish, as grounds for the termination of her parental rights, that: (1) she abandoned Jai G. within the meaning of WIS. STAT. § 48.415(1)(a)2 (2001-02);[2] and (2) she failed to assume parental responsibility within the meaning of WIS. STAT. § 48.415(6). She also contends that the trial court erroneously exercised its discretion in terminating her parental rights to Jai G. Howard G. contends that there was insufficient evidence to establish that he failed to assume parental responsibility within the meaning of WIS. STAT. § 48.415(6). He also contends that the trial court erred in instructing the jury that incarceration is not a defense to failure to assume parental responsibility. Finally, Howard G. contends that the trial court erroneously exercised its discretion in terminating his parental rights to Jai G. Because sufficient evidence established all of the grounds for termination alleged against both parents, the trial court's instructions were proper, and the trial court properly exercised its discretion in terminating both parents' rights, this court affirms.

I. BACKGROUND.

¶2 Jai G. was born prematurely on December 9, 1999. When she was one week old, Jai G. was taken into protective custody and placed in a receiving home as a result of a test that indicated the presence of cocaine in Jai G.'s

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

meconium.[3] On February 16, 2000, she was found to be a child in need of protection or services, and the court accordingly entered a dispositional order placing her outside of the home of her mother, Natisha W.[4] The dispositional order was extended annually. Pursuant to WIS. STAT. § 48.356(2), the dispositional and extension orders containing written warnings regarding the possibility of the termination of parental rights were reduced to writing and given to both parents.

¶3 On February 27, 2002, a petition was filed seeking the termination of Natisha W. and Howard G.'s parental rights to Jai G. As grounds for termination, the petition alleged that Natisha W. had failed to assume parental responsibility for her daughter, pursuant to WIS. STAT. § 48.415(6), and that she abandoned Jai G. within the meaning of WIS. STAT. § 48.415(1)(a)2.[5] As grounds for the termination of Howard G.'s parental rights, the petition alleged that he failed to assume parental responsibility pursuant to WIS. STAT. § 48.415(6). A trial was held, and the jury found that there was sufficient evidence to support all three of the above-mentioned grounds for the termination of Natisha W. and Howard G.'s parental rights. After a dispositional hearing, the trial court ordered the

[3] The meconium is "a dark greenish mass of desquamated cells, mucus, and bile that accumulates in the bowel during fetal life and is discharged shortly after birth." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1401 (Philip Babcock Gove, Ph. D. ed., Merriam Webster, Inc. 1993).

[4] Natisha W. and Howard G. were not married at the time of Jai G.'s birth, and are not currently married.

[5] The petition also alleged two other grounds in regard to Natisha W. that appear to have been dismissed prior to the trial. As the jury found that there was sufficient evidence to support the WIS. STAT. §§ 48.415(1)(a)2 and (6) grounds, and as it is those findings and the trial court's subsequent exercise of discretion that are the subject of this appeal, further explanation or exploration of the additional grounds alleged in the petition is unnecessary.

termination of Natisha W. and Howard G.'s parental rights to Jai G. in December 2002.

II. ANALYSIS.

A. There was sufficient evidence to establish that both Natisha W. and Howard G. failed to assume parental responsibility, and that Natisha W. abandoned Jai G.

¶4 When reviewing the sufficiency of the evidence, "[a]ppellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it." ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. Thus, "[i]f we find that there is 'any credible evidence in the record on which the jury could have based its decision,' we will affirm that verdict." ***Id***., ¶39 (quoting ***Lundin v. Shimanski,*** 124 Wis. 2d 175, 184, 368 N.W.2d 676 (1985)). Accordingly, "appellate courts search the record for credible evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not." ***Id***. Moreover, "[o]nly when the evidence is inherently or patently incredible will [the court] substitute [its] judgment for that of the factfinder." ***State v. Saunders,*** 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995) (citation omitted).

¶5 Although Natisha W. "concedes that because her child was in foster care, she had a limited ability to supervise, educate, and care for the child[,]" she contends that the applicable standard for failure to assume parental responsibility is that the parent never had a substantial relationship with the child, and that here, "the record as a whole showed that the visits were successful and that a relationship had developed." She notes evidence of hugging, kissing, and smiling; taking steps to learn how to treat Jai's asthma with the nebulizer; keeping Jai clean; and playing and doing "educational things" with Jai in support of her

contention that "[j]ust because she was not allowed to do these things every day does not mean that a relationship had not developed."

¶6 Although Howard G. notes that it is undisputed that he did not see Jai after she was taken into protective custody by the state, and that as a result of his incarceration four months after Jai's birth, he was unable to provide financial assistance and participate in the "raising of his daughter[,]" he contends that "incarceration and the resulting inability to provide physical and financial support for the child does not or should not mean that termination of parental rights follows immediately." He further argues that a jury is to consider whether he expressed concern for or interest in his daughter's well-being, and that he demonstrated his love and concern "in spades" by sending letters and cards to social workers, the foster family, and his daughter; requesting visits with his daughter; and taking parenting classes and "other classes to improve himself" while incarcerated.

¶7 WISCONSIN STAT. § 48.415(6) sets forth the failure to assume parental responsibility as a ground for termination, and essentially outlines the means by which a parent can avoid an allegation of failure to assume:

> (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.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. 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 ever 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 ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

¶8 Stated otherwise, a "substantial parental relationship" means "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." ***Id.*** Further, as indicated above, in determining whether Natisha W. or Howard G. has had a substantial parental relationship with Jai G., the jury was to consider "whether [Natisha W. or Howard G.] has ever expressed concern for or interest in the support, care or well-being of the child, [and] whether the person has neglected or refused to provide care or support for the child." *See* ***id.***

¶9 In regard to Natisha W.'s failure to assume parental responsibility, Natisha W. testified that she did not know that she was pregnant with Jai G. until about five months into the pregnancy, and that she used cocaine while pregnant, albeit before she was aware of the pregnancy. She testified that even though she "knew it was important[,]" she "just didn't" have any prenatal care after becoming aware of her pregnancy. Natisha W. testified that she spent some time in jail a couple of months after Jai G.'s birth, and did not see Jai G. after she was released from the hospital until April 2000. Later, she agreed that she had only four visits with Jai in the year 2000. Although it appears that there were weekly visits taking place from around the beginning of 2002 until the conclusion of the trial, Natisha W. testified that she "guessed" she only asked to visit Jai six times in 2001.

¶10 In her testimony, Natisha W. also agreed that she had not provided any financial support for Jai G. while she was in foster care. Further, she did not buy Jai any clothes during the first two years of her life. There was testimony

presented detailing the special medical needs of Jai G., and the foster mother testified that of the fifty-eight medical appointments or treatments Jai G. had in the years 1999-2001, Natisha W. attended only one. Although Natisha W. argues that the State does not point to anything to show that she even knew about the appointments, the foster mother testified that Natisha W. never called her to ask about Jai's health nor sent any cards to Jai. It appears that she did not know about the medical appointments or treatments, despite her knowledge of Jai's complications due to her premature birth, because she never asked. Natisha W. further argues, as noted above, that a relationship had developed. While she notes that during the visits, there was smiling and hugging, cleaning, and teaching, she downplays the importance of her actions before, after, and during the time between the visits. Accordingly, after reviewing all of the evidence, it was not clearly erroneous for the jury to find that Natisha W. failed to assume parental responsibility.

¶11 In regard to Howard G.'s failure to assume parental responsibility, this court agrees that the termination of parental rights should not be the immediate consequence of a parent's incarceration and the resulting inability to financially and physically support the child. However, whatever Howard G. may be insinuating, that is not what happened here. Pursuant to WIS. STAT. § 48.415(6), the jury was to consider "whether [Howard G.] has ever expressed concern for or interest in the support, care or well-being of the child, [and] whether [he] has neglected or refused to provide care or support for the child." *See* § 48.415(6)(b). Section 48.415(6)(b) also states that "with respect to a person who is or may be the father of the child, [whether] the person has ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy" is a factor to consider. *See* ***id.***

¶12 Howard G. testified that he paid no child support, nor hospital bills that were incurred when Jai was born. He also testified that he never saw Jai at any time in the two and a half years prior to the trial. During the course of Howard G.'s testimony, evidence was presented indicating that he was sentenced in late 1999 on two charges—possession of cocaine and intent to deliver, that revocation proceedings were initiated when Howard G. failed to report to his probation agent for several months, and that he was given an alternative to revocation which required him to enroll in an inpatient drug treatment program. Howard G. was discharged from the inpatient drug program after having a drug test that was positive for marijuana. Revocation proceedings were initiated for a second time. After waiving a hearing, he was incarcerated. Howard G. also testified that he had handled cocaine shortly before Natisha W. went into labor with Jai.

¶13 As noted above, the father's behavior during the pregnancy is a factor to consider when determining whether he has failed to assume parental responsibility. *See* WIS. STAT. § 48.415(6)(b). *See also* ***L.K. v. B.B.***, 113 Wis. 2d 429, 438, 335 N.W.2d 846 (1983) (stating "[i]t is clear … that the legislature intended that a father's pre-delivery behavior be a consideration in determining whether the father had established a substantial parental relationship."). Further, it is entirely proper for the jury to consider the criminal activities of the parent when determining whether he or she failed to assume parental responsibility. It has been noted,

> [a]s the supreme court has explained, in a termination case a trial court cannot ignore the circumstances of why a parent was not physically able to assume parental responsibility when that unavailability is due not to illness, military service, or employment, but, rather to incarceration from the wil[l]ful act of burglary[.]

State v. Quinsanna D., 2002 WI App 318, ¶23, 259 Wis. 2d 429, 655 N.W.2d 752 (citation omitted). The court in ***Quinsanna D.*** went on to state that "in another termination case, the supreme court commented that it could not ignore the fact that any roadblock to establishing a [parental] relationship with [the child] caused by [the parent's] arrest, bond, and conviction was produced by [the parent's] own conduct." ***Id.*** (citation omitted).

¶14 Howard G. testified that he had been handling cocaine shortly before Jai's birth. He was convicted of a crime that eventually resulted in his incarceration after his probation was revoked. Although the cases noted above are not factually identical to the instant case, the reasoning employed is as convincing and applicable here. Howard G. admits that he was unable to physically and financially care for Jai because of his incarceration but contends that he did "as much as any incarcerated father could do." He may have sent letters and cards, and taken parenting classes, but he also overlooks an important consideration—the impact his choice to commit a crime would have and has had on his relationship with Jai. The jury was not expected to, nor should it have, ignored the fact that Howard G. was aware, or should have been aware, of the impact his activities and conduct could and would have on his relationship with his child. Further, Howard G.'s incarceration was not the only factor considered at trial. There was evidence presented in regard to Howard G.'s expressions of concern, and the jury presumably took that evidence into consideration. However, the jury ultimately found that Howard G. failed to assume parental responsibility, and given all of the evidence presented at trial, it was not clearly erroneous for it to do so.

¶15 Natisha W. further argues that there was insufficient evidence to support the jury's finding that she abandoned Jai G. because she "did the best she could and had good reason for not visiting." Abandonment can be established by

proving "[t]hat the child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required … and that the parent has failed to visit or communicate with the child for a period of 3 months or longer." WIS. STAT. § 48.415(1)(a)2. In § 48.415(1)(c), the statute further provides a defense. The statute warns:

> [A]bandonment is not established under par. (a) 2. or 3. if the parent proves all of the following by a preponderance of the evidence:
>
> 1. That the parent had good cause for having failed to visit with the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.
>
> 2. That the parent had good cause for having failed to communicate with the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.
>
> 3. If the parent proves good cause under subd. 2., including good cause based on evidence that the child's age or condition would have rendered any communication with the child meaningless, that one of the following occurred:
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> a. The parent communicated about the child with the person or persons who had physical custody of the child during the time period specified in par. (a) 2. or 3., whichever is applicable, or, if par. (a) 2., is applicable, with the agency responsible for the care of the child during the time period specified in par. (a) 2.
>
> b. The parent had good cause for having failed to communicate about the child with the person or persons who had physical custody of the child or the agency responsible for the care of the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.

Natisha W.'s argument appears to be relying on this statutory defense for her failure to visit or communicate with Jai G. during the time period in question.

¶16 In her testimony, Natisha W. agreed that she did not have any visits with Jai G. for the period from April 2, 2001, to July 28, 2001. She first testified that the reason for the failure to visit Jai was that "[she] was in jail. [She] got out of jail. [She] was homeless. [She] didn't have a house. [She] was trying to struggle to get a house." Upon further questioning, she admitted that she was confused and that she was not in jail or homeless during 2001. She also testified that she was not sure why she did not visit Jai during this time period, but that it must have been because she was "asking for visits and [the social workers] w[ere] telling [her] to focus on [her] other kids because they w[ere] returning around that time." Although she testified that, in 2001, she "had a lot of things going on[,]" including urine screens, furnishing a house, and keeping a job, she later agreed that no one stopped her from having visits with her daughter during this time period. After reviewing the evidence presented, only a portion of which is noted above, this court concludes that it was not clearly erroneous for the jury to find that Natisha W. failed to visit or communicate with Jai G. for a period of three months or longer, and that she did not have good cause for having done so.

B. The trial court properly instructed the jury.

¶17 "The trial court has broad discretion when instructing a jury." ***Fischer v. Ganju***, 168 Wis. 2d 834, 849, 485 N.W.2d 10 (1992). "If an appellate court can determine that the overall meaning communicated by the instruction as a whole was a correct statement of the law, and the instruction comported with the facts of the case at hand, no ground[] for reversal exists." ***White v. Leeder***, 149 Wis. 2d 948, 954-55, 440 N.W.2d 557 (1989). Moreover, "[e]ven if we find an instruction to be erroneous in part or in whole, a new trial is not warranted unless we also find that the error is prejudicial." ***Muskevitsch-Otto ex rel. Toney v. Otto***, 2001 WI App 242, ¶6, 248 Wis. 2d 1, 635 N.W.2d 611. Accordingly, "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." ***Id.***

¶18 Howard G. argues that the trial court erred when it instructed the jury as follows:

> You have heard evidence that Howard G[.] was incarcerated for a period of Jai G[.]'s life. A parent's lack of opportunity and ability to establish a substantial parental relationship due to incarceration is not a defense to failure to assume parental responsibility.

He argues that ***Ann M.M. v. Rob S.***, 176 Wis. 2d 673, 500 N.W.2d 649 (1993), the legal support for the alteration of the jury instruction, was improperly applied because: (1) the statement made by the supreme court was dicta because the court determined that the father had the opportunity and ability to assume parental responsibility; (2) "the parties in [***Ann M.M.***] were the two parents: the case did not present the issue of whether the government, with its considerable power, had frustrated or limited an individual's ability/opportunity to function as a parent"; and (3) "the court in [***Ann M.M.***] *did not say* that incarceration is not a defense for failure to assume parental responsibility; they held rather that the state was no longer required to prove that the parent had the opportunity and ability to establish a substantial parental relationship with the child." Howard G. boldly claims that

> [t]he instruction given by the court implies … that the fact of incarceration is the functional equivalent of failure to assume parental responsibility, unfairly pulling the rug out of Howard's defense that, in spite of his lack of ability to provide care and support for Jai, he had made numerous expressions of concern and interest in the support care and well being of the child.

He further argues that "[t]hat defense is clearly recognized by the legislature[,]" referring to the jury's consideration of the parent's expression of concern and care, and that "[i]ncarceration, by itself, is not a statutory ground for termination of

parental rights and the appellate courts of this state have never said that incarceration *per se* equals failure to assume parental responsibility." This court agrees that incarceration does not *per se* equal the failure to assume parental responsibility. However, that point is irrelevant as no one ever explicitly or implicitly argued or held that it did. The remainder of Howard G.'s argument in regard to the jury instruction is unpersuasive for the reasons that follow.

¶19 As noted above, "[i]f an appellate court can determine that the overall meaning communicated by the instruction as a whole was a correct statement of the law, and the instruction comported with the facts of the case at hand, no ground[] for reversal exists." ***White***, 149 Wis. 2d at 954-55. Thus, if the instruction communicated a correct statement of the law and comported with the facts at hand, it was proper. Although failing to articulate any standard of review, Howard G. appears to take issue with both aspects of this inquiry.

¶20 Howard G. claims that the supreme court's statement regarding the need to prove opportunity and ability is dicta. In ***Ann M.M.***, the supreme court did note that "even though the statute does not require it, we conclude that Rob did have the opportunity and ability to assume parental responsibility…." ***Id.*** at 683. The "opportunity and ability" they were referring to was the father's ability to, among other things, contact the baby's grandfather; send gifts, supplies, or money for the baby through him; and express concern for the baby, even though legally prohibited from having contact with the mother and incarcerated for a period of time. Howard G. had this same "opportunity and ability" while he was incarcerated. The basic situation seems fairly similar. After clarifying that proof of the opportunity or ability is not required from the petitioner, in making the statement noted above, the court also appears to have been clarifying that there are ways to assume parental responsibility while incarcerated or prohibited from

contacting the other parent. Regardless, the court's statement that the law no longer requires proof of the opportunity and ability to assume parental responsibility is accurate. The actions of the legislature are indicative of that.[6]

¶21 Howard G. also contends that ***Ann M.M.*** is inapplicable because "the case did not present the issue of whether the government … had frustrated or limited an individual's ability/opportunity to function as a parent." This court disagrees. The father's incarceration and conditions of probation were the main thrusts behind his argument. The ***Ann M.M.*** court noted, "Rob argues that the record does not support by clear and convincing evidence that he failed to assume … because the circumstances surrounding his arrest and conviction…eliminated his opportunity to do so." ***Ann M.M.***, 176 Wis. 2d at 683.

¶22 Finally, Howard G.'s claim that ***Ann M.M.*** did not say that incarceration is not a defense and that "[t]he instruction given by the court implies…that the fact of incarceration is the functional equivalent of failure to assume parental responsibility," is suspect. ***Ann M.M.*** did not say that incarceration is not a defense, because it did not have to. Unlike abandonment,

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[6] In ***Ann M.M.***, the court noted:

> Sections 48.415(6)(a)2 and (b), Stats., no longer require a showing that the father had the opportunity and the ability to assume parental responsibility for the child. This requirement was contained in these sections prior to 1988; however, the legislature specifically removed the requirement in 1988. Act of April 23, 1988, ch. 383, sec. 15, 1987 Wis. Laws 1431, 1433. Thus, the Wisconsin legislature has concluded that a person's parental rights may be terminated without proof that the person had the opportunity and ability to establish a substantial parental relationship with the child.

Ann M.M., 176 Wis. 2d at 683-84 (footnote omitted).

there are no statutory defenses to the failure to assume parental responsibility. *Compare* WIS. STAT. § 48.415(1) *with* § 48.415(6). Further, the instruction given by the court does not imply that incarceration is the functional equivalent of failure to assume. It does, however, properly alert the jury to the present state of the law; i.e., that incarceration is not a defense to failure to assume. ***Ann M.M.***'s failure to articulate those exact words does not render the statement to the jury anything less than an accurate depiction of the current state of the law.

¶23 Howard G. claims that the jury *can* consider whether the parent expressed concern for or interest in the child as a factor in determining the failure to assume, and it *did*. Despite Howard G.'s characterization of this consideration as a "defense" and his claim that his "defense is clearly recognized by the legislature[,]" there are no "defenses" to the failure to assume parental responsibility. In support of this argument, Howard G. notes that there a number of factors to be considered when determining whether that ground exists. No one disagrees with that statement. At trial, Howard G. proffered evidence relative to those factors and in support of his position that he did not fail to assume parental responsibility, and that evidence was presumably considered by the jury.

¶24 The overall meaning communicated by the jury instruction was an accurate reflection of the law and comported with the facts of the case at hand. Contrary to Howard G.'s contentions, the instruction does not appear to imply that incarceration is the functional equivalent of failure to assume.

C. The trial court properly exercised its discretion when it terminated the parental rights of both Natisha W. and Howard G.

¶25 Provided the statutory grounds for termination are satisfied, the decision to terminate parental rights is within the province of the trial court's

discretion. *See* ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). "[T]he trial court must consider all the circumstances and exercise its sound discretion as to whether termination would promote the best interests of the child." ***Mrs. R. v. Mr. and Mrs. B***, 102 Wis. 2d 118, 131, 306 N.W.2d 46 (1981) (citation omitted).

> A determination of the best interests of the child in a termination proceeding depends on first-hand observation and experience with the persons involved and therefore is committed to the sound discretion of the circuit court. A circuit court's determination will not be upset unless the decision represents an erroneous exercise of discretion.

David S. v. Laura S., 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). "A circuit court properly exercises its discretion when it employs a rational thought process based on an examination of the facts and an application of the correct standard of law." ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶43, 255 Wis. 2d 170, 648 N.W.2d 402. WISCONSIN STAT. § 48.426 states:

> **Standards and factors. (1)** COURT CONSIDERATIONS. In making a decision about the appropriate disposition under s. 48.427, the court shall consider the standard and factors enumerated in this section and any report submitted by an agency under s. 48.425.
>
> **(2)** STANDARD. The best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter.
>
> **(3)** FACTORS. In considering the best interests of the child under this section the court shall consider but not be limited to the following:
>
> (a) The likelihood of the child's adoption after termination.
>
> (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.

> (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
>
> (d) The wishes of the child.
>
> (e) The duration of the separation of the parent from the child.
>
> (f) Whether 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.

¶26 Natisha W. contends that the trial court erroneously exercised its discretion in that: (1) it "placed too great a weight on Dr. Collins' report"; (2) it "did not take into account the relationship that Jai had with her siblings"; (3) it "should have considered that Jai has a relationship with Natisha as well"; (4) it "erred in determining that Natisha was not a good risk for participating in any necessary therapy to help Jai transition into her home"; and (5) "it is unconscionable to think that a parent who had made so much progress and had had six of her seven children returned to her could have the seventh one taken away forever."

¶27 Howard G. argues that "the evidence was insufficient to support the finding that Howard failed to assume parental responsibility and Howard was denied a fair trial by an instruction which misstated the law and virtually directed the verdict." He further argues that "[s]ince the circuit court's clearly stated perception was that incarceration equals termination, the application of this preconceived policy, was a failure to exercise discretion." This court concludes, as explained above, that the instruction did not misstate the law. This court further concludes that, contrary to Howard G.'s bold accusations, the trial court did not appear to have a preconceived policy or articulate a perception that "incarceration

equals termination." Howard G. quotes language from the transcript that, taken out of context, may *arguably* support his assertion that the trial court had a "belief that termination was basically preordained as the result of Howard's incarceration[,]" but he carelessly ignores the context in which those statements were made.[7] Thus, his argument is misleading.

¶28 The record indicates that the trial court recounted the evidence presented both at the trial and during the hearing and noted what testimony it found to be credible and what testimony it found to be suspect. The trial court

[7] The quoted statements occurred during a discussion concerning the Assistant District Attorney's objection regarding the admissibility of some portraits or pictures that Howard G. drew in prison. The following portion of the record occurred outside the presence of the jury, and the language quoted by Howard G. is emphasized:

> Here we have [Howard G.] who's been in jail. He has a very difficult case here: Failure to assume parental responsibility. *As I've said, there is a strict liability offense. There is no defense here, that he has the ability to parent this child. He's stuck. He's in jail.* He was out for a period of time. That will be, of course, an issue in this case, as to what he did when he was not in jail. But certainly, for most of this child's life, he's been incarcerated. If you look at this jury instruction here on failure to assume, he's in quite a pickle.
>
> So, what he's asking here is to show that he, in his own way, has expressed concern for his child. And he's done that by writing letters, asking about all of his children, including Jai; and he's done it by drawing a picture of Jai—I don't know—from a photograph or however he did it. And he just wants to show the jury that, you know, I may be locked away but I do care about my child, which, of course, is one of the definitions of substantial parental relationship, one of several.
>
> And care, of course, can be used in two different ways. Care can mean emotional caring and care can mean providing care, shelter on a daily basis, things like that. So, I don't see any prejudice regarding this. [Howard G.] has so little to work with; and the jury will give it the weight that it deserves in light of this jury instruction, which places quite a burden on the parents.

stated, at the outset of its decision, that "[f]or a number of reasons this is a[] very difficult case." It later reiterated that "[t]his is a difficult case[,]" especially noting the apparent love the biological parents had for Jai. The trial court carefully considered every factor required under WIS. STAT. § 48.426, and thoroughly considered all of the evidence presented. The trial court properly exercised its discretion by keeping the best interests of Jai G. as the prevailing concern, rationally and thoughtfully considering the evidence, and carefully considering all of the factors.

¶29 In her reply, and in regard to her argument that the trial court placed "too great a weight" on Dr. Collins' report, Natisha W. contends that "the trial completely failed to acknowledge that Dr. Collins' observation period was done after the child had not seen Natisha for approximately one month." This court disagrees, as the record indicates quite the opposite. The trial court stated:

> The visit was on November 7th, the trial in this case ended on October 25th. I think there has been between a two and three-week period between the last visitation with Jai and [Natisha W.] and the meeting with Dr. Collins. This was not a long period of time in which Jai would be expected to forget who [Natisha W.] was.

She also contends that the trial court did not consider the "depth of the relationship" between Natisha W. and her daughter, contending again that the trial court considered Dr. Collins' report as to the lack of a bond without considering the length of time that had passed. Again, the record belies this argument.

¶30 In support of her argument that the trial court did not consider Jai's relationship with her siblings, Natisha W. also contends that the trial court's conclusion that Jai did not have a significant relationship with her siblings was not supported by the record, and thus constituted an erroneous exercise of discretion.

She refers to the testimony of Darryl Eastern, and his extensive notes regarding the visits, in support of this argument. The trial court noted Dr. Collins' response to Darryl Eastern's "lengthy summary" when it recounted Dr. Collins' testimony indicating that "he did not think it would be harmful to sever the biological ties of Jai and her siblings." When evaluating WIS. STAT. § 48.426(3)(c), the trial court later noted that a "relationship" is the "emotional and psychological relationship[,]" and that all of the witnesses touched on aspects of this factor, referencing Ms. Malen's testimony in particular. It considered the "inherent harm" in severing the child from his or her bloodline, heritage, and ancestry. However, the trial court concluded that the facts in the case outweighed this inherent harm in that "this child has no emotional or psychological relationship with any of her biological siblings." The trial court did not erroneously exercise its discretion.

¶31 Natisha W. further contends that instead of considering the efforts she "put into getting her children back[,]" the trial court "went strictly by [her] troubled past" and "erred in determining that [she] was not a good risk for participating in any necessary therapy to help Jai transition into her home." However, the trial court did consider this effort in making its determination to terminate Natisha W.'s parental rights: "I have weighed in my consideration, and I have weighed it heavily, the fact that six of Miss W[.'s] children were returned to her during the period that Jai was outside the home…. That is a factor that also makes this a difficult case." Although this statement was not made directly before or after the statement regarding its determination that she was not a "good risk" for therapy, it was made in a context that indicated that Natisha W.'s efforts were a constant consideration.

¶32 The trial court conscientiously considered all of the evidence presented and its credibility in making its determination to terminate Natisha W. and Howard G.'s parental rights. The court took the special needs of Jai, the sporadic presence of Natisha W. in Jai's life for the first two years, Howard G.'s criminal history and conduct, the "removals, re-removals, and re-re-removals" of Natisha W.'s other children, the need for stability, and the recommendations of the expert witnesses, among other things, into consideration when making its decision regarding Jai's best interests. The court noted the difficulty of the decision on multiple occasions, and concluded:

> Despite these difficulties, despite these positive things that the parents have in favor of them, the evidence here is absolutely overwhelming in terms of the best interest of this child and the evidence is such that termination of parental rights is in the best interest of this child.

¶33 Although difficult to make, the decision was not "unconscionable." The trial court did not erroneously exercise its discretion, and accordingly, this court affirms.

By the Court.—Order affirmed.

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