COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1377 **Cir. Ct. No. 2008TP28**

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

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

KEVIN G.,

PETITIONER-RESPONDENT,

V.

JENNIFER M. S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Wood County: EDWARD F. ZAPPEN, JR., Judge. *Affirmed.*

¶1 LUNDSTEN, P.J.[1] Jennifer M.S. appeals an order of the circuit court terminating her parental rights to her child, Dakota L.G. Jennifer argues that the evidence was insufficient to support a jury verdict in favor of the termination ground. She also contends that the circuit court committed reversible error in two respects: (1) by failing to orally instruct the jury at the correct time; and (2) by depriving Jennifer of her right to counsel at the return of the verdict. I reject these arguments, and affirm the circuit court.

Background

¶2 Dakota L.G. was born on December 10, 2003. Jennifer M.S., Dakota's mother, was his sole parental caretaker for approximately the next six months. For about two weeks of that six months, Dakota was placed in a foster home, apparently due to Jennifer being jailed for violating her probation. In June 2004, Kevin G. was determined to be Dakota's father, and at that time Kevin began seeing Dakota on weekends and occasionally in the evenings. Subsequently, in December 2004, Jennifer and Dakota moved in with Kevin and remained living with him until July 2005, when Jennifer moved out. During this time, Jennifer was Dakota's caretaker during the day while Kevin worked.

¶3 Also during this period, in January 2005, Kevin received primary placement and sole legal custody of Dakota. Jennifer had been subject to a CHIPS order regarding Dakota. Jennifer agreed that Kevin could have sole legal custody and primary placement of Dakota in order to resolve the CHIPS action.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 In early July 2005, when Jennifer moved out of the apartment, she still returned to watch Dakota on weekdays for the rest of the month. In August 2005, Jennifer moved to a different town, approximately eleven miles away, to live with her then-fiancé. At this point, Kevin's neighbor began caring for Dakota on weekdays while Kevin was at work. In November of 2005, Kevin's wife (then his girlfriend) moved in, and she began providing care for Dakota. Between August 2005 and July 2006, Jennifer visited Dakota only about four times, citing a lack of transportation.

¶5 In June 2006, Jennifer sought and obtained a court order granting her visitation. Between July 2006 and January 2007, she missed several scheduled visits and either cut short or arrived late for several more. In January 2007, after illegally selling prescription medication to an undercover police officer on three different occasions, Jennifer's probation was revoked and she was incarcerated for 18 months. During this 18 months, Jennifer's attempts to communicate with Dakota were limited to one attempted phone call and one letter. Jennifer also attempted and failed to get a court order for visitation while in prison.

¶6 Jennifer left prison in September 2008. In October 2008, Kevin sought and obtained a temporary order prohibiting Jennifer from contacting Dakota and, at the same time, filed a petition to terminate Jennifer's parental rights. The ground cited in the termination petition was that Jennifer had failed to assume parental responsibility.

¶7 After a trial on the termination ground, the jury returned an 11-to-1 verdict finding that Jennifer had failed to assume parental responsibility for Dakota. When the jury returned the verdict, Jennifer's attorney was not present and the jury was not polled. The circuit court subsequently found that termination

was in Dakota's best interests and entered an order terminating Jennifer's parental rights. Jennifer appeals.[2]

Discussion

¶8 Jennifer raises three challenges relevant to the termination ground stage. I address and reject each.

A. Sufficiency Of The Evidence

¶9 Jennifer challenges the sufficiency of the evidence to support the jury's verdict on the termination ground. The termination ground must be proven by clear and convincing evidence. *See* WIS. STAT. § 48.31(1). On review, the "jury's verdict must be sustained if there is any credible evidence, when viewed in a light most favorable to the verdict, to support it." ***Sheboygan Cnty. Dep't of Health & Human Servs. v. Tanya M.B.***, 2010 WI 55, ¶49, 325 Wis. 2d 524, 785 N.W.2d 369. Because there is such evidence here, Jennifer's argument fails.

¶10 The pertinent termination ground is WIS. STAT. § 48.415(6). Section 48.415(6)(a) states that parental rights may be terminated for a "[f]ailure to assume parental responsibility." The ground "shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child." ***Id.*** The provision further states:

[2] This appeal was stayed pending the supreme court's decision in ***Tammy W-G. v. Jacob T.***, 2011 WI 30, 333 Wis. 2d 273, 797 N.W.2d 854, which addressed one of the topics at issue in this appeal. After the ***Tammy W-G.*** decision was released, this court issued an order allowing the parties to submit replacement briefs in light of that decision, and the parties did so.

> "[S]ubstantial 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 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.

WIS. STAT. § 48.415(6)(b). In ***Tammy W-G. v. Jacob T.***, 2011 WI 30, 333 Wis. 2d 273, 797 N.W.2d 854, the supreme court explained that this provision prescribes "a totality-of-the-circumstances test" where "the fact-finder should consider any support or care, or lack thereof, the parent provided the child *throughout the child's entire life*." ***Id.***, ¶3 (emphasis added). This includes a consideration of "the reasons why a parent was not caring for or supporting her child and exposure of the child to a hazardous living environment." ***Id.***

¶11 As Kevin correctly points out, the standard of review requires a focus on whether the credible evidence, together with reasonable inferences from that evidence, supports the jury's verdict. Kevin relies on the following evidence.

¶12 Jennifer lived with Dakota for approximately the first 18 months of Dakota's life, but there was evidence supporting an inference that Jennifer neglected to give Dakota adequate daily care during much of that time. For example, testimony supports a finding that Jennifer bathed Dakota infrequently and, when she did, she did not properly bathe him. Furthermore, Dakota often was left in dirty or vomit-covered clothing, he would sleep on blankets soaked with his own urine, his diaper was not changed often enough, he was often fed poorly (such as being fed cold hot dogs), and Jennifer ignored him in his playpen or highchair

for significant periods of time. There was additional testimony that Jennifer was so neglectful in changing Dakota's diapers that he developed a "very bad, raw" diaper rash that was a health hazard and likely made Dakota "miserable," leading a neighbor to call social services. Soon after Jennifer stopped living with Dakota and weekday caretaking was transferred to Kevin's neighbor, the rash went away.[3]

¶13 The evidence supports a finding that, following this approximately 18-month period, Jennifer was not a significant parental presence in Dakota's life. Jennifer moved out of the residence where Kevin and Dakota lived in July 2005 and in August 2005 chose to move to a different town approximately eleven miles away. For the next year, from August 2005 to July 2006, during which Dakota went from about 18 months old to about 30 months old, Jennifer visited Dakota only about four times. During that same time period, there was testimony that Jennifer spoke to Dakota on the phone maybe once, sent no letters or cards, and provided no money or provisions for Dakota, except a "T-shirt outfit" that was too small. Kevin took the position that Jennifer could see Dakota but that her visits needed to be with some level of supervision, given Jennifer's history. Jennifer, however, rarely took advantage of the offered supervised visits. After this year-long period, Jennifer went to court to obtain a court order granting her a visitation schedule. In June 2006, the court issued an order granting her unsupervised visitation of four hours two times per week and, in addition, one overnight visit every other weekend. These visits were to take place at Jennifer's residence.

[3] Kevin also points to testimony that, during this time period, Jennifer permitted Dakota to be in the presence of convicted sex offenders. I choose not to consider this evidence for purposes of my sufficiency of the evidence analysis because there was no affirmative evidence that Dakota was left alone with the sex offenders and, regarding the sex offender that was the primary focus of the testimony, it is not clear that Jennifer knew the man was a sex offender at the pertinent times.

Between July 2006 and January 2007, Jennifer missed 19 of 78 scheduled visits and either cut short or arrived late for approximately 15 of her remaining 59 visits. There was testimony that, when Jennifer exercised these visits, her care of Dakota was not adequate and that there were no outward signs of mother-son type affection or bonding. For example, there was testimony that Jennifer would typically return Dakota in soiled diapers and that "[h]is entire body [would be] filthy," that Dakota would return from the visits "[c]rabby, tired, [and] hungry," and that the interaction between Jennifer and Dakota was "more of a friend relationship [and not] a mother and son relationship."

¶14 In January 2007, after violating her probation by selling prescription medication, Jennifer was incarcerated and she remained incarcerated until September 2008. There was evidence that Jennifer attempted to call Dakota only once while incarcerated, but failed to get through. Jennifer testified that she believed that the phone call was blocked, but there was other testimony that no calls to Kevin/Dakota's residence were received or refused. During her incarceration, Jennifer only wrote two letters to Kevin regarding Dakota, in June 2007 and January 2008, and only sent one letter to Dakota. In neither letter to Kevin did Jennifer inquire about Dakota's health, education, activities, or otherwise ask about his physical or mental well-being. Even after being released from prison, Jennifer did not inquire into Dakota's well-being.

¶15 As a result of these events, Jennifer had no in-person or phone contact with Dakota between January 14, 2007, which is the last time Jennifer saw him, and September 2008. At the time of the termination hearing in February 2009, Jennifer had not been in direct contact with Dakota for just over two years, from the ages of three to five. Further, there was testimony that, from the time Jennifer moved in with Kevin to the time of the termination hearing, with one

minor exception, Jennifer contributed nothing financially to the care and support of Dakota.[4]

¶16 As explained in ***Tammy W-G.***, the jury's task was to consider "any support or care, or lack thereof, the parent provided the child throughout the child's entire life" in determining whether Jennifer had a substantial parental relationship with Dakota. *See* ***Tammy W-G.***, 333 Wis. 2d 273, ¶3.

¶17 Based on the evidence and reasonable inferences from the evidence summarized above, a jury could have reasonably concluded that Jennifer did not have a substantial parental relationship with Dakota. In the light most favorable to the verdict, the evidence shows that Jennifer, through her own choices, removed herself from most of Dakota's life. For example, when asked if she realized that selling the prescription medication was illegal and, if she were caught, it would cause her to "spend time away from [her] son" and to have "no contact," she answered, "I had a feeling, yes." In addition, the jury could have reasonably believed that Jennifer realized her voluntary decision to move to a different town in August 2005 would result in sharply reduced contact with Dakota, since she did not have a car or a driver's license.

¶18 And, even when in Dakota's life, substantial evidence supports a finding that Jennifer's care was inadequate to the point that she did not exercise "significant responsibility for the daily supervision, education, protection and care of the child." *See* WIS. STAT. § 48.415(6)(b). Beginning when Dakota was six months old, there is testimony based on which a jury could conclude that Jennifer

[4] There was testimony that Jennifer may have purchased a toddler bed.

did not exercise "significant" responsibility in that she "neglected … to provide care" for Dakota in various ways, including by failing to keep Dakota adequately clean, leading to health concerns. *See* § 48.415(6)(b). Based on this testimony, a jury could have reasonably inferred that Jennifer was also neglectful of Dakota for the first six months of his life.

¶19 Thus, I conclude that credible evidence supported the jury's verdict. Nothing Jennifer points to demonstrates otherwise.

¶20 Much of Jennifer's argument is directed at distinguishing the facts of two other cases where termination based on a failure to assume parental responsibility was upheld. For example, Jennifer highlights that, in ***Tammy W-G.***, the parent facing termination was only in the child's life for four months out of a four-and-one-half-year lifespan. *See* ***Tammy W-G.***, 333 Wis. 2d 273, ¶40. She contrasts this to her case, where, as Jennifer puts it, she was "Dakota's primary caretaker until Dakota was 18 months old."[5] In addition, she points to the fact that, in ***Tammy W-G.***, the parent did not have "financial or other disabilities" that would justify his failure to travel to visit the child. *See* ***id.***, ¶42. Jennifer contends

[5] To the extent that Jennifer may be contending that it matters, standing alone, that she was a caretaker for 18 months out of 5 years of Dakota's life, she provides no legal support for the proposition that this fact is determinative. I note that in ***Tammy W-G.*** the court declined to adopt a *per se* minimum-amount-of-time-involved rule, and instead explained that fact finders must consider the totality of the circumstances over a "child's entire life." *See* ***Tammy W-G.***, 333 Wis. 2d 273, ¶¶3, 31. Consistent with this, I find persuasive the recent decision in ***Waukesha County Department of Health & Human Services v. Jennifer L.H.***, No. 2010AP2990, unpublished slip op. (WI App July 13, 2011). In that case, this court rejected a challenge that "the failure to assume parental responsibility claim was not proven as a matter of law, because [the mother] lived with [the child] and helped raise him." *See* ***id.***, ¶¶6, 8. The mother had lived with the child "for most of [the child's] life" and the child "was cared for by his mother and his grandmother." *See* ***id.***, ¶¶2, 8. Applying ***Tammy W-G.***, this court concluded that a jury could nonetheless find the termination ground was satisfied because there was evidence that the mother "failed to establish a substantial parental relationship even while living with [the child]." *See* ***Jennifer L.H.***, No. 2010AP2990, ¶8.

that here, in contrast, she had a reason for not visiting Dakota for one of the years because she had moved to another town and had no transportation. Jennifer also highlights that, in ***Tammy W-G.***, the parent "never sought court assistance in establishing a relationship" with the child. *See* ***id.*** Jennifer then points out that she sought and obtained a court order for visitation.

¶21 Similarly, Jennifer contrasts the facts here to the facts in ***State v. Quinsanna D.***, 2002 WI App 318, 259 Wis. 2d 429, 655 N.W.2d 752. Jennifer notes that, in ***Quinsanna D.***, the parent lived in a "drug house," exposing the children to her own drug use on a daily basis. *See* ***id.***, ¶¶4, 32. Jennifer points out that no similar drug-exposure evidence was present here.

¶22 In the course of these arguments, Jennifer also highlights that there was testimony showing that she did provide care for Dakota by, at times, taking him to doctor appointments, changing his diapers, bathing him and feeding him, and "engag[ing] in educational play." She further asserts that it must be true that Kevin did not have "serious concerns" about her parenting, because Kevin asked Jennifer to continue to care for Dakota for the remainder of July 2005 after she moved out of Kevin and Dakota's home. Jennifer characterizes the evidence as showing that "[h]er parenting may not have been ideal," but asserts that this does not constitute grounds for termination.

¶23 These arguments miss the mark. The question is not whether the evidence in this case is the same as the evidence in the cases cited by Jennifer. The question, rather, is whether there was credible evidence supporting the verdict here. Similarly, the question is not whether there was evidence giving rise to inferences that favor Jennifer's view. To the extent that there were conflicting pictures painted of Jennifer's care of Dakota, the jury was entitled to credit the

testimony regarding her neglect of Dakota and to make inferences based on that testimony. For example, it does not matter whether Kevin thought, at some point in time, that Jennifer was capable of caring for Dakota.

¶24 Thus, Jennifer fails to demonstrate that there was not credible evidence that could support the jury's verdict.

B. Jury Instructions

¶25 Jennifer argues that the circuit court erred because it failed to give the jury instructions orally at the close of evidence. As Jennifer acknowledges, the circuit court did give the instructions orally *before* the presentation of evidence on the first day of trial, and then gave the instructions in written form after the close of evidence on the second day of trial. Jennifer does not argue that the substance of these oral or written instructions was flawed. Rather, Jennifer's argument is that, based on WIS. STAT. § 805.13(4), the court was required to again give the instructions orally after the close of evidence on the second day of trial, together with the written instructions.

¶26 WISCONSIN STAT. § 805.13(4) states:

> **(4)** INSTRUCTION. *The court shall instruct the jury before or after closing arguments of counsel.* Failure to object to a material variance or omission between the instructions given and the instructions proposed does not constitute a waiver of error. The court shall provide the jury with one complete set of written instructions providing the burden of proof and the substantive law to be applied to the case to be decided.

(Emphasis added.) It is Jennifer's view that the italicized language required the court to orally instruct the jury and to do so after the close of evidence. I will

assume, without deciding, that her interpretation of this provision is correct. I nonetheless conclude that her argument fails.

¶27 Jennifer acknowledges that she did not object before the circuit court when it became apparent that the court did not intend to orally instruct the jury after the close of evidence. Her primary argument is that the circuit court's noncompliance with WIS. STAT. § 805.13(4) should result in automatic reversal, regardless whether she preserved the argument. I disagree.

¶28 To support automatic reversal, Jennifer cites three federal court of appeals cases. These cases, however, are inapposite. None address a situation where, as here, the jury *was* given complete oral instructions at some point and then was subsequently given these instructions in writing prior to its deliberations. Rather, the cases Jennifer relies on all address the distinct situation where the jury was *never* given complete oral instructions. *See* ***Guam v. Marquez***, 963 F.2d 1311 (9th Cir. 1992) (incomplete oral instructions); ***Morris v. United States***, 156 F.2d 525 (9th Cir. 1946) (incomplete oral instructions); ***United States v. Noble***, 155 F.2d 315 (3rd Cir. 1946) (no oral instructions on the "nature and elements of the offenses"). I agree with Kevin that the concerns underlying reversal in those cases are not present where, as here, the jury was given complete oral instructions. *See*, *e.g.*, ***Marquez***, 963 F.2d at 1312 (where a jury was not given all the instructions orally, stating that "the failure of a trial court to instruct the jury orally makes it impossible for an appellate court to determine from the record whether each juror was aware of the elements of each crime before the verdict was rendered").

¶29 Jennifer does not otherwise provide support for automatic reversal. Having rejected Jennifer's automatic reversal argument, I turn to the normal analysis that applies to alleged instructional error.

¶30 It is undisputed that Jennifer did not object to the failure to give the instructions orally at the close of evidence. Her challenge on appeal has therefore been forfeited. But even if I ignored forfeiture, I would conclude that the error was harmless.

¶31 Error is harmless when there is no "reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." *See* ***Martindale v. Ripp***, 2001 WI 113, ¶32, 246 Wis. 2d 67, 629 N.W.2d 698. "A reasonable possibility of a different outcome is a possibility sufficient to 'undermine confidence in the outcome.'" ***Id.*** (citation omitted).

¶32 Jennifer argues that there is too great a possibility that the jurors forgot the oral instructions because six witnesses, spanning two days, testified between the oral instructions and the jury's deliberations. I am not persuaded.

¶33 The time lapse Jennifer is concerned about is relatively short. In trials that last for weeks, for example, juries are regularly asked to, and are presumed to be able to, remember complicated trial testimony for much longer time spans. I am not persuaded that there is a significant concern that the jurors here could not remember the instructions.

¶34 In a closely related argument, Jennifer contends that her counsel was ineffective for failing to object when it became apparent that the circuit court was not going to orally instruct the jury at the close of evidence. Ineffective-assistance-of-counsel claims in a termination of parental rights proceeding are

analyzed using the two-part test described in ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***Oneida Cnty. Dep't of Soc. Servs. v. Nicole W.***, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652. "To prevail on an ineffective-assistance-of-counsel claim, the defendant must prove that his or her counsel's performance was deficient and that the deficiency prejudiced his or her defense. In this analysis, courts may decide ineffective assistance claims based on prejudice without considering whether the counsel's performance was deficient." ***State v. Roberson***, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111 (citations omitted). "To establish prejudice, the defendant must show there is a reasonable probability that, but for counsel's error(s), the result of the trial would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome." ***Id.***, ¶29.

¶35 Jennifer's argument fails under the prejudice prong of this test for the reasons I have just discussed. That is, there is no reason to think that the failure to instruct the jury orally at the close of evidence affected the outcome.

C. Denial Of Counsel

¶36 Jennifer contends that reversal is mandatory because her attorney was not present when the jury returned the verdict and because the jury was not polled. I disagree.

¶37 The right to counsel for a parent in a termination proceeding is provided by statute. Specifically, WIS. STAT. § 48.23(2) states: "If a proceeding involves a contested adoption or the involuntary termination of parental rights, any parent 18 years old or older who appears before the court shall be represented by counsel; but the parent may waive counsel provided the court is satisfied such waiver is knowingly and voluntarily made." It is undisputed that Jennifer did not

knowingly and voluntarily waive her right to have her attorney present at the verdict stage.

¶38 Jennifer argues that the rule in the comparable criminal context requiring automatic reversal, *see* ***State v. Behnke***, 155 Wis. 2d 796, 806, 456 N.W.2d 610 (1990), should be extended to apply in the termination of parental rights context. I am not persuaded.

¶39 In ***Behnke***, a criminal defendant's attorney was not present during the return of the jury's verdict, the jury was not polled, and the defendant had not waived his right to have his counsel present. *See* ***id.*** at 798-801. The supreme court wrote: "We conclude that the absence of defense counsel at the return of the jury verdict, without the defendant's knowing, voluntary, and unequivocal waiver of the right to counsel, coupled with the failure to poll the jury, without the defendant's knowing, voluntary, and unequivocal waiver of the right to poll, is grounds for automatic reversal." ***Id.*** at 806.

¶40 In arguing that automatic reversal should also be the rule in termination of parental rights cases, Jennifer does not come to terms with the reasoning that was key to ***Behnke***'s holding. Jury verdicts in criminal cases require unanimity and, in reaching its conclusion, the ***Behnke*** court explained:

> The right to poll the jury at the return of the verdict is a corollary to the defendant's right to a unanimous verdict. Polling is a means by which the uncoerced unanimity of the verdict can be tested. Each juror must take individual responsibility and state publicly that he or she agrees with the announced verdict.

Id. at 801.

¶41 I agree with Kevin that this reasoning does not apply here and, accordingly, that adopting an automatic reversal rule in termination of parental rights cases is not warranted. In this civil proceeding, the jury verdict was via a five-sixths verdict, not a unanimous verdict. *See* WIS. STAT. § 805.09(2) (providing that in civil matters "[a] verdict agreed to by five-sixths of the jurors shall be the verdict of the jury"). In a five-sixths verdict scenario, the concern underlying ***Behnke*** is far less compelling.

¶42 Here, there were twelve jurors and that, in turn, means any dissenter would not be the sole cause of a hung jury either because the dissenter would have company or the dissenter would not cause a hung jury. For example, for a five-sixths verdict, it would not matter if, out of twelve jurors, one or two jurors found the termination ground was not satisfied. Further, if two jurors believed that the ground was not satisfied, then a third determinative juror would already have other jurors that share his or her view. This is different than the criminal context discussed in ***Behnke***, where a verdict may turn on a *single* holdout juror *with whom no other jurors agree*, resulting in a coercive environment.

¶43 Jennifer also relies on a nineteenth century criminal case cited in ***Behnke***, ***Smith v. State***, 51 Wis. 615, 8 N.W. 410 (1881). Her view is, essentially, that regardless of ***Behnke***, ***Smith*** supports automatic reversal because that case had already decided the issue addressed by ***Behnke***—that reversal is automatic when there is deprivation of counsel and no polling—and that ***Smith*** decided this both in the criminal and civil context. Jennifer points to the following in ***Smith***:

> If, by the absence of the defendant's counsel at the time of receiving the verdict, the defendant lost any right which might have been beneficial to him, then we think it was error not to grant a new trial for that reason. It is insisted that he lost the right to poll the jury. If he did, then he lost a right which was very important to him. *That a defendant,*

> *in either a civil or criminal action, has the right to poll the jury, is well settled; and a refusal to permit him to do so is error, for which the verdict will be set aside.*

Smith, 51 Wis. at 620 (emphasis added).

¶44 I reject Jennifer's reliance on ***Smith*** as an independent track to automatic reversal. The language Jennifer points to in ***Smith*** merely states that reversal is required when a court denies a request for polling. As to the remainder of the case, the ***Smith*** court's focus was on the criminal context before it, and I do not discern that it adds to the ***Behnke*** holding. Notably, the ***Behnke*** court did not even treat ***Smith*** as dispositive of the issue before it.

¶45 Finally, Jennifer asserts that a termination of parental rights case, ***State v. Shirley E.***, 2006 WI 129, 298 Wis. 2d 1, 724 N.W.2d 623, shows that reversal should be automatic. Jennifer's argument is based on the premise that "[t]he return of the verdict is a critical stage in the proceedings." In turn, Jennifer argues that ***Shirley E.*** stands for the proposition that "[w]hen a litigant has been totally deprived of the presence and assistance of counsel during a critical stage of the proceeding, reversal is automatic and harmless error analysis does not apply." ***Shirley E.*** does not contain this broad proposition.

¶46 ***Shirley E.*** addressed the situation in which a mother was deprived of counsel "in both the fact-finding and dispositional phases of the termination of parental rights proceeding." ***Id.***, ¶3. The ***Shirley E.*** court stated:

> Depriving a parent of the statutory right to counsel in a termination of parental rights proceeding deprives the parent of a basic protection without which, according to our legislature, a termination of a parental rights proceeding cannot reliably serve its function. The fairness and integrity of the judicial proceeding that the legislature has established for termination proceedings has been placed in doubt when the statutory right to counsel is denied a parent.

> Accordingly, the denial of the statutory right to counsel *in the present case* constitutes structural error.

Id., ¶63 (emphasis added). Thus, in ***Shirley E.***, it was the total denial of counsel that was deemed structural error. *See* ***id.***, ¶64.

¶47 Further, it makes sense that ***Shirley E.*** would not contain a blanket "critical stage" rule in light of the case law. For example, in ***State v. Anderson***, 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d 74, released approximately six months prior to ***Shirley E.***, the supreme court explained that "a harmless error analysis may apply to certain violations of the Sixth Amendment right to counsel," even when such a violation occurs at a "critical stage." *See* ***Anderson***, 291 Wis. 2d 673, ¶76. Jennifer does not provide any support for the proposition that the statutory right to counsel in termination of parental rights proceedings is more extensive than the constitutional right to counsel in a criminal case.

¶48 Apart from what I have discussed, Jennifer does not otherwise develop an argument supporting automatic reversal. Nor does she provide a fallback harmless error argument and, thus, she effectively concedes the error was harmless. Further, if I needed to address that topic, I would conclude that any error was harmless.

¶49 Jennifer's jury returned a verdict of 11-to-1 in favor of a finding that the termination ground was satisfied. There is no reason to suppose that an additional two jurors would have changed their minds if polled by Jennifer's attorney. As discussed above, there is no reason to think that the jurors would have been subject to the sort of coercion that is a concern when a jury verdict must be unanimous.

Conclusion

¶50 For the reasons discussed, I affirm the circuit court.

By the Court.—Order affirmed.

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