

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 15, 2011

A. John Voelker
Acting 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.

Appeal No. 2010AP2497

Cir. Ct. No. 2010TP1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO ANTHONY H., A PERSON
UNDER THE AGE OF 18:**

LANGLADE COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

v.

REBECCA D.,

RESPONDENT-APPELLANT,

TROY P.,

RESPONDENT.

APPEAL from orders of the circuit court for Langlade County:
FRED W. KAWALSKI, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Rebecca D. appeals an order terminating her parental rights to Anthony H. and an order denying her motion for postdisposition relief. A jury found that Rebecca failed to assume parental responsibility for Anthony, pursuant to WIS. STAT. § 48.415(6). On appeal, Rebecca argues the statute is unconstitutionally vague. She also asks us to grant a new trial in the interest of justice. We reject Rebecca’s arguments and affirm.

BACKGROUND

¶2 On March 15, 2010, Langlade County filed a petition to terminate Rebecca’s parental rights to Anthony on the ground that Rebecca had failed to assume parental responsibility. *See* WIS. STAT. § 48.415(6). Rebecca contested the petition and demanded a jury trial.

¶3 A jury trial was held on June 1, 2010. Tonya Fischer, the social worker handling Anthony’s case, testified that Anthony was born on July 30, 2007. In December 2007, when Anthony was nearly five months old, the County received a neglect referral, and Fischer and another social worker made a visit to Rebecca’s home. When they arrived at the home, they found the aftermath of a party that had occurred the night before. Rebecca’s sister and several friends were in the apartment, which, according to Rebecca’s own testimony, was “disheveled” and filled with “beer bottles” and “ash trays.” Rebecca and Anthony were asleep in her bedroom. Anthony was in his crib, which was “cluttered with many other things.” Anthony’s brother was locked in his own bedroom. Both children were subsequently removed from the home.

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

¶4 The County filed a petition alleging Anthony was a child in need of protection or services (CHIPS). Grounds were found for the petition, and a dispositional order was entered on January 16, 2008 placing Anthony in foster care. The order contained conditions Rebecca needed to meet for Anthony's return, including attending parenting classes, achieving financial stability, obtaining a suitable residence, obtaining employment, and demonstrating the ability to appropriately supervise and care for Anthony.

¶5 Fischer testified that Rebecca made some progress toward meeting these conditions but did not make sufficient progress for Anthony to be returned to her home. For instance, Rebecca completed a parenting class, although she missed the first two sessions. She paid some child support, but at the time of trial she was behind by a significant amount. Rebecca also failed to maintain regular contact with Fischer regarding Anthony's care and well-being. Fischer estimated that she initiated ninety to ninety-five percent of her communications with Rebecca. Between the entry of the CHIPS order and the time of trial, Rebecca lost her residence and her employment twice.

¶6 Fischer also testified about Rebecca's relationship with Anthony after he was placed in foster care. Specifically, she testified that Rebecca had not taken advantage of opportunities to visit and care for Anthony. Anthony's foster parents provided an "open ended opportunity" for Rebecca to visit Anthony "on a daily basis," but she did not do so. Fischer testified Rebecca did not have regular contact or regular visitation with Anthony—"she would go in spurts and do well and then she would kind [of] disappear[.]" She provided some clothing for Anthony soon after he was placed in foster care, but had not provided any clothing for "quite a while." She brought some snacks to her visits with Anthony, but did

not otherwise provide food for him. She attended “very few” of Anthony’s medical appointments.

¶7 Fischer also testified that, during supervised visits, she observed that Rebecca had difficulty parenting more than one child and Anthony would often end up “playing in a corner by himself or entertaining himself.” She testified Rebecca’s relationship with Anthony was “more like that of a distant relative than that of a parent.”

¶8 Karen Smith, a county employee who supervised some of Rebecca’s visits with Anthony, also testified that Anthony would play by himself during the visits and did not have a “strong bond” with Rebecca. Smith testified Rebecca’s visits with Anthony were “irregular,” and the lack of regular visits seemed to be “part of the problem” between Anthony and Rebecca.

¶9 Anthony’s foster mother, Geraldine Dempsey, testified that Rebecca would often promise to call Anthony, but would not follow through. Dempsey also testified Rebecca did not visit Anthony on a regular basis and would sometimes go months without visiting him. Dempsey’s home was always open to Rebecca to visit Anthony, but Rebecca visited fewer than thirty times in twenty-two months. The visits were “sporadic” and sometimes “quite far apart.” Dempsey also testified that Anthony became nervous or anxious after visiting Rebecca and sometimes exhibited behavioral problems after those visits. Although Anthony referred to Rebecca as “Mom,” he also referred to Dempsey as “Mama.”

¶10 Rebecca admitted that, during the four months leading up to trial, she had only visited Anthony “a couple times.” She blamed the lack of contact on a shortage of gas money and other transportation problems. Anthony’s foster

home was located thirteen miles outside of Antigo, and there was no public transportation available to Rebecca between Antigo and the home. However, Dempsey testified she had brought Anthony to see Rebecca several times and would have done so more frequently had Rebecca requested it. Fischer also testified that the County was available to assist Rebecca with transportation.

¶11 The jury found that Rebecca had failed to assume parental responsibility for Anthony, pursuant to WIS. STAT. § 48.415(6). Following a dispositional hearing, the court entered an order terminating Rebecca's parental rights.

¶12 Rebecca moved for postdisposition relief, alleging that WIS. STAT. § 48.415(6) was unconstitutionally vague. In the alternative, she asked the circuit court to grant a new trial in the interest of justice, pursuant to WIS. STAT. § 805.15(1). Rebecca argued the real controversy was not fully tried because the jury

was not instructed in accordance with *Tammy W-G. v. Jacob T.*, 2011 WI 30, ¶¶ 3, 32, 38, [333 Wis. 2d 273, 797 N.W.2d 854,] that the jury should consider any parental support or care that [Rebecca] provided to [Anthony] throughout the child's entire life, together with any reasons why [Rebecca] may not have provided parental care and support for [Anthony] at other times, under the totality of the circumstances.

The court denied Rebecca's motion, concluding that § 48.415(6) was not unconstitutionally vague and that the jury instructions did not prevent the real controversy from being fully tried.

DISCUSSION

I. Constitutionality of WIS. STAT. § 48.415(6)

¶13 WISCONSIN STAT. § 48.415 provides in relevant part:

Grounds for involuntary termination of parental rights.

At the fact-finding hearing the court or jury shall determine whether grounds exist for the termination of parental rights. ... Grounds for termination of parental rights shall be one of the following:

....

(6) FAILURE TO ASSUME PARENTAL RESPONSIBILITY.

(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 not 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 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.

¶14 Rebecca argues this statutory language is unconstitutionally vague. The constitutionality of a statute is a question of law that we review independently. *State v. Pittman*, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993). We presume a statute is constitutional. *Id.* “One who challenges the validity of a statute has the burden of showing beyond a reasonable doubt that the statute is

unconstitutional.” *Id.* (quoting *State v. Wickstrom*, 118 Wis. 2d 339, 351, 348 N.W.2d 183 (Ct. App. 1984)).

¶15 A statute is unconstitutionally vague if it fails to give fair notice of the conduct prohibited and fails to provide an objective standard for enforcement. *State v. Ruesch*, 214 Wis. 2d 548, 561, 571 N.W.2d 898 (Ct. App. 1997). In other words, “[t]he first prong of the vagueness test is concerned with whether the statute sufficiently warns persons ‘wishing to obey the law that [their] ... conduct comes near the proscribed area.’” *Pittman*, 174 Wis. 2d at 276 (quoting *State v. Tronca*, 84 Wis. 2d 68, 86, 267 N.W.2d 216 (1978)). “The second prong is concerned with whether those who must enforce and apply the law may do so without creating or applying their own standards.” *Id.*

¶16 “[I]f the defendant is not asserting that a First Amendment right is burdened and his conduct plainly falls within the proscriptions of the statute, he cannot challenge the statute on vagueness grounds.” *Ruesch*, 214 Wis. 2d at 561 (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)); *see also Pittman*, 174 Wis. 2d at 277; *State v. Courtney*, 74 Wis. 2d 705, 713, 247 N.W.2d 714 (1976) (when defendant’s alleged conduct clearly falls within the prohibited zone, defendant may not base a constitutional challenge on hypothetical facts); *R.D.K. v. Sheboygan Cnty. Soc. Servs. Dep’t*, 105 Wis. 2d 91, 99, 312 N.W.2d 840 (Ct. App. 1981) (where parent’s conduct “fell well within the foreseeable and expectable boundaries” of the termination statute, parent had no standing to challenge the statute for vagueness).

¶17 Rebecca does not allege that WIS. STAT. § 48.415(6) burdens a First Amendment right. Accordingly, she cannot challenge the statute on vagueness grounds if her conduct plainly falls within the statute’s proscriptions. *See Ruesch*,

214 Wis. 2d at 561. We agree with the County that Rebecca's conduct clearly falls within the proscriptions of § 48.415(6).

¶18 The statute provides that failure to assume parental responsibility is a ground for termination of parental rights. WIS. STAT. § 48.415(6)(a). It states that failure to assume parental responsibility is established by proving that the parent has not had a "substantial parental relationship" with the child. *Id.* "Substantial parental relationship," in turn, is defined as "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." WIS. STAT. § 48.415(6)(b). The statute lists several factors a court may consider in assessing the existence of a substantial parental relationship, including whether the parent has "expressed concern for or interest in the support, care or well-being of the child," and whether the parent has "neglected or refused to provide care or support for the child." *Id.*

¶19 On the facts adduced at trial, Rebecca clearly failed to assume parental responsibility for Anthony, pursuant to the standards set forth in WIS. STAT. § 48.415(6). Anthony was nearly five months old when he was removed from Rebecca's home. At the time of trial, he was nearly three years old and had been in foster care for two and one-half years. During those two and one-half years, Rebecca failed to meet the conditions for Anthony to be returned to her home. Rebecca failed to maintain regular contact with Fischer about Anthony's well-being, and Fischer frequently had to call Rebecca to find out why Rebecca had not been in touch with the County, whether Rebecca wanted to visit Anthony, and whether she was complying with the conditions in the CHIPS order.

¶20 More importantly, Rebecca failed to maintain either meaningful or consistent contact with Anthony while he was in foster care. Although Dempsey's

home was always open for Rebecca to visit Anthony, Rebecca visited him fewer than thirty times in twenty-two months. Her visits were sporadic, and she would sometimes go months without visiting. In the four months before trial, she only visited Anthony “a couple times.” She would often promise to call Anthony, but then fail to do so. She attended “very few” of Anthony’s medical appointments, did not send him cards or presents after his first birthday, and provided very little food and clothing for him. Her relationship with Anthony was more like that of a “distant relative” than that of a parent. Anthony became anxious and exhibited behavioral problems after visiting Rebecca.

¶21 Rebecca justified her failure to maintain contact with Anthony by stating that she did not have money for gas and had other problems with her car. However, Rebecca did not explain why her transportation problems prevented her from calling Anthony or sending him cards or presents. She did not explain why she failed to accept transportation offered by both Dempsey and the County. She did not explain why she failed to seek help from her boyfriend, or why she lent her 2009 income tax refund to her “daughter’s father” instead of using it to buy fuel or repair her vehicle.

¶22 On these facts, it is clear that Rebecca did not have a “substantial parental relationship” with Anthony over the course of his life. *See* WIS. STAT. § 48.415(6)(a). Rebecca simply did not, under any stretch of the imagination, “accept[] and exercise ... *significant* responsibility for [Anthony’s] *daily* supervision, education, protection and care.” *See* WIS. STAT. § 48.415(6)(b) (emphasis added). Instead, after the first five months of his life, she visited him sporadically, failed to maintain regular contact with him, and failed to keep in touch with the County about his well-being and the steps she needed to take to comply with the CHIPS order. Although she stated she could not visit Anthony

because she did not have money for gas, the evidence showed that she failed to take advantage of other transportation opportunities. It took the jury only sixteen minutes to conclude Rebecca had failed to assume parental responsibility for Anthony. Rebecca's conduct clearly falls within the core proscriptions of WIS. STAT. § 48.415(6). Accordingly, she cannot challenge the statute on vagueness grounds. *See Ruesch*, 214 Wis. 2d at 561.

II. New trial in the interest of justice

¶23 Rebecca next argues that, even if WIS. STAT. § 48.415(6) is not void for vagueness, we should grant her a new trial in the interest of justice. Under WIS. STAT. § 752.35, we may grant a new trial in the interest of justice “if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried[.]” We exercise our discretionary reversal power “only sparingly,” *State v. Prineas*, 2009 WI App 28, ¶11, 316 Wis. 2d 414, 766 N.W.2d 206, and in “exceptional cases,” *Vollmer v. Luety*, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990).

¶24 Here, Rebecca argues that the real controversy was not fully tried because the jury instruction on failure to assume parental responsibility was “fundamentally inadequate.”² The circuit court instructed the jury:

The petition in this case alleges that Rebecca [D.] has alleged to failure [sic] to assume parental responsibility which is a grounds for termination of parental rights. Your

² Rebecca's trial counsel did not object to the jury instruction. Accordingly, Rebecca has waived her right to challenge the instruction directly. *See* WIS. STAT. § 805.13(3); *State v. Cydzik*, 60 Wis. 2d 683, 693-94, 211 N.W.2d 421 (1973). Nevertheless, this court possesses discretionary authority to review waived errors in jury instructions and to determine whether they prevented the real controversy from being fully tried. *See* WIS. STAT. § 752.35; *Vollmer v. Luety*, 156 Wis. 2d 1, 19-20, 456 N.W.2d 797 (1990).

role as jurors will be to answer the following question in the special verdict. Has Rebecca [D.] failed to assume parental responsibility for Anthony [H.]. For failure to assume parental responsibility the Langlade County Social Service must have, must prove by evidence that is clear satisfactory and convincing to a reasonable certainty that Rebecca [D.] has not had a substantial parental relationship with Anthony [H.].

The term substantial parental relationship means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of Anthony [H.]. In evaluating whether Rebecca [D.] has had a substantial parental relationship with the child you may consider factors including but not limited to whether Rebecca [D.] has expressed concern for or interest in the support, care and well being of Anthony [H.], and whether Rebecca [D.] has neglected or refused to provide support and care for the child.

A parent's lack of opportunity and ability to establish a substantial parental relationship is not a defense to failure to assume parental responsibility.

Before you may answer the special verdict question yes, you must be convinced that is by evidence that is clear satisfactory and convincing to a reasonable certainty, that the question should be answered yes. If you are not convinced, you must answer the question no.

¶25 Rebecca concedes that, aside from some minor deviations, the court's instruction was "essentially in conformity" with the applicable standard jury instruction, WIS JI—CHILDREN 346. However, she argues that, in light of our supreme court's holding in *Tammy W-G.*, the court should have instructed the jury that it must consider "the reasons why [Rebecca] may not have had a substantial parental relationship with Anthony H. during his entire life[.]" See *Tammy W-G.*, 333 Wis. 2d 273, ¶3 (The jury's analysis under WIS. STAT. § 48.415(6) "may include the reasons why a parent was not caring for or supporting her child[.]").

¶26 We conclude the circuit court's instruction on failure to assume parental responsibility did not prevent the real controversy from being fully tried.

At trial, Rebecca testified about her reasons for failing to assume parental responsibility for Anthony. Neither the court nor the County made any effort to prevent Rebecca from introducing this evidence or from arguing that it justified her failure to maintain contact with Anthony. Specifically, Rebecca testified that the reason she failed to visit Anthony regularly for two and one-half years was that she lacked money to fuel or repair her car. However, Rebecca did not explain why she failed to take advantage of transportation provided by the County and Anthony's foster mother. She did not explain why she failed to ask her boyfriend for help with transportation, or why she lent her income tax refund to her daughter's father instead of using it to pay for gas or car repairs. Rebecca also failed to explain why her transportation problems prevented her from calling Anthony or sending him cards and presents. We agree with the circuit court that, even without a jury instruction, "there was testimony in the record that addressed [Rebecca's] concerns," and Rebecca's reasons for failing to assume parental responsibility for Anthony were "essentially before the jury during the trial." A new trial in the interest of justice is not warranted.

By the Court.—Orders affirmed.

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

