COURT OF APPEALS
DECISION
DATED AND FILED

August 19, 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 Nos. 2011AP88
2011AP89
2011AP90

Cir. Ct. Nos. 2010TP1
2010TP2
2010TP3

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

NO. 2011AP88

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

FLORENCE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JENNIFER B.,

RESPONDENT-APPELLANT,

SCOTT S.,

RESPONDENT.

NO. 2011AP89

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

FLORENCE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JENNIFER B.,

RESPONDENT-APPELLANT,

SCOTT S.,

RESPONDENT.

NO. 2011AP90

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

FLORENCE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JENNIFER B.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Florence County: PATRICK J. MADDEN, Judge. *Reversed and cause remanded for further proceedings.*

¶1 BRUNNER, J.[1] Jennifer B. appeals orders terminating her parental rights to three of her children: Sierra B., Jordan S., and Brittany M., and from the order denying her postdisposition motion. Jennifer asserts she was denied her right to a jury trial on the grounds that her children were in need of continuing protection or services because the court, not the jury, answered the first special verdict question. She also argues her trial counsel was ineffective for failing to object to the court's answer to a question posed by the jury during deliberations that "went to the heart" of her continuing protection or services defense. Finally, Jennifer contends she is entitled to a new trial in the interest of justice because the County made a statement in its closing argument that "likely confused the jury," and thus the real controversy has not been tried. We reverse.

BACKGROUND

¶2 Florence County filed petitions to terminate Jennifer's parental rights on the grounds that her children continued to be in need of protection or services and that she failed to assume parental responsibility. *See* WIS. STAT. § 48.415(2)(a), (6)(a). Jennifer contested the petitions and demanded a jury trial.

¶3 The court held a two-day jury trial. To prove the grounds of continuing need of protection or services, the County needed to show: (1) Jennifer's children were previously adjudged in need of protection or services and had been removed from the home for six-months or longer pursuant to a court order containing the required warnings; (2) the County made a reasonable effort to provide court ordered services; (3) Jennifer failed to meet the conditions

[1] These appeals are 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.

established for the children's return to Jennifer's home; and (4) there is a substantial likelihood that Jennifer will not meet those conditions within the nine-month period following this hearing. *See* WIS. STAT. § 48.415(2)(a); *see also* WIS JI—CHILDREN 324A (2011). To prove the grounds of failure to assume parental responsibility, the County needed to prove Jennifer did not have a substantial parental relationship with her children. *See* § 48.415(6)(a); *see also* WIS JI—CHILDREN 346 (2011).

¶4 At the close of evidence, when instructing the jury on the grounds of continuing need of protection or services, the court informed the jury that it answered the first element of the special verdict question. The first element asks:

> Has (child) been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?

WIS JI—CHILDREN 324A (2011); *see also* WIS. STAT. § 48.415(2)(a). The record, however, contains no discussion between the court and the parties about removing this element from the jury's consideration.

¶5 Jennifer's defense to the continuing need of protection or services allegation was that the County did not "coerce" her into treatment. During jury deliberations, the jury asked the court: "Could Florence County have [Jennifer B.] committed to a mental hospital after her two attempted suicides? Could they force her to stay a number of days?" The court asked the parties if it should answer the question. As Jennifer's counsel was requesting the court not to answer the question, the court determined it would answer the question, "No." Jennifer's trial counsel did not further object to the court's answer.

¶6 The jury determined that Jennifer failed to assume parental responsibility of her children. The jury also affirmatively answered the remaining special verdict questions on the grounds that Jennifer's children were in continuing need of protection or services. At the subsequent dispositional hearing, Jennifer did not contest termination, and the court subsequently terminated her parental rights.

DISCUSSION

¶7 Wisconsin uses a two-part statutory procedure for the involuntary termination of parental rights. "In the first, or 'grounds' phase of the proceeding, the petitioner must prove by clear and convincing evidence that one or more of the statutorily enumerated grounds for termination of parental rights exist." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. If the County proves that at least one of the grounds for termination exists, then the proceeding moves on to the second phase, where the court determines whether it is in the children's best interest to terminate the parent's rights. ***Id.***, ¶¶26-27.

¶8 Here, the County petitioned to terminate Jennifer's parental rights on the grounds that her children were in continuing need of protection or services and that she failed to assume parental responsibility. *See* WIS. STAT. § 48.415(2)(a), (6)(a). On appeal, Jennifer argues she is entitled to a new trial on the grounds phase of the termination proceeding. Specifically, she asserts that, on the continuing need of protection or services allegation, she was denied her right to a jury trial and her trial counsel was ineffective for failing to object to the court's answer to a jury question that "went to the heart" of her continuing protection or services defense. Additionally, Jennifer argues that she is entitled to a new trial in

the interest of justice because the County made a statement in its closing argument that "likely confused the jury" and prevented the real controversy from being tried.

¶9 We first determine whether the court erroneously deprived Jennifer of a jury trial on the grounds of continuing need of protection or services because it answered the first special verdict question. The County argues that during trial it moved for a directed verdict on the first element and based on "the undisputed evidence introduced by [the County] …, the Trial court had the authority [to] grant [the County's] request for a directed verdict." The County asserts that Jennifer could not have disputed the first special verdict question because of "the March 30, 2010 Orders and notices contained in Exhibit 8."

¶10 While we agree that a directed verdict is available in the grounds phase of a TPR proceeding, *see* ***Steven V.***, 271 Wis. 2d 1, ¶5, the County has provided no record citation showing it moved for and was granted a directed verdict. Our review of the record reveals that while instructing the jury, the court informed it that the court had answered the first special verdict question. The court should not have removed this element from the jury without any discussion between the parties. *See* ***id.***

¶11 Further, although it is not always error to remove an element from the jury's consideration if the evidence is uncontroverted, *see* ***Walworth Cnty. DHHS v. Andrea L.O.***, 2008 WI 46, ¶50, 309 Wis. 2d 161, 749 N.W.2d 168, we disagree with the County that the evidence showing Jennifer received the required warnings was indisputable. Although the March 30, 2010 orders may have

contained executed warnings,[2] the County overlooks that it petitioned to terminate Jennifer's rights on January 12, 2010. The County must warn a parent that their parental rights might be terminated before it petitions for termination. *See* ***Waukesha Cnty. v. Steven H.***, 2000 WI 28, ¶3, 233 Wis. 2d 344, 607 N.W.2d 607 (holding "WIS. STAT. § 48.415(2) [grounds for termination based on continuing need of protection or services] require[s] that the last order specified in § 48.356(2) placing a child outside the home, which must be issued at least six months before the filing of the petition to terminate parental rights, must contain the written notice prescribed by § 48.356(2).") Moreover, the County conceded in its brief that the last order issued before the January 12 petition did not contain executed warnings. Therefore, the evidence was not uncontroverted. We conclude Jennifer was deprived of her right to a jury trial on the grounds of continuing protection or services.

¶12 Although we determine Jennifer was denied her right to a jury trial on the grounds of continuing protection or services, the jury nevertheless also found grounds existed to terminate her parental rights based on her failure to assume parental responsibility. Therefore, we also determine whether Jennifer is entitled to a new trial in the interest of justice based on the County's closing argument.

¶13 Jennifer asserts the following statement made by the County during its rebuttal closing argument prevented the real controversy from being tried:

[2] On April 20, 2011, we granted Jennifer B.'s motion to supplement the record with Exhibit 8; however, the supplement to the record does not contain the March 30, 2010 orders or executed warnings. The County included a copy of these orders and executed warnings for Sierra and Jordan in its appendix; however, there is no March 30 order for Brittany.

> The fact that you have a birthday party for your child when that child is one or two years old hardly addresses the issue of whether you have a parental relationship with your child seven years later when that child is eight or nine years old.
>
> You need to look at the here and now. The way she was seven or eight years ago is a whole different picture. What we're faced with is the here and now, and where is she going, and what's the possibility that she'll get there in the next nine months, and I submit to you that possibility doesn't exist.

¶14 Jennifer argues that the County's reference to "here and now" confused the jury about the relevant time period it should consider for each ground. Specifically, she argues that, when determining whether a parent has established a significant parental relationship, the jury looks at the entire life of the child. *See* ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶3, 333 Wis. 2d 273, 797 N.W.2d 854 ("[F]act-finder should consider any support or care, or lack thereof, the parent provided the child throughout the child's entire life."). She also asserts that "for the CHIPS ground, the jury had to consider whether Jennifer had met past conditions and whether she could meet conditions in the future." Jennifer contends that because the County's "attorney appeared to tell the jury the relevant time period is the 'here and now,' the real controversy on this ground [failure to assume parental responsibility] has not been fairly tried."

¶15 Although we may grant a new trial when the real controversy has not been tried, our discretionary reversal power is formidable. ***State v. Watkins***, 2002 WI 101, ¶97, 255 Wis. 2d 265, 647 N.W.2d 244. We exercise it sparingly and with great caution. *See* ***id.***

¶16 We conclude the County's statement prevented the real controversy from being tried. The County improperly intertwined the time periods that should be considered for the grounds of continuing protection or services and the grounds

of failure to assume parental responsibility. Although the jury was subsequently instructed on the law of the case, there was no curative instruction informing the jury that, for the failure to assume parental responsibility allegation, it needed to consider more than the "here and now"—specifically, it needed to consider the entire life of the child. Given our supreme court's recent determination that a jury needs to consider the entire life of the child when evaluating whether a parent has assumed parental responsibility, *see* ***Tammy W-G.***, 333 Wis. 2d 273, ¶3, we conclude that the County's instruction to the jury to consider the "here and now" prevented the jury from fairly deciding the issue.

¶17 Finally, because we reverse and remand for a new trial, we do not need to address Jennifer's remaining argument regarding her counsel's failure to object to the court's answer to a jury question. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts need not address every issue when one issue is dispositive).

By the Court.—Orders reversed and remanded for further proceedings.

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