COURT OF APPEALS
DECISION
DATED AND FILED

September 11, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP86 **Cir. Ct. No. 2013TP58**

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

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

PORTAGE COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TANYA G.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Portage County: THOMAS T. FLUGAUR, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Tanya G. appeals the circuit court's order terminating her parental rights to Autumn B.A. Tanya G. challenges three jury instructions given to the jury and contends that she was denied effective assistance of counsel when her trial counsel failed to object to the challenged jury instructions. Tanya G. also requests that we exercise our discretionary power of reversal under WIS. STAT. § 752.35, because the real controversy has not been fully tried. For the reasons explained below, we reject Tanya G.'s arguments, and affirm.

BACKGROUND

¶2 Tanya G. is the biological mother of Autumn B.A. In 2009, Autumn B.A. was removed from Tanya G.'s care and the circuit court found Autumn B.A. to be a child in need of protective services. A dispositional hearing was held, and the circuit court ordered Tanya G. to complete various conditions before allowing Autumn B.A. to be returned to her care. Over the span of four years, Tanya G. failed to meet the court's conditions for return.

¶3 In 2013, Portage County Department of Health and Human Services (the County) filed a petition seeking to terminate Tanya G.'s parental rights on two grounds: (1) Autumn B.A. "had a continuing need for protection and services pursuant to Wis. Stat. § 48.415(2)," and (2) Tanya G. had failed, as a matter of law, to assume parental responsibility under WIS. STAT. § 48.415(6).

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) and (3) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 Tanya G. contested the petition and a fact-finding trial was held before a jury. At the close of evidence, the court met with the parties' attorneys to discuss the proposed special verdict and the jury instructions. After some discussion by the attorneys and the court about how the proposed jury instructions related to the special verdict form questions, the parties agreed to the reading of WIS JI—CHILDREN 324A and WIS JI—CHILDREN 180[2] (WIS JI 324A and WIS JI 180). The court and the parties also approved the reading of WIS JI—CHILDREN 152 (WIS JI 152), which includes an instruction legally referred to as the five-sixths verdict rule,[3] without objection.

¶5 The circuit court read the jury the agreed upon jury instructions. The court also informed the jury that the case would be submitted to them in the form of a special verdict consisting of five questions. With respect to Question 4 of the special verdict, the court read WIS JI 324A to the jury pertaining to the first alleged ground for termination of Tanya G.'s parental rights:

> Fourth, that there is a substantial likelihood that Tanya [G.] will not meet the conditions for the safe return of Autumn [B.A.] within the nine-month period following the conclusion of this hearing.
>
> "Substantial likelihood" means that there is a real and significant probability rather than a mere possibility that Tanya [G.] will not meet the conditions for the safe

[2] To avoid confusion, we note that the record includes two jury instructions labeled as "180": WIS JI—CHILDREN 180, which is the challenged instruction in this case; and a duplicate of the five-sixths verdict instruction—WIS JI 152—which is incorrectly identified as "180." Our references to "WIS JI 180" within this opinion relate only to the challenged model jury instruction.

[3] WISCONSIN STAT. § 805.09(2) codifies the constitutional guarantee of a five-sixths jury verdict of Article 1, § 5 of the Wisconsin Constitution: "**Verdict.** A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury. If more than one question must be answered to arrive at a verdict on the same claim, the same five-sixths of the jurors must agree on all the questions."

> return within that time period. Question 4 of the special verdict addresses this element.
>
> In answering Question 4, you may consider all evidence … of events and conduct occurring since the filing of the petition on July 23rd, 2013. Your answer must reflect your finding as of today's date.

(Emphasis added.)

¶6 The circuit court then instructed the jury with regard to the second ground for termination of parental rights, which Question 5 of the special verdict addressed. Following the instructions to Question 5, the circuit court read WIS JI 180 to the jury:

> In answering Questions 1 through 4 in the special verdict, you must consider the facts and circumstances as they existed on July 23rd, 2013, which was the date on which the petition was filed. Your answer must reflect your finding as of that date.

(Emphasis added.)

¶7 Following closing arguments, the court instructed the jury as follows:

> Agreement by 10 or more jurors is sufficient to become the verdict of the jury….
>
> If you can do so consistently with your duty as a juror, at least the same 10 jurors should agree in all the answers. I ask you to be unanimous if you can.

See WIS JI 152.

¶8 The jurors were provided a written copy of the special verdict form and the jury instructions during deliberations. Following deliberations, the jury unanimously answered "yes" to all five questions on the special verdict, thereby finding that both grounds existed to terminate Tanya G.'s parental rights.

¶9 Following the jury trial, dispositional hearings were held. After taking evidence and hearing oral arguments, the circuit court entered an order terminating Tanya G.'s parental rights to Autumn B.A.

¶10 Tanya G., by appellate counsel, filed a notice of appeal requesting remand to file a post-disposition motion for a new trial pursuant to WIS. STAT. § 809.107(6)(am). We granted the motion and remanded the case to the circuit court to consider Tanya G.'s post-disposition motion.

¶11 On remand, Tanya G. filed a post-disposition motion for a new trial on the grounds that WIS JI 152, regarding the five-sixths verdict, was a misstatement of law, and that the court erred in giving inconsistent and contradictory jury instructions regarding the timing of the evidence the jury is to consider in reaching its verdict. She also contended that her defense counsel failed to provide effective assistance because he did not object to the reading of the challenged jury instructions.

¶12 Following a hearing, the circuit court denied Tanya G.'s motion for a new trial. Tanya G. appeals.

DISCUSSION

¶13 On appeal, Tanya G. argues that she is entitled to a new trial on three grounds: (1) the jury instruction regarding the five-sixths verdict was a misstatement of law and thus confused and misled the jury; (2) WIS JI 324A and WIS JI 180, which were both given to the jury, confused and misled the jury as to the timing of the evidence the jury was to consider in reaching its verdict; and (3) counsel provided ineffective assistance for failing to object to the challenged jury instructions. Tanya G. also requests that we exercise our discretionary power

of reversal pursuant to WIS. STAT. § 752.35, because the real controversy was not fully tried, based on the jury receiving the challenged jury instructions. We address and reject each argument in turn.

¶14 Before we address the merits of Tanya G.'s arguments, we reiterate that Portage County filed a petition seeking to terminate Tanya G.'s parental rights on two grounds: (1) Autumn B.A. had a "continuing need for protection and services" pursuant to WIS. STAT. § 48.415(2), and (2) Tanya G. had failed to assume parental responsibility under § 48.415(6).[4] Questions 1 through 4 of the special verdict related to whether Autumn B.A. continued to need protection and services; Question 5 related to the claim that Tanya G. had failed to assume her parental responsibilities.

I. Jury Instructions

¶15 As we indicated, this appeal concerns three jury instructions: WIS JI 152—the five-sixths verdict rule, and WIS JI 324A and WIS JI 180, which relate to Question 4 of the special verdict. Our discussion regarding the jury instructions is guided by the following principles.

¶16 "The purpose of a jury instruction is to fully and fairly inform the jury of a rule or principle of law applicable to a particular case." ***Nommensen v. American Cont'l Ins. Co.***, 2001 WI 112, ¶36, 246 Wis. 2d 132, 629 N.W.2d 301. "As a general matter, if we determine 'that the overall meaning communicated by the instruction as a whole was a correct statement of the law, and the instruction

[4] The County also named Autumn B.A.'s biological father, Joseph A., in the petition. Joseph A. did not contest the petition and consented to a voluntary termination.

comported with the facts of the case at hand, no grounds for reversal exists.'" ***Id.***, ¶50 (quoted source omitted). "However, an 'erroneous instruction warrants reversal and a new trial if the error was prejudicial.'" ***Kochanski v. Speedway SuperAmerica, LLC***, 2014 WI 72, ¶11, ___ Wis. 2d. ___, 850 N.W.2d 160, 166 (quoted source omitted). "'[A]n error relating to the giving … [of] an instruction is not prejudicial if it appears that the result would not be different had the error not occurred.'" ***Id.*** (quoting ***Lutz v. Shelby Mut. Ins. Co.***, 70 Wis. 2d 743, 751, 235 N.W.2d 426 (1975)). We now turn to address Tanya G.'s five-sixths verdict argument.

A. Five-Sixths Verdict Instruction

¶17 Tanya G. contends that the version of WIS JI 152 read by the court was a misstatement of law and thus the instruction was misleading and erroneous. The court instructed the jury as follows:

> Agreement by 10 or more jurors is sufficient to become the verdict of the jury….
>
> If you can do so consistently with your duty as a juror, at least the same 10 jurors should agree in all the answers. I ask you to be unanimous if you can.

(Emphasis added.) Tanya G. argues that, contrary to the court's instruction, case law does not require the same ten persons to agree when the civil verdict presents two or more claims, citing ***In Interest of C.E.W.***, 124 Wis. 2d 47, 59, 368 N.W.2d 47 (1985), and ***Giese v. Montgomery Ward, Inc.***, 111 Wis. 2d 392, 401, 331 N.W.2d 585 (1983) (the five-sixths verdict rule requires that the same ten jurors agree on all questions necessary to support a judgment *only on a particular claim*). The County essentially concedes this point. We agree with Tanya G. that the five-

sixths verdict instruction read to the jury in this case misstates the law.[5] As we quoted above, the jury was instructed that "at least the same 10 jurors should agree in *all the answers*," which necessarily included the second and separate claim that Tanya G. failed to assume her parental responsibility for Autumn B.A. *See* ***C.E.W.***, 124 Wis. 2d at 59; ***Giese***, 111 Wis. 2d at 401.

¶18 Although we conclude that the five-sixths verdict instruction read to the jury misstated the law, Tanya G. is not entitled to a new trial on this basis because she has not demonstrated that she was prejudiced by the presentation of this instruction to the jury. Had any of the jurors dissented to one or both questions, perhaps she would be entitled to a new trial. However, the jury returned a unanimous verdict on both grounds for terminating Tanya G.'s parental rights. In short, Tanya G. has not demonstrated "that the result would [have been] different had the error not occurred." *See* ***Lutz***, 70 Wis. 2d at 751.

B. WIS JI 324A and WIS JI 180

¶19 Tanya G. argues that jury instructions WIS JI 324A and 180 were "inconsistent and contradictory." We also understand Tanya G. to argue that the court erred specifically in giving the jury WIS JI 180, because the instruction is a misstatement of the law. Tanya G. maintains that, by giving WIS JI 180 to the

[5] It appears that the circuit court used the model instruction from the Wisconsin Children's Jury Instructions approved by the Wisconsin Juvenile Jury Instructions Committee. This instruction, however, does not comport with the supreme court's holding in ***Giese v. Montgomery Ward, Inc.***, 111 Wis. 2d 392, 401, 331 N.W.2d 585 (1983), that the five-sixths verdict rule requires that the same ten jurors agree on all questions necessary to support a judgment *only on a particular claim* and not on all claims where more than one claim is made, as in this case. We do not fault the circuit court for using an instruction the Juvenile Jury Instructions Committee has not changed to accurately reflect the current state of the law on this topic.

jury, the jury was prohibited from considering Tanya G.'s post-petition conduct that she contends was vital to her defense. As we have provided, WIS JI 180 instructs the jury, in answering Question 4 of the special verdict, to consider the facts and circumstances as of the date the petition was filed to determine whether there was a substantial likelihood that Tanya G. would meet the conditions for return within the ensuing nine months. In stark contrast, Tanya G. argues that WIS JI 324A was the correct instruction, which, in her view, properly instructed the jury to answer Question 4 based on the facts as of the date of the trial. However, Tanya G. argues that the combined reading of these two instructions provided the jury with contradictory and inconsistent instructions, causing the jury to be misled and confused. The County appears to agree with Tanya G. that WIS JI 180 should not have been given to the jury, and we agree as well.

¶20 The Comment to WIS JI 180 states that "[t]his instruction is intended for use when the jury requires guidance on the question of the appropriate date as to which a verdict question is to be answered." It follows from this Comment that where the jury does not require such guidance, it is inappropriate to give WIS JI 180 if another instruction exists that provides specific guidance on the appropriate date the jury is to consider evidence when answering a verdict question. In this case, WIS JI 324A provides this specific guidance. The Comment to WIS JI 324A provides that the jury instruction committee thought "that evidence of post-petition conduct may be relevant to the allegation that there is a substantial likelihood that the parent will not meet the conditions for return of the child in the nine-month period following the hearing."

¶21 While we agree with Tanya G. that it was error to instruct the jury with both WIS JI 180 and 324A, Tanya G. fails to show that any alleged error was prejudicial because she fails to demonstrate that the jury's result would have been

different had the circuit court not provided the jury with WIS JI 180. *See* ***Lutz***, 70 Wis. 2d at 751 ("[A]n error relating to the giving … [of] an instruction is not prejudicial if it appears that the result would not be different had the error not occurred.").

¶22 Significant to this case, the jury was given the proper jury instruction to guide it in answering Question 4 of the special verdict— WIS JI 324A—and the wording of Question 4 accurately reflected WIS JI 324A. Although it was error to give WIS JI 180 to the jury, the jury was not asked to answer any question on the special verdict comporting with WIS JI 180. Thus, to properly answer Question 4, the jury was instructed to consider Tanya G.'s post-petition conduct. Contrary to Tanya G.'s argument, it is unreasonable to believe that a reasonable jury, in answering Question 4, would have limited its consideration to pre-petition evidence.

¶23 In sum, the overall meaning communicated by WIS JI 324A, and in conjunction with Question 4 of the special verdict, was a correct statement of the law and comported with the facts of the case at hand. Because we presume that the jury follows a court's jury instruction, ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780, and because Question 4 of the verdict was properly stated, Tanya G. has not demonstrated that the jury was misled or confused. Additionally, because Tanya G. has failed to show prejudice, no grounds for reversal exist.[6]

[6] In a separate argument, Tanya G. argues that the circuit court erred in dismissing her motion for a new trial because the court "proceeded on an erroneous view of the law in a number of different respects," all of which relate to her arguments concerning the jury instructions that we considered above. We rejected Tanya G.'s jury instructions arguments and she fails to explain (continued)

II. Ineffective Assistance of Counsel

¶24 To establish an ineffective assistance of counsel claim, Tanya G. must satisfy a two-part test. First, she must show that her "counsel's performance was deficient." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Second, she must prove that "the deficient performance prejudiced the defense." ***Id.*** If Tanya G. fails to meet either the deficient performance or prejudice component of the test, we need not address the other component. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶25 Tanya G. contends that her counsel should have objected to the circuit court's jury instructions and that counsel's performance was deficient because he failed to do so and that his deficient performance prejudiced her. Tanya G. rests her contention on counsel's testimony during the post-disposition hearing that "he believed that the [five-sixths] instruction as given by the circuit court was correct," and that "he did not object to [the Question 4 instruction] because he did not notice the inconsistency in the instruction."

¶26 While it is likely that defense counsel was deficient in failing to object to the challenged jury instructions, Tanya G. has not shown that she was prejudiced. To show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694. We have already concluded that Tanya G. has not shown that she was

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how her additional arguments here add anything to the arguments that have already been made and rejected. We do not further consider these arguments.

prejudiced when the circuit court instructed the jury on the five-sixths verdict or WIS JI 324A and 180. Thus, there is no reason for us to consider this issue any further.

¶27 Finally, Tanya G. requests that we exercise our discretionary power of reversal pursuant to WIS. STAT. § 752.35, on the ground that the controversy was not fully tried. This argument rests on her previous contentions that the court erred with respect to the jury instructions. We may order a new trial under § 752.35 if we conclude that the real controversy has not been fully tried. We exercise our discretionary power of reversal "only sparingly," and "only in exceptional cases." ***State v. Prineas***, 2009 WI App 28, ¶11, 316 Wis. 2d 414, 766 N.W.2d 206; ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98. Because Tanya G.'s arguments for why we should exercise our discretion and reverse the judgment hinge entirely on the success of her jury instructions arguments, which we have rejected, we see no reason to do so.

¶28 Based on the foregoing reasons, we affirm.

By the Court.—Order affirmed.

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