COURT OF APPEALS DECISION DATED AND FILED

September 22, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2016AP1307

Cir. Ct. No. 2014TP18

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

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

R. J. M.,

PETITIONER-RESPONDENT,

V.

M. R. H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County: DAVID WAMBACH, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] M.R.H. appeals the circuit court's order terminating his parental rights to his son, now-13-year-old C.H., after a jury found two grounds for involuntary termination: abandonment and failure to assume parental responsibility. M.R.H. argues that the circuit court erred by allowing the jury to hear evidence relating to M.R.H.'s prior willingness to voluntarily terminate his parental rights and C.H.'s wish to be adopted by his stepfather. I assume, without deciding, that the circuit court erred in allowing the jury to hear that evidence. I conclude, however, that this claimed error was harmless because there is no reason to think that it would have changed the jury's verdict on at least one of the grounds, abandonment. The order terminating M.R.H.'s parental rights is affirmed.

Background

¶2 C.H.'s mother, R.J.M., who has custody of C.H., petitioned for the termination of M.R.H.'s parental rights. R.J.M. alleged the two termination grounds noted above, abandonment and failure to assume parental responsibility.

¶3 WISCONSIN STAT. § 48.415 defines grounds for involuntary termination and states the two grounds, as pertinent here, as follows:

> **(1)** ABANDONMENT. (a) Abandonment, which, subject to par. (c) ["good cause" defenses], shall be established by proving any of the following:
>
> ....
>
> 3. The child has been left by the parent with any person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

> communicate with the child for a period of 6 months or longer.
>
> ....
>
> **(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, [and] whether the person has neglected or refused to provide care or support for the child ….

¶4 According to R.J.M.'s petition allegations, she and M.R.H. were previously married and lived together with C.H. on and off for a few months after C.H.'s birth in 2003. R.J.M. further alleged that she and M.R.H. divorced in 2005, that M.R.H. had been in and out of prison, and that M.R.H. had no personal contact with C.H. after 2005. The parties filed a stipulation indicating that M.R.H. has been imprisoned for much of C.H.'s life, including a 9-month period in 2005, a 5-year period from October 2006 to October 2011, and a 32-month period from February 2013 to October 2015.

¶5 At the jury trial on the grounds phase, the jurors heard from several witnesses, including M.R.H. and R.J.M. Among other admissions, M.R.H. admitted that he had not seen C.H. since late 2005 or early 2006.

¶6 Over M.R.H.'s objection, the court admitted evidence relating to M.R.H.'s prior willingness to voluntarily terminate his parental rights and C.H.'s

wish to be adopted by C.H.'s stepfather.[2] This evidence included all of the following information:

- After R.J.M. filed the petition, but before trial, M.R.H. offered to voluntarily terminate his parental rights to C.H. so that, if C.H. wanted, C.H. could be adopted by C.H.'s stepfather;
- C.H. wrote a letter to M.R.H. stating that C.H. wanted to be adopted by C.H.'s stepfather and that C.H. did not want M.R.H. to continue to "fight for" C.H.;
- Some time after receiving the letter, M.R.H. changed his mind about voluntarily terminating his parental rights and decided to continue contesting the termination proceedings.

The circuit court admitted this evidence, subject to a limiting instruction informing the jurors that they could consider M.R.H.'s willingness to voluntarily terminate his parental rights only for purposes of whether M.R.H. has had a substantial parental relationship with C.H.

¶7 During closing arguments, M.R.H. did not seriously dispute the elements of abandonment, including the element that M.R.H. failed to visit or communicate with C.H. for a period of six months or longer. Rather, M.R.H.'s attorney conceded those elements and focused instead on M.R.H.'s affirmative defense that he had good cause for failing to visit or communicate with C.H.

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[2] It is unclear whether M.R.H.'s trial counsel's objection to the evidence of M.R.H.'s prior willingness to voluntarily terminate his parental rights extended to the evidence of C.H.'s wish to be adopted by C.H.'s stepfather. However, as explained further below, these two categories of evidence, at least as presented to the jury, went hand in glove. I give M.R.H. the benefit of the doubt, and treat the objection as covering both categories of evidence.

¶8 As noted, the jury found against M.R.H. on both the abandonment ground and the failure to assume parental responsibility ground. The jury rejected M.R.H.'s good cause defense to the abandonment ground.

¶9 The circuit court held a dispositional hearing and terminated M.R.H.'s parental rights to C.H. I reference additional facts as needed below.

Discussion

¶10 M.R.H. argues that the circuit court erred by admitting the evidence relating to M.R.H.'s offer to voluntarily terminate his parental rights to C.H. and C.H.'s wish to be adopted by C.H.'s stepfather. M.R.H. appears to acknowledge that this evidence would have been admissible at the dispositional phase of proceedings, when the focus is on the best interests of the child. He argues, however, that it had no place at the grounds phase of proceedings, when the parent's rights are paramount.

¶11 More specifically, M.R.H. argues that the court erred in admitting this evidence during the grounds phase for three reasons: (1) the evidence was irrelevant to the alleged grounds; (2) even if it was relevant, its probative value was substantially outweighed by the risk of unfair prejudice and confusion of the issues; and (3) the evidence was inadmissible as a settlement offer under WIS. STAT. § 904.08.

¶12 I agree that the evidence was problematic because, at a minimum, it carried a significant risk of unfair prejudice and confusion of the issues during the grounds phase. The circuit court acknowledged as much. However, rather than definitively weigh in on M.R.H.'s arguments supporting his assertion of error, I assume without deciding that the court erred by admitting this evidence during the

grounds phase. Nonetheless, for the reasons that follow, I agree with R.J.M. that this claimed error was harmless.

¶13 M.R.H. may be arguing as a preliminary matter that harmless error analysis should not apply in termination of parental rights proceedings because the stakes are so high. If so, that argument fails. It is well established that harmless error analysis applies in termination of parental rights proceedings. *See, e.g.*, ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶¶28, 36, 246 Wis. 2d 1, 629 N.W.2d 768 (erroneously granted default judgment was harmless error); ***State v. Joseph P.***, 200 Wis. 2d 227, 239-40, 546 N.W.2d 494 (Ct. App. 1996) (erroneously admitted testimony was harmless error).

¶14 The court in ***Evelyn C.R.*** stated the harmless error standard as follows:

> [T]here must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue. A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome. If the error at issue is not sufficient to undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless.

Evelyn C.R., 246 Wis. 2d 1, ¶28 (citations omitted). Thus, the ultimate question is whether the claimed error was "sufficient to undermine the reviewing court's confidence in the outcome of the proceeding." *See* ***id.***

¶15 M.R.H. does not argue that harmless error analysis here requires confidence in the jury's verdict on *both* termination grounds, and I see no reason why that would be true. Either ground alone was sufficient to support termination of M.R.H.'s parental rights. *See* WIS. STAT. § 48.415 ("Grounds for termination of parental rights shall be *one* of the following ...." (emphasis added)).

Accordingly, the claimed error here was harmless if I am confident that, absent that error, the jury's verdict would have been the same on *either* ground.

¶16 I focus on the abandonment ground and, based on that ground, conclude that the claimed error was harmless. I need not also address the failure to assume parental responsibility ground. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate court should decide cases on the narrowest grounds).

¶17 Regarding the abandonment ground, I am confident that the jury's verdict would have been the same regardless of the claimed error. I explain my analysis in full below, but it can be boiled down to two main points. First, the jury was effectively instructed not to consider the complained-of evidence for purposes of the abandonment ground. Second, there was no dispute as to the abandonment elements, and M.R.H.'s good cause defense to abandonment turned out to be exceedingly weak.

¶18 As to the jury instruction, the circuit court gave the jurors the following limiting instruction:

> [E]vidence has been admitted that [M.R.H.] stated a willingness to voluntarily terminate his parental rights of [C.H.] *This evidence was admitted solely for the purpose of the jury deciding whether [M.R.H.] has had a substantial parental relationship with [C.H.] as one of many factors for your consideration on that issue*.
>
> Such evidence is not admitted and you are not to consider it to conclude that [M.R.H.] is a bad person or has a bad character. The Court reminds you that whether [M.R.H.]'s rights ought to be terminated is not an issue for you jurors to decide today or at the conclusion of this case when you are deliberating.
>
> [M.R.H.] has the right to contest a petition to terminate his parental rights and you should not consider

> some prior willingness to terminate his parental rights as a relinquishment of that right.

(Emphasis added.)

¶19 Thus, the jury was instructed that the evidence of M.R.H.'s offer to voluntarily terminate his parental rights was admitted only for purposes of the failure to assume parental responsibility ground, not for purposes of the abandonment ground or for any other purpose. Courts "presume that the jury follows the instructions given to it." ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

¶20 I acknowledge that the limiting instruction did not expressly address the evidence of C.H.'s wish to be adopted by his stepfather. However, as presented at trial, that evidence went hand in glove with M.R.H.'s offer to voluntarily terminate his parental rights. The jury repeatedly heard that M.R.H.'s offer was for the purpose of facilitating C.H.'s wish to be adopted by his stepfather. Thus, the jury would have understood that the limiting instruction covered the topic of C.H.'s wish to be adopted by his stepfather as well as M.R.H.'s willingness to facilitate the adoption by voluntarily terminating his parental rights.

¶21 Turning to the abandonment elements and good cause, the abandonment ground required R.J.M. to prove three elements: (1) M.R.H. left C.H. with a relative or other person; (2) M.R.H. knew, or could have discovered, C.H.'s whereabouts; and (3) M.R.H. failed to visit or communicate with C.H. for a period of six months or longer. *See* WIS. STAT. § 48.415(1)(a)3.; WIS JI—CHILDREN 314, at 1-2. And, as noted, there was no serious dispute as to these elements, including no dispute that M.R.H. had no contact with C.H. for long

periods of time after late 2005 or early 2006. Rather, as M.R.H. acknowledges on appeal, his defense to the abandonment ground focused on whether he could prove good cause for his failure to visit or communicate with C.H. for multiple periods of six months or longer. As I explain in the remainder of this opinion, M.R.H.'s good cause defense turned out to be exceedingly weak. Thus, there is no reason to think that the jury's abandonment verdict would have been different absent the complained-of evidence.

¶22 To establish his good cause defense, M.R.H. had the burden to prove *both* good cause for failing to visit C.H. *and* good cause for failing to communicate with C.H. *See* WIS. STAT. § 48.415(1)(c)1. and 2.; *see also* WIS JI—CHILDREN 314, at 2-3.[3] Consistent with the pattern jury instructions, the jury was instructed on the need to prove both, and further instructed as follows:

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[3] WISCONSIN STAT. § 48.415(1)(c) provides, in full:

> (c) Abandonment 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:
>
> 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

(continued)

> In determining if good cause … existed …, you may consider whether [C.H.'s] age or condition would have rendered any communication meaningless; whether [M.R.H.] had a reasonable opportunity to visit or communicate with [C.H.] or communicate with [R.J.M.] who had physical custody of [C.H.]; attempts to contact [C.H.]; whether the person with physical custody of [C.H.] prevented or interfered with efforts by [M.R.H.] to visit or communicate with [C.H.]; any other factors beyond the parent['s] control which precluded or interfered with visitation or communication; and all other evidence presented at this trial on this issue.

See WIS JI—CHILDREN 314, at 3. In rejecting M.R.H.'s good cause defense, the jury answered "no" to the special verdict question asking whether M.R.H. failed to show good cause for failing to *visit* C.H. and, therefore, did not proceed to answer further special verdict questions, including whether M.R.H. had good cause for failing to otherwise communicate with C.H. *See* WIS JI—CHILDREN 314, at 2-3.

¶23 There were multiple periods of six months or longer for which M.R.H. needed to show good cause both for his failure to visit and his failure to otherwise communicate with C.H. I choose to focus on one of the periods, which lasted from October 2006 to October 2011, during which time M.R.H. was imprisoned.

¶24 M.R.H. admitted that he had no visits with C.H. during this entire five-year period, and submitted nothing to refute R.J.M.'s testimony that there was

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> 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.

no other communication between M.R.H. and C.H. during this period. As to whether there was good cause for the lack of contact during this period, M.R.H. points to no evidence that in-person visits or other contacts by phone or letter with C.H. would have been meaningless. For example, M.R.H. points to no evidence that the facilities in which he was imprisoned prohibited prisoners from having visits with their children; that M.R.H. lacked the opportunity to communicate with R.J.M. to arrange visits; that R.J.M. tried to prevent or interfere with visits; or that visits were otherwise outside of M.R.H.'s control.[4] Rather, as demonstrated below, what evidence there was on the topic suggested that, during this entire five-year period, M.R.H.'s failure to have visits with C.H., or any other contact for that matter, was largely because of M.R.H.'s own actions or lack of action.

¶25 M.R.H. admitted at trial that, during this five-year period, his violations of prison rules led to repeated restrictions on his right to have visitors, sometimes for periods of six months. In addition, he was forced to admit that, in prior deposition testimony, he testified that the last time he sought visits was before October 2006. Moreover, any limitation on visitation does not explain the absence of letters or phone calls to C.H.

¶26 In addition, M.R.H. admitted that, even if R.J.M. had done something to try to prevent contact with C.H., M.R.H. never used the legal tools available to him to prevent any obstruction by R.J.M. In one exchange with the guardian ad litem, M.R.H. testified as follows:

[4] There was evidence that R.J.M. had, on at least one prior occasion, facilitated a visit between M.R.H. and C.H. while M.R.H. was serving a prior prison term.

> Q. Could you not have just called [the court] to set up something to adjust visitation and have a hearing by phone like you did with your divorce?
>
> A. I don't know if I could have. I never looked into it or took the initiative to.
>
> Q. If you were really interested in the visitation agreement, shouldn't you have looked into it and taken some initiative?
>
> A. Right. I try to keep that between [R.J.M.] and I and not in the Court's jurisdiction.

¶27 In arguing on appeal that his good cause defense remained viable, M.R.H. points to parts of his testimony in which he stated that he regularly communicated with R.J.M. "about C.H." during the pertinent five-year period. It is true that M.R.H. repeatedly testified that there was never a six-month period during which he did not communicate with R.J.M. about C.H. But communicating with R.J.M. "about" C.H. is not evidence that M.R.H. had good cause for failing to visit or otherwise communicate with C.H.

¶28 Moreover, M.R.H.'s testimony regarding his communications with R.J.M. about C.H. likely backfired. M.R.H. testified that he communicated with R.J.M. about C.H. at least once every six months because that was what the statute required to avoid abandonment (or so he thought). So far as I can tell, there are two possible inferences the jury could have drawn from this testimony, and neither boded well for M.R.H.'s good cause defense. One inference was that M.R.H. was being honest in this testimony and, in effect, admitting to doing the bare legal minimum he thought necessary to preserve a good cause defense. The other inference was that M.R.H. was lying and tailoring his testimony to reflect what he thought was legally necessary for this defense to succeed.

¶29 In sum, given the limiting instruction, the lack of a dispute as to the abandonment elements, and the weakness of M.R.H.'s good cause defense, it is not reasonable to think that the jury would have reached a different result as to abandonment absent the evidence relating to M.R.H.'s offer to voluntarily terminate his parental rights and C.H.'s wish to be adopted by his stepfather. Stated another way, the admission of this evidence does not undermine confidence in the result and, therefore, the claimed error here was harmless.

Conclusion

¶30 For the reasons above, I affirm the circuit court's order terminating M.R.H.'s parental rights to C.H.

By the Court.—Order affirmed.

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