STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 18AP1896

In re the termination of parental rights to A.J.E.S., a person under the age of 18:

E.M.K.,

Petitioner-Respondent,

v.

Z.T.R.,

Respondent-Appellant.

APPEAL TAKEN FROM ORDER TERMINATING PARENTAL RIGHTS IN WINNEBAGO COUNTY, THE HONORABLE BARBARA H. KEY, PRESIDING

APPELLANT'S BRIEF

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ISSUES PRESENTED

Did the circuit court err in denying respondent's request for Wisconsin Jury Instruction 346A when Z.T.R. had been told that he was one of two possible fathers, but did not know he was the father until he took a DNA test after the Termination of Parental Rights petition was filed?

The circuit court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The decision will be made by one judge under Wis. Stat. §752.31 (2) and (3) and is not eligible for publication. Oral argument is not requested.

STANDARD OF REVIEW

Whether an error in the jury instructions entitles a defendant to a new trial in the interest of justice requires us to consider Wis. Stat. §§ 752.35 and 751.06. Under Wis. Stat. § 752.35, the court of appeals has discretion to reverse a conviction and order a new trial where "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." § 752.35. "We review a discretionary determination for an erroneous exercise of discretion. The court [of appeals] erroneously exercises its discretion when it applies the wrong legal standard or makes a decision not reasonably supported by the facts of record."

State v. Langlois, 382 Wis. 2d 414, 450, 913 N.W.2d 812 (2018).

STATEMENT OF THE CASE

E.M.K. first learned she was pregnant from a positive home pregnancy toward the end of March or early April 2017. Shortly thereafter, her pregnancy was confirmed at a doctor's appointment. She told Z.T.R. via Facebook that she was pregnant and there was a possibility he was the father. She told him it was between him and one other man. .

In mid-April 2017, E.M.K. contacted an adoption agency that had five years previously helped arrange an adoption of her older son, D.S. A.S., adoptive mother of D.S., agreed to also adopt A.J.E.S.

While the adoption plans were playing out in the background, E.M.K. continued to tell Z.T.R. that he was one of two possible fathers. Z.T.R. did not learn about any of the planned adoption arrangements.

After E.M.K. delivered by Caesarian section in December 2017, Ms. Sebastion took custody of A.J.E.S. at the hospital. He has remained in her care at her home in Illinois since that date.

E.M.K. said that Z.T.R. knew about the C-section delivery but did not come to the hospital. Z.T.R. stated that he was never told that a C-section was scheduled.

When Z.T.R. learned following a DNA test taken as part of the termination of parental rights (TPR) proceeding that he was the father, he contested the petition. He was incarcerated, but members of his family

stepped forward to say they wanted to adopt A.J.E.S. Because A.J.E.S.'s adoption was arranged privately, no relative search had been conducted before or after the filing of the termination petition.

A.S. then paid for E.M.K.'s attorney and for the guardian ad litem in the TPR case. On paper, E.M.K. was the petitioner. In reality, termination of Z.T.R.'s rights was being pursued so A.S. could move forward with the planned adoption of A.J.E.S.

The TPR petition alleged one ground: Failure to Assume Parental Responsibility, pursuant to Wis. Stat. § 48.415(6). A.S. testified at the trial. She was not identified as the "prospective adoptive mother," but the jury learned that she had been A.J.E.S.'s caregiver since his birth and had adopted D.S.

The jury was given Wisconsin Jury Instruction (JI) 346B. The circuit court denied Z.T.R.'s request for JI346A. The court decided the issue of when Z.T.R. had "reason to believe" he was A.J.E.S.'s father, instead of leaving the determination to the jury.

The jury found grounds to terminate Z.T.R.'s parental rights. Z.T.R.'s motion for post-disposition relief was denied.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING RESPONDENT'S REQUEST FOR JURY INSTRUCTION 346A.

Z.T.R. should be granted a new trial in the interest of justice because the trial court decided an element of Wis. Stat. § 48.415(6) that needed to be decided by the trier-of-fact.

"A new trial may be ordered on either of two grounds: (1) whenever the real controversy has not been fully tried or (2) whenever it is probable that justice has for any reason miscarried. We stated that, under the first category, when the real controversy has not been fully tried, an appellate court may exercise its power of discretionary reversal without finding the probability of a different result on retrial. Under the second category, however, an appellate court must first find a substantial probability of a different result on retrial before exercising its discretionary reversal power. *Vollmer v. Luety, 156 Wis. 2d 1, 16*

A jury could have decided that Z.T.R. first had reason to believe he was A.J.E.S.'s father's when he received the DNA results. Tthere is a substantial possibility that the result on retrial would be different.

Petitioner and birth mother, E.M.K. informed Z.T.R. that he was possibly the father of the child she was expecting, as was another man with whom she was having sexual relations. At the final pretrial on May 30,

2018. Z.T.R.'s trial counsel asked for Wisconsin Jury Instruction (JI) 346A. He renewed the request at the jury instruction conference after the close of evidence at the one-day trial. JT Tr. 211:11 – 216:20.

At the final pretrial conference, the court deferred ruling on trial counsel's request. At the jury instruction conference, the trial court denied the request and refused to instruct the jury using JI 346A. The court included JI 346B in the instructions.

JI 346B ask the jury to answer the following question in the special verdict:

> Has (parent) failed to assume parental responsibility for (child)?

In contrast, JI 346A asks:

> Has (parent) failed to assume parental responsibility for (child), after knowing or having reason to believe that he was (child)' s father?

Wis. JI 346A includes the following paragraphs of explanation for the jury:

> A man has a duty to assume parental responsibility for a child as of the time he knows or has reason to believe he is the father of the child. To establish a failure to assume parental responsibility, (petitioner) must prove by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the parent or the (person) (or) (persons) who may be the parent of (child) (has) (have) not had a substantial parental relationship with (child) once he knew, or had reason to believe, that he was (child)'s father.
>
> In determining when a father had reason to believe he was the father of the child, you may consider the circumstances of and likelihood of conception; what efforts, if any, he did or reasonably should have undertaken to establish whether a child was conceived; his knowledge or lack of knowledge of the birth of the child; whether he did or did not file a declaration of paternal interest; his efforts or lack of efforts to establish paternity or assist authorities in establishing paternity; what efforts others, including the mother, relatives, child support enforcement or child welfare authorities made to establish paternity or apprise him of his paternity; his knowledge or lack of knowledge of those efforts; his responsiveness or lack of responsiveness to those efforts; any

> information that would lead him to believe that he was not the father of the child; any efforts to preclude him from determining that status or of the existence of the child and all other evidence bearing on that issue.

JI 346B includes language about "incarcerated parent." The jury instructions are in other respects the same.

At the final pretrial conference on May 30, 2018, petitioner's counsel stated that Z.T.R. admitted in his deposition that E.M.K. informed him early on that he was a possible father of the child she was expecting. Petitioner argued that Z.T.R.'s deposition testimony showed that he had reason to believe he was the father and, therefore, the issues was not in dispute. Pretrial Hrg. Tr., 64:10-14.

JI 346A leaves the question of when respondent knew or had reason to believe he was the father to the jury as trier-of-fact. In this case, the question raised was whether Mr. Roycraft's knowledge that he *might* be the father was the same as a reason to believe he *was* the father.

The court stated, "Had reason to know. Can you logically argue that he didn't have reason to know? He may have thought it could have been someone else, but he had just as much reason to know it might be him, too." Id. at 15-19. The court deferred ruling on the request for JI 346A until the jury instruction conference at the close of petitioner's case.

At the jury instruction conference, petitioner stated that JI 346A would be "more appropriately given in a case like *Bobby G.*[1] where the

[1] *State v. Bobby G.,* 301 Wis. 2d 531, 734 N.W. 2d 81 (2007).

father did not have notice of the pregnancy until he was served with the summons and petition." JT Tr., 213:11-14.

The court agreed that "It's only listed as an element in 346A when the *Bobby G.* cases was a case in which he didn't know he was the father. Had no reason to know he was the father. Did not know the child's existence." Id. at 215:13-16.

At the post-disposition hearing, the trial court again cited *Bobby G.* as a case in which JI 346A was appropriately given, in contrast to the situation in the current case.

> [Z.T.R.] acknowledged he knew he could be the father. Was he certain he was the father? No. But did he have reason to believe he was the father? He knew that from the outset. That's different than *Bobby G.* in which there wasn't any knowledge originally of the existence so 346A was not appropriate.

Post Dispo Hrg. Tr., 54:1-6

The court also found that the question raised in JI 346A was not a part of Wis. Stats. § 48.415(6)(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. It does not say proving the person who is the child but just the person who may be the parent.
>
> …It's not an element and it really hasn't been disputed here there has been sufficient evidence as to the fact he may be the parent. They both have agreed to that so there's no dispute of fact as to that particular issue. As such, the portion of 346A will not be included.

There was no stipulation of the parties that there "was sufficient evidence that he may be the parent.: Z.T.R.'s counsel was asking the court

to let the jury decide based on the evidence admitted at trial. Nonetheless, the court denied the request for JI 34tA

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Post Dispo Hrg. Tr., 54:1-6

Bobby G. differs from Z.T.R.'s case in the manner described by the court. Bobby G. did not know of his child's existence until he was served with the TPR petition. Z.T.R. knew early on that he was a possible father of E.M.K.'s expected child. However, *Bobby G.* was not decided on that ground.

In *Bobby G.,* the trial court decided a summary judgment motion on failure to assume parental responsibility in petitioner's favor because of admissions made in respondent's answers to petitioner's interrogatories and requests for admissions. That court ruled that such admissions were not a reason for the court to take a decision away from a jury. The court stated:

> "Failure to assume parental responsibility" and "substantial parental relationship" are legally defined terms, and the statutory definitions may not neatly align with the common sense understanding of these phrases. Accordingly, the circuit court should not have so readily accepted Bobby

> G.'s admissions as concessions that the State had proved the requirements under § 48.415(6).
>
> In addition, Wis. Stat. § 48.422(7)(c) provides that before accepting an admission of the alleged facts in a petition, the circuit court shall address the parties and determine that the admission is made voluntarily with understanding of the nature of the actions alleged in the petition and the potential dispositions, and shall "make such inquiries as satisfactorily establish that there is a factual basis for the admission." The circuit court did not live up to these statutory obligations in the present case.
>
> In any event, Wis. Stat. § 48.415(6) provides a non-exclusive list of factors that the circuit court or the jury may consider in determining whether the biological parent failed to assume parental responsibility. The State's requests for admissions and interrogatories did not expressly address all of the factors listed. Even if the State had sought admissions on all of the enumerated factors, the list of factors is not exclusive. Such admissions may still not constitute "clear and convincing" evidence that the statutory ground for termination was actually satisfied by clear and convincing evidence. Section 48.415(6) is a fact-intensive ground.
>
> The circuit court erred as a matter of law in its interpretation of Wis. Stat. § 48.415(6) and in granting partial summary judgment without taking all the relevant evidence during the grounds phase
>
> *State v. Bobby G.,* 301 Wis. 2d 531, 576-577, 734 N.W. 2d 81 (2007).

In *Bobby G.,* the *Co*urt found that an admission was not a reason to deprive the jury of the right to make a factual determination. The same reasoning applies in Z.T.R.'s case. J.I 346 provides a list of factors that the circuit court or the jury may consider in determining when the biological parent had reason to believe he was the father. Petitioner's deposition question did not and could not expressly address all of the factors listed. Even if the State had asked questions regarding each of the listed factors, the list of factors is not exclusive. Petitioner's assertion at the pretrial conference that Z.T.R.'s sworn deposition testimony showed that he knew

early on that he was a possible father does not constitute “clear and convincing" evidence that justifies taking the fact-intensive finding away from the jury.

John L-B. is an unpublished Court of Appeals case in which the father had as much or more “reason to believe” he was the parent of the child in the TPR case than Z.T.R did in the instant case.

> It was also undisputed that John L.-B. knew he was T.J.'s father as of February 2012, after he received the results of a DNA test. However, the parties disputed, among other issues, whether John L.-B. had reason to believe he was T.J.'s father in 2007, when T.J.'s mother was pregnant with T.J. and informed John L.-B. of that fact, and when, two months after T.J.'s birth, T.J.'s mother told him that she believed him to be the father.

Dane County Dep't of Human Servs. v. John L.-B. (In re T.J.), 2013 Wisc. App. LEXIS 424, P11-12 (Wis. Ct. App. May 16, 2013). {Unpublished case, appended.)

However, John L.-B. did not believe the mother because she had lied to him on several occasions in the past, including telling him that she could not get pregnant. He did not believe he was the father until he got the positive DNA test.

The parties' agreed-upon instructions included the special verdict form for 346A, which asks the following two questions:

> 1. Did (parent) know or have reason to believe that he was (child's) father? ....
>
> If the answer to question 1 is "yes," answer the following question:
>
> 2. Has (parent) failed to assume parental responsibility for (child)? ....

Id. at P5.

The jury answered "no" to the first question and therefore did not answer the second question. The trial court dismissed the case. Petitioner appealed, arguing that the circuit court should have directed a verdict of "yes" on the first question.

In discussion, the *John L.B.* court noted that Wis. Stat. § 415.15(6) did require a determination of when a parent knew or had reason to believe he was the father.

> The supreme court in ***Bobby G.*** observed that, until the pertinent statutes were amended in 1995, they contained an express requirement that the father must have had "reason to believe he was the father of the child" before his parental rights could be terminated on the ground of failure to assume parental responsibility. *Bobby G.* at, ¶¶69, 72, 76, 78-80 After the 1995 amendments, the statutes omitted this express requirement. *Id.*, ¶80. The court concluded, however, that the amendments were not intended to change the requirement, based on the statutory context and legislative history. *See* ***id.***, ¶¶82-83.
>
> P37 Thus, under ***Bobby G.***, the pertinent question in a case like John L.-B.'s is whether the parent fails to assume parental responsibility *after* the parent first knew or had reason to believe that he is the father. Indeed, the jury here received an instruction essentially to this effect. *See* WIS JI-CHILDREN 346A ("As of the time a man knows or has reason to believe he is the father of a child, he has a duty to assume parental responsibility for the child.").

Id. at P36-37. That Court of Appeals found that sufficient evidence supported the jury's answer to Question One. The court affirmed the trial court's dismissal of the case.

In so doing, the Court of Appeals applied the *Bobby G.* ruling in a case in which a father had some prior knowledge of the possibility of his fatherhood. The Court also reiterated and relied on the *Bobby G.* court's analysis of Wis. Stat. 48.415(6), requiring that the father must have had

"reason to believe he was the father of the child" before his parental rights could be terminated on the ground of failure to assume parental responsibility. This analysis of the statute directly contradicts the ruling of the trial court in Z.T.R.'s case, in which the court found that the father having a reason to believe that he was the father was not an "element" of the statute.

"The trial court has broad discretion when instructing a jury. A challenge to an allegedly erroneous jury instruction warrants reversal and a new trial only if the error was prejudicial. Such error is prejudicial if it "probably an not merely possibly" misstated the law and misled the jury.. *Fischer v. Ganju,* 168 Wis. 2d 834, 849-850 485 N.W.2d 10 (1992).

Jury Instruction 346A did not go to the jury. The trial court erred in deciding a factual question reserved for the trier-of fact. Thus, the circuit court in the instant case proceeded under an erroneous interpretation of the statute.

A jury might well have decided, as did the jury in the *John L.-B.* case that Z.T.R. did not have "reason to believe" that he was the father of A.J.E.S. until he got the results of the dna test.

CONCLUSION

Wherefore, Z.T.R. asks this court to vacate the order terminating his parental right and grant him a new trial in the interest of justice.

Dated: February 20, 2019.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3759 words.

Dated: February 20, 2019.

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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: February 20, 2019.

Signed:

Electronically signed
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