STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT II

Case No. 2024AP000553

In re the termination of parental rights to T.P.W. III, a person under the age of 18

Fond du Lac County Department of Social Services,

Petitioner-Respondent,

v.

T.P.W., Jr.,

Respondent-Appellant.

Appeal of an Order Terminating Parental Rights Entered in Fond du Lac County Circuit Court, the Hon. Tricia L. Walker Presiding

REPLY BRIEF

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The circuit court erroneously exercised its discretion when it denied Fred's request for an "impossibility" jury instruction based on Fred becoming incarcerated after the conditions of return were imposed.

A. The circuit court erroneously held that the impossibility defense applies only if the condition was impossible when it was imposed.

Like the circuit court below, the Department relies on an irrelevant factual distinction between *Jodie W.*[1] and the case at hand: while the parent in *Jodie W.* was already incarcerated when the conditions of return were imposed, Fred's incarceration occurred afterwards. (Response Br. at 9-10). As both the language and logic of *Jodie W.* make clear, the timing of the conditions of return is not critical to the question of whether the subsequent termination of parental rights violates due process.

Parental rights are fundamental liberty rights protected by Due Process Clause of the Fourteenth Amendment, and their termination are subject to strict scrutiny. *Monroe County Department of Human Services v. Kelli B.*, 2004 WI 48, ¶ 17, 271 Wis.2d 51, 678 N.W.2d 831. Accordingly, the Department must show that [Wis. Stat. § 48.415(2)], as applied, is narrowly tailored to advance a compelling interest that justifies interference with [Fred's] fundamental liberty interest." *Id.*

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[1] *Kenosha County Dep't of Human Services v. Jodie W.*, 2006 WI 93, ¶ 49, 293 Wis. 2d 530, 559–60, 716 N.W.2d 845, 860.

In *Jodie W.*, the Wisconsin Supreme Court joined the numerous other jurisdictions holding that terminating parental rights due to a parent's criminal conviction and incarceration is not "narrowly tailored," because it ignores all the contextual factors necessary to assess the parent's fitness. "[A] parent's incarceration does not, in itself, demonstrate that the individual is an unfit parent." *Jodie W.,* 2006 WI 93, ¶ 49. The Court held that at most, a parent's incarceration is "relevant" to the termination of their rights.

> Other factors must also be considered, such as the parent's relationship with the child and any other child both prior to and while the parent is incarcerated, the nature of the crime committed by the parent, the length and type of sentence imposed, the parent's level of cooperation with the responsible agency and the Department of Corrections, and the best interests of the child.

Id. at ¶ 50.

Given the logic of *Jodie W.*, it does not matter during a termination proceeding that the conditions of return were impossible at the time that the conditions were imposed. If the termination is based on a condition that was impossible to fulfill in light of a person's incarceration, then the termination still ignores all the contextual factors that must be considered in order to determine that the specific parent is unfit.

Indeed, in *Jodie W.* the supreme court did not just critique the imposition of conditions of return that were impossible for Jodie to meet due to her incarceration: the court also criticized the circuit court's subsequent "evaluation" that Jodie failed to

meet the conditions. The court held that "[b]oth the court-ordered conditions of return *and the circuit court's evaluation of Jodie's failure to meet these conditions* were not narrowly tailored to meet" the State's compelling interest to protect Jodie's child from an unfit parent. *Id*. at ¶ 55 (emphasis added). That is, because the circuit court terminated Jodie's parental rights due to her failure to meet conditions of return that were impossible for her to meet as a result of her incarceration, and not because of her fitness as a parent, the court violated her due process rights. The Court likewise held that the timing of the imposition of the condition did not matter by declaring that "a parent's failure to fulfill condition of return due to his or her incarceration, standing alone, is not a constitutional ground for finding a parent unfit." *Id*. at ¶ 49.

The Department attempts to distinguish *Jodie W.* by arguing that Fred's incarceration after the court-ordered conditions was a "choice," the result of Fred "choosing" to commit a crime that would result in incarceration. (Response Br. at 10). This echoes the reasoning of the circuit court in *Jodie W.* when ruling against Jodie's impossibility argument: Jodie's incarceration, and by extension her failure to meet the housing condition, "was the result of Jodie's own actions." *Jodie W.,* 2006 WI 93, ¶ 15. Of course, the Wisconsin Supreme Court went on to reject this reasoning. Any incarceration could be considered a "choice" to not provide housing and other forms of financial and emotional support, by "choosing" to commit the underlying crime. But if such a "choice" could form the basis for the termination of parental rights, then incarceration alone could be the basis for finding that a parent was unfit. And as seen above, the

supreme court squarely rejected this argument. *Jodie W.,* 2006 WI 93, ¶ 49.

Importantly, *Jodie W.* is not simply about the failure to meet conditions that were impossible to meet when they were imposed. The holding is broader than that. The central holding of Jodie W. is that "a parent's incarceration does not, in itself, demonstrate that the individual is an unfit parent," because "other factors" will dictate whether the parent is actually unfit. In *Jodie W.*, the specific mechanism for terminating parental rights in violation of this broad principle was terminating Jodie's rights as the result of failing to meet a housing condition that was impossible to meet in light of her incarceration. But that does not mean that this is the only way that this principle will be violated. For instance, this court held that under *Jodie W.*, parental rights cannot be terminated based on the "continuing denial of period of physical placement or visitation" ground for termination, Wis. Stat. § 48.415(4), when the placement or visitation was denied because of the parent's incarceration.[2] Here the jury instructions allowed Fred's parental rights to be terminated solely because of his incarceration, as his incarceration made it impossible for him to meet the housing and employment conditions of return (among others). Accordingly, the termination of Fred's parental rights violated his due process rights.

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[2] *In re Alandria A.O.*, no. 2014AP2404, unpublished slip op. (WI APP Dec. 23, 2014) (cited for persuasive value only); *In re Keirrah* O., no. 2009AP2383, unpublished slip op. (WI APP Dec. 3, 2009) (cited for persuasive value only).

B. The jury instructions and verdict allowed the jury to find grounds for terminating Fred's parental rights solely because his incarceration made it impossible to satisfy the housing, employment, or other conditions, in violation of his substantive due process rights.

The Department does not directly address Fred's argument that the jury instructions impermissibly allowed the jury to find grounds for termination simply because his incarceration made it impossible to meet multiple conditions of return. Instead, the Department relies on *Waukesha Cnty. DHHS v. Teodoro E.*, 2008 WI App 16, 307 Wis. 2d 372, 745 N.W.2d 701. According to the Department, "[i]n *Teodoro E.*, the Court of Appeals found that the father in *Teodoro E.* was not denied due process when the trial court refused to give the impossibility instruction because his rights were not terminated solely on impossible conditions." (Response Br. at 10).

The Department misstates the holding. *Teodoro E.* was not a jury instruction case, as there was no jury trial. There was only a bench trial, with the court making explicit factual findings supporting termination at the conclusion of the hearing. *Id*. at ¶ 9. Teodoro argued that his deportation had made satisfying several conditions impossible. *Id*. at ¶ 22. The Court of Appeals rejected this argument because the circuit court had found that Teodoro had violated several conditions that were *not* impossible for him to meet despite his deportation to Mexico. For example, the circuit court had found that in violation of his conditions, Teodoro had failed to speak to his child's doctors and teachers, or to pay child support, and that

it was possible for Teodoro to meet these conditions despite being deported. *Id*. at ¶ 23.

Teodoro E. is simply inapplicable. Reviewing a circuit court's factual findings is fundamentally different than reviewing the circuit court's jury instructions. Appellate courts review factual findings for "clear error," and apply de novo those facts to constitutional principles. *Id*. at ¶ 10. When reviewing a jury instruction, the appellate court addresses whether "the overall meaning communicated by the instruction as a whole was a correct statement of the law[.]" *Nommensen v. Am. Cont'l Ins. Co.*, 2001 WI 112, ¶ 50, 246 Wis. 2d 132, 156, 629 N.W.2d 301, 312 (citation and quotation marks omitted). As argued in Fred's brief-in-chief, here the jury instructions were not a "correct statement of the law" because they allowed the jury to find grounds for the termination of Fred's parental rights based on his failure to meet the housing and employment conditions simply because of his incarceration, in violation of *Jodie W.* (Opening Br. at 20-23). The Department simply does not address this question.

C. The Department has not shown that the erroneous jury instruction was harmless.

The Department's "harmless error" argument is a solitary paragraph without recitation of the proper standard or any supporting case law. (Response Br. at 11). Further, the Department's arguments effectively apply a sufficiency-of-the evidence standard that is antithetical to harmless error review. In short, the Department argues that error was harmless because there was evidence that Fred had violated conditions that were not impossible to meet, ignoring the evidence that Fred had not violated those conditions.

The Department failed to meet its burden of proving that the erroneous jury instruction was harmless. *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222, 232 (1985).

Wisconsin's harmless error rule is codified in Wis. Stat. § 805.18(2), which provides that trial court errors, such as an erroneous jury instruction, will compel reversal only if the error "affected the substantial rights" of the aggrieved party. The Wisconsin Supreme Court has articulated the test as follows:

> A defendant's substantial rights remain unaffected (that is, the error is harmless) if it is clear beyond a reasonable doubt that a rational jury would have come to the same conclusion absent the error or if it is clear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

State v. Stietz, 2017 WI 58, ¶ 63, 375 Wis. 2d 572, 595, 895 N.W.2d 796, 808. In other words, a jury instruction "error is prejudicial when it probably misled the jury." *Barney by Lowe v. Mickelson*, 2020 WI 40, ¶ 14, 391 Wis. 2d 212, 220, 942 N.W.2d 891, 895.

The Department does not acknowledge this test for harmless error. In fact, the Department's arguments apply a sufficiency-of-the-evidence standard. *See State v. Beamon*, 2013 WI 47, ¶ 21, 347 Wis. 2d 559, 571–72, 830 N.W.2d 681, 688. The Department argues that:

> Since the incarceration affected only the housing and employment conditions of return, the jury could properly determine that the father failed to meet the conditions of return that were not made impossible due to his incarceration. This was not

> a case where the jury instructions left the jury with only one conclusion.

(Response Br. at 11).

First, the incarceration did not affect "only the housing and employment conditions of return." (*Id.*) The Department's witnesses testified that due to his incarceration, Fred could not meet the housing, employment, and "ability to meet medical, dental, mental health, and educational needs" conditions of return, and the Department could not offer any AODA or parenting classes (R. 170:44-46, 66-68, 70-71, 84).

Second, the Department's argument ignores the evidence that Fred satisfied the other conditions of return. For instance, the Department's witness testified that she thought that Fred did not satisfy the parenting class condition of return because when she quizzed him about what he learned during a parenting class he took in jail, he was not able to provide many details. (R. 170:47). However, Fred produced a certificate from the jail confirming that he completed a 6-week parenting program, and testified at length about the lessons he learned in the parenting class. (R. 161; 171:124-127). The jury could have easily found that Fred satisfied this condition.

Third, the Department applies the wrong standard when it argues that "[t]his was not a case where the jury instructions left the jury with only one conclusion." (Response Br. at 11). The standard is not whether the jury instructions forced the jury's hand. The standard is whether the jury instruction "probably misled the jury." *Barney by Lowe*, 2020 WI 40, ¶ 14, 391 Wis. 2d 212, 220, 942 N.W.2d 891, 895.

In sum, there is a reasonable probability that the jury instructions misled the jury into finding that Fred failed to meet the conditions of return simply because his incarceration made it impossible to meet the and/or "ability to meet medical, dental, mental health, and educational needs" conditions of return, as testified to by the Department's own witness, in violation of Fred's due process rights under *Jodie W.* (R. 170:44-45, 67-68, 70-71, 84).

As a final note, the Department does not argue that the evidence that Fred violated the criminal conduct condition alone rendered the jury instruction error harmless. As Fred pointed out in the opening brief, under *Jodie W.* terminating a parent's rights just because they committed a crime violates the parent's due process rights. While the court mostly refers to the parent's "incarceration" alone as not being indicative of parental, the court was evidently using that term as a shorthand for both the incarceration and the underlying criminal conduct that prompted the incarceration. After all, one does not become incarcerated without a conviction for criminal conduct. It would make no sense for the court to hold that incarceration alone cannot be the basis for terminating parental rights, but any "criminal" conduct can be, regardless of the circumstances of the conduct. Plus, the court at times did refer to the parent's criminal conduct, for instance by holding that the court must consider a number of factors besides incarceration, such as the "nature of the crime committed by the parent."

In any event, the Department does not attempt to dispute Fred's contention that under Jodie W. his parental rights could not be terminated simply

because of criminal conduct, regardless of the circumstances. Plus, it was the Department's burden to argue that the criminal violation alone made any error in the jury instructions harmless. By not addressing this argument, the Department has tacitly conceded it. *State v. Anker*, 2014 WI App 107, ¶ 13, 357 Wis. 2d 565, 573–74, 855 N.W.2d 483, 487 ("We will not abandon our neutrality to develop arguments for the parties, so we take the State's failure to brief the issue as a tacit admission that there was no probable cause for Anker's arrest.").

CONCLUSION

For the reasons stated above and in the opening brief, the order terminating Fred's parental rights to Sam must be reversed.

Dated this 18th day of September, 2024.

Respectfully submitted,

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,481 words.

I hereby certify that filed with this reply brief is a supplemental appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues. I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Electronically signed by Thomas B. Aquino

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September 18, 2024