COURT OF APPEALS
DECISION
DATED AND FILED

April 13, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2648 **Cir. Ct. No. 02TP000638**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LORI W.,

RESPONDENT-CO-APPELLANT,

LARRY H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Lori W. and Larry H. appeal from an order terminating their parental rights to Lorencio H. Lori claims: (1) she received ineffective assistance of counsel; and (2) the trial court should have granted her motion for a mistrial. Larry claims: (1) he was never "adjudicated" Lorencio's father and, therefore, he was not a parent and could not have his parental rights terminated; (2) the termination petition in this case was barred by *res judicata* and due process; (3) the trial court should have granted his motion for a mistrial; and (4) he received ineffective assistance of counsel. Because each issue is resolved in favor of upholding the order, this court affirms.

BACKGROUND

¶2 Lorencio H. was born on November 17, 1996, to Lori W. Larry H. admitted from the beginning that he was Lorencio's father. Lori and Larry were living together and in a relationship at the time Lorencio was conceived. Larry, however, was incarcerated at the time of Lorencio's birth.

¶3 Lorencio was removed from Lori's home shortly after birth because she left him with a friend and did not return. After several days, the friend called the Bureau of Milwaukee Child Welfare and Lorencio was placed in foster care. On June 16, 2000, the State filed a petition to terminate the parental rights of both parents. As to Larry, the petition alleged abandonment and failure to assume parental responsibility as grounds for termination. Larry demanded a jury trial on the grounds phase. Lori stipulated that there were grounds to terminate her

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

parental rights, but she contested the disposition. On October 4, 2000, a genetic test confirmed that Larry was Lorencio's biological father.

¶4 After a trial, the jury concluded that grounds did not exist to terminate Larry's parental rights. At that point, the State elected not to continue the termination proceedings. The CHIPS action, however, continued and there were a number of dispositional orders. Lorencio remained in foster care.

¶5 On August 23, 2002, the State filed a new petition seeking to terminate the parental rights of both parents. The petition alleged abandonment as grounds to terminate Larry's parental rights and that Lorencio continued to be a child in need of protection or services. As to Lori, the petition alleged that she failed to assume parental responsibility and that Lorencio continued to be a child in need of protection or services.

¶6 Larry moved to dismiss the 2002 petition on the grounds of laches. The trial court denied the motion. The case was presented to a jury in May 2003. The jury found that grounds existed to terminate the parental rights of both parents. At the dispositional phase, the trial court found that it was in the best interest of Lorencio to terminate the parental rights of both parents. An order was entered to that effect. Both parents appealed from that order. This court remanded the matter for a hearing on the ineffective assistance claim. The trial court conducted a ***Machner***[2] hearing and then concluded that neither parent had received ineffective assistance of counsel. Both parents now appeal.

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979)

DISCUSSION

A. Lori's Appeal.

¶7 Lori raises two issues on appeal, whether: (1) she received ineffective assistance of trial counsel; and (2) the trial court erred in denying her motion for a mistrial. This court rejects both issues in turn.

¶8 In order to establish ineffective assistance, an appellant must show that counsel provided deficient performance and that such deficiency prejudiced the outcome. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the appellant must show that counsel's "acts or omissions were outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To prove prejudice, the appellant must show that counsel's errors were so serious that the appellant was deprived of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687.

¶9 In reviewing ineffective assistance claims, this court is presented with mixed questions of fact and law. ***Johnson***, 153 Wis. 2d at 127. The trial court's factual findings will not be overturned unless they are clearly erroneous. ***Id.*** Whether counsel's performance was deficient and prejudicial are questions of law that this court reviews independently. ***Id.*** at 128.

¶10 Lori claims her counsel was deficient for failing to object to the testimony of a former social worker, Marcia Ramirez, that Lorencio was upset

about visiting with his mother.[3] At the ***Machner*** hearing, counsel testified that he strategically chose not to make the objection for two reasons. First, he believed that his earlier questioning of the social worker with respect to Lori's successful visits had "opened the door" to the State's follow-up questioning, which elicited the challenged response. Second, he did not want to draw more attention to the testimony by making an objection. The trial court concluded that this explanation constituted reasonable trial strategy and therefore did not constitute deficient performance. This court agrees. Lori has not established that counsel's failure to object to Ramirez's testimony constituted ineffective assistance.

¶11 Lori's other complaint consists of the trial court's refusal to grant a mistrial when the foster mother made unsolicited comments regarding Lorencio's problems after visits with Lori. This court reviews the trial court's decision to grant or deny a motion for a mistrial under the erroneous exercise of discretion standard. ***Haskins v. State***, 97 Wis. 2d 408, 419, 294 Wis. 2d 25 (1980). Thus, this court will not overturn the trial court's decision to deny the motion unless the trial court failed to consider the pertinent facts, apply the correct law, and reach a reasonable determination.

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[3] Specifically, the challenged testimony provided:

> Lorencio does not like these visits, very sensitive about being away from his foster mother, Helen P. Lorencio screamed, yelled, tried to run away. The worker has taken Lorencio on all his visits and he remembers that. Worker has [a] good relationship with Lorencio as long as we do not leave the house and leave his foster mother. Helen P. walked Lorencio out to car. He screamed for about 15 minutes in the car. Lorencio yelled to this worker many times, I'm mad at you.

¶12 Here, the challenged testimony from the foster mother, Helen P., was an answer to the question from the State: "Did [Lorencio] ever bring home cards from [Lori after the visit]?" Helen answered, "No. Just when he -- when he would make a visit and come home, then he would have nightmares, you know." Both Lori's and Larry's counsel objected. The trial court sustained the objection and instructed the jury to disregard Helen's statement. Helen, however, continued to talk and blurted out, "he would cry, you know." Lori's counsel requested a sidebar and moved for a mistrial. The trial court denied the motion, but gave a lengthy curative instruction:

> In this case I think it's pretty easy. There was testimony about Lorencio's reaction in the foster home after visits, crying, nightmares, and at first blush … the reaction to it is, well, that must mean he doesn't like the visit, or it means he doesn't like being removed from his mother three times a week when visits occur, or it might mean that the van driver is mean to him when he is picking him up taking him in the van and yells at him and he is scared to death during that time in the van. It could mean all kinds of things. For you to jump to the conclusion that means any of those things would be improper. There is no evidence on this record as to why this child has those problems. You are to disregard all evidence of that. It does not have any bearing on this case. It's like a kid who has got, you know, a sore foot. Unless you figure out why he has a sore foot, it doesn't really matter all that much. You know, you have to try to figure out why.
>
> This case isn't about that. This case is about a totally different issue. It's not about why he is crying in the foster home or what is going on there.

The trial court's decision to give a curative instruction instead of granting a mistrial was reasonable. This court has held that "best interest evidence," which is what the challenged testimony represents, can be remedied with a curative instruction. ***In re D.S.P.***, 157 Wis. 2d 106, 117, 458 N.W.2d 823 (Ct. App. 1990). There is no dispute that the foster mother's testimony quoted above was not

relevant to the grounds phase of this trial. ***D.S.P.***, nonetheless, holds that this evidence is harmless when a cautionary instruction is given. ***Id.*** Here, the trial court followed that rule of law and its decision did not constitute an erroneous exercise of discretion.

B. Larry's Appeal.

¶13 Larry raises four issues in this appeal, whether: (1) his parental rights can be terminated if he was never found to be the "adjudicated father" of Lorencio; (2) the second termination petition was barred by *res judicata* and due process; (3) the trial court erred in denying his motion for a mistrial; and (4) he received ineffective assistance of trial counsel.

1. Adjudicated Father.

¶14 Larry contends that because he was never "adjudicated" to be the father, his parental rights cannot be terminated and he cannot be found to have abandoned Lorencio during a time where he was not adjudicated the father. This court rejects Larry's contentions.

¶15 First, at no time during the proceedings regarding the first termination petition, during the entry of the subsequent CHIPS order or during the proceedings regarding the second petition, did Larry object to the finding that he was the legal parent of Lorencio. He admitted at all times that he was the biological father. He even requested that Lorencio be given his last name. Moreover, trial counsel testified that this issue was never raised because it would be inconsistent with Larry's position that he was Lorencio's father. Thus, any argument that he was not adjudicated the father for purposes of this proceeding was waived.

¶16 Second, Larry satisfied the definition of "parent" as defined in WIS. STAT. § 48.02(13) (2001-02)[4] at the time of the second termination petition filing. During the first termination proceeding, Larry took a genetic test that proved he was Lorencio's biological father. The court ordered the testing, pursuant to WIS. STAT. § 48.423, after Larry appeared to contest the termination petition.

¶17 WISCONSIN STAT. § 48.02(13) defines parent as "either a biological parent," or "a person acknowledged under s. 767.62(1) or a substantially similar law of another state or adjudicated to be the biological father." The trial court here acknowledged that Larry was the father and afforded him rights under the statutes that an adjudicated father is granted. He was appointed an attorney, he was produced from prison to participate in the extension of the CHIPS order, he received a copy of the dispositional order, and he demanded a jury trial. Larry was treated in all respects as the legal parent, he was found to be a genetic match, and he maintained throughout the entire proceeding that he was Lorencio's father. For this court to reverse the termination order on the ground that Larry was never "adjudicated" to be Lorencio's father, would be an absurdity and contrary to the intent of the termination statutes.

2. Second Petition—*Res Judicata*/Due Process.

¶18 Larry argues that the State was barred from filing the second petition by the doctrine of *res judicata* (now known as claim preclusion), collateral estoppel (now known as issue preclusion), or due process. This court disagrees.

[4] All references to the Wisconsin Statutes are to the 2001-02 version less otherwise noted.

¶19 *Res judicata* provides that a judgment on the merits "in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action." ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 694 n.13, 495 N.W.2d 327 (1993). "In order for the first action to bar the second [action], there must be an identity of parties and an identity of the causes of actions or claims in the two cases." ***Parks v. City of Madison***, 171 Wis. 2d 730, 734-35, 492 N.W.2d 365 (Ct. App. 1992).

¶20 Here, although the parties are the same in both actions, the cause of action is sufficiently different to prevent the application of *res judicata*. The first petition was based on Larry's "failure to assume parental responsibility." In order to prove this ground, the State was required to demonstrate that Larry never established a substantial relationship with his son. According to WIS JI—CHILDREN 356, "substantial relationship" means "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." In making this assessment, the jury could consider

> whether the person ha[d] ever expressed concern for or interest in the support, care or well-being of the child, whether the person ha[d] neglected or refused to provide care or support for the child and whether, with respect to a person who may be the father of the child, the person ha[d] ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

Id.

¶21 The jury could not have found in Larry's favor on the basis that he exercised any day-to-day care for Lorencio because he has been incarcerated since the day that Lorencio was born. Thus, the jury must have based its finding on the

evidence that Larry had expressed concern for Lorencio or for the well-being of Lori during her pregnancy.

¶22 This finding is substantially different from the cause of action asserted in the second petition—that Larry abandoned Lorencio for a six-month period or more. In order to prove abandonment, the State was required to show that Larry failed to visit or communicate with the child during a specific period of time. The State presented evidence that convinced the jury on the abandonment cause of action. The fact that Larry sent cards and letters to Lori was insufficient to defeat an abandonment claim because Lori did not have physical custody of Lorencio. In order to prove that he had not abandoned his son, Larry needed to show that he visited or communicated *with the child*. This necessarily requires direct communication with the child or the person who has physical custody of the child.

¶23 This cause of action was different from the original termination petition both in form and in substance. The grounds were different and the proof was different. The first termination petition involved the pregnancy period of time and communication with Lori after Lorencio's birth. The second petition involved the failure to communicate with Lorencio from the date he was born and following his birth.

¶24 Based on the foregoing, this court cannot conclude that *res judicata* barred the second termination petition. This court similarly agrees with the State and the guardian *ad litem* that collateral estoppel does not operate to bar the second termination petition.

¶25 Collateral estoppel precludes the relitigation of issues actually litigated and decided in an earlier case. ***Crozier***, 173 Wis. 2d at 694 n.12. Based

on this standard, it is clear that collateral estoppel does not apply. The material factual claim in the second termination petition—whether Larry failed to have visits or contact with Lorencio for six months or longer—is significantly different from assuming parental responsibility and was not an issue decided in the first termination proceeding. Although there is some similarity in the time periods involved in both the first and second proceedings, they are not identical. The first proceeding included the pregnancy and the first six months after birth. The second proceeding limited the focus to the six-month time period following Lorencio's birth.

¶26 Finally, Larry claims that subjecting him to successive termination proceedings was fundamentally unfair and a violation of due process. This court disagrees. Under the facts and circumstances here, Larry was afforded proper due process. He was provided with all the rights required by the termination statutes, including an appointed attorney and notice. "Unlike criminal defendants, natural parents have no 'double jeopardy' defense against repeated state termination efforts." ***Santosky v. Kramer***, 455 U.S. 745, 764 (1982). As long as the state gathers more or better evidence, it is permitted to try again to terminate parental rights. ***Id.***

3. Mistrial.

¶27 Larry next claims that the trial court erroneously exercised its discretion in denying a mistrial. Specifically, he contends that the foster mother's testimony, combined with the social worker's comments about Lorencio being upset about visiting Lori, improperly sent a message to the jury that Lorencio was better off in the foster home. Accordingly, Larry argues that these comments were so prejudicial that a mistrial was necessary.

¶28 This court has already addressed and rejected the same argument presented by Lori. For the reasons set forth earlier in this opinion, this court concludes that the trial court did not erroneously exercise its discretion when it denied the motion for a mistrial.

4. Ineffective Assistance of Counsel.

¶29 The same standard of review recited above applies to Larry's claims of ineffective assistance—in order to establish ineffective assistance, an appellant must show that counsel provided deficient performance and that such deficiency prejudiced the outcome. ***Strickland***, 466 U.S. at 687. To prove deficient performance, the appellant must show that counsel's "acts or omissions were outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis. 2d at 127. To prove prejudice, the appellant must show that counsel's errors were so serious that the appellant was deprived of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687.

¶30 In reviewing ineffective assistance claims, this court is presented with mixed questions of fact and law. ***Johnson***, 153 Wis. 2d at 127. The trial court's factual findings will not be overturned unless they are clearly erroneous. ***Id.*** Whether counsel's performance was deficient and prejudicial are questions of law that this court reviews independently. ***Id.*** at 128.

¶31 Larry argues that trial counsel was ineffective because he failed to: (1) move to dismiss the termination petition on the basis that Larry was never "adjudicated" as Lorencio's father; (2) argue that the second termination petition was barred by the doctrines of *res judicata*/due process; and (3) obtain eight letters that Larry had written to Lori during the alleged "abandonment" period. This

court concludes that Larry has failed to demonstrate that his counsel provided ineffective assistance.

¶32 First, with respect to the "adjudicated father" issue and *res judicata*, this court concluded above that neither issue was meritorious. Accordingly, neither can form the basis for an ineffective assistance claim.

¶33 Second, Larry contends that trial counsel should have discovered eight letters he had written to Lori expressing concern for his son, so that these could have been presented to the jury to support Larry's claim that he sent numerous letters to Lori expressing concern for his child. Trial counsel did introduce into evidence two cards and four letters from Larry, which Joyce Z., Lori's mother, had provided to Larry. These six items were the only documents Joyce could find before the hearing in this matter. The other eight letters were discovered by Lori after searching Joyce's home.

¶34 Larry argues that counsel was deficient for failing to make a greater effort to track down the additional eight letters or that counsel should have pressed Joyce directly instead of relying on Larry to obtain the letters from her. Larry has not convinced this court that counsel provided ineffective assistance on this basis. Larry was in direct contact with Joyce and it was reasonable for counsel to rely on Larry to obtain the necessary documents from the maternal grandmother. Even if counsel was deficient for not pressing harder for more documents, Larry cannot establish prejudice. The jury heard his testimony about numerous letters and saw the two cards and four letters he had sent. These documents, together with additional evidence in the record, demonstrate that the outcome would not have changed even if the additional eight letters had been presented to the jury.

By the Court.—Order affirmed.

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