COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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 Nos. 03-3378
03-3379
03-3380
03-3381
03-3542
04-1393

Cir. Ct. Nos. 02TP000131
02TP000132
02TP000136
02TP000137
02TP000132
02TP000136

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

NO. 03-3378
CIR. CT. NO. 02TP000131

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LATRINA W.,

RESPONDENT-APPELLANT.

NO. 03-3379
CIR. CT. NO. 02TP000132

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LATRINA W.,

RESPONDENT-APPELLANT.

NO. 03-3380
CIR. CT. NO. 02TP000136

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LATRINA W.,

RESPONDENT-APPELLANT.

NO. 03-3381
CIR. CT. NO. 02TP000137

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LATRINA W.,

RESPONDENT-APPELLANT.

NO. 03-3542
CIR. CT. NO. 02TP000132

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

WILLIE B.,

RESPONDENT-APPELLANT.

NO. 04-1393
CIR. CT. NO. 02TP000136

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

WARD J.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Latrina W. appeals from an order terminating her rights to her four children, Tatyana N., Willie T.B., Isaiah J. and Jalaylia W. Willie B. appeals from an order terminating his parental rights to Willie T.B. Ward J. appeals from an order terminating his parental rights to Isaiah J. Latrina and Willie also appeal from orders denying their motions alleging ineffective assistance of counsel. These cases, although appealed separately, were consolidated for purposes of disposition. Latrina claims that trial counsel provided ineffective assistance by: (1) failing to object to "best interest" testimony; (2) failing to object to improper remarks during the guardian ad litem's closing argument; and (3) failing to object to hearsay testimony proffered during the State's case. Willie contends that his trial counsel provided ineffective assistance by: (1) failing to object to testimony regarding the facts underlying Willie's conviction for endangering safety; and (2) failing to object to or request a limiting instruction relative to the "best interest" testimony. Because Latrina and Willie have failed to establish their ineffective assistance of counsel claims, this court affirms. Ward claims: (1) the evidence does not support the jury's verdict that grounds existed to terminate his parental rights; and (2) the trial court erroneously exercised its discretion in terminating Ward's parental rights. Because there is evidence sufficient to uphold the jury's verdict and because the trial court did not

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

erroneously exercise its discretion in terminating Ward's parental rights, this court affirms.

I. BACKGROUND

¶2 Latrina (d.o.b. December 30, 1979) gave birth to four children who are the subject of the termination petition. Tatyana N. was born on November 5, 1995; Willie T.B. was born on September 14, 1997; Isaiah J. was born on October 14, 1998; and Jalaylia W. was born on June 8, 2000. Each of the four children has a different father and Latrina was never married. Willie is Willie T.B.'s father; Ward is Isaiah J.'s father.

¶3 On February 11, 2000, Tatyana N., Willie T.B., and Isaiah J. were found to be in need of protection or services. They were removed from Latrina's home on April 29, 1999. Jalaylia W. was found to be in need of protection or services on April 4, 2001, and was removed from Latrina's care immediately upon release from postnatal hospitalization on August 10, 2000. Jalaylia W. has never resided in a parental home.

¶4 Dispositional orders for each of the children were in effect for one-year periods and extended each year to give Latrina an opportunity to satisfy conditions for the return of her children. Latrina failed to meet the conditions. On March 15, 2002, the State filed a petition to terminate the parental rights of Latrina and the four fathers.

¶5 With respect to Latrina, the petition alleged two grounds for termination: (1) failure to assume parental responsibility; and (2) all the children

continued to be in need of protection or services. The petition also alleged that Latrina had abandoned Tatyana N. and Willie T.B. The petition alleged that all four fathers had failed to assume parental responsibility and had abandoned their respective child.

¶6 At the trial, Latrina, Willie and Ward defended against the petition.[2] At the conclusion of the trial, the jury found that grounds existed to terminate all parental rights to these children. At the disposition phase, the trial court found it was in the best interest of the children to terminate parental rights in this case. Latrina and Willie filed post-judgment motions alleging ineffective assistance of counsel. After conducting ***Machner***[3] hearings, the trial court denied the motions. Latrina, Willie and Ward now appeal.

II. DISCUSSION

A. Latrina's and Willie's Appeals

¶7 Latrina and Willie both claim that trial counsel provided ineffective assistance. In order to prove an ineffective assistance claim, Latrina and Willie must demonstrate that the conduct complained of was both deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, they must show specific acts or omissions of counsel that

[2] Walter N., the father of Tatyana N., agreed to voluntarily terminate his parental rights and, as a result, did not participate in the trial. Freddie O., the father of Jalaylia W. never appeared in court and a default judgment terminating his rights was entered. Neither Walter nor Freddie appealed to this court.

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

are "outside the wide range of professional competent assistance." ***Id.*** at 697. There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Id.*** In order to prove that specific conduct was prejudicial, Latrina and Willie must show that counsel's errors were so serious that they were deprived of a fair trial and a reliable outcome. ***Id.*** at 687. Stated another way, they 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." ***Id.*** at 694. This court need not address both prongs of the ineffective assistance test, if Latrina and Willie fail to make a sufficient showing on one. ***Id.*** at 697.

¶8 This court's standard for reviewing an ineffective assistance claim involves a mixed question of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Findings of fact will not be disturbed unless clearly erroneous. ***Id.*** The legal determination as to whether counsel's performance was deficient and prejudicial, however, are questions of law that this court reviews independently. ***Id.*** at 128.

1. Latrina

a. Best Interest

¶9 Latrina's first claim is that trial counsel provided ineffective assistance for failing to object to "best interest" testimony. Specifically, Latrina argues that throughout the testimony of Dr. Christina Diorio, the psychologist who treated Tatyana N. and Willie T.B., the jury was told that it was in the best interest

of the children to stay where they were placed rather than be returned to the care of their mother. The State responds that the allegedly objectionable testimony did not constitute "best interest" evidence. Rather, the evidence was offered in order to prove that Latrina was unlikely to meet the conditions necessary for the return of the children within the next twelve months. The State points out that the testimony described the special needs of the children and what was necessary to adequately take care of the children.

¶10 Latrina cites several excerpts from Dr. Diorio's testimony, which she contends were objectionable.[4] She further argues that the prejudicial effect of this testimony was magnified by Dr. Christopher Morano's testimony that Latrina has an I.Q. of 70, and by the testimony that Tatyana N. was traumatized by the fear that she might have to leave her foster home. This court is not persuaded.

¶11 Although it is true that the best interest of the children is not an appropriate consideration at the grounds phase of the termination proceedings, WIS. STAT. § 48.424, the State was required here to establish the continuing CHIPS ground. In order to satisfy its burden, the State is entitled to introduce evidence of the special needs of the children and evidence that Latrina is not likely

[4] For example, Latrina argues that the following question and answer during Dr. Diorio's testimony constitutes improper "best interest" testimony:

> Q But the current foster parents, the Jiles, from what you have witnessed, they meet these extraordinary needs?
>
> A Yes, they have really been excellent in following through on my recommendations and keeping me up to date as far as what is working, what is not working in the home; as far as meeting those emotional needs.

to meet the conditions required for the return of the children. The evidence that Latrina objected to here was relevant to the CHIPS ground. Dr. Diorio testified regarding the children's special needs, the care that the children need in order to have their needs met, and what parenting skills are necessary in order to meet the children's needs. Dr. Morano offered testimony as to Latrina's ability to meet the special needs of her children. Both doctors offered testimony to support the State's case that grounds exist to terminate parental rights.

¶12 Latrina admits in her brief that the line between describing the needs of the children and the reasons to doubt the mother would be able to meet her conditions and actually inviting the jury to consider the children's best interest is admittedly a fine one. This court agrees. It is a fine line. Testimony that foster parents are adequately meeting the special needs of the children, and that the biological parent is not, could arguably support a contention that it is in the best interest of the children to stay in the foster home. However, that same testimony could just as easily support the contention that these children do not have insurmountable needs and it is *possible* for a parent to meet their special needs. It may also support the proposition that the children continue to be in need of protection or services and the biological parents will not be able to satisfy conditions required for the return of the children within the next year. The record reflects that despite the repeated services offered to Latrina, she refused to accept the help offered to her to become an adequate parent and to satisfy the conditions necessary for the return of her children.

¶13 Latrina argues that Dr. Diorio's testimony that the children need a consistent predictable environment and it would not be in their best interest to be put in an inconsistent and unpredictable environment crossed the line.

¶14 This court cannot agree. Although, certainly it would be preferable to avoid using the phrase "best interest," the use here was describing the needs of these children to have a stable situation. This testimony then supported the State's argument that Latrina could not provide that stable, consistent and predictable environment. Thus, the evidence was pertinent to the CHIPS ground.

¶15 This court cannot say that the fine line was crossed here. The State had an obligation to establish its burden. It did so through the testimony of Dr. Diorio, Dr. Morano and the foster parents. Moreover, precautions are taken to insure that the jury is instructed as to its role in the grounds phase. It is not instructed to make an assessment as to the best interest of the children, but instructed to determine whether the State has proven that grounds exist to terminate parental rights.

¶16 Based on the foregoing, this court concludes that counsel's failure to object to the excerpts proffered by Latrina did not constitute ineffective assistance. The testimony was admissible on the CHIPS ground and did not constitute improper best interest testimony.

b. Closing Argument Remarks

¶17 Latrina next contends that trial counsel provided ineffective assistance for failing to object to two remarks made by the GAL during closing

argument. First, she contends the GAL's comment that Latrina was offered services that "we all pay for" was improper. Second, she claims that the comment "[y]ou talk about a fire being lit under you" improperly asked the jurors to compare themselves to Latrina. This court concludes that when read in context, failing to object to these comments did not constitute ineffective assistance.

¶18 The complete comment about paying for services was:

> In this case, [the social worker] came on board and tried to prevent this from getting here, two times. But, all the service providers-- You folks are now educated beyond, I'm sure, what you ever wanted to know about all the services we all pay for, that are out here. And it's wonderful they're out there. And the people tried to get those programs in place.

¶19 Latrina contends that this statement had no legitimate purpose and, even if not intended to, served solely to arouse resentment in the jurors. This court disagrees. Although reference to who is paying for services certainly was not necessary in addressing the jury during closing, counsel testified that it was a strategic choice not to object to it. Objecting would have drawn further attention to it and may have caused the jurors to further contemplate its impact. That decision was reasonable. Within its context, the comment did not prejudice the outcome of this case. Accordingly, Latrina failed to establish ineffective assistance on this basis.

¶20 The second objectionable statement came during the following excerpt:

> She also renders an opinion that the Conditions wouldn't be met within the one year. But I think you guys know that just simply by the fact that this Petition, this

> action, has been before the Court system, over a year. You've heard what Mom has done over the course of the last year.
>
> You talk about a fire being lit under you. Try to have a Termination of Parental Rights filed against you, and imagine how you would work on whatever you needed to work on, to get done with that, or to try to prevent that from happening.
>
> And what have we had? We had more transitory behavior by Mom. She's now in an efficiency apartment. She hasn't followed-- She has not ended her Counselling at all. She's not in Anger Management. She's still at supervised visits.… This woman is still at supervised visits. No progress has been made regarding that.

¶21 Latrina contends this argument improperly requested the jurors to put themselves in her position to determine how the jurors would have acted. During the ***Machner*** hearing, counsel testified that she did not interpret the GAL's argument in that way, but believed that the GAL was highlighting her client's deficiencies. The trial court found that the statement was objectionable, but not prejudicial.

¶22 This court agrees. The statement, if not improper, comes as close to violating the "Golden Rule" as it can get. The State argues that within context, the objectionable statement clearly is referring to Latrina and not asking the jurors to step into her shoes. Nevertheless, this court agrees with the trial court that even if the statement should have drawn an objection, failure to do so does not render counsel's conduct prejudicial. Objecting to the single sentence would not have altered the outcome of this case.

c. Hearsay

¶23 Latrina's final claim is that counsel failed to object to hearsay testimony proffered through two State witnesses, social workers Barbara DeBerry and Christina Staacke, regarding Latrina's failure to satisfy her parental obligations. The State responds that the questions asked of these witnesses were non-hearsay questions and that counsel made a strategic choice not to object during the *answers* so as to avoid drawing attention to the hearsay statements. The trial court agreed that some of the testimony was hearsay and should have drawn objection from counsel or a request for a limiting instruction. Nonetheless, the trial court determined that even if the failure to object constituted deficient performance, Latrina failed to demonstrate prejudice. This court agrees.

¶24 Even if counsel had objected or requested a limiting instruction, the outcome of this case would not have changed. Latrina's testimony provided the jury with sufficient evidence to find that grounds existed to terminate parental rights. Based on her testimony and the non-hearsay testimony of the other witnesses, the jury would undoubtedly have reached the same result. Accordingly, this court concludes that Latrina's claim of ineffective assistance of counsel fails.

2. Willie

a. Criminal Conviction Testimony

¶25 Willie claims his trial counsel provided ineffective assistance because he failed to object to the introduction of evidence regarding the facts of Willie's endangering safety conviction. Willie argues counsel should have

objected or pressed for a more specific ruling on his motion *in limine* to ensure that this highly prejudicial information was excluded. As a result, the jury heard that Willie's prior conviction stemmed from him firing a gun into a car with six people inside. Trial counsel testified that he did not object based on ***State v. Quinsanna D.***, 2002 WI App 318, 259 Wis. 2d 429, 655 N.W.2d 752 (facts of underlying condition may be admitted if not unduly prejudicial), and his belief that the trial court denied his motion to exclude evidence of the underlying facts of the conviction.

¶26 Willie focuses much of his argument by asserting that the trial court never ruled on the motion *in limine*. The record demonstrates otherwise. The trial court presiding over the first trial specifically addressed the admissibility of Willie's criminal convictions. It held that Willie had three criminal convictions on his record and that this information could be admitted. When the first trial ended in a mistrial, the issue of criminal convictions was raised again before the second trial court. The second court relied on the first court's rulings that the facts of Willie's criminal conduct could be presented to the jury. The first court found the evidence admissible because is was "clearly relevant and its probative value is not outweighed by potential prejudicial effect."

¶27 When the second court ruled on the motion, it received into evidence a certified copy of the endangering safety conviction, which described the incident: "defendant B[] then raised a rifle and pointed it directly at the windshield and fired numerous times striking the windshield spraying glass inside the vehicle and as a result injuring the 3 year old Shanice W[] who was in the front

seat." Thus, the trial court made a reasoned decision to allow into evidence substantive information about Willie's conviction.

¶28 The question that follows then, is whether counsel should have objected to the admission of this evidence. Stated otherwise, was it erroneous for the trial court to allow the admission of this evidence, thereby justifying an objection from counsel? Whether to admit or exclude evidence is a discretionary determination, which will not be overturned unless the trial court erroneously exercised its discretion. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). Here, the jury needed to assess Willie's relevant character traits and patterns of behavior to determine whether he failed to establish a substantial parental relationship with his son. ***Quinsanna D.***, 259 Wis. 2d 429, ¶¶21-23. The conduct associated with the endangering safety conviction was relevant and was not unduly prejudicial. As the State points out, Willie committed the offense on July 26, 1997, while Latrina was pregnant with his child.

¶29 Here, the trial court made an assessment based on the facts as to the admissibility of this evidence. The trial court's determination was not unreasonable and, therefore, this court cannot hold that the trial court erroneously exercised its discretion. Consequently, if the trial court did not err in admitting this evidence, then counsel's failure to object to evidence properly admitted cannot be deficient performance. Willie's claim that counsel was ineffective on this basis fails.

b. Best Interest

¶30 Willie makes the same "best interest" argument asserted by Latrina. For the reasons stated earlier in this opinion wherein this court rejected Latrina's claim regarding best interest evidence, this court similarly rejects Willie's claim that his trial counsel was ineffective for failing to object to "best interest" testimony.

¶31 Willie sets forth a brief additional argument that counsel should have requested limiting instructions to separate his case from Latrina's case. The State asks this court to deny Willie's argument because he did not raise the issue until the rebuttal closing argument at the ***Machner*** hearing. This court agrees that Willie waived his right to raise this issue, not only because he waited until his closing argument to raise it, but also because it is inadequately briefed in this court. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

B. Ward's Appeal

1. Sufficiency of the Evidence

¶32 Ward argues that the evidence was insufficient to support the jury's verdict. The standard of review on a sufficiency of evidence claim is as follows. This court will not overturn a verdict if there is any credible evidence that under any reasonable view will sustain the jury's finding. ***Coryell v. Conn***, 88 Wis. 2d 310, 315, 276 N.W.2d 723 (1979).

¶33 Here, there is credible evidence to support the jury's finding that grounds existed to terminate Ward's parental rights. Although Ward can point to

specific instances, which he asserts support a finding contrary to that of the jury, such is not relevant to this court's review. The record clearly contains evidence demonstrating that Ward both abandoned his child and failed to assume parental responsibility. As to the former, he admitted to the jury that he abandoned Isaiah J. As to the latter, the jury heard evidence that Ward declined visitation with Isaiah J. when he was first placed in foster care because Ward was "happy" with the foster care placement. There was evidence that Ward failed to provide any financial support for Isaiah J. during his first year in foster care and did not send any cards, letters or gifts during that year. This evidence was sufficient to sustain the jury's finding.

2. Termination

¶34 Ward also contends that the trial court erroneously exercised its discretion when it determined that it was in Isaiah J.'s best interest to terminate Ward's parental rights. In reviewing this claim, this court applies the deferential standard of review to determine whether the trial court erroneously exercised its discretion. ***Rock County Dep't of Soc. Servs. v. K.K.***, 162 Wis. 2d 431, 441, 469 N.W.2d 881 (Ct. App. 1991). The trial court's decision does not constitute an erroneous exercise of discretion where the court made findings on the record, based its decision on the standards and factors found in WIS. STAT. § 48.426, and explained the basis for its disposition. ***Sheboygan County HHS v. Julie A.B.***, 2002 WI 95, ¶30, 255 Wis. 2d 170, 648 N.W.2d 402.

¶35 Although this court can sympathize with Ward as to the trial court's decision, the record reflects that the trial court did not erroneously exercise its

discretion when it terminated Ward's parental rights. The trial court noted that there were good moments between Ward and Isaiah J., but indicated that their relationship was not that of parent and child, but more like uncle and nephew.

¶36 Ward makes much of the fact that Isaiah J. referred to him as "Daddy." That, however, is not dispositive. Ward may be Isaiah J.'s "Daddy," but Isaiah J. needed more than that. He needed Ward to be a father. A father has a substantial parental relationship with his child. This means accepting and exercising significant responsibility for the daily supervision, education, protection and care for the child. The evidence overwhelmingly demonstrated that Ward did not meet this standard. Ward never provided a stable home for Isaiah J. He initially declined visitation with his son. He did not protect and care for Isaiah J. when social workers discovered five-month-old Isaiah J. living in Latrina's filthy home.

¶37 In considering whether termination is appropriate, the trial court considers several factors. The first factor is whether adoption is likely after termination. Here, Isaiah J. has been living with his adoptive family for at least one and one-half years. He is being well cared for, is involved with the family church, is attending school and is living in a stable home. The foster family is committed to adopting him. The next factor is the age and health of the child at disposition and removal. Isaiah J. was only five months old when he was removed from the filthy, uncaring environment at Latrina's home. At the time of termination, Isaiah J. was almost five *years* old. He had been living in foster care for the majority of his life.

¶38 The next factor is whether there are any substantial relationships which, if severed, would be harmful to the child. The trial court found that this factor supported termination. Although there was *a* relationship between Ward and Isaiah, it was not *substantial*. The next factor is the wishes of the child. There was no indication that Isaiah J. did not want the court to terminate parental rights.

¶39 The next factor is the duration of the separation of the parent and child. Here, as noted, Isaiah J. was removed from the mother's home as a young infant and has never returned. This factor favors termination.

¶40 Finally, the last statutory factor is the likelihood that termination would result in the child entering into a more stable and permanent family relationship. Clearly, this factor favored termination. Isaiah J. is established with the foster family's church and school and there is no reason to doubt the continued stability of that situation.

¶41 Ward also contends that the trial court could have considered an alternative to termination—placing Isaiah J. with Lucille Berrien, who was a former foster parent to Isaiah J. Berrien testified that she would be willing to keep Isaiah J. in her home and help Ward until he was able to take over full responsibility as Isaiah J.'s father. Placement with a third party and removal from the adoptive resource was rejected by the trial court. The trial court found that it was in Isaiah J.'s best interest to allow his adoption, resulting in a permanent stable familial situation for Isaiah J. There comes a time in termination proceedings where a child needs to become part of a permanent family. The CHIPS disposition orders in this case continued year-after-year until termination

occurred in August 2003. A child should not have to wait in limbo five years for his or her parent to get his or her act together. Adopting the Berrien option would have resulted in more "limbo" time for Isaiah J., and would have resulted in removing him from a stable environment where he was well-cared for and adjusted to the family's church and school. After five years in limbo, removing him from the adoptive home and returning him to Berrien simply was not the best option.

¶42 Based on the foregoing, this court concludes that the trial court did not erroneously exercise its discretion in terminating the parental rights in this case.

By the Court.—Orders affirmed.

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