COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1390 **Cir. Ct. No. 2006TP72**

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

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

HUSHTOLA J.,

RESPONDENT-APPELLANT,

GORDON S.,

RESPONDENT.

APPEAL from an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Hushtola J. appeals an order terminating her parental rights. She argues her counsel was ineffective for failing to object to a confusing statement in the County's closing argument. We conclude the statement was not confusing and affirm the order.

BACKGROUND

¶2 Hushtola gave birth to Abbegail S. on June 20, 2005. Abbegail was placed in foster care on June 22 and a dispositional order was entered on June 24 finding Abbegail was a child in need of protection or services pursuant to WIS. STAT. § 48.356(2).

¶3 The County filed a petition for the termination of the parental rights of both parents on October 4, 2006. The court held a jury trial beginning on January 23, 2007. In its closing argument, the County discussed the requirements of the Wisconsin Children's Code, including whether Hushtola would be able to meet her conditions of return within one year. Because Abbegail is an American Indian, the County also discussed the requirements of the Indian Child Welfare Act (IWCA).[2] The jury found grounds to terminate parental rights for abandonment, failure to assume parental responsibility, and continuing need of protection and services. The court then held a disposition hearing where it terminated both parents' parental rights.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] The requirements of ICWA are that: efforts were made to help prevent the breakup of the Indian family; those efforts were unsuccessful; and serious physical or emotional harm would come to the child if returned to the parents. *See* 25 U.S.C. § 1912(f) (2007).

¶4 Hushtola filed a post-termination motion alleging ineffective assistance of counsel. The trial court held a hearing on the motion. Hushtola argued her trial counsel was ineffective for failing to object to the County's closing argument. She contended the closing argument confused the jury by incorrectly stating that there is a one-year time limit under the ICWA. In support of her position, Hushtola cited the following portion of the County's argument:

> Will these two individuals meet their conditions within the next one year of today's date? …
>
> All of those things suggest that they're not going to be able to successfully complete these conditions within the next one-year period. So, the efforts … to comply with the Indian Child Welfare Act have been unsuccessful. And how about the serious physical or emotional harm?

¶5 The County's attorney explained that in the context of his argument, his discussion of the one-year time limit clearly related only to state law. The court concluded the County's closing argument at trial was methodical and clear and therefore denied Hushtola's motion.

DISCUSSION

¶6 Claims of ineffective assistance are reviewed in a two-step process.[3] ***State v. Johnson***, 2004 WI 94, ¶11, 273 Wis. 2d 626, 681 N.W.2d 901. First, we will uphold the circuit court's findings of historical fact unless clearly erroneous. ***State v. Wright***, 2003 WI App 252, ¶30, 268 Wis. 2d 694, 673 N.W.2d 386. Second, whether those facts amount to ineffective assistance is a question of law reviewed without deference to the circuit court. ***Id.***

[3] A parent is entitled to the effective assistance of counsel in termination of parental rights proceedings, and the applicable standards are those which apply in criminal cases. *See* ***A.S. v. State***, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992).

¶7 To prove ineffective assistance, a party must show that "counsel's actions or inaction constituted deficient performance and that the deficiency caused him prejudice." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. Counsel's performance is deficient only if counsel's actions fall outside the "wide range of reasonable professional assistance." ***Strickland v. Washington***, 466 U.S. 668, 689 (1984). To establish prejudice, Hushtola must establish a reasonable probability that, but for her counsel's unprofessional errors, the result of the proceeding would have been different. *See* ***id.*** at 694. A reasonable probability is one that undermines our confidence in the outcome. ***Id.*** There is "no need for the court to address both components of the inquiry if the defendant makes an insufficient showing on one." ***Id.*** at 697.

¶8 Hushtola argues counsel was ineffective for failing to object to the County's closing argument because the County "erroneously informed the jury that a one year time limit applied to ICWA." At trial, in order to terminate Hushtola's parental rights for continuing need of protection and services pursuant to the Wisconsin Children's Code, the County had to prove: (1) Abbegail was placed outside the home on a CHIPS order; (2) the Department of Human Services made reasonable efforts to help her complete the CHIPS conditions; (3) she had not met those conditions; and (4) she was substantially unlikely to be able to meet the conditions for return within a year.[4] *See* WIS. STAT. § 48.415(2). In addition, because Abbegail is an American Indian, the ICWA required the County to prove beyond a reasonable doubt: (1) efforts were made to help prevent the breakup of the Indian family; (2) those efforts were unsuccessful; and (3) serious physical or

[4] The County also argued for the termination of Hushtola's parental rights due to abandonment and failure to assume parental responsibility. However, neither of those grounds involve the one-year language which is the issue of this appeal.

emotional harm would come to the child if returned to the parents. 25 U.S.C. § 1912(f) (2007).

¶9 The County's closing argument accurately stated the applicable law. The County began by discussing the active efforts to prevent the breakup of the American Indian family under the ICWA. At the same time, the County discussed the reasonable efforts made by the Department to help Hushtola complete the conditions, under the Wisconsin Children's Code, stating:

> So, what are the active efforts and reasonable efforts that have been taken in this case? There have been social workers assigned to monitor this case. Referrals have been made to Tribal agencies, and, frankly, when they're incarcerated -- For example, with [Hushtola] there was the ARC Program that came from the Department of Corrections. There have been referrals, correspondence, phone calls, drivers to get to and forth, releases, bus passes, envelopes, meetings, efforts to monitor how you're doing with the conditions that Judge Zuidmulder put on you, efforts to make the services Native American-oriented, all of those efforts have be there.

¶10 The County then concluded that Hushtola would not be able to meet her conditions within the next year:

> Will these two individuals meet their conditions within the next one year of today's date? All I can suggest to you on that is that the best indicator of someone's future is where they've been, and the chronic usage of controlled substances, the chronic decision-making where they're putting their own interests above those of their child, all of those things suggest that *they're not going to be able to successfully complete these conditions within the next one year. So, the efforts of - to comply with the Indian Child Welfare Act have been unsuccessful.*
>
> And how about the serious physical or emotional harm? I'd suggest to you that returning these -- this child to either one of these parents would result in that serious physical or emotional harm. (Emphasis added.)

¶11 The County's statement that "they're not going to be able to successfully complete these conditions within the next one year" simply concluded the discussion of the Wisconsin's Children's Code. The next sentence discussed the first ICWA requirement, whether efforts to prevent the breakup of the Indian family had been successful. The County then discussed the second ICWA requirement, serious physical or emotional harm.

¶12 Hushtola essentially argues that, because the sentence discussing the one-year time limit was placed by the court reporter in the same paragraph as the County's discussion of the first requirement of the ICWA, the jury was confused. We place no weight on the court reporter's written organization of the County's oral closing argument. Furthermore, considering the context of the argument, we see nothing confusing. As the trial court observed, the County methodically explained the requirements of the Wisconsin Children's Code and the ICWA. The County did not say that the ICWA had a one-year time limit. In fact, the trial judge, who actually heard the closing, stated, "I was here for that trial, and actually [the County] is very methodical and is very clear ... so I'm not satisfied that because the transcript shows a sentence in an above paragraph rather than the paragraph below it that those jurors were confused...."

¶13 Additionally, the County's statement that "they're not going to be able to successfully complete these conditions within the next one year" could not have confused jurors because there are no *conditions* in ICWA. The County's statement could have only referred to the conditions placed upon Hushtola pursuant to the CHIPS order. Therefore, because there was nothing objectionable,

Hushtola's attorney's performance was not deficient and we need not discuss the prejudice requirement.[5]

By the Court.—Order affirmed.

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

[5] We note that even if the County's statement were confusing, Hushtola has not established prejudice. The County's statement is one sentence in a seven-hundred page transcript. The jury was properly instructed and given proper special verdict questions that say nothing about a one-year time limit for the ICWA. Thus, there is no reasonable probability that the trial would have turned out any differently. *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984).