COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP230 **Cir. Ct. No. 2007TP2**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO MONICA R.F., A PERSON UNDER THE AGE OF 18:

SHEBOYGAN COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

HEATHER M.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Heather M. appeals from orders terminating her parental rights to her five year old daughter, Monica, under WIS. STAT. § 48.417(1)(a), and denying post-dispositional relief. Her basic complaint is that the jury should not have heard evidence of physical discipline because the jury's only question was whether she failed to meet Monica's physical and emotional needs. She posits that, since the Department did not charge her with child abuse, such evidence was irrelevant and prejudicial. She passes off her acts as perfectly reasonable "physical discipline." We disagree. Child safety is necessary to meet a child's physical and emotional needs. Thus, evidence of physical discipline and Heather's relationships are relevant to whether Heather is likely to meet that condition. Accordingly, we affirm. We further reject Heather's other claims of unfair prejudice because the evidence did not undermine the outcome.

¶2 In February 2003, when Monica was about nine months old, the Department transferred guardianship to Heather's mom. The transfer happened after Heather's boyfriend at the time physically abused Monica. The incident occurred while Heather left Monica unsupervised with the boyfriend, even though she knew he was on probation for sexually assaulting a minor. Heather argued that it was not a "big deal" because she spanked Monica in similar situations. After guardianship shifted, Heather had very little involvement in Monica's life and did not assume any parental responsibilities when her mother could no longer care for Monica. Instead, Monica was in and out of foster care.

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

¶3 In January 2006, Monica entered foster care full-time and two months later, the Department filed a CHIPS action because Heather's behavior and character traits interfered with Monica's care. *See* WIS. STAT. § 48.13(8). Then, Heather sought custody and began sporadically visiting Monica.

¶4 During the next year, Heather's visits ended with Monica returning to foster care uncared for and with signs of physical discipline. Monica often returned to foster care unbathed and once with soiled underwear. On another occasion, Heather left Monica alone inside a Kwik Trip. And, at still another visit, Heather's social worker found Heather screaming at the top of her lungs with her fists in Monica's face. The next day Heather cancelled her visit because she was afraid that "if she got angry with Monica, she didn't know what she would do." Heather's mom testified to Heather screaming at Monica and Monica flinching when Heather moved towards her. Eventually, Monica asked to not see Heather because she "hurts her."

¶5 Monica started displaying behavioral problems, including violence. The social worker saw Monica "kicking, biting, hitting, intentionally urinating on her foster sister's bed, dragging other children at daycare by their ankles across gravel, dancing provocatively, describing her 'booty,' and showing her teachers her 'nipples.'

¶6 After fifteen months in foster care, the Department filed to terminate Heather's parental rights. *See* 42 U.S.C. § 675(5)(E) (2006); *see also* WIS. STAT. § 48.417(1)(a). The jury heard evidence about Heather's likelihood of meeting the CHIPS conditions for Monica's return. This evidence included testimony of past physical discipline. After the jury found that grounds existed to terminate her parental rights, the court's disposition was to terminate. Subsequently, Heather

moved for post-dispositional relief, mainly faulting her trial counsel for not objecting to the physical discipline evidence. After noting the prerequisites for an ineffective assistance of counsel claim, the circuit court denied her motion because any unfair prejudice did not reach the constitutional standard of undermining the outcome. Heather now appeals.

¶7 Heather alleges numerous different incidents of ineffective assistance of counsel that we will address in five categories. She asserts that her trial counsel failed to: (1) object to evidence of past physical discipline; (2) request a jury instruction on the use of reasonable physical discipline, (3) object to hearsay testimony; (4) object to the Department's closing statement arguing for Monica's need of protection; and (5) object to the Department's claim that it must seek permanence because Monica had been out of Heather's home for fifteen out of twenty-two months. Finally, Heather alleges that justice requires a new trial.

¶8 Among the elements that the Department must prove by clear and convincing evidence to terminate parental rights was that the parent failed to meet or is unlikely to meet the conditions for return within twelve months of the CHIPS hearing.[2] *See* WIS JI—CHILDREN 324 (2007) (questions 3 and 4); WIS. STAT. § 48.415(2)(a)3. Heather contests only some of the evidence the Department presented about Heather's ability to meet Monica's physical and emotional needs by following her social worker's recommendations. At issue on appeal is whether allegedly irrelevant or hearsay evidence, which was presented to the jury because of her counsel's alleged deficiencies, requires a new trial.

[2] When the Department filed this termination, the time period for the likelihood of the parent meeting the conditions for the safe return of the child was twelve months. In 2006, the Wisconsin Legislature shortened this period to nine months. 2005 Wis. Act 293 § 20.

¶9 For an ineffective assistance argument to pass muster, the appellant must prove that trial counsel's performance was deficient and that the deficiency undermined the case's outcome. The appellant "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." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984); *see also* ***A.S. v. State***, 168 Wis. 2d 995, 1005-06, 485 N.W.2d 52 (1992) (applying ***Strickland*** to a TPR case). Prejudice undermines confidence in the outcome when the proceedings are unreliable. ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W. 2d 711 (1985). Whether a party suffered unfair prejudice from counsel's deficiencies is a question of law that we decide de novo. ***Id.*** at 634; ***State v. Guerard***, 2004 WI 85, ¶19, 273 Wis. 2d 250, 682 N.W.2d 12. Further, we will uphold a jury verdict if the jury heard sufficient credible evidence to find the necessary elements. ***State v. Quinsanna D.***, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 655 N.W.2d 752.

¶10 Heather's overarching argument is that her trial counsel failed to exclude evidence of prior physical discipline. Heather argues that evidence of physical discipline is irrelevant because the CHIPS conditions do not prohibit physical discipline. And, the only jury question was whether Heather met those conditions. She relies on ***Bittner v. American Honda Motor Co.***, 194 Wis. 2d 122, 154, 533 N.W.2d 476 (1995), a tort and products liability case, for the holding that evidence of prior acts is unfairly prejudicial when it causes the jury to base its decision on something other than the issues in the case. So, she goes on, this evidence rendered the proceeding unreliable because it focused the jury away from the conditions and on whether Heather was a "bad person."

¶11 ***Bittner***, and more precisely, the rationale in ***Bittner***, is inapplicable here. Unlike torts and product liability cases, prior acts in TPR cases may well "illuminate the reasons why the parent is unable or unwilling to … adequately care for the child in the future," not that the parent is a "bad person." ***State v. Franklin***, 2004 WI 38, ¶14, 270 Wis. 2d 271, 677 N.W.2d 276 (citing WIS. STAT. § 48.415) (2001-02). Past parental conduct may be relevant to predicting a parent's chances of complying with conditions in the future, despite failing to do so to date. ***La Crosse County DHS v. Tara P.***, 2002 WI App 84, ¶13, 252 Wis. 2d 179, 643 N.W.2d 194. Further, a parent's relevant character traits and patterns of behavior help determine how likely the parent's problematic traits or propensities can be modified to assure the child's safety. ***Id.,*** ¶18.

¶12 As we stated earlier, the jury did indeed hear about past physical discipline of Monica by Heather and others. It also heard about Heather's physical discipline of another child. Heather's social worker testified to her recommendation that Heather not use physical discipline after Heather described how she "smacked" the back of Monica's head. The social worker recommended this after observing Monica herself acting out physically towards other people.

¶13 All of this above testimony was relevant for the jury to determine whether Heather would likely meet the CHIPS condition at issue—that of providing for Monica's physical and emotional needs by following her social worker's recommendations. One of the social worker's recommendations was to not use physical discipline. Obviously, evidence of physical discipline is relevant to whether Heather followed her social worker's recommendations. Further, the evidence showed why and what sort of physical and emotional needs Monica had, and why Heather was unlikely to meet them. And as the trial court noted, the evidence demonstrates four relevant traits: (1) how Heather reacts to children in

stressful situations, (2) whether Heather exercises good judgment in choosing her relationships, (3) whom she exposes to Monica, and (4) whom she allows to care for Monica. So, the jury must know whether Heather's household and relationships are safe, to determine if she is likely to meet Monica's needs. Thus, Heather has not convinced this court that counsel's failure to object to evidence of past child discipline is in any way deficient.

¶14 Heather next argues, that assuming the physical discipline evidence was admissible, counsel should have at least requested a reasonable force jury instruction as a defense. The jury instruction would be similar to the optional instruction on child abuse by physical injury, WIS JI—CHILDREN 215, stating that reasonable discipline, as necessary, is permissible so long as it is not intended to cause great bodily harm or death. It would also use a privilege found in the criminal code to define "reasonable." *See* WIS. STAT. § 939.45.

¶15 Initially, we note that ineffective assistance of counsel claims are limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." ***State v. McMahon***, 186 Wis. 2d 68, 85, 519 N.W. 2d 621. (Ct. App. 1994). We see no law or clear duty to ask for a jury instruction on reasonable discipline, let alone to reference the criminal code. The note to the jury instruction itself states that the Committee could not agree on the defense of "reasonable parental discipline," so they omitted references to the criminal code and reasonable discipline. WIS JI—CHILDREN 215, n.3. More importantly, Heather's argument presupposes that, without the instruction, the jury may well have considered Heather's conduct impermissible. We answer that juries are composed of people with a wealth of human experience. They well know the difference between reasonable and unreasonable discipline. This jury did not need an instruction to guide them about whether Heather's behavior

contributed favorably or unfavorably upon her ability to provide Monica with a safe and stable home life. A spanking is one thing, but a smack upside a child's head or screaming at Monica with her fists raised towards the child is another. The jury did not need an instruction to tell the difference.

¶16 Third, Heather alleges the jury heard over two dozen hearsay statements about Heather's use of physical discipline and Heather's boyfriend's gun. We agree with the trial court that these statements were either admissible under the hearsay exceptions or were harmless error. We need not decide which specific statements Heather's counsel should have objected to because under the totality of circumstances these statements were harmless.

¶17 Fourth, Heather alleges that her counsel should have objected to the Department's closing statement arguing for Monica's need of protection. The Department's closing statement included comments that the trial's focus was on Monica's needs and that Heather did not provide for those needs. Heather believes these comments improperly focused on the best interests of the child instead of Heather's parental rights.

¶18 In 1997, the policy and law of termination of parental rights shifted away from maintaining intact families to child health and safety. *See* 1997 Wis. Act 237 §§ 101-02. These amendments clarified the prior family preservation policy by adding the word "safety" 31 times when discussing children. *See* ***id.***, §§ 101-192. For example, the legislature amended WIS. STAT. § 48.01(1)(a) to change the paramount concern of the Children's Code to assure "a child's health and safety." ***Id.***, § 101. This section applies to every single section on terminating parental rights. Thus, TPR law no longer focuses primarily on keeping a "family"

together or keeping kids with a biological parent or designated guardian. Instead, it focuses on placing children in a safe environment, permanently.

¶19 As the trial court noted, Heather failed to read these comments in context with the Department's entire closing statement. Before making those comments, the Department's addressed whether Heather met the CHIPS conditions. The Department did not speak about Monica's needs until after it discussed that the jury must answer whether Heather met the CHIPS conditions.

¶20 For that question, the jury must consider Monica's needs. The issue is whether Heather met Monica's needs. To answer this, the jury had to consider what Monica's needs are. Indeed, the focus of Heather's compliance centered on whether Heather's home could meet Monica's needs. So, Heather's counsel did not err in failing to object to the Department's closing statement.

¶21 Fifth, Heather argues that her counsel was deficient by not objecting to testimony that the Children's Code requires the Department to seek permanency because Monica was out of her home for at least 15 of the prior 22 months. Heather argues that this requirement is discretionary if the child's permanency plan and documentation shows that termination would not be in the child's best interest. *See* WIS. STAT. § 48.417(2)(b).

¶22 This argument is meritless simply because Monica's permanency plan and documentation did not show that termination was not in her best interest.

¶23 Finally, we dismiss Heather's request for a new trial in the interest of justice. The trial court denied Heather's post-dispositional motion for a new trial in the interest of justice because additional admissible evidence mitigated any unfair prejudice, and Heather failed to comply with other CHIPS conditions. We

will not reverse the circuit court's denial of a new trial in the interest of justice unless the decision is erroneous. ***Suhaysik v. Milwaukee Cheese Co.***, 132 Wis. 2d 289, 303, 392 N.W.2d 98 (Ct. App. 1986). We conclude that the circuit court's denial was not erroneous here, for all the reasons explained in this opinion.

By the Court.—Orders affirmed.

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