COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP1236
2008AP1237

Cir. Ct. Nos. 2007TP19
2007TP20

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

NO. 2008AP1236

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

WALWORTH COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ROBERTA W.,

RESPONDENT-APPELLANT.

NO. 2008AP1237

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

WALWORTH COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ROBERTA W.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Walworth County: JOHN R. RACE, Judge. *Reversed and cause remanded with directions.*

¶1 ANDERSON, P.J.[1] Roberta W. appeals from orders terminating her parental rights to her children, Exsavon and Dorraj, and from the order denying her motion for posttermination relief.[2] Upon review of the record, it is our measured opinion that, due to the cumulative effect of trial counsel's errors, Roberta is entitled to a new trial. We are also convinced that the trial court erred in the dispositional phase of this termination.

¶2 Roberta makes several arguments on appeal. Roberta asserts that the trial court erred by denying her motion in limine which sought to exclude "highly prejudicial evidence" concerning her sexual conduct. She also argues that she received ineffective assistance of counsel at trial because counsel failed to object at critical times to the following: "repeated improper references" during the fact-

[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.

[2] Roberta filed notices of appeal on May 14, 2008. The two appeals were consolidated by order of this court and, on June 24, 2008, Roberta's motion for remand to the trial court was granted. Roberta then filed a posttermination motion in the trial court. On July 29, 2008, following an evidentiary ***Machner*** hearing, the trial court denied her posttermination motion in its entirety. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

finding phase by Walworth County Department of Heath & Human Services (WCDHHS) and the guardian ad litem to the best interests of the children; "the trial court's improper opening instructions to the jury"; "the admission of irrelevant and inaccurate evidence concerning [Roberta's] indigence"; "the admission into evidence of the county's demonstrative 'timeline' exhibit"; and the trial court's allowing the submission of the "timeline" exhibit to the jury during deliberations. In addition, Roberta argues that she was denied her statutory right to counsel at her dispositional hearing. Finally, Roberta argues that she is entitled to a new trial in the interest of justice.

¶3 Termination of parental rights proceedings require heightened legal safeguards to prevent erroneous decisions. ***State v. Shirley E.***, 2006 WI 129, ¶24, 298 Wis. 2d 1, 724 N.W.2d 623. A parent's right to the custody and care of his or her children is an extremely important interest that demands protection and fairness. ***Id.***

¶4 The supreme court emphasizes:

> The Wisconsin's Children's Code, WIS. STAT. ch. 48, sets forth a panoply of substantial rights and procedures to assure that the parental rights will not be terminated precipitously, arbitrarily, or capriciously, but only after a deliberative, well considered, fact-finding process utilizing all the protections afforded by the statutes unless there is a specific, knowledgeable, and voluntary waiver.

Shirley E., 298 Wis. 2d 1, ¶25.

¶5 The first step, the fact-finding phase, consists of an evidentiary hearing to determine whether adequate grounds exist for the termination of parental rights. ***Id.***, ¶27. There are eleven statutory grounds on which a petition for involuntary termination can be based. WIS. STAT. § 48.415. The petitioner

must demonstrate by clear and convincing evidence the existence of the alleged grounds for termination. Sec. 48.424; ***Shirley E.***, 298 Wis. 2d 1, ¶27. If the petitioner satisfactorily carries the burden of persuasion, the circuit court "shall find the parent unfit." Sec. 48.424(4).

¶6 During this phase, "the parent's rights are paramount." WIS. STAT. § 48.424; ***Shirley E.***, 298 Wis. 2d 1, ¶27. Here the "best interests of the child" standard does not dominate because other vital interests must be accommodated. In fact, when the government seeks to terminate parental rights, the best interests of the child standard does not "prevail" until the affected parent has been found unfit pursuant to § 48.424(4).[3] "[A] parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" ***Lassiter v. Dep't of Soc. Servs.***, 452 U.S. 18, 27 (1981) (quoting ***Stanley v. Illinois***, 405 U.S. 645, 651 (1972)). This fundamental liberty interest of parents "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." ***Santosky v. Kramer***, 455 U.S. 745, 753 (1982). "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." ***Id.*** Thus, when the state moves to terminate parental rights, "it must provide the parents with fundamentally fair procedures." ***Id.*** at 754.

[3] '"Unfitness' is an absolute requirement before parental rights may be terminated.... Parental rights may only be terminated if the parent is unfit." ***B.L.J. v. Polk County Dep't of Soc. Servs.***, 163 Wis. 2d 90, 110, 470 N.W.2d 914 (1991).

¶7 The second step in a termination case is the dispositional phase which consists of another evidentiary hearing in which the circuit court determines whether termination of parental rights is in the child's best interests. ***Shirley E.***, 298 Wis. 2d 1, ¶28. The child's interests are paramount at this stage of the proceeding, but the parent has a right to present evidence and be heard. ***Id.*** If the circuit court finds during this dispositional phase that the evidence does not warrant the termination of parental rights, the circuit court need not terminate the parent's rights. ***Id.***; WIS. STAT. §§ 48.424(4), 48.427(2).

¶8 One of the procedural safeguards the legislature has afforded to parents in termination of parental rights proceedings is the right to counsel. WIS. STAT. § 48.23(2). This right is unequivocal. ***Shirley E.***, 298 Wis. 2d 1, ¶35. There are several interrelated principles regarding the right to counsel in WIS. STAT. ch. 48 proceedings.

¶9 One principle is that counsel must be present in court and available to participate. ***Shirley E.***, 298 Wis. 2d 1, ¶36. Mere "engagement" of counsel, that is, the contract to represent, without counsel's attendance at the proceedings, does not fulfill the statutory requirement that a parent shall be represented by counsel. ***Id.***

¶10 A second principle is that counsel has a duty to provide his or her client with zealous, competent and independent representation. ***Id.***, ¶37.

¶11 A third principle is that the statutory right to counsel includes the right to effective assistance of counsel: "It is axiomatic that the right to be represented by appointed counsel is worthless unless that right includes the right to *effective* counsel. Representation by counsel means more than just having a warm

body with 'J.D.' credentials sitting next to you during the proceedings." ***Id.***, ¶38 (citation omitted).

¶12 A fourth principle is that the circuit court has a duty "to assure there was representation in court unless there was a knowledgeable and voluntary waiver." ***Id.***, ¶39 (citation omitted).

¶13 A claim of ineffective assistance requires proof that counsel's performance was deficient, and that counsel's deficiencies prejudiced the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether counsel's performance was deficient or prejudicial are questions of law that we review independent of the trial court. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. A presumption exists that the defendant's counsel acted reasonably and within professional norms. ***State v. Johnson***, 2004 WI 94, ¶11, 273 Wis. 2d 626, 681 N.W.2d 901. To prove prejudice, "a defendant must show that, but for his or her attorney's errors, there is 'a reasonable probability' the result of the proceeding would have been different." ***Id.*** Because a defendant must establish both deficient performance and prejudice to prove a claim of ineffective assistance, we need not address both prongs of the analysis if the defendant's showing is insufficient as to one. ***Strickland***, 466 U.S. at 697. Finally, we must keep in mind that prejudice should be assessed based on the cumulative effect of counsel's deficiencies. ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305.

¶14 This case involved a four-day jury trial and the record is fairly voluminous. Because our reversal is based on error—trial counsel and trial court—this review does not require us to determine the merits of the trial court's order terminating Roberta's parental rights and, thus, we will not recount the entire chronology of events upon which the petition for termination is based. We present pertinent facts and law both before and during our discussion.

¶15 WCDHHS first received a complaint regarding Roberta in February 2005. At that time, Roberta was living in Walworth county with her two children, Dorraj and Exsavon. A neighbor who was babysitting the children called to complain that Exsavon had spoiled milk in his bottle and that Dorraj had a diaper rash. After investigating the referral, Paula Hocking, a child protective service worker with WCDHHS, had some concerns about the condition of Roberta's apartment and whether it was safe for the children. Because of Hocking's concerns, WCDHHS provided informal, voluntary services to Roberta. In March 2005, Roberta called WCDHHS and said she felt overwhelmed and was not sure what to do. Hocking went over to the apartment and decided to remove the children. WCDHHS filed a petition alleging that Dorraj and Exsavon were in need of protection and services, and Roberta entered an admission to the petition. The original dispositional order was entered in June 2005, and stated the following as conditions of return for Roberta:

> 1. Roberta shall cooperate with a psychiatric evaluation and medication, if recommended.
>
> 2. Roberta shall cooperate with a psychological evaluation at the Department and follow through with any treatment recommendations.
>
> 3. Roberta shall continue to work with Joanna Peterson-Groth from Lutheran Social Services on parenting skills

> 4. Roberta shall participate in all scheduled visitation with her children.

¶16 Near the time of this June 2005 dispositional order, Roberta moved to an apartment in Racine county. Toward the end of 2005 or beginning of 2006, Roberta became pregnant with another child. Roberta's dispositional order was amended on January 19, 2006, to add the following conditions of return: (1) Maintain her residence in a consistently safe and sanitary way for a period of two months; (2) Roberta shall pay her bills or allow Walworth county to become her protective payee of her funds to ensure that she has a residence for her children to return to; and (3) Roberta will not allow anyone to live in her home that has a felony criminal record.

¶17 Prior to Roberta's move to Racine, Leslie Mollet was assigned as Roberta's Walworth county case worker. However, thereafter, in January 2006, pursuant to Walworth county's request, Racine county began to provide courtesy supervision for Walworth county. In her January 2006 letter requesting courtesy supervision, Mollet informed Racine county that Roberta's

> [c]onditions of return are minimal with the main problem being Roberta's inability to manage finances which has caused repeated moves, evictions and homelessness. She is willing to have her finances managed by a protective payee but this could not be arranged prior to her moving out of Walworth County. Roberta is also pregnant again with a due date some time in July.

¶18 In the winter and spring of 2006, for about three months, WCDHHS initiated unsupervised, overnight visitation. It was then switched back to supervised visitation due to Mollet learning that Roberta was seeing a man (Phillip S.) who had a criminal record. Racine county continued to provide courtesy supervision on behalf of Walworth county and, on June 22, 2006, Roberta gave birth to a son, Philtarion. Racine county filed a CHIPS petition with regard to

Philtarion and the Racine county family court entered a CHIPS order placing Philtarion in foster care.

¶19 Roberta's Walworth county court order was again amended at a hearing on July 14, 2006, to add that: (1) Roberta shall participate in a therapeutic program to assist her to resolve emotional problems from her childhood traumas. Treatment should also focus on Roberta's understanding of personal boundaries and how this presents issues for her children's safety; (2) Roberta shall undergo a thorough physical examination to understand and resolve any physical problems she may have that present a risk to her health or her ability to care for children; (3) Roberta will participate in a parenting program and demonstrate that she can consistently put her children's needs first; and (4) Roberta will cooperate with a psychiatric evaluation and abide by treatment recommendations.

¶20 During this time, Roberta continued to have frequent visits with Dorraj and Exsavon, though she was not allowed overnight visitation. Additionally, with regard to Philtarion, Roberta progressed to having overnight visitations.

¶21 On May 11, 2007, WCDHHS filed a petition to terminate Roberta's parental rights to Dorraj and Exsavon. As grounds, WCDHHS alleged that the children were in need of continuing protection and services in that Roberta had failed to meet her conditions of return and was not likely to meet those conditions within twelve months. *See* WIS. STAT. § 48.415(2)(a).

¶22 Roberta's Racine county case workers and service providers who, as mentioned, were also providing courtesy supervision for Walworth county, testified on her behalf. They stated that at the time of trial, they believed Roberta was making progress toward completing her conditions of return. Rachel Merino,

Roberta's Racine county case manager who supervised both Roberta's Walworth and Racine county cases, testified that Roberta's apartment has been safe and appropriate and her interactions with the children have been appropriate and interactive. Merino testified about the services and programs in which Roberta participated and stated that according to the various service providers, though Roberta still had some work to do, the consensus was that Roberta cooperates in meeting with them and had made progress. Merino confirmed that Roberta "has made considerable efforts to comply with services and complete her court ordered conditions of return" and that a permanency plan was drawn up in August 2007 which indicated the following: that Roberta was progressing in her court ordered condition of return; that Roberta was living in suitable independent housing and had maintained that housing for more than six months; that Roberta now has a payee services by Society's Assets; that Roberta has maintained regular communication with WCDHHS; that Roberta has attended office visits and team meetings as scheduled; that Roberta has direct service providers that cooperate in meeting with her on a regular basis; that Roberta was currently working with Diane Gautsch from Next Generation Now, parent advocate program; that Roberta is participating in parent mentoring with Rose Hardy of Professional Services Group; that Roberta has maintained her appointments and is progressing on her parenting skills; that Roberta has maintained visitations with Philtarion.

¶23 On February 13, 2008, after the trial and dispositional hearing, the court entered orders terminating Roberta's parental rights to Exsavon and Dorraj.

¶24 On appeal, Roberta makes a number of arguments. First, she argues that the trial court erred by denying her motion in limine which sought to exclude evidence concerning her sexual conduct. Before trial, Roberta filed the motion in limine requesting that the court exclude from evidence: all facts and references to

Roberta having given birth to two other children; all references to names of possible fathers of Philtarion given by Roberta to WCDHHS; all references to whether Roberta is currently pregnant, ever thought she was pregnant, potential fathers and any other references thereto; and all references to whether Roberta was involved in a relationship with any males. The motion was argued the first day of trial and was denied by the trial court. Subsequently, WCDHHS did present evidence to this effect at trial.

¶25 It is unnecessary for us to recount all of the sexual conduct evidence admitted. Suffice it to say, we are hard pressed to see the probative value of a good portion of the sexual conduct evidence that was admitted. However, because we reverse based on the prejudice created by the cumulative errors of trial counsel, we choose to leave this argument unaddressed,[4] excepting this one caveat: we are confident that the trial court on remand will closely examine whether admission of the sexual conduct evidence is proper if again asked to do so.

¶26 Second, Roberta argues that her trial counsel was ineffective in several instances and this caused her to be unfairly prejudiced. Roberta asserts that trial counsel was ineffective for failing to object to various references to the best interests of Dorraj and Exsavon during the trial phase of the TPR proceeding. References which she claims confused the jury as to what the purpose of this phase of a TPR is and, thus, unfairly prejudiced her. She gives several examples of times at which trial counsel should have objected in order to prevent her being unfairly prejudiced:

[4] We need not address this argument because we reach the result based upon other dispositive grounds. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issue need be addressed).

(1) Leslie Mollet, the Walworth county case worker, testified at length about the American Safe Families Act (ASFA) and its interaction with the children's best interests. For example, when discussing conditions of return, she stated: "AFSA demands that we have certain time lines where by parents comply with their conditions of return where we must seek permanence for the children."

(2) Later, in discussing the revision of Roberta's conditions of return, the following exchange occurred:

> [GAL]: And that's why you brought in the conditions about her having relationships and trying to work on healthy relationships with guys and other issues, correct?
>
> [MOLLET]: Correct.
>
> [GAL]: You didn't do that just to be mean or just to keep her kids away from her, did you?
>
> [MOLLET]: No.
>
> [GAL]: Your intent is to do what you think works for these kids?
>
> [MOLLET]: What's best for them, yes.

(3) In closing argument, the GAL emphasized the best interests of the children:

> I do agree with [defense counsel] that this is a work in progress, but I disagree as far as who is the work in progress. I represent the interests of two young kids. They are the work in progress that we need to be focusing on, not necessarily Roberta's work in progress….
>
> Only thing that I can say is that Roberta's work in progress has taken a good chunk of time, and when you're talking about kid time and parent time there's a big difference....
>
> I want you to focus on those two little works of progress and on Roberta's progress and lack of progress ….

(4) WCDHHS invoked the children's best interests in its closing argument:

> These children don't have a pause button. We can't just simply stop and make them wait, wait for Roberta to catch up; that does not give them any permanency. And they can't wait for Roberta any longer.

(5) The trial court referred to the children's best interest in its opening instructions to the jury. The first day of trial, the court gave jurors a preliminary instruction as to their role and function. In addition to the standard opening instruction, the court told the jury that they were all there "in the interest of these two children." The court stated, "[Y]ou know how serious a case this is and how life changing it will be for these children."

Upon review, it does appear that the best interests were invoked in a systematic way that could have confused the jury, and to not object to these repeated references and invocations was deficient performance on trial counsel's part.

¶27 Roberta also argues that trial counsel was ineffective for failing to object to the trial court's statements in opening instructions in which it several times used the term "we" when it addressed the jury:

> Now it isn't sufficient merely to place children in foster care. The children must be ordered back home if the parents meet the conditions of return. We are not in the business of rearing other people's children; that's not our goal in life. Our goal in life here is to correct any situation found that's deficient and offer services so you can correct these deficiencies.
>
> Now the parents that (sic) were given conditions of return to complete before the children could be returned to the parental care, and again we are not in the business of rearing other person's children. We don't scoop them in and take children; that's not our business.

Roberta specifically contends that her trial counsel erred in not objecting to the trial court's statements because (1) the instructions improperly focused the jury's attention on the children's best interests; (2) the instructions gave the impression that the court and WCDHHS were on the same side and that the court was aligned with WCDHHS's position in favor of termination; and (3) that by telling the jury that it would have no choice but to "order[] the children back home" if the parents had met the conditions of return and suggesting that neither itself nor WCDHHS was in the business of rearing other people's children, the court was at once legitimizing WCDHHS's position and also telling the jury that Roberta had not met the conditions of return. In this way, Roberta argues, the trial court's comments deprived Roberta of due process by usurping the role of the fact finder. Here again, it appears that the focus on the best interests and the court's usage of the term "we" on several occasions could have easily confused the jury and caused it to base its decision on improper considerations. It was deficient not to pick up on this and object to it.

¶28 Roberta bases another claim of ineffective assistance of counsel on her attorney's failure to object to the admission of "irrelevant and inaccurate" evidence concerning her indigence which invited the jury to again improperly consider the children's best interests and to rely on its own prejudices and preconceived notions. The record shows that WCDHHS presented, without objection, a considerable amount of evidence implicating Roberta's indigence and her receipt of public assistance. Most problematic to this court are misrepresentations made by WCDHHS, unobjected to and unimpeached by trial counsel, concerning Roberta's alleged history of homelessness. In a timeline chart created by Leslie Mollet, Roberta is represented as "living" in a "homeless shelter" in June 2006 and again in December 2006.

¶29 At the post-disposition ***Machner*** hearing, Roberta established that she was, in fact, not homeless either time and that trial counsel had documentary proof of this in his discovery file. In June 2006, Roberta was near the end of her pregnancy with Philtarion. At this time, she still lived in her apartment in Racine county but, because she had some reluctance to having her baby at the Racine hospital, she contacted her caseworker and informed her that she would be in Milwaukee staying in a shelter while she waited to give birth in a Milwaukee hospital. Trial counsel further explained:

> After the baby was born, [Roberta] went directly back; and her residence was always her place and her apartment in Racine. [She] stayed in the homeless shelter for—in Milwaukee for a few days was just temporary so she could have the baby.

With regard to the December 2006 shelter stay, trial counsel testified:

> [Roberta's] landlord wanted—was in the process of updating and remodeling the apartments; and so she had to temporarily leave her apartment, as I recall; and so she stayed at that [shelter] while her apartment was being redone.

The failure to object to the admission of misrepresentative evidence concerning Roberta's homelessness was deficient and it ties into Roberta's fourth ineffective assistance of counsel claim: counsel's failure to object to the admission of WCDHHS's timeline chart as a whole, which we also consider deficient.

¶30 Roberta argues that WCDHHS's timeline chart was inadmissible hearsay and demonstrative evidence and should never have been admitted as a substantive "exhibit" before the jury. Roberta asserts that it was not used to refresh recollection, did not meet the elements of any hearsay exception and was

not a "summary" as envisioned in WIS. STAT. § 910.06.[5] Roberta also argues that counsel should have objected to the timeline's presence in the jury room during deliberations.

¶31 WCDHHS's chief response to Roberta's timeline-related arguments is that she has waived them because trial counsel failed to object at the time of trial. This response is circular and plainly ignores the ineffective assistance of counsel context in which Roberta makes her timeline arguments.

¶32 We note that trial counsel testified that he believed he made mistakes that harmed Roberta's defense and specifically emphasized that "the biggest mistake I made was allowing that timeline in to—to the jury. I should never have done that; um, should have thought about it more. I should have looked at it closer." We agree. The timeline chart, having been requested by the jury, appears to have had an elevated importance to the jury and, thus, to its verdict. Evidence at the ***Machner*** hearing revealed that inaccurate representations of Roberta's homelessness were made on the timeline chart which trial counsel could have objected to and explained in a favorable light. Keeping in mind that WCDHHS used Roberta's homelessness as somewhat of a linchpin of its case—Mollet even testified at one point that "Roberta sees homelessness as a savings plan"—trial

[5] WISCONSIN STAT. § 910.06 provides:

> The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court.

counsel's lack of objection to misrepresentations of Roberta's homelessness was deficient in the context of this trial.

¶33 Having determined that trial counsel's performance fell short on several occasions during this trial, we now turn to the prejudice prong of the ***Strickland*** test. Each instance of deficient performance, examined alone, may not have been enough to cause unfair prejudice. However, we do not examine each deficiency in a vacuum. "Just as a single mistake in an attorney's otherwise commendable representation may be so serious as to impugn the integrity of a proceeding, the cumulative effect of several deficient acts or omissions may, in certain instances, also undermine a reviewing court's confidence in the outcome of a proceeding." ***Thiel***, 264 Wis. 2d 571, ¶60. Therefore, in determining whether a parent in a TPR case has been prejudiced as a result of counsel's deficient performance, we may aggregate the effects of multiple incidents of deficient performance in determining whether the overall impact of the deficiencies satisfied the standard for a new trial under ***Strickland***. *See* ***Thiel***, 264 Wis. 2d 571, ¶60.

¶34 After evaluating the cumulative effect of trial counsel's performance in light of the strength of WCDHHS's case, and in light of the record as a whole, which included the strong evidence from Racine county caseworkers that Roberta was making "considerable efforts to comply with services and complete her court ordered conditions of return," we conclude that, absent these instances of counsel error, a reasonable probability exists that the outcome of the trial would have been different. When permanently removing children from their parents, we must make all efforts to ensure the decision to do so is untainted by error. Because we find that Roberta received constitutionally inadequate representation, we reverse the decision and remand the matter to the circuit court for a new trial.

¶35 We could end here since Roberta will have a new trial. We nonetheless choose to address Roberta's claim that she was denied her statutory right to counsel at her dispositional hearing. The dispositional hearing was held on February 6, 2008. Roberta was not present and it is undisputed that, as in the past, she was relying on Walworth county's transportation service to transport her to court from her apartment in Racine. It is also undisputed that due to inclement weather, Walworth county cancelled its transportation services on February 6, 2008.

¶36 Defense counsel objected to conducting the dispositional hearing in Roberta's absence explaining that it was not in his client's control:

> Yesterday approximately 1:30, she got a call from Leslie Mollet … the social worker in this case, and Leslie Mollet told Roberta that there is a possibility [that despite] the arrangements [that] have been previously made to pick her up—there is a possibility that they many not be able to because of the weather, and [Mollet] suggested that [Roberta] should try to see if her brother or someone else could pick her up and bring her to Court.
>
> At approximately 2:30, Roberta called the on-call person over at transportation and they said we're not sure whether the weather is going to cancel all the rides, we'll know by 4:00 AM. [Roberta informed them that] there is no way I can get alternative transportation from my brother who lives in Milwaukee to come to Racine and take me there knowing by 4:00 AM. And then [Roberta] called back about 3:30 and then they told her all Walworth County transportation has been cancelled including your ride and do the best you can.
>
> [Roberta] has been trying to get a ride. When she talked to me just a few minutes ago she was on a pay phone and had tried to get a ride and was unable to get a ride, and so that presents a particular problem at least for me because, Judge, I can't proceed without my client.
>
> And, secondly, I think it's a problem for the Court because in order to give her at least a minimum due process that she has the right to be here. She will need to advise me

> on the cross-examination and what's happened in previous—we've gone through a jury trial, Judge, as you know, and she would advise me of areas, she would write notes. I cannot proceed without her and cross-exam in this case the County's witnesses.
>
> Secondly, Judge, her testimony is necessary in this disposition hearing. I think it's very pertinent for you to hear from Roberta because it is Roberta's parental rights that are being terminated and I frankly don't see how we can proceed without her presence. And her absence here is through no fault of her own. She does not drive. Walworth County transportation had been scheduled to pick her up. Because of the weather—and I can testify, Judge, I live in Delavan, I came twelve miles here to court and the roads were snow packed. In fact, when I was going it was almost a whiteout and I had a tough time seeing…. The weather is inclement, and I can understand why Walworth County transportation cancelled all of their transportation services. Well, that is beyond her control, Judge.

¶37 The trial court refused to continue the proceedings:

> I am not responsible for her transportation. I recognize there is no public transportation anywhere in the County, but I am not responsible for her transportation. We live in a rural county … and there is adverse weather—if people don't like the weather in Walworth County, Wisconsin let them move to Florida, but meanwhile, we have a calendar to call. And I can't let the transportation people determine whether or not I can call a case.

¶38 In response to the trial court decision to hold the hearing without Roberta, defense counsel left the courtroom and did not return. The court then allowed WCDHHS to present its entire case in the absence of both Roberta and her attorney.

¶39 Thereafter, at defense counsel's request, the court held a continued hearing at which Roberta was allowed to present evidence. However, the court refused to strike the testimony presented by WCDHHS at the prior February 6,

2008 hearing held in Roberta's absence. On February 12, 2008, the court entered orders terminating Roberta's parental rights to Exsavon and Dorraj.

¶40 Roberta argues that the trial court erroneously exercised its discretion "when it implicitly found that Roberta had voluntarily absented herself from the proceedings." Roberta also argues that, even if she had voluntarily absented herself, the court erroneously exercised its discretion when it let WCDHHS present its case without the presence of Roberta's attorney. We agree that the trial court did not adhere to its duty "to assure there was representation in court unless there was a knowledgeable and voluntary waiver." ***Shirley E.***, 298 Wis. 2d 1, ¶¶36, 39 (citation omitted). The court's duty to assure representation extends to the dispositional phase as well. ***Id.***, ¶3.

¶41 Here, the trial court's decision to proceed with the dispositional hearing after trial counsel had left the courtroom denied Roberta of her right to counsel. WISCONSIN STAT. § 48.427(1), which governs the dispositional phase of a termination of parental rights proceeding, provides that in the dispositional phase, "[a]ny party may present evidence relevant to the issue of disposition, including expert testimony, and may make alternative dispositional recommendations to the court." This language is not qualified and its directive is clear. ***Shirley E.***, 298 Wis. 2d 1, ¶54. By statute, Roberta and her counsel had a right to participate at the dispositional phase.[6] ***Id.***

[6] The circuit court had the power to order trial counsel to stay at the proceeding and to sanction trial counsel for failing to obey its order if trial counsel chose to leave regardless. However, to conduct the hearing without trial counsel or parent was inappropriate.

¶42 Moreover, WIS. STAT § 48.23(2) explicitly requires that any waiver of counsel must be knowing and voluntary. Even in a TPR case where the circuit court found a parent in default for failing to obey the court's order to personally attend the hearing, our supreme court held that the parent maintained her statutory right to counsel throughout this termination of parental rights proceeding. ***Shirley E.***, 298 Wis. 2d 1, ¶56. It is "the duty of the court to determine by careful questioning that the waiver of counsel" is knowledgeable and voluntary. ***Id.***, ¶57 (citation omitted). The circuit court conducted no such inquiry here. This was clear error.

¶43 Roberta argues in the alternative that her trial counsel provided ineffective assistance of counsel when he walked out of the proceedings. We again agree. Counsel must be present in court and available to participate. ***Id.***, ¶36. Mere "engagement" of counsel without counsel's attendance at the proceedings, does not fulfill the statutory requirement that a parent shall be represented by counsel. ***Id.*** Trial counsel made a strong case for a continuance on the record: Roberta, after great effort to appear, through no fault of her own, was unable to appear. When the trial court refused to continue the proceeding, trial counsel, by leaving, deprived Roberta of her right to counsel. *See* ***United States v. Cronic***, 466 U.S. 648, 659 (1984) (presuming that trial is unfair if the accused is denied counsel at a critical stage of the trial). This deprivation is tantamount to a structural error. "A structural error is a defect that upsets the framework within which trial proceeds; it is not merely an error in the trial process." ***Shirley E.***, 298 Wis. 2d 1, ¶62. Structural errors "are so fundamental that they are considered per

se prejudicial," and therefore require reversal without a showing of actual prejudice.[7] ***Id.***, ¶¶62-64.

¶44 On a final note, we commend appellate counsel for so zealously representing Roberta in a case that for a myriad of reasons disturbs this court. On remand, we emphasize that the liberty interest of parents "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." ***Santosky***, 455 U.S. at 753. Parents retain a vital interest in preventing the irretrievable destruction of their family life. ***Id.*** Roberta has the right to a new trial and disposition free from prejudicial error. We reverse the orders of the trial court and remand for a new trial.

By the Court.—Orders reversed and cause remanded with directions.

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

[7] Roberta lastly asks us to grant her a new trial in the interest of justice. We need not examine this argument in light of our holding that Roberta is entitled to a new trial on other grounds. *See* ***Gross***, 227 Wis. at 300.