COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP467 **Cir. Ct. No. 2008TP43**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO COLLIN M.L., A PERSON UNDER THE AGE OF 18:

HEATHER T. C.,

PETITIONER-RESPONDENT,

V.

DONALD M. H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] Donald M. H. appeals from the termination of his parental rights on the grounds of abandonment and failure to assume parental responsibility. *See* WIS. STAT. § 48.415(1), (6). First, Donald claims the trial court erred when it did not submit jury instructions and two separate verdicts related to two separate alleged periods of abandonment. Second, Donald claims he was denied effective assistance of counsel when his trial counsel failed to request separate jury instructions and separate verdicts for each claim of abandonment, and when counsel failed to elicit testimony or introduce other evidence regarding specific activities Donald claims he did with his son, such as going fishing, to the zoo, and on nature hikes, which Donald believes would have shown he had a substantial parental relationship[2] with his son. Donald has waived his right to object to the jury instructions and verdict on abandonment and has not shown that his trial counsel's performance was ineffective.[3] We affirm. Following a brief procedural history, we first address the jury instructions and verdict on abandonment; we then turn to the ineffective assistance of counsel claims.

¶2 The petition for termination of parental rights filed by the mother of Donald's son, Heather T. C., alleged failure to assume parental responsibility and two periods of abandonment as grounds for terminating Donald's parental rights.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The failure to assume parental responsibility claim is established by proving that the parent has not had a "substantial parental relationship" with the child. WIS. STAT. § 48.415(6).

[3] Donald argues the merits regarding the trial court's failure to give separate instructions and verdicts for the two alleged periods of abandonment. However, he also acknowledges he waived his right to object to the instructions and verdict. We therefore discuss and apply waiver before moving on to Donald's ineffective assistance of counsel claims.

The two alleged periods of abandonment were from July 2000 to October 2001 and from April 2005 to June 2006. At trial, the trial court instructed the jury on abandonment and failure to assume parental responsibility. The court submitted one verdict for abandonment and one verdict for failure to assume parental responsibility. Donald's trial counsel did not, at any time prior to jury deliberations, object to the jury instructions related to abandonment or to the submission of only one verdict on abandonment. The jury returned a unanimous verdict finding that Donald had abandoned his son; it also returned a unanimous verdict finding that Donald had failed to assume parental responsibility for his son. The trial court denied Donald's motion notwithstanding the verdict, held a dispositional hearing, and terminated Donald's parental rights. Donald filed a motion to vacate the final order and for a new trial, alleging ineffective assistance of counsel.[4] The trial court denied Donald's motion.

¶3 To prove abandonment, a petitioner must establish:

> The child has been left by the parent with any person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child *for a period of 6 months or longer*.

WIS. STAT. § 48.415(1)(a)3. (emphasis added).[5] Even though each alleged period of abandonment in this case well exceeded six months, Donald argues that,

[4] Donald's motion asked that the "final judgment" and order be vacated, but only a final order was entered; thus, we characterize Donald's motion as a motion to vacate the final order terminating his parental rights.

[5] This proof is subject to the responding parent's ability to show good cause as described in WIS. STAT. § 48.415(1)(c), which provides:

> (c) Abandonment is not established under par. (a)2. or 3. if the parent proves all of the following by a preponderance of the evidence:

(continued)

because there were two separate alleged periods, and the jury was not afforded the opportunity to consider and decide on a separate verdict for each period, the jurors could have reached their unanimous verdict with less than five-sixths of the jurors finding abandonment for any one period.

¶4 Given this possibility, Donald claims the failure of the trial court to provide jury instructions and two separate verdicts distinguishing the two separate periods of alleged abandonment denied him his constitutional right to a verdict agreed upon by five-sixths of the jurors.

¶5 Heather counters that there is no legal requirement that, if more than one period of abandonment is alleged, the fact finder must answer the abandonment question with regard to each time period. She contends the law

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> 1. That the parent had good cause for having failed to visit with the child throughout the time period specified in par. (a)2. or 3., whichever is applicable.
>
> 2. That the parent had good cause for having failed to communicate with the child throughout the time period specified in par. (a)2. or 3., whichever is applicable.
>
> 3. If the parent proves good cause under subd. 2., including good cause based on evidence that the child's age or condition would have rendered any communication with the child meaningless, that one of the following occurred:
>
> a. The parent communicated about the child with the person or persons who had physical custody of the child during the time period specified in par. (a)2. or 3., whichever is applicable, or, if par. (a)2. is applicable, with the agency responsible for the care of the child during the time period specified in par. (a)2.
>
> b. The parent had good cause for having failed to communicate about the child with the person or persons who had physical custody of the child or the agency responsible for the care of the child throughout the time period specified in par. (a)2. or 3., whichever is applicable.

merely requires the fact finder to find that the parent violated the relevant provisions for a period of six months or longer, but that the fact finder need not agree on a specific period of six months or longer.

¶6 Failure to object to proposed jury instructions or verdicts at the instruction and verdict conference constitutes waiver of any error in the instructions or verdicts. WIS. STAT. § 805.13(3); ***State v. Cockrell***, 2007 WI App 217, ¶36, 306 Wis. 2d 52, 741 N.W.2d 267; *see also* ***Waukesha Cnty. Dep't of Soc. Servs. v. C.E.W***, 124 Wis. 2d 47, 54, 368 N.W.2d 47 (1985). "The purpose of the rule [in § 805.13(3)] is to afford the opposing party and the trial court an opportunity to correct the error and to afford appellate review of the grounds for the objection." ***Cockrell***, 306 Wis. 2d at 73-74 (quoting ***Air Wis., Inc. v. North Cent. Airlines, Inc.***, 98 Wis. 2d 301, 311, 296 N.W.2d 749 (1980)).

¶7 In this case, Donald failed to object to the jury instructions or verdict on abandonment at the instruction and verdict conference or at any time prior to submission of the instructions and verdict to the jury. By failing to object, Donald waived his opportunity to challenge the jury instructions and verdict on abandonment.

¶8 We now turn to Donald's arguments alleging ineffective assistance of counsel. Donald bases his ineffective assistance claim on two alleged deficiencies in his trial counsel's performance: (1) failure to request separate jury instructions and separate verdicts related to the two separate periods of alleged abandonment and (2) failure to elicit testimony or introduce other evidence at trial related to specific activities Donald claims to have done with his son, which Donald believes would have shown he had a substantial relationship with his son.

¶9 A parent is entitled to effective assistance of counsel in a proceeding to terminate parental rights. ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). In order to prove ineffective assistance of counsel, the parent must show both that counsel's performance was deficient and that the deficient performance prejudiced the parent. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985); ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If the parent fails to prove either prong, we need not address whether the other prong was satisfied. *See* ***Strickland***, 466 U.S. at 700.

¶10 Whether a parent proves ineffective assistance of counsel is a mixed question of fact and law. *See* ***Pitsch***, 124 Wis. 2d at 633-34. Factual determinations of the trial court will be upheld unless they are clearly erroneous. ***Id.*** at 634. Whether trial counsel's performance was deficient and whether it prejudiced the parent are questions of law we review de novo. *See* ***id.***

¶11 When determining the deficiency prong, this court evaluates the reasonableness of trial counsel's performance based on the facts of the particular case and viewed at the time of trial counsel's conduct. ***Id.*** at 636. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Scrutiny of trial counsel's decisions, conduct and overall performance is highly deferential. ***Pitsch***, 124 Wis. 2d at 637.

¶12 On the prejudice prong, an error by counsel is prejudicial if it undermines confidence in the outcome. ***Id.*** at 642. To show prejudice, the complaining party must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** (quoting ***Strickland*** 466 U.S. at 694). "It is not sufficient for

the defendant to show that his counsel's errors 'had some conceivable effect on the outcome of the proceedings.'" ***State v. Domke***, 2011 WI 95, ¶54, 337 Wis. 2d 268, 805 N.W.2d 364 (quoting ***State v. Carter***, 2010 WI 40, ¶37, 324 Wis. 2d 640, 782 N.W.2d 695 (quoting ***Strickland***, 466 U.S. at 693)).

¶13 We first look at Donald's claim that his trial counsel was ineffective in not challenging the jury instructions and verdict submitted on the issue of abandonment. To prove abandonment, a jury needs to find, among other things, that there were no visits or communication by the parent for "a period of 6 months or longer." WIS. STAT. § 48.415(1)(a)3. Donald argues he was denied his right to a five-sixths verdict because trial counsel did not request separate jury instructions and separate verdicts on the two separate periods of alleged abandonment.

¶14 At the ***Machner*** hearing,[6] trial counsel testified that he was not aware of any case law that would have required separate verdicts for each alleged period of abandonment. The trial court also noted at that hearing that it found no case discussing the need for a separate verdict for each alleged period of abandonment, stating, "I've been looking for case law on this issue since the day this motion was filed. There is none." We, too, have found no such law.

¶15 While in the future Wisconsin law may clarify whether separate instructions and separate verdicts are required when more than one period of abandonment is alleged, we have found no clear law that would have required this at the time of the jury instruction and verdict conference in this case. Trial counsel is not required to object and argue points of law that are unsettled. ***State v.***

[6] A ***Machner*** hearing is an evidentiary hearing to determine trial counsel's effectiveness. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

McMahon, 186 Wis. 2d 68, 84-85, 519 N.W.2d 621 (Ct. App. 1994). As this court has previously held, "We think ineffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." ***Id.*** at 85; *see also* ***State v. Maloney***, 2005 WI 74, ¶¶23-30, 281 Wis. 2d 595, 698 N.W.2d 583 (discussing performance standard where area of law is not clear). Although it might have been ideal for Donald's trial counsel to argue for separate instructions and separate verdicts for the two alleged periods of abandonment, because the law and counsel's duty regarding this matter were not clear, he was not deficient for failing to do so. ***McMahon***, 186 Wis. 2d at 84.

¶16 Because we hold that trial counsel was not deficient with regard to the abandonment claim, we need not address the prejudice prong.

¶17 Turning now to Donald's second ineffective assistance claim, we address Donald's argument that, on the issue of failure to assume parental responsibility, trial counsel was ineffective for not eliciting testimony or introducing other evidence regarding specific activities Donald claims to have done with his son. Here, the evidence Donald claims his counsel failed to elicit or introduce was minimal compared to the balance of the testimony. Therefore, we conclude Donald has failed to establish there was a reasonable probability that eliciting such testimony or introducing such evidence would have changed the outcome of this case. Because Donald was not prejudiced by this omission, we need not decide whether trial counsel's conduct was deficient with regard to this issue.

¶18 In evaluating the failure to assume parental responsibility claim, the jury was instructed to consider whether Donald had a "substantial parental

relationship" with his son, meaning "the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of [his son]." The jury heard substantial testimony regarding Donald's long periods of absence from his son's life and lack of any significant expression of interest during those periods. The jury was informed of over $12,000 in child support Donald failed to pay to assist with the upbringing of his son. Donald did not know the name of his son's teacher and had never gone to his son's school. Donald never provided health insurance for his son. The jury also heard testimony regarding Donald's substance abuse, including driving while under the influence with his son in the car.

¶19 Related to Donald's alleged failure to assume parental responsibility, the trial court, who heard the same trial testimony as the jury, concluded, as do we, that testimony regarding occasional activities such as "taking his son fishing or taking him to the zoo" would have been comparatively "immaterial" to the more significant testimony regarding Donald's lack of a substantial parental relationship with his son. The trial court summed up this issue at the ***Machner*** hearing:

> Going to the zoo and fishing? That's fun time. That's not a major decision. What does daily or significant responsibility mean? Supervision, education, protection, and care of the child. And it was quite clear from the testimony of the mother that she did most of that. And [Heather's counsel] was correct when there was direct questions asked of the father, he had no idea about anything about this child.… What do you know about his teacher. What do you know about his favorite toy? Stuff that goes to the heart of the matter. And every answer was I don't know, I don't know.

¶20 Considering the significant testimony before the jury related to Donald's lack of acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of his son, this court cannot conclude

that Donald has met his burden of demonstrating a reasonable probability that the jury verdict on this issue would have been any different if his trial counsel had elicited testimony or produced other evidence regarding the occasional activities Donald claims to have done with his son. The absence of such testimony does not undermine confidence in the outcome, and, therefore, Donald has not shown prejudice.

By the Court.—Order affirmed.

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