COURT OF APPEALS
DECISION
DATED AND FILED

July 10, 2014

Diane M. Fremgen
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. 2014AP398
2014AP399

Cir. Ct. Nos. 2010TP32
2010TP33

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

NO. 2014AP398

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

MABLE K.,

RESPONDENT-APPELLANT.

NO. 2014AP399

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

MABLE K.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Dane County: AMY SMITH, Judge. *Affirmed*.

¶1 BLANCHARD, P.J.[1] Mable K. appeals orders of the circuit court terminating her parental rights to Isaiah H. and May K. and an order denying her motion for a new trial. On appeal, Mable K. makes two arguments. First, she argues that her trial counsel was ineffective for failing to prevent the introduction, or reduce the impact on the jury, of evidence regarding Mable K.'s lack of contact with her children after the period of alleged abandonment. Second, she argues that the circuit court erred in allowing evidence of specific instances of prior untruthful conduct on her part to be used at trial. For the following reasons, I affirm the challenged orders.

BACKGROUND

¶2 The procedural history of this case is lengthy, but only limited facts are pertinent to the issues raised on appeal.

¶3 The Dane County Department of Human Services filed a petition requesting the termination of Mabel K.'s parental rights as to Isaiah H. and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.311(1)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

May K. The Department alleged abandonment, pursuant to WIS. STAT. § 48.415(1)(a)2. (2009-10),[2] as grounds for termination, asserting that Mable K. had abandoned Isaiah and May by failing to "visit or communicate" with them for more than three months, from December 17, 2009 until the end of May 2010.[3]

¶4 In its petition, the Department states that the relevant time period for the alleged abandonment is December 17, 2009 to May 27, 2010. Elsewhere, the Department states that the relevant time period is December 17, 2009 to May 31, 2010. However, Mable K. takes the position that "these slight variances in the time period are not material to the issues raised on appeal." For the balance of this opinion, I will refer to this as the December-May period of alleged abandonment.

¶5 On June 30, 2010, the circuit court entered an order suspending Mable K.'s ability to visit her children, pending the disposition of the termination actions.

¶6 At an initial jury trial held in September 2010, Mable K. failed to appear. The circuit court found her in default for purposes of the grounds phase of the proceedings, found her unfit, and terminated her parental rights. That decision was subsequently reversed and remanded, and the issue proceeded to a second jury trial on grounds. *See* ***Dane Cnty. DHS v. Mable K.***, 2013 WI 28, 346 Wis. 2d 396, 828 N.W.2d 198.

[2] Mable K. does not argue that any pertinent portions of WIS. STAT. § 48.415(1) have changed since 2010.

[3] The Department initially also alleged continuing need of protection or services as a ground for termination, but later moved to dismiss that ground.

¶7 Mable K.'s second jury trial occurred in October 2013. In advance of this trial, the circuit court determined that the Department could use the following as impeachment evidence during testimony of Mable K.: the fact that she had been criminally convicted seven times; and some details regarding specific instances of prior untruthful conduct of Mable K. potentially reflecting on her credibility. On the first topic, the circuit court determined that the fact that she had seven prior convictions was admissible pursuant to WIS. STAT. § 906.09. On the second topic, the court found that particular specific instances of prior untruthful conduct, namely, check forgery and credit card fraud, underlying some of these convictions were admissible pursuant to WIS. STAT. § 906.08(2).

¶8 Regarding the specific instances of prior untruthful conduct, the circuit court allowed impeachment, but limited its scope as follows:

> The specific instances of conduct [regarding convictions for forgery and credit card fraud] may be inquired of [Mable K.] if she testifies, as they are relevant to a determination of [her] credibility, which is relevant for any witness. The specific instances of conduct are recent in time, and are probative of [Mable K.'s] truthfulness or untruthfulness if she testifies.
>
> … this inquiry is limited to the examination of [Mable K.] and may not be proven by extrinsic evidence, and no inquiry may be made of [Mable K.] as to whether or not she was convicted for that conduct. The court concludes that permitting such examination … is appropriate to attack [Mable K. on the issue of Mable K.'s] credibility.

¶9 Regarding prior convictions, the Department elicited the following testimony from Mable K.:

> [DEPARMENT COUNSEL]: … you have a number of criminal convictions; is that right?
>
> [MABLE K.]: Yes.

> [DEPARTMENT COUNSEL]: How many criminal convictions do you have?
>
> [MABLE K.]: Seven.

The Department then immediately turned to the specific instances of prior untruthful conduct:

> [DEPARTMENT COUNSEL]: All right. And you've also been associated with other dishonest behavior, isn't that correct?
>
> ….
>
> [MABLE K.]: Yes.
>
> [DEPARTMENT COUNSEL]: Okay. And, in fact, one time, again, you stole a check, you took the routing number and account number from the check and sent it with your identification to a check printing company and then cashed checks on that account; is that correct?
>
> [MABLE K.]: Yes.
>
> [DEPARTMENT COUNSEL]: Okay. And you knew at the time you cashed those checks that you had no right to that money, is that also correct?
>
> ….
>
> [MABLE K.]: Yes, that was correct.
>
> [DEPARTMENT COUNSEL]: All right. Now, more recently in June of 2011 you took other people's credit cards or debit cards and IDs and charged items on those cards, didn't you?
>
> [MABLE K.]: Yes.
>
> [DEPARTMENT COUNSEL]: And you did that on about 10 different occasions?
>
> [MABLE K.]: Yes, that is currently right.
>
> [DEPARTMENT COUNSEL]: And on at least five of those occasions you were viewed on surveillance video at the locations where you used those cards or credit cards, weren't you?

[MABLE K.]: Yes.

¶10 Also during trial, Mable K. conceded before the circuit court that she had not visited her children during the December-May period of alleged abandonment. In addition, Mable K. testified that she had not communicated directly with her children during this period:

> [GUARDIAN AD LITEM]: … Would you agree that you did not have any direct communication with Isaiah for at least three months after that last visit on December 17, 2009?
>
> [MABLE K.]: Yes, that was correct.
>
> [GUARDIAN AD LITEM]: And would you agree that you've not had any direct communication with May for at least three months after that December 17, 2009 visit?
>
> [MABLE K.]: That is correct.

¶11 As a defense, Mable K. testified that she had sent emails to Isaiah and May's foster parents during the December-May period of alleged abandonment, on topics such as a request for photographs of the children.[4] Her purported defense was that those contacts about her children were sufficient to establish that Mable K. had communicated with her children for the purposes of determining abandonment. In response, the Department: (1) presented testimony from two social workers that it was not possible to discern the dates on which these emails were sent or whether they had actually been sent to the foster parents, and (2) impeached Mable K. with her deposition testimony, in which she stated that she had not contacted her children's foster parents during the pertinent time

[4] Mable K. appears to concede on appeal that there is not a way to construe the emails as having been directed *to* the children, but instead refers to them as having been "*about* the children." (Emphasis added.)

period. The Department also presented evidence and argued that, even if Mable K. had sent these emails during the pertinent time period, they were insufficient to defeat the allegations of abandonment because they were communications with the foster parents, not with Mable K.'s children, or were, at best, "insignificant contacts" with the children.

¶12 At the conclusion of the trial, the jury was instructed to decide whether Mable K. failed to visit or communicate with her children "for a period of three months or longer." The jury found grounds against Mable K., determining that she had not visited or communicated with her children for at least three months and that she did not have good cause for failing to do so. After a dispositional hearing, the circuit court terminated Mable K.'s parental rights as to both Isaiah and May.

¶13 Mable K. filed a motion requesting a new trial, based on substantially the same arguments she now makes on appeal. The circuit court held a hearing on the motion and orally denied it. Mable K. now appeals.

DISCUSSION

¶14 This appeal concerns only the grounds phase of the TPR proceeding initiated against Mable K. *See* WIS. STAT. § 48.424. Mable K. argues that: (1) her trial counsel was ineffective for not taking steps to prevent the jury from hearing evidence regarding her lack of contact with her children *after* the December-May period of alleged abandonment, and for failing to reduce the impact of this evidence by seeking a jury instruction explaining that jury was to ignore this evidence of post-May lack of contact; and (2) the circuit court erred in admitting evidence of the specific conduct underlying some of Mable K.'s convictions, including check forgery and credit card fraud.

I. Ineffective Assistance of Counsel

¶15 As explained above, the Department alleged as grounds for termination that Mable K. had abandoned Isaiah and May by failing to visit or communicate with them for more than three months without good cause, specifically some period of at least three months within the December-May period of alleged abandonment. *See* WIS. STAT. § 48.415(1)(a)2. and (c)1.-2.

¶16 Based on these allegations, Mable K. argues that her trial counsel was ineffective for "fail[ing] to take the steps necessary to ensure [that] the jury did not hear" evidence regarding "Mable K.'s lack of visits or contacts with the children" after the December-May period of alleged abandonment, evidence which she contends was "irrelevant and highly prejudicial." Mable K. asserts that her counsel "should have filed a motion in limine to make it clear that Mable K.'s actions, or inactions after [the December-May period of alleged abandonment] … were utterly irrelevant to the issue of abandonment," or, alternatively, that he "should have sought a conformed version of [the jury instruction given] to make [ ] sure the jury knew the time period after the filing of the petitions was not relevant to the issue of abandonment." Mable K. contends that this deficient performance was prejudicial because of the likelihood that the jury concluded: "If [Mable K.] hasn't had contact with her children for almost four years, her parental rights are not worthy of being saved."

¶17 Parents are entitled to the effective assistance of counsel in termination actions. ***A.S. v. State***, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992). The test for ineffective assistance has two prongs:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the

> "counsel" guaranteed the defendant by the [S]ixth [A]mendment.
>
> Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. If Mable K. fails to meet either prong of this test, the other prong need not be addressed. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.").

¶18 To demonstrate that her counsel's deficient performance was prejudicial, Mable K. 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.'" *See* ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (quoting ***Strickland***, 466 U.S. at 694).

¶19 "A claim of ineffective assistance of counsel presents a mixed question of law and fact." ***Id.***, ¶21. The circuit court's findings of fact will be upheld unless they are clearly erroneous, but the determination of whether those facts satisfy the constitutional standard for effective assistance is a legal question reviewed de novo. ***Id.***

¶20 For purposes of resolving this appeal, I will assume without deciding that it was deficient for Mable K.'s counsel to have failed to ensure that the jury did not hear evidence regarding her lack of contact with her children after the end of May 2010 and to have failed to seek a jury instruction that "define[d] the relevant time period" the jury was to consider for purposes of establishing

abandonment. I conclude that her argument fails because these assumed deficiencies were not prejudicial in light of the overwhelming evidence against Mable K., which met only a weak defense.

¶21 Mable K.'s argument regarding evidence of post-May 2010 conduct relies on the following two sections of transcript:

> [CORPORATION COUNSEL]: But you haven't seen [your children] since December 17[?]
>
> MABLE K.: Right. Last time I saw them was on December 17, 2009.
>
> ….
>
> [MABLE K.'S COUNSEL]: Now at some point you … met with [Mabel K.] at a library, true?
>
> [SOCIAL WORKER]: Correct.
>
> [MABLE K.'S COUNSEL]: And do you recall when that was?
>
> [SOCIAL WORKER]: That was March 17th.
>
> [MABLE K.'S COUNSEL]: Okay. And at that point that was the meeting to sort of restart visits?
>
> [SOCIAL WORKER]: Right.
>
> [MABLE K.'S COUNSEL]: And were the visits ever restarted?
>
> [SOCIAL WORKER]: I don't recall that [Mable K.] made a visit after that.

¶22 No doubt, from this testimony the jury could have concluded that Mable K. failed to visit with her children after May 2010. However, Mable K. fails to persuade me that this testimony undermines the reliability of the trial result. There is no reasonable probability that, but for this testimony, the jury would not have found grounds of abandonment, given the narrow focus of the

Department's arguments before the circuit court, the extensive testimony establishing Mable K.'s lack of contact with her children throughout the December-May period of alleged abandonment, and the absence of support for a viable defense.

¶23 The Department and guardian ad litem explained during opening statements the correct time frame for a finding of abandonment. The guardian ad litem explained to the jury:

> the evidence is expected to be *very narrowly tailored* to the time frame of abandonment from the day after December 17, 2009, through the end of May, 2010. *And it's important that you do not try to speculate what's happened since then*. So I do not anticipate evidence coming in about what's happened recently because *that's not the issue you're being asked to decide today*.

(Emphasis added.) As previewed above, the jury then heard extensive testimony, including from Mable K. herself, that she did not have contact with her children during the December-May period of alleged abandonment. To cite only a few examples, Mable K. testified as follows:

> [DEPARTMENT COUNSEL]: Okay. And in your deposition of June 20, 2013, you admitted that *you had no visits with either Isaiah or May since December 17, 2009, through May 31, 2010*; is that correct?
>
> MABLE K.: Yes, that's correct.

(Emphasis added.) Separately, Mable K. also testified as follows:

> [GUARDIAN AD LITEM]: Okay. Would you agree that *you did not have any direct communication with Isaiah for at least three months after that last visit on December 17, 2009*?
>
> [MABLE K.]: Yes, that was correct.

> [GUARDIAN AD LITEM]: And would you agree that *you've not had any direct communication with May for at least three months after that December 17, 2009 visit*?
>
> [MABLE K.]: That is correct.

(Emphasis added.) In addition, Mable K. did not make a serious effort to establish a defense of good cause for failing to visit her children, as this passage reveals:

> [DEPARTMENT COUNSEL]: … what is the good cause for failing to visit with both May and Isaiah from December 2009 through May 31, 2010?
>
> [MABLE K.]: I was very busy.

¶24 The limited testimony that Mable K. points to regarding evidence that she did not have contact with her children after the December-May period of alleged abandonment does not undermine my confidence in the jury's decision. Overwhelming evidence demonstrated that Mable K., by her own repeated and unambiguous admissions before the jury, did not visit or communicate directly with her children during the December-May period of alleged abandonment.

¶25 As stated above, Mable K.'s defense was that she had communicated with her children by sending emails to the children's foster parents regarding her children. However, the Department presented evidence that these communications had not occurred or had not occurred during the pertinent time period. In addition, the Department also took the position that, even if the communications had occurred during the pertinent time period, they were merely communications *about* her children, not communications *with* her children, or constituted "insignificant contact" and, thus, could not defeat the abandonment allegations. *See* WIS. STAT. § 48.415(1)(b) ("Incidental contact between parent and child shall not preclude the court from finding that the parent has failed to visit or

communicate with the child."); WIS-JI CHILDREN 313 ("Incidental contact means insignificant contact ….").

¶26 Given the focus of the Department's arguments on the December-May time period, the extensive evidence presented that Mable K. had failed to visit or communicate directly with her children during this period, and the Department's multiple, plausible responses to Mable K.'s defense, there is not a reasonable probability that, assuming unprofessional errors by counsel, the result of the proceedings would have been different if the jury had not learned of Mable K.'s lack of contact with the children in more recent years.

II. Introduction of Specific Conduct Evidence

¶27 Mable K. argues that the circuit court erred in allowing the introduction of evidence regarding prior specific instances of untruthful conduct on her part, pursuant to WIS. STAT. § 906.08(2), but her approach is puzzling. I address, and reject, the substance of each of her assertions as she presents them in her principal brief.

¶28 Mable K. begins by citing an irrelevant legal standard, namely, the standard that applies to "other acts" evidence admitted pursuant to WIS. STAT. § 904.04(2). As the circuit court made perfectly clear, the evidence at issue was presented and accepted by the court as specific instances of prior conduct admitted to impeach a witness pursuant to WIS. STAT. § 906.08(2).

¶29 To briefly summarize the applicable rule, any witness can be cross-examined about specific instances of untruthful conduct, in an attempt to shed

light on his or her character trait for truthfulness.[5] Whether to admit or exclude evidence under WIS. STAT. § 906.08(2) is within the discretion of the circuit court. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. The circuit court's discretionary decision will be upheld "if the circuit court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." ***Id.***

¶30 Mable K. then cites to an opinion of this court in a termination of parental rights case in which the State sought to offer "'the substance' of … [prior] offenses and sentences" as "'direct evidence of [the mother's] failure to assume parental responsibility.'" *See* ***State v. Quinsanna D.***, 2002 WI App 318, ¶10, 259 Wis. 2d 429, 655 N.W.2d 752 (quoted source omitted); *see also* ***L.K. v. B.B.***, 113 Wis. 2d 429, 442, 335 N.W.2d 846 (1983) ("A court cannot ignore the circumstances of why this father was not physically available from the fifth month of pregnancy. He was convicted and sentenced for burglary. This was not a case of being absent because of illness, military service or the demands of a job. His absence was due to incarceration from the wilful act of burglary."). The issues in ***Quinsanna D.*** are entirely distinguishable from those in this case. As explained above, the circuit court here did *not* permit the jury to learn the substance of

[5] WISCONSIN STAT. § 906.08(2) provides:

> **(2)** SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, … if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

offenses or sentences, and the evidence was *not* allowed for the purpose of showing that Mabel K. was not available as a parent due to criminal activity resulting in incarceration.

¶31 Mable K. then cites ***McClelland v. State***, 84 Wis. 2d 145, 156-57, 267 N.W.2d 843 (1978), for the proposition that, when applying WIS. STAT. § 906.08(2), a circuit court must conduct the balancing test set forth in WIS. STAT. § 904.03. Section 904.03 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

¶32 As the circuit court here recognized in addressing the post-trial motion, the court did not expressly apply the WIS. STAT. § 904.03 balancing test in making its evidentiary ruling. However, the court explained that it had implicitly done so, and this explanation is sound.

¶33 As our supreme court has explained, a "circuit court's failure to use the words 'balancing,' 'probative value,' or 'prejudicial effect' is not determinative." ***State v. Gary M.B.***, 2004 WI 33, ¶26, 270 Wis. 2d 62, 676 N.W.2d 475. No "'magic words'" are necessary, because their absence "at most, constitutes a failure to set forth [the court's] reasoning." ***Id.*** (quoted source omitted). When a circuit court "does not explicitly engage in balancing on the record, an appellate court can nevertheless affirm, if the record indicates that balancing is implicit from the circuit court's determination." ***Id.***

¶34 Here, the record indicates that the circuit court engaged in the requisite balancing test. The circuit court heard arguments regarding the admissibility of evidence regarding Mable K.'s conduct in the check forgery and

credit card cases from both parties, including an argument from the Department that this impeachment evidence would not present a "danger" of finding grounds against Mable K. because she was a "bad person." In a written decision regarding admissibility, the circuit court explicitly determined that the instances of check forgery and credit card fraud were probative of Mable K.'s truthfulness and credibility, which were central to issues regarding the allegation of abandonment, and that these instances of conduct were recent in time. Implicit in its written decision is that the circuit court agreed with the Department that this impeachment evidence would not unfairly prejudice Mable K. Moreover, as we have explained, the circuit court limited any possible prejudice by ordering that the Department could not inquire into whether Mable K. was convicted based on any of these specific instances of conduct.

¶35 Inexplicably, Mable K.'s counsel observes that he is

> unaware of any law allowing a trial court the unfettered authority to [allow the introduction of] the specific nature of criminal convictions under [WIS. STAT.] § 906.08(2) in spite of [WIS. STAT.] § 906.09, which limits the general inquiry to whether the witness has been convicted of a crime, and if so how many times.

Again, however, the court here determined that the jury would *not* learn the nature of Mable K.'s criminal convictions, and the jury did not learn of the nature of her convictions. Mable K. is correct that "the specific natures of Mable K.'s criminal offenses were not relevant to the ground of abandonment." The jury did not receive this irrelevant information. I could end the analysis there.

¶36 I add, however, that even if I were to assume without deciding that the circuit court erred in admitting this evidence under WIS. STAT. § 906.08(2), a new trial would not be warranted because this error would have been harmless.

¶37 The erroneous admission of evidence does not necessarily require a new trial. ***Martindale***, 246 Wis. 2d 67, ¶30. A new trial will not be granted if the error is harmless, that is, if it did not "affect[] the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial." WIS. STAT. § 805.18(2); *see also* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶32, 271 Wis. 2d 1, 678 N.W.2d 856 (harmless error rule applies to TPR proceedings). A party's "substantial rights" are not affected unless there is a "reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Martindale***, 246 Wis. 2d 67, ¶32. The determination of whether an error is harmless requires review of the entire record. ***State v. Patricia A.M.***, 176 Wis. 2d 542, 556-58, 500 N.W.2d 289 (1993).

¶38 Mable K. argues that she was prejudiced by this evidence because it likely led the jury to find grounds for termination because Mable K. is a "bad person," rather than because she had failed to visit or communicate with her children without good cause. This argument fails.

¶39 First, as discussed above, the jury was presented with overwhelming evidence that Mable K. did not visit or communicate directly with her children during the December-May period of alleged abandonment and that she did not have good cause for failing to do so. In addition, her defense was weak in multiple respects.

¶40 Second, as the Department argues, there was extensive additional evidence presented at trial impeaching Mable K.'s credibility, including: testimony that Mable K. had previously been convicted of seven crimes, inconsistent statements regarding whether she was married, and numerous inconsistencies between Mable K.'s deposition testimony and testimony at trial.

Mable K. comes close to conceding as much in her principal brief, complaining of impeachment evidence "overkill," and in her reply brief, when she refers to a "decision to 'pile on.'" Even assuming that impeachment of Mable K. made the difference at the second trial (itself an unlikely proposition for reasons discussed above), the additional impeachment represented by the prior specific instances of untruthful conduct was unlikely to have tipped the scales. For these reasons, I conclude that there is no reasonable possibility that any error in admitting evidence of the specific instances of conduct, if error, would have contributed to the jury's determination regarding grounds.

CONCLUSION

¶41 For these reasons, I affirm the orders of the circuit court terminating Mable K.'s parental rights and denying her motion for a new trial.

By the Court.—Orders affirmed.

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