COURT OF APPEALS
DECISION
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Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP573 **Cir. Ct. No. 2013TP53**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JIMMY J.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: PEDRO COLON and MARK A. SANDERS, Judges. *Affirmed*.

¶1 FINE, J. This is a continuation of Jimmy J.'s appeal of the order terminating his parental rights to his daughter Londyn F., who was born at the end of November of 2010.[1] A jury returned a verdict that determined, in response to question 1, that Jimmy J. "failed to assume parental responsibility for" Londyn. Ten jurors answered "yes" to that question, and two jurors dissented: Donna D. and Lynn G.

¶2 The trial court determined that "yes" should be the answer to 2, which asked whether Jimmy J. did not "visit or communicate with Londyn [] for a period of three months or longer." Question 3 asked whether Jimmy J. had "good cause for having failed to visit with Londyn [] during that period." Ten jurors answered "no" to that question, and two jurors dissented: Donna D. and Lynn G. Question 4 asked whether Jimmy J. had a "good cause for having failed to communicate with Londyn [] during that period. Ten jurors answered "no" to that question, and two jurors dissented: Donna D. and Lynn G.[2]

I.

¶3 Jimmy J.'s only claim of error on this appeal is that the trial court should not have instructed the jury that at least the same ten of the twelve jurors had to answer the questions the same way. The trial court told the jury:

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[1] The Honorable Pedro Colon presided over the trial and entered the order terminating Jimmy J.'s parental rights to Londyn F. The Honorable Mark A. Sanders caught the case on remand from the court of appeals, and denied Jimmy J. a new trial.

[2] Eleven jurors answered "yes" to question 5 even though it was instructed not to, and Jeanne L. dissented. Question 5 asked whether Jimmy J. communicated "about Londyn [] with" those who had "physical custody" of Londyn during the period of three months or longer. Jimmy J. does not claim on this appeal that this was error.

> Agreement by ten or more jurors is sufficient to become your verdict. Jurors have a duty to consult with one another and deliberate for the purpose of reaching an agreement. If you can do so consistently with your duty as a juror at -- *at least the same ten jurors should agree on all of the answers*. I ask you to be unanimous if you can.

(Emphasis added.) At the post-trial hearing, Jimmy J.'s trial lawyer deliberately chose not to object because he explained this helped his client:

> I don't see how having different people constituting the 5/6 helps the parent. I think it's more difficult for the same people to agree on every proposition than it is for different people to agree on the same proposition. I think if you look at it quantitatively, I think the parent is better off having the requirement that the same people have to agree on each element than if different people can come in and constitute those elements for the 5/6.
>
> ….
>
> I think the parent is better off if the same people have to come to an agreement rather than letting them agree to different portions of it.

¶4 As Jimmy J. points out, the general rule is that the same ten persons do not have to agree when the civil verdict presents two or more claims. *See* WIS. STAT. RULE 805.09(2) ("A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury. If more than one question must be answered to arrive at a verdict on the same claim, the same five-sixths of the jurors must agree on all the questions."); ***Giese v. Montgomery Ward, Inc.***, 111 Wis. 2d 392, 401, 331 N.W.2d 585, 590 (1983) ("It is well established in Wisconsin law that this statute requires not that five-sixths of the jury agree on all questions in the verdict, but rather that this number must agree on all questions necessary to support a judgment on a particular claim."). Further, Jimmy J. points to ***Waukesha Cnty. Dep't of Social Services v. C.E.W.***, 124 Wis. 2d 47, 71–72, 368 N.W.2d 47, 59 (1985), which determined that it was error to tell the jury that it had to agree on all

the bases on which the County sought to terminate the parent's parental rights. Significantly, the jury was *unanimous* in finding that there were no grounds to terminate the parent's parental rights in ***C.E.W.***, and thus did not reach whether the County was prejudiced when the trial court required the same ten jurors to agree to all the questions. ***Id.***, 124 Wis. 2d at 71–72, 368 N.W.2d at 59.

II.

¶5 As in ***C.E.W.***, the parties here did not object to the trial court's five-sixth instruction, and thus forfeited any error. *See* ***id.***, 124 Wis. 2d at 54, 368 N.W.2d at 51. We decide *de novo* the legal matter of the consequences of Jimmy J.'s forfeiture. *See* ***id.***, 124 Wis. 2d at 50, 368 N.W.2d at 49.

¶6 We examine Jimmy J.'s appeal under the ineffective-assistance-of-counsel standard because he forfeited direct review of the trial court's instruction. *See* WIS. STAT. RULE 805.13(3) (failure to object to proposed jury instructions or verdict forfeits any error); ***Kimmelman v. Morrison***, 477 U.S. 365, 375 (1986) (unobjected-to error must be analyzed under ineffective-assistance-of-counsel standards, even when error is of constitutional dimension); ***State v. Carprue***, 2004 WI 111, 47, 274 Wis. 2d 656, 678, 683 N.W.2d 31, 41–42 (in the absence of an objection we address forfeited issues under the ineffective-assistance-of-counsel rubric).

¶7 Parents in Wisconsin are entitled to effective assistance of counsel when the State tries to terminate their parental rights. ***Oneida Cnty. Dep't of Social Services v. Nicole W.***, 2007 WI 30, ¶33, 299 Wis. 2d 637, 659, 728 N.W.2d 652, 663. The test is that set out in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Nicole W.***, 2007 WI 30, ¶33, 299 Wis. 2d at 659, 728 N.W.2d at 663. To establish constitutionally deficient representation, a person must

show: (1) deficient representation; and (2) prejudice. ***Strickland***, 466 U.S. at 687. To prove deficient representation, a person must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. To prove prejudice, a person must demonstrate that the lawyer's errors were so serious that the person was deprived of a fair trial and a reliable outcome. ***Id.***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, the person "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." ***Id.***, 466 U.S. at 694.

¶8 Further, we need not address both aspects of the ***Strickland*** test if the person does not make a sufficient showing on one. *See* ***id.***, 466 U.S. at 697. Finally, our review of an ineffective-assistance-of-counsel claim presents mixed questions of law and fact. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). A circuit court's legal conclusions whether the lawyer's performance was deficient and, if so, prejudicial, are questions of law that we review *de novo.* ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. If those legal conclusions are founded in facts found by the circuit court, those findings of fact will not be disturbed unless they are clearly erroneous. ***Id.***, 153 Wis. 2d at 127, 449 N.W.2d at 848.

¶9 We give broad berth to claims that a lawyer gave ineffective-assistance-of-counsel when the lawyer explains his or her strategy behind what was done. ***State v. Westmoreland***, 2008 WI App 15, ¶20, 307 Wis. 2d 429, 439, 744 N.W.2d 919, 924 ("[S]trategic decisions by a lawyer are virtually invulnerable to second-guessing."); ***State v. Elm***, 201 Wis. 2d 452, 464–465, 549 N.W.2d 471,

476 (Ct. App. 1996) ("A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel."). Here, Jimmy J.'s trial lawyer fully explained why he did not object to the instruction. Thus, he was not constitutionally deficient by not objecting. Moreover, as Jimmy J.'s trial lawyer recognized, the instruction *helped* rather than *hurt* him. Thus, Jimmy J. has also not shown any prejudice.

By the Court.—Order affirmed.

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