COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2241

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

IN RE THE TERMINATION OF PARENTAL RIGHTS OF SARAH G., A PERSON UNDER THE AGE OF 18:

MANITOWOC COUNTY,

PETITIONER-RESPONDENT,

V.

LEESA J.Y.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed.*

NETTESHEIM, J. Leesa J.Y. appeals from a juvenile court order terminating her parental rights to her daughter, Sarah G., and from an order denying her motion for a new trial. Leesa raises two challenges on appeal. First, Leesa contends that the juvenile court improperly allocated the peremptory strikes between the parties. Second, Leesa raises a claim of ineffective assistance of

counsel. Based on our review of the record, we conclude that Leesa waived her right to challenge the juvenile court's allocation of the peremptory strikes. We further reject Leesa's claim of ineffective assistance of counsel. We therefore affirm the order terminating Leesa's parental rights.

Sarah was born on April 28, 1997, to William G. and Leesa. On November 26, 1997, the State filed a petition for the involuntary termination of William's and Leesa's parental rights. The petition alleged that termination was justified based on Sarah's continuous status as a child in need of protection or services (CHIPS) pursuant to § 48.415(2), STATS.

The initial appearance was held on December 17, 1997. The juvenile court continued the hearing in order to permit Leesa and William to retain attorneys. On December 30, 1997, William, without counsel, and Leesa, by her attorney, appeared before the court requesting a jury trial. At a status conference held on February 10, 1998, the court granted an adjournment because William had not yet obtained an attorney. An additional adjournment of the jury trial was granted on March 11, 1998, in order to allow William's attorney to prepare his case.

A two-day jury trial commenced on April 14. Prior to jury selection the parties and the juvenile court conferred in chambers off the record regarding jury selection. Thereafter, the juvenile court recited on the record an understanding which the parties and the court had reached regarding peremptory strikes. The court stated that the parties had agreed to two strikes each to the County, the guardian ad litem, William and Leesa. All parties confirmed their agreement to this understanding.

The jury returned a verdict finding that grounds existed for terminating the parental rights of Leesa but not William. The Manitowoc County Department of Social Services then filed a report recommending the termination of Leesa's parental rights. The juvenile court held a dispositional hearing on May 15, 1998, at which time it ordered the termination of Leesa's parental rights. A written order was entered on May 29, 1998.[1]

On August 19, 1998, Leesa moved for a new trial. Leesa argued that the juvenile court had erroneously deprived her of her fundamental right to three peremptory challenges during jury selection pursuant to § 805.08(3), STATS., which provides that if there is more than one defendant, the trial court may grant three peremptory challenges to each defendant if their interests are adverse. In the alternative, Leesa argued that her trial counsel was ineffective for agreeing to the juvenile court's suggestion regarding the allocation of the peremptory strikes.

The juvenile court held a ***Machner*** hearing on Leesa's motion on September 9, 1998. Thereafter, the court rejected Leesa's motion in a written order entered on September 24, 1998. The court found that "the actions of [trial counsel] in accepting the trial court's offer to give two peremptory strikes to each parent, the county and the guardian ad litem, did not constitute plain error, nor did they constitute ineffective assistance of counsel." Leesa appeals.

[1] Leesa filed a notice of intent to appeal that same day. Her notice of appeal was filed on July 30, 1998. Leesa's appellate counsel subsequently withdrew due to a conflict of interest. Leesa's newly appointed counsel reviewed the case and filed a motion with this court for an order remanding the case to the trial court to hold a ***Machner*** hearing on Leesa's claim of ineffective assistance of counsel. We granted Leesa's motion to remand in an order dated August 14, 1998.

Leesa first contends that the juvenile court erred in allocating the peremptory challenges. Section 805.08(3), STATS., governs the allocation of peremptory challenges in civil cases. It provides in relevant part:

> Each party shall be entitled to 3 peremptory challenges …. The parties to the action shall be deemed 2, all plaintiffs being one party and all defendants being the other party, except that in case where 2 or more defendants have adverse interests, the court, if satisfied that the due protection of their interests so requires, in its discretion, may allow peremptory challenges to the defendant or defendants on each side of the adverse interests, not to exceed 3.

Section 805.08(3). Leesa contends that because she and William had adverse interests at trial, they were each entitled to three peremptory strikes. However, we conclude that Leesa's trial counsel waived this issue for purposes of appeal.

Prior to voir dire, the juvenile court discussed the allocation of challenges with the parties. The court stated: "Under the circumstances, where we have two parents and we have the guardian ad litem taking an active part in the proceedings, I would suggest in fairness to both sides and the individual interests that we have two strikes per client." All parties, including Leesa's trial counsel, expressly stated their agreement to the trial court's suggestion. We therefore deem this issue waived. *See* ***Preuss v. Preuss***, 195 Wis.2d 95, 105, 536 N.W.2d 101, 105 (Ct. App. 1995) (issues not raised before the trial court are generally waived).

Next, we turn to Leesa's contention that her trial counsel's failure to object to the juvenile court's allocation of peremptory challenges constituted ineffective assistance of counsel. As an initial matter, we note that Leesa's argument on this issue is inadequately briefed. The argument consists of a four-line paragraph which simply asserts the right to effective assistance of counsel, and a second five-line paragraph which simply asserts that it was "plain error" for

the court to allocate the strikes in the manner it did given the adverse interests of William and Leesa. Although we may decline to review an issue which is inadequately briefed, *see* ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992), we nevertheless address Leesa's argument on the merits.

We review a claim of ineffective assistance of counsel de novo. *See* ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 715 (1985). In order to prevail on a claim of ineffective assistance of counsel, a party must show that his or her counsel's performance was deficient and that he or she was prejudiced by counsel's unprofessional errors. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***Pitsch***, 124 Wis.2d at 633, 369 N.W.2d at 714. To establish deficient performance, the defendant must show that counsel's acts or omissions were "outside the wide range of professionally competent assistance." *See* ***Strickland***, 466 U.S. at 690. Leesa has failed to do so.

At the ***Machner*** hearing, Leesa's trial counsel testified that he did not view William's and Leesa's positions to be adverse as to the termination of their parental rights. Each argued that the County did not have sufficient grounds to support the individual petitions filed against them. Neither presented evidence or arguments to the jury as to whether the petition against the other was justified. As the juvenile court observed, William and Leesa "did not point the finger at the other" in arguing against the termination of his or her parental rights.

Leesa argues on appeal that "[a]lthough both wished that the termination of parental rights petition as to each of them would be dismissed, it was also in their interests to have the parental rights of the other parent terminated to avoid competition for custody of Sarah G. in the event the petition was dismissed as to each party." However, in so arguing, Leesa has not pointed us to,

nor have we found, any evidence or testimony in the record relating to Sarah's future placement should the petitions have been dismissed. And, as the juvenile court aptly noted, any discussion as to placement would have been outside the scope of the termination hearing.

Leesa's trial counsel also testified, and the record confirms, that he worked with William's attorney "quite often on defending the case." Further, Leesa's attorney testified: "[W]e had to make a strategic decision … about the strikes…. We ended up with four strikes, we might have had three, if we did it differently." Counsel's concerns were justified as § 805.08(3), STATS., commits the allocation of peremptory strikes to the trial court's discretion. At the ***Machner*** hearing, the juvenile court stated: "Under the circumstances, the court could have, if asked, said … the defendants, who do not have adverse interests under these circumstances, have three peremptory challenges that they can split as they see fit." When the record shows that trial counsel made a strategic decision based on the facts and the law which is reasonable under the circumstances, we do not second-guess that decision. *See* ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983).

Based on our review of the record, we conclude that Leesa and William did not have adverse interests with respect to the County's petitions for the termination of their parental rights such that trial counsel's agreement to the juvenile court's allocation of peremptory strikes constituted deficient performance. In the absence of sufficient evidence supporting Leesa's claim that her interests were adverse to William's as to the termination of their parental rights, we cannot conclude that counsel's performance fell below an objective standard of reasonableness. *See* ***Strickland***, 466 U.S. at 688.

We therefore reject Leesa's claim of ineffective assistance of counsel. We affirm the juvenile court order for the termination of Leesa's parental rights and the order denying her motion for a new trial.

By the Court.—Orders affirmed.

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