COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

Nos. 00-0270, 00-0271, 00-0272

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

NO. 00-0270

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

NEUNG S.,

RESPONDENT-APPELLANT.

NO. 00-0271

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

NEUNG S.,

RESPONDENT-APPELLANT.

NO. 00-0272

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

NEUNG S.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Neung S. appeals orders terminating her parental rights to her three children[2] and an order denying post-verdict relief. She claims that her trial counsel was ineffective for failing to move for a directed verdict and dismissal based upon Brown County's failure to prove that its department of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d). All references to the Wisconsin Statutes are to the 1997-98 version.

[2] A separate written order terminating Neung's parental rights was entered for each child.

human services was ordered to provide specific services to Neung.[3] She further claims ineffective assistance because her attorney failed to object to the County's allegedly improper argument.[4] This court holds that a reasonable jury could determine from the trial exhibits those court-ordered services the County was required to reasonably attempt to provide to Neung. Further, the County's counsel's brief and measured remarks during rebuttal argument were made in response to those Neung's attorney made and were therefore permissible under the "invited reply" or "measured response" rule. The trial court's orders are affirmed.

FACTS

¶2 Neung was arrested for robbery and substantial battery. The police permitted her to call a family friend, who arranged to have Neung's children picked up from Neung's residence.[5] Neung was unable to post bail and therefore remained incarcerated during the pendency of her case. As a result of her incarceration, a CHIPS action under WIS. STAT. § 48.13 was filed. A dispositional order was entered on November 6, 1998, as to each of her children. Each order contained the following conditions for the return of the children to the home:

> The conditions/rules placed upon the mother, Neung S[] …:

[3] At one point in Neung's brief, she also contends that the County failed to prove that it provided services to her. Because her argument consists of no more than positing the proposition, it is insufficiently developed to be addressed on appeal. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (This court declines to consider undeveloped arguments.).

[4] In Neung's statement of issues, she also claims that counsel was ineffective for failing to request a curative instruction or mistrial in response to the rebuttal argument. In her argument, however, she focuses on counsel's failure to object, speculates that an objection would have led to a curative instruction, and omits any mention of mistrial.

[5] The children continue to reside with this friend and her husband.

> In order for the children to be reunited with Neung, she shall demonstrate the following for a minimum period of six months:
>
> 1. The pending criminal charge shall be resolved through the Criminal Court process. Neung shall be released from jail and/or prison, and shall not face any further incarcerations. There shall be no further law violations.
>
> 2. Neung shall provide a stable home environment for her children:
>
> A. She shall have suitable housing.
>
> B. She shall have a financial ability to provide for her children's needs.
>
> C. She shall have appropriate and responsible caretakers for her children while at her employment.
>
> 3. Neung shall participate in and successfully complete a parenting course approved by the Brown County Human Services Department.
>
> 4. Neung shall demonstrate an ongoing ability to meet the medical, physical, and emotional needs of her children.
>
> 5. Neung shall participate in a visitation arrangement through the Brown County Human Services Department and with the foster parents.
>
> 6. Neung shall ensure that the children are enrolled in school and is knowledgeable of her children's progress in the school setting.
>
> 7. Neung shall cooperate with the Brown County Human Services Department, which includes, but is not limited to, signing the necessary releases of information. She shall keep the Department social workers informed of any changes in her circumstances that relate to the children.
>
> Throughout the duration of the Dispositional Order, Neung shall participate with the conditions of the Dispositional Order.

¶3 Neung was ultimately convicted and, on March 23, 1999, was sentenced to prison. Neung was first eligible for parole on August 6, 2000, and her mandatory release date is in December 2003. She is also subject to an Immigration and Naturalization Service (INS) detainer. When released from prison, the INS will take Neung into custody and conduct a deportation hearing.

¶4 On July 26, 1999, the County filed the termination proceedings against Neung and the children's father,[6] alleging that the children continued to need protection and services. Specifically, it contended that Neung had failed to meet the conditions in the CHIPS order necessary for the children to be returned to her, the County had made reasonable efforts to provide court-ordered services and it was unlikely that Neung could satisfy the conditions in the next twelve months. *See* WIS. STAT. § 48.415(2)(a).[7]

¶5 In October 1999, a jury trial was held on the termination petitions. Neung conceded she had not met and could not meet the dispositional order

[6] The father's rights were terminated by default when he failed to appear in the action.

[7] WISCONSIN STAT. § 48.415(2)(a) provides:

> Continuing need of protection or services. Continuing need of protection or services, which shall be established by proving any of the following:
>
> (a)1. That the child has been adjudged to be a child or an unborn child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).
>
> 2. a. In this subdivision, " reasonable effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case.
>
> b. That the agency responsible for the care of the child and the family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court.
>
> 3. That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.

conditions while incarcerated. The jury also heard other continuing concerns predating Neung's incarceration that resulted in the department's involvement with her.[8] Further, the County's witnesses testified that because Neung was incarcerated, the County was only able to offer visitation and case management services. It did, however, maintain contact with Neung throughout the CHIPS orders' duration, including regular contact with her prison social worker, and assisted with visitation.

¶6 During the jury instruction and verdict conference, Neung's attorney did not object to the proposed verdict form. Question number two asked whether the County made a reasonable effort to provide the services ordered by the court. Neung claims in her brief that:

> Evidence was introduced in support of the petitions, including the original CHIPS placement order for each child. None of those documents contained an order for the department to provide specific services to appellant. No testimony was introduced that any of these orders directed the provision of specific services, or what specific services the department was ordered to provide.

¶7 Neung's counsel did not move the court to direct a verdict against the County with respect to question two. Rather, her attorney pursued a defense that the County's efforts were not reasonable because they were minimal.

¶8 During deliberations, the jury sent a note to the judge inquiring as to what services the County was to perform. The court responded that the CHIPS court ordered that Neung comply with the conditions set forth in exhibits one, two

[8] These included, but were not limited to, Neung's ability to provide proper parenting skills in the areas of nutrition, dental hygiene, medical care and supervision.

and three (previous CHIPS orders) and that services would have to be provided to meet those conditions.[9]

¶9 The jury concluded that the County had established the alleged termination grounds. At the dispositional hearing, the trial court terminated Neung's parental rights. As part of the appeal process that Neung instituted shortly after the termination orders were entered, the court held a post-verdict ***Machner***[10] hearing on Neung's claim that her trial counsel was ineffective. The court denied the post-verdict motion, for reasons given below.

ANALYSIS

¶10 A parent subject to a parental rights termination proceeding has the right to effective assistance of counsel. *See* ***In re M.D.(S)***, 168 Wis. 2d 995, 1002, 485 N.W.2d 52 (1992). To prevail on an ineffective assistance claim, a parent must demonstrate that counsel's representation was both deficient and prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). To prove deficient performance, the parent 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." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (citing ***Strickland***, 466 U.S. at 687). Failure to pursue matters that lack merit is not deficient performance. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (trial counsel was not ineffective "for failing or refusing to pursue feckless arguments").

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[9] Neung states that trial counsel did not object to the court's response, even though it "did not directly answer the jury's question." She does not, however, specifically claim ineffective assistance as a result of this omission.

[10] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶11 On appeal, the trial court's factual findings will be upheld unless they are clearly erroneous. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether the evidence satisfies either the deficiency or prejudice prong is a question of law that this court reviews de novo. *See* ***id.***

A. DIRECTED VERDICT

¶12 Neung claims that her trial counsel was ineffective for failing to recognize that the CHIPS orders introduced into evidence did not specify the services the County was to provide and for thus not requesting the trial court to answer question two against the County. The trial court held at the post-verdict motion hearing that the exhibits identified the conditions Neung was required to satisfy and that those conditions by implication identified the services the County was to provide. On appeal, the County advances this same argument with regard to services not expressly identified and argues that other services *are* explicitly ordered.[11]

¶13 This court agrees that a reasonable jury could determine from the trial exhibits what court-ordered services the County was required to make a reasonable effort to provide. First, not all of the conditions placed upon Neung under the dispositional order necessarily involve services. As seen above, many place the onus directly upon Neung. For example, she was ordered not to violate the law, to see to her children's education needs and to provide responsible caretakers. Beyond that, however, the County was expressly required to provide a course addressing parenting skills, visitation services, and supervision. To the

[11] The County also advances five other arguments or sub-arguments. Because this court concludes that a reasonable jury could determine from the trial exhibits the services the County was ordered to make a reasonable effort to provide, it need not address the remaining arguments.

extent other conditions place the initial burden upon Neung to comply and, in the County's judgment, she was not succeeding, then by implication it was required to assist Neung. These areas might include services relating to home suitability and stability and financial responsibility.

¶14 Finally, Neung's attorney's performance was not defective because the exhibits sufficiently identified the services the County had to make a reasonable effort to provide. Therefore, Neung's attorney had no basis to move for a directed verdict as to question number two. *See* ***State v. Toliver***, 187 Wis. 2d at 360.

B. IMPROPER ARGUMENT

¶15 Neung contends that the County's rebuttal argument was improper because it was a "blatant appeal" to the jury's sympathies, it attempted "to feed the jury information regarding the effect of their answers" and it was unsupported by the evidence.[12] She claims that her trial counsel was ineffective because he did not object to the improper argument. Had counsel done so, Neung opines that it would have led to a curative instruction to ignore the improper argument. This court rejects the contention that the rebuttal argument was improper. Accordingly, counsel had no basis upon which to object and was therefore not ineffective.

¶16 During both his opening statement and closing argument, Neung's attorney referred to the possibility that Neung would be deported. He informed the jury in his opening statement that Neung would be involved in an immigration

[12] Without this court elaborating, suffice it to say that the County's brief points to the record to dispel this last basis. Further, the trial court found at the post-verdict motions hearing that there was sufficient evidence to support the rebuttal argument. This court will therefore not address the contention further.

hearing and suggested that her chance of being permitted to stay in this country would be improved if her parental rights were not terminated. In his closing argument, Neung's attorney asserted that allowing Neung to keep her children would provide her with a basis for arguing against deportation. At the post-verdict motions hearing, the trial court characterized these statements as an intentional strategy to appeal to the jury's sympathy.

¶17 The entire substance of the County's rebuttal was as follows:

> Mr. Froelich … made an argument to you that … [Neung] has a good argument to stay in the United States if she has her children, although there was no testimony, whatsoever, in that regard. Later he argued that the children deserve to be with their mother. If you think about it, do the children deserve the potentiality of being deported with their mother because of her actions? I hope not, and I hope you will answer yes to all the questions. Thank you.

¶18 The trial court ruled that the rebuttal argument was proper because Neung invited it. Under the "invited reply" or "measured response" rule, courts in criminal cases have refused to reverse convictions where prosecutors have responded reasonably in closing argument to defense counsel's attacks, thus rendering it unlikely that the jury was misled.[13] That is, where the defendant's argument "clearly invited and provoked the remark of the prosecutor [and] the

[13] For example, in ***State v. Edwardsen***, 146 Wis. 2d 198, 430 N.W.2d 604 (Ct. App. 1988), the defendant objected to the prosecutor commenting on his failure to testify, a violation of his constitutional right against self-incrimination. ***Id.*** at 212. The court of appeals upheld the conviction, noting that the defendant, in his own argument, had suggested a reason for his silence. ***Id.*** at 214. The court concluded that "[i]n the instant case, the prosecution's comment constituted no more than a pertinent and measured reply to defendant's calling attention to his own failure to testify. As such, the comment did not violate constitutional prohibitions safeguarding defendant's right to remain silent." ***Id.*** at 215.

appellant cannot complain because his argument backfired." ***State v. Yancey***, 32 Wis. 2d 104, 116, 145 N.W.2d 145 (1966).[14]

¶19 The court of appeals recognized in ***State v. Wolff***, 171 Wis. 2d 161, 168, 491 N.W.2d 498 (Ct. App. 1992), that the implied response rule is not "black[]and[]white." An invited argument or comment "does not invariably compel the conclusion that it can never be considered error." ***Id.*** at 168-69. The issue is whether the prosecutor's invited response, taken in context, unfairly prejudiced the defendant. *See* ***id.*** at 169. If the prosecutor's remarks were "invited" and merely a measured response to "right the scale," such comments would not warrant reversal. *See* ***id.*** This court concludes that is the case here.

¶20 The County's remarks were indeed invited by Neung's strategy to use the specter of her deportation to evoke jury sympathy. The rebuttal argument merely pointed out the corollary that if Neung's parental rights were not terminated, the children, as well as Neung, may face deportation. This constituted a brief, pertinent and measured response that was not, given Neung's strategy, unfairly prejudicial. *See* ***State v. Edwardsen***, 146 Wis.2d 198, 215, 430 N.W.2d 604 (Ct. App. 1988). Because the County's rebuttal argument was proper, Neung's attorney was not ineffective when he had no basis upon which to object to the argument. *See* ***Toliver***, 187 Wis. 2d at 360.

[14] As the County points out in its brief, a rule articulated in criminal cases "should be as favorable to Neung's claim as any other." This is because termination of parental rights proceedings are civil in nature, *see* ***In re J.A.B.***, 153 Wis. 2d 761, 765, 451 N.W.2d 799 (Ct. App. 1989), and higher standards apply to criminal than to civil cases. Compare, for example, the "high criminal standard of proof" to the general civil burden: "to a reasonable certainty by evidence that is clear, satisfactory and convincing." *See* ***State v. Hanson***, 100 Wis. 2d 549, 558, 302 N.W.2d 452 (1981).

By the Court.—Orders affirmed.

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