COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2010AP1172
2010AP1173

Cir. Ct. Nos. 2008TP123
2008TP125

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

2010AP1172
IN RE THE TERMINATION OF PARENTAL RIGHTS TO CHAYANNE A. N.,
A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

LAURA E. N.,

RESPONDENT-APPELLANT.

2010AP1173
IN RE THE TERMINATION OF PARENTAL RIGHTS TO JAYLYNN J. N.,
A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

LAURA E. N.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: STEVEN D. EBERT and AMY SMITH, Judges. *Affirmed*.

¶1 VERGERONT, J.[1] Laura E.N. appeals the circuit court's orders terminating her parental rights to her daughters, Chayanne N., born July 6, 2000, and Jaylynn N., born July 20, 2001. She contends: (1) the circuit court erroneously excluded evidence that Laura was caring for her sixteen-month-old son; (2) the circuit court erroneously admitted hearsay testimony on her daughters' sexualized behaviors; and (3) her trial counsel was deficient for not requesting a new psychological evaluation for Laura and her daughters, not calling expert and other witnesses to testify on Laura's behalf, and not substantiating Laura's claim that she was on prescription drugs at the time she tested positive for opiates.

¶2 For the reasons we explain below, we conclude that none of these challenges entitle her to a reversal of the circuit court's orders terminating her parental rights. Accordingly, we affirm both orders.

BACKGROUND

¶3 On December 23, 2008, the Dane County Department of Human Services filed petitions seeking to terminate Laura's parental rights (TPR

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

petitions) to her two daughters, pursuant to WIS. STAT. § 48.415(2)(a).[2] The TPR petitions alleged that both girls had been adjudged to be children in need of protection or services (CHIPS) and had been placed outside the parental home pursuant to the prescribed court orderssince November 30, 2006.

[2] WISCONSIN STAT. § 48.415 provides as follows:

> Grounds for termination of parental rights shall be one of the following:
>
> ….
>
> (2) 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 9-month period following the fact-finding hearing under s. 48.424.

¶4 The CHIPS orders for each child were initially entered in Iowa County, where Laura then resided. Each order made a finding that "it is contrary to the children's welfare to remain in their parents' home due to concerns of ongoing neglect, exposure to pornographic material, exposure to drug use, drugs in the home and drug paraphernalia in the home." Among the conditions for return for Chayanne was that she participate in therapy, including "sex offender-specific therapy … to be followed by sexual victimization therapy services." For Jaylynn, one condition was that she participate in therapy including sexual victimization therapy. Neither child was "to be left alone with her sister or other same-age or younger children without responsible adult supervision." Other conditions included that Laura abstain from illegal drug use and participate in random urine screening, parenting education, and therapy, and that she be able to "demonstrate an understanding of how her behaviors and parenting choices thus far have negatively impacted her children."

¶5 In December 2007, venue was transferred to Dane County and CHIPS orders were issued by the Dane County Circuit Court in April 2008. These orders included nineteen conditions Laura would have to meet in order to have the children returned to her.

¶6 The TPR petitions alleged that Laura had failed to meet six of the conditions, despite services provided by the Department, and that there was a substantial likelihood she would not meet these conditions within the nine months following the fact-finding hearing on the petitions. The six conditions were:

> [1] Have a safe, suitable and stable home and legal source of income.
>
> ….

> [2] Show that you can care for and control your children properly and that you understand their needs.
>
> [3] Stay in touch with and cooperate with your social worker….
>
> [4] Complete any programs/services recommended by your social worker unless the Court otherwise orders.
>
> ….
>
> [5] Use no illegal drugs or alcohol. Do not abuse prescription drugs.
>
> ….
>
> [6] Laura will give a urine sample for a drug and alcohol test if she is asked to do so. Any failure or refusal to give a urine sample will be considered a positive test by the Court [and] your social worker.

The TPR petitions requested termination of Laura's parental rights in order to allow the children to be adopted by relatives with whom they had been living since being removed from Laura's home in 2006.

¶7 Laura requested a jury trial for the fact-finding hearing pursuant to WIS. STAT. § 48.422. Shortly before the trial, each party filed motions in limine. The court made two rulings relevant to this appeal. First, the court excluded testimony about Laura's sixteen-month-old son, who lived with her and was not under a CHIPS order. Second, the court allowed social workers' testimony based on reports regarding the girls acting out sexually, with a warning that the court did not want this to become the focus of the trial.

¶8 At trial there was testimony about Laura's continued drug use and failed or missed drug tests. Consistent with the pretrial ruling, there was evidence about the children's acting out sexually and about Laura's termination from the reunification program because she was resistant to a recommendation on how to

address this and, more generally, because she was not able to understand her daughters' needs. Laura did not dispute most of the Department's testimony. She testified that her children were important to her and that she would like more time to work on the things she needed to do to have her children returned.

¶9 The jury was given four special verdict questions for each child. The first—whether each had been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law—was answered "yes" by the court. The jury answered "yes" to these three questions: (1) Did the Department make a reasonable effort to provide the services ordered by the court? (2) Has Laura failed to meet the conditions established for the safe return of each child to Laura's home? (3) Is there a substantial likelihood that Laura will not meet these conditions within the nine-month period following the conclusion of the hearing? After a dispositional hearing, the court issued orders terminating Laura's parental rights to both girls.

¶10 Laura filed a motion for postdisposition relief alleging that trial counsel was ineffective for failing to request new psychological examinations for Laura and the children, to call expert witness therapists, and to present evidence that Laura was taking prescription drugs at the time she tested positive for opiates. After a hearing, the circuit court concluded that trial counsel was not ineffective.[3]

DISCUSSION

[3] Laura's postdisposition motion also asked the circuit court to reconsider its two evidentiary rulings. The court concluded these could be presented directly to this court.

¶11 On appeal Laura contends the circuit court erred in excluding evidence about her son and in admitting evidence on her daughters' sexual acting out. She also challenges the circuit court's conclusion that her trial counsel was not ineffective. We conclude that none of Laura's arguments entitle her to a reversal of the TPR orders.

I. Evidentiary Rulings

¶12 The admissibility of evidence is generally addressed to the discretion of the circuit court. ***State v. Peters***, 166 Wis. 2d 168, 175, 479 N.W.2d 198 (Ct. App. 1991). We affirm discretionary decisions if the court applied the correct law to the facts of record and the decision is reasonable. ***La Crosse County DHS v. Tara P.***, 2002 WI App 84, ¶6, 252 Wis. 2d 179, 643 N.W.2d 194. However, the application of the hearsay rules in WIS. STAT. §§ 908.01 and 908.03 to undisputed facts presents a question of law, which we review de novo. ***Peters***, 166 Wis. 2d at 175.

A. Exclusion of Evidence on Laura's Son

¶13 Laura sought to admit evidence that her sixteen-month-old son lived with her and that the Department had not amended the CHIPS petitions concerning her daughters to include her son. This shows, she asserts, that the Department believed she was adequately caring for him, and this is relevant to her ability to meet the conditions for return within nine months of the fact-finding hearing. The Department's counsel argued to the court that the son's father was not the father of the girls and was living with Laura. According to the guardian ad litem, if Laura testified about caring for her son, that would permit testimony from the social workers that the son's father was the primary caretaker, that Laura has struggles in caring for him, and that her son would probably not be in her home if his father

did not live there, too. The court decided to exclude testimony about Laura's son because it was not relevant and it would lead to confusion.[4]

¶14 Laura argues that the court's ruling is apparently contradictory because the court says the evidence is not relevant and then the court cites to the confusion ground of WIS. STAT. § 904.03, a section that permits the exclusion of relevant evidence. We do not agree that the court contradicted itself. We understand the court to be making alternative rulings: the evidence is not relevant and, even if it is, its probative value is substantially outweighed by the danger of confusion of the issues.

¶15 We conclude the circuit court properly exercised its discretion. The circuit court could reasonably view evidence of Laura's care of her son as not relevant to whether she can meet the conditions for return of her daughters within nine months. According to the Department's representations at the motion hearing, Laura's son's father lives with them and is the primary caretaker. How Laura parents in that context does not tend to make it more probable that she will be able to meet conditions for return relating to her drug use and her daughters' needs. *See* WIS. STAT. § 904.01 (defining "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to

[4] The court referred to WIS. STAT. § 904.03, which provides:

> Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although 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.

the determination of the action more probable or less probable than it would be without the evidence").

¶16 Alternatively, assuming there is some relevance, the circuit court could reasonably decide, as it did, that any probative value would be substantially outweighed by confusion of the issues. Laura's assertion that the Department presented no proof at the motion in limine of the son's father's role in caring for their son and that this could be explored at trial demonstrates that there would likely be a dispute over Laura's role and her boyfriend's role in caring for their son.[5] In addition, the Department's witnesses would then be testifying on their view of Laura's care of her son and why they have not filed a CHIPS petition with respect to her son, issues that at best are tenuously related to whether Laura can meet the conditions for return of her daughters within nine months.

B. Admission of Testimony on the Children's Sexualized Behavior

¶17 Laura objected to any testimony of the children's sexualized behavior on the ground that it was hearsay, since none of the witnesses who observed any such behavior were going to be testifying. She also objected on the ground that the psychologists who diagnosed the children in this regard were not going to be witnesses, and the social workers who were going to testify using their reports were not experts in this area. In allowing this evidence, the circuit court stated that under WIS. STAT. § 48.299(4)(b)[6] hearsay evidence may be admitted at

[5] Laura also asserts that there was no proof at the motion in limine hearing that the man Laura was living with was the father of her son. This is perplexing because Laura herself testified: "I live with my boyfriend and *our* son." (Emphasis added.)

[6] WISCONSIN STAT. § 48.299(4)(b) provides:

(continued)

a hearing under ch. 48 if it has demonstrable guarantees of trustworthiness. The court also reasoned that the reports would be admissible as the basis for an expert opinion and as the explanation for why the social workers made the recommendations they did in reliance on the reports. Although the court considered the evidence relevant and admissible, it emphasized to the Department's attorney that it would be admitted "to a limited degree" so as not to take up needless time, confuse the jury, and turn the trial into "a sexual trial."

¶18 On appeal Laura contends that the court erroneously applied WIS. STAT. § 48.299(4)(b) and should instead have applied § 48.299(4)(a), under which chapters 901 to 911 govern the presentation of evidence at this type of a hearing—a fact-finding hearing under § 48.42.[7] Laura also challenges the court's ruling that evidence on the children's sexualized behavior might be admissible as the basis

---

> Except as provided in s. 901.05, neither common law nor statutory rules of evidence are binding at a hearing for a child held in custody under s. 48.21, a hearing for an adult expectant mother held in custody under s. 48.213, a runaway home hearing under s. 48.227(4), a dispositional hearing, or a hearing about changes in placement, revision of dispositional orders, extension of dispositional orders or termination of guardianship orders entered under s. 48.977 (4)(h)2. or (6) or 48.978 (2)(j)2 or (3)(g). At those hearings, the court shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony or evidence that is inadmissible under s. 901.05. Hearsay evidence may be admitted if it has demonstrable circumstantial guarantees of trustworthiness. The court shall give effect to the rules of privilege recognized by law. The court shall apply the basic principles of relevancy, materiality and probative value to proof of all questions of fact. Objections to evidentiary offers and offers of proof of evidence not admitted may be made and shall be noted in the record.

[7] WISCONSIN STAT. § 48.299(4)(a) provides: "Chapters 901 to 911 shall govern the presentation of evidence at the fact-finding hearings under ss. 48.31, 48.42, 48.977(4)(d) and 48.978(2)(e) and (3)(f)2."

for expert opinion or the social workers' recommendations. Finally, it appears Laura is contending the evidence is not relevant.

¶19 The Department does not dispute that the court erroneously applied WIS. STAT. § 48.299(4)(b) and should instead have applied § 48.299(4)(a). We take as an implicit concession that the circuit court relied on the wrong subsection. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 279 N.W.2d 493 (Ct. App. 1979). We accept the implicit concession because it comports with the statutory language.

¶20 The Department contends, however, that evidence of the children's sexualized behavior is admissible under WIS. STAT. ch. 908, which governs hearsay, and, in addition, may be used as a basis for the social workers' expert testimony under §§ 907.02 and 907.03. Laura did not file a reply brief and so does not dispute this. While we could take this as an implicit concession, *see* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994), we will nonetheless independently examine whether evidence on this point was admissible under ch. 908. *See* ***Peters***, 166 Wis. 2d at 175. We will review the rulings the court made on expert opinion and relevancy under the more deferential standard for discretionary decisions. *See* ***Tara P.***, 252 Wis. 2d 179, ¶6.

¶21 We conclude there was evidence of the children's sexual acting out and exposure to sexual matters that was not inadmissible hearsay. Although in her trial testimony Laura initially denied any knowledge that her children acted out sexually, in her deposition testimony, which she read at trial, she agreed that she was aware that one or both of her daughters had "engaged in some kind of sexual acting out at school or other places." Laura's prior deposition testimony is not hearsay because it is an admission by a party opponent. *See* WIS. STAT.

§ 908.01(4)(b)1.[8] In addition, Laura agreed that the social workers who had worked with her had discussed her children's "inappropriate sexual touching with each other"; and, when asked if "Rainbow is a … specialized treatment program for sexually inappropriate behaviors with kids," she answered, "Yes, that's why I put them in there." Finally, Heidi Veloon, the Dane County social worker in the reunification unit who was assigned to this case, testified to statements Laura made to her on the topic. According to Veloon, Laura referred to her own past and said that the type of sexual touching between her daughters was just a phase and not a big problem. These out-of-court statements by Laura are admissions by a party opponent. *See* § 908.01(4)(b)1.

¶22 One topic related to the children's sexualized behavior was their observation of their mother engaged in sex. Laura acknowledged that, on at least one occasion, one of the children observed her engaged in a sex act with her partner. That there was more than one occasion came from testimony of Rebecca Wetter, the Iowa County social worker who was in charge of the children's CHIPS cases for the first year. Wetter testified concerning Laura's statements to her about the children observing their mother engaging in sexual conduct. *See* WIS. STAT. § 908.01(4)(b)1. According to Wetter, Laura acknowledged that the

[8] WISCONSIN STAT. § 908.01(4) provides, in pertinent part:

> Statements which are not hearsay. A statement is not hearsay if:
>
> ….
>
> (b) Admission by party opponent. The statement is offered against a party and is:
>
> 1. The party's own statement, in either the party's individual or a representative capacity ….

children observed her "at different times … engaged in different sexual acts" when they walked out into the living room where Laura and her partner slept. Laura also acknowledged that this "lack of boundaries had affected the [children] in a negative way."

¶23 Another topic related to the children's sexualized behavior was pornography in Laura's house. As already noted, the Iowa County CHIPS orders for each child made a finding that "exposure to pornographic material" was one of the grounds for removing the children from Laura's home. Laura did not appeal that order. We agree with the Department that this is a factual finding within WIS. STAT. § 908.03(8),[9] In the absence of any argument by Laura of untrustworthiness that would remove it from this exception, we conclude it is admissible. In addition, Wetter testified that on one of her visits she saw a large stack of pornographic magazines on the floor in the living room, a room the children had access to. This is based on her personal observations and is not hearsay. *See* § 908.01(3) ("'Hearsay' is a statement, other than one made by the declarant while

[9] WISCONSIN STAT. § 908.03(8) provides:

> Hearsay exceptions; availability of declarant immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ….
>
> (8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

¶24 There was also testimony by Veloon that she recommended to Laura that the children sleep in separate bedrooms, that Laura was resistant to this, and that Laura's inability to understand the children's needs resulted in terminating her from the reunification program. Veloon testified that this recommendation came originally from the children's therapists in Iowa County and was based on the children's sexualized behavior. Veloon testified that, in deciding to adopt the recommendation, she considered the reasons given by the therapists, the children's psychological evaluations, the CHIPS orders issued by the Iowa County circuit court and the feedback she was regularly receiving from the children's care providers. This, she testified, was consistent with her common practice in handling her cases. At the time of trial, Veloon had been employed as a social worker by the Department for seventeen years and had been in the reunification unit for nine years. She has a B.A. in psychology.

¶25 The Department argues that Veloon is qualified as an expert in the field of social work under WIS. STAT. § 907.02 and that under § 907.03 expert witnesses are permitted to rely on "facts or data" that are not admissible evidence in forming their opinions, if they are of a type "reasonably relied upon" in their field. § 907.03; *see also* ***State v. Watson***, 227 Wis. 2d 167, 191, 595 N.W.2d 403 (1999).

¶26 Although the circuit court did not refer to these specific statutes in its pretrial ruling, it is apparent they were the basis for its ruling that reports relating to the children's sexualized behavior might properly be the basis for expert testimony and provide an explanation for the social worker's

recommendation. Because the court was anticipating how the reports would be used based on the parties' representations, its comments are not directed specifically at Veloon's testimony. However, its denial of Laura's pretrial motion on this ground was a proper exercise of discretion given the representations made, and Veloon's actual testimony is consistent with the representations.

¶27 The circuit court's implicit conclusion that social work is a recognized field of specialized knowledge under WIS. STAT. § 907.02 is a reasonable one. *See* ***State v. Hollingsworth***, 160 Wis. 2d 883, 896-97, 467 N.W.2d 555 (Ct. App. 1991) (social worker qualified as expert to give opinion on a parent's intelligence and parenting skills by virtue of his job experience). Veloon's testimony established expertise in the particular social work area of family reunification—identifying a family's needs and coordinating the services necessary to support the children's reunification with their parent or parents—and she did not offer opinions outside of her area of expertise. As for the matters she considered in arriving at her recommendation on the children's sleeping arrangements, there is a reasonable basis in the evidence—as there was a reasonable basis in the parties' pretrial representations to the court—for the conclusion that these are proper matters of a type reasonably relied on in her field.

¶28 In short, the testimony discussed in paragraphs 21-27 was either not hearsay, or comes within a hearsay exception, or is admissible as the basis for an expert opinion. We next take up Laura's contention that the above testimony is not relevant. We conclude the court properly exercised its discretion in determining that it was relevant. It is relevant to the conditions that Laura have a safe home for the children, show that she understands their needs, and complete any programs or services recommended by her social worker—in this case, the reunification program.

¶29 More specifically, the above admissible testimony is relevant to show that Laura knew her children acted out sexually, knew she had not taken care to protect them from sexual material or her own sexual conduct, knew this had a negative effect on them, and yet she resisted the recommendation that they sleep in separate bedrooms as recommended by their therapists, by Veloon, and by all the service providers. Veloon's testimony on Laura's reasons for objecting to separate bedrooms—that it was just a phase, that they should wait and see if there was more sexual touching and deal with it then—is relevant to show that Laura does not understand her children's needs. Veloon also testified that after much discussion with Laura on this topic, Laura stated that, even though she might decide to let them have separate bedrooms now, when the Department was no longer involved, she would do what she wanted and they would share the same bedroom again. This is highly relevant because it shows that, besides not being cooperative now with the recommendations resulting from the services provided to help her children, there is little likelihood that Laura's lack of understanding her children's needs will improve within nine months.

¶30 It appears that Laura's real concern is not with the admissibility of any of the above evidence but with the testimony of specific instances of the children's sexualized behavior. Veloon testified on specific incidents that were reported by their caregivers and documented in the children's files. Another Department social worker testified on reports, also documented in the children's files, by school staff of Chayanne's inappropriately touching other children at school. Even if we assume the testimony of these specific instances was inadmissible hearsay and not proper under WIS. STAT. § 907.03, we conclude the error is harmless, meaning that there is not a reasonable possibility that the error

contributed to the jury's verdict. *See* ***Evelyn C.R. v. Tykila S***., 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768.

¶31 First, given the properly admitted testimony on the topic, including Laura's own admissions, we conclude it is unlikely that the specific incidents of sexualized behavior, which were not shocking or extreme, would have had any impact on the jury's decision. The focus of the testimony on the children's sexualized behavior was not on what they did, but on Laura's failure to understand what her children needed from her. We are satisfied that this was evident to the jury.

¶32 Second, Laura's continued illegal drug use, which was undisputed and of long standing, was a very compelling reason for the jury to decide that, despite the provision of services, Laura had not met the related conditions of return and was not likely to do so within the next nine months. She admitted to using illegal drugs approximately one hundred times (primarily marijuana) since the dispositional orders were imposed in Iowa County in March 2007. She had numerous positive drug tests for illegal drugs administered by the Department during the term of the Dane County dispositional orders, one of them shortly before the trial. She had numerous positive drug tests for illegal drugs administered by the Department of Corrections as a part of her community supervision in her criminal case for possession of a controlled substance and possession of drug paraphernalia. Although Laura testified that some of the positive drug tests for opiates were the result of legally prescribed pain medication, there was also evidence in the record that Laura was in fact abusing prescription pain medication. It was undisputed that Laura missed multiple Department drug tests, all of which were treated as positive under the terms of the CHIPS dispositional order. Given this evidence, the jury was likely persuaded by

the social worker's opinion that, "given [Laura's] long-standing drug use of over ten years, treatment in at least four intensive programs, that she has not shown an ability to stay sober for any length of time" and the social worker did not see that "changing in the near future."

II. Ineffective Assistance of Counsel

¶33 Laura asserts that her trial counsel was deficient for not requesting a new psychological evaluation for Laura and her daughters, not calling expert and other witnesses to testify on Laura's behalf, and not substantiating Laura's claim that she was on prescription drugs at the time she tested positive for opiates. After a ***Machner***[10] hearing, at which trial counsel testified, the circuit court ruled that counsel was not deficient and, alternatively, there was no prejudice.

¶34 To succeed on a claim of ineffective assistance of counsel, defendants must show that their attorney's performance was deficient and that the deficient performance prejudiced their defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). There is a strong presumption that the attorney has rendered effective assistance and made all significant decisions exercising reasonable professional judgment. ***Id.*** at 689. To meet the prejudice test, the defendant must show that there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694; ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Because the defendant must show both deficient performance and prejudice, a reviewing court may dispose of an ineffective assistance of counsel claim where the

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

defendant fails to satisfy either element. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶35 Ineffective assistance of counsel claims present mixed questions of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The trial court's findings of fact will not be disturbed unless clearly erroneous. ***Id.*** at 634. However, the determinations of whether counsel's performance was deficient and whether the defendant was prejudiced are questions of law, which we review de novo. ***Id.***

¶36 Applying these standards in this case, we conclude counsel did not perform deficiently.

A. Failure to Obtain New Psychological Evaluations

¶37 Psychological evaluations of Laura and the children were done in 2007. Trial counsel testified that, based on her experience in trying CHIPS cases, further psychological evaluation of the children would not be useful given the children's ages. Counsel also testified that she didn't see any reason for a further psychological evaluation of Laura and, in fact, had concerns that it could turn out to be worse than the prior one. The 2007 evaluation stated that Laura could not make progress on her mental health issues unless she stopped using drugs, and counsel testified that since 2007 Laura had not done so for any length of time.

¶38 The circuit court credited this testimony and concluded that counsel did not perform deficiently. We agree. Laura has presented no evidentiary basis for finding that a reasonable attorney should have known that second psychological evaluations would have had any better results for either Laura or her children. On appeal, Laura argues "it is possible" that there could have been

discrepancies between the first and a possible second psychological evaluation. However, this abstract possibility is not sufficient to overcome the presumption of reasonableness.

B. Failure to Call Witnesses on Laura's Behalf

¶39 The circuit court concluded there was no evidence presented to support Laura's claim that trial counsel was deficient for not calling expert and other witnesses to testify on her behalf. Specifically, the court found there is no evidence of testimony that was not produced that would have been helpful to Laura. We agree. Moreover, Laura's arguments on appeal do not even describe who might have been able to present helpful testimony.

C. Evidence Substantiating Laura's Testimony on the Reason for Positive Drug Tests

¶40 As already noted, at the fact-finding hearing Laura testified that some of the positive drug tests resulted from legally prescribed opiates for a severe pain condition she has. She also testified that she had not been prescribed opiates at the time of the hearing.

¶41 At the ***Machner*** hearing, counsel testified that she did bring out in Laura's testimony that she took legally prescribed opiates. When asked whether it would have been helpful to present the testimony of the prescribing physician or evidence of the prescriptions, trial counsel answered that "[i]t might have been, but the main issue was the marijuana … not prescription drug misuse." Laura did not present any evidence at the ***Machner*** hearing on when she took the prescribed opiates or how many urine tests would have tested positive as a result, nor did she present any prescriptions. The circuit court concluded that the evidence did not

establish deficient performance because the jury did hear testimony from Laura on her prescriptions for opiates. The court also concluded that, in any event, there was no prejudice from not corroborating that with other evidence because there were a lot of positive tests for marijuana, which is not an opiate.

¶42 We conclude Laura has not demonstrated deficient performance. She presented no evidence at the ***Machner*** hearing of when she was taking the prescribed opiates and how many drug tests were affected compared to the number of positive tests for marijuana. Without this evidence, it is impossible to conclude that her use of prescribed opiates was a significant enough factor in her positive test results so that trial counsel acted unreasonably in not corroborating her testimony on this point. An additional factor here is that the Department presented evidence at trial that Laura had obtained prescription medications inappropriately. Thus, in order to be effective, the corroboration of Laura's testimony would have to counter the inference that the drug test results showing opiates were the result of inappropriately obtaining the medications. Laura has not made any factual showing that such corroborating evidence exists, which is the threshold step for a claim that counsel was deficient for failing to present it.

CONCLUSION

¶43 We affirm the circuit court orders terminating Laura's parental rights to Chayanne and Jaylynn.

By the Court.—Orders affirmed.

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