COURT OF APPEALS
DECISION
DATED AND FILED

November 29, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP1198 **Cir. Ct. No. 2010TP53**

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

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

DAWN H.,

PETITIONER-RESPONDENT,

V.

PAH-NASA B.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Brown County: MARC A. HAMMER, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Pah-Nasa B. appeals an order terminating his parental rights to Cayden B. and an order denying postdisposition relief. Pah-Nasa argues his trial counsel was ineffective for failing to object to testimony concerning an argument between Pah-Nasa and his mother. Pah-Nasa also asserts the circuit court erred by not adjourning the dispositional hearing when he failed to appear. We reject Pah-Nasa's arguments and affirm.

BACKGROUND

¶2 Dawn H. gave birth to Cayden on May 2, 2002. In 2003, Pah-Nasa was adjudicated to be Cayden's father. On July 19, 2010, Dawn filed a petition to terminate Pah-Nasa's parental rights on the grounds of abandonment and failure to assume parental responsibility.[2] *See* WIS. STAT. § 48.45(1), (6)(a). Pah-Nasa contested the petition and demanded a jury trial.

¶3 On the morning of trial, the parties stipulated to fourteen time periods during Dawn's pregnancy and Cayden's life in which Pah-Nasa was incarcerated. At trial, Dawn's counsel first called Pah-Nasa as an adverse witness and elicited testimony that on September 20, 2001, the day Pah-Nasa found out Dawn was pregnant, Pah-Nasa and his mother, Bonnie P., got into an argument. Bonnie was upset Pah-Nasa had gotten Dawn pregnant. Pah-Nasa allegedly pulled a knife on Bonnie, the police were called and broke down the front door, and both Pah-Nasa and Bonnie were arrested. Dawn witnessed this incident.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The abandonment allegation was dismissed prior to trial.

¶4 Pah-Nasa then testified he was incarcerated when Cayden was born. During his incarceration, he had conversations with Dawn about Cayden. When Pah-Nasa was released in August 2002, he lived with Dawn and Cayden until he was reincarcerated in October.[3] Pah-Nasa explained that, during his release, he participated in the day-to-day parenting of Cayden. During his next period of incarceration, Pah-Nasa testified that he wrote and talked to Dawn a couple of times per month and asked about Cayden. Pah-Nasa was released in September 2004. Dawn and Pah-Nasa then terminated their relationship. Pah-Nasa was incarcerated in December 2004 and was released in November 2005. According to the stipulation between the parties, Pah-Nasa continued to be incarcerated at various times between 2006 and 2010.[4]

¶5 Pah-Nasa explained that, after he and Dawn had terminated their relationship, he had placement opportunities with Cayden at Bonnie's house. Pah-Nasa testified he last saw Cayden in December 2008[5] and last spoke with Cayden on the telephone in May 2009. He explained that for the last year and a half, Dawn did not want him to see Cayden and "rarely" returned his phone calls or messages. Pah-Nasa conceded he did not attempt to use the legal system to gain visitation even though he had used it in the past to modify child support. Pah-Nasa also admitted he was in arrears on child support, did not know where Cayden went to school, and did not know what extracurricular activities Cayden participated in.

[3] Pah-Nasa also spent a few days in jail in September.

[4] Most significantly, Pah-Nasa was incarcerated for approximately seven months in 2006-07, almost one year in 2008, and approximately two-and-one-half months in 2009.

[5] Dawn testified Pah-Nasa last saw Cayden in December 2007.

¶6 Dawn testified about Pah-Nasa and Bonnie's September 20 argument. She then testified that, during the times she resided with Pah-Nasa and Cayden, she was responsible for the day-to-day parenting of Cayden. Although Dawn conceded Pah-Nasa had changed Cayden's diaper and given him a bath, she explained that Pah-Nasa never helped pay for rent, food, medicine or other necessities and did not help with other tasks, such as scheduling doctor appointments for Cayden, getting up with Cayden in the middle of the night, or enrolling Cayden in school. She described Pah-Nasa's interactions with Cayden as that of a babysitter. Moreover, even though Pah-Nasa was available to care for Cayden, Cayden still went to daycare when Dawn was at work. Dawn explained that, although she sometimes left Cayden with Pah-Nasa, it was easier to take him to daycare because she did not have to worry about whether Pah-Nasa would show up to watch him. Finally, Dawn testified Pah-Nasa has not attended any of Cayden's doctor or dentist appointments and has only attended one school activity.

¶7 Bonnie testified Cayden had overnight visits at her house. When asked if Pah-Nasa was present during the overnights, Bonnie explained that "most of the time [she] had [Cayden] to [her]self." Bonnie, however, did testify that when Pah-Nasa was there with Cayden, she had observed Pah-Nasa care for Cayden. During cross-examination, Dawn's counsel began to question Bonnie about the September 20 incident. Pah-Nasa's counsel objected on relevancy grounds, and the court sustained the objection.

¶8 During closing arguments, Dawn's counsel argued, in part, that Pah-Nasa's relationship with Cayden never was a parental relationship. Counsel also referenced the September 20 incident. The jury found Pah-Nasa had failed to assume parental responsibility.

¶9 The court then scheduled the dispositional hearing. Dawn, who currently lives with Cayden in Iowa, informed the court she planned on attending the dispositional hearing and it would take her eight hours to travel to court. The court scheduled the dispositional hearing for February 2, 2011 at 11:00 a.m. The court informed the parties that it planned on concluding the proceeding on that date and, if necessary, would continue the hearing into the noon hour.

¶10 Pah-Nasa failed to appear for the dispositional hearing. His trial counsel moved for an adjournment, stating Pah-Nasa had left her a voicemail indicating he believed the hearing was scheduled for 2:00 p.m. Dawn objected to the adjournment, reasoning Pah-Nasa was present when the court scheduled the hearing and Pah-Nasa had also received written notice. The guardian ad litem stated he believed it was contrary to Cayden's interest to adjourn the proceeding. The court denied the request for adjournment, reasoning in part that, although the proceeding was significant, the court was "satisfied that [Pah-Nasa] had full awareness of today's proceeding." The court also based its denial upon Dawn's objection and the "recommendation of the guardian ad litem." The case proceeded to an evidentiary dispositional hearing. At the close of the evidence, the court found Pah-Nasa to be unfit and determined it was in Cayden's best interest to terminate Pah-Nasa's parental rights. Pah-Nasa filed a postdisposition motion, which the court denied following a hearing.

DISCUSSION

¶11 Pah-Nasa raises two arguments on appeal. First, he asserts his trial counsel was ineffective for failing to timely object to testimony regarding the September 20 incident. Second, he contends the circuit court erred by failing to adjourn the dispositional hearing.

I. Ineffective Assistance of Counsel

¶12 Pah-Nasa first asserts his trial counsel was ineffective for failing to object to the testimony concerning the September 20 incident. A party asserting ineffective assistance of counsel must show that his or her counsel's representation fell below an objective standard of reasonable care. ***Strickland v. Washington***, 466 U.S. 668, 687-88, 692 (1984); *see also* ***A.S. v. State***, 168 Wis. 2d 995, 1005-06, 485 N.W.2d 52 (1992) (extending the ***Strickland*** requirement to TPR cases). To prove ineffective assistance of counsel, Pah-Nasa must show both that his trial counsel's performance was deficient and that this deficient performance prejudiced his defense. *See* ***Strickland***, 466 U.S. at 687. A defendant must meet both parts of the ***Strickland*** test to prevail in his ineffective assistance claim. ***Id.*** If he fails to establish either prong of the ***Strickland*** test, we need not determine whether the other prong was satisfied. ***Id.*** at 697.

¶13 The issue in this case was whether Pah-Nasa failed to assume parental responsibility of Cayden. Failure to assume parental responsibility is established by proving the parent has not had a substantial parental relationship with the child. WIS. STAT. § 48.415(6)(a). "'Substantial parental relationship' means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." WIS. STAT. § 48.415(6)(b).

¶14 We conclude Pah-Nasa has failed to prove prejudice, namely a probability sufficient to undermine our confidence in the jury's determination. *See* ***Strickland***, 466 U.S. at 694. Regardless of Pah-Nasa and Bonnie's argument, the evidence supporting Pah-Nasa's failure to assume parental responsibility was ample. Pah-Nasa never attended a doctor or dentist appointment for Cayden and

attended only one school event. He did not know where Cayden went to school or in what extracurricular activities Cayden participated. Dawn testified Pah-Nasa never helped pay for rent, food, medicine or other necessities, and failed to schedule doctor appointments for Cayden, get up with Cayden in the middle of the night, or enroll Cayden in school. She explained Pah-Nasa was more like a babysitter than a parent. Pah-Nasa admitted he was in arrears on child support. When released from incarceration, Dawn kept Cayden in daycare even though Pah-Nasa was available to watch him. Finally, at the time of the termination proceeding, Pah-Nasa had not seen Cayden for two to three years and had not spoken to him in over a year and one half. Although Dawn failed to return certain phone calls and messages regarding visitation, Pah-Nasa, who has filed pro se motions in order to reduce child support, never attempted to use the legal system to gain visitation with Cayden. Finally, to the extent the September 20 testimony may have implied Pah-Nasa was angry or violent, Pah-Nasa testified that he knew Dawn was afraid of him because of "physical altercations" they had. The jury also heard he had been incarcerated fourteen times.

II. Denial of Adjournment

¶15 Pah-Nasa next asserts the court erroneously denied his request for an adjournment of the dispositional hearing. We review a circuit court's determination of whether to grant an adjournment for an erroneous exercise of discretion. ***State v. Leighton***, 2000 WI App 156, ¶27, 237 Wis. 2d 709, 616 N.W.2d 126. Even if the court fails to properly exercise its discretion, we will not reverse if, "after our independent review of the entire record, we can conclude that there are facts which would support the court's decision had it properly exercised its discretion." ***State v. Hines***, 173 Wis. 2d 850, 860-61, 496 N.W.2d 720 (Ct. App. 1993).

¶16 The parties agree that when determining whether to grant or deny a defendant's request for adjournment, a circuit court balances the following six factors:

> (1) the length of the delay requested; (2) whether the "lead" counsel has associates prepared to try the case in his [or her] absence; (3) whether other continuances had been requested and received by the defendant; (4) the convenience or inconvenience to the parties, witnesses and the court; (5) whether the delay seems to be for legitimate reasons or whether its purpose is dilatory; (6) other relevant factors.

Leighton, 237 Wis. 2d 709, ¶¶27-28.

¶17 Pah-Nasa contends the "court failed to exercise its discretion and consider the appropriate relevant factors in deciding whether to grant an adjournment." Specifically, he asserts the court did not balance the factors outlined in ***Leighton*** and did not consider the significance of the dispositional hearing and Pah-Nasa's right to meaningful participation.[6]

¶18 Here, even though the court did not articulate the factors outlined in ***Leighton*** when denying the adjournment request, the record supports the court's discretionary ruling. First, it appears from the record that the court's denial of the

[6] The right to "meaningful participation" in a legal proceeding relates to an individual's right to procedural due process. ***Mathews v. Eldridge***, 424 U.S. 319, 333 (1976) (The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner.). Pah-Nasa does not argue his right to due process was violated; rather, he asserts that the court should have considered his right to meaningful participation when making its discretionary determination. To the extent Pah-Nasa is raising a constitutional issue, this argument is undeveloped and we will not address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 493 N.W.2d 633 (Ct. App. 1992) (We need not address undeveloped arguments.). However, we observe that Pah-Nasa was afforded the opportunity to meaningfully participate in the proceeding—the only reason he has ever advanced for not appearing was that he did not know the correct time of the hearing. The record undermines this assertion.

adjournment was based, in large part, on the fifth ***Leighton*** factor, "whether the delay seems to be for legitimate reasons or whether its purpose is dilatory." *See* ***id.*** The only reason Pah-Nasa presented to the court for failing to attend the hearing was that he did not know the correct time. Although the court recognized "this was a significant hearing," the court, relying on the transcript from the previous hearing, observed it had twice advised the parties the dispositional hearing would be at 11:00 a.m. and that they would work into the lunch hour if necessary. The court noted it had also sent written notice about the hearing to Pah-Nasa. The record supports the court's determination that "[Pah-Nasa] had full awareness of [the] hearing." Pah-Nasa failed to present a legitimate reason for adjournment.

¶19 As for the other relevant ***Leighton*** factors, we observe that, although this was Pah-Nasa's first request for an adjournment, Dawn traveled eight hours to attend this proceeding. We reject Pah-Nasa's speculation that Dawn would not necessarily have been inconvenienced by an adjournment or that a delay would have been minimal. We conclude the court did not erroneously exercise its discretion by failing to grant an adjournment.

By the Court.—Orders affirmed.

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