COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2013

Diane M. Fremgen
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. 2012AP1693
2012AP1694

Cir. Ct. Nos. 2011TP34
2011TP35

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

GLORIA C.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

GLORIA C.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

¶1 KESSLER, J.[1] Gloria C. appeals the orders terminating her parental rights to her children T.C. and M.C. Gloria C. argues that her trial counsel was ineffective for failing to object to the testimony of her ongoing case manager when he expressed the opinion, based on her conduct in the preceding two years, that Gloria C. would not be able to meet the conditions necessary for the return of her children within nine months. We affirm.

BACKGROUND

¶2 On January 24, 2011, the State filed petitions to terminate Gloria C.'s parental rights to her two daughters, T.C. and M.C., alleging that the children were in continuing need of protection or services (continuing CHIPS) and that Gloria C. had failed to assume parental responsibility. *See* WIS. STAT. §§ 48.415(2), 48.415(6).

¶3 A fact-finding trial was held before a jury from October 24, 2011 through October 26, 2011. To prove the grounds of continuing CHIPS at the trial, the State needed to show: (1) Gloria C.'s children were previously adjudged in need of protection or services and had been removed from the home for six-months or longer pursuant to a court order containing the required warnings; (2)

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

reasonable efforts to provide court-ordered services were made; (3) Gloria C. failed to meet the conditions established for the children's return to her home; and (4) there was a substantial likelihood that Gloria C. would not meet those conditions within the nine-month period following the trial. *See* WIS. STAT. § 48.415(2)(a); *see also* WIS JI—CHILDREN 324A (2011).[2]

¶4 Multiple witnesses, including Gloria C.'s ongoing case manager, Tyler Oettinger, testified as to these factors. Oettinger stated that as a case manager, his position required working with families with existing CHIPS orders to provide services that could eventually facilitate reunification between the parents and children. Oettinger testified as to efforts made to provide court-ordered services and stated that based on his approximate two-year experience with Gloria C., he did not think she was capable of meeting the daily physical, emotional and social needs of her children. As relevant to this appeal, when asked whether he believed Gloria C. would meet the conditions necessary for the return of her children within the nine months following the trial, Oettinger stated:

> No, I do not…. Her history would reflect that she wasn't able to make the changes and providing stable housing, being able to form a budget, be consistent in visits, or meeting the full-time needs of all her kids.

(Some formatting altered.) Gloria C.'s trial counsel did not object to this testimony. The jury found that the State proved termination grounds both for continuing CHIPS and for failure to assume parental responsibility.

[2] Although Gloria C. argues that the testimony at issue could have influenced the jury as to whether she failed to assume parental responsibility, only Gloria C.'s challenge to the finding of continuing CHIPS was appealed.

¶5 Dispositional hearings were held on October 26, 2011, and on January 31, 2012. The circuit court entered orders terminating Gloria C.'s parental rights to both of her daughters.

¶6 Following the issuance of the dispositional orders, Gloria C., by appellate counsel, filed a notice of appeal requesting remand for postdisposition fact-finding on the issue of ineffective assistance of counsel.

¶7 Following our order, Gloria C. filed a postdisposition motion asserting, as relevant to this appeal, that her trial counsel was ineffective for failing to object to Oettinger's testimony pertaining to whether Gloria C. would be able to meet the conditions of her children's return within the nine months following the fact-finding trial. Gloria C. argued that Oettinger was not qualified to provide the jury with an expert opinion as to whether Gloria C. would be able to meet the conditions for her children's return. At an evidentiary hearing on the motion, Gloria C.'s trial counsel testified that she did not object because she believed that Oettinger was providing "a lay opinion" and that she did not want to give the State an opportunity to argue that Oettinger was an expert.

¶8 The circuit court denied Gloria C.'s motion, finding that trial counsel was not ineffective because:

> [T]here is no requirement that an expert testify about the fourth prong of a continuing CHIPS case.
>
> Mr. Oettinger was the person with the most factual basis to make that judgment based on his inferences of the facts, given his referrals, given the likelihood on the historical performance of the mother in regards to how those conditions were met.
>
> ….
>
> [Trial counsel] had certainly thought about objecting, … but in this case, she did not do it because she

> understood that testimony would be relevant pursuant to the inferences based on the case manager's performance of Mr. Oettinger or for that matter for any other case manager that would have substantial contact with any case.
>
> So I don't think her conduct was deficient as to that ground, either, and I don't think obviously, that the trial is not – reliability of the trial is not undermined.
>
> Having said all that, there were two grounds that were found and that was based on the mother's failure to assume parental responsibility.
>
> That is an independent ground. That ground is not affected in any of its prongs for the Jury or any of the testimony given for purposes of this motion, so it may be that it is moot.

This appeal follows.

DISCUSSION

¶9 A party asserting ineffective assistance of counsel must show that his or her counsel's representation fell below an objective standard of reasonable care; this requires proving both that counsel's performance was deficient and that the deficient performance prejudiced his or her case. ***Strickland v. Washington***, 466 U.S. 668, 687-88 (1984); *see also* ***A.S. v. State***, 168 Wis. 2d 995, 1005-06, 485 N.W.2d 52 (1992) (extending ***Strickland*** requirement to TPR cases). Ineffective assistance of counsel claims raise mixed questions of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). In reviewing such claims, we defer to a circuit court's findings of fact, but we review *de novo* questions of whether counsel's performance was deficient and prejudicial. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985); WIS. STAT. § 805.17(2) (we will not reverse findings of fact unless "clearly erroneous"). "Judicial scrutiny of counsel's performance must be highly deferential." ***Strickland***, 466 U.S. at 689.

¶10 Gloria C. argues that her trial counsel's failure to object to Oettinger's testimony was deficient performance and prejudicial. Specifically, Gloria C. contends that her trial counsel improperly believed that Oettinger's opinion as to whether Gloria C. would be able to meet the conditions of her children's future return was a lay opinion, when, in fact, Oettinger provided expert testimony that he was not qualified to provide.

¶11 Although trial counsel told the circuit court that she believed Oettinger was a lay witness, we conclude that Oettinger's testimony meets the standards for that of an expert witness. A witness qualifies as an expert based on his or her background, education and experience. *See* ***Wester v. Bruggink***, 190 Wis. 2d 308, 319, 527 N.W.2d 373 (Ct. App. 1994).[3] In termination proceedings, a social worker with proper experience in the field may testify as an expert witness as to a party's parenting skills. *See* ***State v. Hollingsworth***, 160 Wis. 2d 883, 896-97, 467 N.W.2d 555 (Ct. App. 1991). Oettinger is a licensed social worker with a Bachelor's degree in the field. At the time of Gloria C.'s trial, Oettinger had been working as an ongoing case manager for over two years. Most of that time was spent working with Gloria C. Oettinger, therefore, had specialized knowledge and expertise as to Gloria C.'s ability to meet the conditions necessary for the return of her children. Based on his work with Gloria C., Oettinger observed over two years that Gloria C. had been unable to provide stable housing, budget her finances, and make the changes necessary to meet "the full-time needs of all her kids." Based on these observations, he concluded that it was unlikely she would be able to provide all of these things within the next nine months. That conclusion

[3] In 2011, Wisconsin's expert witness statute was updated to conform with ***Daubert v. Merrell Down Pharms.***, 509 U.S. 579 (1993). *See* 2011 Wis. Act. 2, §45. Because the effective date of the amendment was after this action commenced, it does not apply.

was rationally based on facts he had observed. Because Oettinger properly qualifies as an expert witness, trial counsel did not perform deficiently by failing to object to Oettinger's testimony.

¶12 Moreover, there is no reasonable probability that the outcome of Gloria C.'s trial would have been different had her trial counsel objected to Oettinger's testimony. The record contains overwhelming evidence supporting the jury's finding that Gloria C. was unable to meet the conditions of her children's return within nine months. In addition to Oettinger, multiple other witnesses testified as to Gloria C.'s continued failure to maintain a safe and suitable home for her children. Edna Frye, who supervised Gloria C.'s visitation on behalf of The Bureau of Milwaukee Child Welfare, testified that Gloria C. often failed to provide diapers, food and a change of clothes for her children during visits. Frye also testified that Gloria C. was unable to transition from supervised visits to unsupervised visits. Phyllis Pittman, a parent aide assigned to Gloria C., testified that Gloria C. was evicted twice from her home and that Gloria C. was unable to budget her finances in a way that would allow for her children to have basic necessities.

¶13 Finally, the jury also found that Gloria C. failed to assume parental responsibility—a termination ground independent of the continuing CHIPS order. To prove the grounds of failure to assume parental responsibility, the State needed to prove Gloria C. did not have a substantial parental relationship with her children. *See* WIS. STAT. § 48.415(6)(a); *see also* WIS JI—CHILDREN 346. Although Gloria C. argues that Oettinger's testimony could have influenced the jury on this ground, she does not challenge the jury's finding that she did not have a substantial relationship with her children. Frye testified that Gloria C. missed about forty percent of her visits with her children between November 2010 and

April 2011, was unable to have unsupervised visits with her children, would often fail to provide necessities such as food and diapers when she did visit her children, and often times looked to Frye to supervise the children during the visits Gloria C. did attend. Pittman also testified that Gloria C. would miss visits with her children and seemed to struggle making decisions for them. As such, the jury would have found grounds to terminate Gloria C.'s parental rights regardless of Oettinger's testimony. Gloria C. therefore has not proven that she was prejudiced by her trial counsel's failure to object to the testimony at issue.

¶14 For the foregoing reasons, we affirm the circuit court.

By the Court.—Orders affirmed.

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