

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 27, 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. 2013AP1519
2013AP1520**

**Cir. Ct. Nos. 2012TP45
2012TP46**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

No. 2013AP1519

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO RHYLEIGH A. C.; A PERSON
UNDER THE AGE OF 18:**

WINNEBAGO COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

CHRISTINA M. C.,

RESPONDENT-APPELLANT.

No. 2013AP1520

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO NEVAEH C. B.; A PERSON
UNDER THE AGE OF 18:**

WINNEBAGO COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

CHRISTINA M. C.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Winnebago County:
DANIEL J. BISSETT, Judge. *Affirmed.*

¶1 REILLY, J.¹ The termination of parental rights follows a bifurcated procedure: the first stage is a fact-finding hearing where the focus is on the parent, *see* WIS. STAT. § 48.415; it is not until the second stage that the court considers the best interests of the children, *Waukesha Cnty. DSS v. C.E.W.*, 124 Wis. 2d 47, 60-61, 368 N.W.2d 47 (1985). Christina C. appeals from orders terminating her parental rights and denying her request for a new trial, arguing that her counsel was ineffective when he failed to object at the first stage when the best interests of the children were commented on. As the court's instructions and special verdict form given to the jury cured any prejudice, we affirm.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

BACKGROUND

¶2 The Winnebago County Department of Human Services petitioned to terminate Christina’s parental rights to Nevaeh B. and Rhyleigh C. on the ground that both children were in continuing need of protection or services, pursuant to WIS. STAT. § 48.415(2). At the fact-finding hearing, a jury heard testimony that Christina had not met the court-ordered conditions for the safe return of her children, despite services offered by the County, for the two years that both children had been outside of her home. A County social worker also testified that Christina was not likely to meet the conditions in the next year. Christina did not refute testimony that her children had been placed outside her home for more than six months after they were initially found in need of protection or services and she acknowledged that she had not met the conditions for the return of her daughters.

¶3 The court properly instructed the jury on the questions contained in the special verdict form,² following the pattern jury instructions from

² The special verdict form for each child asked jurors to answer “yes” or “no” to:

Question 1: Has [Nevaeh or Rhyleigh] 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?

...

Question 2: Did the Winnebago County Department of Human Services make a reasonable effort to provide the services ordered by the court?

...

(continued)

WIS JI—CHILDREN 324A for each of the children. The jurors were instructed that they needed to be convinced “by evidence which is clear, satisfactory, and convincing to a reasonable certainty” before answering “yes” to each of the questions and that if they were “not so convinced, you must answer no.” The court also instructed the jury that it was “not bound by the arguments of any of the lawyers.”

¶4 During closing arguments, the guardian ad litem (GAL) for Rhyleigh referred to “the best interest of the children” when he stated:

Now, we all know [children] don’t come with manuals, but at the same time, the guidance, support, and services that the Department made available for [Christina] as a result of a judge looking at the entire situation and entering a dispositional order saying these are the conditions, these weren’t something that [a County social worker] just pulled out of the sky or put her hand in the box of conditions and said, well, let’s use this one and this one. It was based upon review of the entire circumstances and the history given the needs of mom and the kids.

This is about the best interest of the children. It’s in the matter of. But when a judge reviews that—and she’s there, she was in court, she knew the conditions. She had an opportunity to talk to the Judge about them if she didn’t like [them]. That never became an issue.

The GAL later referred to the children in the context of the special verdict form:

Question 3: Has Christina [C.] failed to meet the conditions established for the safe return of [Nevaeh or Rhyleigh] to the parental home?

...

Question 4: Is there a substantial likelihood that Christina [C.] will not meet these conditions within the 9-month period following the conclusion of this hearing?

Folks, I don't think this is as difficult of a decision—it is. It's hard in that respect, you hate—I think anybody kind of hates to have to do that, but we're looking at the kids. We're looking at Rhyleigh, a two year old, with the opportunity for permanence. The answers must be yes.

The County also directed the jury's attention to the children during closing argument, stating, "Number one focus on these proceedings, as my colleagues have said, is the children. That's why we're here today. It's the children." Christina did not object to these arguments. The jury found grounds to terminate Christina's rights to both children, and the court, following the second stage that looks to the best interests of the children, ordered that Christina's parental rights be terminated.

¶5 Postdisposition, Christina moved to set aside the findings of unfitness and termination of her parental rights and requested a new proceeding on the basis that she received ineffective assistance from her trial counsel for not objecting to the GAL's and County's closing arguments. The court denied the motion after a *Machner*³ hearing, finding no error by counsel. Christina appeals.

DISCUSSION

¶6 Christina argues that she is entitled to a new fact-finding hearing due to the improper invocation of the "best interest of the children" during closing arguments. See *C.E.W.*, 124 Wis. 2d at 61. Because her trial counsel failed to preserve the issue for review by not objecting, we review her claim for ineffective assistance of counsel. See *Door Cnty. DHFS v. Scott S.*, 230 Wis. 2d 460, 467-69, 602 N.W.2d 167 (Ct. App. 1999). To succeed, Christina has to show that her

³ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

trial counsel's performance was deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Failure to prove either one of these prongs defeats her claim. *See id.* at 697. We will uphold the circuit court's findings of fact unless clearly erroneous. *State v. Carter*, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695. We review de novo whether those facts support the ultimate determination of whether counsel's performance was deficient and if that performance was prejudicial. *State v. Artic*, 2010 WI 83, ¶22, 327 Wis. 2d 392, 768 N.W.2d 430.

¶7 Setting aside the deficient performance prong, Christina has not shown how the closing arguments by the GAL and County were prejudicial so as to undermine our confidence in the outcome of the proceeding. *See Strickland*, 466 U.S. at 694. Christina relies on *Scott S.*'s statement that it is reversible error in a fact-finding hearing for "the court or the GAL [to] instruct the jury that it should consider the best interests of the child." *Scott S.*, 230 Wis. 2d at 469. Christina's reliance is misplaced as she has not shown where either the court or the GAL instructed the jury to consider the best interests of her children in rendering its verdict. Unless shown otherwise, we must presume that the jury acted according to the law. *Strickland*, 466 U.S. at 694.

¶8 Only one of the statements that Christina finds objectionable contains the phrase "best interest of the children." That reference by the GAL was in the context of the original CHIPS order and the conditions placed on her children's return and was not an instruction to the jury. *Cf. Scott S.*, 230 Wis. 2d at 469. Likewise, the County's reference to "the children" as the "focus" of the proceedings was in no way an instruction to consider the best interests of the children during the first stage.

¶9 The second statement by the GAL, in which he told the jurors that “we’re looking at the kids” and the jurors’ “answers must be yes” on the special verdict form, came closer to the line. But any error was cured by the specific questions on the special verdict forms, which did not refer to the best interests of the children, and by the court’s instructions as to what the jury should consider in answering those questions and how to treat closing arguments. “We presume that the jury follows the instructions given to it.” *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Christina has not shown that she was prejudiced by the closing arguments or her counsel’s failure to object, and therefore, she cannot prevail on her claim of ineffective assistance of counsel. *See Strickland*, 466 U.S. at 697.

By the Court.—Orders affirmed

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

