COURT OF APPEALS
DECISION
DATED AND FILED

July 5, 2017

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. 2016AP1701
2016AP1702

Cir. Ct. Nos. 2013TP233
2013TP235

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

S. D.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

S. D.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: MARK A. SANDERS and CHRISTOPHER R. FOLEY, Judges. *Affirmed.*

¶1 BRENNAN, P.J.[1] S.D. appeals the order terminating her parental rights to two of her four children—Q.R.P., born April 18, 2007, and J.L.J., born April 8, 2009—and the order denying her post-disposition motion. She raises four arguments on appeal. First, she contends that the trial court erred in admitting the Parenting Capacity Assessment ("PCA") report and testimony of the State's expert, Dr. Michelle Iyamah, over trial counsel's ***Daubert***[2] objection. Second, she claims her two trial counsel were ineffective in failing to obtain and present her own expert's report to criticize Dr. Iyamah's opinions and methods. Third, she argues that trial counsel were ineffective for failing to raise an "as-applied" due process challenge to the standard jury instruction for WIS JI—CHILDREN 346, Failure to Assume Parental Responsibility. And fourth, she contends that she is entitled to a new trial in the interest of justice because the real controversy was not tried under WIS. STAT. § 752.35.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2015-16).

[2] ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579, 589 (1993), interpreted Federal Rule of Evidence 702 to require the trial court to admit only reliable expert evidence, based on "scientific … knowledge." The so-called ***Daubert*** standard has been codified in Wisconsin as WIS. STAT. § 907.02.

¶2 For the reasons that follow we reject her arguments and affirm the trial court orders terminating her parental rights and denying her post-disposition motion.

BACKGROUND

¶3 S.D. (hereinafter "Sandra"),[3] is the mother of four children initially involved in four petitions for termination of parental rights, which were tried together below.[4] Q.R.P. (hereinafter "Quentin"), the oldest, was born April 18, 2007. Q.A.R.J. (hereinafter "Karl") was born May 31, 2008. J.L.J. (hereinafter "Justine") was born April 8, 2009. And D.A.L. (hereinafter "Delia") was born September 8, 2011.

¶4 This is an appeal of the order terminating her parental rights to just two of the children, Quentin and Justine.[5] The jury did not find grounds as to Delia, and although the jury did find grounds as to Karl, the dispositional hearing court dismissed the petition as to Karl.

The CHIPS orders.

¶5 Sandra first became involved with the Bureau of Milwaukee Child Welfare (BMCW)[6] in December 2008 when Karl, then six months old, was

[3] The names are fictitious; they are used for ease of reading and to protect the children's identities.

[4] Their circuit court case numbers are: Q.R.P., 13TP233; Q.A.R.J., 13TP234; J.L.J., 13TP235; and D.A.L., 13TP236.

[5] The appellate record for Q.R.P. is 16AP1701, and for J.L.J. it is 16AP1702. All record references are to 16AP1702 unless otherwise noted.

[6] The Bureau of Milwaukee Child Welfare (BMCW) has since changed its name to The Division of Milwaukee Child Protective Services (DMCPS).

removed for medical neglect arising out of Sandra's failure to follow up after his surgery for an obstructed bowel and failure to thrive. A CHIPS order was entered regarding Karl on December 2, 2009. Karl was returned to Sandra's care on December 15, 2009.

¶6 In August of 2010, Quentin (age three years old), Karl (age two), and Justine (age one) were removed from Sandra's care because they were living in an "unsafe and dirty" home with broken out windows, limited good food, bugs and garbage strewn about. On January 21, 2011, CHIPS orders were entered as to Quentin and Justine. Karl was eventually returned to Sandra's home in May 2011. Quentin and Justine were returned in August 2011. The CHIPS orders as to these three children were extended several times. However, in March and April 2012 these three children were again removed, along with Delia (age seven months), following continuing concerns over medical neglect, including missed appointments. A CHIPS order regarding Delia was entered on October 19, 2012, and on June 19, 2013, the CHIPS orders for all four children were extended.

¶7 In the CHIPS orders, the court ordered Sandra to meet several conditions for the children's return, including attending their medical appointments, refraining from disciplining them via physical force, controlling her anger, and maintaining a safe environment for the children when they were present in Sandra's home. The court warned Sandra that failure to comply with the return conditions would lead to termination of her parental rights.

The TPR Case.

¶8 The State filed Petitions for Termination of Parental Rights for all four children on August 12, 2013, alleging continuing CHIPS under WIS. STAT. § 48.415(2)[7] and Failure to Assume Parental Responsibility under WIS. STAT. § 48.415(6).[8] The petitions involving all four children were tried together from February 2 to February 11, 2015, with the Honorable Mark A. Sanders presiding over the pretrial ***Daubert*** hearing, grounds trial, and disposition hearing.[9]

The *Daubert* Hearing.

¶9 Prior to trial, trial counsel objected to the State's expert reports and testimony. The court conducted a ***Daubert*** hearing to determine whether the expert testimony was admissible under WIS. STAT. § 907.02. At the hearing, the State called Dr. Michelle Iyamah, a clinical psychologist with a bachelor's, master's, and doctorate in psychology, who testified about the two parenting capacity assessments ("PCAs") she had prepared regarding Sandra in 2013 and 2015. She testified she has over twenty years' experience and has repeatedly testified on PCAs in Illinois for over two decades and in Milwaukee County "a

[7] The elements of WIS. STAT. § 48.415(2), continuing need of protection or services, are that (1) the child has been adjudged to be 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; (2) that the agency responsible for the care of the child and the family 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 six months or longer pursuant to court order; and (4) 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 nine-month period following the fact-finding hearing.

[8] This statute will be addressed below.

[9] The trial also concerned the parental rights of the father of Karl and Justine, and the father of Delia. Those decisions are not at issue in this case.

good number of times in [the preceding] five and one-half years." She is licensed in both Wisconsin and Illinois.

¶10 Dr. Iyamah's testimony explained that the PCA is a complex overview that is "more encompassing than a psych[ological] eval[uation]." In preparing for it, she looks at the record and history, the parent's mental health and support system, and the standardized tests, including a child abuse potential inventory and parenting stress index. She also observes the parent with the children to determine how they interact and how the parent responds to problem behaviors. She uses a form developed by the Department of Children and Family Services in Illinois that has been peer-reviewed and is based on "methods and principles based on reliable science."

¶11 At the conclusion of the ***Daubert*** hearing, after extensive cross-examination by Sandra's trial counsel, the trial court determined Dr. Iyamah was qualified to testify. It concluded her testimony would be helpful to the jury in analyzing the case and that her extensive education and training was sufficient to qualify her as an expert. The court also found that the PCA process was sufficiently scientific, utilizing accepted psychological tests and clinical interview methods. However, the trial court partially limited her testimony by excluding testimony regarding Sandra's "poor" prognosis, concluding that would not be helpful to the jury in understanding a fact at issue.

The TPR Trial.

¶12 The grounds trial encompassed twenty-one witnesses and six days. The State presented ten witnesses regarding the history of state intervention on behalf of the children, their medical and emotional needs, as well as Sandra's attempts to parent her children. Multiple witnesses described Sandra's failure to

meet her children's medical needs. The jury instructions included the standard instruction for WIS. STAT. § 48.415(6), Failure to Assume Parental Responsibility, WIS JI—CHILDREN 346.

¶13 The jury found that grounds existed as to three of the four children, Quentin, Justine and Karl. The jury did not find grounds as to Delia. At the subsequent dispositional hearing, the trial court terminated Sandra's parental rights to Quentin and Justine but did not terminate her parental rights to Karl.

¶14 Sandra filed a post-disposition motion that was heard by the Honorable Christopher R. Foley on February 21, 2017. Sandra argued that her trial counsel was ineffective for failing to introduce expert testimony critical of Dr. Iyamah's opinions and failing to raise a constitutional challenge to the standard jury instruction for Failure to Assume Parental Responsibility. The court concluded at the end of the ***Machner***[10] hearing that trial counsel were not ineffective in not retaining an expert for a ***Daubert*** challenge. The court noted that retaining an expert might have been "advisable" in retrospect but that "hindsight is not the standard" and that trial counsel's decision fell "well within reasonable professional judgment." The court also found that trial counsel's failure to assert a constitutional challenge to the standard Failure to Assume jury instruction was not deficient and that the instruction was a "fair, accurate statement of the law."

¶15 Sandra appeals the post-disposition ***Machner*** order rejecting the two claims of ineffective assistance of counsel and the order terminating her parental

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

rights to Quentin and Justine on grounds of trial court error in the admission of the State's expert testimony over a ***Daubert*** objection. She also seeks a new trial in the interest of justice.

DISCUSSION

1. The trial court did not err in admitting Dr. Iyamah's testimony and report under WIS. STAT. § 907.02 and *Daubert*.

¶16 Sandra first claims the State's expert's reports and opinion testimony were based on invalid tests and unscientific interpretations and should not have been admitted under WIS. STAT. § 907.02 and ***Daubert***.[11] To prove the error, she relies on the post-disposition report and testimony of Dr. Charles Thompson, a clinical and forensic psychologist, who concluded that the State's expert's tests were scientifically unsound, making her results "highly unreliable" and her opinions biased.

¶17 We review a trial court decision to permit opinion testimony of an expert witness under WIS. STAT. § 907.02 applying an erroneous exercise of discretion standard. ***Seifert v. Balink***, 2017 WI 2, 372 Wis. 2d 525, 888 N.W.2d 816, *reconsideration denied* (WI Mar. 14, 2017) (No. 2014AP195). The first step of our review is to determine whether the trial court applied the correct legal standard under WIS. STAT. § 907.02(1), a question we review independently of the trial court. The second step is to determine whether the court properly exercised its discretion in choosing what factors to consider in determining reliability and applying those factors to admit or exclude the evidence. ***Id.***, ¶90. Wisconsin has incorporated the ***Daubert*** standard into WIS. STAT. § 907.02:

[11] She does not challenge the expert's training and experience.

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

¶18 Although Sandra did not present her own expert at the ***Daubert*** hearing,[12] her trial attorneys did attack Dr. Iyamah's opinions and conclusions through cross-examination and argument. Trial counsel's focus was on the requirement imposed by the final clause of the statute: the reliability of the tests used by Dr. Iyamah and the application of the data derived from those tests to Dr. Iyamah's specific interpretations of the data and opinions. Sandra's attorneys questioned Dr. Iyamah on the fact that a number of her tests showed "invalid results." They also challenged her on the fact that she did not do longitudinal studies on the outcomes of the families she evaluates to test the correctness of her opinions. And they also elicited testimony in which she acknowledged the problem of accurate test results due to Sandra's poor reading abilities.

¶19 In its ruling at the ***Daubert*** hearing, the trial court applied the correct legal standard and considered the proper factors. ***Siefert***, 372 Wis. 2d 525, ¶90. It correctly found that Dr. Iyamah qualified as an expert under ***Daubert*** and WIS. STAT. § 907.02. It noted that she had twenty years' experience in clinical psychology, and that she relied on a methodology developed for child welfare cases in Illinois that has been extensively reviewed professionally and tested in the

[12] We address her ineffective assistance argument on the expert testimony separately below.

courts numerous times in Illinois and Milwaukee County. The court held that the expert's testimony would be helpful to the trier of fact as to diagnoses and key recommendations. The court noted that the State's expert would be subject to cross-examination at trial by Sandra's trial counsel on the expert's qualifications and methods, and their scientific validity.

¶20 Responding specifically to Sandra's attorneys' attacks on the test results, the trial court concluded that Dr. Iyamah had made reasonable responses to Sandra's concerns. Although Dr. Iyamah acknowledged the invalidity of certain tests, she attributed it to Sandra's lack of openness or truthfulness. She explained the lack of longitudinal studies on the fact that as a clinician, she does not do follow-up studies. And as to Sandra's reading level, the trial court noted that Dr. Iyamah said she was aware of the problem and read and explained the questions to Sandra.

¶21 Based on all of this, the trial court found that Dr. Iyamah had provided sufficient data using acceptable tools for her expert opinion to be more than *ipse dixit* (essentially, "because I said so") testimony. Then, after initially indicating that all of Dr. Iyamah's testimony might come in, the trial court reconsidered after trial counsel's argument and excluded Dr. Iyamah's "poor prognosis" testimony. This careful parsing of the testimony reveals the trial court's thoughtful and fair exercise of discretion.[13]

¶22 We are to accord trial courts "broad leeway" in how they assess the reliability of the expert testimony as well as to its final determination of reliability.

[13] Although the PCAs were testified about and admitted into evidence, neither was published to the jury.

Seifert, 372 Wis. 2d 525, ¶106. A trial court's decision whether to admit expert testimony must be more flexible when dealing with clinicians applying "their experience and clinical methods." ***Id.***, ¶80. All ***Daubert*** factors, including testability, are simply *suggested* ways to assess methodology, not boxes which must be checked. ***Id.***, ¶114. It would be an abuse of discretion to require overly rigid rules for scientific reliability. *See, e.g.*, ***Dickenson v. Cardiac & Thoracic Surgery of E. Tenn.***, 388 F.3d 976, 980 (6th Cir. 2004) (holding that a doctor with relevant experience was qualified as an expert and reversing a district court decision that had excluded the testimony on the grounds that the doctor did not cite medical literature).

¶23 Sandra's expert at the ***Machner*** hearing, Dr. Thompson, disagreed with the validity of some of Dr. Iyamah's tests, but that does not establish that her expert testimony was improperly admitted under ***Daubert***. Expert testimony can be debatable without being dismissed as the kind of "junk science" a ***Daubert*** analysis is meant to exclude. *See* ***Seifert***, 372 Wis. 2d 525, ¶120.

¶24 Accordingly, the trial court properly exercised its discretion in admitting Dr. Iyamah's reports and testimony under WIS. STAT. § 907.02 and ***Daubert***.

2. Trial counsel were not ineffective for failing to retain their own expert to criticize Dr. Iyamah's report and testimony.

¶25 Relatedly, in her post-disposition motion and on appeal, Sandra argues that although trial counsel objected to Dr. Iyamah's expert report and testimony and cross-examined her at a ***Daubert*** hearing, counsel were nonetheless deficient for not obtaining their own expert report and testimony to criticize Dr. Iyamah's. Sandra contends that had trial counsel obtained a rebuttal expert

who would have provided testimony at trial like her own expert's testimony at the post-disposition ***Machner*** hearing, there is a reasonable probability of a different outcome. Thus, Sandra argues she is entitled to a new trial due to ineffective assistance of trial counsel.

¶26 Parents in involuntary termination of parental rights cases have a statutory right to counsel as provided in WIS. STAT. § 48.23(2), and included is the right to effective counsel. ***A.S. v. State***, 168 Wis. 2d 995, 1004-5, 485 N.W.2d 52 (1992). To prove ineffective assistance of counsel, a party must show that counsel's actions were deficient performance and that the deficiency caused him prejudice. ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. To establish deficient performance, Sandra must point to specific acts or omissions that are "outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). Our Wisconsin Supreme Court explained the test for prejudice as:

> In other words, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." Under this test, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." However, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." The defendant's burden is to show that counsel's errors "actually had an adverse effect on the defense."

State v. Franklin, 245 Wis. 2d 582, ¶14, 629 N.W.2d 289 (citing to ***Strickland***, 466 U.S. at 687, 694, and 693).

¶27 At the post-disposition ***Machner*** hearing, in an attempt to show that trial counsel's failure to get their own expert was outside the wide range of

professional competence, Sandra presented the report and testimony of Dr. Charles Thompson. It was Dr. Thompson's opinion that the PCAs of Dr. Iyamah contained several errors. He complained that her report did not give enough information on the referral; that the choice of assessment instruments was scientifically unsound; that the results were invalid due to poor test choices and scoring; that her conclusions showed biased language; and that her conclusions went beyond the data.

¶28 Trial counsel Katie Holtz testified at the hearing as to her representation strategy. When reviewing representation for effectiveness under ***Strickland***, there is a strong presumption of competent representation. ***State v. Maloney***, 2005 WI 74, ¶43, 281 Wis. 2d 595, 698 N.W.2d 583. A reasonable strategic choice is evidence of competent representation. ***State v. Vinson***, 183 Wis. 2d 297, 307-08, 515 N.W.2d 314 (Ct. App. 1994) ("When counsel has made a strategic choice in determining a course of action during a trial, we apply an even greater degree of deference to counsel's exercise of judgment in considering whether the challenged action constitutes ineffective representation."). Holtz testified that she and co-counsel had considered getting an additional bonding assessment between Sandra and her children, but decided against it because it would not have been privileged and would have to be shared with all the parties. This is a cogent reason for not having obtained an expert bonding report. *See* ***Vinson***, 183 Wis. 2d at 307-08.

¶29 At the ***Machner*** hearing, trial counsel Holtz testified that she was aware at the time of trial that Sandra had already been the subject of three previous psychological evaluations from 2009, 2011 and 2012, and all showed she had significantly impaired cognitive functioning. The existence of three such reports

over that relevant span of time shows that trial counsel had no reason to believe that retaining an expert would produce any significantly different result, and it supports trial counsel's strategic decision to not expose her client to another non-privileged report. Trial counsel knew that the results of the 2009 and 2011 reports were similar to the results of Dr. Iyamah's 2013 and 2015 reports.

¶30 Trial counsel Holtz testified that her focus at trial was not on getting an expert but rather on cross-examination and impeachment of Dr. Iyamah. She attempted to impeach the doctor with the following: (1) the fact that she got a majority of her referrals from the Bureau; (2) her own admission that some of her test results were "invalid"; (3) an attack on the quality of the peer review; and (4) the lack of longitudinal studies on her work. Counsel succeeded in getting the trial court to reverse course at the ***Daubert*** hearing and restrict the doctor from testifying that Sandra's prognosis was poor. This was competent representation in any view.

¶31 And Holtz' testimony further underscores the other problem with Sandra's argument—that it makes pure conclusory statements of prejudicial effect from the absence of another expert's report. Dr. Thompson's testimony establishes only that he quarrels with Dr. Iyamah's test and interpretations. He did not examine Sandra and did not form any conclusion as to her ability to parent and her prognosis. He could not even say that he disagreed with Dr. Iyamah's results. Simply attacking her choice of tests or scoring is insufficient to establish that an expert report on Sandra's ability to parent would have been helpful to her if trial counsel had only obtained one. Her previous three reports indicated otherwise. It is Sandra's burden to show that counsel's error "actually had an adverse effect on

the defense" and demonstrate a reasonable probability of a different result. *See* ***Franklin***, 245 Wis. 2d 582, ¶14.[14]

¶32 Similarly, the State's case was strong even without Dr. Iyamah. It presented witnesses who testified as to Sandra's failure to parent, the number of years that it had gone on, and her inability to benefit from training and programs. Both Quentin and Justine have significant and complex health problems. Quentin, Justine and Karl's pediatrician, Dr. Sharon Busey, testified that Sandra was at first good about keeping appointments for her children's medical needs but then fell out of compliance, which was "very concerning."

¶33 Witnesses testified that Sandra continued to use physical force to discipline the children despite being counseled not to use force. Quentin, Justine and Karl's psychotherapist, Trisha Wollin, diagnosed those children with post-traumatic stress disorder. Quentin told Wollin that his mother hit him with her hands and the end of a belt. Quentin also reported to Wollin that he saw his mother hit Karl "quite often." Delia's father testified to seeing Sandra "whoop"

[14] In support of this issue, Sandra relies on a federal case, ***Dugas v. Coplan***, 428 F.3d 317 (1st Cir. 2005), for the proposition that in a "close" case, the failure to obtain a rebuttal expert "generates concerns that may reach 'a probability sufficient to undermine confidence in the outcome.'" ***Id.*** at 341. First, we note that we are not compelled to give federal cases precedential effect in Wisconsin. Second, we note the distinguishing fact that the ***Dugas*** court, unlike this court, found no merit to the strategic decision rationale that was given in ***Dugas***—counsel's claim that the reason counsel decided not to retain an expert was that he did not want to let the State know he had hired an expert for pretrial consultation. As a contrast here, the strategic rationale of not obtaining yet another unprivileged, potentially harmful report addressed a substantial and legitimate concern. Sandra already had in her file three reports, all unfavorable. Another unprivileged unfavorable report would not have helped her. Third, counsel in ***Dugas*** was uninformed about arson and unprepared to address defects in the State's arson expert's testimony. That is not the case here; trial counsel Holtz is quite familiar with termination of parental rights law and gives legal presentations on the subject. Finally, unlike in ***Dugas***, the expert testimony here was in no way critical to the State's case. The State presented ten other witnesses on Sandra's incapacity to parent her children.

the children, including hitting Karl until his nose bled. Courtney Kleng, a family engagement specialist, testified that when she worked with the family in 2014 and 2015, Sandra told her she might have used physical discipline if Kleng had not been present.

¶34 Bureau witnesses testified to the unsafe and inappropriate nature of Sandra's home. Kelly Conley, the ongoing case manager, said Sandra would not provide the names of visitors to her home because "she didn't believe they would pass the background check." The Bureau's attempts to educate Sandra on parenting skills were a failure because, despite taking the Easter Seals' class on parenting twice, Sandra was unable to earn a competency certificate. This was due to a "lack of being able to understand the terminology and contents." After two years, an Easter Seals family specialist was still working on a parenting curriculum with Sandra, a process that is normally completed in three months.

¶35 Testimony at trial also noted Sandra's failure to acknowledge the reasons that the children were removed from her care, which was an obstacle to her making changes. Sandra's own therapist testified that Sandra was still defensive about the reasons for removal.

¶36 In sum, Sandra has not presented evidence to show that trial counsel was deficient or that there was a reasonable probability that the result would have been different. The test for prejudice is not speculation or hindsight. It is Sandra's burden to show that counsel's errors "actually had an adverse effect on the defense." ***Franklin***, 245 Wis. 2d 582, ¶14 (citation omitted). She has failed to meet that burden.

3. Trial counsel were not ineffective for failing to object to the standard jury instruction for Wis. Stat. § 48.415(6), Failure to Assume Parental Responsibility.

¶37 In her post-disposition motion and on appeal Sandra raises a second ineffective assistance of trial counsel argument. She claims that trial counsel's failure to object to the use of the standard jury instruction for one of the grounds, *see* WIS. STAT. § 48.415(6), Failure to Assume Parental Responsibility, was deficient performance because as applied to her, the instruction violated her due process rights and prejudiced her because the reason she did not satisfy the requirements was that her children had been removed from her home.

¶38 Trial courts have broad discretion instructing juries. There is no error as long as the instruction adequately covers the applicable law. *See* ***State v. Robinson***, 145 Wis. 2d 273, 281, 426 N.W.2d 606 (Ct. App. 1988). In reviewing challenged jury instructions, courts are to determine whether the meaning of the instruction as a whole was an incorrect statement of the law. ***Miller v. Kim***, 191 Wis. 2d 187, 194, 582 N.W.2d 72 (Ct. App. 1995). On review for ineffective assistance, the challenger must also show prejudice. Failure to make an objection that would not have been granted is not ineffective assistance of counsel. ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12 ("Trial counsel's failure to bring a meritless motion does not constitute deficient performance.").

¶39 The jury instruction given by the trial court here was WIS JI—CHILDREN 346:

> To establish failure to assume parental responsibility, the State of Wisconsin must prove by evidence that is clear, satisfactory, and convincing to a reasonable certainty that [Sandra] has not had a substantial parental relationship with [Quentin, Justine, Karl and Delia] …. The term

> ["]substantial parental relationship["] means the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of the appropriate child or children. Substantial parental relationship is assessed based on the totality of circumstances throughout the child's entire life.

The instruction tracks the statutory language correctly. WISCONSIN STAT. § 48.415(6) defines "substantial parental relationship" as the "acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of the child…" The word "daily," on which Sandra bases her as-applied due process challenge, is contained within the statutory definition of the term. *See* WIS. STAT. § 48.415(6)(b).

¶40 Sandra argues that trial counsel was ineffective for not challenging the use of the standard instruction because, as applied to her, a jury instruction that defines a substantial parental relationship as one involving "daily supervision … and care of the child" was "fundamentally unfair" due to the fact that the State had removed the children from her care, making it impossible for her to have a "substantial parental relationship" with her children. She bases this argument on ***Kenosha County Department of Human Services v. Jodie W.***, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845, which held that basing a TPR on incarceration alone violated a parent's constitutional due process right because it was "based on an impossible condition of return." ***Id.***, ¶3.

¶41 We conclude that the standard jury instruction WIS JI—CHILDREN 346 as applied to Sandra did not violate her due process rights. First, the jury instruction correctly states the statute. Second, the instruction is based on well-established Wisconsin law that makes clear that the analysis of "daily supervision, education, protection and care of the child" is broader than just one snapshot day.

The jury is instructed to look at the totality of circumstances in the child's entire life. Neither incarceration, nor, in this case, the time the children were removed from Sandra's care, defines or limits the analysis. The statute and the instruction require the jury to look at the parent's "acceptance and exercise" of significant responsibility and require that the ultimate determination is the totality of circumstances "throughout the child's entire life." *See* ***Tammy W. G. v. Jacob T.***, 2011 WI 30, ¶¶3, 22, 333 Wis. 2d 273, 797 N.W.2d 854.

¶42 Third, the case on which Sandra relies, ***Jodie***, is limited to its facts only, i.e., incarceration, and has not been extended beyond those facts to other cases. Sandra would have us extend those facts to her case. No Wisconsin case has done so, and the law is clear that the jury is to look at all of the reasons that the parent has not accepted and exercised significant responsibility throughout the child's life. *See* ***Tammy W.G.***, 333 Wis. 2d 273, ¶3.

¶43 Here, the instruction told the jury to consider the "daily" exercise of parenting responsibility but applying the "totality of the circumstances" framework and considering the "child's entire life." As applied to Sandra, the instruction told the jury to consider all the evidence in front of it: numerous removals of the children, their returns to Sandra's care, the services offered to Sandra to remedy her deficits, and ultimately, her success rate with the children—all over a period of years. Sandra does not develop any specific argument as to how the application of "daily" harmed her. We will not abandon our neutrality to develop a party's arguments for her. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82. There was ample evidence from which the jurors could decide for themselves, under this correct statement of the law, whether she had developed a substantial

parental relationship for the children as viewed through the lens of their entire lives.

¶44 Accordingly, trial counsel were not deficient for failing to make an objection to the instruction, nor did Sandra show any prejudice from failing to make the objection. "Trial counsel's failure to bring a meritless motion does not constitute deficient performance." ***Swinson***, 261 Wis. 2d 633, ¶59. We affirm the post-dispostion court's rejection of this ineffective assistance argument.

4. Finally, we reject discretionary review under Wis. Stat. § 752.35.

¶45 A new trial in the interest of justice under WIS. STAT. § 752.35 is limited to exceptional cases where the real controversy has not been tried. The power to grant a new trial when it appears the real controversy has not been fully tried "is formidable, and should be exercised sparingly and with great caution." ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. This court will exercise its power of discretionary reversal only in exceptional cases. *See* ***State v. Cleveland***, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543. Sandra's argument for new trial encompasses all of the issues raised above, which we have rejected here. Accordingly, the orders of the trial and post-disposition courts are affirmed.

By the Court.—Orders affirmed.

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