COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0517

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

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

DANE COUNTY,

PETITIONER-RESPONDENT,

V.

TOMAS D. C.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed.*

DYKMAN, P.J.[1] Tomas D.C. appeals from an order terminating his parental rights to Rosa L.C. and an order denying his post-verdict motions. He contends that the trial court committed reversible error by introducing the guardian

[1] This appeal is decided by one judge pursuant to § 752.31(e), STATS, and expedited under RULE 809.17, STATS.

ad litem to the jury as the individual who represents the "best interests" of the child. We conclude that under the applicable statute and relevant case law, the use of the term "best interests" in this context was not error. Tomas also asserts that he was denied effective assistance of trial counsel on several occasions. However, Tomas has failed to establish how the trial counsel's performance was deficient and prejudicial. Accordingly, we affirm.

BACKGROUND

Tomas D.C. immigrated to the United States from Cuba in 1980. His daughter, Rosa L.C., was born on March 18, 1992. During much of Rosa's life, Tomas was incarcerated for various criminal offenses. The last in-person contact Tomas had with Rosa was in March 1995. Tomas did not have contact with his daughter again until May 1997, when he learned of her address and began sending her letters and cards.

On April 14, 1997, the Dane County Department of Human Services filed a petition to terminate Tomas's parental rights to Rosa.[2] The County initially alleged in its petition that Rosa was a child in continuing need of protection or services under § 48.415(2), STATS. It later amended the petition to also allege that Tomas had abandoned his child under § 48.415(1)(a)2. At the pretrial conference, the County indicated that it only intended to pursue abandonment as a ground for termination.[3]

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[2] The mother's parental rights were voluntarily terminated earlier.

[3] The relevant provisions within § 48.415(1), STATS., read as follows:

> (a) Abandonment, which, subject to par. (c), shall be established by proving that:

(continued)

On September 22, 1997, a jury found sufficient grounds to terminate Tomas's parental rights. At a November 12, 1997 dispositional hearing, the court entered an order terminating his parental rights. Tomas appealed the order. We

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> ….
>
> 2. The child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by s. 48.356 (2) or 938.356 (2) and the parent has failed to visit or communicate with the child for a period of 3 months or longer; …
>
> ….
>
> (c) Abandonment is not established under par. (a) 2. or 3. if the parent proves all of the following by a preponderance of the evidence:
>
> 1. That the parent had good cause for having failed to visit with the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.
>
> 2. That the parent had good cause for having failed to communicate with the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.
>
> 3. If the parent proves good cause under subd. 2., including good cause based on evidence that the child's age or condition would have rendered any communication with the child meaningless, that one of the following occurred:
>
> a. The parent communicated about the child with the person or persons who had physical custody of the child during the time period specified in par. (a) 2. or 3., whichever is applicable, or, if par. (a) 2. is applicable, with the agency responsible for the care of the child during the time period specified in par. (a) 2.
>
> b. The parent had good cause for having failed to communicate about the child with the person or persons who had physical custody of the child or the agency responsible for the care of the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.

ultimately remanded the case to the trial court for a ***Machner***[4] hearing to address various post-judgment matters.

On October 6, 1998, a ***Machner*** hearing was held. At the hearing, the trial court made findings and conclusions. First, the court agreed that it may have erred when it introduced the guardian *ad litem* as representing the "best interests" of Rosa; however, it concluded that the error was harmless. Second, the court reviewed and rejected each of Tomas's assertions that his trial counsel was deficient and prejudicial in his performance. Tomas now appeals.

DISCUSSION

1. *Reversible Error*

Tomas contends that the trial court committed reversible error when it stated that the guardian *ad litem* represents the "best" interests of the child. Whether a trial court commits reversible error is a question of law, which we review *de novo*. *See generally* ***Berg v. Marine Trust***, 141 Wis.2d 878, 887, 416 N.W.2d 643, 647 (Ct. App. 1987). Before we can determine if the trial court committed a reversible error, we must first determine whether the trial court erred. In this case, the trial court determined at the ***Machner*** hearing that it erred when it introduced of the guardian *ad litem* to the jury as the individual responsible for "represent[ing] … the best interest of the child …."

[4] ***State v. Machner***, 101 Wis.2d 79, 303 N.W.2d 633 (1981).

Section 48.235(3), STATS., sets out the duties and responsibilities of a guardian *ad litem* appointed under Chapter 48, STATS. Paragraph (3)(a) reads as follows:

> *The guardian ad litem shall be an advocate for the* ***best interests*** *of the person for whom the appointment is made*. The guardian ad litem shall function independently, in the same manner as an attorney for a party to the action, and shall consider, but shall not be bound by, the wishes of such person or the positions of others as to the best interests of such person. If the guardian ad litem determines that the best interests of the person are substantially inconsistent with the wishes of such person, the guardian ad litem shall so inform the court and the court may appoint counsel to represent that person. The guardian ad litem has none of the rights or duties of a general guardian.

(Emphasis added.) The statute states that the guardian *ad litem* is responsible for determining and advocating the best interests of the minor child. Therefore, we initially conclude that the trial court did not err in introducing the guardian *ad litem* in the manner in which it did.

We find support for our conclusion in ***D.B v. Waukesha County Human Serv. Dept***., 153 Wis.2d 761, 451 N.W.2d 799 (Ct. App. 1989). In ***D.B.***, we concluded that the trial court did not err when it introduced the guardian *ad litem* to the jury as "the attorney appointed by the court to represent the best interests of [the child]." ***Id.*** at 769, 451 N.W.2d at 802. We stated that "such an introduction is not only informative, it is desirable." ***Id.*** at 770, 451 N.W.2d at 802. We therefore are satisfied that the trial court's statement to the jury about of the guardian *ad litem* was not erroneous.

Tomas argues that ***D.B.*** is inapplicable because, unlike in ***D.B.***, the trial court in this case admitted that it had erred. We are not persuaded by this argument. An appellate court is not bound by a trial court's legal conclusions.

We conclude that, similar to ***D.B***., the trial court's introduction of the guardian *ad litem* was both informative and desirable, not erroneous.

Tomas, however, argues that in the ten years since ***D.B.*** was decided there has been a philosophical shift in thought as to the role guardians *ad litem* should play in representing the best interests of the child; therefore, he asserts that we should no longer follow our decision in that case. But, we have no authority to overrule, modify or withdraw language from our prior decisions. *See* ***Cook v. Cook***, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997).

2. *Ineffective Assistance of Counsel*

Tomas asserts that he did not receive effective assistance of counsel. To support such a claim, Tomas D.C. must overcome a strong presumption that his counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847-48 (1990). This requires that he establish that his trial counsel's performance was deficient and was prejudicial to the outcome of the proceeding. *See* ***State v. Sanchez***, 201 Wis.2d 219, 232-236, 548 N.W.2d 69, 74-76 (1996).

An attorney's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See* ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 847-848 (quoting ***Strickland***, 466 U.S. at 687). Deficient performance is only prejudicial if the claimant establishes that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *See* ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76. A reasonable probability is a probability sufficient to undermine our confidence in the outcome.

See ***id***. If Tomas fails to meet either the deficient or prejudicial components of the test, we need not address the other component. *See* ***id.***

Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633-634, 369 N.W.2d 711, 714 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis.2d 353, 376, 407 N.W.2d 235, 245 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. *See* ***Pitsch***, 124 Wis.2d at 634, 369 N.W.2d at 715.

Tomas first asserts that his trial counsel was ineffective in failing to object to the court's introduction of the guardian *ad litem* as the individual representing the best interests of the child. We already have concluded that the trial court did not err in presenting the guardian in such a manner; therefore, trial counsel's failure to object was neither deficient nor prejudicial.

Tomas next asserts that his trial counsel was ineffective for not emphasizing the fact that Tomas spoke Spanish and was raised in a different culture. Under § 48.415(1)(c), STATS.,[5] abandonment is not established if the parent demonstrates a good cause for failing to visit or communicate with the child or the agency responsible for the child. Tomas contends that if his trial counsel would have emphasized these language and cultural differences, it was plausible that the jury would have found good cause to explain why Tomas was unable to contact his daughter or the Department of Health and Social Services, and the abandonment allegation therefore might have failed.

[5] See footnote 3.

To prevail on an ineffective assistance of counsel claim, Tomas must establish that there was a reasonable probability that his trial counsel's deficient performance prejudiced the outcome of the case. However, he merely asserts that "it was plausible" or that the jury "might" find that these language and cultural differences constitute a good cause for his lack of contact with his daughter. Plausibility is far from a reasonable probability. Without more definitive evidence that the outcome was prejudiced by the trial counsel's failure to pursue this position, we conclude that Tomas has failed to show prejudice from trial counsel's alleged deficient performance.

Tomas also asserts that his counsel was ineffective because he failed to "prepare a brief with an argument sufficiently strong to persuade the court to allow the first two special verdict questions to go to the jury." These first two questions were as follows:

> 1. Was Rosa placed, or continued in placement outside Tomas [D.C.]'s home pursuant to a court order which contained the termination of parental rights notice required by law?
>
> Answered by the Court: Yes
>
> 2. Did Tomas [D.C.] fail to visit or communicate with Rosa for a period of three months of longer?
>
> Answered by the Court: Yes

Tomas contends that if these two questions went to the jury, it was plausible that there might have been a different outcome in this case. And while Tomas concedes that the trial court was acting "within its discretion" in answering these questions for the jury, he contends that the trial counsel still should have objected to preserve the matter for appellate review. However, in order for trial counsel to be ineffective, the claimant must prove that there is a reasonable probability that the outcome would have been different had trial counsel not been

deficient. Tomas, however, is now arguing that his counsel was ineffective for failing to object to preserve an issue which he concedes the trial court correctly decided. We reject such an argument as meritless.

Finally, Tomas contends that his counsel was ineffective in stipulating to the fact that he had been convicted of nineteen crimes. Tomas asserts that the admission of these convictions was unfairly prejudicial, and that the only value in informing the jury that he was incarcerated during this period of time was to explain why he was unable to have contact with his daughter. We disagree. Evidence of Tomas's prior convictions was introduced for the permissible purpose of impeaching his credibility under RULE 906.09, STATS.

Tomas next asserts that his trial counsel erred when he stipulated to the number of convictions, because no specific convictions were named, no judgment of convictions were presented and no documents were demonstrated or placed in the record. Tomas contends that his trial counsel was ineffective in not asking him whether: (1) the conviction listed on his rap sheet was correct; (2) the conviction was by plea or upon a jury verdict; (3) he admitted guilt or not; and (4) he received counsel. Furthermore, trial counsel also erred in not introducing those judgments of conviction into the record.

We are not persuaded that these assertions are sufficient to constitute a claim for ineffective assistance of counsel. Assuming *arguendo* that trial counsel was deficient in not taking these steps, Tomas has not shown that there is a reasonable probability that this deficient performance prejudiced the outcome in this case. He provides no evidence that if the trial counsel would have taken these steps the outcome would have been different. He offers no evidence that any of the judgment of convictions were erroneously entered or that any of his

convictions were without counsel. Without this evidence, Thomas cannot show that trial counsel's performance was prejudicial to the outcome of the case.

Tomas also contends that he was deprived of his constitutional right to due process. He seems to assert that certain procedural due process safeguards were not met in this case due to his trial counsel's ineffective representation. However, he fails to articulate how those safeguards were violated. He also fails to point out any evidence supporting such a claim. Without this evidence, we cannot conclude that Tomas's due process rights were violated. We also decline his request to exercise our discretionary authority under §§ 751.06 or 752.35, STATS., to reverse and order a new trial, because we find no evidence in the record to suggest that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried. Accordingly, we affirm.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.