COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1608 **Cir. Ct. No. 2003TP119B**

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

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

WAUPACA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TY A. H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waupaca County: JOHN P. HOFFMANN, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Ty A.H. timely appeals a March 14, 2006 circuit court dispositional order terminating his parental rights to his child, Patricia

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04).

A.W., and a September 11, 2006 order denying his postjudgment motion to vacate the dispositional order and to hold a new fact-finding and dispositional hearing on the basis of ineffectiveness of trial counsel. In this appeal, we address whether the trial court erroneously granted a motion in limine filed by the Waupaca County Department of Health and Human Services (the Department) to exclude testimony and reference by counsel regarding the potential placement of Patricia with her paternal grandparents. We also address whether the court erroneously denied Ty's ineffectiveness of trial counsel claims. We affirm.

BACKGROUND

¶2 On August 2, 2005, the Department filed a petition to terminate Ty's parental rights to his child, Patricia. As grounds for the termination of parental rights (TPR), the Department asserted that Patricia was a child in continuing need of protection or services, as provided by WIS. STAT. § 48.415(2)(a) (2003-04).[2]

¶3 On November 28, 2005, the Department filed a motion in limine to prohibit testimony or any mention during opening or closing arguments "of any efforts on behalf of the grandparents in this case to seek placement of the child." After holding a hearing on the motion on December 2, 2005, the court granted the motion by an oral ruling made from the bench. The court ruled that issues related to the grandparents seeking placement were irrelevant to whether the Department made reasonable efforts to provide the services to Ty as ordered by the court, and to the other questions a jury would face at the upcoming fact-finding hearing.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 During the fact-finding hearing, the child's mother, Crystal W., voluntarily terminated her parental rights and withdrew from the proceedings. On the second day of the jury trial, the court rebuked two witnesses for engaging in inappropriate behavior, and indicated its inclination to declare a mistrial. After initially moving for a mistrial, Ty's counsel then withdrew the motion after discussing it with his client. We discuss these events in more detail in our analysis.

¶5 After deliberating, the jury by special verdict found TPR grounds existed under WIS. STAT. § 48.415(2)(a).[3] The jury found that the Department made reasonable efforts to provide services ordered by the court; that Ty failed to meet the conditions established for the safe return of the child to his home; and

[3] WISCONSIN. STAT. §48.415 provides:

> (2) Continuing need of protection or services … shall be established by proving any of the following:
>
> (a)1. That the child has been adjudged to be a child or an unborn child 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.b. That the agency responsible for the care of the child and the family or of the unborn child and expectant mother 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 6 months or longer … and 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 12-month period following the fact-finding hearing under s. 48.424.

that there was a substantial likelihood that Ty would not meet those conditions within the next twelve months.

¶6 At the dispositional hearing, upon the jury's findings, the trial court found that Ty was an unfit father. Based on this finding and consideration of other appropriate factors, the court entered an order terminating Ty's parental rights to Patricia. The court then considered a motion filed by Ty just before the fact-finding hearing to place Patricia with her grandparents. The court rejected this motion.

¶7 Ty appealed and moved for a ***Machner***[4] hearing based on ineffective assistance of counsel claims. We granted the motion. After the hearing, the trial court denied Ty's postjudgment motion to vacate the TPR order and to order a new fact-finding and dispositional hearing on the basis of ineffective assistance of counsel. Ty appeals both the court's denial of his postjudgment motion and its order granting the Department's motion in limine to exclude references to possible placement of the child with her grandparents.[5]

DISCUSSION

Motion in Limine Ruling

¶8 Ty argues that the trial court erroneously granted the Department's motion in limine. He asserts that evidence of his efforts to place Patricia with his parents and evidence of the Department's failure to properly consider placing

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

[5] Ty does not challenge the jury's findings or its verdict.

Patricia with his parents was relevant in determining whether the Department made reasonable efforts to provide services to Ty as ordered by the court.

¶9 We review the circuit court's decision whether to allow testimony under an erroneous exercise of discretion standard. *See* ***LaCrosse County DHS v. Tara P.***, 2002 WI App 84, ¶6, 252 Wis. 2d 179, 643 N.W.2d 194 (2002). Under that standard, we will not reverse a circuit court's decision to exclude evidence if it has "'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***Id.*** (citation omitted).

¶10 We conclude that the trial court properly granted the Department's motion in limine. As we explained, the trial court ruled that this evidence was not relevant to the matters to be established before parental rights may be terminated on CHIPS grounds. We agree.

¶11 One of the matters to be established before parental rights may be terminated on CHIPS grounds is whether the Department made reasonable efforts to provide the services ordered by the court to assist Ty in meeting the conditions for unification with Patricia. *See* WIS. STAT. § 48.415(2)(a)2.b. "Reasonable effort" in this context means

> an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case.

WIS. STAT. § 48.415(2)2.a. A non-exhaustive list of what constitutes "reasonable efforts" to prevent the removal of a child from his or her home is provided in WIS. STAT. § 48.355(2c)1.-5.

¶12 As we have discussed, Ty argues that evidence regarding his efforts to place Patricia with his parents and the Department's refusal to place the child with them was relevant to determine whether the Department made a reasonable effort to provide the services ordered by the court. He points out that the Department never sought placement with the grandparents, despite knowing of their interest in placing Patricia with them, and advising them to become licensed foster care providers and to comply with home study, which they did. Ty also points out that, despite the grandparents' efforts, the Department granted emergency placement in a foster family home rather than in his parent's home. He argues that in doing so, the Department "arbitrarily discarded Ty's parents as an intermediate step – while supposedly pursuing a goal of reunification under the Permanency Plan."[6]

¶13 The Department counters that the issue regarding potential placement of Patricia with Ty's parents is relevant only to the disposition of the case. The Department further argues that its obligation to provide services was limited to assisting Ty in meeting the conditions mandated in the permanency plan for placing Patricia in his home, not in his parents' home. The Department also points out that the court had rejected Ty's July 2005 motion to change Patricia's placement from the foster home to Ty's parents' home. Thus, permitting the introduction of evidence relating to Ty's efforts to place Patricia with his parents "would serve to re-litigate that whole issue."

[6] Ty makes reference to various permanency plans in his chief brief, but the only permanency plan at issue in this appeal is that incorporated by court order and considered during the jury trial in this case, i.e., the December 2004 permanency plan, as referenced by the February 2005 permanency plan order. The jury was explicitly asked to consider these documents, along with the court's February 2004 dispositional order.

¶14 We conclude that the trial court properly excluded evidence and references regarding placement of Patricia from being introduced at trial. In pretrial discussions, Ty's counsel argued that, under the permanency plan, the listed "services" to be provided by the Department included placing Patricia with a family member or other alternative care. In response, the court stated that it "strikes the court that the issue of placement is different than whether or not services, or whether or not the department has made a reasonable effort to provide the services ordered by the court." The court is right. The dispositional orders issued by the court established the services the Department was required to provide to Ty to assist him in meeting the conditions for reunification. Specifically, in its February 19, 2004 dispositional order, the court ordered services including parenting classes, alcohol and drug counseling and treatment, obtain stable housing and stable employment for a period of six months or longer, and other similar services. Those services are of the type required by WIS. STAT. § 48.355(2c)(a)3.

¶15 The *services* the Department was ordered to provide Ty differ from the placement *goals* the Department recommended and which the court adopted and ordered. For example, the court entered an order on February 9, 2005, adopting the December 2004 permanency plan proposed by the Department. Certain services were recommended by the Department and ordered by the court. The permanency plan order also indicated that the primary permanence goal for Patricia was reunification, and the secondary permanence goal was adoption. Thus, it is apparent that the placement of Patricia was not a *service* the Department was ordered to provide Ty; rather, placement was a *goal* to be attained as a result of providing those services.

¶16 Ty's confusion about the placement of Patricia as being a "service" stems from the inartful way in which the permanency plans were drafted. We observe that the permanency plan adopted and ordered by the court on February 9, 2005, contains a statement under the section "Services" on page three and four of the plan that the Department "[w]ill provide placement for Patricia either with a family member or other alternative care as appropriate."[7] Similarly, the permanency plan completed on June 21, 2005, contains the same language under the same section. The fact that the placement goal was included in a section classified as services does not transform those goals into services that the Department was required to make reasonable efforts to provide pursuant to WIS. STAT. § 48.355(2c)(a). Accordingly, it is plain that the *goal* of placing Patricia with a family member does not serve as a basis for admitting evidence during the TPR trial regarding efforts to place Patricia with a family member to establish that the Department failed to make reasonable efforts to provide court ordered *services*.

Ineffective Assistance of Trial Counsel

¶17 We next address Ty's ineffective assistance of counsel arguments. Ty argues that his trial counsel was ineffective in the following ways: (1) by failing to object to what Ty characterizes as the guardian ad litem's (GAL) improper invocation of the best interests of the child standard; (2) by withdrawing his motion for a mistrial; (3) by failing to question potential jurors about their

[7] It appears that the permanency plan was signed on January 22, 2004. This appears to be a mistake. The first page of the plan indicates that the form was filled out on December 21, 2004, which makes it unlikely that the plan was signed on January 22, 2004. Based on our review of the record and the high probability that this permanency plan was the plan adopted and ordered by the court on February 9, 2005, we assume the plan was signed on January 22, 2005.

potential acquaintance with the foster mother, who was a rebuttal witness at trial; and (4) the cumulative prejudicial effect of these errors by his counsel.

¶18 A party asserting ineffective assistance of counsel must show that his 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 case. ***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 ***Strickland*** requirement to TPR cases). If a defendant fails to demonstrate one prong, we need not review the other prong. ***Strickland***, 466 U.S. at 697.

¶19 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) (citing ***Strickland***, 466 U.S. at 698). 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).

¶20 Ty first argues that his trial counsel's performance was deficient in failing to object to the GAL's opening statement where the GAL improperly invoked the "best interest of the child" standard. The opening statement contained the following language which Ty argues was objectionable:

> I'm Keith Steckbauer. I'm a lawyer. I represent in this case today the interests of [the child], and what's strange about that is that I'm asked to come by you and this Court and say what I believe is in her interests, the interest of a child that is a stranger to me. It's not my own kid. I've got my own, that I'm asked to, to suggest to you what's best for this child that's a stranger to me.

¶21 During the ***Machner*** hearing, the trial court explained that the GAL's statement was consistent with WIS. STAT. § 48.235(6),[8] and did not invoke the best interest of the child standard. The GAL similarly argues that his opening statement did not invoke this standard, and that Ty has shown no prejudice resulting from this statement.[9] We agree with both the court and the GAL.

¶22 It is true that the "best interest of the child" standard is not an appropriate consideration for the jury at a TPR hearing; this standard is considered only at the dispositional hearing. WIS. STAT. §§ 48.424(3) and 48.426; *see also* ***Waukesha County DSS v. C.E.W.***, 124 Wis. 2d 47, 59-61, 368 N.W.2d 47 (1985). However, we have explained that there is reversible error only where the court or the GAL actually instructs the jury to consider the best interests of the child. ***Door County HFS v. Scott S.***, 230 Wis. 2d 460, 469, 602 N.W.2d 167 (1999); *see also* ***D.B. v. Waukesha County HSD***, 153 Wis. 2d 761, 770, 451 N.W.2d 799 (1989).[10] Here, the GAL did not explicitly invoke the best interest of the child standard in his opening statement, but rather explained that his role as the GAL was to

[8] WISCONSIN STAT. § 48.235(6) provides that "[i]n jury trials under this chapter, the guardian ad litem or the court may tell the jury that the guardian ad litem represents the interests of the person or unborn child for whom the guardian ad litem was appointed."

[9] The GAL also argues that Ty improperly raises the issue for the first time on appeal. We reject this argument. Ty properly moved for remand for a ***Machner*** hearing. We granted that request by an order entered on July 27, 2006. Ty properly preserved his ineffective assistance of counsel claim through his motion for remand to the circuit court for a ***Machner*** hearing, pursuant to WIS. STAT. RULE 809.107(6)(am).

[10] In ***D.B. v. Waukesha County HSD***, 153 Wis. 2d 761, 770, 451 N.W.2d 799 (1989), the supreme court held that the circuit court did not err in informing the jury that the GAL represented the child's interests, in part because that statement did not instruct the jury to decide the child's best interests, but rather described the GAL's role. The Department would have us extend this ruling to provide that a GAL may use the phrase "best interest of the child," so long as the phrase is in reference to its role, not to the questions put before the jury. However, because our conclusion that the GAL did not invoke the "best interest of the child" standard is dispositive, we do not address this argument any further.

represent the interest of the child. Furthermore, Ty has not demonstrated how the GAL's opening statement prejudiced him, especially in light of the court's jury instruction that consideration of the best interests of the child is a matter for the court, not for the jury.

¶23 Ty next argues that his counsel was ineffective by withdrawing his mistrial motion following the improper conduct of two witnesses. The conduct at issue consisted of two different events. First, Ty's probation officer handed him a landlord's bill in front of the jury while stating, "I have a bill for him here today for the hotel for $400 for things he destroyed while he was there." Second, a Department social worker, Yengyee Lor, was observed by the court nodding her head in agreement with witnesses as they testified in what the court described as a "bobble head" motion. Using strong language, the court criticized the behavior of both witnesses as possibly warranting a mistrial, stating:

> Just so there's no misunderstanding, there's an irate judge sitting here, and I'm irate for a couple of things. One is I think Mr. Jozwiak bringing forward some bill from a landlord and bringing that up and then serving [Ty A.H.] in court is terrible. I'm highly upset about that. I know I have a notion to declare a mistrial and send the bill for this trial to the Department of Corrections.
>
> … [S]omething I'm even more outraged about, Ms. Lor, what's wrong with your head? You can't keep your head still when witnesses are talking? You're sitting there nodding your head agreeing with witnesses and things like that. You understand that's highly inappropriate?
>
> ….
>
> … I think it's highly inappropriate. So I'm thinking about declaring a mistrial and sending a bill to the second floor for this whole cost of the jury….
>
> … [Y]ou've got a highly upset judge here, and I think it's absolutely atrocious ….

¶24 Although Ty's attorney did not witness Lor's behavior, he followed the court's cue and moved for mistrial after the court's statement; Ty's counsel also asked the court to reserve ruling on the motion, stating, "[a] mistrial is one thing if they're living right here, but if the mistrial were granted and this trial was rescheduled for a couple months, it's another trip to have to make up here." Only after speaking with Ty did his counsel withdraw the motion for a mistrial. The court consequently added a curative instruction informing the jury that it should not consider the conduct or demeanor of witnesses in the court while they were not on the stand.

¶25 Ty argues that his counsel's withdrawal of the mistrial motion constituted ineffective assistance because his counsel failed to explain the prejudicial effect of the witnesses' actions, and failed to follow the trial court's lead. He further argues that his counsel withdrew the motion only for logistical and economical reasons. Therefore, according to Ty, his counsel's performance was deficient and he was thereby prejudiced. We disagree.

¶26 All the parties appear to concede that the court would have granted the motion for mistrial. Nonetheless, as the GAL points out, Ty conceded at the ***Machner*** hearing that he believed he made an intelligent, knowing and voluntary decision. Ty fails to point to anything in the record indicating he objected to his counsel's withdrawal of the mistrial motion. In addition, Ty's counsel testified at the ***Machner*** hearing that it was a tactical decision to withdraw the motion based primarily on Ty's concerns about missing more time from his job and the consequent financial loss.

¶27 There is a "'strong assumption that counsel's conduct falls within a wide range of reasonable professional [legal] assistance'" which could be

considered sound trial strategy. ***State v. Ambuehl***, 145 Wis. 2d 343, 351, 425 N.W.2d 469 (Ct. App. 1988) (quoting ***Strickland***, 466 U.S. at 689). Such tactical decisions in a trial are entrusted to the attorney. ***State v. Gordon***, 2003 WI 69, ¶21, 262 Wis. 2d 380, 663 N.W.2d 765. Trial counsel is not required to pursue a mistrial motion over the objections and practical concerns of his client. In addition, as the Department argues, under the reasonable counsel standard, an attorney's behavior should be measured in terms of the situation as it existed at the time. ***Ambuehl***, 145 Wis. 2d at 351 (citing ***Strickland***, 466 U.S. at 688-89). Throughout these proceedings, Ty strongly expressed concern about his financial problems. This was a recurrent theme creating the backdrop for the decision to withdraw the mistrial motion. Consequently, Ty has failed to establish that trial counsel was deficient in withdrawing Ty's motion for a mistrial. Because Ty has not persuaded us that his counsel's performance was deficient, we need not reach the question of whether his counsel's performance prejudiced him.

¶28 Ty next argues that his trial counsel was ineffective by failing to ask potential jurors if they knew the foster parents or, in the alternative, by failing to ask the court to voir dire the jury as to their familiarity with the foster parents. We disagree.

¶29 Patricia's foster mother was called to testify as a rebuttal witness. Ty fails to cite any authority requiring counsel or the court to voir dire the jury on their familiarity with rebuttal witnesses. Thus, Ty has failed to establish counsel was deficient in failing to do so.

¶30 In addition, Ty has shown no prejudice. Ty points to nothing in the record demonstrating that any of the jurors did in fact know either foster parent or were somehow biased based on being familiar with either foster parent.

¶31 Finally, we address Ty's argument that the cumulative impact of his counsel's actions should result in a new fact-finding hearing. This argument rests on the assumption that we conclude counsel was ineffective on the grounds already mentioned. Because we have rejected all of Ty's claims of ineffectiveness of counsel, we reject this argument as well.

CONCLUSION

¶32 We conclude that the trial court properly exercised its discretion in granting the Department's motion in limine. We also conclude that the trial court properly denied Ty's postconviction motion asserting ineffective assistance of trial counsel. We therefore affirm.[11]

By the Court.—Order affirmed.

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

[11] The court on its own motion, and pursuant to WIS. STAT. § 809.82(2)(a), enlarges the time to issue a decision in this TPR case. *See* ***In re Christopher D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995).