

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 10, 2008

David R. Schanker
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. 2007AP1655
2007AP1656**

**Cir. Ct. Nos. 2006TP10A
2006TP10B**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

2007AP1655:

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

GRANT COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

v.

CHERRY M. A.,

RESPONDENT-APPELLANT.

2007AP1656:

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

GRANT COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

v.

CHERRY M. A.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Grant County:
ROBERT P. VANDEHEY, Judge. *Affirmed.*

¶1 BRIDGE, J.¹ Cherry M.A. appeals circuit court orders terminating her parental rights to Blake P. and Dimitri P. Cherry contends that her trial counsel was ineffective for failing to take steps to exclude the introduction of evidence regarding two issues: (1) the fact that she missed visits with her children during the time they were removed from her home, including visits to one child who was not the subject of this proceeding, and (2) the fact that Blake was removed from the home due to Cherry's failure to comply with a safety plan that provided that the children were not to be in the company of people who had a history of sexually abusing the children and/or abusing her. We reject Cherry's arguments and affirm the circuit court.

BACKGROUND

¶2 Cherry M.A. is the mother of Brooks, Kennedee, Blake and Dimitri. On May 3, 2004, Dimitri was taken into custody by the Grant County Department of Social Services. The reason for the child's removal was that Cherry was alleged to have abused another child in her care. Dimitri was placed with an aunt. A safety plan was in place for Cherry which provided in part that none of Cherry's

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

children were to have contact with Cherry's step-father or Cherry's brother. Cherry's step-father had been convicted of sexually abusing Cherry when she was a teenager, and her brother was Substantiated by the Department for sexual abuse of Brooks and Kennedee, Cherry's oldest son and daughter.

¶3 Kennedee was also placed out of the home for a period of time. She returned to Cherry's home on September 3, 2004. The safety plan required that Cherry was to supervise Kennedee and Brooks at all times. This requirement was due to concerns that Brooks and Kennedee had been sexually inappropriate with one another following their sexual abuse victimization.

¶4 On September 5, 2004, the Department received a report that Brooks had allegedly "humped" Kennedee in the bathtub while Cherry was out of the room. On September 7, 2004, the Department received information that Cherry had allegedly left Brooks alone with Cherry's brother. On September 9, 2004, Cherry failed to pick up Brooks from school on time.

¶5 As a result of these allegations, all of Cherry's children were taken into temporary physical custody by the Department on September 9, 2004. Brooks and Blake were placed in a foster home. Dimitri was returned to his aunt's home, and Kennedee was placed with his father. Cherry voluntarily moved into the foster home on September 14, 2004. A CHIPS² petition was granted for each child on November 1, 2004.

² CHIPS is an acronym for "child in need of protection or services." *See* WIS. STAT. § 48.13.

¶6 Cherry moved from the foster home on March 6, 2005. A safety plan was put into place to prepare Cherry for the return of her children. Under the plan, she was expected to maintain the residence and maintain employment. She did not maintain her job and was evicted from the residence as a result of not paying the rent. She was also expected to demonstrate responsible parenting and an ability to keep the children safe. Once Cherry was able to demonstrate these skills, the plan was to have the eldest child, Brooks, returned to her care. Cherry did not follow through with visitation for Brooks as scheduled. During one visit with Brooks, Cherry took him to the home of her mother and step-father and later denied being there.

¶7 Due to what the Department viewed as Cherry's irresponsible behavior and her repeated denial of the sexual abuse suffered by her two older children, the Department determined that Cherry was unable to keep the children safe, and visits were then supervised. A visitation schedule was set for each of her four children. Cherry refused to visit her older two children and failed to consistently meet her obligation to visit Blake and Dimitri over the next several months. There were significant lapses in Cherry's contact with her children, although she began to be more consistent with her visits with Blake and Dimitri in January 2006.

¶8 On October 13, 2006, the Grant County Department of Social Services filed petitions to terminate Cherry's parental rights to Blake and Dimitri. In both cases, the County alleged that the children were in continuing need of protection or services under WIS. STAT. § 48.415(2) and that Cherry had failed to assume parental responsibility pursuant to WIS. STAT. § 48.415(6).

¶9 The cases were consolidated for trial. Following two days of testimony, the jury found that Blake and Dimitri were in need of protection or services and that there was a substantial likelihood that Cherry would not meet the conditions of return within the next twelve months. The jury did not find that Cherry had failed to assume parental responsibility.

¶10 The circuit court conducted a consolidated disposition hearing on March 8, 2007. The court ordered that it was in the best interests of the children that Cherry's rights to both children be terminated. Orders were entered by the court terminating Cherry's parental rights to Blake on March 12, 2007, and to Dimitri on March 28, 2007. Cherry filed a postdisposition motion for a new trial, which was denied. Cherry appeals.

DISCUSSION

I. Standards for Ineffective Assistance of Counsel

¶11 The United States Supreme Court has set out a two-pronged test for determining ineffective assistance of counsel. To sustain a claim, a defendant has the burden of showing both: (1) that her counsel's performance was deficient; and (2) that the deficient performance prejudiced her. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). This analysis applies equally in cases involving termination of parental rights. See *In Interest of M.D.(S)*, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992). If we conclude that the defendant has failed to show prejudice, we may decline to address whether counsel's performance was deficient. *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶12 To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally

competent assistance.” *State v. Nielsen*, 2001 WI App 192, ¶12, 247 Wis. 2d 466, 634 N.W.2d 325 (quoting *Strickland*, 466 U.S. at 690). We “strongly presume” that counsel has rendered adequate assistance. *Id.* To demonstrate prejudice, a 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. *Id.*, ¶13. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* In applying this principle, reviewing courts are instructed to consider the totality of the evidence before the trier of fact. *Id.*

¶13 Whether a defendant was denied the effective assistance of counsel presents a mixed question of fact and law. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not reverse the trial court’s findings of fact regarding counsel’s actions unless those findings are clearly erroneous. *Id.* at 634. Whether counsel’s performance was deficient and whether counsel’s actions prejudiced the defense are questions of law that we review de novo. *Id.*

II. Application Of Standards To Cherry’s Ineffective Assistance Claim

A. Failure To Seek To Exclude Evidence Regarding Cherry’s Missed Visits With Brooks

¶14 Cherry first contends that her counsel was ineffective for not filing a pretrial motion to seek to exclude the introduction of evidence regarding her missed visits with Brooks, or to object to the evidence at trial. She argues that, as a result, the jury heard evidence regarding Cherry’s history of visitation as it pertained to Brooks, who was not the subject of the TPR proceeding, as well as to Dimitri and Blake, who were.

¶15 Beyond stating that this evidence related to a child other than the children who were the subjects of the trial, Cherry does not indicate which

evidence was objectionable and why. She does not suggest what the legal basis for Counsel's objection would have been and does not assert that the admissibility of this evidence was governed by any particular statute or case law. She does not address why counsel's failure to object fell "outside the wide range of professionally competent assistance." *Nielsen*, 247 Wis. 2d 466, ¶12. Neither does she attempt to demonstrate why there is a reasonable probability that, but for this failure, the result of the proceeding would probably have been different.

¶16 In short, Cherry does not develop her argument and does not suggest why trial counsel's conduct constituted ineffective assistance. On that basis, we could easily conclude that her argument is insufficiently developed to warrant a response. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to address inadequately developed arguments). Nevertheless, we reach her argument because it is apparent from the record that the jury heard extensive evidence of Cherry's failure to follow through with visitation of Blake and Dimitri, who were the subjects of the TPR proceeding, as well as with Brooks, who was not. We cannot conclude that, had the jury not heard evidence of Cherry's history of visitation with Brooks, the result would have been any different. Accordingly, we conclude that even if we were to assume that counsel's performance was ineffective, Cherry has failed to show prejudice.

*B. Failure To Seek To Exclude Evidence That Cherry Had
Not Followed The Safety Plan Concerning Blake*

¶17 Cherry next contends that trial counsel was ineffective for not seeking to exclude evidence, either through a motion in limine or through a motion at trial, regarding prior sexual abuse of her and her children, and her failure to protect her children as required by the safety plan. The offending evidence came in at trial in response to a question from one of the jurors. The juror asked a witness

what the initial reason was for taking away Cherry's children. The witness responded as follows: "Initially, Dimitri was removed because Cherry was alleged to have broken the arm of another child. Blake's removal was based on Cherry's violation of the safety plan that her children were not to be in the company of people who had a history of sexually abusing the children and/or abusing her."

¶18 Cherry contends that once the jury heard reference to sexual abuse, they were adversely influenced against her. She also argues that the statement "makes it seem as if many of Cherry [M.]A.'s children had been sexually abused by many people and that she had also been sexually abused by many people. The way it is stated one cannot even tell if Cherry [M.]A. was a perpetrator or was somehow involved with the alleged abuse in a way other than being a victim." Again, however, Cherry does not explain what the legal basis for seeking to exclude the evidence would have been,³ and why counsel's performance was deficient for not doing so. With respect to demonstrating that counsel's deficiency prejudiced her, Cherry states in a conclusory fashion that "the outcome may have been different had the jury not heard this information." The test in *Strickland* requires more than speculation; instead it is necessary to review the evidence before the jury and demonstrate why, in light of the remaining evidence offered at trial, there was a reasonable probability of a different outcome had the two sentences quoted above not been spoken.

³ For example, she does not argue that the prejudicial effect of the evidence exceeded its probative value and should have been excluded under WIS. STAT. § 904.03, or that it should have been excluded under another statutory provision. Nor does she argue that a particular case stands for the proposition that such evidence should be excluded.

¶19 Although we could again conclude that her argument is insufficiently developed under *Pettit*, we again reach the issue. The testimony at trial demonstrated that Cherry had great difficulty in meeting the conditions imposed for the safe return of her children in a variety of ways. Cherry was unable to keep up with scheduled visits with her children; all of her utilities were shut off for failure to pay her bills; she was unable to maintain a residence; she was irresponsible in parenting during the time she stayed in the foster home, including events such as her refusal to pick up formula for Blake because it was snowing outside and the line at Wal-Mart was too long. At one point when Blake asked for his mother, Cherry pointed to the foster mother and told Blake, “Mom is over there.”

¶20 There is ample evidence in the record from which the jury could conclude that Cherry was disinterested and irresponsible as it related to her ability to meet the conditions established for the safe return of the children to the home. Even without the two-sentence reference to the reason for Blake’s removal, we are unable to conclude that the jury’s decision would have been different. Again, we conclude that Cherry has failed to demonstrate that trial counsel’s performance prejudiced her.

¶21 For the above reasons, the orders are affirmed.

By the Court.—Orders affirmed.

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

