

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 2, 2010

David R. Schanker
Clerk of Court of Appeals

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Appeal No. 2009AP3098

Cir. Ct. No. 2007TP308

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN THE INTEREST OF JALACEA W., A PERSON
UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

MACEO W., A/K/A KEONTE M.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

¶1 BRENNAN, J.¹ Maceo W. appeals from the trial court’s order terminating his parental rights to Jalacea W. and from the trial court’s order denying his motion for post-termination relief. He contends, on numerous grounds, that his trial counsel was ineffective. We disagree and affirm.

BACKGROUND

¶2 The facts are those set forth by the witnesses at trial. The disputed facts are noted. Additional facts are included in the discussion section as necessary to address the issues raised by Maceo.

¶3 Jalacea was born on July 14, 2005, to Maceo² and Jamila E.³ Jalacea was born extremely premature at only twenty-five to twenty-six weeks gestation. Jalacea was diagnosed with vocal cord paralysis and a narrowing of the larynx. She had a small trach tube for feeding that required regular changing, was on oxygen, and required twenty-four hour care. She was at risk of having breathing difficulties, pulmonary distress, infection, and aspirating food. Jalacea remained in the hospital until February 2006.

¶4 Maceo testified that while Jalacea was in the hospital he visited her “every other day.” He further testified that on the days he wasn’t visiting her he was “[p]robably s[elling] drugs,” that he knew it was illegal to sell drugs, and that he knew that if he was caught he would not be able to take care of his family.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² Maceo voluntarily acknowledged paternity and was thereafter adjudicated as Jalacea’s father.

³ Jamila’s parental rights were also terminated but are not the subject of this appeal.

¶5 Beginning in early 2006, the Bureau of Milwaukee Child Welfare (BMCW) began receiving referrals concerning the care Jalacea was receiving from her parents—specifically Maceo—while she was in the hospital. By the time the referral was investigated by the BMCW, however, the hospital felt the concerns had been remedied.

¶6 The hospital attempted to train Maceo on the cares necessary to treat Jalacea’s medical conditions. Maceo testified that he was “uncomfortable” dealing with Jalacea’s trach tube, which needed to be changed at least weekly and sometimes more often. He had a prosthetic eye, which made it difficult to train him to change the tube. Both Maceo and the medical staff training him realized that Maceo could not be considered one of Jalacea’s independent caregivers. Jalacea needed at least two independent caregivers before she could be released from the hospital, so both Jamila and Jalacea’s maternal grandmother were trained.

¶7 Following her discharge from the hospital in February 2006, Jalacea lived with Maceo and Jamila. Maceo testified that he did not work. He supported himself after Jalacea’s birth “[t]hrough Social Security and selling drugs”—specifically, marijuana and cocaine.

¶8 During the time Jalacea lived with her parents, the State provided in-home nursing care five days a week to assist the family with Jalacea’s medical needs. Maceo could not be left alone with Jalacea because he was not a trained independent caregiver.

¶9 Jamila testified that during the time she and Jalacea lived with Maceo he was physically and verbally abusive to Jamila and that his abuse corresponded to drinking alcohol and smoking marijuana. She further testified

that on one occasion, Maceo hit her in front of one of the in-home nurses. The nurse called the police, but Maceo was not charged. Maceo denies ever hitting Jamila. Dawn Nelson, a case worker at BMCW, testified that many of the nurses were “afraid” of Maceo and “felt intimidated” by him. At the time BMCW investigated, only one nurse was still willing to work with the family. Maceo testified that his relationship with the nurses “went bad” after he allegedly discovered one of the in-home nurses sleeping on the job and “brought that to ... the staff’s attention.”

¶10 In April 2006, Jalacea was readmitted to the hospital for a tracheotomy. At that same time, BMCW was investigating a referral and verified the reports of domestic violence and reports that either Maceo or Jamila was smoking in the home, which was not permitted because Jalacea was on oxygen. Maceo testified that during the time he lived with Jalacea he smoked about a pack of cigarettes every other day but that he either smoked outside the house or, if he was inside the house, then he would smoke while “trying to hang out the window.” He testified that he knew it was a problem to smoke “directly around [Jalacea].”

¶11 Jalacea was released from the hospital in May 2006. But before she was released, BMCW held several meetings in an attempt to restructure Jalacea’s living arrangements so that she would not have to be placed in foster care. BMCW was particularly concerned about the domestic violence and smoking in the home. Maceo attended the meetings but admitted to walking out. As a result of the meetings, Jamila agreed to move in with Jalacea’s maternal grandmother and care for Jalacea there. Maceo testified that after Jalacea moved in with her maternal grandmother he was “shutout” but he wasn’t “mad about it” “because [Jalacea was] with her family, with some of her family, her mother at least.” Maceo admits that he “[v]ery seldom” saw Jalacea after she moved in with her

maternal grandmother because he did not get along with the maternal grandmother and wasn't allowed in the home.

¶12 In June 2006, because of problems in the maternal grandmother's home—including reports that Jalacea's trach tube was not being changed, that her room was eighty-five degrees and she was dressed in winter clothing, and that Jamila was leaving Jalacea's care to the nurses—BMCW took Jalacea into custody and to the hospital for a medical evaluation. Jalacea was found to be struggling to breathe causing the blood vessels around her eyes to burst. It was discovered that her trach tube, containing granuloma, was not being changed as necessary. As result, Jalacea was in respiratory distress. Upon her release from the hospital, Jalacea was placed in foster care.

¶13 When Jalacea was taken into custody and placed into foster care in August 2006, she was on an apnea monitor, tracheotomy tube, oxygen, and medication. Jalacea had monthly medical appointments and in-home nursing care. She was in the birth-to-three program, receiving speech and occupational therapy. During the two and one-half years before trial, Jalacea had an estimated thirty to forty medical appointments. In the year before trial, she had about twelve appointments. At the time of trial, Jalacea was in early childhood education, in daycare two days a week, and in speech therapy. Jalacea continued to have a lack of eye muscle development in one eye. She also suffered from a prematurity of the lungs and bilateral vocal cord paralysis, but no longer needed a trach tube.

¶14 In late September 2007, Jalacea underwent surgery to remove the trach tube. During the month she was hospitalized, Maceo visited "once or twice." The foster mother did not recall Maceo attending Jalacea's medical appointments. At trial, the foster mother testified that Maceo's contact with Jalacea was

“sporadic.” Maceo testified that prior to his incarceration his attendance at visits with Jalacea was “[f]ifty-fifty.” He further testified that a van he did not pay for came to his home at 6:00 a.m. to take him to the prescheduled visits with Jalacea, and that when he didn’t go to see her it was because he wasn’t at home or “was probably too high to even get up.” Instead of visiting Jalacea, he testified that he would “sleep.” Maceo also testified that, at the time of the trial, he hadn’t seen Jalacea since he visited her in the hospital in October 2007.

¶15 A petition to terminate Maceo’s parental rights (TPR) to Jalacea was filed on November 9, 2007. At that time, Maceo was in custody at the Calumet County Jail for possession with intent to deliver. He was produced to court on December 19, 2007, for his adjourned initial appearance, and requested legal representation. He appeared with counsel on January 28, 2008, and requested a jury trial. At the pretrial conference on April 7, 2008, Maceo did not appear because he had been transferred to the Dodge Correctional Institution, and the pretrial was adjourned to the jury trial date.

¶16 After being rescheduled a number of times, a trial was held beginning on March 30, 2009, concluding on April 2, 2009. The jury unanimously found that Maceo had failed to assume parental responsibility of Jalacea and that Jalacea was a child in continuing need of protective services. Maceo’s attorney made a motion for a judgment notwithstanding the verdict, which was denied. The trial court then made an unfitness finding.

¶17 A dispositional hearing was scheduled for June 10, 2009, but did not proceed because Maceo had been released from prison and was on a probation hold in the Calumet County Jail. The dispositional hearing proceeded on June 24,

2009, with the trial court issuing a letter decision terminating Maceo's parental rights on June 30, 2009.

¶18 Maceo filed a Notice of Intent to Pursue Post-Disposition or Appellate Relief on July 6, 2009. On December 14, 2009, Maceo file a Notice of Appeal. He then filed a motion to remand, which this court granted, allowing Maceo to file a post-termination motion with the trial court on January 18, 2010. There, Maceo alleged numerous claims of ineffective assistance of his trial counsel. A *Machner*⁴ hearing was held before the trial court on February 16, 2010. The trial court denied Maceo's motion. He now appeals.

STANDARD OF REVIEW

¶19 Our review of an ineffective assistance claim presents a mixed question of fact and law. *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). We do not disturb the trial court's findings of fact unless they are clearly erroneous. *Id.* However, whether trial counsel's conduct amounts to ineffective assistance is a question of law that we review independently. *Id.*

¶20 A parent subject to a termination-of-parental-rights petition is entitled to effective assistance of counsel, and we apply the standards set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Oneida County Dep't of Soc. Servs. v. Nicole W.*, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652. Under *Strickland*, to establish ineffective assistance of counsel, a represented person must demonstrate both that trial counsel's performance was deficient and that the

⁴ See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

deficiency was prejudicial. *See id.*, 466 U.S. at 697; *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985).

¶21 To prove deficient performance, the represented person must point to specific acts or omissions by the lawyer that are “outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. To prove prejudice, the person must demonstrate that the lawyer’s errors were so serious that he or she was deprived of a fair trial and a reliable outcome. *Id.* at 687. Thus, in order to succeed on the prejudice aspect of the *Strickland* analysis, the represented person “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 confidence in the outcome.” *Id.* at 694. We need not address both aspects if the represented person does not make a sufficient showing on either one. *Id.* at 697.

DISCUSSION

¶22 During the fact-finding hearing, the State alleged two grounds on which to terminate Maceo’s parental rights to Jalacea: (1) that Jalacea was a child in continuing need of protection or services, *see* WIS. STAT. § 48.415(2), and (2) that Maceo had failed to assume parental responsibility for Jalacea, *see* § 48.415(6). If the jury found that the State had established either ground, the trial court was required to find Maceo unfit and proceed with a dispositional hearing. *See* WIS. STAT. § 48.424(4). The jury found both grounds to be established.

¶23 Maceo attacks his trial counsel’s effectiveness in preventing the State from establishing each ground and for allowing certain evidence to be admitted at the fact-finding hearing. Because we conclude that Maceo’s trial counsel was not ineffective with respect to the failure-to-assume ground or with

respect to Maceo’s general evidentiary concerns as they relate to that ground, we need not address Maceo’s claims that his trial counsel performed ineffectively with respect to the child-in-continuing-need ground—even if counsel performed deficiently with respect to that ground (and we make no such finding), Maceo cannot establish that he suffered prejudice as a result of the deficiency because the State only needed to establish one ground to terminate Maceo’s parental rights to Jalacea.⁵ See *Strickland*, 466 U.S. at 697.

I. Failure-to-Assume Ground

¶24 Maceo alleges that his trial counsel was ineffective with respect to the ground of failure to assume parental responsibility because he: (1) failed to challenge the sufficiency of the State’s evidence, and (2) failed to object to a non-standard jury instruction. We address each claim in turn.

A. Sufficiency of the Evidence

¶25 First, Maceo argues that his trial counsel was ineffective for failing to challenge the sufficiency of the State’s evidence with respect to the failure-to-assume ground. In order to determine whether trial counsel’s performance was deficient—that is “outside the wide range of professionally competent assistance”—we must determine whether the evidence was actually insufficient to support the jury’s verdict. See *Strickland*, 466 U.S. at 690.

⁵ Maceo argues that his trial counsel was ineffective with respect to the child-in-continuing-need ground because his trial counsel: (1) conceded that the State had made reasonable efforts to provide court ordered services to Maceo; (2) failed to argue that the State’s evidence was insufficient to establish that it had made reasonable efforts to provide court ordered services; (3) failed to request a jury instruction on an impossibility defense because Maceo could not meet the conditions of return while incarcerated; and (4) failed to request a directed verdict on the basis that the conditions for return were not narrowly tailored.

¶26 In order to establish that Maceo failed to assume parental responsibility, the State must prove by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that Maceo has not had a substantial parental relationship with Jalacea. *See* WIS JI-CHILDREN 346. “The term ‘substantial parental relationship’ means the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of [Jalacea].” *Id.* The jury can consider factors, including, but not limited to: whether Maceo has expressed concern for or interest in the support, care, or well-being of Jalacea; whether Maceo has neglected or refused to provide care or support for Jalacea; and whether Maceo expressed concern for or interest in the support, care, or well-being of Jamila during her pregnancy. *See id.* “A parent’s lack of opportunity and ability to establish a substantial parental relationship is not a defense to failure to assume parental responsibility.” *See id.*

¶27 Maceo argues that the State did not demonstrate that he failed to assume parental responsibility for Jalacea because there was evidence that Maceo: “expressed concern for [Jalacea] and her well-being”; “zealous[ly]” advocated for Jalacea; provided care and support to Jalacea; never neglected Jalacea or refused to provide her with care and support; and participated as a family member before and after Jalacea’s birth.” Maceo cites to evidence in the record demonstrating that he visited Jalacea in the hospital, attempted to learn to care for Jalacea’s unique medical needs, lived with Jalacea for two months after she was initially released from the hospital, reported a nurse he discovered sleeping on the job, visited Jalacea at her foster home (even though the location was distant and inconvenient), bought Jalacea a gift for her second birthday, completed a Father Reads program in prison, and while incarcerated drew Jalacea three pictures and attempted to send them to her.

¶28 The trial court, in its written decision on Maceo's post-termination motion, set forth a "cursory review" of the evidence in support of the failure-to-assume ground:

1. The stark and shocking circumstances surrounding the detention of Jalacea in the first instance establishing a nearly lethal failure to provide safe and appropriate care for this remarkably fragile child.
2. The highly dysfunctional relationship of [Maceo] and [Jamila], including a highly notable instance of domestic violence in the presence of medical caregivers for J[a]lacea and the child herself.
3. Substance abuse issues on the part of [Maceo].... The combination of substance abuse and domestic violence is a remarkably dangerous combination.
4. [Maceo's] arrest and incarceration.
5. [Maceo's] intimidating and aggressive behaviors directed to medical staff assigned to the home and ongoing lack of cooperation with that staff. Some nursing staff refused to continue to service the family as a result.
6. [Maceo] walked out on an in home care planning meeting with BMCW and medical staff stating words to the substantial effect: "It isn't about me. I'm out of here."
7. The fact that he had only lived with Jalacea for approximately two months of the child's life.
8. A fifty percent attendance rate at visitation; failure to complete domestic violence counseling; failure to complete AODA counseling. He attended very few medical appointments and visited Jalacea very infrequently during one protracted hospital stay during which her tracheotomy was removed.
9. His inability to learn the necessary medical procedures and meet the particularized needs of his daughter due to his own disability (obviously a far less culpable contributing factor, but a relevant and critical one nevertheless)[.]

¶29 When reviewing the sufficiency of the evidence to support a conviction, this court applies a highly deferential standard of review. See *State v. Quinsanna D.*, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 655 N.W.2d 752. “A motion challenging the sufficiency of the evidence to support a verdict may not be granted ‘unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.’” *Richards v. Mendivil*, 200 Wis. 2d 665, 670, 548 N.W.2d 85 (Ct. App. 1996) (citing WIS. STAT. § 805.14(1)).

¶30 The trial court accurately concluded that the evidence it outlined was sufficient to support the jury’s verdict that Maceo failed to assume parental responsibility of Jalacea. Maceo points to evidence that he visited Jalacea in the hospital and lived with her for two months to demonstrate that he “expressed concern for or interest in the support, care, or well-being of Jalacea.” See WIS JI-CHILDREN 346. However, that was only one factor that the jury was to consider, and there was ample evidence that could convince the jury that while Maceo, at times, took some minimal interest in Jalacea, his relationship with her was at no point “substantial.” Further, Maceo has pointed to no evidence that during the time he lived with Jalacea that he did anything but share a roof with her. Indeed, Maceo admits he could not be left alone with Jalacea because he was unable to learn to care for her special medical needs. But Maceo points to no evidence in the record that demonstrates that he was unable to assist with Jalacea’s more basic needs or that he ever made an attempt to assist with those needs. The jury was free to conclude that merely being physically present in Jalacea’s life did not establish a “substantial parental relationship.”

¶31 Further, the jury had to weigh the evidence of Maceo’s minimal visitation and co-habitation with Jalacea against evidence that he intimidated the nurses, abused Jamila, and abused drugs and alcohol—all of which the jury could interpret as demonstrating a lack of concern for the support, care, or well-being of Jalacea. And while Maceo testified that his problems with the nursing staff resulted from his alleged report that one of the nurses was sleeping on the job, the jury was free to disbelieve Maceo’s testimony in light of the other evidence. Additionally, the jury was free to conclude that buying a gift and attempting to send three drawings to Jalacea, when combined with minimal visits over several years does not establish a “substantial parental relationship.”

¶32 As the trial court stated following the *Machner* hearing, that Maceo exhibited “brief shining moments of effort[] to assume responsibility of parenthood” does not overcome the totality of his behavior, which the jury reasonably found to demonstrate that he failed to assume parental responsibility for Jalacea. After hearing testimony that Maceo only occasionally visited Jalacea, abused Jamila while Jalacea was in the home, abused drugs and alcohol, smoked inside the house (albeit, while “hanging out the window”) even though Jalacea was on oxygen, and made only minimal efforts to ascertain Jalacea’s well-being, the jury had credible evidence to sustain its verdict.

¶33 We note that in his reply brief, Maceo cautions the court against relying on *Quinsanna D.* because this court recently certified to the Wisconsin Supreme Court *Tammy W-G. v. Jacob T.*, No. 2009AP2973, unpublished certification (Wis. Ct. App. Apr. 22, 2010). The certification calls into question the viability and constitutionality of *Quinsanna D.*, asking whether WIS. STAT. § 48.415(6) can be used “as a ground for termination of parental rights where there

has, at least arguably, been a substantial relationship early in the child’s life.” *Tammy W-G.*, No. 2009AP2973, unpublished certification at 2.

¶34 First, we note that the supreme court has not yet accepted that case for certification. And until such time as it does and until such time as it may decide to reverse the holding set forth in *Quinsanna D.*, we are bound by the holding in that case. See *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

¶35 Second, this case is distinguishable from both *Quinsanna D.* and *Tammy W-G.* In both those cases, the parent whose rights were being terminated was the child’s primary caretaker before the jury found each failed to assume parental responsibility. See *Quinsanna D.*, 259 Wis. 2d 429, ¶29 (accepting the proposition that the parent provided “daily care” for the children for two years); *Tammy W-G.*, No. 2009AP2973, unpublished certification at 2 (noting that the parent was a stay-at-home dad who provided primary care to the child for approximately four months). Here, while Maceo occasionally visited Jalacea in the hospital and lived with her for a short period, it cannot reasonably be argued that he was ever Jalacea’s primary caretaker. In fact, the evidence shows he could not be left alone with her. Accordingly, the pivotal question of whether Maceo may have engaged in substantial parenting but not have established a substantial parental relationship with Jalacea is not in play in this case.

¶36 Finally, Maceo also argues that the State conceded that Maceo established a substantial parental relationship with Jalacea when the State made the following comment while discussing the jury instructions on the failure-to-assume ground during the *Machner* hearing: “Now, [post-termination defense counsel] indicates that we shouldn’t have been focusing on this

incarceration issue because [Maceo] would have assumed parental responsibility during those two years he was with Jalacea [before his incarceration]. In fact, he did. And there was evidence to support that.” Maceo argues that the comment was a concession that he did establish a substantial parental relationship with Jalacea and that the State cannot now argue otherwise. *See State v. Gove*, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989) (“It is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error.”).

¶37 The State argues that the comment was not a concession and that:

[i]n the excerpt ... the Assistant District Attorney was referring to the argument of [post-termination defense counsel]. That [post-termination defense counsel] claimed incarceration shouldn't have been an issue for this ground; that [post-termination defense counsel] claimed Maceo W. would have assumed parental responsibility during those two years [prior to his incarceration]; that [post-termination defense counsel] claimed Maceo did in fact, assume such responsibility. These three claims mentioned by the State are the exact arguments Maceo W. makes on appeal. Unfortunately, transcripts do not provide us with a record of tone and inflection, but all other comments by the State and the fact that the State vigorously prosecuted this case, belie Maceo W[.]’s statement that the State has now conceded that he assumed parental responsibility for Jalacea.

(Emphasis and record cite omitted.)

¶38 The State’s explanation for its comments during the *Machner* hearing are logical in light of the State’s continued efforts to terminate Maceo’s rights under the failure-to-assume ground. It makes little sense that the State would suddenly concede the issue. Further, it is clear that the trial court, who was present to hear the State’s comment, did not interpret the comment as a concession

of the failure-to-assume ground because the trial court went on to decide that issue in the State's favor. Nor is it clear that post-termination defense counsel interpreted the comment as a concession because he did not raise the issue to the trial court, and in that regard, Maceo has forfeited the issue. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (“It is the often-repeated rule in this State that issues not raised or considered in the trial court will not be considered for the first time on appeal.”).

¶39 Because there was sufficient evidence to support the jury's verdict, Maceo's trial counsel was not deficient for failing to challenge the jury's verdict on those grounds, and therefore, trial counsel was not ineffective. *See Strickland*, 466 U.S. at 697.

B. Non-Standard Jury Instruction

¶40 Second, Maceo contends that his trial counsel was ineffective with respect to the failure-to-assume ground because he did not object to the non-standard jury instruction issued by the trial court. In addition to the standard jury instruction, the trial court added the following:

The evidence in this case indicates that Maceo W[.] was incarcerated during some of the periods of time under consideration in this case. Incarceration of a parent[] does not in itself establish failure to assume parental responsibility. In addition, a parent's lack of opportunity and ability to establish a substantial parental relationship due to incarceration is not a defense to failure to assume parental responsibility.

In determining whether an incarcerated parent has or did not have a substantial parental relationship with their child, in addition to the considerations indicated in other parts of this instruction, you should consider the following factors:

The reasons for the incarceration; the nature of underlying criminal behavior; whether the parent engaged in that behavior knowing that the resultant incarceration would prevent or hinder them from assuming their parental responsibilities.

Efforts to establish a substantial parental relationship despite incarceration, include but are not limited to:

Whether the parent[] offered to pay child support and their financial ability or inability to do so;

Appropriate efforts to communicate with the child or with those responsible for the care and welfare of the child; whether any such efforts were prohibited or impeded by other individuals.

Requests or absence of requests for information relating to the child's education, health and welfare;

Responsiveness or lack of responsiveness of parents to efforts, if any, of others to involve the parent in the life of the child;

Efforts, or lack of efforts, to enlist available, appropriate family members or friends in meeting the physical, financial, and emotional needs of the child; the extent and success of any such efforts.

Maceo argues that his trial counsel acted ineffectively by failing to object to the jury instruction as it was given⁶ because: (1) Maceo had time to establish a parental relationship with Jalacea prior to his incarceration and in fact did establish such a relationship; and (2) the trial court did not give an impossibility instruction on the child-in-continuing-need ground. Maceo cites no case law in support of his argument.

⁶ Trial counsel did object to the jury instruction on other grounds. The trial court granted that motion and amended the instruction accordingly before reading it to the jury.

¶41 “The trial court has broad discretion when instructing a jury.” *Fischer v. Ganju*, 168 Wis. 2d 834, 849, 485 N.W.2d 10 (1992). Our review is limited to whether the trial court acted within its discretion and we will reverse only if the instructions, taken as a whole, communicated an incorrect statement of the law or otherwise probably misled the jury. *State v. Randall*, 222 Wis. 2d 53, 59-60, 586 N.W.2d 318 (Ct. App. 1998).

¶42 Maceo does not argue that the trial court misstated the law. Instead, he argues that the additional instruction regarding his incarceration misled the jury because it focused the jury’s attention on his incarceration. He argues that the instruction was unnecessary because he had an opportunity to establish a substantial parental relationship with Jalacea before his incarceration and in fact did establish such a relationship during that time. However, whether Maceo did establish a substantial parental relationship with Jalacea was the question the jury was directed to answer, and the jury disagreed with Maceo’s interpretation of the evidence. Further, the jury was entitled to consider all relevant evidence of Maceo’s efforts to establish a substantial parental relationship with Jalacea up to and during the trial. *See State v. Bobby G.*, 2007 WI 77, ¶89, 301 Wis. 2d 531, 734 N.W.2d 81. That time period includes time in which he was incarcerated. Accordingly, whether he attempted to establish such a relationship while incarcerated was information the jury was entitled to consider.

¶43 Maceo’s argument that the instruction was “fundamentally unfair” because the trial court did not include an instruction that incarceration cannot be the sole ground for finding that Jalacea was a child in continuing need of protective services is also a nonstarter. Whether and how to instruct the jury with respect to Maceo’s incarceration on each ground was within the trial court’s discretion, and Maceo does not argue that the trial court incorrectly stated the law

or misled the jury, only that its recitation was “unfair.” See *Randall*, 222 Wis. 2d at 59-60. Accordingly, we have no basis on which to reverse the trial court’s discretionary decision.

¶44 Because Maceo has failed to demonstrate that the instruction was given in error, he has not shown that his trial counsel was deficient for failing to object to the instruction. See *Strickland*, 466 U.S. at 697. Accordingly, his trial counsel was not ineffective in that regard.

II. Evidentiary Admissions

¶45 Finally, Maceo argues that his trial counsel was ineffective because he: (1) failed to object to the admission of evidence of domestic violence; (2) failed to object to the admission of evidence of Maceo’s prior crimes; and (3) allowed the jury to hear an overstated and inaccurate listing of Maceo’s criminal history. We will address each claim in turn.

¶46 The trial court has broad discretion in determining whether such evidence is admissible. See *State v. Rodriguez*, 2006 WI App 163, ¶31, 295 Wis. 2d 801, 722 N.W.2d 136. We must sustain a discretionary decision if the trial court examined the relevant facts, applied a proper standard of law, and used a rational process to reach its results. *State v. Andrew J. K.*, 2006 WI App 126, ¶13, 293 Wis. 2d 739, 718 N.W.2d 229.

A. Domestic Violence Evidence

¶47 First, we address Maceo’s complaint that his trial counsel was ineffective when he failed to object to the admission of evidence of domestic violence. Maceo argues that the evidence was irrelevant to establishing the

failure-to-assume ground and was overwhelmingly prejudicial and should have been suppressed during the fact-finding hearing pursuant to WIS. STAT. § 904.03.⁷

¶48 The trial court stated during the post-termination hearing that any objection on the part of trial counsel to the admission of evidence of domestic violence would have been denied. The trial court noted that while the evidence was “overwhelmingly damaging” to Maceo, it would not have excluded the evidence had trial counsel made an objection pursuant to WIS. STAT. § 904.03 because the evidence was relevant to determine whether Maceo “provide[d] a safe and appropriate environment for [Jalacea].” *See* § 904.03 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

¶49 Maceo argues that the trial court, while correctly concluding that the evidence was “overwhelmingly damaging,” wrongly concluded that the evidence was relevant. Maceo contends that whether he could provide Jalacea with a safe and appropriate environment was not a relevant consideration until the dispositional hearing.

⁷ In passing, Maceo also argues that the evidence of domestic violence was impermissible as other bad acts evidence pursuant to WIS. STAT. § 904.04(2) but fails to elaborate upon his claim. We decline to consider the claim because it is unexplained and undeveloped. *See State v. Cook*, 2008 WI App 135, ¶12, 313 Wis. 2d 830, 756 N.W.2d 809. Additionally, we do not need to consider Maceo’s argument that the evidence of domestic violence was irrelevant to establish the child-in-continuing-need ground because we hold that the trial court properly found it admissible with respect to the failure-to-assume ground.

¶50 However, simply because the trial court is to consider at the dispositional hearing whether Maceo provided a “safe and appropriate environment” for Jalacea, does not mean that the information is irrelevant at the fact-finding hearing. Certainly, whether Maceo attempted to provide a “safe and appropriate environment” for Jalacea is relevant to determining whether Maceo expressed concern or interest in Jalacea and whether and what type of care and support he provided for her—relevant factors the jury may consider during the fact-finding hearing when determining whether Maceo established a substantial parental relationship with Jalacea. *See* WIS JI-CHILDREN 346.

¶51 In short, the trial court did not abuse its discretion when finding that the evidence that Maceo engaged in violent behavior in the family’s home was relevant to whether he had a substantial parental relationship with Jalacea. The trial court appropriately weighed the relevant evidence, applied a proper standard of law, and reasonably determined that the relevance of the evidence of domestic violence outweighed the prejudicial value of the evidence, even though the prejudicial value was substantial. *See State v. Sullivan*, 216 Wis. 2d 768, 280-81, 576 N.W.2d 30 (1998). We cannot overturn that decision. *See id.*

¶52 Because the trial court would not have granted a motion to suppress the evidence even if trial counsel had objected to it, Maceo was not prejudiced by trial counsel’s failure to object, and therefore, his trial counsel was not ineffective in that regard. *See Strickland*, 466 U.S. at 697.

B. Prior Crimes and Criminal History

¶53 Next, Maceo contends that his trial counsel acted ineffectively by failing to object to evidence regarding Maceo’s past crimes and failing to properly prepare Maceo to respond to questions regarding his criminal history. The State

argues that any evidence of Maceo's past crimes was harmless, and therefore not prejudicial. We agree.

¶54 The only evidence that Maceo argues should not have been admitted is his own testimony regarding his criminal record. More specifically, he argues that his trial

counsel made no objection when the [S]tate called Maceo W. to the stand and asked him a series of questions about his criminal history. In response to the [S]tate's questioning, Maceo W. testified that he was incarcerated for possession with intent; had done some time for a driving after revocation case; had previous charges for criminal damage to property and disorderly conduct because he had been at a house party, was drunk, and broke a window. When asked how many times he had been convicted of a crime in his life he said, "I'll say about twenty times."

(Record cites omitted.) In fact, Maceo had only been convicted twelve times. Accordingly, he blames his trial counsel for failing to adequately prepare him to testify and for failing to object to the State's questions, thereby allowing into evidence his prior crimes and an exaggerated statement of the number of times he had been convicted. Maceo contends that the evidence was not relevant and was prejudicial and should be excluded pursuant to WIS. STAT. § 904.03.

¶55 Maceo's trial counsel did, in fact, file a motion *in limine* objecting to the admission of evidence of prior crimes. However, the trial court never ruled upon the motion and trial counsel admitted that at the time of the trial he mistakenly believed that the motion had been decided in the State's favor. Trial counsel also conceded that although he had spoken with Maceo four or five times in preparation for questions about "convictions to admit to the jury," because Maceo answered the question regarding the number of his convictions wrong, trial counsel should have discussed it with him more.

¶56 Even assuming, without deciding, that trial counsel was deficient for not objecting to the admission of Maceo’s prior crimes and for not adequately preparing Maceo to testify about the number of his convictions, there is no prejudice. *See Strickland*, 466 U.S. at 697. Following the State’s examination of Maceo, his trial counsel briefly asked him a few follow-up questions with respect to his prior criminal convictions. That testimony informed the jury that Maceo’s current sentence was his first felony conviction, that at least seven of his prior convictions were for operating after revocation, and that “other convictions were misdemeanors.” Given that Maceo’s criminal history was rather benign and that the evidence was only a small part of that given over the four day trial, we agree that trial counsel’s failure to follow-up on his objection was harmless. The jury could not reasonably conclude that Maceo was “dangerously incorrigible” as he contends based upon the testimony. Because the error was harmless, there was no prejudice and trial counsel was not ineffective. *See id.*

By the Court.—Orders affirmed.

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

