

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 8, 2003

Cornelia G. Clark
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. 03-0296 &
03-0297
STATE OF WISCONSIN**

**Cir. Ct. Nos. 02TP000337
& 02TP000338**

**IN COURT OF APPEALS
DISTRICT I**

**NO. 03-0296
CIR. CT. NO. 02TP000337**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
AMANDA D.S., A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

D.L.S.,

RESPONDENT-APPELLANT.

**NO. 03-0297
CIR. CT. NO. 02TP000338**

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

D.L.S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
MARSHALL B. MURRAY, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.¹ D.L.S. appeals from an order terminating his parental rights to his children, Amanda D.S. and Ashley L.S., for failing to establish parental responsibility, as that term is defined by WIS. STAT. § 48.415(6) (2001-02).² He also appeals from an order denying his post-termination motion alleging ineffective assistance of trial counsel. He raises one issue on appeal: that his trial counsel provided ineffective assistance by failing to object to a statement made by the guardian ad litem during opening statement and closing argument. Because D.L.S. has failed to establish ineffective assistance, this court affirms.

I. BACKGROUND

¶2 On May 9, 2002, the State filed a petition requesting termination of D.L.S.'s parental rights to his daughters, Amanda (born May 7, 1998), and Ashley (born March 13, 2001). The petition alleged that D.L.S. failed to assume parental responsibility.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶3 During the trial, the jury was advised that Amanda was removed from D.L.S. when she was two years old because she was discovered in an unsafe commercial building. The building had a hole in the wall for an entranceway, no working toilet, broken plaster and other disrepair. D.L.S. claimed that he was “working” on the building and alleged that they did not live there. D.L.S., however, failed to provide the social worker with credible evidence of another home address.³

¶4 Ashley was placed in foster care immediately following her birth, in part, because the mother had tested positive for cocaine during her pregnancy and because neither parent had completed the court-required conditions for the return of Amanda.

¶5 D.L.S. testified during the trial. He indicated he did not cooperate with his social worker because his job prevented him from doing so. He conceded that he continued to live with the girls’ mother despite her substance abuse problems. He admitted that he failed to complete a domestic violence program, a nurturing program, and an AODA program as ordered by the court.

¶6 The jury returned a verdict finding that D.L.S. failed to establish parental responsibility. The trial court terminated his parental rights. He filed a motion alleging ineffective assistance of trial counsel, which was denied. He now appeals.

³ The only other address given was to a building owned by the City of Milwaukee and when the social worker attempted to meet D.L.S. at this address, he never appeared.

II. DISCUSSION

¶7 D.L.S. raises one issue in this appeal: that his trial counsel was ineffective for failing to object to two statements made by the guardian ad litem. The first statement, made by the guardian in the context of introducing herself to the jury was: “I’m here because [Amanda and Ashley] can’t be. I’m here to protect their legal rights, because they can’t.... [T]he Children are aligned with the prosecutor and with the State in attempting to prove this case.” The second statement, made during closing arguments as the guardian was asking the jury to consider the girls’ interests was: “two little girls who depend on me to come before you so that their voices can be heard in this courtroom.”

¶8 D.L.S. claims that his counsel should have objected to those two statements because the guardian made it sound like Amanda and Ashley wanted his parental rights terminated. During the *Machner*⁴ hearing in this case, trial counsel testified that he did not object for strategic reasons—he did not want to draw any unnecessary attention to the comments.

¶9 In order to succeed on a claim of ineffective assistance of counsel, D.L.S. must demonstrate that the conduct complained of was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, he must show specific acts or omissions of counsel that are “outside the wide range of professionally competent assistance.” *Id.* at 690. There is a strong presumption that counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

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

judgment.” *Id.* To prove prejudice, D.L.S. must show that counsel’s errors were so serious that he was deprived of a fair trial and a reliable outcome. *Id.* at 687. D.L.S must show 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.

¶10 This court’s standard for reviewing an ineffective assistance of counsel claim involves a mixed question of law and fact. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Findings of fact will not be disturbed unless clearly erroneous. *Id.* The legal conclusions as to whether counsel’s performance was deficient and prejudicial, however, are questions of law that we review *de novo*. *Id.* at 128. Lastly, this court need not address both *Strickland* prongs if D.L.S. fails to make a sufficient showing on either one. *Strickland*, 466 U.S. at 697. These standards are applied in termination of parental rights cases. *A.S. v. State*, 168 Wis. 2d 995, 1004, 485 N.W.2d 52 (1992).

¶11 This court concludes that D.L.S has failed to establish either deficient performance or prejudice in this case. Even if the guardian’s statements were objectionable, trial counsel provided a reasonable *strategic* explanation for not objecting to the statements. Counsel did not want to draw more attention to the statements, believing that the isolated statements might be lost “in the fog.”

¶12 In addition, even if D.L.S. could establish that the failure to object constituted deficient performance, he fails woefully to satisfy the prejudice prong of the *Strickland* test. This court concludes that objecting to the guardian’s statements would not have made any difference in the outcome of this case. There was substantial evidence demonstrating D.L.S.’s failure to assume parental

responsibility. D.L.S. admitted that he failed to comply with the court-required conditions for the return of his children. Based on the multitude of evidence favoring termination, this court cannot conclude that failure to object to the proffered statements resulted in prejudice to D.L.S. His claim of ineffective assistance of trial counsel fails.

By the Court.—Orders affirmed.

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

