COURT OF APPEALS
DECISION
DATED AND FILED

August 4, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP129 **Cir. Ct. No. 2010TP6**

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

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

KIMBERLY A.,

PETITIONER-RESPONDENT,

V.

CHARLES B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County: JILL N. FALSTAD, Judge. *Affirmed*.

¶1 BRUNNER, J.[1] Charles B. appeals an order terminating his parental rights to Ethan B. Charles argues his trial counsel was ineffective by (1) failing to ask the court to voir dire the jurors about whether they overheard a sidebar, and (2) failing to move for a mistrial based on the cumulative effect of the sidebar and cross-examination comments. In the alternative, he argues he is entitled to a new trial in the interest of justice. We affirm.

BACKGROUND

¶2 Ethan is the child of Charles and Kimberly A. On April 16, 2010, Kimberly filed a petition to terminate Charles' parental rights to Ethan on the grounds of abandonment and failure to assume parental responsibility. *See* WIS. STAT. § 48.415(1) and (6). Charles contested the petition and demanded a jury trial.

¶3 At trial, during Kimberly's cross-examination, Kimberly supplemented some of her answers with unnecessary comments.[2] Following her

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Charles directs us to the following exchanges that occurred during Kimberly's examination—

> Q: And then you moved in with your new boyfriend, Armondo?
>
> A: I did following a serious altercation.
>
> Q: I am not asking you that. I am asking you, did you move out of the house first?
>
> ….
>
> Q: Why did you change Ethan's name?
>
> A: The B[] family has been in quite a bit of trouble and I wanted Ethan to grow up –

(continued)

examination, the court memorialized a sidebar that occurred during the cross-examination. At the sidebar, Charles' counsel expressed concern about Kimberly's comments, and requested the court to admonish Kimberly and direct her to answer the questions with a yes or no.

¶4 During Charles' examination, he testified that he had visited Ethan within the last three months and, at the visit, Ethan made a derogatory comment to Charles' oldest daughter. In response, during Charles' cross-examination, Kimberly asked Charles how long his "daughter[has] been [living] in a group home?" Charles' attorney objected to this question, and the court held a three-minute sidebar.

¶5 Following the close of evidence, Charles' attorney informed the court that Charles had overheard the sidebar regarding his daughter. Charles heard

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> Q: Objection, judge.
>
> ….
>
> Q: Did you keep him informed over that time period as to Ethan's progress?
>
> A: Yes. I usually did it via text message. It may seem like kind of a bad way to do it, but there were so many harassing phone calls I did not want to deal with that part of it.
>
> Q: Judge, objection. If you can instruct the witness just to answer the question.
>
> ….
>
> Q: Prior to February of 2009, did Mr. B[] file any type of action to obtain placement or custody of Ethan?
>
> A: I believe he filed while incarcerated in September of 2009.
>
> Q: Judge, objection. 904.03. That was a yes or no question.

Kimberly's counsel say "his daughter … stole a car and … she's been locked up since she's been 15." The court asked Charles' attorney if she wanted it to ask the jurors if they heard the sidebar. Charles' attorney instead asked the court for a limiting instruction but expressed concern with the wording—she did not want to call attention to anything that was said. She ultimately asked the court to instruct the jury not to consider anything that may have been overheard in a sidebar. The court gave this instruction. The jury found Charles failed to assume parental responsibility to Ethan and abandoned him. The court terminated Charles' parental rights.

¶6 Charles brought a post-disposition motion, alleging he was denied the effective assistance of counsel when his attorney did "not request a voir dire of the jury and/or move for a mistrial after Charles informed her that the[] jury may have heard comments during a side bar …."

¶7 At the post-disposition hearing, Charles' trial attorney testified that when the sidebar concerning Charles' daughter took place, she believed Charles was on the witness stand. According to the trial attorney, the sidebars were held as far away from the jury as possible and the witness stand was adjacent to the sidebar location. Trial counsel described the volume of the sidebar as "[n]ot loud. But agitated and heated." She testified she did not think to voir dire the jurors to determine whether they had heard the sidebar and did not think of moving for a mistrial—although, she volunteered that she had thought about moving for a mistrial when cross-examining Kimberly. Charles testified that he was sitting at counsel's table, right next to the jury, when the sidebar occurred.

¶8 The court denied Charles' motion, reasoning that after reviewing the transcript:

> [I]t would seem clear that [Charles' counsel] was weighing the best approach or strategy to approaching this issue and that clearly she was considering whether or not she wanted any attention drawn to this …
>
> ….
>
> [Charles' counsel] weighed her options. She was concerned about calling attention to what happened and asked for a curative jury instruction. She asked for specific language. The Court put that language in the jury instructions and so instructed the jury, and in looking at the entirety of the record and the part that played, the Court cannot find that her performance was deficient.
>
> It showed some thinking about the best way to approach it to minimize any prejudice, and when she requested the curative instruction, the Court granted that request and added the language she requested to cure any … prejudice or defect.
>
> So in looking at her performance, the Court does not view that as deficient, [it] views that as a reasonable response to what happened.
>
> And the Court also believes, in looking at the entirety of the record, there hasn't been a degree of prejudice shown to the defense that would indicate that the defendant was deprived of a fair trial, with a reasonable and reliable result.

DISCUSSION

¶9 On appeal, Charles asserts his trial counsel was ineffective. He also contends he is entitled to a new trial in the interest of justice.

I. Ineffective Assistance of Counsel

¶10 A parent is entitled to the effective assistance of counsel in termination of parental rights proceedings. ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). To prove ineffective assistance of counsel, Charles must show both that his trial counsel's performance was deficient and that this deficient performance prejudiced his defense. *See* ***Strickland v. Washington***, 466

U.S. 668, 687 (1984). If he fails to establish either prong of the ***Strickland*** test, we need not determine whether the other prong was satisfied. *See* ***id.*** at 697.

¶11 Whether trial counsel provided ineffective assistance is a mixed question of law and fact. ***Id.*** at 698. The trial court's determinations of what the attorney did, or did not do, are factual and will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, the determination of whether counsel's performance was deficient and whether it prejudiced the defendant is reviewed independently. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). There is "a strong presumption that counsel acted reasonably within professional norms." ***Id.*** at 127.

¶12 Charles first argues his trial counsel was ineffective for failing to have the court voir dire the jurors about whether they overheard the sidebar. Trial counsel testified at the post-disposition hearing that she was concerned about drawing attention to anything that may have been overheard at the sidebar and decided to ask for a limiting instruction, instructing the jurors to disregard anything they may have overheard at a sidebar. We conclude this was reasonable trial strategy and her performance was not deficient.

¶13 Second, Charles contends his trial counsel was ineffective by failing to move for a mistrial based on the cumulative effect of the sidebar and Kimberly's cross-examination comments. He asserts the sidebar "was the straw that broke the camel's back[]" and because "[t]he jury heard such a slew of prejudicial remarks … the only reasonable response … would have been to explore the possibility of a mistrial."

¶14 "A motion for a mistrial is not warranted unless, in light of the entire proceeding, the basis for the mistrial motion is sufficiently prejudicial to warrant a

new trial." ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). "Not all errors warrant a mistrial and 'the law prefers less drastic alternatives, if available and practical.'" ***Id.*** (citation omitted). "A mistrial is appropriate only when a 'manifest necessity' exists for the termination of the trial." ***Id.*** (citation omitted).

¶15 We conclude Charles' trial counsel was not deficient for failing to move for a mistrial based on Kimberly's cross-examination comments together with the sidebar. At the outset, we have already determined Charles' trial counsel was not deficient in how she handled the sidebar. Further, we note that Charles has never argued his counsel's actions in regard to the cross-examination comments were deficient, and he offers no legal authority for the proposition that an attorney's actions, while sufficient in isolation, can become deficient when taken as a cumulative whole. Kimberly's testimony comprises over seventy pages of the trial transcript, and the alleged prejudicial comments occurred in only a few instances. The record reveals trial counsel objected to Kimberly's comments and requested the court to admonish Kimberly, which the court did. Charles' trial counsel's performance in regard to any unnecessary comments was not deficient.

¶16 In any event, we also determine Charles was not prejudiced by his counsel's alleged errors. To prove prejudice, Charles is required to show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine the confidence in the outcome." ***Id.*** Otherwise stated, the "defendant's burden is to show that counsel's errors 'actually had an adverse effect on the defense.'" ***State v. Franklin***, 2001 WI 104, ¶14, 245 Wis. 2d 582, 629 N.W.2d 289.

¶17 Here, Charles has failed to show that, but for counsel's alleged errors, there is a reasonable probability that the jury would not have found Charles abandoned Ethan and/or failed to assume parental responsibility for him. First, Charles offers no evidence, other than pure speculation, showing the jury actually overheard the sidebar. Although he asserts he was sitting next to the jury when he overheard the sidebar, both his trial counsel and the transcript indicate Charles was on the witness stand, removed from the jury and undergoing cross-examination, when the sidebar occurred. Further, the sidebar comments related to a different child and had nothing to do with Charles' alleged abandonment of Ethan or his failure to assume parental responsibility of him.

¶18 Second, as noted above, Kimberly's alleged prejudicial comments occurred in only a few instances and the court admonished her. Charles has not shown how these comments in any way undermine the jury's determinations.

II. Interest of Justice

¶19 Charles argues he is entitled to a new trial in the interest of justice because "either the real controversy had not been fully tried, or that there was a miscarriage of justice." Although we may grant a new trial in the interest of justice, our discretionary reversal power is formidable. ***State v. Watkins***, 2002 WI 101, ¶97, 255 Wis. 2d 265, 647 N.W.2d 244. We exercise it sparingly and with great caution. *See* ***id.***

¶20 Charles contends he is entitled to a new trial in the interest of justice because of "the problems with the fact-finding process … outlined in [section] I above." Section I contains Charles' argument about why his trial counsel was ineffective. Because we determined Charles' trial counsel was not ineffective for the alleged "problems with the fact-finding process," it follows that these alleged

problems do not warrant a new trial in the interest of justice. Moreover, because our review of the record indicates the jury's findings are supported by the record, we conclude the controversy has been fully tried. Therefore, we decline to exercise our discretionary reversal power.

By the Court.—Order affirmed.

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