COURT OF APPEALS DECISION DATED AND FILED

December 30, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 04-2160, 04-2161, 04-2162

Cir. Ct. Nos. 04TP000005, 04TP000006, 04TP000007

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN RE THE TERMINATION OF PARENTAL RIGHTS TO JOHNATHAN G.F., A PERSON UNDER THE AGE OF 18:

WOOD COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

V.

JAMES W. F.,

RESPONDENT-APPELLANT.

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

WOOD COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

V.

JAMES W. F.,

RESPONDENT-APPELLANT.

IN RE THE TERMINATION OF PARENTAL RIGHTS TO REBECCA L.F., A PERSON UNDER THE AGE OF 18:

WOOD COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

V.

JAMES W. F.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] James W.F. appeals orders of the circuit court terminating his parental rights to his children, Johnathan G.F., Kathrine A.F., and Rebecca L.F. He argues that he received ineffective assistance of counsel at the fact-finding hearing. We conclude that, regardless whether counsel performed deficiently, counsel's performance did not result in prejudice to James. Accordingly, we affirm the circuit court's orders.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Background

¶2 In February 2004, Wood County initiated proceedings to terminate James's parental rights to his three children, alleging as grounds for termination that the children were in continuing need of protection or services. *See* WIS. STAT. § 48.415(2). The County alleged, consistent with § 48.415(2), that James had failed to meet the conditions established for the safe return of his children and that there was a substantial likelihood that James would not meet the conditions within the twelve-month period following the fact-finding hearing.

¶3 The conditions were the same for each child and required, among other things, that James (1) establish a suitable residence with sufficient food, clothing, bedding, adequate furniture, and adequate supervision to meet the needs of the children; (2) attend the children's medical appointments while the children were in foster care unless excused by a social worker; (3) participate in counseling to address parenting issues; and (4) refrain from any physical discipline of the children.

¶4 James did not consent to termination and requested a jury trial. After the jury found grounds for termination, the circuit court issued orders terminating James's parental rights to all three children. James appealed, then moved this court to retain appellate jurisdiction while remanding for the circuit court to hear and decide issues of ineffective assistance of counsel. We granted the motion, and the circuit court held a ***Machner*** hearing. After the hearing, the court rejected James's claims of ineffective assistance of counsel.[2]

[2] The court ruled in James's favor on a claim regarding the scope of evidence at the dispositional hearing, but that claim is not before us.

¶5 On appeal, James renews his claims of ineffective assistance of counsel.

Discussion

Ineffective Assistance of Counsel Standards

¶6 The right to effective assistance of counsel, as set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), applies to proceedings for involuntary termination of parental rights. ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). Under ***Strickland***, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *See* ***State v. Gordon***, 2003 WI 69, ¶22, 262 Wis. 2d 380, 663 N.W.2d 765.

¶7 In order to establish prejudice, the 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.***, ¶23 (citations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (citations omitted). When, as here, multiple deficiencies are alleged, we will consider their cumulative effect. ***State v. Thiel***, 2003 WI 111, ¶¶59-60, 264 Wis. 2d 571, 665 N.W.2d 305. In rare situations, we will presume prejudice from deficient performance. ***State v. Erickson***, 227 Wis. 2d 758, 770, 596 N.W.2d 749 (1999).

¶8 "Whether a defendant's trial counsel provided ineffective assistance of counsel is a mixed question of law and fact." ***State v. Guerard***, 2004 WI 85, ¶19, 273 Wis. 2d 250, 682 N.W.2d 12. "We will not disturb the circuit court's factual findings unless they are clearly erroneous." ***Id.*** "Whether trial counsel's

performance was deficient, and whether any such deficiency was prejudicial to the defendant, are questions of law that we review independently." ***Id.***

¶9 James argues that he was prejudiced by counsel's performance because his counsel failed to object to (1) a circuit court ruling that barred counsel from examining James immediately after the County called him adversely, (2) a single verdict form for all three children, (3) testimony detailing a previous incident of abuse that had been ruled inadmissible, and (4) closing argument that invoked the best interests of the children. With respect to the first two claims of deficient performance, James asserts both actual prejudice and presumed prejudice. With respect to the last two claims, he asserts only actual prejudice.

¶10 When analyzing ineffective assistance of counsel claims, we may address either the deficient performance prong or the prejudice prong of the test first. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Here, we conclude that James has failed to show prejudice, presumed or actual. With respect to some of James's claims, we will assume, without deciding, that his counsel's performance was deficient; with respect to the remaining claims, we need not address the topic. *See* ***id.***

Whether Counsel's Performance Resulted in Presumed Prejudice

<u>Presumed Prejudice and James's Adverse Examination</u>

¶11 During preliminary proceedings on the first day of trial, James's counsel asked the court to address whether, if the County called James adversely, counsel would have the opportunity to examine James immediately following the County's adverse examination. The court explained that counsel would not be able to examine James immediately after the adverse examination but would have

the opportunity to call him as a witness later. Counsel did not object to the court's ruling. The County proceeded to call James adversely at trial, and James's counsel did not examine him until calling him as a witness in his own case the next day.

¶12 James urges this court to conclude that the denial of the opportunity to be examined by one's own counsel immediately after adverse questioning by opposing counsel constitutes prejudice as a matter of law. He contends that later examination by one's own counsel can never be a substitute for immediate examination. James relies on ***Herring v. New York***, 422 U.S. 853 (1975), and ***State v. Behnke***, 155 Wis. 2d 796, 456 N.W.2d 610 (1990). In ***Herring***, 422 U.S. at 856, 863-65, prejudice was presumed when a defendant's counsel was not allowed to make any closing argument. In ***Behnke***, 155 Wis. 2d at 806, prejudice was presumed when defense counsel failed to be present at the return of the jury verdict.

¶13 We reject James's proposed *per se* prejudice rule. In ***Herring*** and ***Behnke***, the defendants were completely denied representation at critical stages of the proceedings. In contrast, what occurred here was a difference in timing. Depending on the circumstances of a particular case, this difference in timing might or might not be significant. In any event, it certainly is not the sort of complete denial of representation that occurred in ***Herring*** and ***Behnke***.

Presumed Prejudice and the Single Verdict Form

¶14 The special verdict submitted to the jury without any objection by James's counsel consisted of a single form for all three children. It included the following questions:

> Question 3: Has James F[.] failed to meet the conditions established for the safe return of Johnathan, Kathrine and Rebecca to [his] home?
>
> If you answered question 3 "yes," answer the following question:
>
> Question 4: Is there a substantial likelihood that James F[.] will not meet these conditions within the twelve-month period following the conclusion of this hearing?

In arguing that we must presume prejudice from counsel's failure to object to this verdict, James relies primarily on ***State v. Aimee M.***, 194 Wis. 2d 282, 533 N.W.2d 812 (1995). ***Aimee M.*** merits some discussion, but only to show why it does not apply.

¶15 ***Aimee M.***, a CHIPS case, involved two independent grounds for CHIPS jurisdiction over each of three children. ***Id.*** at 288-89. The special verdict form supplied to the jury in ***Aimee M.*** asked a conclusory question with respect to each child in a manner that did not distinguish between the two grounds for jurisdiction: "(1) Is Lauran F. in need of protection or services; (2) Is Joshua R. in need of protection or services; and (3) Is Nathaniel M. in need of protection or services." ***Id.*** at 289-90. The jury answered yes to each question. ***Id.*** at 290. Aimee M. argued on appeal that, when two or more grounds are alleged for CHIPS jurisdiction, a single verdict question covering both grounds fails to require that the required five-sixths of the jurors agree on at least one jurisdictional ground with respect to each child. ***Id.*** The supreme court agreed. The court reasoned that the purpose of a CHIPS fact-finding hearing is "to provide the court with a meaningful basis upon which to determine which dispositional treatment plan … is appropriate" and that the circuit court could not know which allegation, if either, had been established to the satisfaction of five-sixths of the jurors. ***Id.*** at 292, 297-98.

¶16 Here, there is no inherent five-sixths problem with the verdict form. The verdict used by the jury here involves only one ground. Further, regarding verdict question number three, if the jurors did not agree with respect to each child, then the answer to that question should have been no—because the question names all three children in the conjunctive—and the jury would not have answered verdict question number four at all. Although it is possible the jurors ignored the fact that question number three requires a finding that James failed with respect to all three children, we will not presume prejudice based on the possibility that the jury did not abide by the plain language of the verdict question.[3]

¶17 We find nothing in ***Aimee M.*** or other case law cited by James, and nothing in the WIS. STAT. ch. 48 statutory provisions cited by James, that mandates a separate verdict question for each child in termination proceedings. Although we think separate verdict questions for each child is the better practice, the joint verdict question in this case does not create presumptive prejudice.

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[3] James seems to be arguing that the form of the verdict, under the facts in this case, created the possibility that the jury could not act on a belief it might have had that the conditions as to Johnathan would not be met, but that the conditions as to the other two children would be met. James asks us to presume that when the jury was faced with an all or none choice, the jury might have chosen all, despite the fact that it would have rendered different verdicts as to each child if given the chance. James's argument hinges on the proposition that the nature of the particular evidence in this case created the reasonable possibility of different verdicts with respect to different children. To the extent this is an argument James has developed, we reject it. Our own review of the record shows that much of the conditions evidence applied to all three children, and we conclude that there is no reasonable possibility that the jury would have rendered different verdicts if given the chance.

Whether Counsel's Performance Resulted in Actual Prejudice

Actual Prejudice and James's Adverse Examination

¶18 We turn to James's argument that he suffered actual prejudice from his counsel's failure to object to the circuit court ruling that barred James's counsel from examining him immediately after he was adversely examined by the County. James contends that by denying him the opportunity to testify immediately, the jury may have speculated that James concocted his plan to care for his children overnight. According to James, this possible prejudice was made more likely when the attorney for the County, during closing arguments, highlighted James's apparent switch in position between his adverse examination and his testimony the next day.

¶19 Specifically, James points to testimony that the County elicited from him during the adverse examination in which he explained that, at least temporarily, he planned to remodel and live in his brother's basement with the children. When James's counsel examined him on the next day of trial, James testified that he hoped to have his own place by the following month and offered additional details about how he thought he could meet the conditions required of him. He explained that he could provide clothing, had beds in storage, and had other furniture for the children.

¶20 During the County's closing argument, the County referred to the apparent inconsistency in James's testimony as to his "plans":

> [W]hen I asked him yesterday what his plans were, he talked about remodeling the basement, and since we left here after five and returned this morning around 8:30, nine o'clock, he now has a different plan.… Yesterday I asked [James] about his plan. What would he do if he had

> another year. And his exact answer after a bit of hesitation, he said, I don't have the exact layout with me.… So we move from yesterday not having the exact layout of how this is going to come together, and today, there's just a wonderful plan.

¶21 We are not persuaded that James was prejudiced by counsel's failure to immediately examine him after the County adversely examined him.

¶22 First, happenstance could have led to the very same situation, and James would have no basis to argue error. That is, it might have transpired that the County finished its adverse examination at a time when the court decided to break for an hour for lunch, or other matters, or break for the day. James has not directed our attention to any law providing that a party has a right to be examined by his or her own counsel immediately following examination by an opposing counsel.

¶23 Second, the basic theory underlying James's argument—that the overnight time lapse between adverse examination and examination by his own counsel gave the County an impeachment opportunity that would not otherwise have been available—is purely speculative. James asks us to assume that his responses the next day were unaffected by the opportunity to reflect overnight. But this is an unknown based on the record before us. Furthermore, even if James had been examined by his own counsel the same day and given the same answers, he still would have been vulnerable to the charge that he was inconsistent.

¶24 Third, James overplays the likely effect on the jury of his change in testimony with respect to his housing plan. The second day of trial was not the first time James brought up the possibility of getting his own home. James

testified on the first day of trial that he planned to obtain separate housing and that his brother's basement was only a temporary solution.

¶25 Finally, the evidence was overwhelming that James was unlikely to meet many of the conditions within twelve months of the fact-finding hearing and, therefore, we are confident that the jury would have rendered an adverse verdict regardless of whether James was able to articulate a consistent and specific "plan" as to how he thought he would meet some of the conditions.

¶26 Indeed, much of the evidence showing that James previously had not met conditions was also probative on the issue of whether he was substantially unlikely to meet the conditions in the twelve-month period following the fact-finding hearing. For example, the social worker who had worked with James and his children since April 2002 testified that she was able to verify that James had attended only 11 out of 46 of the children's medical appointments. She testified further regarding his explanation for missing the appointments:

> Q What have you discussed with him about missing these appointments?
>
> A In general I have reminded him of the fact that he needs to be [] attending those appointments. Mr. F[.] has given me a variety of reasons for his lack of attendance. Initially he said that he did not have time to both job search and attend the medical appointments. After he began working, he said that there was no ability for him to both carry a full-time job and attend the appointments, and most recently when I have asked him why he's not attending, he has stated that he's needed to meet with his attorney to prepare for this event.

At no point in James's own testimony was he able to offer a plausible explanation of why he would be likely to attend appointments in the future when he had almost uniformly failed to attend them in the recent past. James's past inability to meet

the required condition of attending the children's medical appointments and his lack of sufficient explanation for missing those appointments was strong evidence that he would be unlikely to meet this condition in the twelve-month period following the fact-finding hearing.

¶27 As another example, James was unable to provide a convincing explanation as to why he had failed to meet the condition that he attend counseling. At one point in the trial, he said it was because he had been billed $150 per session instead of a sliding-scale rate of $7 per session that he was supposed to receive. However, the county social worker testified as follows:

> Q Did Mr. F[.] ever tell you that he was being charged $150 per session at Children's Service Society?
>
> A He did tell me that.
>
> ….
>
> Q Did you follow up on that in any way to find out if that was true?
>
> A I did. I contacted Children's Service Society on December 10.
>
> Q What did you learn?
>
> A They called their billing department and verified that Mr. F[.] was being charged $7 a session, and in fact, he had paid for several sessions in advance, and so he actually had a $7 credit on his bill at that time.
>
> Q Did you give that information to Mr. F[.]?
>
> A I did….
>
> ….
>
> Q Did he ever go back?
>
> A No.

Later at trial, James essentially acknowledged that he was only required to pay $7, answered follow-up questions evasively, and was ultimately unable to offer a good reason for his failure to attend counseling:

> Q At $7 a session, are you telling this jury that $7 kept you from meeting [the counselor]?
>
> A Meeting the other criteria is too financially wise.
>
> Q Is that what you're telling them, that you haven't gone to counseling because you didn't have $7 per session?
>
> A I put priority first.
>
> Q What were the priorities more than counseling?
>
> A I was trying to keep a roof over my head.
>
> Q But you don't keep the roof over your head, do you? Your brother does?
>
> A At the point in time I was—when I was in the trailer court.
>
> Q You've been out of the trailer court since October of 2003, correct?
>
> A Yes.
>
> ….
>
> Q So you didn't have to pay trailer rents, you didn't have to pay lot rents, so that wasn't standing in your way, correct?
>
> A That's right.

Again, James was not able to offer a plausible explanation of why he would be likely to meet a condition in the near future that he had failed to meet in the recent past. His past failures to attend counseling sessions and his lack of good reasons for missing those sessions was strong evidence that he would not attend sessions in the twelve-month period following the fact-finding hearing.

¶28 The recited portions of James's testimony and the County's ability to undercut his credibility with testimony of the social worker were not the products of counsel's failure to examine James immediately following his adverse examination, but rather of James's general inability to come up with convincing explanations for why he had failed to meet many of the required conditions and why the jury should nonetheless believe that he would meet those conditions in the following twelve-month period. In addition, James at times testified in response to questions relevant to the likelihood that he would meet required conditions in a manner that further undercut his credibility and that was beyond rehabilitation. At one point, for example, he testified as follows:

> Q Do you understand, Mr. F[.], that even if doctors have told you that it's not necessary for you to be at the appointment, that the Court order still requires you to be there?
>
> A I ain't gonna answer that one.
>
> Q Do you think that a doctor telling you you're not required to come excuses you from obeying the Court's order?
>
> A I'm not gonna get in that one neither.

¶29 In light of the overwhelming evidence that James would be unlikely to meet the required conditions within twelve months after the fact-finding hearing, our confidence in the jury's decision is not undermined by any alleged effects of counsel's failure to immediately examine James after the County adversely examined him.

Actual Prejudice and James's Remaining Ineffective Assistance Claims

¶30 James makes additional arguments as to how he believes he was prejudiced. First, he argues that the form of the jury verdict resulted in actual

prejudice because the evidence at trial showed differences among the children. Specifically, he asserts that the jury might have concluded that grounds for termination existed for Johnathan but not the other children.

¶31 Second, James argues that prejudice resulted from counsel's failure to object to the admission of testimony of the details of a prior abuse incident involving Johnathan despite a circuit court ruling that limited such evidence. Specifically, James's counsel did not object when the County and the guardian *ad litem* elicited testimony from James that he had disciplined Johnathan with a belt that had left black and blue marks. Counsel also did not object when the County elicited testimony from the social worker regarding the extent of Johnathan's bruising.

¶32 Third, James argues that he was prejudiced by counsel's failure to object to statements made by the County during closing argument that invoked the children's best interests and therefore "told the jury to make its decision on something other than whether the county had proven the grounds alleged." James correctly points out that, during the fact-finding stage of termination proceedings, the best interests of the child standard is not to "dominate" or "prevail." ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶22, 255 Wis. 2d 170, 648 N.W.2d 402. James complains about the following statements by the attorney for the County:

> In other words, your verdict is going to shape the next year of Johnathan's, Kathrine's, and Rebecca's life 'cause you're going to decide if he gets another year to meet these conditions…. [W]hen you factor in the importance of these children having stability, having a home that would be there this week, next week, next month, next year, until they are old enough to provide for themselves, I think it's very clear that this man is not going to meet the conditions….

> ….
>
> … Well, what about those children. What about those children's needs, and what about their opportunities…. All I ask you to do is look at what he's done so far and project that forward another year, and ask yourselves where you see him and where you see these children, and my answer to that is exactly where we are right now. And that's not good enough for children. That's not good enough for children who need stability and permanence, and a forever home.

¶33 In light of the overwhelming evidence we have already discussed, we are not convinced that James has shown a reasonable probability that the jury's decision would have been different but for these alleged errors, even when combined with any effect of counsel's failure to examine James immediately after his adverse examination. *See* ***Thiel***, 264 Wis. 2d 571, ¶¶59-60. We make a few additional observations as to why we conclude that James was not prejudiced by these additional alleged errors resulting from counsel's performance.

¶34 With regard to the single form jury verdict, we rely in part on the same analysis we used to reject a conclusion of *per se* prejudice. That is, a conclusion that James was prejudiced presumes that the jury did not abide by the plain language of the verdict. Furthermore, in order for James to prevail as to any of the children, the jury had to believe that he could meet all of the conditions within twelve months after the fact-finding hearing. *See* WIS. STAT. § 48.415(2). The fact that some of the evidence as to some of the conditions may have differed with respect to each child does not undermine our confidence in the jury's verdict. Most of the evidence had the same relevance as to each child. When we consider the alleged ground for termination in light of the evidence adduced, we do not think that the few differences in evidence among the children were significant.

¶35 With regard to testimony about details of the abuse incident, neither the County nor the guardian *ad litem* called the jury's attention to the incident during closing arguments. In addition, at least some general testimony about the incident was in order because, as explained by James's counsel, James's strategy at trial was to own up to his past mistakes, including the incident with Johnathan, but then attempt to show how he had changed. We conclude that it is unlikely that the additional details of the abuse, while plainly unfavorable to James, affected the verdicts.

¶36 Finally, the statements that James believes improperly invoked the best interests standard do not undermine our confidence in the verdict. For the most part, the statements speak in terms of James's ability to meet conditions. Also, the statements James complains about here are no worse than statements we deemed nonprejudicial in ***Door County DHFS v. Scott S.***, 230 Wis. 2d 460, 467-69, 602 N.W.2d 167 (Ct. App. 1999). Specifically, the guardian *ad litem* in ***Scott S.*** made the following two statements to the jury:

> "I believe in the *best interests of that little girl* Kristeena, that she is entitled to have you look very carefully and answer—these questions in the way that is absolutely clear from the testimony today." [statement 1] … "I am here because my mission is to try to protect Kristeena's … best interests, to try and help you understand what is in the best interests of Kristeena …." [statement 2]

Id. at 468. We said in ***Scott S.*** that "[o]nly when the court or the [guardian *ad litem*] instruct the jury that it should consider the best interests of the child is there reversible error." ***Id.*** at 469. Neither the court nor the guardian *ad litem* here instructed the jury that it should consider the best interests of the children. The special verdict did not reference the best interests standard. In the context of the County's entire closing argument and the rest of the two-day fact-finding

proceeding, the County's statements do not raise a concern that the best interests standard dominated or prevailed.

¶37 In sum, any deficient performance by James's counsel did not result in prejudice to James. Accordingly, we affirm the circuit court's orders.

By the Court.—Orders affirmed.

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