COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP1878, 2011AP1879, 2011AP1880, 2011AP1881, 2011AP1882, 2011AP1911, 2011AP1912, 2011AP1913, 2011AP1914, 2011AP1915, 2011AP1916

Cir. Ct. Nos. 2009TP407, 2009TP408, 2010TP255, 2010TP256, 2010TP257, 2010TP254

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO DALVIN C. JR., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DALVIN C., SR.,

RESPONDENT-APPELLANT,

CORRINE J.,

RESPONDENT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DALVIN C., SR.,

RESPONDENT-APPELLANT,

CORRINE J.,

RESPONDENT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DALVIN C., SR.,

RESPONDENT-APPELLANT,

CORRINE J.,

RESPONDENT.

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CORRINE J.,

RESPONDENT-APPELLANT,

DALVIN C., SR.,

RESPONDENT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CORRINE J.,

RESPONDENT-APPELLANT,

JASON W.,

RESPONDENT.

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

¶1 CURLEY, P.J.[1] Corrine J. and Dalvin C. appeal the orders terminating their parental rights to their five children: Dalvin C. Jr., Delvanna C., Delveyanna C., Delvonta C., and Delvonna C.[2] Additionally, Corrine J. appeals the order terminating her parental rights to her son Asonta J.[3] Corrine J. and Dalvin C. also appeal the orders denying their motions for post-disposition relief. For the reasons that follow, this court affirms the trial court's orders.[4]

BACKGROUND

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

[2] This court, on its own motion, has consolidated these appeals for dispositional purposes.

[3] Asonta J.'s father is Jason W. Jason W.'s parental rights are not at issue in this appeal.

[4] Pursuant to WIS. STAT. RULE 809.107(6)(e), this court is required to issue a decision involving termination of parental rights ("TPR") appeals within thirty days after the filing of the reply brief. We may extend that deadline pursuant to WIS. STAT. RULE 809.82(2)(a) for good cause. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995). This court finds good cause—including the fact that it had to wait for key portions of the record to arrive from the circuit court after the deadline had passed—and now extends the decisional deadline in these matters through the date of this decision.

¶2 This case involves the termination of parental rights for six children: Asonta J., born March 28, 2001; Dalvin C. Jr., born April 10, 2003; Delvanna C., born January 13, 2005; Delveyanna C., born May 15, 2006; Delvonta C., born May 1, 2008; and Delvonna C., born November 15, 2009. Asonta J. is the child of Corrine J. and Jason W. The other five are the children of Corinne J. and Dalvin C.

¶3 Corrine J., Dalvin C., and their children first came to the Bureau of Milwaukee Child Welfare's attention in about March 2005. At that time, the Bureau received a referral from a report that had concerns regarding Asonta J.'s and Dalvin C. Jr.'s school attendance and hygiene. Rebecca McFadden, a Bureau social worker, was assigned to investigate the allegations. She conducted a school visit with the children and home visit with the parents. McFadden testified that she had numerous concerns with the family: the children had extremely poor hygiene, the home itself had hygienic issues including a strong fecal odor, and the children had very poor school attendance.

¶4 In January 2006, the tenth referral in the course of ten months was made to the Bureau regarding the children, and McFadden was again assigned to investigate. When McFadden went to the home, she observed Delvanna C.—just one year old at the time—sleeping face-down on the bed. When the baby was turned over, McFadden saw her gasp for air and saw that she had green mucus around her nose and mouth. Despite the fact that this same issue was addressed in a Bureau referral a month earlier, neither parent had ensured that Delvanna C. received medical care. McFadden had difficulty trying to clean the baby because

there were no tissues and no toilet paper in the house. Additionally, Dalvin C. Jr., who was just under three years old at the time, reported that the marks observed on his body were from mice biting him at night.

¶5 Consequently, that same month, January 2006, due to the concerns about the children's hygiene and health and the cleanliness of the home, as well as a lack of food in the house and an eviction notice, the Bureau removed Asonta J., Dalvin C. Jr., and Delvanna C. from Corrine J.'s home. McFadden testified that she was so concerned about Delvanna C.'s condition at the time she was detained that, "I don't say this often, but I do feel that were it not for that intervention … that she could have potentially died."

¶6 Pursuant to a June 2006 court order, these three children were found to be in need of protection and services. The court-ordered conditions for the return of the children to the home were: (1) stay in touch and cooperate with the case worker; (2) provide a safe and suitable home for the children; (3) have regular, successful visits with the children; (4) refrain from interfering with the placement of the children; (5) complete psychological evaluations and any recommended programming; (6) refrain from hurting the children and prevent others from hurting them; (7) show that the parents could care for and supervise their children and show that they understand their special needs; (8) cooperate with the children's therapist; (9) complete AODA treatment; (10) complete a parenting and nurturing program; (11) complete individual therapy; and (12) have successful, extended visits with the children and demonstrate the ability to care for them on a full-time basis.

¶7 Dalvin C. Jr. and Delvanna C. did not return to Corinne J.'s home. Asonta J. was returned to his mother in September 2008, but was detained again in April 2009. Pursuant to a September 2009 court order, Delveyanna C. and Delvonta C. were placed outside of Corrine J.'s home because of Corrine J.'s inability to monitor safety concerns, including: failing to supervise the children near the stove, allowing the children to place items such as lead and cockroaches into their mouths, and allowing one child to come dangerously close to falling off of a second-floor balcony. Delvonna C., born in November 2009, was detained directly from the hospital.

¶8 At trial, Corrine J. admitted that she had not met the condition of having a safe and suitable home. Sometimes her house was unclean and was infested with cockroaches and rodents, and it contained rotting food and fruit flies.

¶9 In addition, while Corrine J. did stay in touch with her caseworker, she was not always cooperative, and threatened one of her caseworkers. For example, caseworker Jamie Rief left the case in December 2010 because Corrine J. had threatened Rief's children. Corrine J. told Rief that she knew all about her children, that she had videotapes of them, that she was going to make their lives "hell for the next five years," and that she hoped that Rief's seven-year-old daughter would commit suicide. This pattern of threatening behavior caused Rief concern not only for her own children, but for Corrine J.'s mental state.

¶10 Corrine J. also was inconsistent in attending the parenting services offered to her. Sometimes she would attend every appointment, but other times she would miss every appointment.

¶11 Corrine J. did meet the condition of completing a parenting program, but there were concerns about whether she had acquired the necessary skills. Additionally, Corrine J. did not meet the conditions of completing a domestic violence program, cooperating with KindCare, or keeping Dalvin C. out of her home and away from the children. Indeed, the children and Corrine J.'s family members reported witnessing incidents of domestic violence between Corrine J. and Dalvin C.

¶12 Also, while Corrine J. had supervised and unsupervised visitation with her children, she had not yet progressed to completely unsupervised visitation. Her visits with more than one child were described as chaotic, and there were several concerns, including the children's safety, medication, and nutrition.

¶13 Bureau case workers testified that the Bureau had provided all the necessary services to Corrine J. to help her meet the court-ordered conditions and that they did not believe that she could meet those conditions in the next nine months. Corrine J., on the other hand, disputed that the Bureau had helped her and felt that the proceedings were unfair. She believed that she had met all of the conditions and that she did not need any more services.

¶14 Corrine J. also had a number of emotional and cognitive issues that interfered with her ability to effectively care for her children. She was diagnosed with low-grade depression, post-traumatic stress syndrome, cannabis dependence in remission, borderline intellectual functions and personality disorder with dependent features. She was also diagnosed with mild retardation, testing at an IQ

of sixty-eight. Dr. Kenneth Sherry, who administered the evaluations, testified that while individuals with IQ scores similar to Corrine J.'s typically can handle some adult responsibilities, they are unable to handle tasks that require a greater level of decision-making. He also concluded that a person scoring in this fashion would have difficulty managing a large number of children; he testified at trial that it would be "fairly overwhelming."

¶15 Dalvin C., who tested at an IQ-level of sixty-nine and who reads at a second-grade level, also testified at trial that he had not met the court-ordered conditions of return. For example, although he was to obtain AODA treatment, he refused to submit to drug testing and had not completed treatment by the time of trial. He also did not complete the required domestic violence class. Additionally, Dalvin C. had not, by the time of trial, established a safe and suitable home for himself, but rather, divided his time between other family members' residences and supported himself by robbing rival gang members.

¶16 Moreover, supervised visits with Dalvin C. were characterized by social workers as chaotic. During several of these visits, Dalvin C. would come to the house and greet the children, but then he would immediately leave.

¶17 Jamie Rief, who was assigned to the case in about June 2009—and who, as noted, had been threatened by Corrine J.—testified that, based upon her review of the case file, there had not been substantial progress by either parent towards meeting the court-ordered conditions of return from 2006, when the children were detained, until she left the case in December 2010. Similarly, Lee Semones, the case manager assigned by the Bureau at the time of the trial in

March 2011, testified that based upon her knowledge of the family and the parents, she did not believe that either parent would meet the conditions of return in the nine months following trial.

¶18 After all of the evidence was in and the attorney for the State gave her closing argument, the guardian ad litem gave the following closing argument:

> Thank you. So in my opening, I explained that sometimes I'm in agreement with the [S]tate when they file termination of parental rights cases. Sometimes, I'm not…. In this case, I 100 percent agree….
>
> I just want to remind you that I have been on this case. I have been these kids' guardian ad litem the entire time they've been in the child welfare system. And Ms. J[.] and Mr. C[.] have been involved in the system, along with their kids at certain points, for five years. I have seen these kids grow. This is a long time. For some of these kids, for Delvanna, it is their entire life. For some of the other kids, half their life, more than half their life.
>
> Think about how that is for you: Your entire life or half your life. For a child who doesn't have a full grasp or concept of time and how time goes along, it has even more of an impact, that amount of time and years…. Essentially, Mom and Dad are saying at this point, ["]we're not done. We need more time. Give us the nine months. We can do it.["] But I am asking you to not give it to them because if past behavior does predict future success, there's absolutely no way they're going to have it done in nine months. No way. No how.
>
> Mom said one thing that struck me to my core, being on this case for so long. She said … "My kids don't deserve this." And on that, I agree with her. They don't deserve this. And for those reasons, I'm asking that the answer be yes to all the questions.

¶19 After closing arguments, Corrine J.'s attorney moved for a mistrial, arguing that the guardian ad litem's actions, including the fact that during her

closing argument she became emotional and looked as though she were going to break down and cry, were unprofessional and appeared to be an attempt to inflame the jury's passions. The trial court concluded that there was no likelihood that the guardian ad litem's conduct would impact the jury's ability to make a proper decision, and denied counsel's mistrial motion.

¶20 The jury found that the State had proven the failure to assume parental responsibility grounds for all six children. The jury also found that the State had proven the continuing CHIPS grounds alleged for five of the six children. As for whether there was a substantial likelihood that Corrine J. would not meet the conditions for return regarding Dalvin C. Jr., Delvanna C., Delveyanna C., and Asonta J., one juror dissented. Two jurors dissented on this same question for Delvonta C.

¶21 Corrine J. and Dalvin C. each filed post-disposition motions for a new jury trial. The trial court denied the motions, and Corrine J. and Dalvin C. now appeal.

ANALYSIS

¶22 On appeal, Corrine J. argues that she is entitled to a new trial because her trial counsel's failure to object to the guardian ad litem's closing argument constituted ineffective assistance of counsel. Dalvin C. argues that he is entitled to a new trial because the trial court erroneously exercised its discretion in denying his motion for a mistrial based on the guardian ad litem's closing argument. This court will discuss each argument in turn.

(1) Trial counsel was not ineffective for failing to object to the guardian ad litem's closing argument.

¶23 Corrine J.'s sole argument on appeal is that trial counsel was ineffective for failing to object to the guardian ad litem's improper closing argument. *See* ***Door Cnty. DHFS v. Scott S.***, 230 Wis. 2d 460, 466, 602 N.W.2d 167 (Ct. App. 1999) (ineffective assistance of counsel analysis applies to proceedings for the involuntary termination of parental rights). According to Corrine J., the guardian ad litem's arguments and emotional state "moved the jury away from dissecting the trial evidence regarding the critical questions" and "played on the jury's emotions about the case."

¶24 This court reviews "the denial of an ineffective assistance claim as a mixed question of fact and law." *See* ***State v. Kimbrough***, 2001 WI App 138, ¶27, 246 Wis. 2d 648, 630 N.W.2d 752. We will affirm the trial court's factual findings unless they are clearly erroneous. ***Id.*** However, we review whether trial counsel's performance was deficient and prejudicial independently, as a question of law. *See* ***id.***

¶25 To establish a claim for ineffective assistance of counsel, Corrine J. must show that trial counsel's performance was deficient and that this deficient performance was prejudicial. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115. To establish deficient performance, Corrine J. must show facts from which a court could conclude that trial counsel's representation was below the objective standards of reasonableness. *See* ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. To demonstrate prejudice, she "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." *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). If Corrine J. fails to make a sufficient showing on one ***Strickland*** prong, we need not address the other. *See* ***id.*** at 697.

¶26 Corrine J. argues that trial counsel's failure to object was deficient because the guardian ad litem improperly invoked her role as a lawyer in argument, appealed to the best interests of the child at the grounds phase of trial, *see* ***Waukesha County DSS v. C.E.W.***, 124 Wis. 2d 47, 61, 368 N.W.2d 47 (1985) (jury does not consider the best interests of the child standard at grounds, or factfinding, stage of termination of parental rights proceeding), and in saying that she had "watched these kids grow," argued facts not in evidence. Corrine J. argues that trial counsel's performance was prejudicial because:

> This case was not a clear winner for the state. There was evidence that Ms. J. had progressed in meeting the conditions and that the five of the children had lived with her prior to be[ing] removed from her home. In fact, one of the jurors dissented on the question of whether it was

> substantially unlikely that Ms. J. would meet the conditions of return for Dalvin C. [Jr.], Delvanna C., Delveyanna C., and Asonta J. and two jurors dissented on this question for Delvonta C.

¶27 This court disagrees. Grounds for the termination of Corrine J. and Dalvin C.'s parental rights were very strongly established at trial. Both parents—by their own admission—had not met the court-ordered conditions of return by the time of trial, which was approximately six years after the Bureau first became involved in the family's affairs. Corrine J.'s house was unclean, infested with cockroaches, and infested with rodents that bit the children. Corrine J. displayed a severe lack of emotional stability and maturity, having not progressed to unsupervised visits with her children and making serious threats against one of her caseworkers. Corrine J. also was inconsistent in attending the parenting services offered to her, and failed to complete the domestic violence program.

¶28 Dalvin C. refused to submit to drug testing and had not completed AODA treatment by the time of trial. He did not complete the required domestic violence class. Additionally, Dalvin C. had not, by the time of trial, established a safe and suitable home for himself, but rather, divided his time between other family members' residences and supported himself by robbing rival gang members. Moreover, during supervised visits, Dalvin C. would abdicate his parental responsibilities, stopping only to greet the children, and then leaving immediately thereafter. These facts—as well as numerous others adduced at trial—show that, consistent with the caseworkers' testimony, neither Corrine J. nor Dalvin C. was likely to meet the court-ordered conditions for return in the nine months following trial. Therefore, this court concludes there is no "reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***Strickland***, 466 U.S. at 694. In other words, Corrine J. cannot show prejudice. *See* ***id.***

¶29 Because this court finds that there was no prejudice, it will not address whether trial counsel's performance was deficient. *See* ***id.***, 466 U.S. at 697 (if defendant fails to make a sufficient showing on one prong of ineffective-assistance analysis, we need not address the other); *see also* ***State v. Zien***, 2008 WI App 153, ¶3, 314 Wis. 2d 340, 761 N.W.2d 15 (cases should be decided on narrowest possible ground).

(2) The trial court did not erroneously exercise its discretion in denying Dalvin C.'s motion for a mistrial.

¶30 Dalvin C.'s sole argument on appeal is that the trial court erred in denying his motion for a mistrial based upon the guardian ad litem's closing argument. "Whether to grant a mistrial is … a matter for the trial court's discretion," and accordingly, this court gives the trial court's decision "great deference." *See* ***State v. Foy***, 206 Wis. 2d 629, 644, 557 N.W.2d 494 (Ct. App. 1996). "When a decision is within the trial court's discretion," this court reviews it "to determine whether the court examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." *See* ***id.***

¶31 Dalvin C. argues that the trial court erred in denying his motion because the guardian ad litem improperly invoked the "best interest" standard, which was not at issue at this part of the trial, in her argument. *See* ***C.E.W.***, 124 Wis. 2d at 61. Dalvin C. also argues that the guardian ad litem's argument was an

improper "golden rule" argument asking the jury members to put themselves in the place of the children. Finally, Dalvin C. argues that the trial court erred in denying his motion because the guardian ad litem's closing arguments did not constitute harmless error. This court disagrees with Dalvin C. The trial court did not err in denying his motion for a mistrial.

¶32 First, in regards to Dalvin C.'s argument that the guardian ad litem improperly invoked the "best interest" standard, the trial court, in its written letter denying Dalvin C.'s motion, "examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." *See* ***Foy***, 206 Wis. 2d at 644. Specifically, the trial court determined:

> There is clearly and unquestionably no explicit violation of the rule barring evidence or argument regarding best interests in the grounds phase of the proceedings…. At no time did the closing argument of the [guardian ad litem] explicitly urge the jury to disregard their obligation to restrict their determination to whether the petitioner had or had not proved the ground alleged….
>
> [W]e emphasize to juries the limitation of their function and their obligation to solely determine whether grounds have or have not been proven…. This point was emphasized to this jury in both the voir dire … and in the final instructions….
>
> [The guardian ad litem]'s statements that she was 100% in agreement with the decision of the state to file a termination petition is nothing more than the functional equivalent of asserting that there is overwhelming evidence that grounds exist to terminate the parent's parental rights. There is nothing improper in that argument; it is proper and zealous advocacy of her position.

¶33 Therefore, because the trial court's decision, highlighted above, demonstrates that it did apply the proper legal standard to the relevant facts and

did engage in a rational decision-making process, *see* ***id.***, this court will not overturn the trial court's decision, even though Dalvin C. may disagree with it.

¶34 Second, regarding Dalvin's improper "golden rule" argument, this court similarly concludes that the trial court properly applied the law to the relevant facts and "engaged in a rational decision-making process." *See* ***id.*** The trial court explained in its written letter denying the motion:

> The need for timely permanence for children is a core and driving principle of state and federal child welfare policy…. Time and timing is a critical aspect of the claim of continuing need of protection and services, one of the grounds established for termination in this case. Lawyers do and should urge juries to use their common sense in assessing evidence; we instruct them to do so…. This was not a golden rule violation; it was appropriate argument that the length of time the children had been in foster care was too long and, particularly so when considered in the children's perception of time.

¶35 Again, while Dalvin C. may not agree with the trial court's decision on the matter, the above analysis makes clear that the trial court carefully considered his arguments, but rejected them based upon a proper application of the facts to correct legal principles. *See* ***id.*** Moreover, Dalvin C. points to no authority mandating reversal when an attorney has made an improper "golden rule" argument, and this court declines to make such law here, especially in a case such as this, where the effect of the reference at issue was undoubtedly insignificant given the overwhelming evidence of grounds for the termination of Corrine J. and Dalvin C.'s parental rights.

¶36 Third, regarding his harmless error argument, Dalvin C. specifically argues that the trial court erred when it found that: (1) the guardian ad litem did improperly assert personal knowledge in her closing argument, but that (2) this argument did not improperly affect the outcome of trial. He argues that this was an improper "harmless error" determination because a fundamental right is at stake. *See* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶22, 271 Wis. 2d 1, 678 N.W.2d 856 ("A parent's interest in the parent-child relationship and in the care, custody, and management of his or her child is recognized as a fundamental liberty interest protected by the Fourteenth Amendment."). In so arguing, Dalvin C. relies on ***Oswald v. Betrand***, 374 F.3d 475, 482 (7th Cir. 2004) (listing situations in which harmless error does not apply).

¶37 However, ***Oswald***, on which Dalvin C. relies, is inapposite; the case itself was a federal criminal case, and none of the examples listed as being exceptions to the general "harmless error" rule had to do with a termination of parental rights proceeding. *See* ***id.*** Furthermore, the trial court did not actually apply a harmless error analysis to Dalvin C.'s argument that the guardian ad litem violated the rule against lawyers asserting personal knowledge of facts in litigation. Rather, the trial court explained that the guardian ad litem's argument did not violate Dalvin C.'s right to *due process*:

> There is, and can be, in my view, no reasonable argument that this implicit violation of the rule had any impact on the determination of the jury—much less an impact that "so infected the trial with unfairness" as to rise to the level of a due process violation or "undermine confidence in the outcome" of the case…. The evidence of ongoing and intractable dangerously deficient parenting was overwhelming.

¶38 As Dalvin C. himself notes, the test for whether an attorney's remarks violate a litigant's due process rights is whether they "so infected the trial with unfairness as to make the result[] … a denial of due process." *See* ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992) (explaining test for determining whether prosecutor's remarks amounted to due process violation). For the reasons explained with regard to Corrine J.'s argument on appeal, this court determines that the impact of the guardian ad litem's comments was miniscule compared with the overwhelming evidence supporting the jury's verdict. The trial court properly denied Dalvin C.'s motion, and the verdict will not be disturbed.

By the Court.—Orders affirmed.

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