COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2599 **Cir. Ct. No. 2011TP2**

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

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

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

V.

SCOTT H.,

RESPONDENT-APPELLANT,

AMANDA H.,

RESPONDENT.

APPEAL from orders of the circuit court for Oneida County: PATRICK F. O'MELIA, Judge. *Affirmed.*

¶1 MANGERSON, J.[1] Scott H. appeals an order terminating his parental rights to his son, Daman H., and an order denying postdisposition relief. Scott contends his trial counsel was ineffective. We affirm.

BACKGROUND

¶2 Daman was born to Scott and Amanda H. on November 19, 2008. Oneida County took custody of Daman at the hospital, and he has been in foster care his entire life.

¶3 On February 10, 2011, the County petitioned to terminate Scott's and Amanda's parental rights. As for grounds for termination, the petition alleged that Daman continued to be a child in need of protection or services, *see* WIS. STAT. § 48.415(2), and that Scott and Amanda had failed to assume parental responsibility, *see* WIS. STAT. § 48.415(6). Both parents contested the petition, and the court held a six-day joint jury trial.

¶4 On the second day of trial, case worker Sue Dervetski testified about a visit that occurred at Scott and Amanda's house in October 2009. When she arrived with Daman, Scott was watching a Charles Manson television show. As Scott got up to turn the television off, Dervetski looked at the screen and saw "a naked … pregnant woman, … on the ground in her blood." At the end of the visit, Dervetski told Scott that it appeared he was not ready for the visit because the Charles Manson program was not suitable for children and should have been turned off before they arrived. At that point, Scott became angry and began

[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.

yelling at Dervetski in front of Daman. After this visit, future visits were removed to the agency because of worker safety concerns.

¶5 Later, during deliberations, the jury asked for a list of the court-ordered services so that it could answer one of the special verdict questions for the continuing CHIPS ground.[2] In response to the jury's request, the parties stipulated to sending four exhibits—three case plans and the CHIPS dispositional order—back to the jury. The exhibits totaled sixty-one pages and contained the court-ordered services as well as other information.

¶6 The jury found that Daman continued to be a child in need of protection or services and that Scott had failed to assume parental responsibility. Following a dispositional hearing, the court terminated Scott's parental rights.

¶7 Scott brought a postdisposition motion. The court denied his motion following a hearing. Additional facts will be discussed below.

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[2] The special verdict form for the continuing CHIPS ground asked:

> 1. Has Daman been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law? ….
>
> 2. Did the Oneida County Department of Social Services make a reasonable effort to provide the services ordered by the court to Scott [H.]? ….
>
> 3. Has Scott [H.] failed to meet the conditions established for the safe return of Daman to the [H.]s' home? ….
>
> 4. Is there a substantial likelihood that Scott [H.] will not meet these conditions within the nine-month period following the conclusion of this hearing? ….

DISCUSSION

¶8 On appeal, Scott contends his trial counsel was ineffective in five ways. He asserts counsel was ineffective for sending the CHIPS documents to the jury and for failing to object to evidence that Scott watched a "gory" movie about Charles Manson. Scott also asserts counsel was ineffective in regard to the failure to assume parental responsibility ground because counsel failed to file a post-verdict motion challenging sufficiency of the evidence, failed to allege that ground was unconstitutional as applied, and failed to request a modified jury instruction.

¶9 A parent in a termination of parental rights action has the right to the effective assistance of counsel. ***Oneida Cnty. Dept. of Social Servs. v. Nicole W.***, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652. To establish ineffective assistance of counsel, Scott must prove his counsel's performance was deficient and he was prejudiced by this deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). To show deficient performance, he must show specific acts or omissions of counsel that were outside the wide range of professionally competent assistance. *See* ***id.*** at 690. Prejudice is proven if Scott shows "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** If Scott fails to establish either prong of the ***Strickland*** test, we need not determine whether the other prong is satisfied. *See* ***id.*** at 697.

CHIPS documents

¶10 Scott first argues his counsel was ineffective for allowing documents to be sent to the jury "that contained highly prejudicial statements." Scott, in his statement of facts, highlights seventeen statements included in the exhibits sent to

the jury. He contends counsel was deficient because, even though the court gave counsel the opportunity to redact these statements, counsel failed to do so. Moreover, at the ***Machner***[3] hearing, counsel testified she had no strategic reason for allowing those statements to be sent to the jury.

¶11 As for prejudice, Scott contends that we do "not need to spend considerable time analyzing all of the statements to determine whether the statements were prejudicial." He instructs that "[i]t is sufficient to consider only the first one in order to reach the necessary conclusion that the unredacted statements undermine confidence in the outcome." That statement provides:

> Previous patterns of aggressive behavior have included that Mr. [H.] has a documented history of violent behavior, including assaultive criminal behavior in the past. These behaviors include profanities, temper outbursts, and throwing or kicking things. These behaviors are impulsive, are without provocation, and escalate quickly. His violent behavior has been directed toward Mrs. [H.] and in front of his children. In the past, it has also been observed to be directed toward his children.

¶12 Scott asserts this statement was the "most harmful" one revealed to the jury because there was no evidence in the record that he was "criminally aggressive" "towards Amanda and his children." He also argues the County has the burden to prove he was not prejudiced by this information.

¶13 In an ineffective assistance of counsel framework, Scott, not the County, has the burden of proving he was prejudiced by trial counsel's stipulation to send the exhibits to the jury. *See* ***Strickland***, 446 U.S. at 694. We also observe the statement does not allege that Scott was "criminally aggressive" toward his

[3] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

family—the statement says "violent." The statement then describes Scott's violent behavior as "profanities, temper outbursts, and throwing or kicking things."

¶14 We conclude that, irrespective of whether counsel was deficient for sending that information to the jury, Scott was not prejudiced by any deficiency. First, we agree with the County that this information was largely cumulative to other evidence introduced at trial. There, Scott voluntarily revealed he had been in prison and discussed participating in "cage of rage" while there. Additionally, multiple witnesses testified about Scott's anger problems—he yelled at workers; he yelled at Amanda; workers feared for their safety and felt threatened, visits had to be removed to the agency because of his behavior; and law enforcement was made available for visits. Moreover, the jury observed Scott's inappropriate behavior during trial—he interrupted witness testimony and closing arguments; he argued with the court and counsel; he was not responsive during portions of cross-examination; and he walked out of trial on more than one occasion.

¶15 Second, there was substantial evidence in the record to support the jury's determination that Daman continued to be a child in need of protection or services. Daman had been in foster care his entire life. As part of the conditions for Daman's return, Scott was, in part, ordered to attend visits with Daman and engage in counseling. During trial, the case workers testified that Scott and Amanda had cancelled multiple visits during 2010 and 2011 and their excuses ranged from illness to working at a rummage sale to having tech support come to their house. One time when Scott and Amanda cancelled a visit for an illness, a case worker later observed them at the grocery store.

¶16 As for the counseling requirement, Scott's counselor testified Scott attended only four appointments in June and July 2010, missed the following ones,

and did not return the counselor's calls. The counselor never heard from Scott again. Although Scott testified he stopped going because he could not afford the $4 copay, he admitted he never gave any bills to the County. Moreover, the jury observed Scott walk off the witness stand and out of the courtroom after the guardian ad litem asked him how many $4 counseling sessions he could obtain for the $40 per month he spends on tobacco.

¶17 Scott does not discuss how he was prejudiced by the remaining sixteen statements; however, our general observation is that, for the most part, the statements highlighted in Scott's statement of the facts are cumulative to other evidence in the record. For example, Scott volunteered information about his daughters, and other witnesses discussed Scott's scheduled visits with them. More than one witness testified Daman was doing well in foster care, law enforcement officers were made available for visits, and the County did not believe Scott had met the conditions for return.

¶18 In short, Scott has not shown a reasonable probability that the result of the proceeding would have been different if counsel had not stipulated to sending the CHIPS documents to the jury. *See* ***Strickland***, 446 U.S. at 694.

Charles Manson television show

¶19 Scott next asserts his trial counsel was ineffective for failing to object to evidence that he "watched a gory television show about Charles Manson." (Some capitalization omitted.) Specifically, he objects to Dervetski's description of the program—that she observed "a naked … pregnant woman, … on the ground in her own blood." Scott contends counsel should have filed a motion in limine requesting that the worker "not testify about the specific facts of the show other than to say it was not appropriate for children." He asserts that he

was prejudiced by counsel's failure because the "gory details are not relevant and are more prejudicial than probative."

¶20 Scott, however, has failed to establish how, in the context of a six-day jury trial, Dervetski's single reference to the details of the Charles Manson program was so prejudicial that it undermines our confidence in the trial's outcome. *See* ***Strickland***, 446 U.S. at 694. We conclude Scott was not prejudiced by counsel's alleged failure to prevent the jury from learning the details of the television program. *See* ***id.***

Failure to assume parental responsibility arguments

¶21 Scott's remaining allegations of ineffective assistance of counsel relate to the failure to assume parental responsibility ground. However, WIS. STAT. § 48.415 only requires a finding on one termination of parental rights ground. Because the jury found grounds to terminate Scott's parental rights based on a continuing CHIPS, we need not address his arguments related to failure to assume parental responsibility. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues needs to be addressed); ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("cases should be decided on the narrowest possible ground").

¶22 Scott, however, argues that we cannot affirm on one ground because of the doctrine of prejudicial spillover. In support, he cites ***State v. McGuire***, 204 Wis. 2d 372, 556 N.W.2d 111 (Ct. App. 1996).

¶23 Scott's reliance on ***McGuire*** and prejudicial spillover is confusing and undeveloped. In essence, ***McGuire*** explains that if an appellate court vacates a conviction on one count, a defendant may be entitled to a new trial on the

remaining count if he shows there was prejudicial spillover from the vacated count's evidence. ***Id.*** at 380-81. Here, however, we are not vacating the failure to assume parental responsibility determination, we are merely not addressing it because, as stated above, WIS. STAT. § 48.415 only requires a finding on one ground and the continuing CHIPS ground is sufficient.

¶24 Moreover, even if we were to consider applying prejudicial spillover, Scott only asserts we should invoke the doctrine because "the counts in this case not only overlap, they go to the very same finding—whether there are grounds to find Scott H. to be unfit." However, in ***McGuire***, the court observed a closer degree of overlap and similarity weighs *against* invoking the doctrine of prejudicial spillover. *See* ***McGuire***, 204 Wis. 2d at 382.

By the Court.—Orders affirmed.

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