

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 15, 2012

Diane M. Fremgen
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 No. 2011AP2600

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.

AMANDA H.,

RESPONDENT-APPELLANT,

SCOTT H.,

RESPONDENT.

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

¶1 PETERSON, J.¹ Amanda H. appeals an order terminating her parental rights to her son, Daman H., and an order denying postdisposition relief. Amanda argues the circuit court erred by failing to grant her motion to sever her trial from her husband's. She also contends trial counsel was ineffective and the failure to assume parental responsibility ground is unconstitutional as applied. We affirm.

BACKGROUND

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

¶3 On February 10, 2011, the County petitioned to terminate Amanda's and Scott's parental rights. The petition alleged that Daman continued to be a child in need of protection or services, *see* WIS. STAT. § 48.415(2), and that Amanda and Scott 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 During trial, Scott's behavior was inappropriate at times—he interrupted witness testimony and closing arguments, he argued with the court and counsel, he was not responsive during portions of cross-examination, he revealed irrelevant information, and he walked out of trial on more than one occasion. Most significantly, Scott suggested he had other children who had been

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.

neglected,² and he made references to being in prison.³ During his cross-examination, he instructed the guardian ad litem to stop “flopping” her head at him, and when the GAL asked Scott how many \$4 counseling sessions he could obtain instead of spending \$40 per month on tobacco, Scott walked off the witness stand and walked out of the courtroom.

¶5 Based on Scott’s behavior, Amanda twice moved to sever the trial. The circuit court denied both requests, reasoning the parties were married, Scott was part of the case, and the jury had been instructed and would be instructed again that each parent would receive a separate and independent verdict. The court also observed Scott’s behavior was not surprising to Amanda because “[s]he knows how he acts.” As for Scott’s absence, the court instructed the jury that, because this was a civil proceeding, Scott was not required to be present and his absence should have no bearing on the jury’s decision.

¶6 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

² Specifically, when the guardian ad litem was questioning one of the experts, the GAL asked whether Daman suffered from reactive attachment disorder. The expert responded, “no.” At that point, Scott interrupted, “I thought we was here for Daman and not the girls. Hang on. They’re talking about the girls. This is for Daman No. She’s talking about the girls’ lack of development going to Birth to Three She’s not even referring to Daman If they don’t want to talk about the girls, don’t bring it up.”

³ The first time Scott mentioned his prison record was after the County asked him how many times he had completed anger management counseling. Scott responded, “Are you asking for my prison record, Mr. Fugle? ... Because we agreed several times that my prison record will not be brought up and that’s what you’re doing. You brought it up. Now let’s talk about my prison record. Let’s go. Come on, ask me about it.”

continuing CHIPS ground.⁴ 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.

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

¶8 Amanda brought a postdisposition motion. The court denied her motion following a hearing. Additional facts will be discussed below.

DISCUSSION

¶9 Amanda argues the circuit court erred by failing to grant her severance motions, and her trial counsel was ineffective for agreeing to send the

⁴ 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 Amanda [H.]?
3. Has Amanda [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 Amanda [H.] will not meet these conditions within the nine-month period following the conclusion of this hearing?

CHIPS exhibits to the jury. She also raises two arguments involving the failure to assume parental responsibility ground—that counsel was ineffective for failing to follow up on a request to modify the jury instruction and that the ground is unconstitutional as applied.

I. Severance Motions

¶10 Amanda first argues the circuit court erred by denying her severance motions. Whether to grant a motion for severance is within the circuit court’s discretion. *S.D.S. v. Rock Cnty. Dep’t of Social Servs.*, 152 Wis. 2d 345, 362, 448 N.W.2d 282 (Ct. App. 1989). The circuit court must determine whether the basis for the severance motion is so prejudicial that it undermines the litigant’s right to a fair trial. *See State v. Locke*, 177 Wis. 2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993). We will not reverse a circuit court’s denial of severance absent an erroneous exercise of discretion. *See State v. Hall*, 103 Wis. 2d 125, 140, 307 N.W.2d 289 (1981).

¶11 At trial, the circuit court denied both severance requests, reasoning the parties were married, Scott was part of Amanda’s case, and the jury had been and would be instructed that each parent would require a separate and independent verdict. At the postdisposition hearing, the court elaborated that it denied the motions because the evidence against each parent was “virtually identical” and Scott “was and would be an integral part in any trial.” Moreover, the court reasoned that, even if Amanda had been given a separate trial, Scott “could do and possibly would do what he did at this trial” The court also observed that, while Scott’s behavior was inappropriate, it accounted for only a small portion of the six-day trial and “[m]ost of the time Scott merely sat at counsel table”

¶12 Amanda argues the court erred by denying her severance motions because Scott’s behavior and revelations were prejudicial. In support, she relies on *United States v. Mannie*, 509 F.3d 851, 852 (7th Cir. 2007), which is a case where Mannie was granted a new trial based on the co-defendant’s trial behavior.

¶13 In *Mannie*, the defendants were charged with dealing drugs, and the government’s theory was that both defendants were dangerous gang members. *Id.* at 853, 857. At trial, the co-defendant physically attacked his attorneys in front of the jury, stared down and gestured at the jurors, made comments during other witnesses’ testimony, and was unresponsive during his cross-examination. *Id.* at 854-55. The court held Mannie was entitled to a new trial:

[G]iven the government’s theory, and given the air of intimidation, the outbursts, and the violence that the jury witnessed, it is clear that there was an impermissible risk that some jurors voted to convict based on the perception that Mannie was a violent gangster who needed to be incarcerated for the safety of the community.

Id. at 857. The court noted, however, that “this set of circumstances is truly rare” and “[c]autionary instructions and jury interviews should remain the primary weapons against improper jury bias.” *Id.*

¶14 Amanda recognizes the co-defendant’s behavior in *Mannie* was more threatening and violent than Scott’s behavior at trial. Nevertheless, she asserts Scott’s actions were more prejudicial because of the information he revealed—specifically, he volunteered information about going to prison and seemed to indicate their daughters had been neglected. She contends the jury instructions in this case did not cure any prejudice because they did not address Scott’s prejudicial revelations or his misbehavior.

¶15 We conclude the circuit court did not err by failing to grant Amanda's severance motions. First, any prejudicial effect Scott's behavior or his prison revelation had on Amanda was cured by the jury instructions. "Jurors are presumed to have followed jury instructions." *State v. LaCount*, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780. In this case, the court instructed the jury at the beginning and at the end of trial that it was required to consider the evidence against each parent separately and its verdict as to one parent should be made without regard to the other parent.

¶16 Second, although Scott's reference to his daughters was inappropriate, we conclude that, when viewed in the context of the entire trial, Amanda was not substantially prejudiced by this information. Other witnesses indicated during their testimony that Amanda and Scott had children placed outside the home or that there were conditions in place to return the children to Amanda and Scott.

II. CHIPS documents

¶17 Amanda next argues her trial counsel was ineffective because he "stipulated to sending documents back to the jury during deliberations that were both inappropriate for publication and prejudicial" A parent in a termination of parental rights proceeding 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, Amanda must prove her counsel's performance was deficient and she was prejudiced by this deficient performance. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To show deficient performance, she must show specific acts or omissions of counsel that were outside the wide range of professionally competent assistance.

Id. at 690. Prejudice is proven if Amanda shows “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* If Amanda fails to establish either prong of the *Strickland* test, we need not determine whether the other prong is satisfied. *See id.* at 697.

¶18 Here, Amanda contends that, although her trial counsel redacted certain words and phrases from the exhibits, the documents improperly referenced Scott’s “violent” behavior, court involvement with her other children, incidents that were not in evidence, and the best interest of Daman. Specifically, she objects to references to Scott’s prison time and a statement that Scott has acted “violent” toward Amanda and the children.⁵ She also objects to the CHIPS dispositional order that stated Daman was a child in need of protection or services based on information that she had neglected another child in the home. Amanda also objects to certain statements not referenced at trial—that she and Scott had not “complied with the previous court requirements through Monroe County”; that their previous landlord was suing them; and that in late 2008 and early 2009, Scott’s probation agent observed the house was “out of control” and full of garbage. Finally, she objects to statements that Daman was doing well in foster care, that the County was providing appropriate services for him, that his parents could not care for him, and that he should not return to his parents.

⁵ The statement provides that the violent and criminal behavior include “profanities, temper outbursts, and throwing or kicking things.”

¶19 We conclude that, irrespective of whether Amanda’s trial counsel was deficient for allowing that information to go to the jury, Amanda was not prejudiced by this information. First, the information was, for the most part, cumulative to other trial evidence. For example, during trial, Scott admitted he had been in prison and multiple witnesses testified about their observations of Scott’s angry behavior, including that it had been directed toward Amanda. Moreover, the jury was aware Amanda had other children who had been removed from the home, and that, at least until the end of 2010, the County did not consider Amanda’s house clean or safe for Daman. During one visit, there were burner grates, coins, food pieces, lighters, and a bag of tobacco on the floor, dirty dishes on the counter, uncovered food on the stove, and the cat litter box was “quite dirty.” As to the statement from Scott’s probation agent, the agent was questioned about this information at trial and, although she could not recall making those observations, she explained, “If I reported it to [case worker Brenda] Vandenberg, then it’s probably accurate.” Finally, multiple witnesses testified that Daman was doing well in foster care, and case worker Anne Foster testified Amanda had not met the conditions for return.

¶20 Second, there was ample 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. Two of Amanda’s ordered conditions for Daman’s return were that she go to counseling and attend visits with Daman. Amanda met with her therapist one time in June 2010 and, while more appointments were scheduled, she never returned. Although she testified that she intended to attend counseling within the next nine months, at the time of trial, it had been almost one year since Amanda originally met with her therapist and never followed up. Further, the case workers testified that Amanda cancelled

many visits with Daman during 2010 and 2011 and her excuses ranged from illness, to working at a rummage sale, to having tech support come to her house. One time after Amanda cancelled a visit for an illness, a case worker then observed her at the grocery store. Amanda has not undermined our confidence in the jury verdict. *See Strickland*, 466 U.S. at 694.

III. Failure to Assume Parental Responsibility and Prejudicial Spillover

¶21 Amanda's remaining arguments relate to the failure to assume parental responsibility ground. She contends her trial counsel was ineffective for failing to request a modified jury instruction for that ground, and the ground is unconstitutional as applied. However, WIS. STAT. § 48.415 only requires a finding on one termination of parental rights ground. Because the jury found grounds to terminate Amanda's parental rights based on a continuing CHIPS, we need not address her 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 Amanda, however, argues that the two errors surrounding the failure to assume ground were so prejudicial that it made that ground a "slam dunk" for the County. She contends that, as a result, the "jury had no incentive to deliberate fully on the continuing-CHIPS ground."

¶23 We disagree. The jury requested a list of court-ordered services so that it could answer one of the special verdict questions on the continuing CHIPS ground. This implicitly shows the jury was in fact deliberating the continuing CHIPS ground. Moreover, the jury was instructed to "consider the evidence as to

each ground separately,” and is presumed to have followed that instruction. *See LaCount*, 310 Wis. 2d 85, ¶23.

By the Court.—Orders affirmed.

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

