COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 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. 2011AP2783 **Cir. Ct. No. 2011TP1**

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

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

JACKSON COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ROBERT H.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Jackson County: THOMAS E. LISTER, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Robert H. appeals from the order terminating his parental rights to his son, Avery G., and the order denying his motion for postdisposition relief. Robert contends he is entitled to a new trial on three grounds: (1) the requirement of the Wisconsin Indian Child Welfare Act (WICWA) with respect to testimony by qualified expert witnesses was not satisfied during the fact-finding hearing; (2) he was denied effective assistance of counsel; and (3) we should exercise our discretionary power of reversal because the real controversy has not been fully tried and it is probable that justice has miscarried. We conclude that the requisite testimony of an expert witness qualified under WICWA was presented at the disposition hearing and the error in not presenting it at the fact-finding hearing was harmless based on the specific circumstances in this case and given the arguments made by Robert. We also conclude that Robert did not receive ineffective assistance of counsel and there are not grounds for the exercise of our discretionary power of reversal. Accordingly, we affirm the order terminating Robert's parental rights to Avery and the order denying his postdisposition motion for a new trial.

BACKGROUND

¶2 On May 2, 2011, the Jackson County Department of Health and Human Services (the County) filed a petition to terminate the parental rights of Robert to his son, Avery. The petition also sought to terminate the parental rights

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) and (3) (2009-10). On the court's own motion, we are extending the deadline in WIS. STAT. RULE 809.107(6)(e) for releasing this opinion by one day to July 17, 2012. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted. All references to the U.S. Code are to the 2006 version unless otherwise noted.

of Avery's mother, Faye G., whose rights are not at issue on this appeal. Avery is an enrolled member of the Ho-Chunk Nation.

¶3 The petition alleged that six-year-old Avery had been in placement outside the parental home since 2005, when he was seven months old, and that since 2007, he had been residing with an uncle who is also his court-appointed guardian and a member of the Ho-Chunk Nation. The petition alleged two statutory grounds for termination: (1) Robert failed to assume parental responsibility for Avery, *see* WIS. STAT. § 48.415(6); and (2) Avery was a child in continuing need of protection and services because Robert had not met the conditions for Avery's safe return, set forth in the order in a Child in Need of Protection or Services proceeding, and there was a substantial likelihood that he would not meet those conditions within nine months of the fact-finding hearing, *see* WIS. STAT. § 48.415(2). Robert denied the allegations and demanded a jury trial.

¶4 The Ho-Chunk Nation Department of Social Services, Child and Family Services, (the Nation) moved to intervene in the case. The motion was granted. The Nation supported the termination of Robert's parental rights.

¶5 A jury trial was held to determine whether the grounds stated in the petition existed for the termination of Robert's parental rights.[2] Because this case involved the termination of parental rights to an Indian child, the jury was also asked to determine two additional issues: (1) whether, beyond a reasonable doubt,

[2] As noted, the petition sought to terminate both Robert's and Faye's parental rights. Accordingly, the jury trials of Robert and of Faye were consolidated, but each parent was represented by separate counsel and the jury completed a separate special verdict for each parent.

the return of Avery to the custody of Robert was likely to result in serious emotional or physical damage to Avery; and (2) whether, by clear and convincing evidence, active efforts had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of Avery's family and whether those efforts had proved unsuccessful. *See* 25 U.S.C. § 1912(d) & (f); WIS. STAT. § 48.028(4)(e). It is the first of these two elements—the "serious emotional/physical damage element"—that is at issue on this appeal. Only one witness, Dr. Stephen Dal Cerro, testified regarding this element at the fact-finding hearing. His opinion was that the return of Avery to the custody of Robert was likely to result in serious emotional or physical damage to Avery.

¶6 The jury returned a verdict finding that both grounds for termination were met and that active efforts had been made to provide remedial services but those efforts had been unsuccessful. The jury also found that placing Avery in Robert's custody would likely result in serious emotional or physical damage to Avery.

¶7 The circuit court subsequently held a disposition hearing. Along with other testimony at this hearing, Stephanie Lozano, a social worker from the Ho-Chunk Nation, testified that, in her opinion, Avery would suffer severe emotional or physical damage if he were to be placed in the custody of either of his parents. Lozano testified that the basis for her opinion included the length of time Avery had been placed outside either parent's home, the consequences of Avery's parents' alcohol and drug issues, as well as the testimony of Dr. Dal Cerro regarding the risk of Avery developing the behaviors exhibited by his parents if he were to be placed with either of them. In its disposition order, the circuit court found that Avery would likely suffer serious emotional or physical damage if

returned to Robert's custody. The circuit court ordered Robert's parental rights to be terminated.

¶8 Robert filed a postdisposition motion asking the court to vacate the termination order and grant a new trial.[3] Robert argued that the requirements of WICWA, WIS. STAT. § 48.028(4)(e), were not satisfied because there was no testimony at the fact-finding hearing by a "qualified expert witness" that returning the child to the parent's custody is likely to result in serious emotional or physical damage.[4] Robert also argued that trial counsel was ineffective and that he was entitled to a new trial in the interest of justice.

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[3] Robert initially filed a notice of appeal from the order terminating his parental rights. He subsequently filed a motion in this court for remand, arguing that additional fact finding was needed on the issues of ineffective assistance of counsel and whether certain experts were qualified under the Wisconsin Indian Child Welfare Act. We granted the motion and ordered a remand. On remand Robert filed the postdisposition motion.

[4] Both WICWA and the Federal Indian Child Welfare Act (ICWA) contain the requirement that a "qualified expert witness" present this testimony. When we use the phrase "qualified expert witness" in this opinion, we mean a witness meeting the requirements of WICWA and ICWA.

WICWA identifies the following four categories of individuals who may be a qualified expert witness:

> 1. A member of the Indian child's tribe recognized by the Indian child's tribal community as knowledgeable regarding the tribe's customs relating to family organization or child-rearing practices.
>
> 2. A member of another tribe who is knowledgeable regarding the customs of the Indian child's tribe relating to family organization or child-rearing practices.
>
> 3. A professional person having substantial education and experience in the person's professional specialty and having substantial knowledge of the customs, traditions, and values of the Indian child's tribe relating to family organization and child-rearing practices.

(continued)

¶9 After a hearing, the circuit court denied the motion. The court determined that Lozano's testimony at the disposition hearing, incorporating the testimony of Dr. Dal Cerro, was sufficient to satisfy the requirements of WIS. STAT. § 48.028(4)(e) because the court had held that Lozano was a qualified expert witness under WICWA and under the Federal Indian Child Welfare Act (ICWA). The court also determined that trial counsel did not perform deficiently and, even if trial counsel had done everything Robert claims he should have done, there was not even "a remote possibility that the result of the trial would have been different." The court concluded that "none of the claimed errors raised by

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> 4. A layperson having substantial experience in the delivery of child and family services to Indians and substantial knowledge of the prevailing social and cultural standards and child-rearing practices of the Indian child's tribe.

WIS. STAT. § 48.028(2)(g).

ICWA does not define "qualified expert witness." The Bureau of Indian Affairs' "Guidelines for State Courts" on ICWA provides that the following are "most likely to meet the requirements for a qualified expert witness":

> (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
>
> (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
>
> (iii) A professional person having substantial education and experience in the area of his or her specialty.

44 Fed. Reg. 67593 (1979).

For purposes of this opinion, any differences in the WICWA definitions of "qualified expert witness" and the ICWA guidelines are not relevant.

appellate counsel prejudiced [Robert] nor the trial results and a new trial in the interest of justice [was] not required."

DISCUSSION

¶10 On appeal Robert makes three arguments. First, he contends he is entitled to a new trial because no expert witness who was qualified under WICWA testified at the fact-finding hearing that Avery was likely to suffer severe emotional or physical damage if he were to be returned to the custody of his parents. Second, he contends that his trial counsel was ineffective for failing to move to sever his trial from Faye's trial, failing to file a motion in limine to restrict Dr. Dal Cerro's use of the word "psychopath," and failing to object to Dr. Dal Cerro's testimony concerning Avery's best interests. Third, Robert asks this court to exercise our discretionary power of reversal and order a new trial because the real controversy has not been fully tried and justice has miscarried.

¶11 For the reasons we explain below, we reject each of Robert's arguments.

I. Alleged ICWA/WICWA Error

¶12 This case involves the termination of parental rights to an Indian child, and therefore ICWA, 25 U.S.C. §§ 1901-1963, and WICWA, WIS. STAT. § 48.028, both apply.[5] ICWA and WICWA both require a determination,

[5] ICWA does not preempt WICWA, and WICWA can be harmonized with ICWA by "applying any state law safeguards beyond those mandated by ICWA." ***Monroe Cnty. Dep't of Human Servs. v. Luis R.***, 2009 WI App 109, ¶18, 320 Wis. 2d 652, 770 N.W.2d 795 (citation omitted). Accordingly, in an action to terminate parental rights to an Indian child, "the County must meet the substantive and procedural requirements of ICWA, as well as proving the grounds for termination of parental rights as required by state law." ***Id.*** (citation omitted).

supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child," before termination of parental rights may be ordered. 25 U.S.C. § 1912(f); WIS. STAT. § 48.028(4)(e)1.

¶13 WICWA, but not ICWA, also specifies when during the termination of parental rights proceeding this element is to be determined. WICWA provides that at the fact-finding hearing, in addition to determining whether grounds exist for the termination of parental rights,

> [i]f the child is an Indian child, the court or jury shall also determine at the fact-finding hearing whether continued custody of the Indian child by the Indian child's parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child under s. 48.028(4)(e)1. … unless partial summary judgment on the grounds for termination of parental rights is granted, in which case the court shall make those determinations at the dispositional hearing.

WIS. STAT. § 48.415.

¶14 It is undisputed that, at the fact-finding hearing, no qualified expert witness under ICWA and WICWA testified that continued custody of Avery by Robert was likely to result in serious emotional or physical damage to Avery. Lozano, a social worker with the Ho-Chunk Nation's Child and Family Services Division, was the only witness that the court determined was a qualified expert witness under the statutes, and she did not testify to this at the fact-finding hearing. Dr. Dal Cerro, a licensed clinical psychologist, did testify at the fact-finding hearing that he believed "there is a high likelihood that the child could be harmed either emotionally or physically if returned to the parent." However, it is undisputed that, although he was qualified to render an opinion on this issue under

the rules of evidence, he was not a qualified expert witness under ICWA or WICWA.

¶15 Robert contends that, because no qualified expert witness testified to the serious emotional/physical damage element during the fact-finding hearing, he is entitled to a new trial. Resolution of this issue requires that we apply ICWA and WICWA to the undisputed facts.[6] This presents questions of law, which we review de novo. *See* ***Wells Fargo Bank, N.A. v. Biba***, 2010 WI App 140, ¶6, 329 Wis. 2d 787, 793 N.W.2d 95 (citation omitted). As we next explain, we disagree that Robert is entitled to a new trial on this ground.

¶16 First, as we have noted, ICWA plainly does not require that the testimony of a qualified expert witness under the statutes be presented at a fact-finding hearing prior to the disposition hearing. Therefore, under ICWA, we can look to the disposition hearing to determine whether the serious emotional/physical damage element has been satisfied.

¶17 At the disposition hearing, Lozano testified that Avery would likely suffer severe emotional or physical damage if he were to be placed in the custody of either of his parents. Lozano testified that the basis for her opinion included the length of time Avery had been placed outside his mother's home, the consequences of Avery's parents' alcohol and drug issues, as well as the testimony of Dr. Dal Cerro regarding the risk of Avery developing the behaviors exhibited by his parents if he were to be placed with either of them. Subsequently, the court

[6] Although Robert couches his argument in terms of whether the proceedings complied with WICWA, he refers to ICWA in his arguments and therefore we address whether the proceedings complied with ICWA.

ordered that Robert's parental rights be terminated. The court concluded in the disposition order that continued custody of the child by Robert is likely to result in serious emotional or physical damage to the child based upon the testimony of Lozano.

¶18 Robert contends that this testimony of Lozano at the disposition hearing cannot satisfy the serious emotional/physical damage element because, according to Robert, the circuit court at the fact-finding hearing determined that Lozano, as a social worker, did not have the expertise to offer an opinion on this issue.[7] As we understand Robert's argument, he contends that what the court did at the disposition hearing was to "combine" Lozano's qualification as a qualified expert under ICWA and WICWA with Dr. Dal Cerro's qualification as a psychiatrist to testify on the serious emotional/physical harm element. This, he asserts, is not authorized by ICWA or WICWA. We disagree with Robert's characterization of what the circuit court did.

¶19 During the fact-finding hearing, while the court was considering whether Lozano was a qualified expert witness under ICWA and WICWA, counsel for Robert objected on the ground that her testimony might relate to best interests of the child. The jury was excused and the parties continued to discuss the issue. The district attorney explained that she did not intend to ask Lozano questions related to the best interests of the child. Instead, she intended to ask Lozano whether the State met its burden to make active efforts to provide services

[7] The premise of Robert's argument appears to be that, if the circuit court ruled that Lozano was not qualified to testify to the serious emotional/physical damage element at the fact-finding hearing, the court could not subsequently reconsider its decision and allow such testimony at the disposition hearing. We accept this premise for purposes of argument only.

and programs to prevent the breakup of Avery's family. Then the following exchange occurred:

> The Court: …. The serious emotional or physical harm, I believe that was addressed with respect to [Robert] at least by Dr. Del Cerro?
>
> [D.A.]: It was. [Counsel for the Nation] asked those questions. I'm not sure if it will be addressed in Miss Lozano's testimony.
>
> The Court: How could they be? She's not qualified to.
>
> [D.A.]: But I believe that she would just reference Dr. Del Cerro's report, but –
>
> The Court: All right.
>
> [D.A.]: And then her knowledge of the contact with [Robert's] contact with Avery and whether that's been consistent. But –
>
> The Court: Okay.

¶20 At the postdisposition hearing, the court further clarified its ruling regarding Lozano. The court opined that a social worker was not qualified—like a psychologist, psychiatrist, or physician may be—to testify "on issues of physical harm or injury or mental or emotional harm or injury." However, the court also stated that an "expert witness may customarily rely on the input of other experts in formulating their opinion." Therefore, the court ruled, Lozano could testify to the serious emotional/physical damage element by "relying at least in part on Doctor Dal Cerro." This is what Lozano did at the disposition hearing. Thus, the record indicates that the circuit court approved of Lozano's testimony on this element because she incorporated the testimony of Dr. Dal Cerro on whether Avery would suffer severe emotional or physical damage if returned to his father's custody. The court did not "combine" the testimony of Lozano and Dr. Dal Cerro.

¶21 The admission of expert testimony is a matter addressed to the circuit court's discretion. ***Parker v. Wisconsin Patients Comp. Fund***, 2009 WI App 42, ¶28, 317 Wis. 2d 460, 767 N.W.2d 272 (citation omitted). Robert does not argue that the circuit court erroneously exercised its discretion when it permitted Lozano to testify to the serious emotional/physical damage element while relying on Dr. Dal Cerro's opinion. He argues only that the circuit court could not combine the testimony of Lozano and Dr. Dal Cerro to satisfy the serious emotional/physical damage element. However, as we have explained, this is not what the circuit court did. Accordingly, we reject Robert's argument that Lozano could not testify at the disposition hearing regarding the serious emotional/physical harm element.

¶22 In sum, we conclude ICWA was not violated. ICWA requires that, before parental rights are terminated, there must be a finding, based on the testimony of a qualified expert witness under the statute, that serious emotional or physical damage is likely to result if the child is placed in the parent's custody. *See* 25 U.S.C. § 1912(f). However, ICWA does not require this to be done at the fact-finding hearing. Lozano's testimony presented at the disposition hearing satisfied ICWA's requirement.

¶23 We next address whether Robert is entitled to a new trial under WICWA because it requires that "the court or jury shall … determine at the fact-finding hearing" whether the serious emotional/physical damage element is met. *See* WIS. STAT. § 48.415. Because no qualified expert witness testified to this element at the fact-finding hearing, we conclude there was a violation of § 48.415.

¶24 The County[8] contends that, even if it was error under WICWA for this evidence to be presented at the disposition hearing instead of the fact-finding hearing, the error is harmless in light of the following: the testimony of a qualified expert witness was presented at the disposition hearing; the circuit court found, based upon this testimony, that Avery was likely to suffer severe emotional or physical damage if placed in Robert's custody; and the jury had already found, based on substantially the same evidence, that the serious emotional/physical damage element was met.

¶25 Robert contends that WICWA errors are not subject to a harmless error analysis. In support of this argument, he refers us to a provision of ICWA, to cases from other states interpreting ICWA, to an online guide published by the Native American Rights Fund titled ***A Practical Guide to the Indian Child Welfare Act***,[9] and to a page from a document on WICWA published by the Wisconsin Department of Children and Families (the Department).[10] However, none of these address the specific error in this case, and Robert provides no developed argument explaining why these sources nonetheless lend persuasive support to his position.

¶26 First, the provision of ICWA that Robert cites, 25 U.S.C. § 1914, is not applicable here. It provides that, when any child is the subject of a termination

[8] Avery's guardian ad litem has also filed a brief in this appeal. The County has adopted each argument and statement of authority submitted by the guardian ad litem into its argument on appeal.

[9] Robert provides us with the following web address: http://narf.org/icwa/index.htm.

[10] The document cited by Robert is titled ***Frequently Asked Questions Regarding the Wisconsin Indian Child Welfare Act*** and is available at http://dcf.wisconsin.gov/children/ICW/statsadmin/pdf/faq.pdf.

of parental rights action under state law, and ICWA applies, any parent from whose custody the child was removed may petition any court to invalidate the termination of parental rights action if the action violated specified provisions of ICWA. *See* 25 U.S.C. § 1914.[11] However, the specific provisions cited in § 1914 do not relate to the requirement—found only in WICWA, not in ICWA—that the serious emotional/physical damage element be determined at the fact-finding hearing.

¶27 Second, none of the issues in the ICWA cases Robert cites are similar to the WICWA issue presented here and therefore those cases do not provide a rationale that might apply in this case. In each of those cases, the trial court failed to comply with 25 U.S.C. § 1912, which is one of the provisions cited in 25 U.S.C. § 1914.[12]

[11] The specific provisions cited in 25 U.S.C. § 1914 are: § 1911, which relates to Indian tribe jurisdiction over Indian child custody proceedings; § 1912, which relates to pending court proceedings (including the requirement that no termination of parental rights may be ordered unless the serious emotional/physical damage element is satisfied, but not including the requirement that this finding be made at a fact-finding hearing); and § 1913, which involves procedures for the voluntary termination of parental rights.

[12] Two of the cases Robert cites involve actions where no qualified expert witness testified to the serious emotional/physical damage element. *See* ***Carney v. Moore***, 754 P.2d 863, 868, 870 (Okla. 1988) (reversing on the grounds that "the evidence presented in the trial court does not contain any expert witness testimony as to whether the continued custody of the child by the mother would result in serious emotional or physical harm to the child" and the placement of the child was inconsistent with ICWA); ***In re M.H.***, 691 N.W.2d 622, 628 (S.D. 2005) (reversing because of the absence of qualified expert testimony supporting termination). Two cases Robert cites involve actions where notice was not provided in accordance with 25 U.S.C. § 1912. *See* ***In re L.A.M.***, 727 P.2d 1057, 1060-61 (Ala. 1986); ***In re H.D.***, 729 P.2d 1234, 1241 (Kan. Ct. App. 1986). As we have explained, ICWA expressly provides that, if the requirements of 25 U.S.C. § 1912 are not met, a parent may petition any court to invalidate the action. *See* 25 U.S.C. § 1914. Similarly, in ***Department of Soc. Servs. v. Morgan***, 364 N.W.2d 754, 758 (Mich. Ct. App. 1985), § 1912 was not satisfied when the court applied a "clear and convincing" standard instead of "beyond a reasonable doubt."

¶28 Third, the online ICWA guide is not helpful because the section Robert cites, § 14.6, provides only that "[t]he failure to use an expert witness … is grounds for a mandatory reversal under [25 U.S.C. §] 1914." As we have just explained, the failure to provide the testimony of a qualified expert witness *at a fact-finding hearing* is not one of the grounds for mandatory reversal under § 1914.

¶29 Fourth, the page of the Department publication that Robert cites makes a general statement that does not shed any light on the issue before us. The page provides that:

> In most cases, the result of non-compliance [with WICWA] is that the tribe may move the court to invalidate any action that may have occurred and either go back to the court proceeding at which point the non-compliance occurred or to the beginning of the case …. For example, … [i]f the non-compliance was that a qualified expert witness' testimony was not provided, then the court could require the case to go back to the fact-finding hearing or to the beginning of the case.

Setting aside the fact that the statement addresses the tribe moving to invalidate—and here the Nation supported termination—the statement discusses the consequences when no qualified expert witness testifies, but that did not happen here. In addition, the qualification "in most cases" suggests that in not every case does noncompliance result in going back to the point at which "the non-compliance occurred or to the beginning of the case."

¶30 To the extent that Robert attempts to create an argument, based upon the language in WIS. STAT. § 48.415, that it is reversible error for a circuit court to find, at a disposition hearing that includes the testimony of a qualified expert witness, that the serious emotional/physical harm element is met, he does not sufficiently develop this argument in the context of the circumstances of this case.

The particular circumstances are: the jury heard the testimony of Dr. Dal Cerro at the fact-finding hearing, which was the basis for Lozano's testimony at the disposition hearing; the jury unanimously found, beyond a reasonable doubt, that the placement of Avery into Robert's custody is likely to result in serious emotional or physical harm to Avery; the circuit court was later presented with testimony from Lozano, an expert witness qualified under WICWA (and ICWA), that the placement of Avery into Robert's custody is likely to result in serious emotional or physical harm to Avery; and the circuit court determined that continued custody of Avery by Robert is likely to result in serious emotional or physical damage to the child.

¶31 Accordingly, we apply a harmless error analysis. WISCONSIN STAT. § 805.18(2) provides, in part, that "[n]o judgment shall be reversed or set aside or new trial granted … unless … it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial." An error affects the substantial rights of a party when there is a "reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768 (citation omitted).

¶32 Here, there is no reasonable possibility that this error contributed to the outcome of the action. The jury heard the testimony of Dr. Dal Cerro regarding the serious emotional/physical damage element and found, beyond a reasonable doubt, that the element was satisfied. At the disposition hearing, the circuit court heard Lozano, a qualified expert witness, conclude that Avery would likely suffer serious emotional or physical damage if returned to Robert, based at least in part on Dr. Dal Cerro's opinion. Afterwards, the circuit court likewise found that the serious emotional/physical damage element was met.

¶33 Accordingly, based on the specific circumstances of this case and given the arguments presented by Robert, we conclude that the error under WIS. STAT. § 48.415 was harmless.

II. Ineffective Assistance of Counsel

¶34 A parent in a termination of parental rights action has a right to the effective assistance of counsel. WIS. STAT. § 48.23(2); ***Oneida Cnty. Dep't of Soc. Servs. v. Nicole W.***, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652 (citation omitted). To succeed on an ineffective assistance of counsel claim, Robert must establish 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); *see also* ***A.S. v. State***, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992) (applying ***Strickland*** to proceedings for the involuntary termination of parental rights).

¶35 Deficient performance means that the identified acts or omissions of counsel "were outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. Prejudice occurs when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** The burden is on the party asserting ineffectiveness to overcome the strong presumption that counsel acted reasonably. ***State v. Brunette***, 220 Wis. 2d 431, 446, 583 N.W.2d 174 (Ct. App. 1998) (citation omitted). Because the defendant must show both deficient performance and prejudice, a reviewing court may dispose of an ineffective assistance of counsel claim where the defendant fails to satisfy either element. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990) (citation omitted).

¶36 Whether 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 (citations omitted). We will uphold the circuit court's factual findings unless they are clearly erroneous. ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 710, 530 N.W.2d 34 (Ct. App. 1995) (citation omitted). However, whether the attorney's conduct constituted ineffective assistance is a question of law, which we decide de novo. ***Id.*** Applying these standards, we reject Robert's contentions that he received ineffective assistance of counsel.

A. Severance of Robert's Trial from Faye's Trial

¶37 Robert first contends his counsel performed deficiently when he failed to move to sever Robert's trial from Faye's trial. Robert contends that counsel should have moved to sever the trial or moved for a mistrial after trial because the jury may have blamed Robert for not protecting Avery from Faye's dismal care; the jury may have had trouble keeping Faye's conditions for return separate from those of Robert's and may have been confused regarding which services were offered to Faye as opposed or Robert; and the jury may have been led to believe that Faye and Robert should be treated "collectively."

¶38 Assuming, without deciding, that it was deficient not to move to sever Robert's trial from Faye's trial, we agree with the circuit court that Robert has not established that, had the trials been severed, there is a reasonable probability that the result of Robert's trial would have been different.

¶39 First, Robert contends that the jury may have blamed Robert for not protecting Avery from Faye's dismal care. However, Robert does not explain why this would have been different if Robert's and Faye's trials had been severed. In his main brief Robert argues generally that "testimony concerning Faye's home

and neglect would have been inadmissible had the trials been severed." However, the example he gives in his reply brief demonstrates just the opposite.

¶40 In Robert's reply brief, he cites a portion of the record containing the testimony of social worker Michelle Schoolcraft. Schoolcraft had described the circumstances surrounding the original removal of Avery from Faye's home. She testified that she had been dispatched to Faye's home to investigate an allegation of neglect after police officers, in conducting a welfare check on the family, found multiple people in the home, intoxicated and unable to be awakened; the home was in disarray, with "beer cans all over, dirty dishes, garbage all over, dirty diapers"; and Avery and another child were both in the home wearing dirty diapers.

¶41 Schoolcraft testified that after this incident Avery was subsequently removed from the home and temporarily placed with Robert, who did not live with Faye. During that time, Schoolcraft testified, Robert took Avery back to Faye's house and spent time at Faye's house with Avery. Accordingly, the evidence related to the conditions of Faye's house would have been relevant regardless whether the trials were severed or combined.

¶42 Second, we conclude there is no basis in the record to support Robert's argument that the jury may have confused Robert's conditions for return with Faye's conditions for return. In his brief Robert quotes individual statements or phrases made by various social workers during trial to show that the social workers testified about Faye and Robert as a unit or family, which may have confused the jury as to which conditions each parent had to satisfy for the return of Avery. However, in the context of each witness's testimony, it is clear that the social workers testified to Faye's conditions separately from Robert's conditions.

For example, Robert cites the testimony of social worker Lindsay Krueger that the County went above and beyond in providing services to "the family." However, when considering her testimony as a whole, it is clear that she testified regarding Robert and Faye separately. She first discussed Robert's conditions for return and whether he met those conditions. Then she identified Faye's conditions and whether Faye met those conditions. When Krueger discussed the services provided to the parents, she identified which service was given to which parent. She stated, for example, that the county "did set up supervised visits for both [Robert] and [Faye]. We provided gas vouchers to [Robert] to get to and from visits. We provided gas vouchers to [Faye] to attend court hearings…." In this context, the use of the term "family" would not confuse the jury as to which services were provided to each parent.

¶43 Third, the jury was provided with separate special verdict forms for each parent; and the attorneys for Faye and for Robert each argued separately to the jury regarding the evidence relative to the client of each. We see no basis for concluding that the jury treated Faye and Robert "collectively."

B. Use of the Term "Psychopath"

¶44 At trial, Dr. Dal Cerro testified that he conducted a psychological assessment of Robert with a focus on Robert's capacity to parent. Dr. Dal Cerro testified that Robert is alcohol dependent and has antisocial personality disorder. Dr. Dal Cerro also testified that Robert has a "fairly high level of psychopathy." He discussed Robert's psychopathy throughout his testimony.

¶45 In his postdisposition motion Robert argued that trial counsel was ineffective for failing to object to the use of the term "psychopath" because it is unduly prejudicial. The circuit court concluded that trial counsel was not deficient

for failing to object to the term and also concluded that this alleged error did not have an effect on the outcome of the trial.

¶46 On appeal Robert renews his argument that counsel was ineffective for failing to object to the use of the term "psychopathy." Specifically, Robert contends that "describing Robert as a psychopath not only aroused a sense of horror but conveyed an underlying message about [Robert's character] that a jury would find hard to ignore." Robert argues that, "in every day conversation, 'psychopathy' is deemed synonymous with violence, derangement, and serial killing."

¶47 We conclude that trial counsel's failure to object to the term was not deficient because there was no reasonable basis for trial counsel to object to the use of this term.

¶48 The record reflects that Dr. Dal Cerro's use of the term "psychopath" was used not to arouse the jury's sense of horror or to provoke its instinct to punish. When Dr. Dal Cerro first used the term "psychopathy," he offered the jury a specific definition of how he was using the term. Dr. Dal Cerro explained:

> [A]bove and beyond meeting criteria for an antisocial personality disorder, [Robert] had a fairly high level of psychopathy. Psychopathy is a clinical construct that they use for research purposes. It's consistent with antisocial personality disorder but it's actually more severe in terms of the impairments to interpersonal functioning.
>
> And I noted some of the characteristics that are associated with psychopathy including extensive criminal background, evasive or glib in speech, poor behavioral controls. In other words, acting on impulse. Significant personal entitlement, lack of remorse, shallow or callous affect, lack of empathy, prone to manipulation and conning. Previous history, early history of juvenile delinquency,

> history of promiscuous sexual behavior, failure to take responsibility for his own actions, lack of realistic long term goals, history of violent offenses, relapse following treatment, failure on conditional release.

¶49 This definition made it clear that his use of the term was specific to describing a set of characteristics that occur in those who have the same impairments as Robert, namely, antisocial personality disorder and a fairly high level of psychopathy. This was relevant to Dr. Dal Cerro's testimony and not unfairly prejudicial to Robert. Accordingly, there was no reasonable basis on which trial counsel could object to the use of the term, and trial counsel's failure to object was not deficient.

C. Alleged Failure to Object to Dr. Dal Cerro's Testimony Regarding Best Interests of the Child

¶50 Robert argues that trial counsel was ineffective for failing to object to testimony offered by Dr. Dal Cerro at the fact-finding hearing concerning the best interests of Avery. We reject this contention and conclude that trial counsel was not deficient.

¶51 At the fact-finding hearing, Dr. Dal Cerro testified regarding the likelihood of Avery developing antisocial or psychopathic tendencies because his father suffers from antisocial personality disorder. Robert contends that counsel was deficient for not objecting to this testimony because the testimony "cut straight to the heart" of the best interests of the child analysis, which, according to Robert, is irrelevant at the fact-finding hearing.

¶52 The guardian ad litem and the County (incorporating the GAL's arguments) contend that this testimony was relevant to whether Robert could meet his conditions for return, and was therefore appropriately admitted during the fact-

finding hearing. Specifically, they contend the testimony was relevant to the following two conditions:

- "Condition 10: Robert will be able to provide for Avery's basic needs. This includes, but is not limited to, access to education, food, shelter, hygiene."

- "Condition 12: Robert will demonstrate his ability to parent Avery appropriately and interact with persons that provide a service to Avery in an appropriate manner."

¶53 We agree the testimony was relevant to both conditions. An increased chance that Avery, if placed in the custody of Robert, would model antisocial behaviors is relevant to whether Robert could adequately care for Avery's mental and emotional health and whether Robert could parent Avery appropriately. Because this testimony is relevant to the grounds of termination, it was not outside the wide range of professionally competent assistance for trial counsel not to object to this testimony on the ground it was only relevant to best interests of the child. *See* ***Strickland***, 466 U.S. at 690.

III. Discretionary Reversal—Real Controversy Not Tried or Miscarriage of Justice

¶54 Robert contends that we should exercise our discretionary power of reversal to grant him a new trial on the ground that the real controversy has not been fully tried and that it is probable that justice has miscarried. *See* WIS. STAT. § 752.35 ("In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from … for a new trial.") "[C]ourts have concluded the real controversy has not

been fully tried when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." ***State v. Sugden***, 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795 N.W.2d 456 (quotation omitted). We may conclude that justice has been miscarried "if we determine that there is a substantial probability that a new trial would produce a different result." ***State v. Murdock***, 2000 WI App 170, ¶31, 238 Wis. 2d 301, 617 N.W.2d 175 (citation omitted).

¶55 Regarding whether the real controversy has been fully tried, Robert argues that the erroneous failure to sever Robert's trial from Faye's resulted in the jury hearing improperly admitted evidence relating to Faye's parenting, which clouded the jury's ability to determine whether Robert had assumed parental responsibility and whether he would meet the conditions of return within nine months. However, we have concluded that the failure to move to sever, assuming without deciding that it was deficient performance, was not prejudicial to Robert. For similar reasons, we conclude the combined trial did not "so cloud a crucial issue that it may be fairly said that the real controversy was not fully tried." Robert also argues that Dr. Dal Cerro's use of the word "psychopath" was erroneously admitted. As we have already explained, it was relevant testimony and not unfairly prejudicial. Accordingly, we conclude that the real controversy has been fully tried.

¶56 For similar reasons, we conclude that justice has not miscarried. The evidence Robert asserts was erroneously admitted was either not error, or, if assumed error, was not prejudiced. Therefore, there is no probability that a new trial would produce a different result.

¶57 We decline to exercise our discretionary power of reversal.

CONCLUSION

¶58 We affirm the orders terminating Robert's parental rights to Avery and the order dismissing Robert's claim for postdisposition relief.

By the Court.—Orders affirmed.

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