COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP632 **Cir. Ct. No. 2011TP13**

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

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

OZAUKEE COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

MONIQUE B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: SANDY A. WILLIAMS, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] Monique B. appeals from an order terminating her parental rights to her daughter, Quianna P. The order followed a jury's finding that grounds for termination existed based on Monique's failure to assume parental responsibility and on Quianna's continuing status as a child in need of protection or services (CHIPS).

¶2 Monique argues that the Ozaukee County Human Services Department (the County) did not prove that she failed to assume parental responsibility because the evidence at the fact-finding hearing was insufficient to prove she never had a substantial parental relationship with Quianna. Monique further argues that the continuing CHIPS ground for termination cannot stand because the only CHIPS order containing written notice regarding potential termination of her parental rights (TPR) to Quianna was presented to Monique just one month before the filing of the TPR petition when current law required it to be presented at least six months before the filing of the petition.

¶3 Monique also contends her trial counsel was ineffective for failing to seek summary judgment on the continuing CHIPS ground, failing to object to various "errors and omissions" in the jury instructions, and failing to object to the trial court permitting an individual not selected for the jury to remain in the courtroom during the fact-finding hearing. For the reasons set forth below, we affirm.

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

BACKGROUND

¶4 Monique was fifteen years old when she gave birth to Quianna. For the majority of Quianna's first three years, Monique and Quianna lived with Monique's mother. When Quianna was three years old, the County removed her and her younger brother, Hayden, from Monique following an incident in which Monique overdosed on prescription medication. Hayden was placed with a foster family and Quianna was placed with Monique's mother. Quianna subsequently was removed from Monique's mother's home due to an allegation that Quianna's six-year-old uncle had sexually abused her. A CHIPS order regarding Quianna followed and Quianna was placed in successive foster homes. Thereafter, Monique saw Quianna at County-arranged visitations.

¶5 Approximately two years later, the CHIPS placement was extended by an order which included written notice regarding potential termination of Monique's parental rights to Quianna. A month thereafter, the County filed a petition to terminate Monique's parental rights to Quianna, alleging grounds under WIS. STAT. § 48.415(2)(a) and (6), continuing CHIPS and failure to assume parental responsibility. A fact-finding hearing was held and the jury found that both grounds for termination had been satisfied. The trial court subsequently held a dispositional hearing and terminated Monique's parental rights to Quianna. Monique's parental rights to Hayden were also terminated through these proceedings; however, Monique does not appeal the termination of her parental rights to Hayden.

¶6 Posttermination, Monique raised a claim of ineffective assistance of counsel, arguing that counsel failed to: (1) request summary judgment on the CHIPS allegation on the ground that no CHIPS order containing the written notice

of potential termination of her parental rights was provided to Monique at least six months prior to the filing of the TPR petition as statutorily required; (2) object to the jury instructions and special verdicts on various grounds; and (3) object to the trial court allowing a member of the jury pool, who was not chosen as a juror, to remain in the courtroom during the fact-finding hearing. Monique also argued that the evidence was insufficient to prove either of the grounds for termination.

¶7 The trial court held a ***Machner***[2] hearing on the ineffective assistance of counsel claims and concluded that Monique's counsel was not ineffective. The court further found sufficient evidence for the jury's verdicts on both grounds for termination. The trial court denied Monique's motion and Monique appealed. Additional facts, as necessary, are set forth in the remainder of the opinion.

DISCUSSION

¶8 Monique contends the County did not prove that she failed to assume parental responsibility because the evidence at the fact-finding hearing was insufficient to prove she *never* had a substantial parental relationship with Quianna. We disagree.

¶9 Our review of a jury's verdict is highly deferential. We will not upset a jury verdict if there is any credible evidence to support it. ***Sheboygan Cnty. DHHS v. Tanya M. B.***, 2010 WI 55, ¶49, 325 Wis. 2d 524, 785 N.W.2d 369. Where there is more than one reasonable inference that may be drawn from the evidence, this court must accept the inference drawn by the jury. *See* ***State v.***

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

Quinsanna D., 2002 WI App 318, ¶30, 259 Wis. 2d 429, 655 N.W.2d 752. It is our duty to search the record for credible evidence to sustain the jury's verdict. ***Id.*** Further, we afford special deference to a jury's determination where, as here, the trial court approves of the jury's finding. ***D.L. Anderson's Lakeside Leisure Co. v. Anderson***, 2008 WI 126, ¶22, 314 Wis. 2d 560, 757 N.W.2d 803. In such cases, we "will not overturn a jury's verdict unless 'there is such a complete failure of proof that the verdict must be based on speculation.'" ***Id.*** (quoting ***Morden v. Continental AG***, 2000 WI 51, ¶40, 235 Wis. 2d 325, 611 N.W.2d 659).

¶10 Here, the jury was instructed that in order to find that Monique failed to assume parental responsibility, it had to find that she "never had a substantial parental relationship with [Quianna]."[3] The jury was further instructed that "substantial parental relationship" means "the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of the child[]." The jury was also informed that, in evaluating whether Monique had had a substantial parental relationship with Quianna, it could consider factors "including but not limited to ... whether [Monique] has neglected [] to provide care or support for [Quianna]."

¶11 Monique emphasizes that the focus of the fact-finding hearing was on the period *after* Quianna was removed from Monique. Since the jury

[3] Monique notes, and the County does not dispute, that this jury instruction reflected an outdated version of WIS. STAT. § 48.415(6). The statute was amended in 2006 and no longer requires a showing that a parent has "never" had a substantial parental relationship with the child, but now only requires a showing that the parent has "not" had a substantial parental relationship with the child. *See* 2005 Wis. Act 293, § 21; *see also* ***State v. Bobby G.***, 2007 WI 77, ¶¶87-89 & n.38, 301 Wis. 2d 531, 734 N.W.2d 81 (discussing amendment). The County did not object to the jury instruction using the word "never" and does not contest that it was bound to that higher standard in the instructions the trial court gave the jury.

instructions required the County to prove Monique *never* had a substantial parental relationship with Quianna, Monique argues that the County not only needed to establish that Monique did not have a substantial parental relationship with Quianna after Quianna was removed from Monique, but that it also needed to establish that Monique did not have such a relationship with Quianna *before* she was removed. Monique contends the County failed to establish this. While the evidence at the fact-finding hearing was largely focused on the period following Quianna's removal, there was sufficient proof regarding the period prior to removal that the jury did not need to speculate in order to conclude Monique never had a substantial parental relationship with Quianna.[4]

¶12 A jury must apply a totality-of-the-circumstances test when evaluating whether a parent has failed to assume parental responsibility pursuant to WIS. STAT. § 48.415(6). ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶¶3, 22, 333 Wis. 2d 273, 797 N.W.2d 854. Allowing the fact-finder to use the entire span of the child's life in deciding whether a parent has assumed parental responsibility has been the legislature's intent since it enacted the original § 48.415(6) in 1979. ***Tammy W-G.***, 333 Wis. 2d 273, ¶27. In so doing, the jury "should consider any support or care, or lack thereof, the parent provided the child throughout the child's entire life. This analysis may include the reasons why a parent was not caring for or supporting her child and exposure of the child to a hazardous living environment." ***Id.***, ¶3. The jury "may consider, among other things, whether the parent 'has expressed concern for or interest in the support, care or well-being of

[4] As previously noted, after her removal from Monique, Quianna was placed in various foster homes. Monique does not challenge the sufficiency of the evidence regarding her failure to assume parental responsibility as it relates to the period after Quianna was removed from her.

the child,' and whether the parent 'has neglected or refused to provide care or support for the child.'" ***Id.***, ¶26 (citing § 48.415(6)(b)).

¶13 As the trial court noted, the jury heard that Monique was only fifteen years old when she gave birth to Quianna and that Monique and Quianna lived with Monique's mother for the majority of the time prior to Quianna's removal. Monique's mother testified that Quianna was in *her* care "since she's been born" and that she "feel[s] like she's my own 'cause my daughter was so young having her." She stated that as a young teenage mother, Monique had "struggled with schooling, staying out of trouble, picking the right and wrong harms," and also suggested Monique previously had a drug and alcohol problem and had not been very motivated. Monique herself testified at the fact-finding hearing that it had been "[a]t least three years" since she last used marijuana and that she tested positive for marijuana shortly before the County removed Quianna. The jury also heard testimony that shortly before Quianna and Hayden were removed from Monique, Monique overdosed on prescription medication in an attempt to commit suicide because she had been "kicked out of the home she was living in." The jury also heard that Quianna was removed from Monique's mother's home because of an allegation that Quianna's six-year-old uncle had sexually abused her. Further, the jury was told that after the County determined that these allegations were unsubstantiated, Monique initially told the County she was not contesting Quianna's continued placement with a nonrelative foster family.

¶14 The jury heard a family support worker, who was previously a kindergarten preschool teacher, testify to her observation that Quianna was "somewhat behind for her age." Finally, the jury heard a County social worker testify that Quianna has "reactive attachment disorder" and "low muscle tone." The social worker explained that reactive attachment disorder "often shows up

after several years ... [but] starts at birth through those first formative years." Her testimony also suggested that Quianna's low muscle tone would have stemmed from being left in swings or not given opportunities to develop her muscles as "an infant." Her testimony further suggested that Quianna was improving with regard to her reactive attachment disorder and low muscle tone since being removed from Monique.

¶15 The above testimony supported the jury's verdict. Additional testimony at the fact-finding hearing did show that Monique had some type of parental relationship with Quianna. From the above-cited testimony, however, a reasonable juror could reasonably infer that Monique never accepted and exercised *significant* responsibility for the *daily* supervision, education, protection, and care of Quianna during the period preceding her removal and, ultimately, that Monique never had a *substantial* parental relationship with Quianna. Further, in making its determination whether Monique never had a substantial parental relationship with Quianna, the jury was informed that it could consider whether Monique "has neglected [] to provide care or support for [Quianna]." Based on our review of the record, we cannot say that "there [was] such a complete failure of proof that the verdict must [have been] based on speculation." ***D.L. Anderson's Lakeside***, 314 Wis. 2d 560, ¶22 (quoting ***Morden***, 235 Wis. 2d 325, ¶40).

¶16 Monique also argues that her trial counsel provided ineffective assistance because counsel failed to move for summary judgment on the continuing CHIPS ground. Monique contends that if counsel had brought a motion for summary judgment based on the County's failure to provide Monique with a CHIPS order containing a written notice regarding the potential termination of her parental rights to Quianna more than six months before the filing of the TPR petition, the motion "should have been granted." She claims counsel's

failure to bring such a motion permitted jurors to hear damaging evidence related to the continuing CHIPS ground which otherwise would not have been before them and that this prejudiced her with regard to the failure-to-assume-parental-responsibility ground.

¶17 A parent is entitled to the effective assistance of counsel in a proceeding to terminate parental rights. ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992) (extending requirements of ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), to TPR proceedings). To prove ineffective assistance of counsel, a parent must show that trial counsel's performance was deficient and that the deficient performance prejudiced the parent. ***A.S.***, 168 Wis. 2d at 1005. To prove deficient performance, the parent must establish that counsel's conduct fell below an objective standard of reasonableness. ***State v. Thiel***, 2003 WI 111, ¶¶18-19, 264 Wis. 2d 571, 665 N.W.2d 305. To prove prejudice, the parent 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." ***Id.***, ¶20 (quoting ***Strickland***, 466 U.S. at 694). If the parent fails to establish either deficient performance or prejudice, the claim of ineffective assistance fails. *See* ***Strickland***, 466 U.S. at 697; ***State v. Williams***, 2006 WI App 212, ¶18, 296 Wis. 2d 834, 723 N.W.2d 719. Here, Monique has not proven she was prejudiced by counsel's failure to bring a summary judgment motion on the continuing CHIPS ground and, thus, her claim fails.

¶18 Monique contends generally that inclusion of the continuing CHIPS ground in the fact-finding hearing allowed the County to elicit testimony about "various court-ordered conditions Monique failed to meet and the prospect that she would not meet the conditions within the next nine months." Monique makes

one specific contention—that evidence showing a court removed Quianna from Monique and set conditions for Monique to meet before Quianna could be returned to her was prejudicial in relation to the failure-to-assume-parental-responsibility ground because it suggested a court had determined Monique was a "bad mother." Other than this contention, Monique fails to identify what specific evidence presented at the hearing she believes would not have been presented to the jury if the continuing CHIPS ground had not been part of the hearing.

¶19 Even if the continuing CHIPS ground had not been included in the fact-finding hearing, evidence of Quianna's removal from Monique and placement in foster care almost certainly would still have been before the jury. This is so because the failure-to-assume-parental-responsibility ground required the jury to decide if Monique had accepted and exercised significant responsibility for the daily supervision, education, protection and care of Quianna under a totality-of-the-circumstances test. *See* ***Tammy W-G.***, 333 Wis. 2d 273, ¶3. The facts and circumstances related to Quianna being removed from Monique and not living with her for several years thereafter would have been relevant to the jury's determination on this ground. Beyond that, Monique asks us to speculate on what other evidence the jury might or might not have heard if the continuing CHIPS ground had not been before it and what the result might have been on the proceeding. Speculation is insufficient to establish prejudice, *see* ***State v. Erickson***, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999); rather, Monique must show that her counsel's alleged error actually had some adverse effect, s*ee* ***State v. Keeran***, 2004 WI App 4, ¶19, 268 Wis. 2d 761, 674 N.W.2d 570. She has not made that showing.

¶20 Monique also claims she was prejudiced by counsel's failure to object to the jury instructions on the failure-to-assume-parental-responsibility

ground. She claims the instructions were flawed because they "treated the two children as a single unit, suggesting that its decision on the two needed to be the same," and because they "told the jury it should answer the verdict question 'yes'" if the County proved Monique failed to assume parental responsibility by clear and convincing evidence, but did not tell the jury it should answer the verdict question "no" if the verdict question was not proven.

¶21 We find no prejudice in either of these alleged errors because the special verdicts the jury answered were clear. The first two special verdict pages dealt solely with Quianna and the last two pages dealt solely with Hayden. There could be no confusion among jurors that they were to give separate answers with regard to each child. Further, on separate pages, as indicated, each verdict question asked for a "yes" or "no" answer, as set forth below:

> Has Monique [] failed to assume parental responsibility for Quianna []?
>
> _____
> Yes/No
>
> Has Monique [] failed to assume parental responsibility for Hayden []?
>
> _____
> Yes/No

Thus, the jury was presented with the clear "yes" or "no" choice it had to make as to each child individually. Based on our review of the record, Monique was not prejudiced by her counsel's failure to object to these challenged portions of the jury instructions.

¶22 Monique also argues that trial counsel provided ineffective assistance by not objecting to the trial court's decision to permit an individual who was not selected for the jury to remain and observe the proceedings. While

Monique concedes that "allowing the public to sit in on a TPR trial ... is unlikely to affect the outcome of the case," she nonetheless asks us to "presume[]" prejudice. We decline to do so.

¶23 First, as the County argues and the trial court pointed out at the posttermination hearing, the record does not identify during what portions of the fact-finding hearing the individual may actually have been present. Monique's counsel testified at the ***Machner*** hearing that she believed the individual did not stay for the entire hearing. Further, the trial court stated at the posttermination hearing that it did not see anything in the record indicating the individual "learned anything different than what the whole jury panel had learned when they were just going through voir dire." More importantly, Monique has presented nothing to suggest she was actually prejudiced by the individual's presence in any way. Nor has she identified anything in the statutes suggesting the legislature intended the remedy for a court improperly permitting a member of the public to observe such a hearing to be vacating the jury's verdict, as she argues we should do. We decline to create such a remedy. Monique has not established prejudice with regard to this claim.

¶24 Monique raises additional issues specifically directed at the validity of the continuing CHIPS verdict. We do not address those because we conclude that even if errors were present, they were harmless. Only one ground needed to be established for the termination of Monique's parental rights. *See* WIS. STAT. § 48.415. The jury found Monique failed to assume parental responsibility with regard to Quianna and we affirm that verdict. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) ("As one sufficient ground for support of the judgment has been declared, there is no need to discuss the others urged.").

By the Court.—Order affirmed.

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