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January 20, 2016

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You are hereby notified that the Court has entered the following opinion and order:

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2015AP2271-NM                      State v. D.E. (L. C. Nos. 2015TP57, 2015TP58, 2015TP59)  
2015AP2272-NM  
2015AP2273-NM

Before Hruz, J.<sup>1</sup>

Counsel for D.E. filed a no-merit report concluding there is no arguable basis for D.E. to challenge orders terminating his parental rights to three of his sons. D.E. was advised of his right

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<sup>1</sup> These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

to respond to the report and has not responded. Upon this court's independent review of the record, no issue of arguable merit appears.

### **BACKGROUND**

The jury found two grounds for terminating D.E.'s parental rights: the children's continuing need for protection and services (continuing CHIPS) and failure to assume parental responsibility. To establish continuing CHIPS, the State was required to prove four elements by clear, satisfactory, and convincing evidence: (1) the children were adjudged in need of protection or services and placed or continued in placement outside D.E.'s home for a cumulative period of six months or longer pursuant to one or more court orders containing a termination of parental rights notice;<sup>2</sup> (2) the Bureau of Milwaukee Child Welfare (BMCW) made a diligent effort to provide the services ordered by the court; (3) D.E. failed to demonstrate substantial progress toward meeting the conditions established for the return of the children to the home; and (4) there was a substantial likelihood that D.E. would not meet those conditions within the nine-month period following the conclusion of the hearing at which the jury was to determine whether grounds existed for termination. *See* WIS. STAT. § 48.415(2).

D.E.'s sons were placed outside his home in December 2012 based on D.E.'s maltreatment of his live-in girlfriend's minor son. A CHIPS proceeding was initiated regarding D.E.'s three sons—then ages seven years, five years, and sixteen months—based on concerns for their safety. In March 2013, the court issued CHIPS dispositional orders containing a warning that D.E.'s parental rights could be terminated if he failed to meet the conditions set forth in

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<sup>2</sup> The circuit court granted a directed verdict on the first element.

those orders. Two months later, D.E. entered a guilty plea to child abuse and was placed on probation. Some of the conditions of probation dovetailed with the requirements of the CHIPS dispositional orders. The CHIPS orders were extended in December 2014.

The dispositional orders set general goals for the parents<sup>3</sup> to meet as well as specific conditions for the return of the children to their home. The general goals required D.E. to identify and recognize how to reduce stress before it turned into anger, establish consistent nonphysical discipline, and learn how to deal with a child's negative behavior without resorting to physical discipline or violence. He was required to demonstrate his understanding of the destructive power of violence within the family. D.E. was required to maintain a relationship with the children by regularly participating in successful visitation. He was required to demonstrate an ability and willingness to provide a safe level of care for the children and their special needs, to cooperate effectively with others needed to help care for the children, and to cooperate with the BMCW case manager.

D.E. was specifically required to attend specialized parenting and anger management programs focusing on teens, and was required to successfully complete domestic violence programming through Alma Center, Task Force Battered Women, and successfully complete a fatherhood program. He was ordered to engage in intensive family therapy, individual therapy if financially available, parenting programming, and visitation with the children. He was prohibited from using alcohol, illegal substances or nonprescribed drugs, was required to undergo an AODA assessment and recommended treatment, and was required to have random

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<sup>3</sup> The mother's parental rights also were terminated after she failed to appear for the trial and disposition hearing.

urine screening. Any missed urine screening would be considered a positive test result. D.E. was required to participate in individual therapy and/or play therapy, and to participate in therapy for children who have been exposed to intra-family violence. He was required to resolve all criminal charges, cooperate with the Department of Corrections (DOC), and sign releases of information to allow BMCW to communicate with DOC, and to allow release of the CHIPS dispositional order to DOC.

The State's case during the grounds phase of the TPR proceeding included testimony and exhibits from BMCW social workers, Doctor Stephen Emiley, psychotherapist Karissa Vogel, the boys' foster mother, and D.E., who was called adversely. The social workers and psychotherapist testified regarding the boys' reports of other physical abuse that D.E. denied. Although D.E. completed some parenting and domestic violence programs, the social workers questioned the effect the classes had on his behavior. For example, he violated his probation in March 2014, by committing arson to a building, resulting in his being sentenced to prison, consecutive to the prison sentence imposed for the child abuse after his probation was revoked. They testified D.E. would not participate in intensive family therapy.

A social worker testified D.E. failed to take any random urine analyses, relying only on the scheduled urine analyses conducted by his probation officer. D.E. claimed he was unable to comply with the random urine tests because they were scheduled before 6:00 p.m. and this conflicted with his work schedule. However, the social workers testified they made arrangements for him to have the test conducted after 6:00 p.m. if he would call to make that appointment, but he failed to call.

D.E.'s visits with the boys occurred in the context of the boys' therapy sessions. D.E. was asked to stop attending the sessions because the therapist deemed his presence "disruptive." The social workers and foster mother testified that D.E. threatened the foster mother. The foster mother described D. E.'s behavior at a family meeting as mean and aggressive. He threatened to call the foster mother "24-7," although he never did. He refused to sign forms to allow medication for the children recommended by doctors.

The case manager testified regarding her efforts to get D.E. individual therapy, but testified D.E. refused to complete any more court-ordered conditions, and just wanted the children sent to Georgia, presumably to live with his mother. She testified D.E. refused to sign consent forms or speak with her after he went to prison, and he did not respond to numerous requests for him to contact her. As of the date of the TPR petition, she testified he met none of the conditions for the children's return.

Doctor Emiley's testimony confirmed the social workers' assertions that D.E. frequently lied and minimized his negative behaviors. For example, D.E. said he had five children when he actually has nine, and misrepresented that the abuse victim was his son. At the psychological interview, he denied any drinking or drug use, but at trial testified he was drunk when he committed the arson. In addition, the children told the therapists they were frequently abused when he came home drunk. D.E. said he "smacked" the abuse victim at issue in the criminal proceedings, who then lost his balance and hit his chest against the edge of a piece of furniture, causing the injury that sent him to the hospital. He said other injuries on the boy were inflicted by the child's brothers.

In addition to his own testimony, D.E. presented testimony from his probation officer. She testified she met with him twice per month before the arson incident, and he never missed an appointment. She testified he completed anger management and fatherhood classes, and an AODA assessment that did not recommend further treatment. She testified D.E. never tested positive for alcohol and never failed to report, although she conceded he knew ahead of time when the appointments would occur. She testified she was never told that D.E. was noncompliant with the CHIPS orders, did not know he was drunk at the time of the fire, was unaware of the allegations of physical abuse other than the one that led to his conviction, and was unaware that he was discharged from family therapy due to his disruptive behavior.

## DISCUSSION

### I. Sufficiency of the Evidence

The record contains no arguable basis for challenging the jury's verdicts. This court must sustain a verdict if there is any evidence to support it. *Morden v. Continental AG*, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. The credibility of witnesses and the weight given to their testimony are matters for the jury to decide. *D.B. v. Waukesha County Human Services Dept.*, 153 Wis. 2d 761, 770, 451 N.W.2d 799 (Ct. App. 1989). As the arbiter of the witnesses' credibility, the jury could reasonably find D.E. failed to meet many of the conditions for the return of the children despite adequate efforts by BMCW, and he was unlikely to meet the

conditions in the next nine months due to his attitude and continued incarceration until at least September 2018.<sup>4</sup>

As the State summarized in its closing argument, the BMCW social worker referred D.E. to a psychological evaluation, in which he lied. She referred him to therapy, which he refused. She referred him to family therapy from which he was discharged because he was uncooperative. She referred him to parenting classes, which he completed, but he refused to take another parenting class. Although he took domestic violence counseling, that did not result in behavioral change. He continued to believe physical discipline was appropriate. She referred him to alcohol and drug screens that he did not complete. In short, he was not willing to participate in the activities she set up for him pursuant to the CHIPS orders, and if he did participate, he was disruptive and dishonest. He failed to participate in any individual therapy, family therapy, and the random urine analyses. He has not created a safe, suitable, and stable home. He has not cooperated with BMCW, has not signed releases, and threatened the woman who provided day-to-day care for his sons. He did not understand the special needs of any of the children and did not know how they were diagnosed or the names of their doctors, teachers, or therapists. This evidence is sufficient to support the jury's verdict on the CHIPS ground.

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<sup>4</sup> Because the State presented sufficient evidence to support the continuing CHIPS allegation, and because termination of parental rights can be based on any one ground, we need not review the sufficiency of the evidence to support the jury's findings regarding failure to assume parental responsibility.

## II. Effective Assistance of Counsel

At the close of the grounds phase, and again at the beginning of the disposition phase, D.E. expressed dissatisfaction with his attorney based on counsel's failure to ask certain questions and to call certain witnesses to testify. Any claim of ineffective assistance of counsel would fail because D.E. could not meet his burden of establishing deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

D.E. wanted his counsel to elicit testimony regarding letters he sent to the children in December 2014, to contradict a suggestion that he only sent letters after the petition for termination of his parental rights was filed. However, the social worker's testimony acknowledged that D.E. sent packages at Christmas time that may have contained letters. Counsel did not perform deficiently, and D.E. was not prejudiced by counsel's failure to ask additional questions to clarify that minor point.

D.E. wanted his attorney to call the person who supervised his urine screening to contradict a suggestion that the screening done for his probation officer might have been invalid because his urine was diluted. However, no witness testified that diluting the urine sample would affect the test for the presence of alcohol. The point of the testimony regarding urine analyses was that D.E. violated the CHIPS order by not having random screening. The quality and results of the non-random screening performed by DOC were not significant. No witness testified that diluting the urine sample would affect the test for the presence of alcohol.



D.E. also wanted his attorney to call the prison social worker to testify that the case manager never sent him anything to sign, and that he never received any mail from her. He did not indicate why a prison social worker would necessarily be aware of all the mail D.E. received.

D.E. stated he wanted his mother and sister to testify, but he did not indicate what they would have said or how it would likely affect the verdict. He also indicated he wanted “Madeline,” who supervised the visits, to testify, but he again failed to indicate how her testimony would have been favorable to his defense.

Presenting D.E.’s defense through his probation officer constituted a reasonable strategy because of her knowledge of the case and her otherwise cooperative relationship with the BMCW social workers. The circuit court concluded D.E.’s trial counsel provided “highly competent and effective assistance.” Nothing in the record would support a claim of ineffective assistance of counsel.

The no-merit report also analyzed whether D.E.’s counsel was ineffective for failing to require the State to establish Dr. Emiley’s expert credentials at a *Daubert*<sup>5</sup> hearing. Emiley examined D.E. two years before the trial, but had retired by the time of the trial. He had conducted over 14,000 psychological evaluations, including 6,000 in CHIPS cases. Any challenge to his credentials as an expert witness would have failed. Therefore, D.E. was not prejudiced by his counsel’s failure to require a *Daubert* hearing.

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<sup>5</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).

### III. The Disposition Phase

Finally, there is no arguable basis for challenging the circuit court's discretionary decision to terminate D.E.'s parental rights. The court considered the factors set out in WIS. STAT. § 48.426(3), finding a high likelihood that the children would be adopted by the foster mother, and that nothing about the boys' ages or health that made adoption inappropriate. The court found the two older boys had a substantial relationship with both of their parents and with their two older half-brothers, but the risk of harm was mitigated by the adoptive mother's willingness to allow continuing visits. The youngest boy had not developed a relationship with his parents. The court considered the boys' desire to be adopted and that they called the foster mother "mom." Because the children had been separated from their biological parents for over two years and termination of parental rights would allow them to enter a more stable and permanent family relationship, the court appropriately concluded termination was in the children's best interests.

This court's independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the orders are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Christine M. Quinn is relieved of her obligation to further represent D.E. in these matters. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*