COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2014

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 Nos. 2014AP144
2014AP145

Cir. Ct. Nos. 2011TP000278
2011TP000279

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JOHNNIE J.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JOHNNIE J.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: M. JOSEPH DONALD and JOHN DiMOTTO, Judges. *Affirmed*.

¶1 BRENNAN, J.[1] Johnnie J. appeals from orders terminating her parental rights to Eve J. and Lavontae R. She contends that her trial counsel provided constitutionally ineffective assistance because she failed to object to the admission of expert testimony from three witnesses and failed to object to multiple instances of hearsay during the trial. However, even if we assume that Johnnie's allegations against her trial counsel amount to deficient performance, we conclude that Johnnie was not prejudiced by counsel's alleged errors. As such, Johnnie was not subjected to constitutionally ineffective counsel, and we affirm.

BACKGROUND

¶2 In September 2008, Johnnie's children Eve (born May 22, 2002) and Lavontae (born December 4, 2004) were detained by the Bureau of Milwaukee Child Welfare ("BMCW") after BMCW received multiple reports that Johnnie was physically harming the children. Eve and Lavontae were found to be children in need of protection or services ("CHIPS") and a dispositional order was entered in February 2010. The order placed the children outside of Johnnie's home and

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

detailed the conditions Johnnie needed to meet for the children to be returned. The dispositional order was extended through the children's eighteenth birthdays.

¶3 In September 2011, the State filed a petition to terminate Johnnie's parental rights ("TPR") to Eve and Lavontae, alleging: (1) abandonment, *see* WIS. STAT. § 48.415(1)(a)2.; (2) continuing need of protection or services, *see* WIS. STAT. § 48.415(2); and (3) failure to assume parental responsibility, *see* WIS. STAT. § 48.415(6).[2] The State moved to withdraw the abandonment grounds for both children before trial, and the trial court granted the motion.

¶4 In August 2012, the matter was tried to a jury.[3] The State called fourteen witnesses during the trial, including caseworkers and other individuals who had been engaged to provide services to Johnnie. Those witnesses testified about their efforts to provide services to Johnnie, the difficulties Johnnie created when they attempted to provide those services, and Johnnie's failure to meet the conditions of return. The witnesses also included the therapists who were treating Eve and Lavontae, and Dr. Kenneth Sherry who was treating Johnnie.

¶5 Johnnie also testified. She told the jury that she did not know how to spell her children's names and did not know their birthdays. Johnnie stated that she did not know what school the children went to, their teachers' names, or how they were doing in school. She did not know the names of the children's doctors

[2] The TPR petitions also included termination grounds for Eve's unknown biological father and Lavontae's known biological father. The trial court entered orders terminating the fathers' parental rights in October 2012. Those orders are not before us on appeal.

[3] The Honorable M. Joseph Donald presided over the jury trial and the dispositional hearing, and entered the orders terminating Johnnie's parental rights to her children.

or dentists and had no knowledge of their medical or dental care. Johnnie did not know how the children were doing in their current foster care placement. She testified that she was willing to take the anger management and parenting classes mandated by the CHIPS order, but did not believe that she needed the services.

¶6 We will set forth the relevant testimony of the other witnesses in more detail later in this opinion when analyzing the merits of Johnnie's ineffective-assistance-of-counsel claim.

¶7 The jury found that both Eve and Lavontae were children in continuing need of protection or services and that Johnnie had failed to assume parental responsibility of both children. Following the dispositional hearing, the trial court determined that it was in Eve's and Lavontae's best interests to terminate Johnnie's parental rights.

¶8 In November 2012, Johnnie filed a notice of intent to pursue post-disposition relief. Due to her appointed counsel failing to file any documents on her behalf, Johnnie was appointed successor counsel following an order from this court. Successor counsel filed a motion to remand these cases for a post-disposition fact-finding on the issue of ineffective assistance of counsel. We ordered the cases remanded for a hearing challenging trial counsel's effectiveness.

¶9 The post-disposition court held a hearing in May 2014 to address the ineffectiveness claim.[4] The court assumed, for the sake of argument, that deficient performance was established and looked only to whether there was prejudice from

[4] The Honorable John DiMotto presided over the post-disposition hearing and entered the order denying post-disposition relief.

that performance. The court then ruled that there was no prejudice. The court specifically found that "[t]he evidence that was admissible was overwhelmingly strong" and that the verdict "was the only verdict a reasonable jury could reach." Johnnie appeals.

DISCUSSION

¶10 Johnnie contends that her trial counsel was constitutionally ineffective for failing to object to the admission of expert testimony and for failing to object to hearsay testimony. The post-disposition court ultimately concluded that, even assuming trial counsel's performance was deficient, Johnnie was not prejudiced by admission of the allegedly inadmissible evidence. For the reasons set forth below, we agree with the post-disposition court and affirm.

¶11 Parents are entitled to the effective assistance of counsel in termination-of-parental-rights actions. ***A.S. v. State***, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992). The test for ineffective assistance has two prongs. First, Johnnie "must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to Johnnie] by the Sixth Amendment." *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Second, Johnnie "must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive [Johnnie] of a fair trial, a trial whose result is reliable." ***Id.*** If Johnnie fails to meet either prong of this test, the other prong need not be addressed. *See* ***id.*** at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.").

¶12 Here, like the post-disposition court, we will assume for the sake of argument that Johnnie's trial counsel's performance was deficient and look only to whether Johnnie was prejudiced by that alleged deficient performance.

¶13 "A claim of ineffective assistance of counsel presents a mixed question of law and fact." *See* ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. The trial court's findings of fact will be upheld unless they are clearly erroneous; however, the determination of whether those facts satisfy the constitutional standard for effective assistance is a legal question reviewed *de novo*. ***Id.***

¶14 Johnnie's ineffective-assistance-of-counsel claim is two-fold. First, she argues that her trial counsel failed to object to the expert testimony of three witnesses. Second, she argues that her trial counsel failed to object to a plethora of inadmissible hearsay evidence. We summarize the testimony that Johnnie contends was inadmissible here.

Allegedly Inadmissible Expert Testimony

¶15 Johnnie first argues that her trial counsel was ineffective for failing to object to alleged expert testimony from three witnesses—Geoffrey Dimin, Dr. Kenneth Sherry, and Erica Stolarski—on the grounds that the testimony was insufficiently reliable under WIS. STAT. § 907.02(1).[5]

[5] WISCONSIN STAT. § 907.02(1) states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon

(continued)

¶16 Dimin testified that he had a bachelor's degree in psychology and was employed by the Milwaukee Center for Independence as a "Supervisor of Community Living." He testified that he conducted "parenting assessments" as a part of his job and described the assessments and how they are administered. Dimin told the jury that he did a parenting assessment with Johnnie in June 2011. He summarized the results thusly:

> When compared to the average population, when put in situations where these parenting techniques are required, individuals that score in that range are more likely to use parenting techniques that are not considered positive or nurturing that could impact a child in a negative manner.

Johnnie argues that Dimin testified that she "failed" the parenting assessment and that her trial counsel should have objected because the State did not present any evidence to support the scientific validity of the parenting assessment.

¶17 Dr. Sherry, a psychologist who performed an evaluation of Johnnie, testified that Johnnie had an IQ of 64, placing her in the "mildly mentally retarded range." Dr. Sherry told the jury that he believed that "the mental retardation precludes [Johnnie] from managing basic adult responsibilities" and that Johnnie would necessarily be unable to manage basic adult tasks or care for children. Johnnie argues that this testimony is inadmissible because there was no evidence presented to demonstrate that the tests Dr. Sherry used to determine Johnnie's IQ were reliable.

> sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

¶18 Erica Stolarski testified that she had been Johnnie's case manager from July 2010 until the trial. She testified regarding the CHIPS order that was in place, the conditions it contained, and the services that were provided to Johnnie. She testified that Johnnie had not met the conditions for return of the children. Stolarski told the jury that she did not believe that Johnnie would meet the conditions for return in the next nine months because "[h]er children have been removed from her care for the past [four] years, and plenty of services have been referred for her, and she's gone to some of them, but she hasn't completed any of them." Johnnie argues that Stolarski's opinion amounted to no more than testimony to the jury about how they should decide the case and was impermissible under the statutes prohibiting lay and expert testimony. *See* WIS. STAT. §§ 907.01 and 907.02.

Allegedly Inadmissible Hearsay

¶19 Next, Johnnie argues that her trial counsel was ineffective for failing to object to the following testimony as inadmissible hearsay. *See* WIS. STAT. §§ 48.299(4), 908.01 & 908.02.

¶20 Brenda Kaminski was a social worker employed by BMCW who was responsible for intake screening. She testified regarding referrals she received concerning Johnnie. Johnnie argues the following testimony regarding those referrals was inadmissible hearsay.

- Kaminski stated that "[t]here was a concern that Johnnie … had taken her son to the hospital and there was concern regarding her aggressive behavior towards the child at the hospital."

- Kaminski described a conversation she had with a nurse from the hospital, in which the nurse described Johnnie "screaming at Lavontae, calling him things such as stupid, stubborn, asking why he can't listen." Kaminski stated that the nurse told her that Johnnie said she "wanted to get rid of Lavontae," that she observed Johnnie pick up Lavontae and put him on the stretcher on his buttocks "with force," and that while at the hospital Johnnie "continuously screamed at Lavontae loud enough to be heard across the emergency room."

- Kaminski testified that she received a referral from Johnnie's mother, who told her that Johnnie "had been throwing things, acting out in an aggressive manner," and that Johnnie "had actually hit Lavontae prior to leaving the home with him and … threat[ened] that she was going to harm herself and the child."

- Kaminski also told the jury about a referral she received from Johnnie's sister, testifying that the sister expressed "the same concerns that Johnnie … was unable to care for herself or her child." According to Kaminski, Johnnie's sister also told her that Johnnie had been "throwing stuff, was angry, aggressive in the home and threatened to harm herself and the child and actually hit Lavontae and then they fled the house."

- Kaminski testified about referrals received by BMCW regarding "concern" for Johnnie from various unnamed individuals. For example, Kaminski stated that someone expressed concern that Johnnie "may not be able to provide for her son" because of her developmental delays and handicaps. Kaminski related that other individuals contacted BMCW to tell the agency that Johnnie was "20 weeks pregnant tested positive for chlamydia, has a history of seizures" and "could benefit from services"; that he or she had "concerns of physical abuse to Eve"; that he or she had "concern that [Johnnie] had slapped Eve"; and that Johnnie was "taken to the Milwaukee County Mental Health Complex, then jail." Kaminski also described an individual who reported that after Johnnie gave birth to Eve, Johnnie's mother and sister were advised "not to leave [Johnnie] with the baby due to her violent history."

¶21 Marisol Goines was a case manager for BMCW who testified regarding various reports made to the agency about Johnnie's behavior. Johnnie objects to the following statements.

- Goines testified that a woman working in an unknown capacity for an office where Johnnie was receiving medical care told Goines that Johnnie "normally would not follow through with her doctors' appointments and that when she would see her, that she would become very angry and would yell at her."

- Goines also testified that Lavontae had been diagnosed with ADHD and that Johnnie was resistant to Lavontae being on medication despite the fact that "there were multiple professionals that were concerned wanting to look into that avenue as a way to help him." Goines told the jury that "the pediatrician diagnosed him as having ADHD, his teacher sent me multiple emails regarding his hyper activity at school, as well as the foster parents at the time spoke to me repeatedly regarding his behaviors, his therapist had also eventually diagnosed him as having ADHD also."

¶22 Dubravko Ahmedic was Johnnie's original case manager and testified to reports made to BMCW about Johnnie's behavior. Johnnie argues that the following testimony is inadmissible hearsay.

- Ahmedic testified that Johnnie's sister reported that Johnnie may have stolen her iPod and that Johnnie was not visiting with the children.

- Ahmedic also told the jury that Johnnie's mother told him that Johnnie "wasn't able to stay at people's houses for more than a few days because she would get into arguments on occasion with people and she would have to leave right away."

- Ahmedic related that someone reported that Johnnie's sister "was taking care of Lavontae since his birth."

Johnnie was not prejudiced by the allegedly inadmissible testimony.

¶23 Even if we accept Johnnie's argument that her trial counsel was deficient for failing to object to all of the foregoing evidence, we cannot conclude that she received ineffective assistance of counsel because, as the post-disposition court found, "[t]he evidence that was admissible was overwhelmingly strong." We simply cannot conclude that there is a reasonably probability that omission of this evidence would have led to a different result. *See* ***Strickland***, 466 U.S. at 694. (To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

¶24 The jury found two grounds on which to terminate Johnnie's parental rights to Eve and Lavontae: CHIPS and failure to assume parental responsibility. However, only one ground is necessary to terminate a parent's rights. Because we conclude that there is not a reasonable probability that the jury would have changed its verdict with respect to the failure-to-assume-parental-responsibility ground, even excluding the evidence Johnnie challenges, we do not address whether the jury would have changed its verdict with regards to the CHIPS ground. *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").

¶25 To prove the ground of failure to assume parental responsibility, the State needed to demonstrate that Johnnie did not have a substantial parental relationship with her children. *See* WIS. STAT. § 48.415(6)(a); *see also* WIS JI—

CHILDREN 346. There was substantial evidence at trial, none of which Johnnie objects to, to support that proposition.

¶26 Ahmedic, Johnnie's case manager from September 2008 to July 2009, testified at trial that he set up supervised visitation for Johnnie and the children. Ahmedic stated that Johnnie failed to attend more than half of the visits, and when she did attend, she displayed little interest in interacting with her children and used inappropriate language. Due to Johnnie's missed visits, her visitation was suspended in December 2008. After December 2008, BMCW attempted to utilize Johnnie's sister to supervise visits, but Johnnie did not attend "often or at all."

¶27 Ahmedic also told the jury that he scheduled a psychological evaluation for Johnnie but the evaluation was not completed until April 2009 because Johnnie missed several appointments. Ahmedic also set up parenting and anger management classes for Johnnie through Renew Counseling services; however, Johnnie did not complete the programing.

¶28 Dr. Sherry, a licensed psychologist since 1987, conducted an evaluation of Johnnie in April 2009. He testified that, during the evaluation, Johnnie described herself as getting "upset about little things." She also told Dr. Sherry that she had previously whipped Eve and Lavontae on the bottoms of their feet with a belt to discipline them but that she now only whips the children on their butts with her hand.

¶29 Goines, Johnnie's case manager from July 2009 until February 2010, testified that she had attempted to enroll Johnnie in anger management therapy and attempted to assist her with scheduling her medical care, but that Johnnie failed to

stay in contact with service providers. Goines also testified that when she informed Johnnie that numerous professionals were concerned about Lavontae's behaviors, Johnnie refused to discuss the matter, became angry, and yelled at Goines.

¶30 Stolarski, Johnnie's case manager from July 2010 until the time of the trial, told the jury that Johnnie did not consistently stay in touch with her until December 2011, and that she had difficulty implementing services because she often could not locate Johnnie. Stolarski testified that Johnnie had never asked about the children's schooling, health care providers, or made an effort to learn about their special needs.

¶31 Ryan Bamberg, a residential case manager at the Milwaukee Center for Independence ("MCFI"), conducted visits at Johnnie's home from June until October 2011. He testified that he found the home to be dirty, with standing liquid on the table, dirty dishes in the sink, garbage in the home, and roaches.

¶32 Penny Fishler, a parenting instructor, testified that Johnnie was placed in group parenting because in-home visits were not working. Fishler testified that the majority of days Johnnie would sleep through the class. Johnnie was switched back to in-home meetings in January 2012 because the group setting was not working. Fishler stated that during the time she was working with Johnnie, Johnnie made no progress in any of her parenting courses.

¶33 While all of this testimony shows that there was sufficient evidence produced at trial from which a jury could conclude that Johnnie did not have a substantial relationship with her children, the most demonstrative testimony is Johnnie's testimony on her own behalf. Johnnie told the jury that she did not

know how to spell her children's names and that she could not remember the children's birthdays. She testified that the children had lived with relatives for a substantial period of their lives and that she was not living with at least one of the children when they were removed from her care in September 2008. Johnnie testified that she did not know what services the children were engaged in, what school they attended, or their grades or teachers. She knew nothing about the children's medical or dental care, or any of the providers they saw. Johnnie had never been to a doctor or dentist appointment with the children, or to a parent-teacher meeting.

¶34 In sum, we agree with the post-disposition court's finding that the jury's verdict "was the only verdict a reasonable jury could reach." Johnnie's own description of her involvement in her children's lives plainly demonstrates that she did not have a substantial parental relationship with her children. *See* WIS. STAT. § 48.415(6)(a); *see also* WIS JI—CHILDREN 346. As such, we conclude that Johnnie was not prejudice by her trial attorney's alleged errors, and we must affirm.

By the Court.—Orders affirmed.

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