

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

Nos. 98-1747
98-1748

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

No. 98-1747

**IN RE THE TERMINATION OF PARENTAL RIGHTS OF
FANTASIA C., A PERSON UNDER THE AGE OF 18:**

ROCK COUNTY,

PETITIONER-RESPONDENT,

V.

AMY L.,

RESPONDENT-APPELLANT.

No. 98-1748

**IN RE THE TERMINATION OF PARENTAL RIGHTS OF
LANIAH C., A PERSON UNDER THE AGE OF 18:**

ROCK COUNTY,

PETITIONER-RESPONDENT,

V.

AMY L.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Rock County:
GERALD W. JAECKLE, Judge. *Affirmed.*

DYKMAN, P.J.¹ Amy L. appeals from orders terminating her parental rights to Fantasia C. and Laniah C. She argues that her trial counsel was ineffective in failing to object to damaging testimony concerning both her relationship with two of her other children and her ability to make substantial progress toward satisfying the conditions set by the court for the return of Laniah and Fantasia. She also asserts that her trial counsel erred when he made inaccurate and prejudicial statements to the jury during opening and closing arguments concerning the relevant facts and applicable legal standards. She previously appealed and we remanded the case for a *Machner* hearing.² After the hearing, the trial court determined that her trial counsel's performance was not prejudicial. We agree. Amy L. also contends that the trial court erroneously exercised its discretion regarding the admissibility of a certain piece of evidence. We disagree. Accordingly, we affirm.

¹ This appeal is decided by one judge pursuant to § 752.31(e), STATS, and expedited under RULE 809.17, STATS.

² *State v. Machner*, 101 Wis.2d 79, 303 N.W.2d 633 (1981).

BACKGROUND

In July 1996, Amy L. informed Jennifer Fischer, a social worker for Rock County, that she was unable to control or provide for her children, Fantasia C., born October 30, 1993, and Laniah C., born October 10, 1994, and requested to have them placed in foster care. On August 26, 1996, the court entered dispositional orders stating that Fantasia and Laniah were in need of protection and services within the meaning of § 48.13(4), STATS. The court also set out six conditions that Amy L. was required to meet before her children would be returned to her. The conditions were that: (1) she maintain a safe and stable residence, suitable for children, for a period of six months; (2) she demonstrate an ability to meet each child's physical and emotional needs, which included obtaining and maintaining employment; (3) she must demonstrate an understanding of how her past history of abuse has affected her parenting ability; (4) she must demonstrate an ability to consistently protect her children; (5) she must develop stress management and coping skills; and (6) she must not reside with anyone who is detrimental to her children.

The County filed petitions requesting the involuntary termination of Amy L.'s parental rights pursuant to § 48.415(2)(c), STATS., stating that she had not made substantial progress toward satisfying these six conditions and it was unlikely that she would satisfy them in the next year.

At trial, John Dalee and Tracy Mayer testified for the County regarding their involvement in this case. Each testified that, in their professional opinions, Amy L. had not made substantial progress toward meeting the conditions set by the court, and that it was unlikely that she would satisfy the conditions within the next year. After hearing all the evidence, the jury found that

the elements of § 48.415(2), STATS., were met for both children. On March 30 and April 9, 1998, the court conducted dispositional hearings under §§ 48.426 and 48.427, STATS., and concluded that it was in the best interests of the children that Amy L.'s parental rights be terminated.

On appeal, Amy L. argued that her trial counsel was ineffective. We remanded the case to the trial court for a *Machner* hearing. At that hearing, Amy L. asserted that her trial counsel: (1) misstated legal standards in his opening statements; (2) failed to object to damaging testimony; and (3) made inaccurate factual statements during closing arguments concerning her inability to make substantial progress toward meeting the conditions. The trial court concluded that while trial counsel may have been deficient during some of the trial, his performance did not prejudice the outcome of the case. Amy L. appeals.

DISCUSSION

1. *Ineffective Assistance of Counsel*

An indigent parent has a statutory right to effective assistance of counsel in termination of parental rights' proceedings. *A.S. v. State*, 168 Wis.2d 995, 1002, 485 N.W.2d 52, 54 (1992). Wisconsin uses a two-prong test to determine whether an attorney's actions constitute ineffective assistance of counsel. *See State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). The first prong considers whether trial counsel's performance was deficient. *State v. Littrup*, 164 Wis.2d 120, 135, 473 N.W.2d 164, 170 (Ct. App. 1991). Deficient performance requires a showing that counsel's representation fell below the objective standard of reasonableness. If counsel's performance is deficient, the second prong considers whether the deficient performance prejudiced the defense. *See Littrup*, 164 Wis.2d at 135, 473 N.W.2d at 120. If the

claimant fails to meet either the deficient performance or prejudicial component of the test, we need not address the other component. *See State v. Sanchez*, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). Whether deficient performance and prejudice exist are questions of law that we review de novo. *Id.* at 236-37, 548 N.W.2d at 76.

The required test is that counsel be “adequate.” We have held that adequate counsel does not mean “the best counsel that might have tried the case, nor the best defense that might have been presented.” *State v. Williquette*, 180 Wis.2d 589, 605, 510 N.W.2d 708, 713 (Ct. App. 1993), *aff’d.*, 190 Wis.2d 677, 526 N.W.2d 144 (1995). In fact, counsel need not be perfect, or even very good, to be constitutionally adequate. *See id.*

We review an attorney’s performance with great deference. The burden is upon 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, 180 (Ct. App. 1998). That party must show that counsel’s deficiencies were so prejudicial that they deprived him or her of a trial whose result is reliable. *State v. DeKeyser*, 221 Wis.2d 435, 442, 585 N.W.2d 668, 672 (Ct. App. 1998).

Amy L. argues that her trial counsel was deficient in representing her, and that his deficient performance prejudiced the outcome of the case. For example, Amy L. contends that her trial counsel was ineffective in allowing the County to question her about two of her other children. The County asked her if she had other children and whether those other children lived with her. She responded that she had two other children, Brittany and Jewel, and that they lived with their father. The County then asked whether the children are ever placed

with her, and she responded that the children's father denied her placement privileges after she was late in returning them to him following a weekend visit. Amy L. contends that her trial counsel should have objected to this line of questioning because it was irrelevant and prejudicial to the outcome of the case.

At the *Machner* hearing, the court concluded that trial counsel was deficient in not objecting to this line of questioning, and that it would have sustained an objection had one been made. However, the court determined that trial counsel's failure to object was not prejudicial. We are satisfied that trial counsel's failure to object to this line of questioning was insufficient to affect the reliability of the outcome of this case. Amy L. admitted at trial that she had not made substantial progress in meeting some of the conditions set by the court. She also admitted to making statements that she did not think she would meet the conditions, and that it may be better if the County kept her children. In sum, because we are satisfied that the failure to object to this line of questioning was not prejudicial, we need not consider whether it was deficient performance. *See Sanchez*, 201 Wis.2d at 236, 548 N.W.2d at 76.

Amy L. next contends that her trial counsel was ineffective in failing to object to certain testimony by John Dalee, a counselor at the Beloit Counseling Center, and by Tracy Mayer, a case manager with Child Protective Services in Rock County, regarding their respective opinions as to whether she was making substantial progress toward meeting the conditions set by the court.³ Both Dalee and Mayer opined that Amy L. struggled to make substantial progress toward

³ Amy L. asserts that the trial counsel erred in failing to object to the six conditions set by the court for being vague. This issue was not raised at the *Machner* hearing; therefore, we will not consider it on appeal. *See State v. Rogers*, 196 Wis.2d 817, 826, 539 N.W.2d 897, 900 (Ct. App. 1995).

meeting the conditions. Amy L. contends that the County failed to lay the proper foundation necessary to qualify Dalee and Mayer as experts; therefore, their testimony was inadmissible. Amy L. also argues that her trial counsel should have objected to statements in which Dalee and Mayer both stated that it was unlikely that she would meet these conditions within the next year. She contends that their statements were inadmissible speculation.

At the *Machner* hearing, trial counsel stated that he did not object to this testimony because he believed the witnesses to be qualified experts who were offering relevant opinion testimony. Trial counsel also stated that he did not object to certain statements made by Dalee because Dalee unexpectedly testified in a manner favorable to Amy L.'s position. He therefore decided to give Dalee more leeway in the anticipation and hope that his testimony would continue to be favorable.

The trial court concluded that trial counsel was not ineffective by failing to object to these statements. We agree. Dalee and Mayer are experts for the purposes of this case. A witness qualifies as an expert based on his or her background, education and experience. See *Wester v. Bruggink*, 190 Wis.2d 308, 319, 527 N.W.2d 373, 378 (Ct. App. 1994). Dalee is a therapist with a master's degree in guidance and counseling and has six years of experience as a therapist. He specializes in handling clients referred to him from Child Protective Services, and has worked with approximately five hundred families in the past six years. Dalee has also been Amy L.'s therapist for two years. Mayer is a case manager with Child Protective Services with a master's degree in social work. She has seven years' experience as a social worker with the County. In January 1997, she was assigned as Amy L.'s case manager. Dalee and Mayer qualified as experts.

The trial court also concluded that Mayer's and Dalee's testimony was admissible. An expert's testimony is admissible if it assists the trier of fact in understanding the evidence before it or in making a factual determination. *See* § 907.02, STATS.; *State v. Richardson*, 189 Wis.2d 418, 423, 525 N.W.2d 378, 380 (Ct. App. 1994). The trial court determined that their testimony was probative of Amy L.'s progress in the past and the ultimate question of whether she would meet the conditions within the next year. We therefore are satisfied that not objecting to its admission is not deficient performance.

Amy L. next asserts that trial counsel erred when he misstated the appropriate legal standard in his opening statement. Trial counsel stated that one of the issues in the case was whether Amy L. "substantially complied" with the conditions set by the court. However, Amy L. argues that this is not the correct legal standard; the standard is whether she demonstrated "substantial progress" toward meeting the conditions for the children's return as set out in § 48.415(2), STATS. She contends that the terms "progress" and "compliance" have significantly different meanings, and that trial counsel prejudiced the outcome of the trial by informing the jury of an incorrect legal standard.

Amy L. also asserts that trial counsel erred during closing arguments when he essentially conceded that she failed to meet the conditions set by the court for the return of Fantasia and Laniah. Amy L. argues that trial counsel was incorrect, and that there was evidence that she had been striving to meet the conditions. She testified that she was attempting to locate a safe and suitable residence, she was receiving counseling for residence and employment issues, she was making progress in understanding how her past history of abuse affected her parenting ability, and she was making substantial progress in developing stress management and coping skills.

At the *Machner* hearing, trial counsel testified that he told the jury that, based on the evidence, it could make the inference that she had not made substantial progress toward meeting the six conditions, not that they should make that inference. He further stated that it was his strategy to essentially concede this point and focus on the likelihood that she would meet the conditions within the next year. He did not want to lose credibility with the jury by arguing that she had made substantial progress; instead, he wanted to focus on points on which they could prevail—the likelihood of future success. He stated that he discussed this strategy with Amy L. prior to trial.

The trial court concluded that the misstatement of the legal standard during opening arguments was not deficient performance and was not prejudicial, presumably because the terms are interchangeable in this context. It also held that trial counsel was not deficient in conceding that Amy L. may not have made substantial progress toward meeting the six conditions in the past. The trial court recognized that conceding this fact was necessary in order to maintain credibility with the jury, and that the only way that trial counsel could prevail would be to focus primarily on her likelihood of success within the next year. Finally, the trial court stated, and we agree, that neither of these statements were prejudicial because the court instructed the jury that opening and closing statements by the attorneys were not evidence, and they should not be considered when the jury makes its determination. Furthermore, the trial court properly instructed the jury as to the appropriate legal standard prior to deliberations. We therefore conclude that trial counsel was not ineffective.

2. *Records of Regularly Conducted Activity*

Amy L. contends that the trial court erred when it allowed Mayer to testify at trial that an administrative review panel supported her opinion as to Amy L.'s progress. She asserts that the statement was inadmissible hearsay, and that it was irrelevant and unfairly prejudicial. We will not disturb an evidentiary ruling where the trial court has exercised its discretion in accordance with accepted legal standards and the facts of record. *State v. Clark*, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993). Where the trial court does not adequately set out the reasons for its decision, we independently review the record to determine whether it provides a reasonable basis for the trial court's discretionary ruling. *Id.* Generally, we look for reasons to sustain discretionary determinations. *See Steinbach v. Gustafson*, 177 Wis.2d 178, 185-86, 502 N.W.2d 156, 159 (Ct. App. 1993).

Mayer testified at trial that she routinely goes before an administrative review panel to discuss what is going on in a particular case, what the parent is doing, what the ultimate goal is in the case, and how the children's needs are being met. Mayer described the process as, "sort of a checks and balance to be sure that the case is on target[, and that] people are doing what they're are expected to do." She stated that this review occurs six months after the previous court hearing, and that the parents are invited to attend. The panel then issues a report with its findings and conclusions, and that report then is filed with the court.

In February 1998, Mayer attended the panel's review of Amy L.'s case and gave a progress report in the same fashion and with substantially the same information that she would later testify to at trial. Mayer testified that Amy

L. was then given an opportunity by the panel to discuss her feelings and opinions on the matter, which Amy L. did. After the review, the panel filed a report supporting Mayer's plan for termination. At trial, the County sought to introduce the panel's report into evidence. Amy L.'s counsel objected, claiming that the report was inadmissible hearsay.

Mr. Kraujalis: If I can state my objection, your honor, obviously, the document itself is hearsay. It contains a conclusion by ... individuals who are not here in court testifying whom I can cross-examine. I don't think it has any relevancy per se what someone else or some other aspect of the agency ... believes should be done.

Ms. Timmerman: Judge, I think that Mr. Kraujalis made it relevant in his cross-examination. He is purporting that Ms. Mayer is doing everything solely based on her own opinion and her own viewpoints. And, in fact, this Administrative Review Panel reviews the case and makes recommendations about what the department is doing and if they think something should be done differently, and there is a paragraph at the end where they are supportive of [Mayers] actions. And, if they are not, they certainly have that right to include that. So [Mayer] is not alone in making the recommendations

The trial court asked Mayer whether this review process is normally done in a case like this, and whether the administrative panel normally issues recommendation reports. Mayer responded that these reviews are conducted and reports are made in every court case. She said that the panel listens to the update and then may make recommendations. In this case, the panel agreed with Mayer's opinions and actions. After hearing this explanation, the court allowed Mayer to testify that this case went through the administrative review process and the panel agreed with her conclusions; however, it held that the jury was not to see the actual report.

Amy L. contends that the trial court erroneously exercised its discretion in allowing Mayer to testify as to the administrative review panel's conclusions. She argues that the testimony was hearsay because it was an out-of-court statement and her attorney had no opportunity to cross-examine the members of the panel regarding their opinions. She further argues that the opinions are inadmissible under RULES 907.01 and 907.02, STATS., because no foundation was provided for their opinions. Additionally, she asserts that the opinions were irrelevant under RULE 904.01, STATS., and they were prejudicial and confusing under RULE 904.03, STATS.

The panel's opinion was an out-of-court statement that was being offered for the truth of the matter asserted; therefore, it is hearsay under RULE 908.01(3), STATS. When the trial court does not specify under which exception it was admitting a hearsay statement, we must independently determine what exception, if any, applies. *See Clark*, 179 Wis.2d at 490, 507 N.W.2d at 174; *see also D.L. v. Huebner*, 110 Wis.2d 581, 597, 329 N.W.2d 890, 897 (1983).

Under RULE 908.03(6), STATS., a report is admissible at trial if it is created pursuant to a regularly conducted activity, as shown by the custodian or other qualified witness.⁴ Mayer testified that the panel regularly performs these administrative reviews and sets out its opinion in these recommendation reports.

⁴ RULE 908.03(6), STATS., reads as follows:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

Furthermore, Mayer testified that she was present at this review and that she was familiar with how this process works. We are satisfied that she is qualified to review and interpret the report and to testify as to the panel's conclusion in this case. And because we find no information or circumstances which indicate that the panel's report or Mayer's interpretation of the report is untrustworthy, we conclude that Mayer's statement is admissible under RULE 908.03(6).

Amy L. further asserts that the panel's opinion is inadmissible under RULES 907.01 and 907.02, STATS., because no foundation was provided. However, Amy L. failed to raise this specific objection at trial, and has waived her right to raise it on appeal. *State v. Rogers*, 196 Wis.2d 817, 828-829, 539 N.W.2d 897, 901 (Ct. App. 1995).

Finally, Amy L. contends that the evidence was irrelevant under Rule 904.01, STATS.,⁵ and confusing and unfairly prejudicial under RULE 904.03, STATS.⁶ We disagree. The evidence is relevant because it supports Mayer's conclusions regarding Amy L.'s progress, and as the County pointed out at trial, it dispels the assertion that Mayer's conclusions were based solely on her opinion. We therefore conclude that it is relevant to the outcome of the proceeding.

⁵ RULE 904.01, STATS., reads as follows: "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

⁶ Rule 904.03, STATS., reads as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

We also disagree that this evidence makes it seem that a “higher power” approved of Mayer’s actions and opinions, and that it confused the jury and unfairly prejudiced the outcome. The fact that the panel supported Mayer’s opinion and actions means that Mayer did not possess total control over the evaluation of Amy L.’s progress. When there is agreement on an issue in dispute, that agreement usually is not unfairly prejudicial to the outcome, and it generally does not confuse the jury. This agreement simply strengthened the County’s assertion that Amy L. had not made substantial progress toward satisfying the court-imposed requirements. Consequently, we conclude that Mayer’s statement that the panel agreed with her conclusions was admissible.

CONCLUSION

We conclude that trial counsel’s overall performance did not alter the result of the proceeding, and, therefore, was not prejudicial. We also conclude that the trial court did not erroneously exercise its discretion in allowing Mayer to testify as to the panel’s support of her opinions and actions. Accordingly, we affirm.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.

