

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 26, 2015

A. John Voelker
Acting 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. 2014AP2911

Cir. Ct. No. 2013TP271

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS
TO KAYLA M., A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

KAMILLE M.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
JOHN J. DIMOTTO and REBECCA G. BRADLEY, Judges.¹ *Affirmed.*

¹ The Honorable John J. DiMotto presided over Kamille M.'s jury trial and entered the order terminating Kamille M.'s parental rights. The Honorable Rebecca G. Bradley presided over the subsequent *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), hearing and entered the order denying Kamille M.'s post-disposition motion.

¶1 KESSLER, J.² Kamille M. appeals the order terminating her parental rights to Kayla M. and the subsequent order denying her post-disposition motion. Kamille M. argues that her trial counsel was ineffective at the grounds phase of her trial for failing to object to hearsay and failing to object to “the State’s veiled reference to Kayla M.’s ‘best interests’” during closing arguments. This court affirms.

BACKGROUND

¶2 On September 27, 2011, the Bureau for Milwaukee Child Welfare (hereafter “the Bureau”) received a referral stating that Kamille M. was depressed, suicidal, and did not have anyone to care for her young children, including her son Justin, who was eight, and her daughter Kayla M., who was twenty-one months old at the time.³ According to the order for temporary physical custody and the CHIPS petition that followed, by the time police arrived to check on the family, Kamille M. said she was no longer suicidal but was “very depressed,” “could no longer handle things,” and had “no one to turn to for help.” The CHIPS petition explained the Kamille M. was depressed because “she could no longer stand [her] apartment and the neighborhood is dangerous” and that she was “tired of being fearful of her neighborhood.” The order for temporary custody further explained that Kamille M. had been raped in February 2011, her car had been broken into, and her grandfather, who owned the home she lived in, did not want to make necessary repairs to her home—all factors that caused Kamille M.’s mental health

² This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

³ Kamille M.’s parental rights to her son Justin are not at issue here. Justin was, as we will see, returned to Kamille M.’s care before her trial regarding Kayla M.

to deteriorate to the point where she was ultimately admitted to the hospital on an in-patient basis.

¶3 The CHIPS petition noted that there were numerous problems with Kamille M.'s home, including:

her fridge does not work well, only some of her electrical outlets work, her oven does not work, she only has hot water in the bathroom and there are bugs in the home.... [T]here was moldy food in the fridge, dirty dishes in the sink, roaches in the home, outlet covers missing on the outlets, ... broken windows in the home and the back stairs seem to be broken.

¶4 Kayla M. was found to be a child in need of protection or services in November 2011, and a dispositional order placed her in a foster home. The dispositional order contained a number of conditions that Kamille M. was required to meet in order for Kayla M. to be returned to her home:

- be “able to successfully meet her mental health needs,” including being able to “identify and address triggers that cause her to be unable to meet her emotional and behavioral needs,”
- have “a safe and suitable home to raise her children,” including being “capable of accessing community and/or other resources to assist in maintaining a safe home,” and having a home “absent of any safety dangers,”
- be “able to identify and address behavioral concerns ... that interfere with her children’s safety and well-being,” including being able to use “age-appropriate discipline and boundary-setting with her children to ensure they are safe in her home and in the community,”

- demonstrate “the ability to meet her children’s day-to-day supervisory, educational, medical and behavioral needs; and
- demonstrate “the willingness and ability to provide a safe level of care” for Kayla M., including “demonstrating the ability and willingness to care for the child ... on a full-time basis.”

¶5 In September 2013, the State filed a petition for the termination of Kamille M.’s rights to Kayla M. The petition alleged that Kayla M. was in continuing need of protection or services, contrary to WIS. STAT. § 48.415(2), and that Kamille M. had failed to meet the conditions of return described in the 2011 dispositional order.

¶6 A jury trial took place in June 2014. The State called Kamille M. adversely, and questioned her in detail about the conditions of her home, the state of her mental health, and her ability to properly care for Kayla M. The State also called Tai Words-Jones, a family support specialist, and Yulonda Anderson, a family case manager—both of whom were assigned to work with Kamille M. In addition, the State called Amy Gleysteen, a licensed counselor who treated Kamille M. from 2011 to 2014.

¶7 All of the State’s witnesses, including Kamille M. when called adversely, testified that Kamille M. had not met all of the conditions and goals set forth by the CHIPS dispositional order. The examples below are illustrative, and not exhaustive.

¶8 For example, Anderson and Kamille M. both testified that Kamille M. had not been able to meet the first condition—that Kamille M. be able to meet her mental health needs. Anderson testified that Justin’s being returned to Kamille

M. represented a “high point” in Kamille M.’s ability to meet her mental health needs, but that things had been inconsistent ever since:

There have been a lot of inconsistencies with [Kamille M.]’s ability to meet the needs of the home, to meet Justin’s needs, to meet her own mental health and physical needs.... There have been times when [she] has been very motivated to seek her own physical and mental health needs and other times when she has not. That often manifests in the way that her home and her decisions are made.

....

Regarding decisions that she makes, when [Kamille M.] has not been consistent with her mental health, she tends to miss visits, she tends to miss appointments, she tends to make decisions that do not put herself or her needs in the best situation. So she is not seeing to her mental health which then spirals into the condition of her home deteriorating which then spirals into Justin not having his needs met consistently....

¶9 Kamille M. acknowledged that her ability to keep on top of her housekeeping fluctuated with her mental health status, explaining that issues like clutter piling up and molding food were connected to her anxiety level. She also admitted that she had not been consistent in keeping her home clean.

¶10 As for the second condition, keeping a safe and suitable home Kamille M. testified that she had not met that goal. During her adverse examination, Kamille M. testified extensively as to the cleanliness and safety of her home during the years Kayla M. was in foster care. Kamille M.’s adverse examination included the following questions and answers:

Q: How did your house look at the time that the police and the Bureau came on that day [in September 2011]?

A: It was very messy.

Q: Okay. I am going to read to you a description [of your house]. You tell me if this is how you remember it looking.

A: Okay.

Q: There was moldy food in the refrigerator, dirty dishes in the sink, roaches in the home, outlet covers missing on the outlets, clothes scattered throughout the house, mold in the bathrooms and problems with the plumbing such as no cold water. There were broken windows in the home, and the back stairs seemed to be broken. Does that describe what was going on in your home that day [when the children were detained]?

A: I don't remember there not being any hot or cold water. I don't remember the steps being broken. In the bathroom, I remember there being missing tile. I don't remember there being moldy tile. Yes, I had some dirty dishes. Yes, I probably had rotten food in the refrigerator. That's why I was trying to get out of the house to buy food. Yeah, I would say that sounds about right.

...

Q: Do you remember a man by the name Ryan Nolan?

A: Yes.

Q: Ryan was your family support worker who came out to see your home in an effort to decide whether you would be able to have visits in your home, correct?

A: Uh-huh.

....

Q: I am going to read a number of different things how Ryan described the home, and you tell me if this was what it was like in January of 2012. Now, this was three months after you were in the hospital. He came out on January 12, 2012. The home has enough space potential suitable for three children and one adult, however, the makeup of the home is incomplete and hazardous for small children. The walls are incomplete in that parts of the walls are torn open and need to be sealed with drywall. The living room contained numerous tools and equipment that could potentially harm an infant or toddler child if left unmonitored. The tools slash clutter could fall on a child,

and the child could swallow the hazardous objects scattered around the room, and the tools or debris could puncture the child as they are sharp and heavy. Various sharp objects such as nails and appliance pieces are scattered across the floor. Outlet covers have not been placed on the outlets in the living room. Is that an accurate picture of what was going on in January of 2012 when Ryan came out to your house?

A: Yes.

Q: The children's rooms are not set up for their return at this time. [Kamille M.] has two pack and plays and one mattress in the home. The pack and plays contain tools and other objects. The mattress is leaned up against the wall in the room with the water leak. Another mattress was left outside covered in snow. [Kamille M.] stated that she initially placed the mattress outside to dry it out, but it was not brought in once it began snowing, therefore, it's covered in snow. Does that sound – do you remember that?

A: No. I remember the wall that was in my son's room, the master bedroom, there was a leak, and that leak ruined a mattress that I had [thrown] out, but I do remember kind of using the pack and play as storage. My house compared to that as a whole – it's not like that anymore.

Q: The bathroom was filled with clutter. The bathtub was unusable due to the amount of clutter and the equipment inside the bathroom as well as the broken water pipes. The pipes of the bathroom are exposed in one of the children's bedrooms. The pipes are leaking onto the wood flooring causing possible wood rot in the child's room. The water leak was covered by a plastic sheet, however, it is clear the flooring is damaged under the plastic. A metal pipe has been lodged in the pipe leak where the water will spray if the bathtub is turned on. Once the pipe is fixed, drywall needs to be put in place to cover the exposed pipes in the wall. The wet floor will need to be replaced. [Kamille M.] stated she slipped and fell in the room with the leak. Was that going on with the pipes and the walls open?

A. We fixed all that now. We dry walled it up, me and my grandpa and a couple other people. We put everything back together.

....

Q: Okay. The lights ... in the ceiling in the home are working, although they do flicker at times. [Kamille M.] says this is due to the water leak from the bathroom dripping into the wires in the basement. Yes?

A: Yes.

....

Q: ... I have notes from Ryan Nolan from July of 2012 when Justin came home the next month that said your house was cleaned. Ms. Anderson and Ms. Tai Words-Jones had to come in and do a deep clean after that, correct?

A: What do you mean by deep clean?

Q: Moldy food, gnats all over the sink, the inoperable sink. Did that happen? Was that your kitchen?

A: Yeah, there were gnats. Yeah, the sink didn't work, and I since then fixed the sink. This was last year.

Q: And when Ms. Anderson came to your home on May 14 of this year [2014], how did it look?

A: In May of this year?

Q: Let me tell you what she said, and you tell me if this was fair?

A: Okay.

Q: Upon entering the home, this worker observed the home to be in disarray throughout. There was less clutter in the kitchen where [Kamille M.] said the sink is again inoperable. The electricity is working, however, [Kamille M.]'s bedroom, living and dining room and bedrooms were cluttered with clothing, toys and other debris. [Kamille M.] said that Justin refused to clean his room. The dining area where we spoke was cluttered with food debris. This worker swept the chair free of debris when [Kamille M.] asked this worker to sit. Is that how your house looked less than one month ago?

A: Um, Yes.

¶11 In addition, Anderson testified that Kamille M. did not demonstrate the ability to have a safe, suitable home for Kayla M. Anderson said that the

cleanliness of Kamille M.'s home was a continual problem, and at one point Anderson went so far as to help Kamille M. clean her kitchen as Kamille M. had been "struggling for quite some time." Words-Jones testified:

There were times where I went in and – there was one time where there was a hammer found in a recliner. There were push pins on the floor. Sometimes there would be lighters and cigarettes ... within Kayla's reach.

....

[T]here were things that Kayla could access that could cause her harm. For example, there was a cabinet which had a child safety lock on it that was rarely locked, and there was ... bleach and other cleaning products in that cabinet.

¶12 Regarding the third condition, Anderson testified that Kamille M. was unable to identify and address behavioral concerns and set appropriate boundaries. For example, shortly after Kayla M. had her tonsils and adenoids removed—at a time when she had sutures on her throat and was supposed to be on a special diet—Kamille M. allowed Kayla M. to have potato chips, which could have posed a choking hazard. When Anderson asked Kamille M. to take the chips away, Kamille M. responded that Kayla "is a kid and going to have what she wants."

¶13 As for the fourth goal, being able to meet Kayla M.'s day-to-day needs, Kamille M. believed she met that condition, but the State's other witnesses did not. Anderson testified that Kamille M. was not up-to-date on Justin's medications, which showed that she was not able to meet Kayla M.'s needs. In addition, Anderson testified that because of Kamille M.'s behavior, her visits with Kayla M. had been reduced from overnights to one supervised visit per week.

¶14 Regarding the fifth and final goal, showing a willingness and ability to provide a safe level of care for Kayla, Anderson testified that Kamille M. had the potential to do so, but had not actually done so up to this point.

¶15 After all of the testimony was heard, the jury found Kamille M. unfit. A dispositional hearing followed, at which the trial court concluded that termination of Kamille M.'s parental rights was in Kayla M.'s best interest. Kamille M. filed a post-disposition motion, alleging that her attorney was ineffective. Consequently, the trial court held a *Machner* hearing, but ultimately denied Kamille M.'s motion. Kamille M. now appeals. Additional facts will be developed below.

DISCUSSION

¶16 Kamille M.'s appeal centers on the grounds phase of her trial. "Wisconsin has a two-part statutory procedure for the involuntary termination of parental rights." *Steven V. v. Kelley H.*, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. During the first, or "grounds" phase of the proceeding, "the burden is on the government," see *Sheboygan County DHHS v. Julie A.B.*, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402, to "prove by clear and convincing evidence that one or more of the statutorily enumerated grounds for termination of parental rights exist," *Steven V.*, 271 Wis. 2d 1, ¶24; see also WIS. STAT. § 48.31(1). "During this step, the parent's rights are paramount." *Julie A.B.*, 255 Wis. 2d 170, ¶24 (citation omitted). "If grounds for the termination of parental rights are found by the ... jury, the court shall find the parent unfit." WIS. STAT. § 48.424(4). Once the jury has declared a parent unfit, "the proceeding moves to the second, or dispositional phase, at which the child's best interests are paramount." *Steven V.*, 271 Wis. 2d 1, ¶26.

¶17 Specifically, Kamille M. argues that her trial counsel was ineffective at the grounds phase for failing to object to hearsay and failing to object to “the State’s veiled reference to Kayla M.’s ‘best interests’” during closing arguments.

¶18 Parents are entitled to effective assistance of counsel in termination of parental rights proceedings. *Oneida Cnty. DSS v. Nicole W.*, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652. “In examining whether assistance of counsel in an involuntary termination of rights proceeding was effective,” this court applies the test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Nicole W.*, 299 Wis. 2d 637, ¶33. Under *Strickland*, Kamille M. must show that trial counsel’s performance was deficient, and that this deficient performance was prejudicial. *See State v. Mayo*, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115; *see also Strickland*, 466 U.S. at 687. To establish deficient performance, Kamille M. must show facts from which a court could conclude that trial counsel’s representation was below objective standards of reasonableness. *See State v. Wesley*, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. To demonstrate prejudice, she “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.” *See Strickland*, 466 U.S. at 694. If Kamille M. fails to make a sufficient showing on one Strickland prong, this court need not address the other. *See id.* at 697. The issues of performance and prejudice present mixed questions of fact and law. *See State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Findings of historical fact will not be upset unless they are clearly erroneous, *see id.*, but the questions of whether counsel’s performance was deficient or prejudicial are legal issues we review independently, *see id.* at 236-37.

(1) *Trial counsel was not ineffective for failing to object to alleged hearsay.*

¶19 This court turns first to Kamille M.’s arguments regarding hearsay. Kamille M. argues that her trial counsel failed to object at numerous moments in her adverse examination when the prosecutor allegedly injected inadmissible hearsay via its questions. In support of her contention, she cites *State v. Dean*, 67 Wis. 2d 513, 534-36, 227 N.W.2d 712 (1975), a case in which the prosecutor implied that certain facts were true without proving them. In *Dean*, the prosecutor implied that the defendant knew whether he would be eligible for parole if found guilty by asking, ““You had a book at home entitled, ‘Criminal Investigation’ didn’t you?”” See *id.* at 535. After the defendant answered, “Not that I know of,” the prosecutor again implied the book’s existence by asking whether it was in his bedroom. *Id.* The state never, however, “put in any proof that such a book was ever found.” *Id.* Kamille M. argues that, as in *Dean*, the State’s attorney in her case implied that certain facts were true by referencing various reports made by Bureau personnel and other witnesses while questioning Kamille M., but then failed to offer any of the reports into evidence or to question the alleged authors of those reports. Kamille argues that trial counsel should have objected to the questions which implied facts that were later not proved and that the failure to object was prejudicial.

¶20 With regard to the first portion of the first line of questioning at issue in Kamille M.’s brief, there was no impropriety because the State’s attorney merely read a description of Kamille’s home and asked whether that description was accurate:

Q: How did your house look at the time that the police and the Bureau came on that day [in September 2011]?

A: It was very messy.

Q: Okay. I am going to read to you a description.
You tell me if this is how you remember it looking.

A: Okay.

This style of questioning is not analogous to what was deemed improper in *Dean*.
See id., 67 Wis. 2d at 534-36.

¶21 Regarding the remainder of the first line of questioning at issue in Kamille M.'s brief, Kamille M. cannot show prejudice because she agreed with the description offered in the question:

Q: Ryan was your family support worker who came out to see your home in an effort to decide whether you would be able to have visits in your home, correct?

A: Uh-huh.

....

Q: I am going to read a number of different things how Ryan described the home, and you tell me if this was what it was like in January of 2012.... Is that an accurate picture of what was going on in January of 2012 when Ryan came out to your house?

A: Yes.

¶22 The remainder of Kamille M.'s examples follow the same pattern. At each moment that Kamille M. claims trial counsel should have objected to a question that purported to inject hearsay, Kamille M. either agreed wholly with the description or testified at length about how her version of events differed:

- Regarding questions about Justin's alleging that he had been left alone twice in 2009, Kamille admitted to leaving Justin and Kayla home alone but claimed it only happened one time.

- Regarding parent educator Phyllis Pitman’s reports that Kamille M. refused to participate in safety services, Kamille M. testified that she had spoken with Pitman and still had her business card.
- Regarding an “un-attributed ‘note’ that Kamille M. was discharged from in-patient treatment ‘due to emotional instability and mood lability,’” Kamille M. initially denied that she was dropped from the program but later admitted that she was in fact dropped after having an anxiety attack and getting into a “big argument.”
- Regarding Hazel Jackson’s notes describing the condition of a broken window, Kamille M. agreed with the description.
- Regarding an email from Kayla M.’s foster mother indicating that Kamille M. missed Kayla M.’s birthday party, Kamille M. gave her account of events from that day, but, when confronted with the report of the foster mother, changed the details of her story to conform to the foster mother’s.⁴
- Regarding a visitation worker’s assertion that Kamille M. missed a visit with her daughter, Kamille M. did not dispute that she had missed a visit, but rather explained that she had not been home that day and could not remember why.

¶23 Moreover, as described more fully in the background section above, even without the aforementioned testimony, there was plenty of evidence adduced

⁴ Kamille M. also points to the use of Gleysteen’s notes as “highly improper,” but then later backtracks and states that “this error was corrected because Ms. Gleysteen subsequently testified.” Thus, this court discerns no prejudice.

at trial showing the Kamille M. was unfit. As noted, Kamille M. herself admitted that she had not met the conditions of return, and the State’s witnesses testified at length regarding the ways Kamille M. could not consistently care for herself, her children, or her home. As such Kamille M. cannot show prejudice, and this court need not address trial counsel’s alleged deficiencies further. See *Strickland*, 466 U.S. at 694, 697.

(2) *Trial counsel was not ineffective for failing to object to “the State’s veiled reference to Kayla M.’s ‘best interests’” during closing arguments.*

¶24 Turning next to Kamille’s argument that trial counsel was ineffective for failing to object to “the State’s veiled reference to Kayla M.’s ‘best interests’” during closing arguments, this court again concludes that Kamille M. cannot show prejudice. Kamille argues that the following argument from the State’s attorney constitutes reversible error because it asked the jury to consider Kayla M.’s best interests, contrary to *Door County DHFS v. Scott S.*, 230 Wis. 2d 460, 469, 602 N.W.2d 167 (Ct. App. 1999) (reversible error if the court instructs jury to consider child’s best interests at grounds phase):

Ya know who this really isn’t fair to? A little girl who is four and a half who spent 33 months out of her mother’s home who goes back and forth for visits, and sometimes her mom is there.

Some time on her birthday, she goes to McDonalds, waits for her mom and her mom doesn’t come. That is who it’s not fair to.

While Kamille M. claims that this portion of the argument “tainted the jury’s assessment” of her fitness because “it preyed upon the jurors’ emotions,” Kamille M. takes this argument out of context. The above comments were made in relation to Kamille M.’s testimony in which she complained that “it wasn’t fair” that the State did not offer more services to keep her on track. In addition, when

considered in the context of the entire trial, the above comment does not rise to the level of prejudice.

¶25 In sum, Kamille M.'s trial counsel was not ineffective. Therefore, she is not entitled to a new trial.

By the Court.—Orders affirmed.

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

