COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2824 **Cir. Ct. No. 2007TP118**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO ELISHA M.-C., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CHESTER C.,

RESPONDENT-APPELLANT,

ELLEN M.,

RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

¶1 FINE, J. Chester C. appeals the order terminating his parental rights to Elisha Lois M.-C., and from the trial court's order denying his motion for post-termination relief. He contends that his trial lawyer gave him ineffective representation by not objecting to various hearsay statements. The trial court assumed that the lawyer should have objected but determined that Chester C. was not prejudiced as a result. We affirm.

I.

¶2 Elisha was born on November 30, 2005, to Chester C., who was forty-seven at the time, and Ellen M. They were not married. The order terminating Chester C.'s parental rights to Elisha recites that the trial court determined after a bench trial that Chester C. had: (1) abandoned the child, *see* WIS. STAT. § 48.415(1)(a)2; (2) had not assumed a substantial parental responsibility for her, *see* WIS. STAT. § 48.415(6); and (3) did not meet the conditions for the return of a child adjudicated in need of protection and services, *see* WIS. STAT. § 48.415(2).[1]

> (1) A parent abandons his or her child if, as material to this case, he or she "has failed to visit or communicate with the child for a period of 3 months or longer," if "the child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by s. 48.356 (2) or 938.356 (2)." WIS. STAT. § 48.415(1)(a)2.[2] In deciding that this ground was proven, the trial

[1] Ellen M.'s parental rights to Elisha were also terminated. That matter is not at issue on this appeal.

[2] Chester C. does not argue that the court orders did not have the required notices or that Elisha was not placed outside his home during the relevant period.

court noted that Chester C. had admitted that he "had no contact with" Elisha from mid-August 2006 ("August 12th, or 13th") to "November 26th" 2006. The trial court further found that Chester C.'s reason for not having contact with Elisha during that time—namely, that the social agency did not, as phrased by the trial court in its oral decision finding that the State had proven abandonment, give Chester C. "a fair chance" to meet his parental responsibilities—was negated by evidence that the agency believed that Chester C. was "wanted by the Police Department for involvement in a very violent offense [and i]t would have been irresponsible for them to allow visitation under those circumstances." Although he blames the social-service agency, Chester C. does not show how the trial court's findings are clearly erroneous. *See* WIS. STAT. RULE 805.17(2); ***State v. Raymond C.***, 187 Wis. 2d 10, 16, 522 N.W.2d 243, 246 (Ct. App. 1994) (applying "clearly erroneous" standard in a termination-of-parental-rights case).

(2) A parent does not assume parental responsibility when he or she has "not had a substantial parental relationship with the child." WIS. STAT. § 48.415(6)(a).

> In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether,

> with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

WIS. STAT. § 48.415(6)(b). In deciding that this ground was proven, the trial court found that the State had established that Chester C. had not "ever actually exercised a significant responsibility for the daily supervision, education, protection, and care of" Elisha, except "for a very brief time in this child's life." Here again, Chester C. does not point out how the trial court's findings are clearly erroneous.

(3) There are grounds to terminate a person's parental rights to a child if that child has been found to be in need of protection and services and the parent has not satisfied the conditions established to permit the child to return safely to the parent's home. WIS. STAT. § 48.415(2).[3]

[3] WISCONSIN STAT. § 48.415(2) reads:

> Continuing need of protection or services, which shall be established by proving any of the following:
>
> (a) 1. That the child has been adjudged to be a child or an unborn child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).
>
> 2. a. In this subdivision, "reasonable effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case.
>
> b. That the agency responsible for the care of the child and the family or of the unborn child and expectant mother has

(continued)

> In deciding that this ground was proven, the trial court found that the State had established that the social-welfare agency had made sufficient efforts "to provide the services that were mandated to assist Mr. C[.]'s effectuating a safe return of Elisha to his home," but that he had had not met those conditions. As with the other two grounds, Chester C. does not point out how the trial court's findings are clearly erroneous.

¶3 Rather than trying to show that the trial court's ultimate findings under WIS. STAT. §§ 48.415(1)(a)2 & (6)(a) & (b) were clearly erroneous, Chester C. contends that his lawyer was ineffective because he did not object to the following hearsay assertions made during the trial. We set them out with some background.

> made a reasonable effort to provide the services ordered by the court.
>
> 3. That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 9-month period following the fact-finding hearing under s. 48.424.
>
> (am) 1. That on 3 or more occasions the child has been adjudicated to be in need of protection or services under s. 48.13 (3), (3m), (10) or (10m) and, in connection with each of those adjudications, has been placed outside his or her home pursuant to a court order under s. 48.345 containing the notice required by s. 48.356 (2).
>
> 2. That the conditions that led to the child's placement outside his or her home under each order specified in subd. 1. were caused by the parent.

(1) Chester C. was convicted on his no-contest plea of battering his uncle. *See* WIS. STAT. § 940.19(1). Hearsay was received as to what the uncle and an alleged witness to the uncle's injuries told a Wisconsin parole officer who was Chester C.'s agent following his release from prison in May of 2008. Neither the uncle nor the witness testified at the trial. The exhibits received during these termination-of-parental-rights proceedings reveal that in proffering Chester C.'s plea, the State and Chester C. stipulated to the criminal "complaint as a factual basis." The criminal complaint recited that Chester C. cursed his uncle, and struck him "with a closed fist on the left side of [the uncle's] face, as a result of which he suffered the following injuries: severe pain and swelling."

(2) A social worker with the Bureau of Milwaukee Child Welfare testified about an anonymous caller who said that Chester C. had slit Ellen M.'s throat during a fight, and also about what Ellen M. claimed was another assault by Chester C. Neither the caller nor Ellen M. testified at the trial. Chester C. was convicted on his guilty plea of substantial battery in connection with the slashing assault. *See* WIS. STAT. § 940.19(2). The criminal complaint, which the State and Chester C. agreed could be the factual "basis for a guilty plea" and which was received in evidence in these termination-of-parental-rights proceedings, recites that Ellen M. "personally observed [Chester C.,] while armed with a knife and a baseball bat, hit her with the bat in the shoulder, cut [her] on the hand and kick[ed] her in the face as a result of which she suffered the

following injuries[:] pain and bruising to her shoulder and face and a laceration requiring 15 stitches to close."

(3) The social worker testified that Elisha's grandmother told her that Chester C. was "allegedly under the influence" when he visited Elisha at the grandmother's house. The grandmother did not testify at the trial.

(4) The social worker testified that another social worker told her that she had trouble locating Chester C. and that he had not made scheduled visits and did not return some telephone calls.

(5) Another social worker testified that at a visit with Elisha, Chester C. wore headphones and did not seem as "engaged" with Elisha as he had previously. The State does not claim that the social worker witnessed this.

II.

¶4 A parent subject to a termination-of-parental rights petition is entitled to effective assistance of a lawyer, and we apply the standards set out in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Oneida County Dep't of Social Services v. Nicole W.***, 2007 WI 30, ¶33, 299 Wis. 2d 637, 659, 728 N.W.2d 652, 663. Under ***Strickland***, to establish ineffective assistance of counsel, a represented person must show: (1) deficient performance; and (2) prejudice. ***Strickland***, 466 U.S. at 687. To prove deficient performance, the represented person must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. To prove prejudice, the person must demonstrate that the lawyer's errors were so

serious that he or she was deprived of a fair trial and a reliable outcome. ***Id.***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, the represented person "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.***, 466 U.S. at 694. We need not address both aspects if the represented person does not make a sufficient showing on either one. ***Id.***, 466 U.S. at 697.

¶5 A trial court's findings of fact in connection with the ***Strickland*** analysis will be upheld "unless clearly erroneous." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). Whether the lawyer's performance was deficient, and if so, prejudicial, are questions of law, however, that we review *de novo.* ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848.

¶6 As noted, the trial court rejected Chester C.'s contention that his trial lawyer ineffectively represented him by not objecting to the hearsay evidence. Assuming that the lawyer should have objected and that not doing so was below the standard of professional competent representation, the trial court opined that Chester C. had not shown ***Strickland*** prejudice:

> Mr. C[.] has virtually continuously been involved in the criminal justice system since 1998. Exs. 6-12.[4] Several of those convictions demonstrated high levels of domestic violence, most notably the incident involving Elisha's mother resulting in her receiving 15 stitches to close the would he inflicted, an incident that occurred when Elisha

[4] The exhibits to which the trial court referred included certified copies of Chester C.'s convictions on his guilty pleas of substantial battery in connection with his attack on Ellen M., theft of movable property involving someone else, and attempted possession of cocaine, in addition to his no-contest pleas to battering a woman other than Ellen M. and his uncle.

> was one year old. Exh. 11.[5] Several of the incidents involved illegal substance use/possession and irrefutable evidence establishes use of cocaine as recently as August, 2008, more than one year after the termination petition in this case was filed. I have not calculated the cumulative amount of time the resultant periods of incarceration total, but it would be fair to say that they rendered Mr. C[.] substantially unavailable to meet the responsibilities of parenthood for virtually all of Elisha's life. Most recently, his arrest and conviction, and related revocation of his extended supervision, in regard to the assault of his uncle (coupled with the documented substance abuse) resulted in him being incarcerated in August, 2008, with a projected release this month [February 2010].
>
> Mr. C[.] bitterly complains that the presumed inadmissible evidence was used to prove that he "was a violent person" and if Elisha was returned to his care, "she would be in danger." The State did not need that evidence to prove those facts; they were overwhelmingly and irrefutably proven by stark and competent evidence; in essence, they were proved by Mr. C[.]'s own conduct. The overwhelming nature of that competent evidence establishing those pivotal facts renders any argument that the presumably inadmissible evidence "prejudiced" Mr. C[.] wholly without merit.

(Two footnotes added; one footnote omitted.)

¶7 Other than complaining that his trial lawyer did not object to the hearsay we have recounted, Chester C. does not show why, in ***Strickland***'s words, "there is a reasonable probability that" if his lawyer *had* objected "the result of the proceeding would have been different," which, ***Strickland*** opines, "is a probability sufficient to undermine confidence in the outcome." *See* ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388, 397 (Ct. App. 1999) ("A defendant who alleges that counsel was ineffective by failing to take certain steps *must show with specificity what the actions, if taken*, would have revealed and how they *would have altered*

[5] This references the substantial battery conviction noted earlier.

the outcome of the proceeding.") (emphasis added), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 744. Indeed, although his stipulations to the criminal complaints as factual bases for his no-contest pleas were not admissible, *see* WIS. STAT. RULE 904.10, his stipulation to the complaints charging crimes to which he pled guilty *were* admissible, *see* WIS. STAT. RULE 908.01(4)(b)(1) & (2) (out-of-court assertions by a party, or those out-of-court assertions to which he or she has adopted are not hearsay); WIS. STAT. RULE 909.02(4) (self-authentication of certified copies of public records). Thus, although Chester C. has recounted the proceedings at some length in his briefs, and contends that his extensive criminal and assaultive history bears little on whether he could give Elisha a safe and nurturing home, he has not explained how he was prejudiced by the admission of, in the context of this case, the fairly *de minimis* hearsay, especially since the hearsay in connection with his no-contest plea to battering his uncle could have been easily cured by the State after an objection by calling the uncle to testify (and Chester C. does not show why this could not have been done even though, as noted, he has the burden to prove that he was prejudiced by things he claims were his lawyer's failings). Further, insofar as Chester C.'s trial lawyer did not object to out-of-court assertions by social workers, Chester C. has also not satisfied his burden under ***Strickland***'s prejudice aspect to show why, in the face of the trial lawyer's objection, the State could not have merely called the social workers to testify about their personal observations. So, in essence, all we are left with is Elisha's grandmother's assertion that Chester C. was drunk when he visited Elisha one time. Here again, Chester C. has not shown why a contemporaneous objection to this out-of-court assertion could not have been cured by the State's subpoena of the grandmother.

¶8 As we have seen and as the State points out, "Chester C. makes no argument and provides [no] cite to legal authority that the circuit court's findings of fact"—either on the merits of whether his parental rights to Elisha should be terminated or whether his trial lawyer gave him ineffective representation—"are clearly erroneous." Accordingly, on our *de novo* review of the trial court's conclusion and giving deference to its findings, we agree that Chester C. has not shown ***Strickland*** prejudice. We affirm.

By the Court.—Orders affirmed.

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