COURT OF APPEALS
DECISION
DATED AND FILED

November 3, 2004

Cornelia G. Clark
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. 04-1305 & 04-1306

Cir. Ct. Nos. 03TP000034
03TP000072

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

NO. 04-1305

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

BROWN COUNTY,

PETITIONER-RESPONDENT,

V.

SHANNON R.,

RESPONDENT-APPELLANT.

NO. 04-1306

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

BROWN COUNTY,

PETITIONER-RESPONDENT,

V.

SHANNON R.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Shannon R. appeals orders terminating her parental rights to her children Darell and Daniel. Shannon argues: (1) the circuit court lost competency to proceed in Darell's case when it failed to hold the initial hearing within thirty days of the petition's filing, contrary to WIS. STAT. § 48.422(1); (2) her trial counsel was ineffective for failing to object to the jury instructions; (3) Brown County failed to properly notify Shannon of the conditions of Daniel's return, contrary to WIS. STAT. § 48.356; (4) the court erroneously admitted expert testimony by a tribal judge; (5) there was insufficient evidence to find serious emotional or physical damage to the children; and (6) the court erred when it refused to admit a psychologist's testimony.[2] We disagree and affirm the orders.

BACKGROUND

¶2 This consolidated appeal involves the termination of Shannon's parental rights to her sons, Darell and Daniel. The boys' father is a member of the

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] While most of the issues Shannon raises on appeal apply to both boys, she also raises separate issues requiring reversal in only one case. Shannon argues that if we reverse in one case, we should also reverse the other in the interest of justice. Since we affirm on those separate issues, we need not address Shannon's argument for reversal in the interest of justice.

Bad River Tribe, and both boys are eligible for enrollment. Accordingly, the boys are "Indian children" under the Indian Child Welfare Act,[3] and the additional protections of the Act apply. The Bad River Tribe declined jurisdiction in both cases, and the boys' father has not contested the termination of his parental rights.

¶3 Darell was born on June 24, 2001, and removed from Shannon's care on July 17, 2001. On September 2, 2003, Brown County filed a petition for the termination of Shannon's parental rights to Darell. The case was assigned to Judge Richard Dietz.

¶4 Daniel was born on May 26, 2002, and immediately removed from Shannon's care. On May 27, 2003, the County filed a petition for the termination of Shannon's parental rights to Daniel. That case was assigned to Judge Sue Bischel.

¶5 On September 4, 2003, the County petitioned to consolidate the cases for purposes of trial. Judge Bischel ordered the cases consolidated before Judge Dietz. Because Judge Dietz was unable to accommodate the jury trial on his calendar, he submitted the consolidated cases to the district court administrator for judicial reassignment.

¶6 Judge John McKay was assigned to the cases. On December 10, 2003, a jury trial commenced before Judge McKay. The jury found grounds existed to terminate Shannon's parental rights. Shannon's parental rights to both children were terminated in orders filed February 11, 2004.

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[3] *See* 25 U.S.C. § 1901-1963 (2003).

DISCUSSION

Initial Appearance

¶7 Shannon contends that the circuit court lost competency to proceed in Darell's case. The petition in Darell's case was filed on September 2, 2003. The initial appearance was held on October 23, 2003—past the thirty days required by WIS. STAT. § 48.422(1).[4] Shannon argues that WIS. STAT. § 48.315, which provides for delays, continuances and extensions of time under the Children's Code, does not apply, thereby depriving the court of competency.

¶8 "[F]ailure to comply with mandatory time limits under the Children's Code may result in the loss of the circuit court's competency to proceed." ***State v. April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927. Under the undisputed facts of this case, whether the circuit court complied with the time limits involves a question of statutory interpretation, which is a question of law that we review independently. ***Id.***, ¶6.

¶9 Shannon argues that WIS. STAT. § 48.315(2m) is inapplicable, concluding that all of § 48.315 is irrelevant to this case. However, Shannon does not respond to the County's argument that other portions of § 48.315 are relevant

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[4] WISCONSIN STAT. § 48.422(1) provides:

> The hearing on the petition to terminate parental rights shall be held within 30 days after the petition is filed. At the hearing on the petition to terminate parental rights the court shall determine whether any party wishes to contest the petition and inform the parties of their rights under sub. (4) and s. 48.423.

to this case and prevent the court from losing competence.[5] Specifically, § 48.315 provides, in part:

> **(1)** The following time periods shall be excluded in computing time requirements in this chapter:
>
> ….
>
> (c) Any period of delay caused by the disqualification of a judge.

Accordingly, § 48.315(1)(c) tolls the time limits for any reasonable period of delay necessitated by the reassignment of a case to a new judge. ***State v. Joshua M.W.***, 179 Wis. 2d 335, 343-44, 507 N.W.2d 141 (Ct. App. 1993).

¶10 Upon our review of the record, we agree with the County that Judge Dietz's referral of the case to the court administrator for reassignment amounted to "disqualification" under WIS. STAT. § 48.315(1)(c), which tolled the time limits and prevented the court from losing competency to proceed. At the September 29, 2003, hearing on the consolidated cases, Judge Dietz ruled:

> I'm just simply unable to meet the statutory imperative of getting this case tried in any sort of reasonable timely fashion. You know, I have four other involuntary TPR's scheduled and as I said, with motions for speedy trial; so I will refer … these matters to the District Court Administrator for assignment. That's all I can do.

The application for judicial assignment was dated September 30 and the judicial assignment order was filed October 1. The initial appearance was held on October 23. Shannon does not challenge either the necessity or reasonableness of the delay, and we conclude that the delay here was necessitated by the

[5] Unrefuted arguments are deemed admitted. *See* ***State v. Quinsanna D.***, 2002 WI App 318, ¶41, 259 Wis. 2d 429, 655 N.W.2d 752.

disqualification of Judge Dietz and reasonable in time. *See* ***Joshua M.***, 179 Wis. 2d at 343-44. Because § 48.315(1)(c) applies, the court retained competency.

Jury Instructions

¶11 Shannon argues that her trial counsel was ineffective for failing to object to the jury instructions. Shannon contends that, because the Indian Child Welfare Act applies, all questions regarding the efforts of government entities to provide services and the success of those services should have been decided under the Act's "beyond a reasonable doubt" standard, not the Wisconsin Children Code's "clear and convincing evidence" standard. Accordingly, she contends a portion of the trial was decided under the wrong burden of proof, in violation of the Act, and her trial counsel was ineffective for failing to object.

¶12 Our review of an ineffective assistance claim presents a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). We do not disturb the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** However, whether the attorney's conduct amounts to ineffective assistance is a question of law that we review independently. ***Id.***

¶13 To establish ineffective assistance of counsel, Shannon must show both that her trial counsel's performance was deficient and that the deficiency was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Prejudice requires more than just a showing of a conceivable effect on the outcome of the trial. ***Erickson***, 227 Wis. 2d at 773. Rather, Shannon must allege facts establishing that, but for the attorney's deficient performance, there was a reasonable probability of a different trial outcome. *See* ***id.*** If an appellant fails to establish one prong of the

analysis, we need not address the other. ***State v. Reed***, 2002 WI App 209, ¶14, 256 Wis. 2d 1019, 650 N.W.2d 885.

¶14 Without deciding whether counsel's performance was deficient, we conclude that Shannon has failed to demonstrate prejudice. Shannon's argument first identifies questions two through four of the special verdict, which address the findings necessary to terminate parental rights under Wisconsin law and were decided under the clear and convincing evidence standard. She then contends those questions were the "functional equivalent" of questions five and six, which addressed the findings necessary to terminate under the Act and were decided under the beyond a reasonable doubt standard. Accordingly, she argues, questions five and six should have superceded questions two through four because the Act supercedes Wisconsin law whenever it conflicts.

¶15 However, Shannon does not contest that verdict questions five and six stated the correct standard and were decided under the proper burden of proof as required by the Act. Even if the jury had not received questions two through four, the jury made the necessary findings in questions five and six under the correct burden to terminate Shannon's parental rights. Consequently, the submission of questions two through four had no affect on the outcome and did not prejudice Shannon.

¶16 Shannon also argues that requiring the jury to make findings regarding similar questions under different burdens of proof is confusing and "asking too much" of the jurors. However, it is well established that we presume the jury follows the instructions given by the circuit court. *See, e.g.*, ***Schwigel v. Kohlmann***, 2002 WI App 121, ¶13, 254 Wis. 2d 830, 647 N.W.2d 362 (Ct. App. 2002). The circuit court instructed the jury that questions two through four were

to be decided by the clear and convincing standard of proof and that questions five and six were to be decided beyond a reasonable doubt. It also instructed the jury on each of those burdens of proof. Accordingly, we presume that the jury made the findings required under the Act based upon the correct burden of proof.

Written Notice

¶17 Shannon contends that this court should reverse because the County did not prove that she received written notice of the potential for termination of her parental rights and conditions necessary for Daniel's return, required under WIS. STAT. § 48.356(2).[6] Shannon argues that the County's certified mailing to her last known address, sent in care of and signed for by her roommate Melissa Marcus, was inadequate notice and that the County should have ensured that she personally received the required notice.

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[6] WISCONSIN STAT. § 48.356 provides:

> (1) Whenever the court orders a child to be placed outside his or her home, orders an expectant mother of an unborn child to be placed outside of her home or denies a parent visitation because the child or unborn child has been adjudged to be in need of protection or services under s. 48.345, 48.347, 48.357, 48.363 or 48.365, the court shall orally inform the parent or parents who appear in court or the expectant mother who appears in court of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child or expectant mother to be returned to the home or for the parent to be granted visitation.
>
> (2) In addition to the notice required under sub. (1), any written order which places a child or an expectant mother outside the home or denies visitation under sub. (1) shall notify the parent or parents or expectant mother of the information specified under sub. (1).

¶18 Whether undisputed facts satisfy statutory notice requirements is a legal question of statutory interpretation. ***Waukesha County v. Steven H.***, 2000 WI 28, ¶16, 233 Wis. 2d 344, 607 N.W.2d 607. We review questions of law independently. ***April O.***, 233 Wis. 2d 663, ¶6.

¶19 WISCONSIN STAT. § 48.356(2) requires that "any written order" that places a child outside the child's home "shall notify the parent" of the potential grounds for termination of parental rights and the conditions that must be met for the child to be returned to the home. However, § 48.356(2) does not specify the manner in which that notice must be given. Other sections within WIS. STAT. ch. 48 specifically require personal service of various legal documents. *See* WIS. STAT. §§ 48.273(1) ("service shall be made personally by delivering to the persons a copy of the summons or notice") and 48.273(4)(b) ("Personal service is required …."). We conclude that the legislature's omission of such language is decisive that personal service of the written warnings under § 48.356(2) is not required.

¶20 Even where the legislature has mandated personal service of documents in the Children's Code, certified mail to a person's last known address can be an acceptable form of substitute service. For instance, § 48.273(1) requires personal service of other notices, including notices of hearings, but also grants the court discretion to order service by certified mail to the last known address. We conclude that the manner of notification used by the County—certified mail to Shannon's last known address, signed for by a member of that household—was reasonably calculated to ensure notice to Shannon and, thus, is legally sufficient.

¶21 Alternatively, Shannon argues that because the County did not introduce evidence that she personally received the notice and because she denies receiving the written notice, her counsel was ineffective for not requesting a jury

instruction on written notice or arguing the issue to the jury. Because we have concluded the notice was legally adequate, counsel was not deficient for failing to argue otherwise and, therefore, Shannon's claim of ineffective assistance fails. *See* ***Reed***, 256 Wis. 2d 1019, ¶14.

Testimony by Tribal Judge

¶22 Shannon contends that trial counsel was ineffective for failing to object to the expert testimony of Judge Alton Smart, a tribal judge for the Bad River Tribe. She contends that Smart should not have been allowed to testify because he was biased. Shannon also claims that, because Smart was not qualified to render an opinion, counsel should have objected when Smart testified regarding the likelihood that Shannon would be able to meet the conditions for the return of her children within one year.

¶23 Shannon argues that Smart was biased because his tribe was a potential party to the case and he testified consistently with the tribe's position.[7] She contends that SUPREME COURT RULE 60.03(c), which states in part that "[a] judge may not lend the prestige of judicial office to advance the private interests of the judge or of others," renders Smart's testimony improper. However, she also concedes that because Smart is a tribal, rather than state, judge, he is not bound by the rule.

¶24 Without citation to authority, Shannon contends that Smart's biased testimony should have been barred. However, bias goes to credibility, not

[7] Because the children are eligible for enrollment, the Bad River Tribe has the right to intervene at any point in this proceeding. *See* 25 U.S.C. § 1911(c) (2003). The tribe declined jurisdiction in this case and has supported the termination of parental rights.

admissibility, of testimony. *See* WIS JI—CIVIL 215 (1991). The assessment of credibility of witnesses is left to the finder of fact. ***Id.*** Since Smart's testimony could not have been barred due to bias, counsel was not deficient for failing to object.

¶25 Shannon also argues that trial counsel should have objected to Smart's testimony about the statutory requirement that Shannon was unlikely to meet the conditions for the return of her children within one year. She claims that the circuit court implicitly found ineffective assistance when it stated that the failure to object was "almost harmless." However, the circuit court explicitly found no ineffective assistance. Nonetheless, even if the circuit court had found ineffective assistance, we are not bound by the circuit court's conclusion, as our review is independent. *See* ***Erickson***, 227 Wis. 2d at 768.

¶26 We conclude that Shannon has not established that her counsel's failure to object rises to the level of prejudice necessary for a finding of ineffective assistance. Shannon must show that, but for counsel's errors, there was a reasonable probability of a different trial outcome. *See* ***Erickson***, 227 Wis. 2d at 773. Although trial counsel did not object to Smart's opinion on this statutory requirement, she vigorously cross-examined Smart on the basis for his opinion, eliciting testimony that Smart had never met Shannon or the children and had only conducted a paper review of the case. Additionally, the two social workers involved in the case testified that it was unlikely that the conditions would be met. Even if Smart had not been allowed to testify, it is unlikely that the jury would have reached a different conclusion.

Sufficiency of Evidence

¶27 Shannon challenges the sufficiency of the evidence to support the jury's verdict that her continued custody is likely to result in serious emotional or physical damage to her children. She contends that Smart's opinion, based solely on a paper review of the records, is insufficient to support the verdict.

¶28 When reviewing the sufficiency of the evidence, we use a highly deferential standard of review. ***State v. Quinsanna D.***, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 655 N.W.2d 752. We sustain the jury's verdict if there is any credible evidence to support it. ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. We search the record for evidence that supports the verdict, accepting any reasonable inferences the jury could reach. ***Quinsanna D.***, 259 Wis. 2d 429, ¶30.

¶29 The Act prohibits the termination of parental rights unless there is:

> a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(f) (2003). The Act requires expert testimony. However, by its plain language, it does not limit the evidence to be considered on the issue of harm to *only* expert testimony.

¶30 Aside from Smart's testimony, the jury heard evidence that Shannon had lived in fourteen different homes in the approximate two-year period leading up to trial, including a period of incarceration. Her longest period of consecutive employment was approximately five months. At the time of trial, Shannon was unemployed and living rent-free at her grandmother's house.

¶31 The jury also heard opinion testimony from Melissa Blom, one of the social workers who assisted Shannon for over two years, that returning the children was likely to damage them. Blom testified about Shannon's inability to maintain a stable lifestyle in housing or employment. Kay Reynolds, another social worker assigned to Shannon's case, testified that, based on Shannon's past sporadic efforts, Shannon's recent efforts toward reunification did not change her opinion that Shannon was unlikely to change her lifestyle in the future.

¶32 Shannon cites ***C.J. v. State of Alaska DH&SS***, 18 P.3d 1214 (Alaska 2001), to support her argument that Smart's testimony is insufficient to support the damage element under the Act.[8] In ***C.J.***, the court found the State's expert's conclusions on harm were "considerably weakened" since, like Smart, the expert only conducted a paper review. *See* ***id.*** at 1218. However, even if we accepted the reasoning of the Alaska court, Shannon's argument ignores the other evidence the jury heard from which it could reasonably infer a likelihood of damage to the children. There was ample evidence from which the jury could infer that returning the children to Shannon's care would likely result in continued instability and, in turn, damage to the children.

Psychologist's Testimony

¶33 Shannon argues the circuit court erred when it barred her expert psychologist, Dr. Gerald Wellens, from giving his opinion regarding the likelihood

[8] Shannon also cites ***In re Phoebe S. & Rebekah S.***, 664 N.W.2d 470 (Nebr. 2003), in support of her argument that the County has failed to show that returning the children to Shannon at some point in the future would cause harm. However, in ***Phoebe S.***, there was no evidence of abandonment or imprisonment. ***Id.*** at 485. That case involved a mother who had improved her housing and employment situations, ***id.***, and, accordingly, is factually distinguishable from Shannon's case.

that Shannon would be able to meet the conditions for return of her children in the next twelve months. Wellens was allowed to testify as to Shannon's capacity to meet the conditions, specifically that Shannon had no psychological impediments that would prevent her from meeting those conditions. However, the circuit court ruled there was no foundation for Wellens to testify as to whether Shannon was, in fact, likely to meet those conditions. The court found:

> There is no foundation that [Wellens] has any understanding or expertise in whether she can actually do it. The social workers, on the other hand, have worked with her in the field on those very subjects, and that's why they're entitled to make that opinion.
>
> ….
>
> Quite honestly, there is a substantial difference, I believe, between asking whether or not she can complete the condition as opposed to asking whether or not he sees any bar based on his expertise to her completing the condition.

¶34 The admission of evidence is within the discretion of the circuit court. ***State v. Brewer***, 195 Wis. 2d 295, 305, 536 N.W.2d 406 (Ct. App. 1995). Accordingly, we will not reverse the circuit court's decision to bar Wellens' testimony "if there is a reasonable basis for the decision and it was made in accordance with accepted legal standards and in accordance with the facts of record." ***Id.*** (citation omitted).

¶35 Shannon first claims that the circuit court applied the wrong legal standard in denying admission of Wellens' opinion. However, Shannon does not

explain this argument, and we need not consider undeveloped arguments.[9] *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶36 Shannon also contends that Smart's testimony on the likelihood of meeting conditions "opened the door" to Wellens' testimony on this issue. She claims the doctrine of curative admissibility compelled the admission of Wellens' testimony. Curative admissibility applies when one party accidentally or purposefully takes advantage of evidence that would normally be inadmissible. ***State v. Dunlap***, 2002 WI 19, ¶14, 250 Wis. 2d 466, 640 N.W.2d 112. When this occurs, a "court may allow the opposing party to introduce otherwise inadmissible evidence if it is required by the concept of fundamental fairness to prevent unfair prejudice." ***Id.***

¶37 The admission of Smart's testimony on this element does not compel the circuit court to allow Wellens' testimony when, as here, there is no unfair prejudice. For purposes of the ineffective assistance of counsel analysis above, we have already concluded Shannon was not prejudiced by her counsel's failure to object to Smart's testimony, because Smart was effectively cross-examined and because the social workers gave equivalent testimony on this element. Moreover, the court's ruling did not completely bar Wellens' testimony on compliance; he was only precluded from opining on the likelihood of Shannon's compliance, not her ability to comply. "Fundamental fairness" does not require that Wellens be

[9] Shannon also argues that the circuit court's ruling, in violation of the Act, places all of the predictive opinion testimony in the hands of the social workers, relying on ***Oregon Juvenile Dept. v. Jamesyn Charles***, 688 P.2d 1354 (Ore. 1984). However, Shannon is challenging Wellens' ability to testify about a statutory element, not a requirement under the Act and, therefore, her reliance on the Oregon case is misplaced.

allowed to testify to the ultimate issue merely because Smart's unobjected-to testimony encompassed the issue.

By the Court.—Orders affirmed.

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