COURT OF APPEALS
DECISION
DATED AND FILED

September 24, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP936 **Cir. Ct. No. 2011TP212**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ROBERTA W.,

RESPONDENT-APPELLANT,

PHILLIP S.,

RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County: PEDRO COLON, Judge. *Affirmed*.

¶1 KESSLER, J.[1] Roberta W. appeals from the order terminating her parental rights to her son, Philtarion W. She also appeals from an order denying postdisposition relief. We affirm.

BACKGROUND

¶2 Philtarion W. was born on June 22, 2006. On June 27, 2011, the State filed a petition for the termination of Roberta W.'s parental rights to Philtarion W., alleging that Roberta W. had failed to assume parental responsibility and that Philtarion W. was a child in need of protection or services (continuing CHIPS).

¶3 According to the facts in the record, Philtarion W. was born in Racine County. He was removed from Roberta W. immediately after his birth and was found to be a child in need of protection or services based upon safety concerns that Roberta W. had not addressed regarding her two older children. The two older children were the subject of an open case in Walworth County. Philtarion W. was returned to Roberta W.'s care in July 2008, where he remained for seventeen months until he was re-detained in January 2010 by the Bureau of Milwaukee Child Welfare due to concerns about Roberta W.'s housing and mental health.[2]

¶4 Prior to trial, the State filed a motion seeking to admit evidence of Roberta W.'s prior and concurrent history with Walworth County Child Protective Services. The State argued that the "'historical information'" was relevant to

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

[2] By this time Roberta W. had relocated to Milwaukee County.

whether Roberta W. would probably be able to meet the court-ordered conditions of Philtarion W.'s return to her care. At the final pretrial hearing, the State argued that because its termination petition alleged continuing CHIPS, it was required to prove that Roberta W. would most likely not meet the conditions of Philtarion W.'s return. As such, the State argued, evidence that Roberta W. previously did not meet the conditions of return for her older children, despite the services provided by the Bureau and other counties, was relevant to the question of whether she could probably meet the necessary conditions for Philtarion W.'s return. Roberta W.'s counsel agreed that the evidence was relevant, but objected to the jury hearing evidence that Roberta W.'s parental rights had actually been terminated in those cases. The circuit court ruled that "the fact that the TPR has been found in another court as to another child will not come in. [The State] can bring in only the conditions which have not been met."

¶5 At trial, the State presented evidence from multiple witnesses about Roberta W.'s history with multiple county services dating back to 2003. Much of the evidence was introduced without objection from Roberta W.'s counsel. The jury found that Roberta W. failed to assume parental responsibility and that Philtarion W. was a child in need of protection or services. At the subsequent dispositional hearing, the circuit court found that it was in Philtarion W.'s best interest to terminate Roberta W.'s parental rights.

¶6 Roberta W., through new counsel, filed a motion for postdisposition relief, alleging that her trial counsel was ineffective for failing to object to the State's opening statements referencing Roberta W.'s history of failing to meet court-ordered conditions, along with the State's numerous other questions and references discussing her older children. Roberta W. argued that the evidence was irrelevant and prejudicial because her older children were not the subject of the

TPR concerning Philtarion, and evidence about their history with other counties and their removal from Roberta W.'s home predated Philtarion W.'s birth.

¶7 Roberta W.'s trial counsel testified at a postdisposition hearing. Trial counsel testified that he did not object to the prior CHIPS evidence because he thought the evidence was relevant and admissible pursuant to this court's decision in ***La Crosse County Dept. of Human Servs. v. Tara P.***, 2002 WI App 84, 252 Wis. 2d 179, 643 N.W.2d 194. Trial counsel also testified that a large part of his defense was to focus on Roberta W.'s efforts to meet the conditions of return for her youngest child, T.W. Because trial counsel thought he "was doing the same thing" as the State, he testified, he did not find it appropriate to "argue information about the older kids was irrelevant when [he was] arguing the information for the younger kid was relevant for the same reason."

¶8 The circuit court denied Roberta W.'s postdisposition motion. This appeal follows. Additional facts are included as relevant to the discussion.

DISCUSSION

¶9 This court reviews "the denial of an ineffective assistance claim as a mixed question of fact and law." *See* ***State v. Kimbrough***, 2001 WI App 138, ¶27, 246 Wis. 2d 648, 630 N.W.2d 752. We will affirm the circuit court's factual findings unless they are clearly erroneous. ***Id.*** However, we review whether trial counsel's performance was deficient and prejudicial independently, as a question of law. *See* ***id.***

¶10 To establish a claim for ineffective assistance of counsel, Roberta W. 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. To establish deficient performance, Roberta W. must show facts from which a court could conclude that trial counsel's representation was below the 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 v. Washington***, 466 U.S. 668, 694. If Roberta W. fails to make a sufficient showing on one ***Strickland*** prong, we need not address the other. *See* ***id.*** at 697.

¶11 Roberta W. contends that her trial counsel was ineffective for failing to object pretrial and during trial to information about (1) her older children's history with Child Protective Services and their removal from her home, predating Philtarion W.'s birth; and (2) her other children not being returned because Roberta W. failed to the meet the necessary conditions. The specific information Roberta W. objects to is as follows:

> Child Protective Services became involved in 2003 because of allegations that Roberta W.'s daughter was being neglected and that there was domestic violence in the home;
>
> Child Protective Services again became involved following a 9-1-1 call made in 2004 after Roberta W. and the father of the older children got into a fight;
>
> Walworth County instituted a CHIPS proceeding against Roberta W. in 2005;

> At one point Roberta W. called the Walworth County Department of Health and Human Services and requested that the children be temporarily removed "before she did something that she regretted."
>
> The children had not been returned to Roberta W. as of the date of the jury trial; and
>
> Roberta W. had not met the conditions of the older children's return.

Roberta W. contends that all of this information was irrelevant and prejudicial to her case. As such, she contends, trial counsel should have objected. Because evidence of Roberta W.'s history with multiple social services was properly admitted, we disagree that trial counsel was ineffective for failing to object to its admission.

¶12 To establish that Philtarion W. was a child in continued need of protection or services, the State was required to prove the following four elements: (1) the child has been adjudged to be a 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 WIS. STAT. § 48.345; (2) the agency responsible for the care of the child and the family has made a reasonable effort to provide the services ordered by the court; (3) the child has been outside the home for a cumulative total period of six months or longer pursuant to such orders and the parent has failed to meet the conditions established for the safe return of the child to the home; and (4) there is a substantial likelihood that the parent will not meet the conditions within the nine-month period following the fact-finding hearing. *See* WIS. STAT. § 48.415(2)(a).

¶13 The State argued that there was a substantial likelihood that Roberta W. would not meet the conditions of Philtarion W.'s return within the nine-month period following the jury trial based, in part, on Roberta W.'s failure to meet the conditions necessary for reunification with her two older children. We agree with the circuit court that "the facts occurring prior to a CHIPS dispositional order are frequently relevant to the issues at a termination proceeding." ***Tara P.***, 252 Wis. 2d 179, ¶10.

¶14 "[A] history of parental conduct may be relevant to predicting a parent's chances of complying with conditions in the future, despite failing to do so to date." ***Id.***, ¶13. In determining whether "there is a substantial likelihood" that a parent will not meet the requisite conditions for the return of his or her children, "a fact finder must necessarily consider the parent's relevant character traits and patterns of behavior, and the likelihood that any problematic traits or propensities have been or can be modified in order to assure the safety of the children." ***Id.***, ¶18. Here, prior to Philtarion W.'s birth, Roberta W. had a history of working with multiple counties to address her mental health issues, in-home safety issues, and parenting decisions. However, Roberta W. was unable to meet the conditions of her older children's return. Multiple case workers working with Roberta W. after Philtarion W.'s birth also testified as to their ongoing concerns about Roberta W.'s mental health. Evidence concerning Roberta W.'s inability to meet the conditions of reunification with her older children, therefore, is evidence from which it could reasonably be inferred that Roberta W. is unlikely to meet these conditions as they pertain to reunification with Philtarion. As such, trial counsel did not render deficient performance.

¶15 Moreover, trial counsel testified that his decision not to object to the evidence Roberta W. complains of was strategic. Trial counsel introduced

evidence that Roberta W. was actively trying to meet the conditions of the return of her youngest child, T.W. Trial counsel testified that it would be "borderline ridiculous" for him to argue that evidence pertaining to the older children was inadmissible when he was attempting to introduce evidence pertaining to the younger child to prove the same fact—whether there was a substantial likelihood that Roberta W. would meet the necessary conditions for Philtarion W.'s return. "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996). Merely because counsel's strategy was not entirely successful does not mean that counsel's performance was legally insufficient. ***State v. Teynor***, 141 Wis. 2d 187, 212, 414 N.W.2d 76 (Ct. App. 1987). We will not second-guess trial counsel's decision, but rather will judge counsel's conduct based on the facts of the case. *See* ***State v. Nielsen***, 2001 WI App 192, ¶¶12, 44, 247 Wis. 2d 466, 634 N.W.2d 325. If trial counsel had objected to the State's evidence, and the objection was sustained, then trial counsel may not have been able to introduce evidence pertaining to T.W. As trial counsel stated, he discussed T.W. for the same reason the State discussed the other two children—to determine whether Roberta W. could meet the conditions of Philtarion W.'s return. Under that hypothetical, trial counsel could have been deprived of a large part of his defense. Trial counsel made a reasonable, strategic decision not to object to the evidence Roberta W. complains of, and therefore did not render ineffective assistance.

¶16 For the foregoing reasons, we affirm the circuit court.

By the Court.—Orders affirmed.

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