

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 22, 2014

Diane M. Fremgen
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. 2013AP421
2013AP422**

Cir. Ct. No. 2011TP9

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

No. 2013AP421

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

MANITOWOC COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

v.

REBECCA H.,

RESPONDENT-APPELLANT.

No. 2013AP422

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

MANITOWOC COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

CRAIG W.,

RESPONDENT-APPELLANT.

APPEALS from an order of the circuit court for Manitowoc County:
GARY L. BENDIX, Judge. *Affirmed.*

¶1 REILLY, J.¹ Rebecca H. and Craig W. appeal from an order terminating their parental rights to their daughter, Erica W. They contend that they are entitled to a new trial as trial counsel made numerous errors at their fact-finding trial, and therefore, they received ineffective assistance of counsel. Additionally, they argue that conflicts of interest by Erica's guardian ad litem (GAL) should not have been waived. We affirm.

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

BACKGROUND

¶2 Erica was born with cerebral palsy and, at the time of the proceeding in circuit court, was nonverbal, needed a walker for mobility, and wore leg braces for support. Erica was determined to be a child in need of protection or services (CHIPS) in November 2007 by a court order that placed her with her parents, Rebecca and Craig. Erica was removed from her parents' home by court order in December 2008 after she suffered what was believed to be a cigarette burn to her thumb. Conditions placed on Erica's safe return to her parents' home included that Rebecca and Craig demonstrate parenting ability during visitation and show that they understand and can meet Erica's needs. As of July 2011, Erica had not been returned to Rebecca and Craig's home. The County petitioned for termination of Rebecca's and Craig's parental rights on the ground that Erica continued to be in need of protection or services, WIS. STAT. § 48.415(2)(a).

¶3 A four-day fact-finding trial was held before a jury, which found grounds existed to terminate the parental rights of both Rebecca and Craig. The circuit court subsequently terminated their parental rights. Rebecca and Craig appeal.²

DISCUSSION

¶4 Rebecca and Craig allege their counsel made a number of errors—at the fact-finding trial and in their waiver of the GAL's conflicts of interest prior to trial—and that they are entitled to a new proceeding due to ineffective assistance

² We granted Rebecca's and Craig's motions to consolidate their appeals. WIS. STAT. RULE 809.10(3).

of counsel. To prevail, Rebecca and Craig must show both that counsel's performance was deficient and that this deficient performance was prejudicial so as to deprive them of a fair trial. *A.S. v. State*, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992). We will not disturb a circuit court's findings of fact unless clearly erroneous. *State v. Balliette*, 2011 WI 79, ¶19, 336 Wis. 2d 358, 805 N.W.2d 334. We make the ultimate conclusion of whether there was ineffective assistance of counsel without deference to the circuit court. *State ex rel. Flores v. State*, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994).

Cigarette Burn

¶5 Rebecca and Craig first allege that counsel should have moved to exclude mention of the cigarette burn that caused Erica to be removed from their home in 2008. They argue that the burn evidence was irrelevant and prejudicial. At a postdisposition hearing, both Rebecca's and Craig's trial counsel testified that they believed that the burn evidence was helpful as the burn was a relatively minor issue compared to what the jury might otherwise imagine, it allowed them to introduce evidence that Erica had also been burned while in foster care, and Erica was not burned again while in their care. The circuit court found that these were reasonable strategic and tactical decisions by counsel. We see no deficient performance in counsel's decisions.

¶6 In a related argument, Rebecca and Craig contend trial counsel was ineffective for not objecting when a social worker testified on the first day of trial that a picture of Erica's burn "looks like an exact circle of a cigarette that had been held onto the spot for a period of time cause it was pretty deep." They argue that this testimony was improper expert testimony, contrary to the evidence, and prejudicial. We agree that this testimony was likely improper; however, we

conclude that this fleeting reference was not prejudicial, given its limited role in the scope of the trial. The County never argued anything other than the burn was due to parental neglect. Trial counsel for Rebecca and Craig also testified at the postdisposition hearing that an objection might have drawn more attention to this isolated testimony. This was a reasonable concern and did not constitute deficient performance.

Speech Pathologist

¶7 Rebecca and Craig contend trial counsel was ineffective for failing to object to the County's question to a speech pathologist who had provided in-home speech therapy to Erica: "From what you observed in the therapy sessions, given Erica's additional needs, are Rebecca and Craig capable of meeting them?" The speech pathologist answered, "In my professional opinion, no.... Erica requires a very specialized form of care that I really don't think that Becky and Craig necessarily understand what it takes to care for her." Rebecca and Craig argue this was impermissible expert witness testimony under WIS. STAT. §§ 907.01(3) and 907.02(1). They argue that as the record is absent any evidence establishing that the speech pathologist is qualified to give an expert opinion as to Rebecca's and Craig's ability to meet the conditions of return, trial counsel was ineffective for not objecting to this testimony.

¶8 We disagree. First, we note that the speech pathologist clarified on cross-examination that her opinion was limited to Erica's speech needs based on what she witnessed in therapy sessions, as she "would have no other knowledge of anything else." Second, WIS. STAT. § 907.02(1) allows expert opinion based on "scientific, technical, or other specialized knowledge." The language of § 907.02(1) mirrors that of FED. R. EVID. 702. In interpreting the federal rule, the

United States Supreme Court has acknowledged that expert witnesses may rely not only on scientific knowledge and data, but also on their personal knowledge and experiences. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999). The reliability of nonscientific testimony must be evaluated according to the circumstances of the case. *See Lees v. Carthage College*, 714 F.3d 516, 521 (7th Cir. 2013).

¶9 The speech pathologist testified that she has a master’s degree in speech language pathology, thirty-five years’ experience in the field, and had worked with Erica, Rebecca, and Craig for nearly three years. Trial counsel was not deficient for not challenging the qualification of the speech pathologist as an expert nor for failing to object at trial. The record establishes that the speech pathologist would have been qualified as an expert under WIS. STAT. § 907.02(1) to answer questions related to Erica’s speech needs and Rebecca’s and Craig’s ability to meet them.

Social Worker’s Testimony about Rebecca and Craig’s Expert

¶10 Rebecca and Craig next argue that trial counsel was ineffective for failing to object when a social worker, testifying in rebuttal to their expert witness, responded, “Yes,” when asked whether she was concerned that their expert’s opinion was made without observing them parent. They argue this was improper expert opinion by the social worker. We disagree. The County established in leading up to this testimony that the opinion provided by Rebecca and Craig’s expert was limited to whether they understood proper parenting techniques, whereas the conditions placed on Erica’s safe return required them to also apply these skills. The testimony of the social worker went to the relevancy of their

expert witness's testimony. This was proper rebuttal testimony, and counsel was not deficient for failing to object.

The County's Summary of WIS. STAT. § 48.417

¶11 Rebecca and Craig contend trial counsel should have objected when the County, in cross-examination of their expert witness, incorrectly summarized the statutory requirements for filing a petition to terminate parental rights. They likewise argue that trial counsel should have moved to exclude the mention of statutory timelines for filing a petition to terminate parental rights. The circuit court found that the summary was prompted by Rebecca and Craig's expert's "attempt to distort the case history" and that any inaccuracy in the County's statement did not rise to a level requiring an objection. We agree with the circuit court that counsel was not ineffective for failing to object to the question as Rebecca and Craig were not prejudiced by it. The County's characterization of the law was clarified in subsequent testimony by another witness.

Waivers of GAL's Conflicts of Interest

¶12 Lastly, Rebecca and Craig claim error when the circuit court accepted their waivers of the GAL's conflicts of interest. Before trial, Rebecca and Craig waived conflicts of interest of Erica's GAL posed by the GAL's prior representation of Rebecca at a CHIPS hearing and the GAL's employment by a law firm where other attorneys had supported the presiding judge's campaign and employed his wife on a contract basis. The waivers were accepted at a court hearing where the GAL reviewed the nature of the conflicts, Rebecca's and Craig's counsel outlined their discussions of the matter with their clients, and Rebecca and Craig affirmed their waivers.

¶13 Rebecca and Craig assert that trial counsel was ineffective for allowing them to waive the GAL's conflicts of interest. We reject this argument as Rebecca and Craig have not made a prima facie showing of prejudice. *See State v. Smith*, 198 Wis. 2d 584, 590, 543 N.W.2d 512 (Ct. App. 1995). First, without more, we can see no prejudice posed by the GAL's employment in a law firm with previous connections to the presiding judge, and Rebecca and Craig have not developed such an argument for us. Second, the GAL's representation of Rebecca at a CHIPS hearing does not automatically disqualify her when there is no indication that confidential information was disclosed during that brief time that could taint the proceedings. *Cf. id.* at 588-89. Rebecca and Craig have not argued that the GAL used any information that she received as Rebecca's counsel against Rebecca or Craig at trial. Instead, they argue that even with valid waivers, disqualification of the GAL was necessary and a new trial is required. We disagree with such a drastic remedy. The costs and delays associated with repeating both the fact-finding and dispositional stages of these proceedings are unwarranted "unless there is a danger that [their] rights have been compromised." *Id.* at 590. As neither has claimed there has been actual prejudice, or supplied any information from which we might find actual prejudice, there is no reason to invalidate the prior proceeding. *See id.*

¶14 Rebecca and Craig also state that their oral waivers at the court hearing were insufficient and, therefore, invalid. We disagree. A private conversation between attorney and client about the nature of the conflict and the client's wishes, a summarization of this private conversation for the court, and a court's independent verification with the client satisfies the requirements for a valid waiver. *State v. Cobbs*, 221 Wis. 2d 101, 106, 584 N.W.2d 709 (Ct. App. 1998). That is what happened here. Although a court may exercise discretion in

rejecting a waiver request, our case law does not require such a result. *State v. Demmerly*, 2006 WI App 181, ¶13, 296 Wis. 2d 153, 722 N.W.2d 585. Rebecca’s and Craig’s waivers were valid.

CONCLUSION

¶15 As Rebecca and Craig cannot show both that trial counsel was deficient and that they were prejudiced by this deficient performance, and as they validly waived any conflicts of interests by the GAL, we affirm the order of the circuit court terminating their parental rights to Erica.

By the Court.—Order affirmed.

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

