COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP140 **Cir. Ct. No. 2013TP4**

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

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

MANITOWOC COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

RALPH B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Manitowoc County: JEROME L. FOX, Judge. *Affirmed.*

¶1 GUNDRUM, J.[1] Ralph B. appeals from an order terminating his parental rights. He contends Manitowoc County did not meet its burden at the fact-finding hearing (hereinafter "trial") of showing that he failed to assume parental responsibility and that his counsel was ineffective in representing him at trial. We disagree on both contentions and affirm.

Background

¶2 In February 2013, Manitowoc County filed a petition to terminate Ralph's parental rights to Anna M. B. on the basis that he failed to assume parental responsibility. The following relevant facts were adduced at trial and during posttrial proceedings.

¶3 Anna's mother testified that she and Ralph moved in together when she was five to six months pregnant with Anna. When the mother was eight months pregnant, Ralph became upset with her, grabbed her neck, and said, "Bitch, I will kill you," and struck her. After Anna was born on September 26, 2010, Ralph would yell at the mother, and on one occasion, threatened to hurt her family and burn down her family's home if she moved there with Anna. Ralph would get upset when Anna was fussy and told the mother he did not want to be a parent and that she should give up Anna.

¶4 The mother testified that on October 16, 2010, she left home for about thirty minutes. When she returned, she noticed Ralph was "very upset," and he said he could not get then-three-week-old Anna to stop crying. Anna had

[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.

pinkish lines across the bottom of her eyelids, her eyes were swelling, and she could hardly open them. Ralph said he was walking with Anna and accidentally bumped her head on the wall. The mother told Ralph she wanted to take Anna to the hospital, but Ralph said it was "too late. That … there was nothing that they could do for her at that time of night." The next day the mother noticed the lines across Anna's eyelids looked purple, one of her ears "was completely black and blue," she had "a fingerprint on her chest," and "a mark on her upper lip." The mother took Anna to the hospital.

¶5 On cross-examination, the mother confirmed that (1) upon learning she was pregnant, Ralph moved to Manitowoc, got an apartment with the mother, and took a job to support her while pregnant and after Anna was born, and continued that support through his last paycheck; (2) she also hit Ralph during some disagreements and agreed that Ralph "walked away" sometimes when "things got physical"; and (3) up until only a few months prior to trial, she was exchanging letters with Ralph and that her letters to him included updates about Anna. The mother agreed on cross-examination that she instigated some of the animosity between Ralph and her family by telling him that her father was going to "kick his ass."

¶6 A city of Manitowoc police officer testified regarding the incident involving violence against the mother when she was eight months pregnant with Anna and that Ralph admitted to him that he had argued with the mother and threatened to kill her. A city detective testified regarding his investigation of Anna's injuries from the October 2010 incident. He stated that when he interviewed Ralph for the first time and showed him pictures of Anna's injuries, Ralph showed very little emotion and denied causing the injuries. During the second interview, Ralph continued to deny causing the injuries and "specifically

stated that it doesn't matter if it's his own child, or his nieces, or nephews. When they cry, when they fuss, when they have a poopy diaper, he passes them off to another adult." The detective confirmed that Ralph stated that he does not do crying babies. During the third interview, Ralph confessed that while the mother was gone from the home on October 16, Anna began crying, and when he could not console her, he became agitated and angry and struck her hard on the face with an open hand and then held her under the armpits and shook her four times.

¶7 A doctor who examined Anna three days "after she initially presented" observed bruises on Anna's eyelids, "bleeding in the whites of her eye on the left side," and bruising of her left ear. She also observed from a CT scan "evidence of bleeding in the area around the brain." The results of an MRI also "suggested … that there was some injury to the brain itself" and a possible skull fracture. The doctor concluded that the injuries were most likely the result of "nonaccidental trauma, or inflicted injury, or child's physical abuse."

¶8 In addition to the above witnesses, the County also called Anna's foster mother (the maternal grandmother), Anna's pediatrician, the director of a birth-to-three program Anna attended, and a human services department caseworker. Anna's foster mother testified that the first contact she received from Ralph was in May 2013, and that even in that single letter Ralph sent to her, he did not ask about Anna. The foster mother also discussed Anna's progress, noting that she had made all her milestones and seemed recovered from the October incident. The pediatrician testified he had been Anna's doctor since March 2011, had never met Ralph, and was only contacted by Ralph twice, receiving both letters in 2013. Because Ralph's requests were for information and records, the pediatrician forwarded the request to the medical records department and did not follow up on Ralph's request. The birth-to-three director testified that there was nothing in

program records showing that Ralph ever refused to cooperate in the program's care of Anna and further that Ralph had signed off on Anna's discharge from the program where she had been receiving occupational therapy.

¶9 The department caseworker testified that the department removed Anna from the mother and Ralph's home on October 17, 2010, placed her in temporary custody outside the home, and commenced a child in need of protective services (CHIPS) case. At a trial related to this CHIPS case, a jury found Ralph had abused Anna, which resulted in a dispositional order listing conditions Ralph needed to meet in order to resume contact with Anna. The caseworker also testified regarding Ralph's criminal conviction for the abuse of Anna, including that Ralph received a ten-year sentence—five years of imprisonment and five years of extended supervision. The caseworker also discussed the conditions of Ralph's sentence and what actions the department took to monitor Ralph's progress in meeting the conditions to resume contact with Anna. He also testified that during two scheduled telephone conferences regarding Anna's future, Ralph became agitated early on in the conferences and hung up.

¶10 On cross-examination by Ralph's counsel, the caseworker testified that he did not know whether anyone from the department had discussed the CHIPS dispositional order with Ralph to ensure his understanding of it. On examination by Anna's guardian ad litem, the caseworker testified that Ralph never told him or the previous caseworker that Ralph did not understand any of the documents he received.

¶11 Ralph also testified. He indicated that he did not inquire of others about Anna because of paperwork instructing him not to have contact with her even through "third parties." Regarding Ralph's limited show of emotion, to

which the detective had testified, Ralph stated that he learned from his mother's discipline of him when he was young to keep emotions to himself. He testified to his limited education and reading ability; his contact with Anna's foster mother once he learned he could permissibly make such contact; his attempt to get Anna's department file; and that he received letters from the mother that provided him information about Anna. Ralph indicated he was sorry for what he had done to Anna, testifying that he would wake up in the night screaming and had attempted suicide. He stated that Anna was his only daughter and he loved her and wanted a chance to be in her life.

¶12 At the conclusion of the trial, the jury found grounds existed to terminate Ralph's parental rights to Anna. The trial court found Ralph to be an unfit parent, and after a dispositional hearing, found termination of Ralph's and Anna's mother's parental rights[2] to be in the best interest of Anna and terminated their rights.

¶13 New counsel filed a postdisposition motion alleging trial counsel was ineffective for three reasons: failure to properly present certain evidence to the court to ensure its admission, failure to submit two instructions to the jury, and failure to object to evidence regarding the length of Ralph's criminal sentence. After a ***Machner***[3] hearing at which trial counsel, Ralph, and the County attorney testified, the trial court found that trial counsel was not deficient and that "[t]he facts in this case were overwhelming for the verdict that the jury eventually arrived at." Ralph appeals. Additional facts are set forth as necessary.

[2] Anna's mother voluntarily terminated her parental rights to Anna.

[3] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Discussion

¶14 Ralph raises two arguments on appeal. First, that the County failed to meet its burden of showing that Ralph had failed to assume parental responsibility. Second, that Ralph's trial counsel was ineffective in failing to object to or introduce certain evidence and failing to propose certain jury instructions. We disagree with Ralph on all points.

The County met its burden

¶15 Ralph contends the County failed to meet its burden to show he failed to assume parental responsibility because there were facts in evidence at the trial that supported a finding that he *had* assumed parental responsibility. Specifically, Ralph points to evidence that he supported Anna and her mother financially prior to going to prison and that his lack of communication with others about Anna was due to a confusing no-contact order. Ralph's argument falls short.

¶16 While the County needed to prove by clear and convincing evidence that Ralph failed to assume parental responsibility, *see* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856; *see also* WIS. STAT. §§ 48.31(1) and 48.415(6), our review of a jury's verdict is highly deferential and we will not upset a verdict if there is any credible evidence to support it, ***Sheboygan Cnty. DHHS v. Tanya M.B.***, 2010 WI 55, ¶49, 325 Wis. 2d 524, 785 N.W.2d 369. Where there is more than one reasonable inference that may be drawn from the evidence, this court must accept the inference drawn by the jury. *See* ***State v. Quinsanna D.***, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 655 N.W.2d 752. It is our duty to search the record for credible evidence to sustain the jury's verdict. ***Id.*** Further, we afford special deference to a jury's determination where,

as here, the trial court approves of the jury's finding. ***D.L. Anderson's Lakeside Leisure Co. v. Anderson***, 2008 WI 126, ¶22, 314 Wis. 2d 560, 757 N.W.2d 803. In such cases, we "will not overturn a jury's verdict unless 'there is such a complete failure of proof that the verdict must be based on speculation.'" ***Id.*** (quoting ***Morden v. Continental AG***, 2000 WI 51, ¶40, 235 Wis. 2d 325, 611 N.W.2d 659).

¶17 Failure to assume parental responsibility is established by proving that the parent has not had a "substantial parental relationship" with the child. WIS. STAT. § 48.415(6)(a). "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.

Sec. 48.415(6)(b). In deciding whether a parent has failed to assume parental responsibility, a jury must apply a totality-of-the-circumstances test and may consider the entire span of the child's life. ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶¶3, 22, 27, 333 Wis. 2d 273, 797 N.W.2d 854. The jury "should consider any support or care, or lack thereof, the parent provided the child throughout the child's entire life. This analysis may include the reasons why a parent was not caring for or supporting [his or] her child and exposure of the child to a hazardous living environment." ***Id.***, ¶3.

¶18 Ralph's primary argument is that the evidence in total did not amount to clear and convincing evidence that he failed to assume parental responsibility primarily because "Ralph did not abandon [the mother] when she was pregnant, even where he was uncertain whether he was the father," and he worked a job to support Anna and the mother. Ralph also points out that he maintained contact with the mother from prison and in that way learned how Anna was doing. Ralph asserts that he was uncertain about his ability to lawfully contact others about Anna. Even assuming all these assertions are true, there nonetheless was more than sufficient evidence to sustain the jury's verdict. To begin, there was credible evidence presented that Ralph (1) physically abused Anna's mother when she was eight months pregnant with Anna, (2) spent very little time directly caring for Anna, (3) expressed that he did not do crying babies, and (4) verbally threatened to harm the mother's family. Further, and most significantly, during a brief period Anna was entrusted to his care, Ralph struck and then repeatedly shook Anna—causing significant physical harm to her—because she was crying. Ralph also acknowledged that he knew his actions could cause Anna serious injury at the time he did them. Further, when the mother wanted to take Anna to the hospital immediately following the incident, Ralph dissuaded her from doing so. In addition, Ralph's attempt at suicide further evidences his failure to assume parental responsibility.

¶19 In both the CHIPS and criminal cases, Ralph was prohibited from contacting Anna, and as of the date of the trial, Ralph was serving a prison sentence as a result of the serious harm he caused her. Were it not for his own criminal conduct toward Anna, he would not have been prohibited from contacting her. *See* ***Ann M.M. v. Rob S.***, 176 Wis. 2d 673, 685, 500 N.W.2d 649 (1993) ("[W]e cannot ignore the fact that any roadblock to establishing a relationship with

[his daughter] caused by [father's] arrest, bond, and conviction was produced by [father's] own conduct."). As a result, as testified to at trial, Ralph has not had contact with Anna for years. Because the jury had ample evidence before it to find that Ralph had failed to assume parental responsibility, we will not disturb its verdict. *See* ***Tanya M.B.***, 325 Wis. 2d 524, ¶49.

Counsel was not ineffective

¶20 Alternatively, Ralph contends counsel provided ineffective assistance in representing him at trial because counsel (1) "permitted the jury to hear the length of Ralph's incarceration," (2) "failed to properly present evidence supporting Ralph's defense against the County's allegations," and (3) "failed to ask for instructions that would instruct the jury not to consider bad acts evidence improperly and not consider the child's best interest." We disagree.

¶21 A parent is entitled to effective assistance of counsel in a proceeding to terminate parental rights. ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). In order to prove ineffective assistance of counsel, the parent must show both that counsel's performance was deficient and that the deficient performance prejudiced the parent. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985); ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If the parent fails to prove either prong, we need not address whether the other prong was satisfied. *See* ***Strickland***, 466 U.S. at 697.

¶22 Whether a parent proves ineffective assistance of counsel is a mixed question of fact and law. *See* ***Pitsch***, 124 Wis. 2d at 633-34. Factual determinations of the trial court will be upheld unless they are clearly erroneous. ***Id.*** at 634. Whether trial counsel's performance was deficient and whether it prejudiced the parent are questions of law we review de novo. *See* ***id.***

¶23 When determining the deficiency prong, this court evaluates the reasonableness of trial counsel's performance based on the facts of the particular case and viewed at the time of trial counsel's conduct. ***Id.*** at 636. "Reviewing courts should be 'highly deferential' to counsel's strategic decisions and make 'every effort ... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364 (citation omitted); ***Pitsch***, 124 Wis. 2d at 637 (scrutiny of trial counsel's decisions, conduct, and overall performance is highly deferential). There is a strong presumption that the parent received adequate assistance, that counsel's decisions were justified in the exercise of reasonable professional judgment, *see* ***Domke***, 337 Wis. 2d 268, ¶36; ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752, and "that counsel acted reasonably within professional norms," ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To prove deficient performance, the complaining party must show that counsel's specific acts or omissions were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. Counsel's performance is deficient only if the complaining party proves that counsel's challenged acts or omissions were objectively unreasonable under all the circumstances of the case. *See* ***Kimbrough***, 246 Wis. 2d 648, ¶35.

¶24 On the prejudice prong, an error by counsel is prejudicial if it undermines confidence in the outcome. ***Pitsch***, 124 Wis. 2d at 642. To show prejudice, the complaining party must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** (quoting ***Strickland***, 466 U.S. at 694). "It is not sufficient for the defendant to show that his [or her] counsel's errors 'had

some conceivable effect on the outcome of the proceedings.'" ***Domke***, 337 Wis. 2d 268, ¶54 (citations omitted).

1. Length of incarceration

¶25 Ralph claims his trial counsel provided ineffective assistance by failing to object to evidence that Ralph was serving a sentence of five years of incarceration followed by five years of extended supervision related to his assault on Anna. He asserts the evidence was irrelevant to the jury's determination of whether Ralph failed to assume parental responsibility and "instead, suggested what was in Anna's best interest," which was a determination to be made later by the court, not the jury.

¶26 As the County correctly asserts, trial counsel did not perform deficiently in failing to object to this length-of-sentence testimony because he had sound strategic reasons for not doing so. Counsel testified at the ***Machner*** hearing that he knew the jury would hear evidence that Ralph was still incarcerated at the time of trial and the jury would know that his abuse of Anna was the reason for the incarceration. Because of this, counsel testified, he believed it would be better for the jury to know that Ralph would be released from prison in a few years, rather than leave the jury to speculate about how long he might be in prison. The trial court, the same judge as had presided over the trial, concluded that the length of Ralph's sentence was "absolutely" relevant and the jury "ought to be told that this is not a sentence that is going to run interminably, but one that actually has a fairly short ending to it." The court found this to be "a reasonable strategic decision" on counsel's part.

¶27 When initially asked at the ***Machner*** hearing why he did not object to the length-of-sentence evidence, trial counsel stated he could not recall why;

however, when subsequently questioned by the County, counsel provided the above-identified reason. Because counsel did not provide this reason when initially asked at the hearing, on appeal, Ralph questions counsel's credibility. The trial court, however, observed counsel testify and found counsel's explanation for his strategic choices credible, saying counsel "gave entirely adequate explanations for what it is he did at trial." Ralph has not convinced us that the trial court erred in this credibility determination. Thus, we conclude that counsel's decision to not object to the length-of-sentence evidence was reasonable and not deficient.

¶28 Further, Ralph has failed to show he was prejudiced by counsel's failure to object to the length-of-sentence testimony. To establish prejudice, Ralph must show there is a reasonable probability that the outcome of the trial would have been different had counsel objected. He has not made this showing. Even if the trial court, in the exercise of its discretion, would have precluded the evidence if counsel had objected,[4] we are not convinced that it would have made any difference in the outcome.

¶29 Ralph complains that informing the jury of the length of his sentence "inevitably suggested to the jury that Ralph's role as a father was no longer possible."[5] However, in light of the evidence admitted of the violent nature of

[4] We question whether the trial court would in fact have precluded the evidence if trial counsel had objected. As previously noted, at the ***Machner*** hearing, the trial court stated that the evidence of the length of Ralph's sentence was "[a]bsolutely" relevant.

[5] Ralph states in his brief-in-chief: "Ralph's criminal case was emphasized to the jury, so the failure to exclude the fact of his incarceration constituted prejudice as well." While Ralph develops several pages of arguments regarding the *length* of his incarceration, he raises no issue and develops no arguments challenging the *fact* of his incarceration being before the jury. As a result, we do not address it. ***ABKA Ltd. P'ship v. Board of Review***, 231 Wis. 2d 328, 349 n.9, 603 N.W.2d 217 (1999) (we do not address undeveloped arguments).

Ralph's assault on three-week-old Anna, without the evidence as to the length of his incarceration, as trial counsel noted, jurors might well have believed Ralph had received an even longer sentence than the one they heard and thus concluded that Ralph would be precluded from being a father to Anna for an even longer period of time. Ralph has failed to establish he was prejudiced by counsel's failure to object.

2. Evidence supporting Ralph's defense

¶30 Ralph points out that in its case, the County emphasized that Ralph failed to ask others about Anna and cooperate with authorities regarding Anna's future. He contends counsel was ineffective for failing "to properly present evidence meant to undermine these allegations." We disagree.

¶31 The County presented evidence from witnesses, including the foster mother, Anna's pediatrician, and the assigned caseworker regarding Ralph's failure to communicate with them about Anna. The caseworker testified that Ralph was included by telephone in two planning meetings to discuss Anna's future, but during both meetings, Ralph became upset, indicated he was not going to participate, and hung up. During Ralph's testimony later in the trial, trial counsel succeeded in procuring testimony from Ralph that Ralph's CHIPS attorney, who was representing Ralph at the time of those telephone calls, had told him not to discuss the adoption of Anna over the phone and that it instead would be handled in court. The County objected on hearsay and attorney-client privilege grounds and the court struck the testimony.

¶32 Ralph complains that trial counsel failed to make effective arguments to the trial court that would have convinced the court to permit Ralph's testimony about his CHIPS attorney telling him not to discuss the adoption of

Anna over the phone. In response to the County's questions at the ***Machner*** hearing regarding this concern, trial counsel testified that he was concerned that pursuing the testimony would risk waiving Ralph's privilege with his CHIPS attorney and that this risk was not in Ralph's best interest. Counsel was concerned that "once the toothpaste is out of the tube, it's hard to put back in." Trial counsel noted that the attorney's advice to Ralph was but "one piece of the puzzle" in showing that Ralph refrained from asking others about Anna because it was his understanding that he should not do so, and that once he learned that such contact was acceptable, he contacted the foster mother. Counsel then noted that through other questioning, he got the answers he wanted before the jury.[6] Indeed, review of the trial record establishes that counsel procured testimony from Ralph that he did not communicate with others about Anna because, based on paperwork he had received, he believed he was legally prohibited from doing so, but that once he learned he could legally communicate with others about Anna, he wrote to the foster mother.

¶33 Moreover, by itself, the stricken testimony was of limited value. As the County phrases it, "[w]ithout confirmation from the CHIPS attorney, Ralph's statement is simply an unverified self-serving excuse that does nothing to explain Ralph's lack of cooperation on matters other than *adoption* discussions." (Emphasis added.) Further, as acknowledged by trial counsel at the ***Machner*** hearing, if the door to Ralph's discussions with the CHIPS attorney had been

[6] Trial counsel also procured testimony from Ralph that Ralph contacted the foster mother after discussing with *trial counsel* what "third party contact" meant. Upon the County's objection, the trial court also struck this testimony. Trial counsel then asked Ralph: "Let me put it to you this way. Once you knew that you could have contact without getting in trouble, what did you do?" Ralph responded: "I wrote [the foster mother]."

opened, the County could have subpoenaed that attorney to testify. If that attorney provided testimony contrary to Ralph's, Ralph's case could have been hurt more than by simply leaving this attorney-advice "puzzle piece" aside. Because trial counsel successfully solicited from Ralph nonstricken testimony that he did not communicate with others regarding Anna because he was under the belief that he was not permitted to do so, and that once he learned he could do so, he contacted Anna's foster mother, we also conclude that Ralph was not prejudiced by trial counsel's actions or failure to act. As the trial court concluded at the ***Machner*** hearing, there was sufficient other evidence presented during the trial that

> part of the reason [Ralph] failed to communicate with the people he probably should have or could have communicated with resulted not from any perverseness on his part, but, rather, a misunderstanding. [I] think [trial counsel] got that into the record in a fashion that most of the jurors understood it.

We agree.

3. Jury instructions

¶34 Ralph also asserts he was provided ineffective assistance because trial counsel "fail[ed] to have the jury instructed at the end of trial on two critical matters: not determining whether grounds existed to terminate Ralph's parental rights based on Anna's best interest and to not consider bad acts evidence improperly." We again disagree.

¶35 A termination of parental rights proceeding has two phases. *See* ***Oneida Cnty. DSS v. Nicole W.***, 2007 WI 30, ¶11, 299 Wis. 2d 637, 728 N.W.2d 652. First, a fact-finding hearing is held at which the fact finder must determine if the evidence shows that grounds for termination exist under our statutes. ***Id.*** If the fact finder so finds, the trial court must find the parent unfit and subsequently

determine if termination of the parent's parental rights is in the best interest of the child. ***Id.***, ¶¶11-13. During the first phase—the "grounds" phase—"the parent's rights are a court's central focus." ***Id.***, ¶12; *see also* WIS JI—CHILDREN 301.

¶36 Ralph asserts that trial counsel should have requested WIS JI—CHILDREN 301[7] because it "cautions the jury that their task is only one part of the process, and to focus only on whether the grounds alleged exist, not whether parental rights should be ultimately terminated." The County claims trial counsel was not ineffective and that "none of the parties asked the jury to consider best interests, or even came close to making the implication."

[7] WISCONSIN JI—CHILDREN 301 (released Apr. 24, 2013) reads:

> CONSIDERATION OF CHILD'S BEST INTERESTS IN TERMINATION PROCEEDINGS
>
> I want to again emphasize that this hearing is only one part of a process that may result in termination of parental rights.
>
> In this jury trial, the first phase of the proceedings, your responsibility is to determine what the facts are from all the evidence and answer the questions on the special verdict that will be submitted to you. Your answers will determine whether the State has proved that a ground or grounds for termination of parental rights exists. However, you are not being asked to decide if parental rights should be terminated. Based on your answers to the questions on the special verdict, it will be my responsibility to conduct further proceedings and hearings, and it is solely and ultimately my responsibility to determine if parental rights should be terminated based upon factors the law requires a court to consider if grounds for termination of parental rights are proven. You should not be concerned with what the final result of this jury proceeding might be, and you should not be concerned with what the final result of this entire lawsuit might be.
>
> Consideration of the best interests of the child is a matter for the court in proceedings which will be conducted in the future; it is not a consideration for the jury.

¶37 At the ***Machner*** hearing, trial counsel testified that he did not ask for the jury instruction because doing so may have resulted in jurors thinking about what was in Anna's best interest when they otherwise might have been focused on their task of determining whether grounds to terminate existed. As counsel put it:

> You walk into a room and you say, don't think about pink elephants. Immediately, the subconscious, everybody thinks about pink elephants.
>
> If I introduce something about Anna's best interest to a jury, there is the possibility that some bright, young thing on the jury, in—in the jury room, is going to say, why aren't we talking about Anna's best interest? Isn't this about the little girl?
>
> At this point, in a fact finding hearing, the focus is on the respondent, not the child….
>
> By bringing up the issue of best interest, you could actually be encouraging them to think about Anna's best interest. And that wasn't the focus.

¶38 Ralph argues that trial counsel's assertion that use of WIS JI—CHILDREN 301 may have placed the idea of Anna's best interest in the minds of jurors is "contrary to the purpose of the instruction, as evidence[d] by the instruction's commentary." Whether it is contrary to the *purpose* of the instruction is immaterial; what matters is whether trial counsel's belief that it could encourage jurors to consider what was in Anna's best interest—when they otherwise well may have been focused on their task of simply determining whether Ralph had failed to assume parental responsibility—was a reasonable belief and a valid strategic consideration. The jury instructions and special verdict utilized in the trial focused the jury on the correct question—whether Ralph had failed to assume parental responsibility for Anna. Trial counsel's decision not to ask for WIS JI—CHILDREN 301 in order to avoid the risk of raising in the minds of jurors the question of what was in Anna's best interest was a reasonable strategic

decision; thus counsel was not deficient. Ralph also has failed to convince us that there is a reasonable probability that the failure to ask for WIS JI—CHILDREN 301 resulted in a different outcome than he otherwise would have received. His contention that this failure affected the outcome is completely speculative. *See* ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) ("A showing of prejudice requires more than speculation."); *see also* ***Domke***, 337 Wis. 2d 268, ¶54 ("It is not sufficient for the defendant to show that his [or her] counsel's errors 'had some conceivable effect on the outcome of the proceedings.'" (citations omitted)).

¶39 Ralph also claims trial counsel was ineffective by failing to tender an instruction "that would have ensured that the jury would consider evidence of Ralph's bad acts properly." He specifically argues that the jury may have improperly used the evidence that Ralph had abused Anna's mother prior to Anna's birth and Anna after the birth to conclude he was a bad person, rather than using it only for the purpose of determining whether Ralph had formed a substantial relationship with the child and assumed parental responsibility. Ralph asserts that counsel was deficient for not proffering an instruction similar to one the jury instruction committee has proposed *but not adopted*. The unadopted instruction Ralph asserts trial counsel should have proposed is:

> This evidence was not presented to establish that (parent) is a bad person or that (parent) has a bad character and you may not consider it for that purpose. This evidence was presented solely with respect to the issue of whether (parent) has had a substantial parental relationship with (child) and you may only consider it for this purpose, giving it the weight you determine it deserves.

¶40 The County responds that "no one articulated an argument that Ralph was a bad person or had bad character." At the ***Machner*** hearing, trial

counsel stated that to the best of his recollection no arguments were made asserting that Ralph was a bad person or had bad character. Ralph has not pointed to any such assertions in the record, nor have we found any.

¶41 The evidence showing that Ralph abused Anna and her mother was properly admitted, as Ralph concedes, as related to whether Ralph had formed a substantial relationship with Anna and had assumed parental responsibility. While it may have been a reasonable strategy to request a jury instruction like the one Ralph proposes, which, again, has *not* been adopted by the jury instruction committee, we cannot say Ralph has overcome the strong presumption that he received adequate assistance based on trial counsel's failure to request that the court give this instruction. Further, Ralph's assertion of prejudice is, again, purely speculative.

¶42 We ultimately agree with the circuit court's conclusion that "[t]he facts in this case were overwhelming for the verdict that the jury eventually arrived at," and we agree with the County's observation in its response brief that "[e]ven if [trial counsel] had done everything Ralph now suggests he should have, the core facts of the County's case would still have been presented to the jury." And those facts were overwhelming that Ralph failed to assume parental responsibility.

By the Court.—Order affirmed.

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