COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2026

Samuel A. Christensen
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. 2026AP1245
2026AP1246

Cir. Ct. Nos. 2025TP1
2025TP2

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

M.J.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Fond du Lac County: LAURA J. LAVEY, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] M.J., hereinafter referred to by the pseudonym Marion, appeals from orders of the circuit court terminating her parental rights to her two children and from an order denying her postdisposition motions. She contends her trial counsel provided ineffective assistance by failing to "obtain or review the discovery before [Marion] waived her right to a trial and entered no contest pleas to the grounds phase in the termination of her parental rights cases." For the following reasons, we affirm.

BACKGROUND

¶2 Marion's children were determined to be in continuing need of protection or services (CHIPS); one child was removed from her care in July 2021 and the other in November 2022. In January 2025, petitions were filed to terminate Marion's parental rights to the children, and counsel was subsequently appointed to represent Marion. The circuit court scheduled a jury trial on the petitions for November 19, 2025. On the day of the trial, Marion pled no contest to the CHIPS grounds supporting termination of her parental rights, and the court set the matters for a disposition hearing. At the disposition hearing, the court determined that terminating Marion's parental rights was in the best interests of the children and so ordered.

¶3 Marion moved for postdisposition relief on the basis that her trial counsel performed ineffectively in his representation of her by failing to request and review discovery prior to counseling Marion as to whether to plead or take the matter to trial. Marion requested the circuit court vacate its orders and grant a new

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2023-24). All references to the Wisconsin Statutes are to the 2023-24 version.

trial. She asserted that counsel had performed deficiently and, citing ***United States v. Cronic***, 466 U.S. 648, 660-61, 666-67 (1984), that she was "not required to point to any particular prejudice at trial to obtain redress from trial counsel's deficient performance" because "the 'surrounding circumstances [trial counsel's failure to review discovery] make it unlikely that [she] could have received the effective assistance of counsel.'"

¶4 Following an evidentiary hearing on Marion's motion, the circuit court agreed trial counsel performed deficiently by not reviewing the discovery but disagreed that Marion did not need to show prejudice. The court stated that the circumstances of the present case were not at the extreme level the Court discussed in ***Cronic***. Drawing from counsel's testimony at the evidentiary portion of the hearing, the court explained that in this case counsel

> did feel he had sufficient information through his meetings with [Marion], through his review of the detailed information on file to be able to address any questions that [Marion] had ever had throughout the course of the case, that he says he did tell her as part of their follow up prior to [the trial date] that if she didn't enter a plea, he would ask for an adjournment. [Counsel] testified, and I believe credibly, that he told her why, that he hadn't reviewed the discovery and that was an obligation that he had on his part, advised that she could ask for an adjournment. After a follow-up question as to what [Marion's] response to that was and whether that had changed her opinion at all as to what she wanted to do, [counsel's] testimony was that [she] still said that she did not want to go through with a trial, and the reason for that was that essentially she couldn't deal with that emotionally and the trauma of that trial would be too much for her.

The circuit court continued:

> Now that is contested to a certain degree by [Marion's] own testimony. She testified that [counsel] did not advise her of the fact that he had not reviewed that discovery, but [Marion's] testimony here today I think was somewhat

contradictory on its own. At various points, she testifies that it was her decision, a decision that she had come to to enter that no contest plea, that she did that mainly because she believed it was in the best interests of the children to do that. At various points in time in her testimony, she did indicate that she did not want to move forward with a trial. I think her answer was that she wasn't getting any answers from [counsel] and from going to the [c]ourt. She said she didn't want to put the kids through that and put her through all of that trauma. Albeit later, she did testify that her not wanting to testify didn't play any role in her decision to enter a no contest plea. So there is some conflicting testimony. At no point in time do I think that [Marion's] testimony is intentionally conflicting. I think she is testifying to the best of her ability truthfully; however, those reasons were changing throughout the testimony that the [c]ourt heard here today.

… [Marion's] testimony today that she was deciding to enter this plea because she believed that it was in the best interests of her children to my recollection is essentially what she had indicated was her reason for doing so back [during her pleas] on November 19th…. And I'll just reference in that regard in page 23, lines 14 to 15, in response to a question by [guardian ad litem counsel] where [Marion] had stated specifically that she made the decision for the no contest based on what she thought was best for the children.

So at the end of the day, the [c]ourt is looking at whether there's deficient performance…. Here I believe there absolutely was…. [Counsel] certainly has a significant experience, having done this for 30 years. He indicated I believe 60 to 80 trials he believes he's done as far as termination of parental rights. But in this circumstance, he acknowledges there's an error. It's a very significant error to not request discovery and review the possible evidence in your client's case. So when it comes to deficient performance, I believe that exists here ….

In looking at whether or not there is prejudice, … I don't find there's been prejudice as required by the law. Not only did [Marion] testify that it was her decision to enter that no contest plea for the benefit of the children, while she did provide some testimony that she felt forced by [counsel] to do that, there was no specific evidence or testimony, something that [counsel] did. The only thing she pointed to was questions that he would ask, are you wanting to enter a no contest plea or are you wanting to go

to trial. That is what she referenced as to what it was that she felt was prompting her or how [counsel] was guiding her to enter a no contest plea. I believe she did testify as well that he had said that it would be in her best interest, but on cross-examination, [State counsel] had elicited testimony that the way that conversation went was well, if that's how you're doing that and you just want to—that might be better for you to help deal with some of the emotional issues that come along with going to trial. So there's no specific evidence in the record based on what I've received and heard today that [counsel] in any direct way, or frankly any indirect way, forced or coerced [Marion] into entry of her no contest plea.

There was also … perhaps a lack of understanding. [Marion] did testify that she didn't understand some of the bigger words that may have been used during that hearing and that she relies on her husband to help her understand those circumstances. She indicated she did not understand her conversation with me and was confused that day. She indicated that she had called [counsel] after that plea, asking some followup questions about that to help her understand.

[Counsel], in his testimony, however, indicated that post-entry of this plea, if [Marion] had wanted to withdraw her plea, he would have filed a motion, that in if in his review of discovery, which he did indicate he did do in preparation for the contested dispositional hearing, if he had found anything that would have supported a defense that [Marion] would have had to the allegations in the petition, which again were of continuing need of protection or services, he would have filed a motion prior to the dispositional hearing to have [Marion] withdraw her plea. No such motion was filed. He indicated that there was nothing in the discovery that would have successfully defended against those allegations, and in his opinion, most, if not all of those allegations would have been very difficult to overcome. He also testified that [Marion] never asked to withdraw her plea after that November 19th [plea] hearing.

As it relates to [Marion's] testimony that she did not understand the entry of her no contest plea and the conversations she had with the [c]ourt, what I typically do, and I had wanted to check that I did so in this case and I did, is in having a conversation with [Marion], because I recognize what is at stake when a parent is deciding to enter this plea, I recognize that those decisions can be very

> personal. They can be for a number of reasons, and mindful of making sure that her decision was knowingly and voluntarily being entered, I also wanted to make sure that she underst[oo]d the significance of that. I did ask her that if she did not understand anything that she just let me know that and we would take a pause, I could let her talk to her own counsel, and then we would proceed, and I did do that in this circumstance[] as well, and I'll just note at no point in time during my conversation with her during that hearing did [Marion] ever indicate that she didn't understand anything.
>
> I understand that she's generally making that statement here today in her testimony, but again, there's nothing specific that's being pointed to that would give this court sufficient evidence to show that there was a lack of an understanding or a voluntary plea in this circumstance. So again, I think that's a bit outside of the scope of the motion, but for purposes of having a full record and a full decision here today, I did want to address it. I don't find on that basis that there's a reason to grant a withdrawal of [Marion's] plea either.
>
> So in sum then, I am finding that [counsel's] failure to request discovery was deficient, but that that deficiency did not prejudice the circumstances here. I don't find based on the evidence and the testimony before the Court that had he requested it that [Marion] would have come to any other conclusion than what she already did in deciding to enter her no contest plea that day.

¶5 Marion appeals.

DISCUSSION

¶6 A parent is entitled to effective assistance of counsel in a proceeding to terminate his or her parental rights. ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). 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* ***id.*** at 1005; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If the parent fails to prove either prong,

we need not address whether the parent satisfied the other prong. *See* ***Strickland***, 466 U.S. at 700.

¶7 Whether a parent proves ineffective assistance of counsel is a mixed question of fact and law. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). Factual determinations of the circuit 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.***

¶8 To prove deficient performance, the parent must show that counsel's specific acts or omissions were "outside the wide range of professionally competent assistance." *See* ***Strickland***, 466 U.S. at 690. 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." ***Pitsch***, 124 Wis. 2d at 642 (quoting ***Strickland***, 466 U.S. at 694). "It is not sufficient for the [parent] to show that his [or her] counsel's errors 'had some conceivable effect on the outcome of the proceeding.'" ***State v. Domke***, 2011 WI 95, ¶54, 337 Wis. 2d 268, 805 N.W.2d 364 (quoting ***State v. Carter***, 2010 WI 40, ¶37, 324 Wis. 2d 640, 782 N.W.2d 695 (quoting ***Strickland***, 466 U.S. at 693)). Indeed, "[a] showing of prejudice requires more than speculation." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). In the context of a request to withdraw a plea, as in this case, a parent "must allege facts to show 'that there is a reasonable probability that, but for the counsel's errors, he [or she] would not have pleaded [no contest] and would have insisted on going to trial.'" *See* ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citation omitted).

¶9 Consistent with the circuit court's determination, Marion insists on appeal that trial counsel performed deficiently by failing to obtain and review discovery materials, including the social worker's case notes, prior to her scheduled trial date, which turned into her plea date. Because the State does not develop any arguments contesting the court's determination or responding to Marion's brief-in-chief arguments that counsel performed deficiently, it concedes counsel's deficiency. Thus, we consider whether counsel's deficient performance prejudiced Marion.

¶10 Marion asserts that she need not show trial counsel's deficient performance prejudiced her; instead, she asserts prejudice may be presumed. Relying on ***Cronic***, 466 U.S. at 660-61, she claims this is so because

> [w]hen trial counsel has not even familiarized himself with the basic materials relevant to the case, counsel cannot make any informed decisions about how to examine the witnesses at trial or what investigation to conduct…. [I]t is unlikely that trial counsel here, or any counsel under similar circumstances, could have been adequately prepared for trial.

Cronic does not aid Marion.

¶11 ***Cronic*** involved an attorney's representation of a defendant on a 13-count indictment on federal criminal mail fraud charges involving the transfer of millions of dollars in checks between banks in multiple states. 466 U.S. at 649-50. Defendant's counsel withdrew shortly before trial. ***Id.*** at 649. The ***Cronic*** Court noted that "[t]he court appointed a young lawyer with a real estate practice to represent [the defendant], but allowed him only 25 days for pretrial preparation, even though it had taken the Government over four and one-half years to investigate the case and it had reviewed thousands of documents during that

investigation." ***Id.*** at 649. Two co-defendants testified for the government, the defendant was convicted of 11 of the 13 charges, and received a 25-year sentence. ***Id.*** at 649-50.

¶12 The Court considered whether it should be presumed that the young real-estate-turned-federal-criminal-defense counsel performed prejudicially in representing the defendant. ***Id.*** at 657-58. The Court faulted the court of appeals for "not indicat[ing] that there had been an actual breakdown of the adversarial process during the trial …. Instead it concluded that the circumstances surrounding the representation of [the defendant] mandated an inference that counsel was unable to discharge his duties." ***Id.*** The ***Cronic*** Court recognized that "[t]here are … circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," ***id.*** at 658, but concluded that the facts before it did not present such a case, ***id.*** at 666.

¶13 The ***Cronic*** Court expressed that "the complete denial of counsel … at a critical stage" of a defendant's trial would present a circumstance where prejudice need not be proven. ***Id.*** at 659. "Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." ***Id.*** It noted that "no specific showing of prejudice was required in ***Davis v. Alaska***, 415 U.S. 308 (1974), because the petitioner had been 'denied the right of effective cross-examination' which 'would be constitutional

error of the first magnitude and no amount of showing of want of prejudice would cure it.'" ***Cronic***, 466 U.S. at 661.[2] The Court further stated:

> Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

Id. at 659-60.

¶14 The Court discussed ***Powell v. Alabama***, 287 U.S. 45 (1932), as another example of a case where a defendant did not need to prove prejudice. In that case, the ***Cronic*** Court wrote, the ***Powell*** defendants

> had been indicted for a highly publicized capital offense. Six days before trial, the trial judge appointed "all the members of the bar" for purposes of arraignment. "Whether they would represent the defendants thereafter if no counsel appeared in their behalf, was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court." On the day of trial, a lawyer from Tennessee appeared on behalf of persons "interested" in the defendants, but stated that he had not had an opportunity to prepare the case or to familiarize himself with local procedure, and therefore was unwilling to represent the defendants on such short notice. The problem was resolved when the court decided that the Tennessee lawyer would represent the defendants, with whatever help the local bar could provide.
>
> > "The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged

[2] Related to this point, the ***Cronic*** Court stated, "[a]part from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." ***United States v. Cronic***, 466 U.S. 648, 659 n.26 (1984).

> with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them."
>
> This Court held that "such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard." The Court did not examine the actual performance of counsel at trial, but instead concluded that under these circumstances the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair.

Cronic, 466 U.S. at 660-61 (footnote omitted; citations omitted). The ***Cronic*** Court concluded that "***Powell*** was thus a case in which the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial." ***Cronic***, 466 U.S. at 661.

¶15 The ***Cronic*** Court stated, however, that "every refusal to postpone a criminal trial will not give rise to such a presumption," underscoring how rare it is for the presumption of prejudice to be appropriate by pointing to ***Avery v. Alabama***, 308 U.S. 444 (1940), in which

> counsel was appointed in a capital case only three days before trial, and the trial court denied counsel's request for additional time to prepare. Nevertheless, the [***Avery***] Court held that since evidence and witnesses were easily accessible to defense counsel, the circumstances did not make it unreasonable to expect that counsel could adequately prepare for trial during that period of time.

Cronic, 466 U.S. at 661 (citations omitted). The ***Cronic*** Court stated, "[t]hus, only when surrounding circumstances justify a presumption of ineffectiveness can

a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial." ***Id.*** at 662.

¶16 Circling back to the challenge to the convictions before it, the ***Cronic*** Court noted that the defendant "places special stress on the disparity between the duration of the Government's investigation [over four and one-half years] and the period the District Court allowed to newly appointed counsel for trial preparation," 25 days. ***Id.*** at 649, 663. The Court was unmoved because "[t]he Government's task of finding and assembling admissible evidence that will carry its burden of proving guilt beyond a reasonable doubt is entirely different from the defendant's task in preparing to deny or rebut a criminal charge," noting that in this case, the government's preparation of the case and relevant documents "unquestionably simplified the work of defense counsel in identifying and understanding the basic character of the defendants' scheme." ***Id.*** at 663-64. The Court further noted that "[a] competent attorney would have no reason to question the authenticity, accuracy, or relevance" of the government's case establishing key transactions between the banks, noting "there could be no dispute that these transactions actually occurred" and adding that "the only bona fide jury issue open to competent defense counsel on these facts was whether [defendant] acted with intent to defraud." ***Id.*** at 664. "When there is no reason to dispute the underlying historical facts," the Court stated, "the period of 25 days to consider the question whether those facts justify an inference of criminal intent is not so short that it even arguably justifies a presumption that no lawyer could provide the [defendant] with the effective assistance of counsel required by the Constitution." ***Id.*** at 664-65.

¶17 The ***Cronic*** Court added that its conclusion

> is not undermined by the fact that [defendant's] lawyer was young, that his principal practice was in real estate, or that this was his first jury trial. Every experienced criminal defense attorney once tried his first criminal case. Moreover, a lawyer's experience with real estate transactions might be more useful in preparing to try a criminal case involving financial transactions than would prior experience in handling, for example, armed robbery prosecutions. The character of a particular lawyer's experience may shed light in an evaluation of his actual performance, but it does not justify a presumption of ineffectiveness in the absence of such an evaluation.

Id. at 665. The Court concluded that "[t]his case is not one in which the surrounding circumstances make it unlikely that the defendant could have received the effective assistance of counsel…. [The defendant] can therefore make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel." ***Id.*** at 666.

¶18 Marion insists we should presume prejudice instead of requiring the showing of it that is generally required in ineffective assistance of counsel cases. She claims she should not have to show a reasonable probability that had counsel timely requested and reviewed discovery, as he should have done, she would not have pled to the CHIPS grounds, eventually leading to the termination of her parental rights. Marion has not convinced us that this case is so egregious as to eliminate her burden of establishing prejudice. As our supreme court has recognized, "the circumstances in which prejudice is presumed are rare." ***State v. Pinno***, 2014 WI 74, ¶83, 356 Wis. 2d 106, 850 N.W.2d 207. This is not such a case.

¶19 Notably, Marion has directed us to no law actually suggesting that if counsel fails to request and review discovery, prejudice may be presumed. She briefly cites ***State v. Thiel***, 2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 305, on

the issue of deficient performance; but again, no one disputes counsel performed deficiently. ***Thiel***, however, is informative for another reason.

¶20 After concluding that counsel for Thiel performed deficiently by "fail[ing] to review certain portions of the discovery provided by the prosecution," ***Thiel***, 264 Wis. 2d 571, ¶¶37, 57, our supreme court turned to the question of prejudice. Rather than presume Thiel was prejudiced by counsel's failure to review key discovery, the court went to great lengths to evaluate whether prejudice had been shown based on the "effect" and "impact" of counsel's deficiency in light of the totality of the circumstances, ***id.***, ¶¶59-60, 62. The ***Thiel*** court reviewed various reports counsel had not read and analyzed the potential impact on the trial of failing to review each. ***Id.***, ¶¶64-65. The guidance we gain from ***Thiel*** is that Marion should *not* be exempt from having to show prejudice.

¶21 We also find persuasive a recent decision of this court on all fours with the present case. As in this case, ***State v. V.T.***, Case Nos. 2025AP1338, 2025AP1339 and 2025AP1340, unpublished slip op., ¶¶1, 6 (WI App March 23, 2026),[3] addressed the question of whether counsel performed ineffectively in representing a mother in a termination of parental rights case by "fail[ing] to obtain and review any discovery" prior to trial. Sounding a familiar tune, the mother argued "that she d[id] not need to show actual prejudice at trial, since the circumstances of the case—i.e., the fact that trial counsel failed to review any discovery materials—make it unlikely that any attorney could provide effective assistance." ***Id.***, ¶10. Like Marion, the mother also relied on ***Cronic*** for her

[3] *See* WIS. STAT. RULE 809.23(3)(b) ("[A]n unpublished opinion issued on or after July 1, 2009, that is authored … by a single judge … may be cited for its persuasive value.").

position that we should presume prejudice. ***V.T.***, Case Nos. 2025AP1338, 2025AP1339 and 2025AP1340, ¶12. We rejected her position, noting that "[t]he holding in ***Cronic*** was narrow and did not provide a clear-cut exception to the test in ***Strickland***." ***V.T.***, Case Nos. 2025AP1338, 2025AP1339 and 2025AP1340, ¶12. We further pointed out "that the circumstances in that case did not justify a presumption of ineffectiveness." ***Id.*** We "similarly conclude[d] that [the mother] may only make a claim for ineffective assistance of counsel by following the guidelines set forth in ***Strickland***. [The mother] must show both that trial counsel's performance was deficient and that the deficiency prejudiced her defense." ***Id.***, ¶13. We concluded: "[The mother] notably makes no attempt to argue that her defense was prejudiced by counsel's performance, and she therefore fails this prong of the ***Strickland*** test. Because [the mother] has failed to make this showing, her claim for ineffective assistance of counsel fails." ***Id.***, ¶16.

¶22 Here, too, Marion has "ma[de] no attempt to argue that her defense was prejudiced by counsel's performance." We see no reason for a different result than in ***V.T.***

By the Court.—Orders affirmed.

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