COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1083

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

IN RE THE TERMINATION OF PARENTAL RIGHTS OF CHRISHAMBIE LATICIA D., CHIFAWNDIE LAQUITA D., CHONTANITE LAMIRA D. AND CORY ALEXANDER H., PERSONS UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LINDA D.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

WEDEMEYER, P.J.[1] Linda D. appeals from an order terminating her parental rights to her four children, Chrishambie, Chifawndie, Chontanite, and Cory. She claims: (1) the trial court erroneously exercised its discretion when it denied her motion to dismiss on the basis that the Department of Human Services had lost some of the social worker notes pertinent to this case; (2) the trial court erroneously exercised its discretion in denying her motion for a mistrial based on an alleged violation of the sequestration order by two of the State's witnesses; (3) the trial court erred in instructing the jury under the old (pre-July 1, 1996) abandonment statute rather than the new law; and (4) her trial counsel provided ineffective assistance. Because the trial court did not erroneously exercise its discretion in denying Linda's motion to dismiss or motion for a mistrial, because the trial court did not err in instructing the jury under the old statute, and because Linda was provided effective assistance of trial counsel, this court affirms.

I. BACKGROUND

On November 7, 1991, Linda left her four children in the care of an ex-boyfriend who, after three days, turned the children over to a family member. On November 11, 1991, a family member contacted the Milwaukee County Department of Human Services and a CHIPS proceeding was commenced. A dispositional order was entered on June 15, 1992, setting forth conditions that Linda must satisfy before her children would be returned to her. Three days later, Linda left Wisconsin and went to Mississippi, where she remained until July 1993. In August 1993, she moved to Louisville, Kentucky, where she resided until August 1997.

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

Linda admitted that between June 1992 and February 1997, she only visited with her children on four occasions. On February 4, 1997, the State filed a petition to terminate Linda's parental rights. A jury trial on the petition was conducted in August 1997. The jury found that Linda had abandoned her children, had disassociated herself from the children, failed to demonstrate substantial progress toward meeting the conditions for the return of the children, and would not meet these conditions within the next twelve months.

The dispositional hearing was held on October 3, 1997. Following this hearing, the trial court entered an order terminating Linda's parental rights. A ***Machner***[2] hearing was conducted on Linda's ineffective assistance claim, after which the trial court concluded Linda was provided effective assistance of trial counsel. Linda now appeals.

II. DISCUSSION

A. Motion to Dismiss.

Prior to trial, Linda moved to dismiss the petition on the basis that the Department of Human Services had lost significant portions of its file relative to this case. The trial court denied the motion. The standard of review for this court in considering whether the trial court erred in denying the motion to dismiss is a discretionary one. *See* ***Johnson v. Allis Chalmers Corp.***, 162 Wis.2d 261, 273, 470 N.W.2d 859, 863 (1991). A discretionary decision will be sustained if the trial court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable

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

judge could reach. *See* ***id.*** Further, "findings of fact shall not be set aside unless clearly erroneous." Section 805.17(2), STATS. Having reviewed the record, this court cannot conclude that the trial court erroneously exercised its discretion in denying Linda's motion to dismiss.

The record reflects that the trial court entertained extensive argument from all sides as to the types of records that were missing and the importance or insignificance of the missing notes. The trial court heard testimony from case workers assigned to the case before rendering its ruling. At the conclusion of the hearing, the trial court found that any missing notes would not be relevant to the abandonment grounds for termination, which was the issue in this case. This finding is not clearly erroneous, but clearly supported by the witness testimony and the record generally.

Further, the trial court ruled that any missing notes would affect both the State's case and Linda's case equally and, therefore, should not be the basis for dismissal of the petition. The trial court found that any missing notes would not prevent Linda from presenting her case and that the notes would be of less official weight than the official court reports or the petition, which are contained in the record.

The reasoning espoused by the trial court based on these findings demonstrated a proper exercise of discretion. The trial court considered the pertinent facts relative to the law and reached a reasonable conclusion. That is, the nature of the missing documents would not prejudice Linda's case, the more official records reflecting the case workers' observations were contained in the official reports, and the missing notes do not contain material relevant to the abandonment issue. Based on the testimony and argument presented, the trial

court's conclusion constituted a reasonable exercise of discretion, which this court will not disturb on appeal.

B. Motion for Mistrial.

Linda next argues that the trial court should have granted her motion for a mistrial based on an alleged violation of the sequestration order that occurred when two of the State's witnesses were observed discussing the case. The trial court denied the motion.

Whether to grant a motion for a mistrial is left to the discretion of the trial court and will not be disturbed on appeal unless the decision constituted an erroneous exercise of discretion. *See* ***Valiga v. National Food Co.***, 58 Wis.2d 232, 253-54, 206 N.W.2d 377, 389 (1973). Having reviewed the record, this court cannot conclude that the trial court's decision here constituted an erroneous exercise of discretion.

During the trial, Linda moved for a mistrial and presented the testimony of an attorney not related to the case, Jennifer Abbott, who testified that she observed two of the State's witnesses, case workers Joyce Alford and Diane Patterson, in the hallway outside the courtroom discussing the case. Abbott testified that the two witnesses were reading their depositions aloud to each other; they talked about what a low maintenance case this was, that Linda's attorney was trying to discredit them, and that Linda's attorney "gave long depositions"; the two talked about receiving subpoenas from both sides with a witness fee from Linda's attorney; the two also discussed how to get paid for their depositions; that they mentioned the date of June 1996, and about trying to locate Linda in Mississippi and about trying to contact a Mississippi social worker.

Linda argued that the discussion between Alford and Patterson constituted a violation of the court's sequestration order and, therefore, constituted grounds for a mistrial. The trial court disagreed. It found that there was no testimony demonstrating any potential tainting of other witnesses' testimony. The purpose of a sequestration order is to assure a fair trial and prevent witnesses from shaping testimony to conform with another witness. *See* ***Nyberg v. State***, 75 Wis.2d 400, 409, 249 N.W.2d 524, 528 (1977), *overruled on other grounds by* ***State v. Ferron***, 219 Wis.2d 481, 579 N.W.2d 654 (1998). Although it would be preferable if the conversation between Alford and Patterson had not occurred, the record supports the trial court's finding that nothing in the conversation operated to taint the testimony of these two witnesses. Accordingly, there was no prejudice to Linda as a result. Therefore, the trial court's decision to deny the motion for a mistrial did not constitute an erroneous exercise of discretion.

C. Decision to Instruct Under the Old Law.

Linda next contends that the trial court erred when it instructed the jury under the "old" (pre-July 1, 1996) abandonment statute. This court is not persuaded.

As noted, the first dispositional order in this case was issued in June 1992. The petition to terminate Linda's parental rights was filed in February 1997. The grounds for termination were that Linda had abandoned her children as that term is defined in § 48.415(1)(a)2, STATS. Prior to July 1, 1996, i.e, under the "old law" this statute provided that abandonment meant that the parent had failed to visit or communicate with the child for a period of six months or longer. The parent could rebut a showing of abandonment by "other evidence that the parent has not disassociated himself or herself from the child or relinquished

responsibility for the child's care and well-being." Section 48.415(1)(c), 1993-94. Effective July 1, 1996, the period of abandonment was reduced from six months to three months. In addition, § 48.415(1)(c) was rewritten and the "disassociation/relinquish responsibility" language was deleted. The new version provided:

> (c) Abandonment is not established under par. (a) 2. or 3. if the parent proves all of the following by a preponderance of the evidence:
>
> 1. That the parent had good cause for having failed to visit with the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.
>
> 2. That the parent had good cause for having failed to communicate with the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.
>
> 3. If the parent proves good cause under subd. 2., including good cause based on evidence that the child's age or condition would have rendered any communication with the child meaningless, that one of the following occurred:
>
> a. The parent communicated about the child with the person or persons who had physical custody of the child during the time period specified in par. (a) 2. or 3., whichever is applicable, or, if par. (a) 2. is applicable, with the agency responsible for the care of the child during the time period specified in par. (a) 2.
>
> b. The parent had good cause for having failed to communicate about the child with the person or persons who had physical custody of the child or the agency responsible for the care of the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.

The question arose in this case whether to instruct the jury with respect to the provisions of the old law, or the new law, or some combination thereof. The State left the decision up to Linda's attorney, who elected instruction solely under the old law.

The trial court's decision to so instruct was not erroneous as is clear from the legislature's nonstatutory provision enacted to protect parents who may

be affected by the change in the law. The legislature enacted section 9110(1)(c) as a part of 1995 Wisconsin Act 275, which created the new law. This section provided:

> This subsection does not preclude a person from filing a petition under section 48.42 (1) of the statutes for termination of parental rights on the grounds specified in section 48.415 (1) (a) 2., 1993 stats., against a parent who has received the notice under section 48.356 (2) or 938.356 (2) of the statutes of the grounds for termination of parental rights under section 48.415 (1) (a) 2., 1993 stats., if 6 months or longer have elapsed since the date of that notice.

Linda was sent notice under the old law in September 1992, August 1993, August 1994, and August 1995. Thus, according to section 9110(1)(c) of the new enactment, proceeding under the old law was not erroneous.[3] Moreover, Linda waived any objection to the instruction when her attorney elected to have the jury instructed under the old law.

D. Ineffective Assistance Claims.

Linda's final claim is that she received ineffective assistance of trial counsel. Specifically, she contends her trial counsel was ineffective for (1) electing instruction under the old law rather than the new law; (2) failing to challenge the State's striking of two African-American males as potential jurors; (3) failing to move the trial court to prohibit the State from calling any and all witnesses from the Department of Human Services based on the missing notes and/or violation of the sequestration order. The trial court, after conducting an evidentiary hearing, found that Linda had not proven her ineffective assistance claim. This court agrees.

[3] Linda's due process violation claim is without merit. She was afforded proper due process as she was properly warned pursuant to statute, and the trial court applied the correct law.

In order to succeed on a claim of ineffective assistance, Linda must show both that her trial counsel's performance was deficient and it prejudiced the outcome. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). This court reviews the trial court's decision on this issue under a mixed standard of review. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714 (1985). Findings of historical fact will not be disturbed unless they are clearly erroneous. *See* ***id.*** The questions of whether counsel's performance was deficient and, if so, whether it was prejudicial, are legal issues that this court decides independently. *See* ***id.*** at 634, 369 N.W.2d at 715.

Employing these standards, this court concludes that Linda did not receive ineffective assistance for the reasons that follow. Linda first contends her trial counsel was ineffective because she elected to have the trial court instruct the jury under the old "six month/disassociation" abandonment statute, rather than the new one. Trial counsel's testimony at the ***Machner*** hearing clearly demonstrates that this decision was a strategic choice. Trial counsel indicated that proceeding under the old law would be harder for the State to prove its case and easier for Linda to demonstrate contact within each six-month period, whereas the new law's three-month period would be much harder for Linda to show compliance. Trial counsel also explained that she felt the "disassociation/relinquish responsibility" language of the old law, rather than the "good cause" language under the new law would allow for an easier attack because the disassociation standard was more "nebulous." These explanations support the conclusion that trial counsel's election to proceed under the old law was a reasonable strategic decision and, therefore, did not constitute deficient performance or prejudice the outcome.

Linda also claims that trial counsel's performance was ineffective for failing to challenge the State's removal of two African-American males from

the jury panel. This court is not persuaded. After the jury was impaneled, absent any challenge from Linda's trial counsel, the State offered an explanation as to why it elected to strike the two African-American men from the jury. The State indicated that one man was struck because his brother had been prosecuted by the district attorney's office on an attempted homicide case and thus, the State was concerned about this prospective juror's ability to be fair and impartial. In addition, this particular juror was not attentive during *voir dire* and was single, without children. The State further explained that the second African-American male was struck because he was single, without children. The guardian ad litem added that he was interested in impaneling a jury which had some contact with children and knew something about raising them.

This record sets forth a race-neutral and gender-neutral explanation for the selections made by the State. Moreover, Linda's trial counsel explained during the ***Machner*** hearing that she did not challenge the State's strikes because she did not believe the State struck the black men for racial reasons, and because Linda indicated a preference for female jurors to serve as they were viewed as more sympathetic. The trial court found that the reasons given by the State were not discriminatory but, in fact, race-neutral grounds. The trial court's findings in this regard are not clearly erroneous. Accordingly, any challenge Linda's trial counsel leveled questioning the State's strikes would have failed. Therefore, trial counsel's decision not to challenge the State's strikes does not constitute ineffective assistance.

Next, Linda claims trial counsel was ineffective for failing to move to exclude the case worker witnesses from testifying either on the basis that they were missing notes or because of the alleged violation of the sequestration order. This court is not persuaded.

At the ***Machner*** hearing, trial counsel explained her reasons for not pursuing such motions. She testified that she needed Patterson, despite the absence of Patterson's notes and the fact that Patterson was involved in the alleged violation of the sequestration order. She did not want the court to prohibit Patterson from testifying because her testimony would demonstrate that the Department of Human Services failed to make diligent efforts to provide services to Linda. Further, counsel testified that she also needed Marilyn Rulseh, a case worker whose notes were also missing. Rulseh was needed as a part of Linda's case. Counsel also testified that the missing records were evidence she wanted to put in front of the jury, to put a question in the jury's mind that records did exist documenting Linda's contact with her children, but the department had lost them. Accordingly, counsel indicated that she could not move to exclude all the case workers because she needed certain case workers' testimony for Linda's defense.

The trial court found that trial counsel diligently pursued the lost notes/sequestration issues in her motion to dismiss and motion for a mistrial and, when those motions were denied, made a reasonable strategic decision not to attempt to bar all of the case workers from testifying. The strategic reason was that some of these workers would offer testimony that would be helpful to Linda's case.

This court agrees with the trial court's analysis on these issues. Trial counsel clearly offered reasonable strategic reasons for not making the challenges raised here. This court cannot conclude that the strategic choices constituted ineffective assistance. Therefore, Linda's claim of ineffective assistance fails.

By the Court.—Order affirmed.

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