COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

Nos. 98-1536, 98-1537

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

NO. 98-1536

IN RE THE TERMINATION OF PARENTAL RIGHTS OF MICHAEL M.S., A PERSON UNDER THE AGE OF 18:

BARRON COUNTY,

PETITIONER-RESPONDENT,

V.

RAY S.,

RESPONDENT-APPELLANT,

KATHY S.,

RESPONDENT-CO-APPELLANT.

NO. 98-1537

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

BARRON COUNTY,

PETITIONER-RESPONDENT,

V.

RAY S.,

RESPONDENT-APPELLANT,

KATHY S.,

RESPONDENT-CO-APPELLANT.

APPEALS from orders of the circuit court for Barron County: JAMES C. EATON, Judge. *Reversed and cause remanded with directions.*

MYSE, J. Kathy S. and Ray S. appeal orders terminating parental rights to their minor sons Michael M. S. and Eric W. S.[1] Kathy contends the trial court erred by submitting a combined verdict thereby depriving her of an individual determination of grounds for termination. She also asserts the trial court erred by failing to instruct the jury which conditions for return of the children applied to which parent. Additionally, Kathy contends she was denied effective assistance of counsel. Because it appears from the record that the issue as to whether Kathy made substantial progress toward meeting her conditions for return of the children was not fully tried, this court reverses and remands for a new trial as to whether grounds exist for termination of Kathy's parental rights. As a result of our disposition, this court does not reach Kathy's other assertions of trial court error or ineffective assistance of counsel.

[1] Although jointly represented in the termination proceedings below, Kathy and Ray S., individually, filed separate notices of appeal from the orders terminating their parental rights for each child. The appeals terminating parental rights to Michael are designated Case No. 98-1536. The appeals terminating parental rights to Eric are designated Case No. 98-1537. This court ordered the appeals consolidated.

Ray contends the trial court erred by submitting a combined verdict and by failing to determine whether he knowingly, voluntarily and intelligently stipulated to the County's diligent efforts to provide services. Additionally, Ray contends he was denied effective assistance of counsel. This court rejects Ray's arguments and concludes that his arguments provide no basis for reversal. However, in the event Kathy were to prevail on remand, this court directs the trial court to consider the factors set out in § 48.426, STATS., to determine whether the termination of Ray's rights would be in the children's best interests.

Barron County Department of Social Services filed a combined petition seeking to terminate Kathy's and Ray's parental rights to Michael and Eric. The petition was based upon the parents' failure to meet the conditions set forth in 1996 and 1997 CHIPS orders. Those orders enumerated both individual and combined conditions Kathy and Ray would be required to meet for return of the children. A jury trial was conducted in February 1998. The parents were jointly represented at trial. At the trial's conclusion, counsel did not request and the trial court did not submit a separate verdict for each parent. Instead, a single combined verdict form asked the jury to answer four questions. Question three of the verdict asked whether "the parents failed to demonstrate substantial progress toward meeting the conditions established for the return of the children to the parents' home …." Question four asked whether there was "a substantial likelihood that Ray and Kathy S. will not meet these conditions within the twelve-month period following the conclusion of this hearing …." The jury was also instructed to consider the conditions contained in both the 1996 and 1997 CHIPS orders for question three and to consider only the 1997 conditions for question four. The jury returned verdicts in the County's favor on both questions. Ray's and Kathy's parental rights were terminated after a dispositional hearing.

Kathy's Appeal.

It is undisputed that trial counsel did not object to the submission of the single verdict. This court acknowledges that, generally, the failure to object to verdicts constitutes waiver. ***In re C.E.W.***, 124 Wis.2d 47, 54, 368 N.W.2d 47, 51 (1985). Nevertheless, this court may exercise its discretionary power to review a waived error on matters that go directly to the integrity of the fact-finding process. ***Vollmer v. Luety***, 156 Wis.2d 1, 11-12, 456 N.W.2d 797, 802 (1990) (recognizing the importance of the court's inherent power to review waived error to achieve justice in individual cases). Section 752.35, STATS., provides that the appellate court may reverse and grant a new trial in the interest of justice if it appears from the record that the real controversy was not fully tried.

Section 48.43(3), STATS., provides that if the grounds specified in § 48.415, STATS., are found to exist as to only one parent, the rights of only that parent may be terminated without affecting the rights of the other parent. Section 48.43(3), STATS. In this case, a single verdict was submitted to the jury which asked whether "*the parents*" had failed to make substantial progress in meeting the CHIPS conditions, and whether there was a substantial likelihood "*Ray and Kathy*" would not meet the conditions within the twelve-month period following the hearing. The jury's findings, based upon the wording of the single verdict, go directly to the integrity of the fact-finding process. This court cannot determine whether the jury combined the conditions in the various orders and applied them jointly or whether the jury considered the conditions individually as they applied to each parent. The danger inherent here is that the jury could have returned a verdict against one spouse because the other spouse failed to meet the conditions specific to him or her. Therefore, this court exercises its discretionary power

pursuant to § 752.35, STATS., and reviews the record to determine whether the real controversy as to grounds for terminating Kathy's parental rights was fully tried.

The jury was instructed to consider the conditions detailed in both the 1996 and 1997 CHIPS orders to answer the substantial progress question. The orders contained conditions specific to each parent individually and conditions pertaining to the parents jointly. The 1996 conditions applicable to Kathy individually and to Kathy and Ray jointly included: (1) maintaining a suitable dwelling that is clean and safe; (2) maintaining regular medical care for her medical problems; (3) continuing supervised visitation on a regular basis; (4) having a telephone; and (5) having reliable transportation.[2] The 1997 conditions altered the housing condition by requiring Kathy and Ray to maintain a suitable dwelling for at least six months before the return of the children and visitation was required on a bi-weekly basis instead of on a "regular" basis. The reliable transportation condition was dropped.

With these conditions in mind, this court considers the evidence contained in the record relevant to Kathy's progress in meeting those conditions. Sandra Robarge, a mortgage originator for the First Star Home Mortgage Corporation, testified that since the summer of 1997, she had been working with Kathy and Ray to secure a loan for the purchase of a house in Dallas, Wisconsin. Robarge testified Kathy and Ray had been credit approved, had found a structurally sound property in Dallas, had the property appraised, and were waiting final approval which was expected shortly. Peter Arnold, dispositional caseworker for Barron County Social Services, testified that Kathy kept the minimal standard

[2] The County abandoned a condition requiring a family assessment and clinical evaluation of Kathy and Ray.

she needed for getting her medications checked and, while she may not go in as often as the doctors or others would like for blood tests, she did seek medical care when she did not feel well. He also testified Ray and Kathy owned a reliable vehicle. Kathy was not required to obtain a driver's license and the vehicle requirement was only included in the 1996 order. Arnold testified that in December 1996, Kathy called to inform him they had a telephone installed in their trailer although by that time they were more frequently staying with a family, the Knotts, for whom Kathy and Ray provided babysitting services.[3] Arnold testified about the visitation condition. He stated that Kathy and Ray maintained consistent predictable visits with their children. In July 1997, the department contracted with Children's Service Society to provide supervised visitation twice a month. In October 1997, the CHIPS order was changed to require bi-weekly visitation. Kathy and Ray did not maintain a bi-weekly schedule. Arnold explained, however, that he had been unaware of this change and had operated under the assumption that visitation was required twice a month. This court concludes, based on this evidence, that a jury could have found Kathy was making substantial progress toward meeting her conditions for return of the children.

In contrast, in addition to the joint conditions enumerated above, Ray individually was required to: (1) maintain regular medical care for his diabetes and other medical problems; (2) refrain from using alcoholic beverages; and (3) obtain a valid driver's license (1996 order only). There is evidence in the record pertaining to Ray's failure to meet conditions (2) and (3).

[3] There is evidence in the record that the electricity in the trailer was eventually shut off resulting in no heat other than the gas stove burners. Ray and Kathy testified that they stayed more frequently with the Knotts because transportation back and forth was difficult in the winter months. By June 1997, Kathy and Ray lost the trailer and were living with the Knotts.

Because there is evidence supporting Kathy's substantial progress toward meeting her CHIPS conditions and evidence of Ray's failure to make substantial progress toward meeting his CHIPS conditions, the use of the single verdict in this instance may have deprived the jury of the opportunity to consider Kathy's progress and the likelihood of her meeting those conditions within the twelve-month period following the hearing. This court does not comment generally on the propriety of the use of single verdicts. In this case, however, the conditions required of Kathy and Ray were different and the evidence pertaining to their individual progress in meeting those conditions was so different that we cannot determine based on the single combined verdict whether the jury applied the evidence from one parent to the other or whether the jury found that each parent individually had failed to meet his or her individual conditions. It appears from the record a jury could have found Kathy substantially complied with her conditions for return of the children and that, therefore, the real controversy, whether grounds exist for terminating Kathy's parental rights, was not fully tried. Accordingly, this court reverses the trial court's order terminating Kathy's parental rights and remands for a new trial.

Ray's Appeal.

Ray first contends the trial court erred by directing a verdict without establishing whether he knowingly, voluntarily and intelligently stipulated that the County had made a diligent effort to provide services and by failing to provide an individual verdict.

This court is not persuaded that a stipulation ensued. At the beginning of trial, counsel suggested he might present evidence disputing the diligent effort question. At the conclusion of trial, such evidence was not

forthcoming. Counsel for Barron County moved the court as a matter of law to answer "yes" to the verdict question. Appellants' counsel replied that there was insufficient evidence for a properly instructed jury to conclude otherwise. The court proceeded to answer "yes" to the diligent effort question. The court acted not because of an offered stipulation but based on the weight of the evidence. Termination of parental rights proceedings are civil in nature and the court may properly direct a verdict in such actions. ***In re J.A.B.***, 153 Wis.2d 761, 765, 451 N.W.2d 799, 800 (Ct. App. 1989).

Ray also contends that the trial court's failure to provide an individual verdict deprived him of certain fundamental rights. Ray acknowledges that counsel's failure to object to the combined verdict form waives any error in the proposed verdict. Section 805.13(3), STATS. Ray, however, urges this court to use its discretionary authority to reverse in the interests of justice. Section 752.35, STATS. We decline. This court has already concluded that there is clear and convincing evidence in the record demonstrating Ray has failed to make substantial progress in meeting certain conditions set forth in the CHIPS orders. The real controversy as to Ray has been fully tried and justice has not miscarried. This court could not conclude that on retrial, based on this record, there would be a substantial probability of a different result. Ray's allegations of trial court error, therefore, fail.

Ray also alleges ineffective assistance of counsel asserting as error: (1) failure to advise appellants of potential conflicts of interest before undertaking their joint representation; (2) failure to consult with appellants prior to stipulating to the diligent effort question; and (3) failure to object to the combined verdict. At

a ***Machner***[4] hearing, the trial court concluded that the ***Strickland*** prongs had not been met.

A claim of ineffective assistance of counsel requires proof of both deficient performance and resulting prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). There is a strong presumption that counsel acted reasonably and within professional norms. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847-48 (1990). Even if Ray can show counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice. *See* ***id***. at 127, 449 N.W.2d at 848. To prove prejudice, he must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). A reasonable probability is a probability sufficient to undermine our confidence in the outcome. *See* ***id***. In assessing Ray's claim, this court need not address both the deficient performance and prejudice components if he cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697.

This court's determination that the record contains clear and convincing evidence that Ray did not make substantial progress toward meeting certain conditions in the CHIPS orders also leads us to conclude that Ray cannot demonstrate prejudice. Even if the alleged deficiencies had not occurred, Ray fails to persuade this court that there is a reasonable probability that the result would have been different considering the evidence in the record. Because this court concludes Ray has failed to establish prejudice, his ineffective assistance of counsel claim fails.

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

While this court rejects Ray's allegations of error, in the event Kathy were to prevail on remand, this court directs the trial court to consider the factors set out in § 48.426, STATS., to determine whether the termination of Ray's rights would be in the children's best interests.

By the Court.—Orders reversed and cause remanded with directions.

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