COURT OF APPEALS DECISION DATED AND FILED

March 22, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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 No. 2015AP845

Cir. Ct. No. 2014TP21

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

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

OUTAGAMIE COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

MICHAEL P.,

RESPONDENT-APPELLANT,

MARY E.,

RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed.*

¶1 HRUZ, J.[1] Michael P. appeals an order terminating his parental rights to his daughter. He argues his due process right to an impartial tribunal was violated as a result of five instances in which the circuit court interjected to admonish or question Michael during Michael's adverse examination by Outagamie County at the trial in the "grounds" phase of the termination proceedings. Michael also argues his trial counsel performed deficiently by failing to object to these interjections. We reject Michael's argument and affirm.

BACKGROUND

¶2 The Outagamie County Department of Health and Human Services petitioned to terminate Michael's parental rights in 2014.[2] As grounds for termination, the County alleged the child was in continuing need of protection and services, Michael's failure to assume parental responsibility, and abandonment. The case proceeded to a three-day jury trial on these grounds for termination, at which Michael was represented by counsel.

¶3 The County called Michael as an adverse witness and began by questioning him about his prior criminal offenses and care for the child. After asking approximately fifty questions, the County asked, "Do you know when you are expected to be released from prison at this time?" The following exchange then occurred:

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The mother voluntarily terminated her parental rights. Her termination is not at issue in this appeal.

A I answered that already.

Q What was that?

THE COURT: Mr. [P.], --

MICHAEL [P.]: -- The 23rd of May.

THE COURT: -- Mr. [P.], --

MICHAEL [P.]: -- Yes.

THE COURT: -- don't do this, okay?

You understand what I mean and I don't wanna come off any harder than what I need to but you get … asked a question by anybody, you answer the question. If you think you've answered it twice, your thoughts don't matter. Your attorneys will object.

Understood?

MICHAEL [P.]: Yes.

Michael's testimony continued until the lunch break without further interruption from the circuit court.

¶4 After lunch, the County questioned Michael extensively about the court-ordered conditions of return. After lengthy questioning, which spans twenty-four pages in the hearing transcript, the County requested that Michael read the highlighted portion of a letter he wrote to his daughter in 2012. Michael refused to read only the highlighted portion of the letter and stated, "Pick it up in mid-sentence is gonna remove everything from context. Can I … at least read the entire sentence?" The circuit court and Michael then had the following exchange:

THE COURT: Mr. [P.], maybe you didn't understand what I had said earlier. When you're asked or told to do somethin', you do it and then your attorney … will have a chance to ask you questions at some point in this trial. Then, if they want you to read the full sentence, they'll let you.

MICHAEL [P.]: Yes, your honor.

> THE COURT: The second warning.
>
> Understood?
>
> MICHAEL [P.]: Yes.
>
> THE COURT: 'kay. I don't wanna have to do it a third time.

¶5 Michael's testimony continues for another twenty-seven pages in the hearing transcript until the circuit court's next interjection. The County asked Michael if he knew that the Department's decision to cancel further visitation with his daughter had already been made at the time he chose not to attend a scheduled visit. Michael responded, "I didn't show up because I was sick." Michael continued explaining the reason for his failure to attend the visitation session when the circuit court interjected:

> THE COURT: [Mr. P.], the question was different than you stating again that you didn't show up for the third time.
>
> MICHAEL [P.]: Yes, your Honor.
>
> THE COURT: So it was when you didn't show, you didn't have an understanding what the Department's position was. That was the question.
>
> MICHAEL [P.]: Yes. That's correct. I did not know the Department's decision on … the single visit that I missed.

The County went on to explore Michael's reasons for failing to attend the visit and his failure to advise the Department that he would not be attending.

¶6 The County then questioned Michael regarding his contacts with the Department after it canceled further visitation with the child. Michael testified that as an alternative to revocation of his probation, he was allowed to live at a location known as the Ryan House, where offenders participate in a "ninety day

criminal thinking program." However, when asked whether he notified the Department of his changed address, Michael testified that the Ryan House "was not a residence" and was merely a location offering rehabilitation services. The circuit court then asked Michael whether the Ryan House is a "place where you actually live," and he responded that it was a "residential" facility. The court and the parties had a brief discussion about the nature of the facility, which everyone ultimately agreed was a place where offenders were expected to sleep overnight. Michael clarified that his only point was that he had maintained a separate residence while at the facility.

¶7 After some additional testimony, the County questioned Michael about events that occurred in February and March 2014, specifically about whether Michael was twice incarcerated on probation holds during that time span. Michael responded, "Well, I don't know if you would call it incarceration but, yeah. Okay." The circuit court then asked, "What else do you call it? When you go to jail?" The court rejected Michael's explanation that he believed incarceration was limited to sentencing, stating, "When you're locked up, [that's] incarceration." Michael then agreed he was "locked up two separate times" between February and March 2014.

¶8 After the County rested, Michael returned to the witness stand to be questioned on direct examination by his attorney. The circuit court did not interrupt or ask questions of Michael during this testimony. At the conclusion of trial, the jury determined the County had met its burden of proof on all three grounds for termination alleged in the petition. In the dispositional phase, the circuit court concluded termination was in the child's best interests.

¶9 Following the appointment of postdisposition counsel, Michael filed a motion seeking a new grounds trial, primarily based on his trial attorney's failure to object to the circuit court's interjections during the County's adverse examination of Michael. The circuit court held a two-day evidentiary hearing on the motion, after which it concluded Michael's trial counsel was not constitutionally ineffective. Among other things, the court found Michael's "conduct, demeanor, his tone, the way he came across as argumentative during the questioning by [the County] didn't reflect well for him. He sort of did himself in …. Those times that I interrupted had in my opinion pretty little impact in comparison to everything that he had done." The court denied Michael's motion, and he now appeals.

DISCUSSION

¶10 Michael characterizes the circuit court's conduct as "numerous and uninvited interjections into ... [his] adverse examination." Michael argues the trial judge impermissibly took on the role of an advocate, thereby demonstrating objective bias and depriving Michael of his due process right to a fair trial by an impartial tribunal. For the same reason, Michael also argues his attorney was constitutionally ineffective by failing to object to any instance of the circuit court's questioning.[3] Regardless of whether Michael's argument is viewed in terms of structural error or ineffective assistance of counsel, we conclude he is not entitled to a new trial.

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[3] *See* WIS. STAT. § 906.14(3) (Objections to interrogation by the judge "may be made at the time or at the next available opportunity when the jury is not present.").

¶11 Michael first argues his due process right to an impartial tribunal was violated because the court's interruptions and questioning revealed objective bias that, in turn, tainted the jury. We presume a judge was fair, impartial and capable of ignoring any biasing influences. ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. A judge is objectively biased if: (1) there are objective facts demonstrating the judge in fact treated a party unfairly, ***State v. Herrmann***, 2015 WI 84, ¶27, 364 Wis. 2d 336, 867 N.W.2d 772; or (2) a reasonable person, taking into consideration human psychological tendencies and weaknesses, concludes the average judge could not be trusted to "hold the balance nice, clear and true" under all the circumstances, ***id.***, ¶32 (quoting ***Gudgeon***, 295 Wis. 2d 189, ¶24).

¶12 Here, there was nothing in either the quantity or the quality of the circuit court's questioning that reveals objective bias. A trial judge is permitted to interrogate witnesses, including those called by a party. *See* WIS. STAT. § 906.14(2). The judge also controls the mode and order of presenting evidence to ensure the fairness and reliability of the trial process, and he or she is tasked with preserving dignity, order and decorum in the courtroom. ***State v. Anthony***, 2015 WI 20, ¶¶75-76, 80, 361 Wis. 2d 116, 860 N.W.2d 10, *cert. denied*, 136 S. Ct. 402 (2015). All of the circuit court's interruptions and questions at issue in this case—which, contrary to Michael's arguments, were relatively infrequent—were justified by one or more of these principles. They included the court's efforts to have Michael answer the questions asked, rather than interposing his own objections or answering a different question, and to clarify confusing testimony.

¶13 The authorities on which Michael relies either support that conclusion or are easily distinguished. In ***State v. Carprue***, 2004 WI 111, 274 Wis. 2d 656, 683 N.W.2d 31, our supreme court concluded that a trial judge did

not display bias by questioning a witness outside the presence of a jury to make sure that the judge's statements to the jury were accurate regarding the procedures governing "in-house" monitoring. ***Id.***, ¶65. Under ***Carprue***, it was not error for the circuit court to question Michael regarding the nature of his stay at the Ryan House and his confinement in February and March 2014 to prevent or dispel any confusion that arose during Michael's testimony and to ensure the jury had accurate information.[4] Michael also relies on ***United States v. Hickman***, 592 F.2d 931 (6th Cir. 1979), in which the record revealed "constant interruptions [by the trial judge] which frustrated the defense at every turn and infringed upon defendants' rights of cross-examination." ***Id.*** at 936. The judge here did not act similarly. Indeed, even Michael concedes "the court's interventions in this case were much more limited than the judges in ***Hickman*** or ***Carpue*** [sic]."

¶14 Michael's claim of ineffective assistance of counsel fails for these and other reasons. Whether a person whose parental rights have been terminated received ineffective assistance of counsel is a two-part inquiry. *See* ***State v. Ortiz-Mondragon***, 2015 WI 73, ¶32, 364 Wis. 2d 1, 866 N.W.2d 717 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)); *see also* ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992) (extending right to effective assistance of counsel to respondents in cases involving petitions for involuntary termination of parental rights). First, the person must demonstrate that counsel's performance

[4] The fact that the questioning in ***State v. Carprue***, 2004 WI 111, 274 Wis. 2d 656, 683 N.W.2d 31, occurred outside the presence of the jury is not material to our disposition in this case for two reasons. First, although poorly explained in Michael's brief, his argument is that the jury was tainted by the circuit court's manifestation of objective bias in its exchanges with Michael. As a result, if the court did not manifest objective bias during the trial, it could not have improperly affected the jury's deliberations. Second, and perhaps more importantly, the jurors were told to disregard their beliefs regarding the circuit court's impression of the case. *See infra* ¶16.

was deficient. ***Ortiz-Mondragon***, 364 Wis. 2d 1, ¶32. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Second, the person must show that the deficiency prejudiced the defense. ***Ortiz-Mondragon***, 364 Wis. 2d 1, ¶32. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Strickland***, 466 U.S. at 687. Whether a person received ineffective assistance is a mixed question of fact and law, whereby we review the circuit court's findings of fact under the clearly erroneous standard but independently determine whether counsel's performance was deficient and prejudicial. ***State v. Johnson***, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845 (1990).

¶15 Michael's counsel did not perform deficiently. Any objection to the circuit court's interruptions and questioning would have lacked merit for the reasons that defeated his claim of structural error. *See supra* ¶12; *see also* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441 (trial counsel's failure to bring a meritless motion does not constitute deficient performance). Moreover, the record also demonstrates that Michael's trial counsel had a strategic reason for failing to object. We indulge a strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance, and our review is highly deferential to counsel's strategic decisions. ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364. Here, trial counsel testified she considered objecting to the court's interruptions and questioning but chose not to draw "any more attention to what [she] felt the Court had already pointed out was [Michael's] failure to answer the questions posed by the [County]." Trial counsel was especially dismayed with Michael's conduct because she "spent a lot of time prepping him for his testimony before the hearing and even during." Trial counsel

was aware the County would call Michael adversely, and she believed her client "came off as a jerk" in the documents and testimony she expected the County to introduce. She stated she "didn't want the jurors to think that he was this jerk, this abrasive guy, this guy who's always fighting against everyone. So we tried to prep him in a way that he would … show possibly this softer side." This involved also preparing Michael for "questions that we can't get around the State asking," which questions counsel advised Michael he would need to answer. Trial counsel had further instructed Michael to leave it to his attorneys to correct the record during Michael's case-in-chief. She also made clear "the last thing he absolutely wants to happen is for a judge to correct him or to have to sort of address his demeanor or lack of responses on the stand." As trial counsel readily acknowledged, Michael did not follow these instructions at trial.

¶16 Michael has also failed to put forth any cognizable appellate argument regarding prejudice. His bald statement that he has suffered prejudice is insufficient. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Further, the jury was expressly instructed to disregard any impressions it had about the circuit court's feelings regarding the case. *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989) ("We presume the jury follows the instructions given to it."). In sum, Michael has failed to satisfy either prong of the ineffective assistance inquiry.

By the Court.—Order affirmed.

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