COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1606 **Cir. Ct. No. 2014TP33**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

G.H.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MARK A. SANDERS and CHRISTOPHER R. FOLEY, Judges. *Affirmed*.

¶1 BRASH, J.[1] G.H. appeals from an order terminating his parental rights to his son, M.R.H. He also appeals the order denying his postdispositional

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

motion.[2] G.H. makes the following arguments on appeal: (1) trial counsel was ineffective; (2) WIS. STAT. §§ 48.415(2) and (6) were unconstitutional as applied; (3) the circuit court erred in admitting foster parent testimony, creating a comparison of parenting abilities; (4) the evidence adduced at trial was insufficient; and (5) he is entitled to a new trial. We disagree and affirm.

BACKGROUND

¶2 G.H. is the biological father of M.R.H., who was born on December 19, 2012. At the time of his birth, M.R.H. tested positive for herpes, prompting a referral to the Bureau of Milwaukee Child Welfare (BMCW).[3] Jessica Kotsakis, an Initial Assessment Social Worker for the BMCW, investigated this referral.

¶3 Kotsakis's investigation revealed significant concerns about V.A.'s (M.R.H.'s mother) ability to care not only for herself, but also for the child.[4] Kotsakis visited the home where G.H. and V.A. were residing and had concerns about the overall safety of the home. Specifically, the home was being heated by an open-flame stove, the ceiling was waterlogged and falling down, there was no heat in the majority of the house, and the parents had limited supplies for M.R.H.

[2] The Honorable Mark A. Sanders presided over the jury trial and the dispositional hearing. The Honorable Christopher R. Foley entered the order denying G.H.'s postdispositional motion.

[3] The Bureau of Milwaukee Child Welfare (BMCW) has since been renamed the Division of Milwaukee Child Protective Services. Since the agency was still the BMCW at the time of this proceeding, all references will be to the BMCW.

[4] V.A., has an I.Q. of 63 and suffers from cognitive disabilities that affect her ability to care for M.R.H. This IQ would categorize V.A. as having an intellectual disability. V.A. is also appealing the termination of her parental rights in a separate case that is still pending.

Furthermore, G.H. suffered from an untreated and unpredictable seizure disorder as well as a traumatic brain injury that caused problems with his short-term memory. G.H. also struggled with controlling his frustrations.

¶4 At the completion of her investigation, Kotsakis detained M.R.H. and placed him in protective custody on January 18, 2013. A child in need of protection or services (CHIPS) dispositional order was entered on August 14, 2013, placing M.R.H. outside the parental home. The three conditions of return were as follows:

> Condition 1: Meet the following Goals for Behavioral Change[5]
>
> Goal 4: [G.H.] has adequate skill and knowledge to take care of his child, including identifying his needs and demonstrating the ability to … safely meet them on a daily basis.
>
> Goal 5: [G.H.] obtains suitable housing and income. The income obtained provides him with the funds to support stable and safe housing, food, utilities, and the ongoing needs of his child.
>
> Goal 6: [G.H.] is always in control of his emotions. He expresses anger and frustration in a calm, non-violent, and non-impulsive manner by using his learned coping skills.
>
> Condition 2: All parents must maintain a relationship with your child/ren by regularly participating in successful visitation with the child/ren unless the parent's visits are limited by the court.
>
> Condition 3: All parents must demonstrate an ability and willingness to provide a safe level of care for the child. A safe level of care is described as follows:
>
> 1. The parent demonstrates the ability to have a safe, suitable and stable home.

[5] Goals one, two, and three of Condition 1 pertained solely to V.A. Goals four, five and six of Condition 1 pertained solely to G.H. Conditions two and three pertained to both V.A. and G.H.

> 2. The parent does not abuse the child(ren) or subject them to risk of abuse.
>
> 3. The parent demonstrates they are able and willing to care for the child(ren) and their special needs on a full-time basis.
>
> 4. The parent cooperates effectively with others needed to help care for the child(ren).
>
> 5. The parent must cooperate with the BMCW by staying in touch with their ongoing Case Manager, letting the ongoing Case Manager know their address and telephone number, and allowing the ongoing Case Manager into their home to assess the home for safety.

¶5 Ultimately, the State filed a petition to terminate G.H.'s parental rights to M.R.H. on February 18, 2014.[6] The termination of parental rights (TPR) petition alleged that G.H. failed to assume parental responsibility under WIS. STAT. § 48.415(6) and that M.R.H. remained a child in need of protection or services under § 48.415(2). A jury trial was held to determine whether G.H. failed to assume his parental responsibility and whether M.R.H. remained a child in need of protection or services.

The Jury Trial.

¶6 A jury trial was held from December 8, 2014 to December 11, 2014. Multiple witnesses testified at the trial, including G.H., case workers, and M.R.H.'s foster parent.

¶7 G.H. testified he was currently employed. G.H. testified that because of this employment, he will no longer be eligible for BadgerCare, and that he is not able to receive health insurance through his employer. G.H. offered

[6] This petition also sought to terminate V.A.'s parental rights to M.R.H.

conflicting testimony on how he plans to pay for his seizure medication without health insurance. G.H.'s testimony indicated that he has not seen a doctor or taken his medication on a consistent basis. G.H. testified that between July 2014 and December 2014, he called M.R.H. approximately three times per month. G.H. further testified that sometimes when he calls he does not get an answer. G.H. also testified that Stacey Pangratz, the ongoing case manager, was willing to do community visits with G.H. and M.R.H., but that he has not made any plans to take advantage of this offer. G.H. testified that he has missed visits with M.R.H. because of conflicts with his work schedule. G.H. further testified that he believes V.A. is capable of caring for M.R.H. on her own.

¶8 Ms. Kotsakis testified that she visited G.H.'s home and observed that it was being heated by an open-flame stove, the ceiling was waterlogged and falling down, there was no heat in the majority of the house, and G.H. had limited supplies for M.R.H. Kotsakis testified that G.H. suffered from an untreated and unpredictable seizure disorder as well as a traumatic brain injury that caused problems with his short-term memory. Kotsakis further testified that she had significant concerns about G.H.'s ability to meet the basic day-to-day care of the child such as feeding, sleeping arrangements, and medical care. Kotsakis also testified that G.H. struggled with controlling his frustrations.

¶9 Mindy Tokarski, a former ongoing case manager assigned to G.H. to provide him with services for the safe return of M.R.H. also testified. Tokarski testified that she worked with G.H. for approximately four months. Tokarski testified that during this time, she ensured that supervised visitation continued and that she worked with G.H. to develop appropriate goals for behavioral change. Tokarski testified that G.H. was inconsistent in his attendance of supervised visitation with M.R.H. and struggled with meeting M.R.H.'s basic needs when he

did attend. Tokarski further testified that G.H. struggled at managing his emotions during stressful situations, such as when M.R.H. was crying and could not be soothed, and that he was unable to make progress in meeting the conditions of return on the CHIPS order.

¶10 Stacey Pangratz, the ongoing case manager, also testified. Pangratz testified that she had been the ongoing case manager since July 2013. Pangratz testified that G.H.'s visitation with M.R.H. continued to be fully supervised due to safety concerns. Pangratz testified that she set up services for G.H., including anger management, individual therapy, and specialized parenting assistance. Pangratz further testified that she took steps to assist G.H. in obtaining the proper medical care and medication for his previously untreated seizure disorder. Pangratz testified that, despite all the services G.H. received, she saw no marked improvements in G.H.'s ability to care for M.R.H. on a full-time basis.

¶11 Brittney Lasker, the family engagement specialist who supervised G.H.'s visitations with M.R.H. also testified. Lasker testified that she provided assistance to G.H. to help him in setting up his own doctor's appointments in order to get back on medication for his seizure disorder and provided assistance to connect G.H. to the Milwaukee Center for Independence. Lasker testified that she was not comfortable moving towards unsupervised visitation because G.H. consistently left the visits early. Lasker further testified that G.H. consistently stated that he planned to have V.A. act as the primary care taker of M.R.H. despite her obvious cognitive limitations. Lasker also testified that despite G.H. working with the BMCW to improve his protective capacities for nearly two years, she did not feel it would be safe to move towards unsupervised visitation.

¶12 Dr. Kenneth Sherry, a psychologist who evaluated G.H. in September of 2013, also testified. Sherry testified that he diagnosed G.H. with low levels of depression and a personality disorder. Sherry testified that personality disorders are "a pattern of maladaptive behaviors that are kind of consistent, chronic and at a level that are impacting daily functioning, social relationships, ability to manage various kinds of adult capacities at work, home and in the general population." Sherry testified that the treatment for personality disorders was long-term psychotherapy in the range of three to five years. Sherry further testified that an individual with G.H.'s psychological make up would have difficulty controlling his anger, might become easily irritated, and might act out.

¶13 Katie Demerath, M.R.H.'s current foster mother, also testified. Demerath testified that she had taken placement of M.R.H. in July 2014, but had provided respite for him prior to officially receiving placement. Demerath testified about the day-to-day care she provided M.R.H., including the care she provided him for his herpes diagnosis and behavioral issues. Demerath further testified about the contact she had with G.H. outside of visitation and the gifts and presents that G.H. provided for M.R.H. while he was in her care.

¶14 Immediately following Demerath's testimony, counsel for both parents made a motion for a mistrial. The attorneys argued that Demerath's testimony created an impermissible comparison and prejudiced the jury against G.H. and V.A. After arguments, the circuit court denied the motion for a mistrial, reasoning that:

> The testimony that was presented from the foster parent is relevant. It was explicitly relevant to the failure to assume parental responsibility ground. There was nothing said by the foster parent that would draw a direct comparison or even an indirect comparison. She was explaining what she did and what

> was necessary to be done for [M.R.H.'s] care on—not really a daily basis, but just for his care.

The circuit court found there was no obvious or clear comparison and the attorneys for G.H. and V.A. did not state with any particularity why the testimony created the need for a mistrial.

¶15 The jury found that G.H. failed to assume parental responsibility and that M.R.H. remained a child in need of protection or services. At a dispositional hearing on January 30, 2015, the circuit court found that it was in M.R.H.'s best interest to have the parental rights of G.H. terminated.[7]

The Postdispositional Motion and Hearing.

¶16 On February 10, 2015, G.H. filed a notice of intent to pursue postdispositional relief. On August 18, 2015, G.H. filed a notice of appeal. On September 4, 2015, we remanded to the circuit court so that G.H. could file a postdispositional motion.

¶17 In his postdispositional motion, G.H. argued that his counsel was ineffective for failing to: (1) move to dismiss because WIS. STAT. § 48.415(2) was unconstitutional as applied; (2) request an instruction that the State had to prove specific instances of failure to control emotions; (3) object to the instruction that the jury should find no parental relationship unless G.H. provided daily care and supervision of his child; (4) object to inadmissible evidence; (5) object to the foster parent's testimony and for failing to move for a mistrial; and (6) make a

[7] The circuit court also terminated V.A.'s parental rights.

specific claim, pursuant to WIS. STAT. § 805.14(4), that the evidence was insufficient.

¶18 A hearing took place on December 16, 2015. At the close of the hearing, the circuit court asked the parties to brief any outstanding issues. On January 15, 2016, the circuit court denied all of G.H.'s postdispositional arguments in a written decision. This appeal follows.

DISCUSSION

¶19 On appeal, G.H. argues that: (1) his trial counsel was ineffective for failing to request an instruction that the State had to prove specific instances of G.H.'s failure to control his emotions when determining whether M.R.H. remained a child in continuing need of protection or services, and that without such instruction, WIS. STAT. § 48.415(2) was unconstitutional as applied; (2) his trial counsel was ineffective for failing to object to the jury being told they could consider whether G.H. had provided daily supervision, protection, and care for M.R.H. when determining whether he failed to assume responsibility and, as a result, § 48.415(6) was unconstitutional as applied; (3) the circuit court erred in admitting foster parent testimony, creating a comparison of parenting abilities; (4) the evidence adduced at trial was insufficient; and (5) he is entitled to a new trial. We address each issue in turn.

I. Child In Continuing Need Of Protection Or Services

a. Ineffective Assistance Of Counsel

¶20 A parent in a termination of parental rights case is entitled to effective assistance of counsel. ***Oneida Cnty. Dep't of Soc. Servs. v. Nicole W.***, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652. To prevail in his ineffective

assistance of counsel claim, G.H. must demonstrate that his attorney's performance was deficient and that the deficient performance prejudiced G.H.'s defense. *See* ***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 the ***Strickland*** test to involuntary TPR proceedings).

¶21 To establish deficient performance, G.H. must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed to [him] by the Sixth Amendment." *See* ***Strickland***, 466 U.S. at 687. That is, G.H. must show that his attorney's "representation 'fell below an objective standard of reasonableness' considering all the circumstances." *See* ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695 (citing ***Strickland***, 466 U.S. at 688). To establish prejudice, G.H. "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See* ***Strickland***, 466 U.S. at 694. If G.H. makes an insufficient showing on one of the components, we are not required to address the other. *See* ***id.*** at 697.

¶22 An ineffective assistance of counsel claim is a mixed question of law and fact. ***Id.*** at 698. We will not overturn the circuit court's findings of fact unless they are clearly erroneous. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). The determination of whether counsel's performance was deficient and prejudicial are questions of law which we review *de novo*. *See* ***id.***

¶23 G.H. argues that his trial counsel was ineffective for failing to ask that the jury be instructed that the State must prove specific instances of G.H. failing to control his emotions. We disagree.

¶24 The circuit court provided the following instruction to the jury:

> Before [M.R.H.] may be found to be in continuing need of protection or services, the State must prove the following four elements by evidence that is clear, satisfactory, and convincing to a reasonable certainty: First, that [M.R.H.] was adjudged to be a child in need of protection or services and placed or continued in a placement outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law.… Second, that the Bureau [of] Milwaukee Child Welfare has made reasonable efforts to provide the services ordered by the court. Reasonable efforts means an earnest and conscientious effort to make good faith steps to provide those services, taking into consideration the characteristics of the parent or child, the level of cooperation of the parent, and other relevant circumstances of the case. You may find that an agency's effort was reasonable even though there are minor or insignificant deviations from the court's order…. Third, that … [G.H.] [has] failed to meet the [conditions] established for the safe return of [M.R.H.] to the home….
>
> Fourth, that there is a substantial likelihood that … [G.H.] will not meet the conditions for the safe return of [M.R.H.] within the nine-month period following the conclusion of this hearing. Substantial likelihood means that there is a real and significant probability, rather than a mere possibility, that … [G.H.] will not meet the conditions for the safe return within this time period.

This instruction is an accurate statement of the law related to continuing need of protection or services. *See* WIS. STAT. § 48.415(2). The circuit court has broad discretion in instructing the jury and there is no error so long as the instructions adequately cover the applicable law. *See* ***State v. Robinson***, 145 Wis. 2d 273, 281, 426 N.W.2d 606 (Ct. App. 1988).

¶25 Here, the jury instruction given was an accurate statement of the law. Therefore, it was within the circuit court's discretion to provide it. *See* ***id.*** G.H.'s proposed alternative instruction is a misstatement of the law. Not objecting to the jury instruction that was used, therefore, is not deficient performance. *See* ***Strickland***, 466 U.S. at 687-88. Because G.H. has failed to show that his

counsel's performance was deficient in this regard, we need not address prejudice. *See* ***id.*** at 697. Accordingly, based on our independent review of the record, we conclude that G.H. did not receive ineffective assistance of counsel because his counsel failed to request an instruction that the State had to prove specific instances of G.H.'s failure to control his emotions.

b. WISCONSIN STAT. § 48.415(2) Is Not Unconstitutional As Applied

¶26 G.H. argues that without instructing the jury that the State had to prove specific instances of his failure to control his emotions, the continuing need for protection or services statute, WIS. STAT. § 48.415(2), was unconstitutional as applied to him. We disagree.

¶27 Whether a statute is unconstitutional as applied presents a question of law that we review *de novo*. *See* ***Kenosha Cnty. DHS v. Jodie W.***, 2006 WI 93, ¶22, 293 Wis. 2d 530, 716 N.W.2d 845. Any statute that infringes upon a parent's liberty interest in parenting his child is subject to strict scrutiny review. *See* ***id.***, ¶41. Under this test, we determine whether the statute is narrowly tailored to advance a compelling interest that justifies interference with the parent's fundamental liberty interest. *See* ***Monroe Cnty. DHS v. Kelli B.***, 2004 WI 48, ¶17, 271 Wis. 2d 51, 678 N.W.2d 831. The Wisconsin Supreme Court has already determined that the State's compelling interest in WIS. STAT. § 48.415 is to protect children from unfit parents. *See* ***Kelli B.***, 271 Wis. 2d 51, ¶25. The sole issue here, therefore, is whether the statute, as applied to G.H., is narrowly tailored to meet the State's compelling interest to protect M.R.H. *See* ***id.***, ¶17.

¶28 Relying on ***Jodie W.***, G.H. argues that because it is impossible for him to control his emotions to the point where he never experiences anger or frustration, there is no scenario in which he could meet this condition for M.R.H.'s

return. This argument is misguided. In ***Jodie W.***, the Supreme Court held that WIS. STAT. § 48.415(2) was unconstitutional as applied to Jodie, an incarcerated parent, because she was found unfit "without regard for her actual parenting activities." ***Id.***, 293 Wis. 2d 530, ¶52. The court further held that a circuit court may not order termination based solely upon the fact that a parent is incarcerated. ***Id.***, ¶50. While incarceration may be relevant, other factors must also be considered. *See* ***id.*** The true issue in assessing the constitutionality of § 48.415(2) is whether the conditions of return are tailored to the particular parent and child. *See* ***id.***, ¶51

¶29 Here, the BMCW was aware that G.H. had a history of being unable to meet M.R.H.'s basic needs. The BMCW was also aware that G.H. had unstable and unsafe housing. Based on this knowledge, the BMCW created goals that took G.H. and his history into account. Specifically, G.H. was required to provide a safe level of care as well as demonstrate that he has the skills and knowledge necessary to ensure M.R.H.'s safety. While G.H.'s anger management issues were certainly a factor considered in determining whether M.R.H. remained a child in continuing need of protection or services, it was not the sole factor. Accordingly, based upon our independent review of the record, we conclude that WIS. STAT. § 48.415(2) was not unconstitutional as applied to G.H.

II. Failure To Assume Parental Responsibility

a. Ineffective Assistance Of Counsel

¶30 G.H. argues that his trial counsel was ineffective for failing to object to the jury being told that they could consider whether G.H. had provided daily supervision, protection, and care for M.R.H. when determining whether he had failed to assume parental responsibility. We disagree.

¶31 The standard for ineffective assistance of counsel is outlined above in Section I (a). This standard applies equally here.

¶32 The circuit court provided the following instruction to the jury:

> To establish a failure to assume parental responsibility, the State of Wisconsin must prove by evidence that is clear, satisfactory, and convincing to a reasonably certainty that … [G.H.] [has] not had a substantial relationship with [M.R.H.]. The term "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of [M.R.H.]. Substantial parental relationship is assessed based on the totality of circumstances throughout the child's entire life. In evaluating whether … [G.H.] [has] a substantial parental relationship with [M.R.H.], you may consider factors including but not limited to whether … [G.H.] expressed concern for or interest in the support, care, or well-being of [M.R.H.], whether … [G.H.] neglected or refused to provide care or support for [M.R.H.], whether … [G.H.] exposed [M.R.H.] to a hazardous living environment, and all other evidence bearing on that issue which assists you in making this determination. You may consider the reasons for the [parents'] lack of involvement when you assess all of the circumstances throughout the child's entire life.

¶33 This instruction is an accurate statement of the law related to failure to assume parental responsibility. *See* WIS. STAT. § 48.415(6). Therefore, it was within the circuit court's discretion to provide it. *See* ***Robinson***, 145 Wis. 2d at 281. Since this instruction provided an accurate statement of the law, not objecting to it is not deficient performance. *See* ***Strickland***, 466 U.S. at 687-88. Because G.H. has failed to show that his counsel's performance was deficient in this regard, we need not address prejudice. *See* ***id.*** at 697. Accordingly, based upon our independent review of the record, we conclude that G.H. did not receive ineffective assistance of counsel because his counsel failed to object to the jury being told that they could consider whether G.H. had provided daily supervision, protection and care for M.R.H.

b. WISCONSIN STAT. § 48.415(6) Is Not Unconstitutional As Applied

¶34 G.H. argues that WIS. STAT. § 48.415(6), the failure to assume parental responsibility statute, was unconstitutional as applied to him. We disagree.

¶35 The standard for whether a statute is unconstitutional as applied is outlined above in Section I (b). This standard applies equally here.

¶36 In order to establish failure to assume parental responsibility pursuant to WIS. STAT. § 48.415(6), the State must establish that the parent has not had a substantial parental relationship with the child. Section 48.415(6) provides:

> (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.
>
> (b) In this subsection, "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.

¶37 G.H. argues that it was impossible for him to assume parental responsibility if the BMCW detained M.R.H. at birth. Therefore, according to G.H., his substantive due process rights were violated because he did not have an opportunity to assume parental responsibility within the meaning of the statute. This argument is misguided.

¶38 There is nothing in WIS. STAT. § 48.415(6) that requires the child to be living with the parent in order for the parent to assume parental responsibility. Furthermore, the Wisconsin Supreme Court has held that a totality of the circumstances test should be used when determining whether a parent assumed parental responsibility. *See* ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶22, 333 Wis. 2d 273, 797 N.W.2d 854.

¶39 G.H.'s argument ignores the overwhelming evidence in the record that shows that his lack of a relationship with M.R.H. resulted from his own actions, not those of the State. The record establishes that G.H. was inconsistent in his attendance of supervised visits with M.R.H. and that he consistently left these visits early. The record establishes that when M.R.H. was detained by the BMCW, there were serious concerns with the condition of G.H.'s home and whether or not G.H. had the ability to meet the basic day-to-day care needs of M.R.H. such as feeding, sleeping arrangements, and medical care. Furthermore, G.H.'s ongoing case manager saw no marked improvements in G.H.'s ability to care for M.R.H. on a full-time basis. The record also establishes that G.H. had continuous struggles with controlling his frustrations and emotions during stressful situations, such as when M.R.H. was crying and could not be soothed.

¶40 G.H. was given the opportunity to present evidence to the jury about his steps to assume parental responsibility both before M.R.H. was born and after. The jury was subsequently provided with a correct instruction regarding the law on failure to assume parental responsibility and, after considering all evidence, found that G.H. had not assumed parental responsibility. Accordingly, based upon our independent review of the record, we conclude that WIS. STAT. § 48.415(6) was not unconstitutional as applied to G.H.

III. The Foster Parent's Testimony Was Properly Admitted

¶41 G.H. argues that the circuit court erred in admitting Demerath's—the foster parent—testimony, creating an overly prejudicial comparison of parenting abilities. We disagree.

¶42 The admission of relevant evidence is within the discretion of the circuit court. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.1. We review a circuit court's decision to admit evidence under an erroneous exercise of discretion standard. *See* ***Martindale***, 246 Wis. 2d 67, ¶28. We will not reverse a circuit court's decision so long as it "examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." *See* ***id.***

¶43 Here, Demerath's testimony was relevant. As one of G.H.'s conditions of return, G.H. was required to demonstrate an ability and willingness to provide a safe level of care for M.R.H., which included being able to meet M.R.H.'s specific needs. Demerath's testimony focused primarily on what M.R.H.'s special needs were, thus making it relevant to whether M.R.H. was in continuing need of protection or services. *See* WIS. STAT. § 48.415(2). Furthermore, Demerath testified about M.R.H.'s daily supervision, education, protection, and the care that she provided. This testimony is relevant to whether G.H. failed to assume parental responsibility. *See* § 48.415(6).

¶44 As to G.H.'s argument that Demerath's testimony was overly prejudicial because it created a comparison of her parenting abilities with those of

G.H., we disagree. We find nothing in Demerath's testimony that would draw a comparison between her parenting abilities and those of G.H. Demerath's testimony merely explained what she did and what was necessary to be done for M.R.H.'s care. Accordingly, we conclude that the circuit court did not erroneously exercise its discretion when it admitted Demerath's testimony.

¶45 Additionally, G.H. appears to argue that his counsel was ineffective for failing to make any specific argument in support of the motion for a mistrial on the grounds that Demerath's testimony created an impermissible comparison and prejudiced the jury against G.H. However, G.H. offers no specifics on how his counsel's performance was deficient, or how he was ultimately prejudiced. *See* ***Strickland***, 466 U.S. at 687. Moreover, this argument is misguided. While V.A.'s counsel made the primary argument for why Demerath's testimony was overly prejudicial, G.H.'s counsel joined that argument in full before briefly supplementing it. G.H. does not present any suggestion for what more his counsel could have done. Instead, G.H. simply concludes that "[s]ince the trial court was wrong to conclude that the foster parent's testimony was not offered for sake of comparison, counsel was ineffective." Because we do not decide undeveloped arguments, we do not address this argument further. *See* ***League of Women Voters v. Madison Cmty. Found.***, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 707 N.W.2d 285; *see also* ***Vesely v. Security First Nat'l Bank of Sheboygan Trust Dep't***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985) (we do not decide inadequately briefed arguments).

IV. There Is Sufficient Evidence

¶46 G.H. argues that the evidence adduced during the trial was insufficient to establish that M.R.H. was a child in continuing need of protection or services and that G.H. failed to assume parental responsibility. We disagree.

¶47 "A party may move to set aside a verdict and for a new trial because … the verdict is contrary to … the weight of the evidence…." WIS. STAT. § 805.15(1). "No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." WIS. STAT. § 805.14(1); s*ee also*, ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Whether the evidence is sufficient is a question of law that we review *de novo*. *See* ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676.

¶48 G.H. argues that there was insufficient evidence based on several disagreements with characterizations the State made at closing arguments. Closing arguments, however, are not evidence and the jury was specifically instructed in that regard. *See* WIS JI—CRIMINAL 160 (closing arguments are not evidence); *see also*, ***State v. Draize***, 88 Wis. 2d 445, 455-56, 276 N.W.2d 784 (1979).

¶49 Additionally, there was sufficient evidence presented over the five-day jury trial to support the jury's findings. We will not fully restate the testimony outlined in the Background section above. However, this evidence included testimony from both the family engagement specialist and the ongoing

case managers, who each stated that it was unsafe to progress to unsupervised visitations. Furthermore, Dr. Sherry testified that G.H. suffered from a personality disorder that, without treatment, could result in situations where G.H. would have difficulty controlling his anger, become easily irritated, and act out. Sherry also testified that treatment for this personality disorder would take three to five years of intensive weekly therapy. Accordingly, based on our independent review of the record, we conclude there is sufficient evidence to find both grounds: that M.R.H. was in continuing need of protection or services and that G.H. failed to assume parental responsibility.

V. A New Trial Is Not Warranted

¶50 Finally, G.H. argues that he is entitled to a new trial in the interest of justice because the real controversy was not fully tried. We disagree.

¶51 WISCONSIN STAT. § 752.35 provides for discretionary reversal and states that we may reverse the order being appealed "if it appears from the record that the real controversy has not been fully tried…." *See* ***id.*** "The power to grant a new trial when it appears the real controversy has not been fully tried 'is formidable, and should be exercised sparingly and with great caution.'" ***State v. Sugden***, 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795 N.W.2d 456 (citation omitted). We only exercise our power to grant a discretionary reversal in exceptional cases. *See* ***id.***

¶52 G.H. argues that the trial was unfair because the State made it impossible for him to provide daily care for M.R.H. The sole reason G.H. lost the opportunity to provide direct daily care for M.R.H. as a custodial parent was his failure to provide a safe place for M.R.H. The State's intervention, therefore, was necessary to protect M.R.H.'s right to safety and protection. G.H. was given a fair

opportunity to counter that evidence at trial. The fact that the jury found the State's evidence to be more compelling is not sufficient grounds for granting a new trial.

¶53 G.H. also had the opportunity to convince the jury that he had met all the conditions for safe return. In fact, G.H.'s brief contains many references to favorable evidence presented at trial. G.H. makes no argument that any evidence favorable to him was excluded. However, the jury, as the finder of fact in this case, was charged with weighing the evidence and drawing reasonable inferences therefrom. *See* ***Poellinger***, 153 Wis. 2d at 506. The fact that the jury did not view the evidence in the same way as G.H. is not sufficient grounds for granting a new trial.

¶54 G.H. also argues that we should grant him a new trial because Demerath's—the foster parent—testimony established a prejudicial comparison between parenting abilities. Once again, the jury was not presented with any argument or testimony that could lead them to base their verdict upon speculative comparisons between foster and biological families. As discussed above in Section III, the circuit court arrived at its determination to admit Demerath's testimony using a rationale that was transparent and well-founded in the law. Accordingly, we decline to grant G.H. a new trial.

¶55 For the foregoing reasons, we affirm.

By the Court.—Orders affirmed.

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