COURT OF APPEALS
DECISION
DATED AND FILED

July 19, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1614 **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.

V. A.,

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] V.A. appeals from an order terminating her parental rights to her son, M.R.H. She also appeals the order denying her postdispositional motion.[2] V.A. makes the following arguments on appeal: (1) trial counsel was ineffective; (2) it is unconstitutional to terminate her parental rights when she was incompetent at the time she entered her plea to the underlying CHIPS petition; (3) WIS. STAT. § 48.415(6) is unconstitutional as applied; (4) the circuit court erred in admitting foster parent testimony, creating a comparison of parenting abilities; and (5) the evidence adduced at trial was insufficient. We disagree and affirm.

BACKGROUND[3]

¶2 V.A. is the biological mother 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).[4] Jessica Kotsakis, an Initial Assessment Social Worker for the BMCW, investigated this referral.

¶3 Kotsakis's investigation revealed significant concerns about V.A.'s ability to care not only for herself, but also for M.R.H. Kotsakis visited the home

[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.

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

[3] As indicated in the supplemental record provided by Appellant, this case shares a record with appeal 2015AP1606.

[4] 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.

where V.A. and G.H.[5], M.R.H.'s father, 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. Kotsakis had significant concerns about the parents' abilities to meet the basic day-to-day needs of M.R.H. such as feeding, sleeping arrangements, and medical care.

¶4 At the completion of her investigation, Kotsakis detained M.R.H. and placed him in protective custody on January 18, 2013. On January 22, 2013, the State filed a petition for protection or services. An initial child in need of protection or services (CHIPS) hearing was held on February 13, 2013, at which V.A. was represented by appointed counsel, Attorney Jon LaMendola.[6] During this hearing, Attorney LaMendola raised concerns regarding the mother's competency and an evaluation was ordered to be completed by Dr. Kenneth Sherry. Dr. Sherry conducted an evaluation of V.A. on February 15, 2013. Dr. Sherry concluded that he believed V.A. was not "competent to be able to continue unassisted by a guardian ad litem."

¶5 On March 18, 2013, the circuit court appointed Attorney Terence Bridgman as guardian ad litem for V.A. On May 2, 2013, Attorney LaMendola indicated that V.A. was still in a contest posture. Although Attorney Bridgman

[5] G.H.'s parental rights were also terminated in Milwaukee County Circuit Court Case No. 2014TP33. We affirmed the termination of G.H.'s parental rights in a separate appeal, 2015AP1606.

[6] Attorney Jon LaMendola represented V.A. in the child in need of protection or services (CHIPS) matter only.

agreed, he stated that it would be in V.A.'s best interest for the court to take jurisdiction so that she could get the services she needed. On May 31, 2013, V.A., through her guardian ad litem Attorney Bridgman, stipulated to all facts in the CHIPS petition. Thereafter, the circuit court declared that M.R.H. was a child in need of protection and services, and took jurisdiction pursuant to WIS. STAT. § 48.13(10).

¶6 A CHIPS dispositional order was entered on August 14, 2013, placing M.R.H. outside the parental home. The conditions of return were as follows:

> Condition 1: Meet the following Goals for Behavioral Change.[7]
>
> Goal 1: [V.A.] has adequate skill and knowledge to take care of her child, including identifying [M.R.H.'s] needs and demonstrating the ability to … safely meet them on a daily basis.
>
> Goal 2: [V.A.] obtains suitable housing and income. The income obtained provides her with the funds to support stable and safe housing, food, utilities, and the ongoing needs of her child.
>
> Goal 3: [V.A.] is always in control of her emotions and actions. She demonstrates appropriate coping strategies and expresses anger and frustration in a calm, non-violent, and non-impulsive manner.
>
> 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:

[7] 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.

> 1. The parent demonstrates the ability to have a safe, suitable and stable home.
>
> 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.

¶7 Ultimately, the State filed a petition to terminate V.A.'s parental rights to M.R.H. on February 18, 2014.[8] The termination of parental rights (TPR) petition alleged that V.A. 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).

The Jury Trial

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

¶9 Kotsakis testified that she had significant concerns about V.A.'s ability to care for not only herself, but also for M.R.H. Kotsakis testified that she visited V.A.'s home and had concerns about the overall safety of the home.

[8] This petition also sought to terminate G.H.'s parental rights to M.R.H.

Specifically, Kotsakis testified that the home was being heated by an open-flame stove, the ceiling was water logged and falling down, there was no heat in the majority of the house, and the parents had limited supplies for M.R.H. Kotsakis further testified that she had significant concerns about V.A.'s ability to meet the basic day-to-day needs of M.R.H. such as feeding, sleeping arrangements, and medical care.

¶10 Mindy Tokarski, a former ongoing case manager assigned to V.A. to provide her with services for the safe return of M.R.H. also testified. Tokarski testified that she worked with V.A. for approximately four months. Tokarski testified that during this time, she ensured that supervised visitation continued and that she worked with V.A. to develop appropriate goals for behavioral change to eliminate the reasons why M.R.H. was in out-of-home care. Tokarski testified that V.A. was inconsistent in her attendance of supervised visitation with M.R.H. and struggled with meeting M.R.H.'s basic needs when she did attend. Tokarski further testified that V.A. struggled to meet the needs of M.R.H. during stressful situations, such as when M.R.H. was crying and could not be soothed. Finally, Tokarski testified that during the time she was case manager, V.A. was not able to make progress in meeting the conditions of return in the CHIPS order.

¶11 Stacey Pangratz, an ongoing case manager, also testified. Pangratz testified that she had been V.A.'s and G.H.'s ongoing case manager since July 2013. Pangratz testified that V.A.'s visitations with M.R.H. continued to be fully supervised due to safety concerns. Pangratz testified that she set up services for V.A., including supervised visitation, individual therapy, and specialized parenting assistance. Pangratz testified that, despite all the services V.A. received, she saw no marked improvements in V.A.'s ability to care for M.R.H. on a full-time basis.

¶12 Brittney Lasker, the family engagement specialist who supervised V.A.'s visitations with M.R.H. also testified. Lasker testified that she employed a "visit coaching" model with V.A. and G.H. to help them recognize and establish M.R.H.'s needs. Lasker testified that she was not comfortable moving towards unsupervised visitation because G.H. consistently left the visits early, and V.A. was not able to handle M.R.H.'s basic needs independently. Lasker further testified that G.H. consistently stated that he planned to have V.A. act as the primary caretaker of M.R.H. despite her obvious cognitive limitations. Finally, Lasker testified that despite V.A. working with the BMCW to improve her protective capacities for nearly two years, Lasker did not feel it would be safe to move towards unsupervised visitation.

¶13 V.A. also testified. While some of her testimony was conflicting, V.A. testified that she did not know why M.R.H. was placed in out-of-home care. V.A. further testified that she has never had any conversations with Tokarski or Pangratz regarding why M.R.H. was placed in out-of-home care. V.A. testified that neither Tokarski or Pangratz, nor anyone involved in the BMCW, has told her about what she needs to do to have M.R.H. returned. V.A. testified that she has not seen a copy of the dispositional order listing the conditions she must meet for M.R.H. to be returned. V.A. testified that while she was aware that M.R.H. has herpes, she does not know what medication he would need to take in the event of an outbreak. V.A. further testified that she did not know what her plan for providing care for M.R.H. would be if he were returned to her care.

¶14 Dr. Sherry, a psychologist who evaluated V.A., also testified. Dr. Sherry testified that he completed a competency evaluation of V.A. in February 2013, and a psychological evaluation of V.A. in May 2013. Dr. Sherry testified that, during the competency evaluation, he determined V.A.'s full scale IQ was

sixty-three. Dr. Sherry testified that a full scale IQ of sixty-three placed V.A. in the first percentile and within the clinical category of intellectual disability. Dr. Sherry testified that based on this IQ score, V.A. would likely struggle with "reasoning, comprehension, being able to processes information, decision making," and "with most tasks beyond what is simple and regiment and routine and noncomplex." Dr. Sherry also testified that he completed achievement tests with V.A. and found that she tested at a first grade reading level, a first grade spelling level, and a second grade arithmetic level. Dr. Sherry testified that these low levels of achievement, combined with V.A.'s low IQ, would cause significant struggles in meeting basic adult responsibilities. Finally, Dr. Sherry testified that, in his opinion, V.A.'s mental capacities were unlikely to change throughout the case.

¶15 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 care 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 V.A. outside of visitation and the gifts and presents that V.A. provided for M.R.H. while he was in her care.

¶16 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.

¶17 The jury found that V.A. 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 terminate V.A.'s parental rights.[9]

The Postdispositional Motion and Hearing

¶18 On February 9, 2015, V.A. filed a notice of intent to appeal. On September 4, 2015, we remanded this matter to the circuit court so that V.A. could file a postdispositional motion.

¶19 In her postdispositional motion, V.A. argued that her trial counsel was ineffective for failing to: (1) move to dismiss because WIS. STAT. § 48.415(6) was unconstitutional as applied to V.A.; (2) object to the instruction that the jury should find no parental relationship unless V.A. provided daily care and supervision of her child or, in the alternative, request a modified instruction; (3) object to the entry of inadmissible evidence; (4) object to the foster parent's

[9] The circuit court also terminated G.H.'s parental rights.

testimony and for failing to move for a mistrial; (5) object to the State's request that the court answer Question 1 of the CHIPS order; and (6) move to dismiss because WIS. STAT. § 48.415(2) was unconstitutional as applied to V.A. or, alternatively, challenge the validity of the underlying CHIPS order based upon V.A.'s incompetency during the proceedings.

¶20 On December 16, 2015, the circuit court held a postdispositional hearing. 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 V.A.'s postdispositional arguments in a written decision. This appeal follows.

DISCUSSION

¶21 On appeal, V.A. argues that her counsel was ineffective for: (1) failing to challenge the validity of the underlying CHIPS order; (2) failing to obtain a psychological expert to rebut the assertions of Dr. Sherry that V.A.'s legal incompetence meant that she was incompetent to parent; and (3) failing to object to the instruction that the jury should find no substantial parental relationship unless V.A. provided daily care and supervision. Alternatively, V.A. argues that it is unconstitutional to terminate her rights when she was incompetent at the time she entered her plea to the underlying CHIPS petition. V.A. also appears to argue that WIS. STAT. § 48.415(6) is unconstitutional as applied to her. Additionally, V.A. argues that the circuit court erred in admitting the foster parent's testimony and that there was insufficient evidence.

I. Ineffective Assistance Of Counsel

¶22 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 her ineffective assistance of counsel claim, V.A. must demonstrate that her attorney's performance was deficient and that the deficient performance prejudiced V.A.'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).

¶23 To establish deficient performance, V.A. must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed … by the Sixth Amendment." *See* ***Strickland***, 466 U.S. at 687. That is, V.A. must show that her 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, V.A. "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 V.A. makes an insufficient showing on one of the components, we are not required to address the other. *See* ***id.*** at 697.

¶24 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.***

a. The Underlying CHIPS Order

¶25 V.A. argues that her trial counsel was ineffective for failing to challenge the validity of the underlying CHIPS order. V.A. further argues that this would have been a permissible collateral attack of the underlying order because it relates to V.A. receiving ineffective assistance of counsel during the underlying CHIPS proceeding. We disagree.

¶26 "A collateral attack on a judgment is 'an attempt to avoid, evade, or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding prescribed by law and instituted for the purpose of vacating, reviewing, or annulling it.'" ***Nicole W.***, 299 Wis. 2d 637, ¶27 (citation omitted). "In general, 'a judgment is binding on the parties and may not be attacked in a collateral action unless it is procured by fraud.'" ***Id.***, ¶28 (citation omitted). While the court in ***Nicole W.*** briefly discussed the possibility of extending the ability to collaterally attack a termination order when there was ineffective assistance of counsel, the court stopped short of extending the right to collaterally attack an underlying CHIPS order except in cases of fraud. *See* ***id.***, ¶¶ 27, 30-33, 36. "The finality of a judgment in a termination of parental rights proceeding is even more critical because, as the legislature recognized, 'instability and impermanence in family relationships are contrary to the welfare of children.'" ***Id.***, ¶28 (citation omitted).

¶27 Here, there is no suggestion that the underlying CHIPS order was secured by fraud. To collaterally attack the underlying CHIPS order, therefore, would be meritless. "Trial counsel's failure to bring a meritless motion does not constitute deficient performance." ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12. Because V.A. has failed to show that her counsel's

performance was deficient in this regard, we need not address prejudice. *See* ***Strickland***, 466 U.S. at 697. Accordingly, based upon our independent review of the record, we conclude that V.A. did not receive ineffective assistance of counsel because her counsel failed to challenge the validity of the underlying CHIPS order.

¶28 V.A. spends some time discussing whether the State had jurisdiction to file the petition seeking to terminate her parental rights. This argument, however, is premised on the presumption that had V.A.'s trial counsel—Attorney Laurence Moon—challenged the underlying CHIPS order, the circuit court would have found it void as a matter of law. As discussed above, however, a challenge to an underlying CHIPS order constituted a collateral attack which is prohibited unless the order was secured by fraud. *See* ***Nicole W.***, 299 Wis. 2d 637, ¶28. Attorney Moon, therefore, had no grounds to challenge the underlying CHIPS order. Accordingly, V.A.'s argument that the State was without jurisdiction to file the petition seeking to terminate her parental rights fails.

¶29 V.A. asserts in the alternative that, if her trial counsel was not ineffective for failing to challenge the underlying CHIPS order, it was unconstitutional to terminate her parental rights because she was incompetent at the time she entered her plea to the underlying CHIPS order. V.A., however, makes no argument to support this assertion. Because this issue is inadequately briefed, we decline to address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (stating that we will not address issues on appeal that are inadequately briefed).

b. Additional Psychological Evaluation of V.A.

¶30 V.A. next argues that her trial counsel was ineffective for failing to get a second psychological evaluation completed for trial. We disagree.

¶31 At the postdispositional hearing, V.A.'s trial counsel, Attorney Moon, testified that Dr. Sherry's psychological evaluation of V.A. was consistent with his own interactions with V.A. Attorney Moon testified that he did not believe an additional evaluation would have reached a substantially different opinion. Attorney Moon testified that he believed there was a possibility that a subsequent evaluation could have been more damaging than Dr. Sherry's evaluation. As such, Attorney Moon testified that instead of ordering a new evaluation, he chose to attack the validity of Dr. Sherry's opinion and his methods for obtaining them. This constitutes a reasonable strategic choice by Attorney Moon. "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-64, 549 N.W.2d 471 (Ct. App. 1996). Attorney Moon, therefore, was not deficient in failing to get a second psychological evaluation. Because V.A. fails to show that Attorney Moon's performance was deficient in this regard, we need not address the prejudice prong. *See* ***Strickland***, 466 U.S. at 697.

¶32 Nevertheless, even if Attorney Moon was deficient in his decision not to obtain a second psychological evaluation, it does not create a reasonable probability that the outcome would have been different. *See* ***id.***, at 694. Accordingly, based on our independent review of the record, we conclude that V.A. did not receive ineffective assistance of counsel because her trial counsel failed to obtain a second psychological evaluation prior to trial.

c. Failure to Assume Parental Responsibility

¶33 V.A. next argues that her trial counsel was ineffective for failing to object to the failure to assume parental responsibility jury instruction. We disagree.

¶34 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 reasonable certainty that [V.A.] … [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 … [V.A.] [has] a substantial parental relationship with [M.R.H.], you may consider factors including but not limited to whether … [V.A.] expressed concern for or interest in the support, care, or well-being of [M.R.H.], whether … [V.A.] neglected or refused to provide care or support for [M.R.H.], whether … [V.A.] 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.

¶35 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* ***State v. Robinson***, 145 Wis. 2d 273, 281, 426 N.W.2d 606 (Ct. App. 1988) (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). 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 V.A. has failed to show that her 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 V.A. did not receive ineffective assistance of counsel because her counsel failed to object to the jury instruction on failure to assume parental responsibility.

¶36 V.A. also appears to argue in the alternative that WIS. STAT. § 48.415(6) is unconstitutional as applied to her. Specifically, V.A. argues that it was impossible for her to assume parental responsibility if the BMCW detained M.R.H. at birth. We disagree.

¶37 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 her 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 state 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 V.A., is narrowly tailored to meet the State's compelling interest to protect M.R.H. *See* ***id.***, ¶17.

¶38 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.

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

¶40 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.

¶41 V.A.'s argument ignores the overwhelming evidence in the record that shows her lack of a relationship with M.R.H. resulted from her own actions, not those of the State. The record establishes that V.A. was inconsistent in her attendance of supervised visits with M.R.H. The record establishes that when

M.R.H. was detained by the BMCW, there were serious concerns with the condition of V.A.'s home and whether or not V.A. 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, V.A.'s ongoing case manager saw no marked improvements in V.A.'s ability to care for M.R.H. on a full time basis.

¶42 V.A. was given the opportunity to present evidence to the jury about her 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 V.A. 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 V.A.

II. The Foster Parent's Testimony Was Properly Admitted

¶43 V.A. argues that the circuit court erred in admitting Demerath's—the foster parent—testimony, creating an overly prejudicial comparison of parenting abilities. V.A. further argues that the circuit court erred in denying V.A.'s motion for a mistrial on the same grounds. We disagree.

¶44 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.***

¶45 Here, Demerath's testimony was relevant. As one of V.A's conditions of return, V.A. 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 V.A. failed to assume parental responsibility. *See* § 48.415(6).

¶46 As to V.A.'s argument that Demerath's testimony was overly prejudicial because it created a comparison of her parenting abilities with those of V.A., we disagree. We find nothing in Demerath's testimony that would draw a comparison between her parenting abilities and those of V.A. 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. Furthermore, because we conclude that the circuit court properly admitted Demerath's testimony, it was not error for the circuit court to deny V.A.'s motion for a mistrial.

III. There Is Sufficient Evidence

¶47 V.A. 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 V.A. failed to assume parental responsibility. We disagree.

¶48 "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). We will not grant a motion challenging the sufficiency of the evidence as a matter of law "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.

¶49 We are satisfied that 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 V.A.'s low levels of achievement, combined with her low IQ, would cause significant struggles in meeting basic adult responsibilities. Finally, Dr. Sherry testified that, in his opinion, V.A.'s mental capacities were unlikely to change throughout the case.

¶50 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 V.A. failed to assume parental responsibility.

¶51 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.