COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

Nos. 00-1587, 00-1588, 00-1589

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

NO. 00-1587

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

BROWN COUNTY,

PETITIONER-RESPONDENT,

V.

KATHY C.,

RESPONDENT-APPELLANT.

NO. 00-1588

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

BROWN COUNTY,

PETITIONER-RESPONDENT,

V.

KATHY C.,

RESPONDENT-APPELLANT.

NO. 00-1589

IN RE THE TERMINATION OF PARENTAL RIGHTS TO HAYDEN T.S., A PERSON UNDER THE AGE OF 18:

BROWN COUNTY,

PETITIONER-RESPONDENT,

V.

KATHY C.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] This is an appeal of orders terminating Kathy C.'s parental rights to her three children.[2] Kathy presents five contentions: (1) The orders must be reversed because she was not advised of her right to substitute the judge; (2) Brown County failed to prove that there was a substantial likelihood that she would not meet within one year the conditions prerequisite to her children's return; (3) the trial court violated her due process right to present a defense by excluding her expert witness's opinion that she was likely to meet the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e). All references to the Wisconsin Statutes are to the 1997-98 version.

[2] As Kathy notes in her brief, while there are separate case numbers, petitions and orders for each child, the cases were tried as one. On appeal, this court consolidates these cases on its own motion.

return conditions within a year; (4) her trial counsel was ineffective; and (5) a new trial should be granted in the interest of justice. This court concludes that Kathy's arguments are meritless and the orders terminating her parental rights are thus affirmed.

BACKGROUND

¶2 Kathy voluntarily placed her three children in foster homes through the Brown County Department of Human Services while she was receiving substance abuse treatment.[3] At an uncontested hearing, the children were found in need of protection and services (CHIPS) pursuant to WIS. STAT. § 48.13. The court entered CHIPS orders with one-year terms, each requiring Kathy to satisfy certain conditions before the children could be returned to her.

¶3 Approximately seven months after the CHIPS orders were entered, the department filed a termination of parental rights (TPR) petition for each child, seeking to terminate Kathy's rights under WIS. STAT. § 48.415(2)(a).[4] Kathy

[3] Kathy intimates that she precipitated the proceedings that ultimately resulted in the termination of her parental rights. This court's review of the fact-finding transcript reveals, however, that the County had commenced a CHIPS proceeding before Kathy contacted the department regarding foster placement.

[4] WISCONSIN STAT. § 48.415(2) provides in pertinent part:

> CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services, which shall be established by proving any of the following:
> (a)1. That the child has been adjudged to be a child or an unborn child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.347, 48.357, 48.363, 48.365 … containing the notice required by s. 48.356 (2) or 938.356 (2).
> ….
> 3. That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for

(continued)

contested the petitions, and a jury found that the County proved the alleged termination grounds. At the dispositional hearing, the trial court terminated Kathy's parental rights upon its finding that termination would be in the children's best interests. *See* WIS. STAT. §§ 48.426 and 48.427. Kathy pursued post-adjudication motions, which the trial court denied. This appeal followed.

ANALYSIS

1. Right To Substitute Judge

¶4 Kathy contends that at the initial appearance the trial court failed to advise her of the right to request a different judge to hear the proceedings. *See* WIS. STAT. § 48.422(1), (4) and (5). Indeed, in its post-judgment written decision, the trial court found that "[t]he record fails to disclose that at the initial appearance [Kathy] was advised of her right to substitution." Kathy argues that under these circumstances, she is entitled to a reversal and new proceedings unless the department proved by clear and convincing evidence that Kathy knew of the right and voluntarily waived it.[5] She further contends that the department did not meet this burden.

¶5 In ***In re Kywanda F.***, 200 Wis. 2d 26, 37, 546 N.W.2d 440 (1996), the supreme court held that a circuit court's failure to inform an alleged delinquent of the right to substitution is harmless error unless the party establishes actual

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> the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.

[5] Although alluding to waiver, Kathy's argument focuses upon the knowledge issue.

prejudice. Relying on a TPR case, ***In re Robert D.***, 181 Wis. 2d 887, 891-92, 512 N.W.2d 227 (Ct. App. 1994), the supreme court held that "[i]n the case of the right to substitution, we conclude that actual prejudice is shown if it is established that the juvenile was not told of the right and did not know of that right." ***Kywanda***, 200 Wis. 2d at 37. The court concluded that the prejudice suffered by the juvenile is the lost opportunity to substitute the judge due to ignorance of the right.

¶6 The supreme court held that the trial court should employ the ***Bangert***[6] analysis to determine whether failing to inform of the statutory right to substitution was reversible error. *See* ***Kywanda***, 200 Wis. 2d at 38. Under that analysis, the parent must first make a prima facie showing that the court violated its mandatory statutory duties and allege that he or she in fact did not know of the information that the court was statutorily required to provide. *See* ***id.*** If a prima facie showing is made, the burden shifts to the County to demonstrate by clear and convincing evidence that the person knew of the statutory right and therefore was not prejudiced. *See* ***id.*** The County may utilize any evidence to substantiate knowledge of the right, including examining the person's counsel. *See* ***id.***

¶7 At a post-judgment ***Machner***[7] hearing, Kathy's attorney gave the following testimony. He had no specific recollection of informing Kathy of her right to substitute the assigned judge. He has appeared as adversary counsel in many TPR cases and they constitute about twenty-five percent of his caseload. It is his practice to identify the judge before whom the case is filed and to "advise the client of the right to substitute and talk maybe about a particular judge's

[6] *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

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

tendencies or give my opinion as to what I think about the judge." This is something he does regularly in TPR cases. It is his common practice to talk to the clients about the judge and whether they want to substitute. As part of his initial conference with a client, he goes through what is involved in a TPR. As part of this process, again, "it's my common practice to tell them to look at who the judge is, to look at who the judge was on the CHIPS case and see if they have any objection to that particular judge, and [in] every case I'm always interested in who the judge is." Kathy's attorney understood that a substitution request must be made at the initial appearance, and he has requested substitution in the past. He has no specific recollection of departing from his regular practice of informing his clients of the right to judicial substitution.

¶8 Kathy did not testify at the post-adjudication hearing and therefore did not refute the inference that her attorney informed her of the right, consistent with his common practice. Based on this evidence, the trial court drew the inference that Kathy knew of her substitution right.

¶9 Under WIS. STAT. § 904.06, evidence of a routine practice is relevant to prove that a person's conduct conformed with that practice.[8] In other words, proof of a routine practice is relevant to demonstrate by inference conduct

[8] WISCONSIN STAT. § 904.06 provides:

> Habit; routine practice. (1) ADMISSIBILITY. Except as provided in s. 972.11(2), evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.
> (2) METHOD OF PROOF. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

on a particular occasion. Even where there is no corroborating evidence of conforming conduct on a particular occasion, evidence of habit or custom is nevertheless relevant because it makes more probable the fact that person acted in the particular manner. Any lack of evidence as to conduct on a particular occasion is a question of sufficiency. ***French v. Sorano***, 74 Wis. 2d 460, 466, 247 N.W.2d 182 (1976). Indeed, "this evidence often plays an important role during trial, since counsel will normally resort to it only in the absence of other evidence of the particular conduct sought to be proven through the … routine practice." 7 DANIEL D. BLINKA, WISCONSIN PRACTICE, § 406.1, at 139 (1991).

¶10 Kathy does not expressly argue that the trial court erred by considering habit evidence.[9] Rather, she essentially argues that the trial court drew the wrong inference, tacitly implying that the evidence of Kathy's trial attorney's common practice was insufficient to prove clearly and convincingly that

[9] Kathy does not contend that her former attorney's testimony was insufficient to establish habit. Moreover, neither party discusses whether "habit," referring to an individual's conduct, and "routine," applicable to organizations, connote the same thing.

> The cases and commentary discussing habit and routine practice use the terms in two different, sometimes conflicting ways. First, the narrow psychological denotation of habit describes something very like a classic conditioned response: a semi-automatic reaction repeated almost unvaryingly in the face of certain, specific circumstances. Second, a broader, probabilistic conception treats "habit" simply in terms of the frequency and specificity of the occurrence of an act. That is, the more often a person or organization has behaved in a certain way in a particular context, the more likely it is they will behave the same way when confronted with the same circumstances in the future.

7 DANIEL D. BLINKA, WISCONSIN PRACTICE, § 406.1, at § 138-39 (1991). Professor Blinka suggests that "where the issue involves the conduct of a specific individual, the psychological perspective should hold sway," ***id.*** at 139, to avoid impermissibly admitting character habit under the guise of "habit." In this instance, however, the trial court implicitly applied the second concept of the term. As indicated, Kathy does not challenge the definition the trial court used.

she had actual knowledge of her substitution right. Kathy, however, confuses the burden of proof at trial with the standard of review on appeal.

¶11 Although an action to terminate parental rights is civil, *see* ***In re J.A.B.***, 153 Wis. 2d 761, 765, 451 N.W.2d 799 (Ct. App. 1989), this court looks to a criminal case by analogy:

> Although the trier of fact must be convinced that the evidence presented at trial is sufficiently strong to exclude every reasonable hypothesis of the defendant's innocence in order to find guilt beyond a reasonable doubt, this court has stated that that rule is not the test on appeal.
>
> ….
>
> The test is not whether this court [is] convinced of the defendant's guilt beyond a reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true .... The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding. Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted ….

State v. Poellinger, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (citations omitted). Thus, this court "may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Id.*** at 501.

¶12 As indicated, the trier of fact determines the sufficiency of the evidence and the inferences to be drawn from the evidence. *See* ***Acme Equip. Corp. v. Montgomery Co-op. Creamery Ass'n***, 29 Wis. 2d 355, 363, 138 N.W.2d

729 (1966). Although the evidence of habit the trial court relied upon is circumstantial, "[i]t is well established that a finding of guilt may rest upon evidence that is entirely circumstantial and that circumstantial evidence is often times stronger and more satisfactory than direct evidence." ***Poellinger***, 153 Wis. 2d at 501-02. An appellate court, when faced with a record of historical facts that supports more than one inference, must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law. *See* ***id.*** at 506-07.[10] Kathy does not argue, let alone demonstrate, that the inference the trial court drew—that Kathy's attorney informed her of the substitution right—was incredible as a matter of law.[11] Therefore, her argument on this issue is without merit.

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[10] Kathy's brief is prefaced with an impassioned plea in support of her contention that before affirming,

> this court should be absolutely sure that the case was fully tried, and that Kathy was fully and effectively represented and that Kathy was fully and properly advised of her rights. If this court has even the beginning of an inkling of a doubt, the court should reverse this case for a new trial.

These are the only two sentences in Kathy's brief that suggest this court's standard of review. She offers no authority for the propositions that this court must reverse unless it is "absolutely sure" or if it has an incipient whisper of a doubt. While this court is acutely sensitive to the grave ramifications for the appellant that will result from an affirmance, it is nevertheless not free to abandon the applicable standards of review for those Kathy advances.

[11] Kathy suggests that the evidence shows that this case was "not handled by [Kathy's trial counsel] in the routine manner, because he had no prior notice of the case or the hearing, and only received the pleadings and met his client in the court at the time set for the Initial Appearance." According to the record, however, Kathy's attorney did not remember when, where or how long before the initial appearance he first met Kathy. Kathy rests her factual contention on the County's statement at the initial appearance that Kathy's attorney received a copy of the petitions when he appeared at the initial hearing and on her assertion by record citation, that Kathy's attorney "did not recall that Kathy was actually incarcerated in the Brown County jail at the time of [presumably, immediately prior to] the Initial Appearance." These circumstances do not compel the determination that Kathy's attorney did not advise her of her right to substitution in time to exercise the right. The trial court evidently reached the same unstated conclusion when it made its finding that Kathy was informed of the right.

2. Substantial Likelihood Conditions Will Be Met

¶13 Kathy contends that the County was required but utterly failed to prove that it was substantially likely that Kathy would not meet the conditions for the children's return "within the 12-month period following the fact-finding hearing." *See* WIS. STAT. § 48.415(2)(a)3 (twelve-month element). She asserts that the County's witnesses testified to the contrary; that she was making progress toward meeting the conditions, thwarted only by her various incarcerations for "unrelated matters." Kathy's brief recites testimony consistent with this position.[12] Finally, she argues that the twelve-month element was "extremely important" because the County pursued the TPR before the dispositional order expired, and Kathy was therefore not given a "fair chance" to comply with the conditions.

¶14 The County argues that it proved Kathy would likely not meet the dispositional order conditions within twelve months of the fact-finding hearing by demonstrating her past conduct.[13] It asserts, as the trial court concluded, that the jury could rely upon Kathy's past conduct as "a rational predictor of the future conduct." The County further contends that not only was it not required to offer expert opinion evidence on whether Kathy would likely meet the return conditions if given another year, but her past conduct is more compelling evidence on the issue than is an opinion. This court agrees.

[12] In addition to referring to the County's witness's testimony, Kathy also testified that her incarcerations would be complete one month after the trial, she had employment, and she believed she would have funds to rent an apartment. She also discussed her AODA and health concerns' progress. She indicated that she was now taking anti-depressant medication that assisted in addressing her AODA and other issues and also in complying with the return conditions.

[13] The County stated: "[E]very time [Kathy] was out of jail during the court order, she was violating the alcohol condition, was going into casinos, had no home and had sporadic employment."

¶15 Whether the evidence is sufficient to sustain a jury's verdict is a question of law. *See* ***State v. Tolliver***, 149 Wis. 2d 166, 174, 440 N.W.2d 571 (Ct. App. 1989). The allegations in the petition must be proved by clear and convincing evidence. *See* WIS. STAT. § 48.31(1). On appeal, this court must approve a jury's verdict if it is supported by credible evidence. *See* ***Giese v. Montgomery Ward, Inc.***, 111 Wis. 2d 392, 408, 331 N.W.2d 585 (1983). Additionally, the evidence must be viewed in a light most favorable to sustain the verdict. *See* ***York v. National Continental Ins. Co.***, 158 Wis. 2d 486, 493, 463 N.W.2d 364 (1990). Finally, the witnesses' credibility and the weight afforded the evidence are left to the province of the jury. *See* ***Fehring v. Republic Ins. Co.***, 118 Wis. 2d 299, 305, 347 N.W.2d 595 (1984), *rev'd on other grounds,* ***DeChant v. Monarch Life Ins. Co.***, 200 Wis. 2d 559, 547 N.W.2d 592 (1996).

¶16 This court is not persuaded that the twelve-month element was "extremely important." The County's timing in filing the TPR action did not imbue this element with special significance. It must be proved to the requisite burden of proof, like any other of the other applicable elements. Moreover, the filing is not material to whether there is evidence to sustain the jury's finding that it is substantially unlikely Kathy would meet the return conditions within one year of the TPR fact-finding hearing. Rather, it would be relevant to Kathy's failure to meet the dispositional order conditions as of the date of the fact-finding hearing, another element under WIS. STAT. § 48.415(2)(a)3. Kathy, however, does not contend on appeal that the evidence was insufficient as to this element. Her "timing" argument, therefore, provides no basis for relief.

¶17 Kathy's reply brief did not respond to the County's contentions that it could prove her likely future behavior by demonstrating her past conduct[14] and that it was therefore not required to present expert testimony. Arguments that are not refuted are deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Further, Kathy provides no authority for her tacit proposition that expert testimony regarding this element is required. This court declines to consider arguments that are not supported by citation to authority. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶18 Kathy's brief recites evidence that would support a different verdict from the one the jury returned. Applying the appropriate standard of review, however, the jury heard ample evidence from Kathy herself[15] from which it could find that she was substantially unlikely to comply with the dispositional order conditions within twelve months after the fact-finding hearing.

¶19 At the time the CHIPS order was granted, Kathy was advised that her failure to comply with the order's conditions could result in the termination of her parental rights. The dispositional order required Kathy to obtain and maintain suitable housing for herself and her children. Kathy testified that in the approximately eleven months from the CHIPS action commencement through the fact-finding hearing, she resided in an AODA treatment center, two motels in

[14] In similar contexts, our supreme court has recognized that past conduct may be a significant indicator of future behavior. *See* ***State v. Randall***, 192 Wis. 2d 800, 838, 532 N.W.2d 94 (1995); ***Larson v. Larson***, 30 Wis. 2d 291, 299-300, 140 N.W.2d 230 (1966).

[15] The County called Kathy as its first witness and presented eight other witnesses.

Green Bay, twice in the Outagamie jail, at her parents' house in Kaukauna, and in the Shawano and Brown County jails.

¶20 Various conditions required Kathy to address her dependency problems through evaluation, counseling, recommended follow-up and cooperation. Kathy testified that she was released from the treatment center with a diagnosis of alcohol and cocaine dependence and "pathological gambling." A later psychological evaluation confirmed this diagnosis. Upon Kathy's release, the treatment center recommended that she enter a halfway house. According to Kathy's testimony, she refused, opting for an intensive outpatient program as part of completing her treatment. Kathy was discharged from the program that same day because of a "relapse" involving a detrimental personal relationship. Kathy never returned to complete the program. Similarly, she did not comply with her social worker's and AODA case manager's renewed recommendation in September that she enter a halfway house. Kathy admitted during direct examination that she told them in a letter that there was nothing they could tell her that she did not already know. At this point in her examination, the County's counsel asked Kathy if she believed she already knows everything she needs to know, to which she replied, "Yes."

¶21 Three times during the periods Kathy was not incarcerated, she violated the condition of both the CHIPS order and her probation that she maintain absolute sobriety. When asked by her own attorney whether she believed she could maintain sobriety in the future, Kathy testified, "I can't really tell you that."

¶22 The psychologist who conducted the court-ordered psychological evaluation recommended that Kathy have a psychiatric consultation. Kathy testified that she did not follow this advice because she was then incarcerated.

Never during her testimony did she explain why she did not pursue a consultation when she was not incarcerated.[16] As a result of the evaluation, the psychologist also recommended individual psychotherapy. Kathy never pursued this because "there was never any appointment set up by my social worker."

¶23 The CHIPS order required Kathy to enroll in a domestic violence group at Golden House and remain in its programming until successfully discharged. Kathy testified that her social worker took her to the Golden House to enroll. Rather than enter counseling at the Golden House, however, Kathy unilaterally participated in a different program without confirming with her social worker that the alternative she chose was an appropriate substitute. When the County's attorney asked Kathy why she did not enter the Golden House, Kathy replied, "Because when [her social worker] brought me to the Golden [House], they talked about abuse and stuff like that, and I believe control wasn't abuse. I was taking up space." The CHIPS order notwithstanding, Kathy testified that she did not think she needed the Golden House program.

¶24 When Kathy was incarcerated, her social worker attempted to facilitate communication by providing Kathy with self-addressed envelopes. Kathy changed the address on a number of them and used them to correspond with her fiancée.

¶25 Finally, while Kathy admitted that she had "a lot of room for improvement," she nevertheless believed the department was working against her and her children and had been "from the beginning."

[16] Kathy did indicate that while in jail she consulted with a psychiatrist regarding an unrelated concern, thus establishing that incarceration was not necessarily an impediment to following the recommendation.

¶26 The jury heard evidence regarding what Kathy characterizes as her progress and was instructed to consider *all* the evidence in determining whether she would likely satisfy the conditions within twelve months. Kathy's testimony, however, was by itself more than sufficient to support the jury's finding that her comportment under the threat of termination demonstrated a substantial likelihood that she would not comply with the various conditions within twelve months after the fact-finding hearing.

3. Due Process Right To Present Defense—Expert Witness

¶27 Kathy sought to present a psychologist's opinion testimony that if she were to continue her therapy, employment and medication, she could meet the dispositional order conditions. This evidence was first disclosed during the fact-finding hearing. The principal theme in the psychologist's written report, prepared at the trial court's direction, is stated in its last paragraph:

> The task before [Kathy] is significant. However, if Ms. C. maintains her current program—counseling, medication support, and employment—there is good reason to operate on the premise that she can overcome past disappointments. And while her character has attitudes which are not complimentary, her progress through short-term and circumscribed cognitive and interpersonal therapy techniques may be quite successful.

After an offer of proof, the trial court determined that the evidence could not be presented.

¶28 Kathy contends that she "had a constitutional right to defend herself against the government's taking of her children."[17] From this proposition, lacking

[17] Kathy argues: "In these cases, TPR actions affecting Kathy C.'s most fundamental constitutional rights to be a mother to her natural children, the court erred at a fundamental constitutional level."

the benefit of supporting authority, *see* ***M.C.I., Inc.***, 146 Wis. 2d at 244-45, Kathy attempts to draw the right to present a defense[18] in a criminal case into the TPR setting. The constitutional right to present evidence is, however, grounded in the confrontation and compulsory process clauses of art. I, § 7, of the Wisconsin Constitution and the Sixth Amendment to the United States Constitution. *See* ***Washington v. Texas***, 388 U.S. 14, 17-19 (1967); ***State v. Pulizzano***, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). Article I, § 7, provides in pertinent part: "DECLARATION OF RIGHTS ... Rights of accused. … In all criminal prosecutions the accused shall enjoy the right ... to meet the witnesses face to face [and] to have compulsory process to compel the attendance of witnesses in his behalf …."

¶29 The Sixth Amendment provides in material part: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor ...." These constitutional provisions by their plain terms apply to criminal cases. As indicated, termination cases are civil. *See* ***J.A.B.***, 153 Wis. 2d at 765. Kathy's observation concerning the fundamental rights inherent in the relationship between a parent and child is not, by itself, sufficient to establish a right to present a defense under art. I, § 7, and the Sixth Amendment.

¶30 The admission of evidence is a decision left to the discretion of the circuit court. *See* ***Michael R.B. v. State***, 175 Wis. 2d 713, 723, 499 N.W.2d 641 (1993). The circuit court properly exercises discretion if it applies the facts of

[18] *See, e.g.,* ***State v. Pulizzano***, 155 Wis. 2d 633, 456 N.W.2d 325 (1990).

record to accepted legal standards. *See* ***State v. Kuntz***, 160 Wis. 2d 722, 745, 467 N.W.2d 531 (1991).

¶31 The function of expert testimony at trial is to "assist the jury when the issue to be decided requires an analysis that would be difficult for the ordinary person in the community." ***State v. Blair***, 164 Wis. 2d 64, 75, 474 N.W.2d 566 (Ct. App. 1991).

¶32 The trial court relied upon several bases for not admitting the expert's opinion. It considered the effect of the late disclosure on the County and guardian ad litem's "ability to properly prepare." It noted that WIS. STAT. § 904.03 permits exclusion of relevant evidence that is confusing, misleading or cumulative. In applying this rule, it determined that the expert's opinion had marginal probative value in that it did not assist the jury. The trial court stated that the evidence constituted nothing more than

> common sense that … if Ms. C. continues her therapy and if she would continue in employment and if she would continue in supportive medications that then she could meet the conditions of the order twelve months from now … this jury does not need an expert to tell them that … his testimony would not at all be helpful to the jury ….[19]

A review of the report led the trial court to conclude that the psychologist's proffered opinion was unrelated to any expertise but, rather, was based only on an

[19] The County's brief cuts to the heart of it: The opinion

> was a mere tautology. [The] report states that if "Ms. C. continues with her therapy, her employment and her supportive medication … she can meet the conditions of the CHIPS petition." … Thus [the expert's] opinion was essentially "if Ms. C. completes the conditions in the CHIPS order, then Ms. C. will have completed the conditions in the CHIPS order."

assumption of future events. The trial court was thus concerned that the jury might be misled by "cloaking [common-sense testimony] in the aura of an expert," which it deemed "inappropriate." The events the expert relied upon were in the record, and Kathy points to nothing in the offer of proof to demonstrate that the expert was in a better position to apply them to the element in question than was the jury. This court concludes that the trial court properly exercised its discretion in rejecting the psychologist's testimony.

4. Ineffective Assistance of Counsel

¶33 Kathy contends that her trial attorney's performance was ineffective for two reasons. First, he had "absolutely no coherent or logical or rational strategy of defense …." He "completely failed to present the most overwhelmingly reasonable and logical defense" by failing to inform the jury that it could find that Kathy would comply with the return conditions within one year. Second, Kathy's attorney mishandled the defense psychologist's evidence in a variety of ways.

¶34 Kathy's trial counsel was appointed by the state public defender. An indigent parent has a statutory right to effective assistance of counsel in TPR proceedings. *See* ***In re M.D.(S.)***, 168 Wis. 2d 995, 1002, 485 N.W.2d 52 (1992). This court employs the standards that are applicable in criminal cases, *see* ***id.*** at 1005, and thus addresses two components in determining whether an attorney's actions constitute ineffective assistance. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The first issue is whether trial counsel's performance was deficient. *See* ***State v. Littrup***, 164 Wis. 2d 120, 135, 473 N.W.2d 164 (Ct. App. 1991). If counsel's performance is deficient, the court then determines whether the deficient performance was prejudicial. *See* ***id.*** at 135. If

the parent fails to meet either the deficient performance or prejudicial component of the test, the other component is not addressed. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶35 Deficient performance requires a showing that counsel's representation fell below the objective standard of reasonableness. *See* ***Littrup***, 164 Wis. 2d at 135. Without intending an implication in the case at hand, counsel need not be perfect, or even very good, to be constitutionally adequate. *See* ***State v. Williquette***, 180 Wis. 2d 589, 605, 510 N.W.2d 708 (Ct. App. 1993). The required test is that counsel be "adequate." *See* ***id.*** Adequate counsel does not mean "the best counsel that might have tried the case, nor the best defense that might have been presented." *See* ***id.***

¶36 We review an attorney's performance with great deference. The burden is upon the party asserting ineffectiveness to overcome the strong presumption that counsel acted reasonably. *See* ***State v. Brunette***, 220 Wis. 2d 431, 446, 583 N.W.2d 174 (Ct. App. 1998). Strategic decisions, in particular, are virtually unassailable. *See* ***Strickland v. Washington***, 466 U.S. 668, 690 (1985).

¶37 The parent must further show that any deficiencies were so prejudicial that they deprived him or her of a trial whose result is reliable. *See* ***State v. DeKeyser***, 221 Wis. 2d 435, 442, 585 N.W.2d 668 (Ct. App. 1998).

¶38 Whether trial counsel provided ineffective assistance is a mixed question of law and fact. *See* ***State v. Johnson***, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986). The trial court's determination concerning the circumstances of the case and counsel's conduct and strategy are factual matters that will be upheld unless clearly erroneous. *See* ***State v. Kalk***, 2000 WI App 62 ¶12, 234 Wis. 2d 98, 608 N.W.2d 428. Whether the attorney's conduct constituted

ineffective assistance, however, is a question of law that this court decides de novo. *See* ***Johnson***, 133 Wis. 2d at 216.

¶39 Kathy first argues that her trial attorney never once examined any witness or made any argument to the jury concerning Kathy's likely future compliance with the return conditions.[20] She faults her attorney for not cross-examining the County's witnesses on this issue when "every witness testified that Kathy was doing everything she could to comply." Kathy concedes, however, that her attorney testified at the ***Machner*** hearing that one of his strategies was to show that Kathy had sufficiently complied with the return conditions.[21] He further testified to his belief that suggesting Kathy could meet the conditions in another year was strategically inconsistent with the contention that she *had* met the conditions.

¶40 Kathy essentially questions whether her trial attorney in fact pursued the strategy he identified and, in any event, criticizes her attorney's failure to choose a different one, *i.e.*, arguing that Kathy would be able to meet the return conditions within one year. Her arguments notwithstanding, the trial court found that Kathy's attorney made a strategic decision to focus on the contention that she had met the conditions rather than present what the attorney considered to be a contradictory defense. The trial court heard the attorney's testimony and determined credibility and weight. Kathy has not demonstrated that the trial

[20] This is one of several occasions where Kathy's brief indulges in hyperbole by overstating the facts or the record. As the County notes, Kathy's attorney addressed this issue with her during her examination.

[21] He also testified, and the record demonstrates, that he attempted to persuade the jury that the County had not met its obligation to make reasonable efforts to assist Kathy in meeting the conditions. *See* WIS. STAT. § 48.415(2)(a)2b.

court's finding regarding strategy was clearly erroneous. Because this court deems the chosen and "virtually unassailable" strategy reasonable, this court concludes that trial counsel's conduct was not deficient.

¶41 Kathy also criticizes several different aspects of the way her trial attorney handled the defense's proffered expert testimony. All of her arguments, however, ultimately go to the expert opinion admissibility. Because the trial court properly excluded the opinion, as discussed above, Kathy was not prejudiced by her trial attorney's handling of the evidence.[22] This court therefore concludes that Kathy was not denied effective assistance of counsel.

5. Interest Of Justice

¶42 Kathy finally argues that this court should reverse the termination orders in the interest of justice pursuant to WIS. STAT. § 752.35.[23] An appellate court may exercise its power of discretionary reversal where the real controversy has not been fully tried. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 28-29, 496 N.W.2d 96 (Ct. App. 1992). This discretion to reverse, however, should be exercised only

[22] Kathy argues that her trial attorney was deficient in part because he did not promote the evidence in a manner that would have convinced the court to admit it. She does not, however, address the court's reasoning regarding relevancy under the proper standard of review.

[23] WISCONSIN STAT. § 752.35, entitled "DISCRETIONARY REVERSAL", provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

in exceptional cases. *See* ***State v. Betterley***, 183 Wis. 2d 165, 178, 515 N.W.2d 911 (Ct. App. 1994).

¶43 The crux of Kathy's argument is that there was significant evidence that she had made substantial progress "in getting her life together," and, therefore, "this case screamed out for a defense based upon the theory that Kathy could comply with the conditions given an additional year." As this court interprets it, Kathy's position resolves into a request for a new trial to advance a defense that in hindsight she now prefers. This court will not reverse to enable an alternative defense to be advanced at a new trial merely because the theory presented at first trial proved ineffective. *See* ***Hubanks***, 173 Wis. 2d at 29.

¶44 Moreover, Kathy does not raise an "exceptional reason" to grant a new trial. Despite her protestations, the issue of her future progress was squarely before the jury. The trial court instructed on the element, telling the jury to consider *all* of the evidence as it pertained to that verdict question. Kathy testified that because she was now taking medication, she believed she would meet the return conditions in the following year. Finally, in arguing above that her trial counsel was ineffective, Kathy did not demonstrate that the strategy was unreasonable.

¶45 Indeed, despite Kathy's view, her own testimony severely compromised the "12-month element" defense. In advancing her interest of justice argument, Kathy highlights the evidence favorable to her while virtually ignoring the damaging testimony. Without regard to what the other witnesses testified to, Kathy herself admitted failures to follow conditions and recommendations, believing herself to be in a superior position to direct her

recovery.[24] She testified that she did not know if she could maintain sobriety. She questioned the department's commitment to helping her. Put in this context, and combined with the other evidence concerning Kathy's history and needs, it seems unlikely the jury would find that she possessed the insight and judgment necessary to successfully meet the conditions. Accordingly, there is no basis before this court upon which to order a new trial in the interest of justice.

By the Court.—Orders affirmed.

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

[24] The Golden House did not provide the counseling she needed. At least as to her AODA problems, Kathy knew everything there was to know.