COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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.

Appeal Nos. 2010AP2248
2010AP2249

Cir. Ct. Nos. 2007TP19
2007TP20

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

NO. 2010AP2248
IN RE THE TERMINATION OF PARENTAL RIGHTS TO EXSAVON A. J., A PERSON UNDER THE AGE OF 18:

WALWORTH COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ROBERTA J. W.,

RESPONDENT-APPELLANT.

NO. 2010AP2249
IN RE THE TERMINATION OF PARENTAL RIGHTS TO DORRAJ J. J., A PERSON UNDER THE AGE OF 18:

WALWORTH COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ROBERTA J. W.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Reversed and cause remanded with directions.*

¶1 ANDERSON, J.[1] Roberta J. W. appeals from orders terminating her parental rights to her children, Exsavon and Dorraj, and from the order denying her motion for posttermination relief.[2] Roberta argues that she was denied her due process right to a neutral and impartial magistrate because, during Roberta's trial, the judge actively involved himself in the questioning of witnesses and the flow of evidence.[3] After review of the record and trial transcripts, we agree with Roberta and remand this case for a new trial.

¶2 In May 2007, Walworth County filed petitions to terminate Roberta's parental rights to her children, Dorraj and Exsavon. As grounds, the

---

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Roberta filed notices of appeal on September 7, 2010. The two appeals were consolidated by order of this court and, on November 9, 2010, Roberta's motion for remand to the trial court was granted. Roberta then filed a posttermination motion in the trial court. On January 20, 2011, following an evidentiary ***Machner*** hearing, the trial court denied her posttermination motion in its entirety. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[3] Roberta also argues that she was denied her due process right to a neutral and impartial magistrate because during *pretrial* the judge actively involved himself in the questioning of witnesses and the flow of evidence. We need not address this argument. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) ("As one sufficient ground for support of the judgment has been declared, there is no need to discuss the others urged.").

County alleged that, under WIS. STAT. § 48.415(2), the children were in continued need of protection or services. The original CHIPS orders had been entered in June 2005. Around this time, Roberta moved to Racine county, and pursuant to Walworth County's request, Racine county provided courtesy supervision. In June 2006, Roberta gave birth to another child, Philtarion, and Racine county successfully initiated a CHIPS petition as to Philtarion. Roberta's initial TPR trial in the current case was held in front of Judge John Race. By orders entered in February 2008, Roberta's parental rights to Dorraj and Exsavon were terminated. Roberta appealed, and in an opinion filed on November 12, 2008, this court reversed the orders and remanded to the trial court with directions for a new trial.

¶3 A bench trial, presided over by Judge Robert Kennedy, began on April 20, 2010. Walworth County presented a number of witnesses in support of its position that Roberta had not yet gained an adequate understanding of personal boundaries and had not consistently put her children's needs first. The County also contended that Roberta would not meet these conditions within the next twelve months. Roberta presented a number of witnesses in support of her theory that as to all conditions she had either met them by the time of trial or would meet them within the next twelve months.

¶4 During the trial, the trial judge asked countless questions of the witnesses and interjected numerous times. The County called Roberta adversely as its first witness in its case-in-chief. Roberta's testimony spans over 100 pages on this first day of trial. The judge interjects in some fashion on 95 of the 104 pages of the transcript of Roberta's testimony.

¶5 During direct testimony of Roberta's former case manager, Penny Nevicosi, the judge engaged in the following exchange, eventually prompting the guardian ad litem (GAL) to lodge a strident objection:

> [Judge]: Excuse me, from your, from your expertise and training, is it a good thing or a bad thing for a child of tender years to have to be the one that tries to comfort a parent, rather than vice-versa?
>
> [Nevicosi]: I would say that's a bad thing.
>
> [Judge]: And if a parent gets herself or himself in a situation where a child has to come over and try and calm and make the parent feel better and that child is, you know, two, three, four years of age type of thing, a parent who allows that to happen is—is that parent putting her child's or his child's needs first?
>
> [Nevicosi]: No.
>
> [Judge]: Did you explain to her that that was not—that was not only something she shouldn't do in front of the child, but that she was forcing the child to try and be her comforter, and that that was a very poor role model?
>
> [Nevicosi]: Yes.…

¶6 The judge continued to engage is this sort of questioning several more times, interrupting and asking lengthy questions purporting to summarize Nevicosi's testimony. At which point the GAL lodged his objection, "want[ing] to make a record right now" that "on five occasions today" the judge was abusing his function and was not being fair to Roberta:

> [GAL]: Judge, if I may, I want to make a record right now.
>
> Five times today you've done what you just did. And every time you've done it, I don't mean to make light of it, but I was a great fan of the "Rumpole of the Bailey" series when Rumpole, the audience would be able to hear what was going on in his mind when he's talking about what his lordship was doing up on the bench. And I've thought of

> Rumpole of the Bailey five times today, thinking to myself, snidely: Thanks, judge, that was very helpful.
>
> [Judge]: I appreciate it. I'm a big reader of Rumpole of the Bailey, and I have also felt as I read that I agreed with him 100 percent about how his honor was abusing his function and was not being fair to the defense. Having said that, I don't think I'm doing that sort of thing. I may be. But I don't think so.
>
> [GAL]: I'm telling you I have felt so on five occasions today.
>
> [Judge]: And I will continue to do it if I need to make sure that the record—that I've understood what a witness has testified to. It's a procedure I use.
>
> By the way, I do it in favor of one side or the other. If you will look carefully over the record of the last couple of days, a number of times I have asked witnesses in regards to things that I think the correct interpretation of what they were saying was actually favorable to Roberta. And that's what I do too.
>
> If, if the testimony I've heard means X, Y and Z and it's favorable and I restate the testimony to make sure that's what you said, and they said "That's what I said" and that's favorable to Roberta, that's good too. I'm an impartial guy in that regard.
>
> I want to know what the witness testified to. I do not want to push it in any direction. So that's where I differ from the famous judges in that fictional character's books, at least as I see it.

¶7 Lisa Dess was the investigating Milwaukee county social worker who participated in the removal of Philtarion from Roberta in January 2010. As the County was asking questions about the safety plan developed for Roberta, the trial judge interjected, putting into the mouth of Dess his own negative characterization of Roberta's housing situation. In essence, the trial judge, rather than letting the witness testify to her opinion, interrupted to say that Roberta, by her own "misjudgments and misconduct," is the only one to blame for whatever housing misfortune she faced:

> I think I understand what you two have been talking about. Basically, you're saying she had a Racine residence, did—may or may not have had some problems, but it was safer than the various places she ended up going and the way she ended up doing things.
>
> And that it would have been much safer for her to have stayed in the Racine residence through December as she arranged an alternative residence rather than going to places like the shelter cares, much less the Word of God.
>
> And that also, when she went to these various places, she did things that got herself forced out of there, into another shelter care, and then into a very inappropriate location—well, into the lobby of Sinai, and then an inappropriate location, and so on.
>
> In other words, what I think you were saying is, her whole line of steps that were forced upon her were forced upon her by misjudgments and misconduct by herself.

¶8 After this characterization, the judge asked Dess, "Did I say that right or did I—is there—am I missing what you're saying?" Dess responded, "Basically you're correct." The court then asked whether there was "any substantial error" in his "outline" of what he thought Dess was saying. Dess responded that she "[did not] believe so."

¶9 Continuing its direct examination of Dess, the County elicited testimony from Dess stating that when she first met Roberta, she was "stranded" at a grocery store with Philtarion. Later, on cross-examination, defense counsel tried to normalize and contextualize the incident only to again have the judge interject and take the wind out of the defense's case. After defense counsel elicited from Dess that Roberta had actually been grocery shopping and had grocery bags with her during their encounter, the judge interrupted and asked whether Roberta told Dess why she had chosen a grocery store "so far away" and whether Dess had asked Roberta how she got there in the first place. Defense counsel, responding to the judge's remarks, elicited from Dess that Milwaukee in fact "has a pretty

extensive bus system" and that it "wouldn't have taken long" to get from the house to that particular grocery store by bus. But again, the judge acted as advocate, attempting to impeach Roberta's credibility through Dess: "Can I ask you this? From that—you know something about Milwaukee. Are there grocery stores a little closer than five miles away?"

¶10 In a similar manner, the judge put words and characterizations into Danielle Harkness's mouth, the in-home therapist hired to supervise the weekly visitations between Roberta and her children. In fact, Harkness herself congratulated the judge, saying "[v]ery nicely put" after the judge made what he called a "[k]ey point" favoring the County's position:

> [Judge]: I'm going to interrupt, because there's one thing I've just got to get before I forget it. Um, you said you avoided topics, meaning you would avoid the topics about, "Hey listen, [Roberta], um, you were—you really didn't have this thing prepared, things didn't go right. Now, shouldn't you give more time to reflect and …"
>
> [Harkness]: Uh-huh.
>
> [Judge]: —"and make sure these things are all set before the children get here so things like this don't happen?" But you're saying, in effect, you noticed those, but you didn't dare touch on those topics or when you did, you got this hot tempered, angry response; and so you stayed away from them?
>
> [Harkness]: Yes.
>
> [Judge]: Okay. Key point.
>
> [Harkness]: Very nicely put.
>
> [Judge]: I'll take the congratulations and go on.

¶11 And when the County resumed its questioning, the judge again interrupted to make sure the County did not "miss out on something important" by

not continuing to elicit testimony from Harkness on the "narrative line of negatives" that Harkness was testifying to:

> [Judge]: Wait. I appreciate that's a good question, but the witness was on a narrative line of negatives that she saw. We didn't like the narrative; however, that doesn't mean the court doesn't want to hear the rest of the negatives, or positives, for that matter, if there are more.
>
> [The County]: I—I can—
>
> [Judge]: And I'd appreciate it if we would finish that topic—
>
> [Harkness]: Okay.
>
> [Judge]: —first instead of possibly missing out on something important.
>
> [Harkness]: Okay.
>
> [County then asks the witness]
>
> [County]: Were there some more negative—negatives that you saw with Roberta?
>
> [Judge]: And that's just a "yes" or "no" right now.
>
> [Harkness]: The impulsiveness is what I was talking about. For—
>
> [Judge]: Is that a "yes" or a "no"?
>
> ….
>
> [Judge]: All right. Now we're back at this. One question at a time obviously, but a question was asked, and you didn't answer the question. You started off at an explanation of the question. Do you know what I mean?
>
> [Harkness]: (Nods head.)
>
> [Judge]: Okay.
>
> [Harkness]: Yes.
>
> [Judge]: Try that question again.
>
> [The County] Is there another negative characteristic?

> [Judge]: "Yes" or "no"?
>
> [The Witness]: Yes.
>
> [The County]: And what is that characteristic?
>
> [Harkness]: Impulsiveness.
>
> [Judge]: Any other besides impulsive, hot tempered, and the, um, things barely coming together, and the late things for Christmas, and the gift holding out? Any other negative factors besides those that you had mentioned?
>
> [Harkness]: The perception that she is a victim.
>
> [Judge]: And I'm going to just take charge for a moment. Any others besides that?
>
> [Harkness]: Not that I can think of at this time.
>
> [Judge]: Now, you can proceed to your next question.
>
> [The County]: Thank you.

¶12 Then during defense counsel's cross-examination of Harkness, the judge again interrupted, adding his own characterizations to Harkness's testimony. Harkness had testified about some conflict she witnessed at a visit over a birthday cake. On cross-examination, defense counsel attempted to mitigate this testimony by eliciting from the witness the reason why Roberta had thrown away some food. The judge interjected, "Well, wait a moment. Did she explain to the children why she was throwing away the food?" Harkness answered "no" and the judge continued on:

> [Judge]: So the child would see her throwing away food and wouldn't know why, right?
>
> [Harkness]: Most likely they didn't know why.
>
> [Judge]: So if a child then chose to throw away food it didn't want, it would have seen a message of how to, you know, handle excess food that it didn't want and would follow the same instructions only to have the mother get upset, right?

> [Harkness]: Yes, that's—that's logical.
>
> [Judge]: And that's the inconsistency. It's not so much her throwing away the food as not explaining well to the child a reason why the child's action should be distinguished from her own, right?
>
> [Harkness]: Correct.
>
> [Judge]: And the children would have been, you think, old enough at this time to have reasonably understood such an explanation?
>
> [Harkness]: Yes.
>
> [Judge]: But she didn't give it?
>
> [Harkness]: No.
>
> [Judge]: Okay. Proceed.
>
> [Defense Counsel]: I don't have any other questions.

¶13 Similarly, the judge interjected during another witness's defense friendly testimony and turned it on its head. During Roberta's cross-examination of Marian Dorsz, a visitation supervisor in 2007, defense counsel elicited that at times Roberta's apartment was clean and safe. The judge then interrupted stating that what Dorsz meant to imply was that Roberta had later stopped keeping her apartment clean:

> [Judge]: And sorry, I know I'm interrupting, but I'm sitting there saying you said at the beginning the apartment was sometimes cleaned—sometimes clean, but the implication of that is that later on, she stopped doing that. Is that what you were saying?
>
> [Dorsz]: Yes.

¶14 On the last day of trial, during Roberta's testimony in her case-in-chief, the judge continued to engage in similar defense-busting questioning. Significantly, during the County's cross-examination, Roberta was asked when she last spoke with her prospective mentor, Beverly Moore, and whether she spoke

with her by phone or in person. At this point, the judge interrupted, asking Roberta for the mentor's phone number so that he could have his clerk call the mentor and "just confirm" that Roberta had spoken to her.

> [Judge]: What's her telephone number?
>
> [Roberta]: It's stored in my cell phone which is in my purse.
>
> [Judge]: Okay. Would you go get it for me?
>
> [Roberta]: Yes. It's [a phone number is provided on the record].
>
> [Judge]: Would you have any objection to me having my clerk call her and just confirm that you talked to her about possibly mentoring you?
>
> [Roberta]: I do not mind.

The judge, in trying to explain away this attempt to impeach Roberta, in effect admitted that impeachment was exactly what he was trying to do: "I asked [Roberta] that question to see how she would respond. I did not actually intend to make the phone call."

¶15 The parties made their respective closing arguments, with the County arguing in favor of an unfitness finding and Roberta arguing against.

¶16 The GAL supported Roberta's position and asked the court to find that Roberta had met the conditions of return for her children. He urged the court to believe the testimony of the Racine county witnesses over that of the Walworth County witnesses, noting that "it is almost an accident that venue lies in [Walworth] County" given that "[a]ll of the connections are with Racine County and that's where supervision took place." He expressed frustration, pointing out to the court the "disconnect" between how Roberta's case was handled with the two counties involved:

> I have sat through four days of evidence. I'm going to cut to the chase. If Your Honor believes the evidence given by Racine County workers then I believe that Roberta will win. If Your Honor believes the testimony of Walworth County witnesses then Roberta will lose. There is a disconnect here that is apparent.

¶17 Judge Kennedy gave an oral opinion and ultimately found Roberta unfit. The dispositional hearing took place on May 25, 2010, also in front of Judge Kennedy. Judge Kennedy found that termination of Roberta's parental rights was in both children's best interests.

¶18 By order entered November 9, 2010, this court retained jurisdiction over Roberta's appeal but ordered remand to the trial court to permit fact-finding. Roberta filed a posttermination motion, which was heard on December 16, 2010, and January 13, 2011. At the first date of the hearing, the parties and Judge Kennedy addressed Roberta's claim that Judge Kennedy erroneously denied her request for judicial substitution. At the second date of the hearing, appellate counsel called trial counsel to testify about his strategy in regard to the judicial questioning at trial.[4] Before trial counsel testified, the judge explained why he believed there was no judicial bias in the trial proceedings. Trial counsel testified that he had reviewed the trial transcripts and did not have a strategic reason for not objecting to the judge's questioning of witnesses at trial. Trial counsel testified that he agreed with the GAL's objection:

[4] At the posttermination hearing, the judge expressed some confusion over why Roberta had raised a claim of ineffective assistance of counsel. Appellate counsel explained that she was only trying to make a record to avoid any claim of waiver in the court of appeals. The judge did not believe that waiver was an issue, in large part because the GAL had objected at trial and because the judge had already found there was no judicial bias. Nonetheless, the judge permitted Roberta to question trial counsel and to make a record.

> I would say that I agreed with Attorney Wilson's objection; and then, yes, um, I don't know if there was any specific question whether I thought that's incredibly objectionable, but I think in sum, they had become very objectionable. And so, yes, I agree with the objection.

¶19 The judge questioned defense counsel at the ***Machner*** hearing. ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). When asked at what point he came to the conclusion that the "judge was somehow violating … Roberta's rights," defense counsel stated:

> I can't identify a particular moment. That question has been put to me before, and I can't point to a single question and say, "At this point, I feel that I absolutely should have objected." I think I agree with the way Attorney Wilson characterized the objection, and that's that it felt as though we could see your Honor's thoughts and the way your Honor was questioning the witnesses; and then when we looked at all of the questions that your Honor had asked, it seemed that you had your mind made up in some sense already.

Finally, when asked specifically whether he felt that the questions of the trial judge showed bias against Roberta, Roberta's defense counsel answered in the affirmative:

> [Judge]: Counsel, did you—as you went through this trial, before [the GAL] objected, did you feel that the questions of the court showed a bias against your client?
>
> [Defense Counsel]: I did, but I can't point to a specific question. I could only say that when you look at all of the questions that were, um, listed by Attorney Cerone, that—that that appeared to me to be true.

¶20 The judge found that defense counsel was not ineffective for failing to object to the judge's questioning of witnesses and that the issue of judicial bias was not waived. The judge explained that the GAL made a timely judicial bias objection, which he overruled and Roberta's counsel was "certainly not required to

repeat an objection" which had already been made by one of the parties to the action and overruled.

¶21 The judge denied Roberta's motion, ruled that he was not biased and issued a written decision explaining "why on certain court trials it will question witnesses."

> Well, my ruling is I simply was not biased, and I did not show bias. It was not my intent to show bias.

¶22 Roberta appeals.

¶23 The opinions of our appellate courts are replete with precatory admonitions that trial judges must not function as partisans or advocates or engage in excessive examination. *See* ***State v. Carprue***, 2004 WI 111, ¶44, 274 Wis. 2d 656, 683 N.W.2d 31. In reversing a conviction in which a trial judge crossed the line of propriety, our supreme court recently explained that the trial judge "must not permit [himself or herself] to become a witness or an advocate for one party. A defendant does not receive a full and fair evidentiary hearing when the role of the prosecutor is played by the judge and the assistant district attorney is reduced to a bystander." ***State v. Jiles***, 2003 WI 66, ¶39, 262 Wis. 2d 457, 663 N.W.2d 798.

¶24 The right to an impartial judge is fundamental to our notion of due process. ***Franklin v. McCaughtry***, 398 F.3d 955, 959 (7th Cir. 2005); ***State v. Washington***, 83 Wis. 2d 808, 833, 266 N.W.2d 597 (1978). We presume a judge has acted fairly, impartially, and without bias; however, this presumption is rebuttable. ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. When evaluating whether a defendant has rebutted the presumption in favor of the judge's impartiality, we generally apply two tests, one subjective

and one objective. ***State v. Rochelt***, 165 Wis. 2d 373, 378, 477 N.W.2d 659 (Ct. App. 1991). Roberta does not attempt to argue the judge was subjectively biased. Therefore, we need only determine whether the judge was objectively biased.

¶25 Objective bias can exist in two situations. The first is where there is the appearance of bias. ***Gudgeon***, 295 Wis. 2d 189, ¶¶23-24. "[T]he appearance of bias offends constitutional due process principles whenever a reasonable person—taking into consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances." ***Id.***, ¶24 (citation omitted). Thus, the appearance of partiality constitutes objective bias when a reasonable person could question the judge's impartiality based on the judge's statements. ***Id.***, ¶26; *see also* ***Rochelt***, 165 Wis. 2d at 378. The second form of objective bias occurs where there are objective facts demonstrating the trial judge in fact treated the defendant unfairly. ***State v. McBride***, 187 Wis. 2d 409, 416, 523 N.W.2d 106 (Ct. App. 1994). Roberta argues both forms of objective bias are present here.

¶26 While a trial judge is permitted to exercise his or her discretion and ask questions during the course of a trial, this discretion "should be most carefully exercised," and the judge's questions must not betray bias or prejudice or bespeak a mind made up.[5] ***Carprue***, 274 Wis. 2d 656, ¶40. Accordingly, while a trial

[5] WISCONSIN STAT. § 906.14 is titled "Calling and interrogation of witnesses by judge." It reads:

> **(1)** CALLING BY JUDGE. The judge may, on the judge's own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.
>
> **(2)** INTERROGATION BY JUDGE. The judge may interrogate witnesses, whether called by the judge or by a party.

(continued)

judge should be permitted to ask questions in order to clarify material lines of inquiry, he or she must not cross the "fine line" into the appearance of partisanship. ***Id.***, ¶¶41-42.

¶27 Again, one of the most fundamental rights of an accused is the right to a fair trial by an impartial tribunal. *See* ***Franklin***, 398 F.3d at 959; ***Washington***, 83 Wis. 2d at 833. Even in cases tried to the bench, such as Roberta's, the risk of usurping the function of trial counsel certainly exists. *See* ***United States v. Cassiagnol***, 420 F.2d 868, 878 (4th Cir. 1970). In general, it is the quality rather than the quantity of judicial involvement in questioning witnesses that determines whether reversible error has occurred, but often the greater the involvement, the higher the likelihood that the judge is effectively usurping the role of counsel, which calls for reversal. *See, e.g.*, ***United States v. Hickman***, 592 F.2d 931 (6th cir. 1979) (convictions reversed on appeal because trial judge interjected himself in proceedings more than 250 times; constant

---

> **(3)** OBJECTIONS. Objections to the calling of witnesses by the judge or to interrogation by the judge may be made at the time or at the next available opportunity when the jury is not present.

In substance, this rule is identical to RULE 614 of the FEDERAL RULES OF EVIDENCE. FED. R. EVID. 614. It is also based upon Wisconsin case law. WIS. STAT. ANN. § 906.14 (West 2000).

Under subsection (1), a judge may call witnesses on his or her own motion. There are no explicit limitations to this power, but limitations are implied by Wisconsin court decisions. The Judicial Council Committee's Note to subsection (1) reads in part: "It is expected that this authority will be used only in the exceptional case."

Subsection (3) of WIS. STAT. § 906.14 authorizes objections and it "defers the requirement of a timely objection ... to the next available opportunity when the jury is not present." This subsection appears to focus more on situations where the judge questions witnesses in front of a jury than where a judge questions a witness in a bench trial or outside the presence of a jury.

interruptions frustrated defense, infringed right of cross-examination; judge intimated disbelief in defense story).

¶28 "[A] conviction should be reversed when the appellate court is satisfied from the record that the trial judge prejudged the case before hearing all the evidence." ***Cassiagnol***, 420 F.2d at 878.

¶29 This court is so satisfied.

¶30 The County makes many arguments, none of which persuade us to affirm. We note that its reliance on ***Carprue*** is misplaced. If anything, ***Carprue*** aids Roberta's argument. There, our supreme court engaged in a comprehensive discussion explaining why the practice of judicial interrogation is a dangerous one which will lead to a new trial being granted if the trial judge abuses this discretion. *See* ***Carprue***, 274 Wis. 2d. 656, ¶43, and *see generally* ***id.***, ¶¶41-47. Further, while the supreme court in ***Carprue*** did not grant a new trial, its decision was predicated on its finding that Carprue waived the claim of judicial bias because he had failed to timely object. ***Id.***, ¶¶46-47, 69. In fact the supreme court specifically explained that "if Carprue had objected, [the judge] would likely have altered her conduct or taken the opportunity to more fully explain her actions…. Since Carprue did not object, any error by the court went unchecked." ***Id***, ¶45.

¶31 Unlike in ***Carprue***, here, we do not have waiver. The GAL properly raised an objection regarding judicial bias. And we agree with the trial judge that the issue of judicial bias need not have been raised again by defense counsel to preserve it.

¶32 That established, we grant a new trial, noting that even though the trial judge faced a strong objection to his unfair conduct by the GAL, he made no

effort to alter his objectionable conduct. The record reveals that the trial judge in fact doggedly carried on with partiality. During Roberta's trial, the judge exhaustively interrogated her. During Roberta's adverse testimony, the transcript reveals the judge's questioning and interjections on 95 of the 104 pages of trial transcript. Similarly, the judge questioned numerous other witnesses extensively. The judge's posttermination explanation that it was simply attempting to clarify the evidence in its role as a fact finder does not account for the improper role the judge played in Roberta's trial.

¶33 To be clear, the judge's lack of detachment is demonstrated not merely by the quantity of questions he asked, but by the nature of many of his questions. We agree with Roberta that contrary to the judge's opinion that he was merely attempting to clarify by "restat[ing] the testimony," the judge's questions and supposed clarifications too often put words into the witnesses' mouths and revealed a bias against Roberta. The judge, at several points during testimony, *and before Roberta had completed her case,* gave indication that he had already decided the case adversely to Roberta. *See* ***id.***, ¶40.

¶34 Most disturbing to this court are the occasions the judge interrupted witness testimony in a plain attempt to impeach Roberta's credibility: first, on cross-examination, when Roberta stated when she last spoke to her prospective mentor, the judge interrupted—by his own admission "to see how [Roberta] would respond"—and asked Roberta for the mentor's phone number so, he said, he could have his clerk call the mentor; second, when the judge called into question Roberta's explanation that she was grocery shopping at a store "so far away." Impeaching witness credibility is counsel's role and not the role of the trial judge.

¶35 The trial judge's pervasive quantitative involvement coupled with its qualitative questioning led to the judge effectively usurping the role of counsel. The record reflects not only the appearance of judicial bias, it is sated with evidence that the judge predetermined Roberta's case before it was fully presented. This violated Roberta's right to a fair trial by an impartial tribunal. Because of this due process violation, we conclude that the termination of Roberta's parental rights to her two children cannot stand and we remand for a new trial.

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

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