

APPENDIX

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**COURT OF APPEALS
DECISION
DATED AND FILED**

August 10, 2021

Sheila T. Reiff
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 No. 2020AP982
STATE OF WISCONSIN**

Cir. Ct. No. 2018TP20

**IN COURT OF APPEALS
DISTRICT III**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO D. N. B., A PERSON UNDER
THE AGE OF 18:**

DOUGLAS COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

D. B.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Douglas County:
KELLY J. THIMM, Judge. *Affirmed.*

¶1 STARK, P.J.¹ In this termination of parental rights (“TPR”) action, the Douglas County Department of Health and Human Services (“the County”) filed a petition to terminate David’s parental rights to his son, Dylan,² based on two grounds: continuing need of protection or services (“continuing CHIPS”), *see* WIS. STAT. § 48.415(2); and failure to assume parental responsibility, *see* § 48.415(6). The jury found that both grounds existed, and the circuit court subsequently entered a dispositional order terminating David’s parental rights. David then filed a motion for postdisposition relief, which the court denied.

¶2 David now appeals, arguing that his trial attorney was constitutionally ineffective by: (1) failing to argue that the application of the amended version of the continuing CHIPS statute, WIS. STAT. § 48.415(2), in the TPR proceedings against David violated David’s right to due process; (2) failing to introduce evidence at the grounds trial regarding additional visits that occurred between David and Dylan; and (3) failing to object to testimony during the grounds trial about Dylan’s negative reactions to David during certain supervised visits. David also argues the evidence was insufficient to support a finding that he was notified of the potential grounds for termination of his parental rights, as required by § 48.415(2)(a)1., because the notice he received referred to the elements set forth in the prior version of the continuing CHIPS statute, rather than the amended version.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2019-20). All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

² For ease of reading, we refer to the parent and child in this confidential matter using pseudonyms, rather than their initials.

¶3 Based on our supreme court's recent decision in *Eau Claire County Department of Human Services v. S.E.*, 2021 WI 56, 397 Wis. 2d 462, 960 N.W.2d 391, we conclude David's attorney was not ineffective by failing to argue that the application of the amended version of the continuing CHIPS statute violated David's right to due process.³ We also conclude that even if David's attorney performed deficiently by failing to introduce evidence of the additional visits and by failing to object to testimony about Dylan's negative reactions to David, David has failed to show that those alleged errors prejudiced his defense. Finally, we conclude the evidence was sufficient to establish that David was notified of the potential grounds for termination of his parental rights, as required by WIS. STAT. § 48.415(2)(a)1. We therefore affirm.

BACKGROUND

¶4 Dylan was born in November 2015. He was removed from his parents' care on May 6, 2016, when he was approximately six months old. About two and one-half weeks later, he was placed in a foster home in Greenwood, Wisconsin.

¶5 On July 22, 2016, Dylan was adjudicated to be a child in need of protection or services ("CHIPS") based on neglect. The CHIPS dispositional order continued Dylan's placement in the Greenwood foster home and listed conditions that both parents were required to meet in order to have Dylan returned to their care. The dispositional order further admonished the parents:

³ On January 12, 2021, we placed this appeal on hold pending our supreme court's decision in *Eau Claire County Department of Human Services v. S.E.*, 2021 WI 56, 397 Wis. 2d 462, 960 N.W.2d 391. That decision was released on June 10, 2021.

Your parental rights can be terminated against your will under certain circumstances. A list of potential grounds to terminate your parental rights is given below. Those that are check-marked may be most applicable to you, although you should be aware that if any of the others also exist now or in the future, your parental rights can be taken from you.

Below this warning, three grounds for termination were checked: abandonment, continuing CHIPS, and failure to assume parental responsibility.

¶6 At the time the CHIPS dispositional order was entered, the continuing CHIPS ground for termination of an individual's parental rights required the petitioner to prove, among other things, that

the child has been outside the home for a cumulative total period of 6 months or longer ... and that the parent has failed to meet the conditions established for 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 9-month period following the fact-finding hearing under s. 48.424 [i.e., the hearing to determine whether grounds exist to terminate the parent's parental rights]*.

WIS. STAT. § 48.415(2)(a)3. (2015-16) (emphasis added). Consistent with the 2015-16 version of the statute, the summary of the continuing CHIPS ground in the July 22, 2016 dispositional order informed David that his parental rights could be terminated if he failed to meet the conditions for Dylan's return to his home and there was "a substantial likelihood that you will not meet these conditions within the 9-month period following the fact-finding hearing under § 48.424, Wis. Stats."

¶7 WISCONSIN STAT. § 48.415(2)(a)3. was subsequently amended, effective April 6, 2018. *See* 2017 Wis. Act 256, § 1. As relevant here, under the

amended version of the statute, a petitioner seeking to establish the continuing CHIPS ground must prove that

the child has been placed outside the home for a cumulative total period of 6 months or longer ...; that the parent has failed to meet the conditions established for the safe return of the child to the home; *and, if the child has been placed outside the home for less than 15 of the most recent 22 months, that there is a substantial likelihood that the parent will not meet these conditions as of the date on which the child will have been placed outside the home for 15 of the most recent 22 months.*

Sec. 48.415(2)(a)3. (emphasis added).

¶8 Thus, the amended version of WIS. STAT. § 48.415(2)(a)3. “reconfigur[ed] the timeframe within which the factfinder may consider the likelihood of the parent meeting the court-ordered conditions.” *S.E.*, 397 Wis. 2d 462, ¶19. The old version of the statute required the factfinder to “look forward nine months from the date of the TPR fact[-]finding hearing to determine whether the parent had a ‘substantial likelihood’ of meeting the conditions established for the safe return of [the] child,” regardless of how much time the child had spent outside the parent’s home. *Id.*, ¶18. Under the amended version, however, the legislature

replaced the forward-looking nine-month period with a “15 of the most recent 22 months” timeframe. Only if the child has been placed outside the home for less than 15 of the most recent 22 months may the factfinder consider whether there “is a substantial likelihood that the parent will not meet [the] conditions as of the date on which the child will have been placed outside the home for 15 of the most recent 22 months.”

Id., ¶19.

¶9 On November 30, 2018—over seven months after the amended version of WIS. STAT. § 48.415(2)(a)3. went into effect—the County filed a petition for termination of David’s parental rights to Dylan.⁴ At that point, Dylan was nearly three years old and had been placed outside of his parents’ homes for approximately two years and six months. As grounds for the termination of David’s parental rights, the TPR petition alleged both continuing CHIPS and failure to assume parental responsibility. With respect to the continuing CHIPS ground, the petition asserted that the amended version of § 48.415(2)(a)3. applied and that because Dylan had been placed outside the home for more than fifteen months, the County was “not obligated to prove any substantial likelihood that [David] will not meet the Conditions for Safe Return in the future.”

¶10 A jury trial in the grounds phase of the TPR proceedings took place on August 26, 2019.⁵ At trial, the jury heard the testimony of Catherine Krause, the initial assessment social worker who was assigned to Dylan’s case after he was removed from his parents’ care on May 6, 2016. Krause explained that she typically remains involved in a CHIPS case until a dispositional order is entered, which in this case occurred on June 22, 2016. Krause testified that during the time she was assigned to Dylan’s case, she offered David multiple opportunities to visit Dylan, each of which David refused.

⁴ The County’s petition also sought to terminate Dylan’s mother’s parental rights. However, the termination of the mother’s parental rights is not at issue in this appeal, and we therefore do not address it further.

⁵ See *S.E.*, 397 Wis.2d 462, ¶11 n.9 (explaining that TPR proceedings involve a two-step process comprised of a fact-finding hearing to determine whether grounds exist to terminate the parent’s rights, followed by a dispositional hearing during which the circuit court determines whether a termination of the parent’s rights is in the child’s best interests).

¶11 The jury also heard the testimony of Mia Piikkila, who had previously been employed by the County as a social worker and who was assigned to Dylan's case after Krause. Piikkila testified that as of September 18, 2018, the County had offered David seventy-six visits with Dylan, but David had kept only thirty-two of those visits. Stated differently, Piikkila testified that as of September 2018, David had missed fifty-seven percent of his scheduled visits with Dylan. During its closing argument, the County emphasized David's poor record of keeping his scheduled visits with Dylan, arguing it showed that David had failed to assume parental responsibility.

¶12 The County also presented evidence during the grounds trial regarding Dylan's negative reactions to David during certain supervised visits. Ashley Kantonen, who had previously been employed as a social worker for the County, testified that she supervised a visit between Dylan and David on March 20, 2019. According to Kantonen, Dylan "was very hesitant on going with [David]" at the beginning of that visit and "was having a really hard time letting go of [his foster mother's] hand." Kantonen testified that Dylan only let go of his foster mother's hand and went with David after his foster mother promised him that she was going to stay in the same building. Kantonen also testified that there were "difficulties" during the ensuing visit because Dylan "wanted to go back to [his foster mother]."

¶13 Katlyn Frye, a social services aide employed by the County, testified that she supervised a visit between Dylan and David in October 2018. Frye testified that at the beginning of that visit, Dylan "did not want to take his father's hand to go back to the room and he was crying and screaming for a brief period." Frye subsequently clarified that Dylan cried and screamed for about half of the one-hour visit. Frye also testified that during a supervised visit on July 2, 2019,

Dylan “did not want to go to the visit. He had locked the car door several times, refused to unbuckle his seatbelt, and tried running to the front of the van to continue locking doors.” According to Frye, that behavior continued for over fifteen minutes.

¶14 The jury ultimately found that the County had established both of the alleged grounds for termination of David’s parental rights—continuing CHIPS and failure to assume parental responsibility. Following a dispositional hearing, the circuit court found that the termination of David’s parental rights would be in Dylan’s best interest, and on October 11, 2019, the court entered an order involuntarily terminating David’s parental rights.

¶15 David moved for postdisposition relief, arguing that his trial attorney was ineffective in numerous respects. As relevant to this appeal, David argued his trial attorney was ineffective by failing to argue that application of the amended version of the continuing CHIPS ground to David without proper notice violated David’s right to due process; by failing to introduce evidence of additional visits between David and Dylan; and by failing to object to Kantonen’s and Frye’s testimony about Dylan’s negative reactions to David during certain supervised visits.

¶16 The circuit court held a hearing on David’s motion, during which David introduced evidence that he had participated in additional visits with Dylan, beyond those described by the County’s witnesses during the grounds trial. Specifically, David’s mother testified that from Dylan’s birth until the day he was removed by the County, he spent eighty percent of his time at her home. She testified that David was “basically living with” her during that time period and provided the majority of Dylan’s care. David’s mother also testified that between

the time Dylan was removed in May 2016 and the summer of 2017, he had at least twelve overnight visits at her home, the longest of which lasted eight or nine days. She testified that David was present and provided care for Dylan during those visits.

¶17 The parties also stipulated during the postdisposition hearing that between February 28, 2019, and August 20, 2019, David had supervised visits with Dylan eleven times and saw him on one additional occasion following a court hearing. The parties further stipulated that David missed two visits without excuse during the month before the grounds trial, but he “did not have any other unexcused absences during that period of time.”

¶18 The circuit court denied David’s motion for postdisposition relief in an oral ruling, concluding that his trial attorney’s performance was neither deficient nor prejudicial. David now appeals.

DISCUSSION

I. Ineffective assistance of counsel

¶19 A parent in a TPR action has the right to the 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 determine whether a parent received ineffective assistance, we apply the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Nicole W.*, 299 Wis. 2d 637, ¶33.

¶20 To establish ineffective assistance under the *Strickland* test, a parent must demonstrate both that his or her attorney performed deficiently and that the deficient performance prejudiced the parent’s defense. *Nicole W.*, 299 Wis. 2d 637, ¶33. To establish deficient performance, the parent must show that counsel’s

performance fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687-88. To establish prejudice, the parent must show that there is a reasonable probability—that is, a probability sufficient to undermine confidence in the outcome—that the result of the proceeding would have been different absent counsel’s errors. *See id.* at 694. If a parent fails to make a sufficient showing on one prong of the *Strickland* test, we need not address the other. *See id.* at 697.

¶21 Whether an attorney rendered ineffective assistance is a mixed question of fact and law. *State v. Nielsen*, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. We will uphold the circuit court’s findings of fact unless they are clearly erroneous. *Id.* However, whether the facts are sufficient to establish ineffective assistance is a question of law that we review independently. *Id.*

A. Failure to object to the application of the amended continuing CHIPS statute

¶22 As noted above, the CHIPS dispositional order in this case was entered on July 22, 2016, before WIS. STAT. § 48.415(2)—the statute containing the continuing CHIPS ground for termination of parental rights—was amended. In its notice of the potential grounds for termination of David’s parental rights, the dispositional order therefore referred to the 2015-16 version of § 48.415(2), which was in effect at the time. As such, the dispositional order informed David that his rights could be terminated under the continuing CHIPS ground if, among other things, the County proved there was a substantial likelihood that David would not meet the conditions for Dylan’s safe return to his home “within the 9-month period following the fact-finding hearing” in the grounds phase of a TPR proceeding. *See* WIS. STAT. § 48.415(2)(a)3. (2015-16).

¶23 The continuing CHIPS statute was subsequently amended, however, and the amended version was in effect when the County filed its petition to terminate David's parental rights in November 2018. In the TPR petition, the County affirmatively alleged that the amended version of the statute applied and that it was therefore not required to prove a substantial likelihood that David would not meet the conditions for Dylan's safe return in the future. David's trial attorney did not dispute that the amended version of the statute applied. Moreover, undisputed evidence at the grounds trial established that Dylan had been placed outside of David's home for more than fifteen out of the most recent twenty-two months. Accordingly, under the amended version of the continuing CHIPS statute, the jury was not asked to determine whether there was a substantial likelihood that David would meet the conditions for Dylan's safe return to his home in the future. Instead, the jury was simply asked whether David "[h]as ... failed to meet the conditions established for the safe return of [Dylan] to his home." See WIS. STAT. § 48.415(2)(a)3. The jury answered that question in the affirmative.

¶24 David now contends his trial attorney was ineffective by failing to argue that the application of the amended continuing CHIPS statute to him violated his right to due process. However, his argument in that regard is foreclosed by our supreme court's recent decision in *S.E.*

¶25 The facts of *S.E.* are nearly identical to those in this case. In *S.E.*, Tyler was removed from the care of his mother, Sophie, in June 2016. *S.E.*, 397 Wis. 2d 462, ¶6. In August 2016, he was found to be a child in need of protection or services. *Id.* The August 2016 CHIPS dispositional order notified Sophie that her parental rights could be terminated and identified continuing CHIPS as a possible ground for termination. *Id.*, ¶7. In describing the continuing CHIPS

ground, the dispositional order referred to the elements that existed under the 2015-16 version of WIS. STAT. § 48.415(2). *S.E.*, 397 Wis. 2d 462, ¶7. Thus, the dispositional order informed Sophie that “the factfinder at a TPR trial would need to determine that there was a ‘substantial likelihood’ [she] would not meet the conditions established for the safe return of the child to the home within the nine-month period following the date of trial.” *Id.*

¶26 The continuing CHIPS statute was then amended in April 2018, eliminating “any prospective consideration of the likelihood the parent would meet the conditions for the safe return of the child to the home if the child had already been placed outside the parent’s home for at least ‘15 of the most recent 22 months.’” *Id.*, ¶9. In June 2018, Eau Claire County moved to terminate Sophie’s parental rights based on abandonment, and in September 2018, the County amended its petition to add continuing CHIPS as a ground for termination. *Id.*, ¶10. In October 2018, the circuit court entered another CHIPS order, which again identified continuing CHIPS as a potential ground for the termination of Sophie’s parental rights, but this time it referenced the elements in the amended version of the continuing CHIPS statute. *Id.*

¶27 Prior to the grounds trial in the TPR proceedings, the parties disputed whether the 2015-16 version of the continuing CHIPS statute or the amended version should apply to Sophie’s case. *Id.*, ¶11. The circuit court concluded that the amended version applied, and that the “15 out of 22 months” time frame in the amended statute “began to run in 2016 when Sophie received the original CHIPS order and written notice.” *Id.*

¶28 On appeal, Sophie argued that the “15 out of 22 months” time frame in the amended statute began to run “only after [she] received written notice of the

amended version of” the continuing CHIPS statute. *Id.*, ¶13. Our supreme court rejected Sophie’s argument, concluding the time frame began to run when Sophie received the original CHIPS dispositional order in 2016, even though that order referred to the nine-month time frame under the prior version of the continuing CHIPS statute. *Id.*, ¶¶20, 41. The court noted that WIS. STAT. § 48.356(1) and (2) “require circuit courts to provide parents with oral and written notice, respectively, of any ‘grounds for termination of parental rights under [WIS. STAT. §] 48.415 which may be applicable.’” *S.E.*, 397 Wis. 2d 462, ¶21 (quoting § 48.356(1); emphasis in *S.E.*). The continuing CHIPS ground, in turn, requires the petitioner to prove that the child has been adjudged to be in need of protection or services and has been placed outside the home “pursuant to one or more court orders ... containing the notice required by § 48.356(2).” *S.E.*, 397 Wis. 2d 462, ¶21 (quoting § 48.415(2)(a)1.; emphasis in *S.E.*).

¶29 Based on these statutes, the *S.E.* court held that a circuit court need only provide notice of those grounds that *may be applicable* in a future TPR proceeding. *Id.*, ¶24. “At the time a circuit court places a child outside the home or continues the child’s out-of-home placement, the circuit court must give the parent notice of the grounds that may form the basis for a future TPR hearing—at the particular time the notice is given.” *Id.* A court is not required to provide notice of grounds that *will be* applicable in a future TPR proceeding, only those that *may be* applicable. *Id.*, ¶25.

¶30 The supreme court therefore rejected Sophie’s argument that, in order for the County to initiate TPR proceedings against her based on the amended continuing CHIPS ground, “she would first need to receive TPR warnings, in her CHIPS proceedings, reflecting the amended statutory grounds.” *Id.*, ¶26. The court explained:

In August 2016, after the circuit court found Tyler to be a child in need of protection or services, Sophie received written notice that she could lose her parental rights. The notice identified both the TPR ground “which may be applicable” to Sophie—continuing CHIPS—and its three applicable sub-parts. Sophie’s initial CHIPS order referenced the prior version of WIS. STAT. § 48.415(2)(a)3. (2015-16), because that was the version in effect at the time the circuit court gave Sophie the TPR warnings. The CHIPS statute, WIS. STAT. § 48.356, requires only that Sophie receive notice of those TPR grounds “which may be applicable” to her and that is, in fact, the notice she received. Accordingly, the first sub-part of the continuing CHIPS ground for terminating Sophie’s parental rights was satisfied because the CHIPS orders “contain[ed] the notice required by s. 48.356(2)” as mandated by § 48.415(2)(a)1.

S.E., 397 Wis. 2d 462, ¶26.

¶31 The supreme court further concluded it was “of no import” that the legislature amended the continuing CHIPS statute in 2018 “because there is no dispute that each time Sophie received TPR warnings, the circuit court orders contained the requisite notice under WIS. STAT. § 48.356(2)—namely, any grounds for termination of parental rights ‘which may be applicable’ to Sophie at the time the warnings were given.” *S.E.*, 397 Wis. 2d 462, ¶27. The court continued:

Moreover, the statutorily-required warnings contemplate that different grounds may form the basis for a TPR action and the parent is forewarned of this. Sophie’s notice needed to identify only the grounds for termination that existed at the time of the initial CHIPS order. Sophie’s notice did just that: it included all three sub-parts of continuing CHIPS in effect in 2016—the grounds for termination of her parental rights “which may be applicable” in a future TPR proceeding. The dispositional order underscores the potential for different grounds supporting a future TPR proceeding by cautioning the parent to “be aware that if any of the other[] [grounds] exist now or in the future, your parental rights can be taken from

you.” Accordingly, Sophie was put on notice that different grounds could support a TPR action against her.

Id.

¶32 The supreme court also rejected Sophie’s argument that starting the “15 out of 22 months” time frame in 2016 when she received the original CHIPS order referencing the prior version of the continuing CHIPS statute would violate her right to due process. *Id.*, ¶31. First, the court concluded the amended statute had “no retroactive effect as applied to Sophie’s case,” as it neither created a new obligation nor imposed a new duty with respect to past conduct. *Id.*, ¶35. The court emphasized that, both before and after the amendment, Sophie was on notice that: “(1) her parental rights were at risk if she failed to meet the conditions established for Tyler’s safe return to her home, and (2) the [County] was legally obligated to file a TPR petition should she fail to meet those conditions within 15 months of Tyler’s out-of-home placement.” *Id.*, ¶36.

¶33 Second, the court concluded the application of the amended statute to Sophie did not violate her right to due process by depriving her of her constitutionally protected right to parent her child without “fair notice.” *Id.*, ¶37. In support of her argument in that regard, Sophie relied on *State v. Patricia A.P.*, 195 Wis. 2d 855, 537 N.W.2d 47 (Ct. App. 1995), for the proposition that a due process violation occurs “any time a court terminates parental rights for conduct different than the conduct described in the notice.” *S.E.*, 397 Wis. 2d 462, ¶37. However, the *S.E.* court explained that *Patricia A.P.* stands for the narrower proposition that the state applies a fundamentally unfair procedure when it warns a parent that his or her rights to a child may be terminated based on the parent’s future conduct, but it then substantially changes the *type of conduct* that may lead to the loss of rights without notice to the parent. *S.E.*, 397 Wis. 2d 462, ¶38. The

court reasoned that the 2018 amendment to the continuing CHIPS statute did no such thing, as it did not substantially change the type of conduct leading to the termination of a parent's rights. *Id.*, ¶39. Instead, “[u]nder both the prior and amended versions of the statute, the past conduct of the parent triggering the TPR petition remains the same: the parent has failed to meet the conditions established for the safe return of the child to the home.” *Id.*

¶34 *S.E.* defeats David's argument that the application of the amended continuing CHIPS statute in his case violated his right to due process. As in *S.E.*, a CHIPS dispositional order was entered in this case that warned David that his parental rights could be terminated, and that continuing CHIPS was one of the potential grounds for termination. Like the dispositional order in *S.E.*, the dispositional order in this case was entered before the continuing CHIPS statute was amended, and it therefore referenced the elements of the continuing CHIPS ground that existed under the 2015-16 version of the statute. In both cases, TPR petitions were later filed after the continuing CHIPS statute had been amended to include the “15 out of 22 months” time frame. In *S.E.*, the supreme court concluded that applying the amended version of the continuing CHIPS statute to Sophie—and, specifically, beginning the “15 out of 22 months” time frame when Sophie received the original CHIPS dispositional order—was appropriate and did not violate Sophie's right to due process. *S.E.* therefore compels a conclusion that, in this case, the application of the amended continuing CHIPS statute did not violate David's right to due process, even though the CHIPS dispositional order referred to the elements of continuing CHIPS that existed under the prior version of the statute.

¶35 David argues that *S.E.* is distinguishable because “Sophie's CHIPS dispositional order was eventually amended to give her notice of the statutory

change,” but in David’s case “that amendment never happened.” While David is correct that this factual distinction between the two cases exists, we agree with the County that it is a distinction without a difference.

¶36 The supreme court’s decision in *S.E.* did not rest on the fact that Sophie’s CHIPS dispositional order was eventually amended (after the TPR petition had been filed) to include the elements of the continuing CHIPS ground set forth in the amended version of statute. Instead, the court concluded that the notice provided by the original CHIPS order—which referenced the 2015-16 version of the statute—was sufficient because that order was merely required to notify Sophie of the grounds for termination that “may be applicable” in a future TPR proceeding. *S.E.*, 397 Wis. 2d 462, ¶26. The court further concluded that applying the amended version of the statute to Sophie did not violate her right to due process because the amended statute did not create any new obligation or impose a new duty with respect to past conduct, nor did it substantially change the type of conduct that could lead to the loss of Sophie’s parental rights. *Id.*, ¶¶35, 39. Although the court mentioned in passing that Sophie’s CHIPS dispositional order had been updated to reference the amended statute after the TPR petition was filed, none of the court’s substantive conclusions relied on that fact.

¶37 Under *S.E.*, any argument that the application of the amended continuing CHIPS statute to David violated his right to due process would have been meritless. An attorney is not ineffective for failing to raise a meritless issue. *State v. Wheat*, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (“Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit.”); *State v. Simpson*, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (a defendant is not prejudiced by counsel’s failure to make a motion that would have been denied). Accordingly, David’s trial

attorney was not constitutionally ineffective by failing to argue that the application of the amended continuing CHIPS statute to David violated his right to due process.

B. Failure to introduce evidence regarding additional visits

¶38 As noted above, David also argues that his trial attorney was ineffective during the grounds trial by failing to introduce evidence regarding additional visits that David had with Dylan, beyond those testified to by the County's witnesses. We need not address whether counsel performed deficiently in this respect, as we conclude David has failed to establish prejudice. As explained below, David has failed to show that it is reasonably probable the jury would have reached a different verdict on the continuing CHIPS ground had his attorney introduced evidence about the additional visits. As such, David has failed to establish a reasonable probability that the result of the TPR proceeding would have been different absent counsel's alleged error.⁶

¶39 In order to establish the continuing CHIPS ground, the County was required to prove three elements: (1) that Dylan was adjudged to be a child in

⁶ As noted above, the jury found that the County had established two grounds for termination of David's parental rights: continuing CHIPS and failure to assume parental responsibility. In order to prevail on its TPR petition, however, the County only needed to establish a single ground for termination. We conclude the alleged errors by David's trial attorney were not prejudicial as to the continuing CHIPS ground. Later in this opinion, we also reject David's argument that the County's evidence was insufficient to support the jury's verdict on the continuing CHIPS ground. We therefore need not address whether counsel's alleged errors were prejudicial as to the failure to assume parental responsibility ground. Even if it were reasonably probable that the jury would have reached a different verdict on the failure to assume parental responsibility ground absent counsel's alleged errors, it is not reasonably probable that the jury would have reached a different verdict on the continuing CHIPS ground. Thus, it is not reasonably probable that the overall result of the TPR proceeding would have been different absent counsel's alleged errors.

need of protection or services and was placed outside his home for six months or longer pursuant to a court order containing the notice required by WIS. STAT. § 48.356(2); (2) that the County made a reasonable effort to provide the services ordered by the court; and (3) that David failed to meet the conditions established for the safe return of Dylan to his home. *See* WIS. STAT. § 48.415(2)(a); WIS JI—CHILDREN 324 (2021).

¶40 David does not argue that evidence regarding his additional visits with Dylan had any relevance to the first or third elements of the continuing CHIPS ground. As to the second element, however, David argues that if evidence about the additional visits had been introduced at the grounds trial, it is reasonably probable that the jury would not have found that the County made a reasonable effort to provide the services ordered by the court in the CHIPS dispositional order. David asserts that the visits in his mother's home during the early part of Dylan's life ended abruptly after his parents were denied a foster care license, and he then "had far fewer opportunities to care for his son and struggled to take advantage of the ones he had." David claims there was "no evidence in the record that the [County] timed its services or altered them to deal with this change in circumstances."

¶41 David also argues that evidence about the visits that occurred during the six months before trial would have strengthened his case as to whether the County made reasonable efforts by showing that his visit record dramatically improved after he completed residential drug treatment. He contends that the introduction of evidence about those visits would have allowed him to argue that "if [the County] had gotten him into treatment sooner, he would have met [the] conditions [for Dylan's return] sooner."

¶42 David's arguments regarding the likelihood of a different result on the reasonable efforts element of the continuing CHIPS ground are speculative and largely undeveloped.⁷ David does not point to any evidence in the record substantiating his assertion that he had fewer opportunities to visit Dylan after his parents' foster care license was denied. In addition, while David asserts he "struggled to take advantage of" subsequent opportunities for visits, he does not explain why that was the case. He does not, for instance, cite any evidence that it became more difficult for him, logistically, to participate in visits with Dylan after the visits at his parents' home ceased. Although David baldly asserts that the County should have "altered" its services after the visits at his parents' home ended, he does not explain what additional or different services he believes the County should have provided, nor does he cite any evidence showing that the County's services during the relevant time period were inadequate. Moreover, David does not cite any evidence showing that he requested, but was denied, additional visits with Dylan after the visits at his parents' home ended.

¶43 David's argument that the later visits show a lack of the County's reasonable efforts by demonstrating that the County should have gotten him into drug treatment sooner is similarly speculative. David does not cite any evidence that the County could have, but failed, to get him into drug treatment sooner than it did. And while David asserts he "specifically objected to the timing of drug treatment" during the grounds trial, the pages of the transcript that he cites do not

⁷ At the grounds trial, the County bore the burden of establishing each element of the continuing CHIPS ground by clear and convincing evidence. *See S.-G. v. S.-G.*, 194 Wis. 2d 365, 378, 533 N.W.2d 794 (1995). On appeal, however, it is David's burden to prove that he was prejudiced by counsel's alleged errors. *See Oneida Cnty. Dep't of Soc. Servs. v. Nicole W.*, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652.

support that assertion. Instead, at the cited pages, Piikkila testified that “pretty early on in the case” she had referred David to Nystrom & Associates for an AODA assessment, which identified “a substance abuse issue.” Piikkila testified that after the assessment was completed, she and David had “ongoing” conversations about “what he would need to do to ... help rectify those concerns.” She explained, however, that David failed to “follow through” on the recommendations set forth in the assessment. She testified that she and David had “a lot of conversations about needing to call” and “[n]eeding to schedule those appointments,” but David failed to do so.

¶44 On this record, we cannot conclude it is reasonably probable that the jury would have reached a different result on the continuing CHIPS ground had David’s trial attorney introduced evidence about the additional visits. David’s argument that the additional visits would have shown that the County failed to make reasonable efforts to provide the required services during the middle part of the CHIPS case is speculative and unsupported by citations to evidence in the record. Under these circumstances, David has failed to meet his burden to establish that he was prejudiced by counsel’s failure to introduce evidence regarding the additional visits.

C. Failure to object to testimony about Dylan’s negative reactions to David during certain supervised visits

¶45 David also argues that his trial attorney was ineffective by failing to object to Kantonen’s and Frye’s testimony about Dylan’s negative reactions to him during certain supervised visits. He contends that testimony was inadmissible because it had no probative value as to either of the alleged TPR grounds. He also contends that any minimal probative value the testimony may have had was outweighed by the danger of unfair prejudice, as the testimony improperly invited

the jury to consider Dylan's best interests. *See Door Cnty. Dep't of Health & Fam. Servs. v. Scott S.*, 230 Wis. 2d 460, 468, 602 N.W.2d 167 (Ct. App. 1999) (stating "the best interests standard is confined to the dispositional phase, and ... at the [grounds] stage, the best interests of the child are not to be considered"); *see also* WIS JI—CHILDREN 301 (2015) (instructing jurors that "[c]onsideration of the best interests of the child is a matter for the court in proceedings which will be conducted in the future; it is not a consideration for the jury").

¶46 Again, we need not determine whether David's trial attorney performed deficiently by failing to object to the testimony in question. Instead, we conclude it is not reasonably probable that the jury would have reached a different result on the continuing CHIPS ground had counsel objected to, and succeeded in excluding, that testimony.

¶47 The County produced strong evidence on each of the three elements of the continuing CHIPS ground. As to the first element, the County was required to show that Dylan was adjudged to be a child in need of protection or services and was placed outside his home for six months or longer pursuant to a court order containing the notice required by WIS. STAT. § 48.356(2). *See* WIS. STAT. § 48.415(2)(a)1., 3. To satisfy that element, the County relied on the July 22, 2016 CHIPS dispositional order. The County also introduced undisputed evidence that Dylan had been placed outside of David's home for more than six months. Based on that evidence, the parties stipulated that the first element of the continuing CHIPS ground had been satisfied, and the circuit court answered "yes" to the relevant question on the special verdict form. As we discuss in greater detail in the next section of this opinion, the County's uncontroverted evidence was sufficient to establish the first element of the continuing CHIPS ground.

¶48 As to the second element, the County was required to prove that it made a reasonable effort to provide the services ordered by the court. *See* WIS. STAT. § 48.415(2)(a)2.b. The term “reasonable effort” means “an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child ..., the level of cooperation of the parent ... and other relevant circumstances of the case.” Sec. 48.415(2)(a)2.a.

¶49 The County presented evidence at the grounds trial that it: offered David visits with Dylan; arranged to transport David to those visits; arranged for an AODA assessment; attempted to assist David in obtaining treatment for his substance abuse issues; provided drug testing; and provided David with information about an organization that helped him to obtain housing. The County’s witnesses also testified as to the difficulty they had in obtaining David’s cooperation with some of the services that they attempted to provide. Piikkila conceded that the County had not made a referral for David to complete a parenting skills course, as required by the CHIPS dispositional order. She explained, however, that the County refers parents for that service when they are “30 days or closer to reunification,” and David never reached that point due to his failure to comply with other required conditions.

¶50 Piikkila also testified that she had attended multiple permanency plan hearings during the CHIPS case, and in each of those hearings the court made a finding that the County had made reasonable efforts to achieve the goals of the permanency plan, one of which was reunification. Piikkila further testified that a parent has an opportunity to inform the court during a permanency plan hearing that he or she needs additional help from the County and to assert that the County is not making reasonable efforts to achieve the goals of the permanency plan.

Piikkila testified that David did not raise any issue regarding reasonable efforts in any of the permanency plan hearings that she attended. On this record, there was ample evidence from which the jury could conclude that the County made reasonable efforts to provide the services required by the CHIPS dispositional order.

¶51 Finally, to prove the third element of the continuing CHIPS ground, the County was required to show that David had failed to meet the conditions in the CHIPS dispositional order for Dylan's safe return to his home. *See* WIS. STAT. § 48.415(2)(a)3. Again, the County presented ample evidence to satisfy this element. Most importantly, the dispositional order required David to "[o]btain and maintain safe and stable housing for at least a six month period." Undisputed testimony at the grounds trial established that David had repeatedly refused to allow the County to access his home to determine compliance with that condition. Undisputed evidence also showed that David had failed to maintain weekly contact with the social worker assigned to the case, as required by the dispositional order.

¶52 Given the ample evidence that the County presented regarding each element of the continuing CHIPS ground, it is not reasonably probable that the jury would have reached a different result on that ground had David's attorney objected to the testimony about Dylan's negative reactions to David during certain supervised visits. The evidence about Dylan's reactions was simply not relevant to the continuing CHIPS ground, as it did not tend to prove or disprove any element of that ground. David asserts the admission of the evidence nevertheless prejudiced him because it improperly "focus[ed] the jury's attention on the wishes and best interests of the child," which created a "risk" that the jury "would consider those things instead of the actual requirements of the continuing CHIPS

ground.” The jurors were expressly instructed, however, that they were not to consider the best interests of the child, nor should they be concerned about the final result of the TPR proceeding. We presume that jurors follow the court’s instructions, *see State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989), and David has not made a showing sufficient to overcome that presumption.

¶53 Ultimately, David has failed to establish a reasonable probability that the jury would have reached a different verdict on the continuing CHIPS ground had his trial attorney objected to the testimony about Dylan’s negative reactions to David during supervised visits. The admission of that evidence—either when considered alone or when considered in tandem with counsel’s failure to admit evidence of additional visits—does not undermine our confidence in the result of the grounds trial.

II. Sufficiency of the evidence

¶54 David’s final argument on appeal is that the County failed to introduce sufficient evidence at the grounds trial to establish the first element of the continuing CHIPS ground—i.e., that Dylan was adjudged to be a child in need of protection or services and was placed outside his home for six months or longer pursuant to a court order containing the notice required by WIS. STAT. § 48.356(2).⁸ *See* WIS. STAT. § 48.415(2)(a)1., 3. David does not dispute that Dylan was adjudged to be a child in need of protection or services and was placed

⁸ David does not argue that the evidence was insufficient to establish the second and third elements of the continuing CHIPS ground. We therefore do not address the sufficiency of the evidence as to those elements.

outside his home for six months or longer. He contends, however, that the CHIPS adjudication and out-of-home placement were not pursuant to a court order containing the notice required by § 48.356(2). More specifically, David argues the July 22, 2016 CHIPS dispositional order, which the County entered into evidence at the grounds trial, did not contain the requisite notice because it referred to the elements of the continuing CHIPS ground that existed under the 2015-16 version of the continuing CHIPS statute, rather than the amended version that was ultimately applied during David's TPR proceedings.

¶55 This argument fails in light of our supreme court's decision in *S.E.* Again, in *S.E.*, the court concluded that the notice provided by a 2016 CHIPS dispositional order that referred to the elements from the 2015-16 version of the continuing CHIPS statute was sufficient, even though the amended version of the statute was applied during the parent's subsequent TPR proceedings. *See S.E.*, 397 Wis. 2d 462, ¶24. As discussed above, the court reasoned that WIS. STAT. § 48.356(2) merely requires a circuit court to provide notice of the grounds for termination of parental rights that *may be applicable* at a future TPR hearing; it does not require a court to provide notice of the grounds that *will be applicable*. *S.E.*, 397 Wis. 2d 462, ¶¶24-25. The court expressly stated: "At the time a circuit court places a child outside the home or continues the child's out-of-home placement, the circuit court must give the parent notice of the grounds that may form the basis for a future TPR hearing—at the particular time the notice is given." *Id.*, ¶24.

¶56 That is precisely what occurred here. The July 22, 2016 CHIPS dispositional order gave David notice—as of the time the order was entered—of the grounds that might form the basis for a future TPR hearing. Under *S.E.*, it is of no import that the order referred to the 2015-16 version of the continuing

No. 2020AP982

CHIPS statute, instead of the amended version that was ultimately applied at David's grounds trial. Although the *S.E.* court was not confronted with a sufficiency-of-the-evidence argument, the court's reasoning makes it clear that the CHIPS dispositional order in this case provided the notice required by WIS. STAT. § 48.356(2) and was therefore sufficient to satisfy the first element of the continuing CHIPS ground. As such, we reject David's sufficiency-of-the-evidence argument.

By the Court.—Orders affirmed.

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

Case 2018TP000020

Document 1

Filed 11-30-2018

Page 1 of 6

STATE OF WISCONSIN, CIRCUIT COURT, DOUGLAS COUNTY

COUNTY

IN THE INTEREST OF

☐ Amended

a person under the age of 18

Petition for Termination of
Parental Rights

11/17/2015

Date of Birth

Case No. 18TP

FILED

11-30-2018

Juvenile Clerk

Douglas County, WI

2018TP000020

I state on information and belief that the following is true: (if unknown or cannot be ascertained, so state)

1. Petitioner's Name and Address [REDACTED] Social Worker, Douglas Co. DHHS, 1316 N. 14th St., Rm. 400, Superior, WI 54880		
Child's Address C/O [REDACTED] Greenwood, WI 54437	County where child is present at time of filing petition Clark	Sex Male
Child has previously been adopted? ☐ Yes ☐ No		
Parent #1's Name [REDACTED]	Parent #1's Address Last known address: [REDACTED] MN 55425	Birthdate 02/17/1995
Parent #2's Name [REDACTED]	Parent #2's Address [REDACTED]	Birthdate 01/21/1997
Child's Legal Guardian	Legal Guardian's Address	
Child's Legal Custodian	Legal Custodian's Address	

2. The petitioner is interested as Social Worker, Douglas Co. DHHS3. The child is a ☐ marital ☒ non-marital child.4. The father is ☒ adjudicated. ☐ presumed. ☐ alleged. ☐ biological (nonadjudicated). ☐ unknown.
☐ Names and addresses of additional possible fathers, if known, are attached.5. The petitioner seeks termination of parental rights of the
☒ mother, who ☐ will ☒ may ☐ will not consent to the termination of her parental rights under
§48.41, Wis. Stats.

If involuntary, grounds for termination of parental rights exist under §48.415(1)(a)2., (2)(a), (6)(a)), Wis. Stats. A statement of the facts and circumstances which support these grounds is as follows: ☐ See attached

The child's mother may consent to the termination of her parental rights pursuant to Wis. Stat. §48.41. In the event that she does not consent to the voluntary termination of her parental rights, multiple grounds exist for the involuntary termination of her parental rights: [REDACTED] has abandoned her son under Wis. Stat. §48.415(1)(a)2. The child subject of this petition continues to be in need of protection or services under Wis. Stat. §48.415(2)(a), and the child's mother has failed to assume parental responsibility for her son under Wis. Stat. §48.415(6)(a).

The child subject of this petition is two (2) years, 11 months old, (or 35 months old) on the cusp of his third birthday as of the date of this petition. He was taken into custody by the Douglas County Dep't. of Health & Human Services on or about May 6, 2016, after both of his parents were arrested and taken into custody. The parents' arrests were preceded by multiple reports of child abuse, disorderly conduct, and violation of a no-contact order. At the time, [REDACTED] the child subject of this petition, was approximately six (6) months old. A temporary physical custody order was entered on May 9, 2016, and CHIPS proceedings were commenced as Douglas County file 16JC19. [REDACTED] was adjudicated as a child in need of protection or services under Wis. Stat. §48.13(10)("Neglect") based

upon the admission(s) of the parent(s). A Dispositional Order was entered in Douglas County 16JC19 on July 22, 2016, which placed [REDACTED] outside of a parental home (or continued the out-of-home placement commenced by the Temporary Physical Custody Order of May 9, 2016). Since that time, a period of more than two (2) years, three (3) months, [REDACTED] has not returned to a parental home. The Dispositional Order contained the statutory TPR Warnings required by law.

As it pertains to the claim of abandonment under Wis. Stat. §48.415(1)(a)2., as set forth above, the child has been placed (or continued in a placement) outside of a parental home under an order of the Court containing the requisite TPR warnings. There has been a period of three (3) months or longer during which Ms. [REDACTED] failed to visit or communicate with the child, without good cause. Prior to the Permanency Plan report written on or about April 9, 2018, Ms. [REDACTED] contacted the placement provider in January. Her last face-to-face interaction was in August, 2017.

At the time of the Dispositional Order, the Court ordered certain services for the Department to provide, and also ordered certain conditions of safe return for Ms. [REDACTED] to meet before reunification could occur. As a conditions for safe return, the Court first ordered Ms. [REDACTED] to complete an AODA assessment (and to communicate the scheduled date and time of the assessment to the social worker) within 30 days of the date of Disposition. Ms. [REDACTED] as ordered to participate in any and all treatment recommended by that assessment.

The Department made reasonable efforts to provide this service to Ms. [REDACTED]. The Department provided Ms. [REDACTED] the resources and referrals which she could have used to schedule her assessment. Due to Ms. [REDACTED] living outside of the immediate Douglas County area, in the state of Minnesota, it was recommended that Ms. [REDACTED] complete a Rule 25 Assessment, and the case plan required Ms. [REDACTED] to sign any necessary releases to document her progress.

Despite the length of time since Disposition, as of the date of this Petition, Ms. [REDACTED] has yet to even schedule, let alone complete, her AODA assessment.

The Department also made arrangements for/ facilitated random and/or regular drug and alcohol screenings to monitor sobriety.

The Department was also ordered to facilitate the completion of a mental health assessment, which (as an additional Condition for Safe Return) Ms. [REDACTED] was also obligated to complete. The Department facilitated this service by way of a contracted provider, to whom Ms. [REDACTED] was referred/ put into contact. Ms. [REDACTED] completed a mental health assessment in 2016, but failed to follow through and complete any treatment recommendations.

Third, the Department was ordered to provide/ facilitate parenting skills programming, and she was further ordered to demonstrate age appropriate parenting abilities with her child. The Department provides this service by way of an additional contract provider. To date, the service has not been completed.

[REDACTED] was ordered to locate and obtain safe and stable housing, and maintain that housing for a period of six (6) months. The Department made reasonable efforts to assist [REDACTED] in meeting this condition by providing Ms. [REDACTED] housing resources to try to assist her in her housing search. As of the date of this petition, Ms. [REDACTED] has failed to meet this condition, and is presently homeless.

Ms. [REDACTED] as ordered to maintain regular contact with the Department, at least on a weekly basis. The Department, through its assigned worker(s), provided Ms. [REDACTED] with the number(s) at which it could be contacted. Despite these efforts, Ms. [REDACTED] has failed to meet that condition, and has only maintained sporadic contact with the Department.

Finally, Ms. [REDACTED] was ordered to complete Domestic Violence education and to attend regular support groups. As a part of its reasonable efforts to provide this service/ facilitate completion of this Condition, the Department referred Ms. [REDACTED] to the appropriate resources in terms of women's support groups. As of the date of this Petition, Ms. [REDACTED] has yet to enroll in any women's advocacy and education for domestically violent relationships.

In sum, despite the Department's reasonable efforts, Ms. [REDACTED] as failed to meet the Conditions for Safe Return ordered at the time of Disposition.

2017 Wisconsin Act 256 applies to this case. As set forth above, [REDACTED] has been outside of a parental home for more than 15 months; as such, the Department is not obligated to prove any substantial likelihood that [REDACTED] will not meet the Conditions for Safe Return in the future. A copy of 2017 Wisconsin Act 256 is attached hereto and

incorporated by reference.

For the reasons set forth above, [REDACTED] is a child that continues to be in need of protection or services under Wis. Stat. §48.415(2)(a).

Additional grounds insofar as Ms. [REDACTED] has failed to assume parental responsibility for her son under Wis. Stat. §48.415(6)(a). Ms. [REDACTED] does not have a substantial parental relationship with [REDACTED]. Substantial parental relationship" is defined as the acceptance and exercise of significant responsibility for the child's daily supervision, education, protection, and care. As set forth above, [REDACTED] was removed from his parent's home(s) as a result of neglect. Moreover, for the last 29 months of his 35 months-long life, [REDACTED] has been in out-of-home care, meaning that the responsibility for his daily needs for supervision, education, protection, and/or care has fallen to the Department and his foster care providers. 29 out of 35 months constitutes approximately 83% of his life.

[REDACTED] was also exposed to a hazardous living environment. At the time of removal, it was reported that Ms. [REDACTED] was being verbally abusive to another child, [REDACTED] older sister [REDACTED] and it was reported that the child was forcibly and violently pulled up off of the ground.

For these reasons, Ms. [REDACTED] has failed to assume parental responsibility for her son.

☒ father, who ☐ will ☒ may ☐ will not consent to the termination of his parental rights under §48.41, Wis. Stats.

If involuntary, grounds for termination of parental rights exist under §48.415(2)(a), (6)(a) _____, Wis. Stats.

A statement of the facts and circumstances which support these grounds is as follows: ☐ See attached
The child's father may also consent to the termination of his parental rights pursuant to Wis. Stat. §48.41. In the event that he does not consent to the voluntary termination of his parental rights, multiple grounds exist for the involuntary termination of his parental rights: The child subject of this petition continues to be in need of protection or services under Wis. Stat. §48.415(2)(a), and the child's father has failed to assume parental responsibility for his son under Wis. Stat. §48.415(6)(a).

As set forth above, the child subject of this petition is two (2) years, 11 months old, (or 35 months old) on the cusp of his third birthday as of the date of this petition. He was taken into custody by the Douglas County Dep't. of Health & Human Services on or about May 6, 2016, after both of his parents were arrested and taken into custody. The parents' arrests were preceded by multiple reports of child abuse, disorderly conduct, and violation of a no-contact order. At the time [REDACTED] the child subject of this petition, was approximately six (6) months old. A temporary physical custody order was entered on May 9, 2016, and CHIPS proceedings were commenced as Douglas County file 16JC19. [REDACTED] was adjudicated as a child in need of protection or services under Wis. Stat. §48.13(10)("Neglect") based upon the admission(s) of the parent(s). A Dispositional Order was entered in Douglas County 16JC19 on July 22, 2016, which placed [REDACTED] outside of a parental home (or continued the out-of-home placement commenced by the Temporary Physical Custody Order of May 9, 2016). Since that time, a period of more than two (2) years, three (3) months, [REDACTED] has not returned to a parental home. The Dispositional Order contained the statutory TPR Warnings required by law.

At the time of the Dispositional Order, the Court ordered certain services for the Department to provide, and also ordered certain conditions of safe return for Mr. [REDACTED] to meet before reunification could occur. As a conditions for safe return, the Court first ordered Mr. [REDACTED] to complete an AODA assessment (and to communicate the scheduled date and time of the assessment to the social worker) within 30 days of the date of Disposition. Like Ms. [REDACTED] Mr. [REDACTED] was also ordered to participate in any and all treatment recommended by that assessment.

The Department made reasonable efforts to provide this service to Mr. [REDACTED]. As it did with Ms. [REDACTED] the Department provided Mr. [REDACTED] with the resources and referrals which he could have used to schedule his assessment. At one point, Mr. [REDACTED] did complete an assessment; however, he did not follow through with any of the recommended treatment. It has been so long that he will need to complete a new AODA assessment. Mr. [REDACTED] as failed to meet this condition for safe return.

As it did with Ms. [REDACTED] the Department also facilitated regular and/or random drug screening to monitor sobriety.

The Department was also ordered to provide/ facilitate parenting skills programming, and Mr. [REDACTED] was further ordered to demonstrate age appropriate parenting abilities with his son. The Department provides this service by way of an additional contract provider. To date, because he has yet to complete the AODA assessment and follow-through, he has yet to start this service, and thus it has not been completed.

Ms. [REDACTED] was ordered to locate and obtain safe and stable housing, and maintain that housing for a period of six (6) months. The Department made reasonable efforts to assist Mr. [REDACTED] in meeting this condition by providing him the necessary housing resources to try to assist him in her housing search.

In sum, despite the Department's reasonable efforts, Ms. [REDACTED] has failed to meet the Conditions for Safe Return ordered at the time of Disposition.

2017 Wisconsin Act 256 applies to this case. As set forth above, [REDACTED] has been outside of a parental home for more than 15 months; as such, the Department is not obligated to prove any substantial likelihood that Mr. [REDACTED] will not meet the Conditions for Safe Return in the future. A copy of 2017 Wisconsin Act 256 is attached hereto and incorporated by reference.

For the reasons set forth above [REDACTED] is a child that continues to be in need of protection or services under Wis. Stat. §48.415(2)(a).

Additional grounds exist insofar as Mr. [REDACTED] has also failed to assume parental responsibility for his son under Wis. Stat. §48.415(6)(a). Mr. [REDACTED] does not have a substantial parental relationship with [REDACTED]. "Substantial parental relationship" is defined as the acceptance and exercise of significant responsibility for the child's daily supervision, education, protection, and care. As set forth above, [REDACTED] was removed from his parent's home(s)

as a result of neglect. Moreover, for the last 29 months of his 35 months-long life, [REDACTED] has been in out-of-home care, meaning that the responsibility for his daily needs for supervision, education, protection, and/or care has fallen to the Department and his foster care providers. 29 out of 35 months constitutes approximately 83% of his life.

[REDACTED] was also exposed to a hazardous living environment. At the time of removal, it was reported that Ms. [REDACTED] was being verbally abusive to another child in the home, and that Mr. [REDACTED] had contact with Ms. [REDACTED] in violation of a restraining order/ order for protection, which resulted in him being arrested and taken into custody.

For these reasons, Mr. [REDACTED] as failed to assume parental responsibility for his son.

- ☐ additional possible fathers (known or unknown). Attach name(s) if known. The statutory grounds for termination of the parental rights of each possible father and the facts and circumstances which support these grounds are attached.

6. ☐ a. The child is not subject to the federal Indian Child Welfare Act.

OR

☐ b. It is unknown at this time whether the child is subject to the federal Indian Child Welfare Act. (For an Indian Child, use the Indian Child Welfare Act version (IW-1630) of this petition.)

7. The Uniform Child Custody Jurisdiction Act Affidavit is attached to this Petition.

8. The best interests of the child will be served by termination of the parental rights of the parent(s).

☐ 9. The best interests of the minor birth parent(s) will be served by the termination of ☐ his ☐ her ☐ their parental rights.



Andrew J. Harrington

Name Printed or Typed

Date

11/29/18



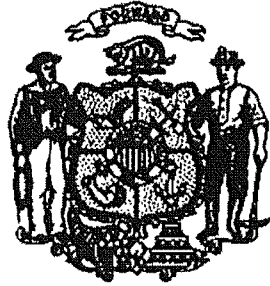
Name Printed or Typed

Date

11/29/18

Name of Attorney Andrew J. Harrington	
Address 425 E. LaSalle Ave., P.O. Box 137 Barron, WI 54812	
Telephone Number (715) 537-5636	Bar Number 1061492

State of Wisconsin



2017 Assembly Bill 775

Date of enactment: April 4, 2018

Date of publication*: April 5, 2018

2017 WISCONSIN ACT 256

AN ACT to amend 48.415 (2) (u) 3. of the statutes; relating to: the showing of a substantial likelihood that a parent will not meet the conditions established for the safe return of the child to the home in a termination of parental rights proceeding.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 48.415 (2) (a) 3. of the statutes is amended to read:

48.415 (2) (a) 3. That the child has been placed outside the home for a cumulative total period of 6 months or longer pursuant to such orders ~~an order listed under subd. 1.~~ not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for 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 9-month period following the fact-finding hearing under s. 48.424; and, if the child has been placed outside the home for less than 15 of the most recent 22 months, that there is a substantial likelihood that the parent will not meet these conditions as of the date on which the child will have been placed outside the home for 15 of the most recent 22 months, not including any period during which the child was a runaway from the out-of-home placement or was residing in a trial reunification home.~~

* Section 991.11, WISCONSIN STATUTES: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication."

STATE OF WISCONSIN, CIRCUIT COURT, DOUGLAS COUNTY

For Official Use

FILED**JUL 22 2016**James L. McManis
Register in Probate
Clerk of Juvenile Court
Douglas County, WI

IN THE INTEREST OF

**Dispositional Order -
Protection or Services
(Chapter 48)**

Name

11/12/2015

Date of Birth

Case No. 2016JC000019

A petition has been filed with the court.

This dispositional hearing was held on July 22, 2016, which is the effective date of this order.**THE COURT FINDS:**

1. The child is in need of protection or services because:

Count	Description	Wisconsin Statutes	Plea	Date of Petition
1	CHIPS / Neglect	48.13(10)	Admission	May 12, 2016

2. The provisions of the Indian Child Welfare Act do not apply.

(For an Indian child who is placed out-of-home, use the Indian Child Welfare Act version (IW-1611) of this order.)

☒ 3. The child is placed out-of-home.A. Placement in the home at this time ☒ is ☐ is not contrary to the child's welfare.

On 05/06/16 Superior Police Department responded to several calls regarding the welfare of a child. There are allegations of Physical Abuse of a Child, Violating a Restraining Order, and Disorderly Conduct. [REDACTED] has a No Contact Order with [REDACTED] through Minnesota which he and [REDACTED] knowingly violated. [REDACTED] states that he has an attempted strangulation charge against [REDACTED]. [REDACTED] states he has sentencing on Tuesday 05/10/2016 in Minnesota for which he states he will be going to NERCC for 9 months. [REDACTED] and [REDACTED] Sr. remain in custody at the Douglas County Jail at the time of this report.

[REDACTED] reports that she has untreated bipolar disorder. She has child protection history in Carlton County, Minnesota. [REDACTED] so has a warrant in Minnesota.

B. Reasonable efforts to prevent removal were [Complete one of the following]

☒ made by the department or agency responsible for providing services as follows:

At the time of removal, both parents were arrested. [REDACTED] was released from jail on May 6, 2016, but states his address is in Minnesota and that he is being sentenced to 9 months in jail on 05/10/2016.

☐ made by the department or agency responsible for providing services, although an emergency situation resulted in immediate removal of the child from the home as follows:☐ not required under §48.355(2d), Wis. Stats., _____☐ required, but the department or agency responsible for providing services failed to make reasonable efforts.**EXHIBIT**Ex 2
18 TP 19.20

Dispositional Order - Protection or Services (Chapter 48)

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Case No. 2016JC000019

C. Reasonable efforts to place the child in a placement that enables the sibling group to remain together were
☒ made.

☐ not required because the child does not have siblings in out-of-home care.

☐ not required because it would be contrary to the safety or well being of the child or any of the siblings.

D. Permanency plan was

☒ not filed.

☐ filed and reasonable efforts to achieve the permanency goal of the permanency plan, including through an out-of-state placement if appropriate, were

[Complete one of the following only if a permanency plan was filed]

☐ made by the department or agency responsible for providing services as follows:

☐ not made by the department or agency responsible for providing services as follows:

☐ E. The ☐ mother ☐ father was present and was asked to provide the names and other identifying information of three adult relatives of the child or other adult individuals whose home the parent requests the court to consider as placements for the child, unless that information was previously provided.

4. As to the department or agency recommendation:

☒ A. The placement location recommended by the department or agency is adopted.

OR

☐ B. After giving bona fide consideration to the recommendations of the department or agency and all parties, the placement location recommended is not adopted.

☐ 5. The Statement of Guardian ad Litem was filed.

☐ 6. Other:

THE COURT ORDERS:

1. The child is placed under court jurisdiction.

2. Placement.

☐ A. In-home at _____

Expiration date of this order *[Not to exceed 1 year]* _____

☒ B. Out-of-home at _____ Greenwood, WI 54437

and into the placement and care responsibility of the department in the county where this order is issued, or the Division of Milwaukee Child Protective Services if this order is issued in Milwaukee County, which has primary responsibility for providing services.

Unless otherwise specified, the expiration date of this order shall be the later of the following:

- One year from the date of this order;
- The date the child reaches his or her 18th birthday;
- The date the child is granted a high school or high school equivalency diploma or the date the child reaches his or her 19th birthday, whichever occurs first, if the child is enrolled fulltime in a secondary school or vocational or technical equivalent and reasonably expected to complete the program prior to age 19;
- The date the child is granted a high school or high school equivalency diploma or the date the child reaches his or her 21st birthday, whichever occurs first, if ALL of the following apply:
 - The child is a fulltime student in secondary school or vocational or technical equivalent.
 - An individualized education program is in effect for the child.
 - The child or guardian, on behalf of the child, agrees to this order.

- The child is 17 years of age or older when this order is entered.

OR

☐ Expiration date of this order _____.

- ☒ 3. This is an out-of-home placement. The child has one or more siblings in out-of-home care and the child is not placed with all those siblings. The department or agency
- ☒ shall make reasonable efforts to provide frequent visitation or other ongoing interaction between the child and any siblings.
 - ☐ is not required to provide for frequent visitation or other ongoing interaction because it would be contrary to the safety or well being of the child or any siblings.
- ☐ 4. This is an out-of-home placement and the department or agency shall conduct a diligent search in order to locate and provide notice as required by §48.355(2)(cm), Wis. Stats., to all adult relatives of the child, including the three adult relatives provided by the parents under §48.335(6), Wis. Stats., no later than 30 days from the date of the child's removal from the home, unless the search was previously conducted and notice provided.
- ☐ 5. This is an out-of-home placement. If a permanency plan has been prepared, filed and is consistent with this order, this order contains the plan. Otherwise, a permanency plan consistent with the court's order shall be filed no later than 60 days from the date of the child's removal from the home and shall be made part of this order.

6. Conditions of supervision and/or return as follows:

☐ See attached**Recommended Conditions for [REDACTED] (Mother):**

1. Complete an AODA assessment and provide the assigned Social Worker with a scheduled appointment date time within 30 days after the Dispositional Hearing 8/22/06
2. Participate in and complete all AODA treatment and services as recommended by the completed AODA assessment. If treatment is a recommendation made, participation in treatment services shall begin immediately following completion of the AODA assessment.
3. Submit to random UA testing anytime it is requested by the Department or AODA provider with which [REDACTED] actively participating. All UA results must show negative use by [REDACTED] If [REDACTED] refused to complete a random UA, is unable to provide a sample for the UA, or is more than 15 minutes late for a UA, results of this UA will be considered a positive result.
4. Obtain and maintain a safe and stable housing for at least six month period. Stability includes but may not be limited to, maintaining a current status of payment on rent and other utilities, as well as, no reported violations with housing provider/manager. The home must be free from any dangers to the health and safety of the child including, but not limited to; no drug use, accessibility to drugs by the child either illicit, legal or prescription in nature, no illegal activity, and free from any violence.
5. Participate and complete a parenting skills program and demonstrate age appropriate parenting abilities with her children. This will be observed and documented by parenting skills provider in conjunction with the assigned Department Social Worker, during direct interactions between [REDACTED] and her children. This will also be measured by verbal explanation of parenting skills provided by the above identified professionals.
6. Complete a Mental Health assessment and provide assigned Social Worker with a scheduled appointment date and time within 30 days after the Dispositional Hearing, 8/22/2016.
7. Participate and complete all Mental Health treatment and services as recommended by the completed Mental Health Assessment. Participation in treatment services should begin immediately following the completion of the assessment.
8. Complete a Domestic Violence Education Program and attend Women's Support Groups in order to learn the impact that Domestic Violence has on [REDACTED] life and her children's.
9. Maintain at least weekly contact with the assigned Social Worker by phone, in person, or written correspondence. Immediately notify the assigned Social Worker of changes with current addresses or phone number.
10. Sign all releases of information requested by the assigned Social Worker related to active monitoring of case management, planning for the family and to stay currently updated as to progress made with service providers.

Recommended Conditions for [REDACTED] Father):

1. Complete an AODA assessment and provide the assigned Social Worker with a scheduled appointment date time within 30 days after the Dispositional Hearing, 8/22/2016.
2. Participate in and complete All AODA treatment and services as recommended by the completed AODA assessment. If treatment is a recommendation made, participation in treatment services shall begin immediately following completion of the AODA assessment.
3. Submit to random UA testing anything it is requested by the Department or AODA provider with which [REDACTED] is actively participating. All UA results must show negative use by [REDACTED] if [REDACTED] refused to complete a random UA, is unable to provide a sample for the UA, or is more than 15 minutes late for a UA, results of this UA will be considered a positive result.
4. Obtain and maintain safe and stable housing for at least a six month period. Stability includes but may not be limited to, maintaining a current status of payment on rent and other utilities, as well as, no reported violations with housing provider/manager. The home must be free from any dangers to the health and safety of the child including, but not limited to: no drug use, accessibility to drugs by the child either illicit, legal or prescription in nature, no illegal activity, and free from any violence.
5. Participate and complete a parenting skills program and demonstrate age appropriate parenting abilities with his child. This will be observed and documented by parenting skills provider in conjunction with the assigned Department Social Worker, during direct interactions between [REDACTED] and his child. This will also be measured by verbal explanation of parenting skills provided by the above identified professionals.
6. Complete a Domestic Violence Education Program in order to learn the impact that Domestic Violence has on [REDACTED] life and his child.
7. Maintain at least weekly contact with the assigned Social Worker by phone, in person, or written correspondence. Immediately notify the assigned Social Worker of changes with current addresses or phone number.
8. Sign all releases of information requested by the assigned Social Worker related to active monitoring of case management, planning for the family and to stay currently updated as to progress made with service providers.

For both parents [REDACTED] and [REDACTED] parents of all the children:

Follow the Family Interaction Plan: This means, but is not limited to:

1. Meet with the assigned Social Worker to arrange for a visitation plan that will work for all those involved and follow the plan put into place.
2. Be on time for all scheduled visits and stay for the entire visitation.
3. Do not use drugs or alcohol before a visit other than those medications prescribed.
4. Follow all rules of the supervised visitation plan while continuing to follow rules of the supervised visitation contract.
5. Call the children at reasonable times or times arranged between caregiver and parent.
6. Talk to teachers, doctors, therapists and other people providing care for your children to keep updated on their needs.
7. Keep the children safe by not allowing those individuals who may be a danger to the children such as those individuals who are involved in criminal activities or are active drug or alcohol users enter or stay in the home.

7. Specific services to be provided to child and family as follows:

☐ See attached☐ 8. Legal custody transferred to

- ☐ County Department of Human/Social Services.
- ☐ Wisconsin Department of Children and Families.
- ☐ Division of Milwaukee Child Protective Services.
- ☒ Other: Douglas County Health and Human Services

Dispositional Order - Protection or Services (Chapter 48)

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☐ 9. Special treatment or care as follows:☐ See attached

10. If the child is placed outside of the home, the parent(s) shall provide a statement of income, assets, debts, and living expenses to the county department or agency.

☒ A. The parent(s)/guardian shall contribute toward the expenses of custody/services in the amount of

☐ \$ _____

☒ to be determined by [Agency] Douglas County Child Support Enforcement Agency

☒ B. The amount of support to be paid by the parent(s), guardian or trustee for the out-of-home placement is

☐ \$ _____ or _____ % of gross income payable by wage assessment.

☒ to be set by the child support agency.

The support obligation begins on the date of placement.

☒ 11. The appointment of the guardian ad litem for the child

☐ terminates until further order of the court.

☒ is continued to allow the guardian ad litem to perform any of the duties under §48.235(4), Wis. Stats.

☐ is continued for the following purpose(s): _____

☐ 12. The appointment of the attorney for the

☐ mother ☐ father ☐ other: _____ terminates until further order of the court.

☐ mother ☐ father ☐ other: _____ is continued through the term of this order.

☐ mother ☐ father ☐ other: _____ is continued for the following purpose(s): _____

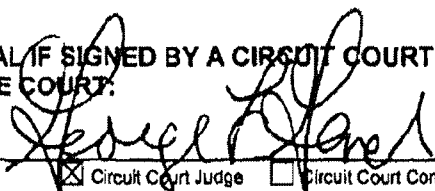
13. If the child is placed out of the home, the parent(s) who appeared in court have been orally advised of the applicable grounds for termination of parental rights (TPR) and the conditions that are necessary for the child to be returned to the home or restoration of visitation rights. Written TPR warnings are attached. Conditions for return/visitation are part of this order or attached.

☐ 14. Other: _____

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL IF SIGNED BY A CIRCUIT COURT JUDGE.
BY THE COURT:

DISTRIBUTION:

1. Original - Court
2. Child/Guardian ad Litem
3. Parents/Guardian/Legal Custodian
4. Attorney(s)
5. Social Worker/Agency Staff Person
6. Foster Parent/ Physical Custodian
7. District Attorney/Corporation Counsel
8. Court Appointed Special Advocate
9. Other: _____


☒ Circuit Court Judge ☐ Circuit Court Commissioner
Honorable George L. Glonek
Name Printed or Typed

July 22, 2016

Date

NOTICE: If requested by a parent/guardian/legal custodian, child (14 years of age or over), expectant mother (14 years of age or older) or the guardian ad litem for an unborn child, the agency providing care or services for the child or expectant mother or that has legal custody of the child must disclose to, or make available for inspection, the contents of any records kept or information received by the agency about the child or expectant mother unless the agency determines that imminent danger would result.

Case 2018TP000020 Document 56 Scanned 08-26-2019
STATE OF WISCONSIN, CIRCUIT COURT, DOUGLAS COUNTY

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For Official Use

Notice Concerning Grounds To Terminate Parental Rights

Case No. 2016JC000019

Your parental rights can be terminated against your will under certain circumstances. A list of potential grounds to terminate your parental rights is given below. Those that are check-marked may be most applicable to you, although you should be aware that if any of the others also exist now or in the future, your parental rights can be taken from you.

☒ **Abandonment.** *Any of the following must be proven by evidence that:*

- ☐ You have left your child without provision for care or support:
 - ☐ and neither parent has been found for 60 days.
 - ☐ in a place or manner that exposes your child to substantial risk of great bodily harm or death.
- ☒ You have failed to visit or communicate with your child for:
 - ☒ three months or longer after your child has been placed, or continued in a placement, outside your home by a court order.
 - ☐ six months or longer after leaving your child with any person, and you know or could discover the whereabouts of your child.
- ☐ A court of competent jurisdiction previously has found that when your child was under one year of age:
 - ☐ your child was abandoned, pursuant to §48.13(2), Wis. Stats., or a comparable state or federal law.
 - ☐ you intentionally abandoned the child in a place where the child may suffer because of neglect, in violation of §948.20, Wis. Stats., or a comparable state or federal law.

☒ **Continuing Need of Protection or Services.** *As proven by evidence that:*

- ☒ A court placed, or continued in a placement, your child outside your home after a judgment that your child is in need of protection or services under §§48.345, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363, or 938.365, Wis. Stats., and:
 - The agency responsible for the care of your child has made a reasonable effort to provide the services ordered by the court;
 - Your child has been outside your home for a cumulative total period of six months or longer under a court order;
 - You have failed to meet the conditions established for the safe return of your child to your home; and,
 - There is a substantial likelihood that you will not meet these conditions within the 9-month period following the fact-finding hearing under §48.424, Wis. Stats.
- ☐ A court has adjudicated your child in need of protection or services on three or more occasions, under §48.13(3), (3m), (10) or (10m), Wis. Stats., and:
 - In connection with these adjudications, the court has placed your child outside your home pursuant to a court order containing this notice, and,
 - You caused the conditions that led to each of the out-of-home placements.

☐ **Continuing Need of Protection or Services (Unborn child).** *As proven by evidence that:*

- A court placed you (as an expectant mother), or continued you in a placement, outside your home after a judgment that your unborn child is in need of protection and services under §§48.345 and 48.347, Wis. Stats.
- The agency responsible for the care of you and your unborn child has made a reasonable effort to provide the services ordered by the court;
- Your child stayed outside your home for a cumulative total period of six months or longer under a court order; [Not including time spent outside the home as an unborn child]
- You have failed to meet the conditions established for the safe return of your child to your home; and,
- There is a substantial likelihood that you will not meet these conditions within the 9-month period following the fact-finding hearing under §48.424, Wis. Stats.

☒ **Failure to Assume Parental Responsibility.** *As proven by evidence that:*

- You are or may be a parent of a child.
- You have not had a substantial parental relationship with the child.

☐ **Continuing Parental Disability.** *As proven by evidence that:*

- You are presently an inpatient at a hospital as defined in §50.33(2)(a),(b) or (c), Wis. Stats., a licensed treatment facility as defined in §51.01(2), Wis. Stats., or state treatment facility as defined in §51.01(15), Wis. Stats., on

Notice Concerning Grounds To Terminate Parental Rights

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Case No. 2016JC000019

account of mental illness as defined in §51.01(13)(a) or (b), Wis. Stats., or developmental disability as defined in §55.01(2) or (5), Wis. Stats.

- You have been an inpatient for at least two of the last five years before a petition to terminate parental rights is filed.
- Your condition is likely to continue indefinitely.
- Your child is not being provided with adequate care by a parent, guardian, or relative who has legal custody of your child.

☐ **Continuing Denial of Periods of Physical Placement or Visitation.** *As proven by evidence that:*

- You have been denied periods of physical placement by a court order in an action affecting the family, or have been denied visitation by an order under §§48.345, 48.363, 48.365, 938.345, 938.363, or 938.365, Wis. Stats.
- At least one year has elapsed since the order denying periods of physical placement or visitation was issued and the court has not subsequently modified its order so as to permit you periods of physical placement or visitation.

☐ **Child Abuse.** *As proven by evidence that:*

You show a pattern of physically or sexually abusive behavior which is a substantial threat to the health of the child who is the subject of the petition; and that:

- ☐ You have caused death or injury to a child or children resulting in a felony conviction.
- ☐ A child has previously been removed from your home by the court under §48.345, Wis. Stats., after an adjudication that the child is in need of protection or services under §48.13(3) or (3m), Wis. Stats.

☐ **Relinquishment.** *As proven by evidence that:*

- ☐ A court of competent jurisdiction has found pursuant to §48.13(2m), Wis. Stats., that you have relinquished custody of your child under §48.195(1), Wis. Stats., when the child was 72 hours old or younger.

☐ **Incestuous Parenthood.** *As proven by evidence that:*

You are related, either by blood or adoption, to your child's other parent in a degree of kinship closer than 2nd cousin.

☐ **Homicide or Solicitation to Commit Homicide of Parent.** *As proven by evidence that:*

You have been convicted of the intentional or reckless homicide of the other parent, or solicitation to commit intentional or reckless homicide of the other parent, in violation of §§940.01, 940.02 or 940.05, 939.30, Wis. Stats., or a comparable state or federal law.

☐ **Parenthood as a Result of Sexual Assault.** *As proven by evidence that:*

- You are or may be the father of a child.
- The child was conceived as the result of a sexual assault in violation of §§940.225(1),(2) or (3), 948.02(1) or (2), or 948.025 or 948.085, Wis. Stats., which you committed against the child's mother during a possible time of conception.

☐ **Commission of a Felony Against a Child.** *As proven by evidence that:*

- ☐ You have been convicted of a serious felony as defined in §48.415(9m)(b), Wis. Stats., against one of your children.
- ☐ You have committed child trafficking in violation of §948.051 or a comparable state or federal law involving any child.

☐ **Prior Involuntary Termination of Parental Rights to Another Child.** *As proven by evidence that:*

- Your child has been adjudicated to be in need of protection or services under §48.13(2),(3) or (10), Wis. Stats. or your child was born after a petition for termination of parental rights under §48.415(10), Wis. Stats., was filed in which a sibling of your child is the subject.
- In the three years prior to the child being adjudicated in need of protective services as specified in §48.415(10)(a), or in the case of a child born after the filing of a petition regarding a sibling as specified in §48.415(10)(a), within three years prior to the date of the birth of the child, a court has ordered the termination of your parental rights with respect to another of your children on one or more grounds specified in §48.415, Wis. Stats.

The court has orally informed me of the applicable grounds for termination of parental rights, and I have received a copy of this notice.

Signature of Parent/Expectant Mother

Signature of Parent

Date

FILED

10-11-2019

Juvenile Clerk

Douglas County, WI

2018TP000020

BY THE COURT:

DATE SIGNED: October 11, 2019

Electronically signed by Kelly J. Thimm
Circuit Court Judge

STATE OF WISCONSIN, CIRCUIT COURT, DOUGLAS COUNTY

IN THE INTEREST OF

Name

**Order Concerning Termination of Parental Rights
(Involuntary)**

11/17/2015

Date of Birth

Case No. 18TP20

This termination of parental rights hearing was held on [Date] Wednesday, 10/9/19, which is the effective date of this Order.

THE COURT FINDS:

1. Notice was given to all those entitled to notice.
2. The provisions of the Indian Child Welfare Act do not apply. An inquiry has been made on the record to each participant in this proceeding as to whether the participant knows or has reason to know that the child is an Indian child. *[For an Indian child, use the Indian Child Welfare Act version (IW-1639) of this Order.]*

3. The parent(s) are

- ☒ A. Parent #1's name: _____ Date of birth: 2/17/1995
- ☒ B. Parent #2's name: _____ Date of birth: 1/21/1997
- ☐ C. Other possible parent(s):
- Name: _____ Date of birth: _____
- Name: _____ Date of birth: _____
- Name: _____ Date of birth: _____

- ☐ 4. There was no declaration of paternal interest.

- ☐ 5. Name(s) _____ failed to appear at the hearing, and is/are in default.

6. This matter was tried to ☒ a jury. ☐ the court.
- The following grounds for termination of the parental rights of _____ were found to exist:

Parent #1 Parent #2

- | | |
|-------------------------------------|---|
| ☐ | ☐ abandonment |
| ☐ | ☐ relinquishment |
| ☒ | ☒ continuing need of protection or services |
| ☐ | ☐ continuing parental disability |
| ☐ | ☐ continuing denial of periods of physical placement or visitation |
| ☐ | ☐ child abuse |
| ☐ | ☒ failure to assume parental responsibility |
| ☐ | ☐ incestuous parenthood |

- ☐ ☐ homicide or solicitation to commit homicide of parent
☐ ☐ parenthood as a result of sexual assault
☐ ☐ commission of a felony against a child
☐ ☐ prior involuntary termination of parental rights to another child

☒ 7. ☒ Parent #1 ☒ Parent #2 is unfit.

8. It is in the best interest of the child that the parental rights of the ☒ Parent #1 ☒ Parent #2 (s) be terminated after considering the following factors:

- The likelihood of the child's adoption after termination.
- The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
- Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
- The wishes of the child.
- The duration of the separation of the parent from the child.
- Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

9. Reasonable efforts to achieve the permanency goal of the permanency plan, including through an out-of-state placement if appropriate, were *[Complete one of the following only if there is a permanency plan]*

☒ made by the department or agency responsible for providing services.

☐ not made by the department or agency responsible for providing services.

10. Any parent who has appeared was informed of the provisions of §§48.432, 48.433 and 48.434, Wis. Stats.

☒ 11. Other: On August 26, 2019 (the date of trial), [REDACTED] the child's mother, entered a plea of, "no contest" as to the grounds set forth above, and thus did not participate in the trial.

☐ 12. The evidence does not warrant the termination of the parental rights of [Name] _____.

THE COURT ORDERS:

☒ 1.A. The parental rights of [Name of Parent(s)] [REDACTED] is/are terminated.

Guardianship, placement and care responsibility, and custody of the child

- ☐ remain with the parent whose rights have not been terminated.
☒ are transferred pending adoption to State of Wisconsin, Department of Children & Families.
☐ Other: _____

If guardianship or custody is transferred to an agency, that agency shall be responsible for securing the adoption of the child or establishing the child in a permanent family setting. The child's permanency plan ☐ was filed. ☐ is attached. ☒ will be filed within 60 days.

The provisions of §§48.432, 48.433 and 48.434, Wis. Stats., are attached.

☐ 1.B. The Petition to Terminate Parental Rights of [Name] _____ is dismissed.

☐ 2. Other: _____

THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL.

Case 2018TP000020

Document 123

Filed 10-06-2020

Page 1 of 2

FILED
10-06-2020
Juvenile Clerk
Douglas County, WI
2018TP000020

DATE SIGNED: October 6, 2020

Electronically signed by Kelly J. Thimm
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

DOUGLAS COUNTY

In the Interest of [REDACTED] (D/O/B 11/17/2015)

Case No. 18TP20

Order on Respondent's Postdisposition Motion

Hearings on the Respondent [REDACTED] motion for Postdisposition relief were held in this matter on Thursday, August 27, 2020, and Monday, October 5, 2020. As to the hearings, the Department appeared by counsel, Andrew J. Harrington, LIDEN, DOBBERFUHL & HARRINGTON, S.C., 425 E. LaSalle Ave., P.O. Box 137, Barron, WI 54812, remotely by way of Zoom. The Respondent, [REDACTED] Sr. (hereinafter, Respondent [REDACTED]) also appeared remotely by way of Zoom telephone and was represented by his attorney, Kimberley K. Bayer, 600 N. 51st St., Milwaukee, WI 53208, who also appeared remotely by way of Zoom. The child's mother [REDACTED] did not appear, nor did any attorney appear on her behalf. She is not a part of these appellate proceedings. Guardian ad litem Chris A. Gramstrup, GRAMSTRUP LAW OFFICE, 1409 Hammond Ave., Ste. 322, Superior, WI 54880, appeared remotely by way of Zoom telephone, on behalf of the child's interests. The Hon. Kelly J. Thimm presided.

All parties appeared by Zoom or by phone with consent of the court and pursuant to the orders of both the Douglas County Circuit Court, the Chief Judge of the Tenth Judicial District, and the Wisconsin Supreme Court regarding in-person court proceedings.

At the hearing on Thursday, August 27, 2020, the court heard testimony from Respondent's mother, [REDACTED] and from Respondent's trial counsel, attorney Ryan A. Reid. Both witnesses were subject to direct and cross-examination, and the court decided objections made on the record.

At the hearing on Monday, October 5, 2020, the court heard additional testimony from Respondent's trial counsel, attorney Ryan A. Reid, and former Douglas County social worker [REDACTED]. Both witnesses were subject to direct and cross-examination, and the court decided objections made on the record.

Neither the County nor the Guardian ad litem presented any evidence or testimony. The Court heard arguments from Attorney Bayer, Attorney Harrington, and the Guardian ad litem.

The Court, having noted the appearances on the record and based upon the aforementioned motion(s) of the parties, the briefs and/or affidavits in support of the motion, the arguments of the parties and/or counsel at the hearing, and the record of the proceedings herein, the court makes the following

ORDER:

1. The court finds that Attorney Reid was neither deficient, nor was any supposed deficiency prejudicial to Respondent [REDACTED]. As to the 11 separate allegations of supposed ineffective assistance, based upon the

record and case presented at trial, and the hearings on August 27 and October 5, Attorney Reid had strategic decisions for raising certain issues and declining to raise other issues, based upon his education, training, and experience as an attorney. That aspect of the motion is DENIED.

2. With respect to the issues related to any ineffective assistance related to Attorney Reid's alleged failure to call the Respondent's parents at either the trial or at Disposition, (again) Attorney Reid had credible and strategic reasons for doing so. The court finds that Attorney Reid was more credible than [REDACTED]. That aspect of the motion is DENIED, as well.
3. With respect to the issues related to any ineffective assistance related to Attorney Reid's alleged failure to present more evidence on the issue of visits between Respondent and [REDACTED] at either the trial or at Disposition, (again) Attorney Reid had credible and strategic reasons for doing so. That aspect of the motion is DENIED.
4. With respect to the issues related to any ineffective assistance related to Attorney Reid's alleged failure to object to the testimony of social worker [REDACTED] about permanency plan review hearings in the CHIPS case, while the testimony was hearsay that could have been objected to, any such error was essentially harmless given the other evidence that was presented and the fact that the evidence likely would have come in irrespective of the testimony. That aspect of the motion is DENIED, as well.
5. With respect to the issues related to any ineffective assistance related to Attorney Reid's alleged failure to object to the letter of the foster parents, counsel for Respondent withdrew that portion of the motion at the hearing on Monday, October 5, 2020.
6. With respect to the issues related to any ineffective assistance related to Attorney Reid's alleged failure to object to the admission of the Dispositional Order or to make any objection on the basis of the change in the law with respect to Wis. Stat. §48.415(2)(a), on the one hand the Court finds that there was no error, based upon the authority cited in *Eau Claire County Dep't of Human Services v. S.E.*, 2020 WI App 39 (Wis. Ct. App. 2020). Consistent with that opinion, the change in the law brought about by 2017 Wisconsin Act 256 did not substantially change the conduct that might lead to a TPR. See *id.* at ¶¶22-23. Further, as in *Eau Claire County*, the change in the elements did not change the fact that Respondent was advised of the potential grounds for termination. See *id.* at ¶¶34-36. That aspect of the motion is DENIED, as well.
7. With respect to the issues related to any ineffective assistance related to Attorney Reid's alleged failure to "meaningfully defend" Respondent at Disposition, the court finds that this is a conclusory allegation, without basis. That aspect of the motion is DENIED.
8. For all the foregoing reasons, the postdisposition motion filed by Respondent [REDACTED] on July 17, 2020, asking that Respondent's trial counsel be found to have provided ineffective assistance of counsel, is DENIED.

301 CONSIDERATION OF CHILD'S BEST INTERESTS IN TERMINATION PROCEEDINGS

I want to again emphasize that this hearing is only one part of a process that may result in termination of parental rights.

In this jury trial, the first phase of the proceedings, your responsibility is to determine what the facts are from all the evidence and answer the questions on the special verdict that will be submitted to you. Your answers will determine whether the State has proved that a ground or grounds for termination of parental rights exists. However, you are not being asked to decide if parental rights should be terminated. Based on your answers to the questions on the special verdict, it will be my responsibility to conduct further proceedings and hearings, and it is solely and ultimately my responsibility to determine if parental rights should be terminated based upon factors the law requires a court to consider if grounds for termination of parental rights are proven. You should not be concerned with what the final result of this jury proceeding might be, and you should not be concerned with what the final result of this entire lawsuit might be.

Consideration of the best interests of the child is a matter for the court in proceedings which will be conducted in the future; it is not a consideration for the jury.

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STATE OF WISCONSIN

CIRCUIT COURT

DOUGLAS COUNTY

IN THE INTEREST OF [REDACTED]
DOB: 11/17/15

VERDICT

Case No. 18 TP 20

Continuing Need of Protection or Services

FILED
AUG 26 2019Jaime L. McKeeth
Register in Probate
Clerk of Juvenile Court
Douglas County, WI

1. Has [REDACTED] been adjudged to be in need of protection or services and placed outside of the home for a cumulative total of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?

ANSWER: X YES _____ NO

Answer Question 2 only if you answered Question 1 "YES:"

2. Did the Douglas County Department of Health and Human Services make a reasonable effort to provide the services ordered by the court?

ANSWER: X YES _____ NO

If the Answer to Question 2 was YES, answer the following question:

3. Has [REDACTED] failed to meet the conditions established for the safe return of [REDACTED] to his home?

ANSWER: X YES _____ No[REDACTED]
Foreperson

Dissenting Jurors, if any

As to Question

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- DIRECT

1 that [REDACTED] [REDACTED] had to satisfy before

2 [REDACTED] [REDACTED] would be returned to his care?

3 A Yes.

4 Q And about two-thirds of the way down the page, is there a
5 reference to something called a Family Interaction Plan?

6 A Yes.

7 Q When you talk about a Family Interaction Plan, what is
8 that referring to?

9 A So a Family Interaction Plan ensures that a parent will
10 see their child, have opportunities to engage with their
11 child while they are in Douglas County custody. So,
12 yeah, just basically -- this basically lays out what
13 would have to be done for meeting with their child.
14 Anything from arranging visitation; there's also
15 conditions such as don't use drugs or alcohol before a
16 visit; be on time; following the rules; calling children
17 is always very important and something we stressed a lot
18 while in placement; as well as talking to people that
19 make up the child's team, whether that be therapists,
20 schools, the foster parents, for one of course; and just
21 trying to keep them as involved in their child's life as
22 possible.

23 Q And looking at that dispositional order, there are
24 certain notices concerning grounds for termination of
25 parental rights attached to that particular order?

[REDACTED] DIRECT

1 THE COURT: Mr. Harrington, you have to slow
2 down.

3 MR. HARRINGTON: Yes, Your Honor.

4 THE COURT: Can you please reask that slower?

5 MR. HARRINGTON: I will.

6 BY MR. HARRINGTON:

7 Q Attached to Exhibit Number 2, is there a notice
8 concerning the grounds to terminate parental rights?

9 A Yes, there is.

10 Q Thank you. Now, looking back at those conditions for
11 safe return, is the Department obligated to provide
12 services to assist parents in meeting those conditions
13 for safe return, if at all possible?

14 A Yes.

15 Q And did the Department do so in this case?

16 A Yes.

17 Q Do the -- generally speaking, do the conditions mirror or
18 parallel the services that the Department is to provide?

19 A Yes.

20 Q Looking at the first condition that Mr. [REDACTED] had to
21 satisfy was to complete an AODA assessment?

22 A Yes.

23 Q And when you -- we're talking about an AODA assessment,
24 can you describe what is meant by AODA assessment?

25 A AODA is Alcohol Or Other Drugs Assessment, where we would

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[REDACTED] - DIRECT

1 father and son had a good time?

2 A Just ensuring that it was -- proper parental techniques
3 were occurring, how Mr. [REDACTED] behavior was toward his
4 son, things like that.

5 Q Okay. Is it fair to say that during these visits that
6 you supervised, you were in a position to observe both
7 the demeanor of [REDACTED] and [REDACTED]

8 A Yes.

9 Q Did you have such an opportunity on the visit, March 20th
10 of 2019, in terms of observing the demeanor of [REDACTED]

11 [REDACTED]
12 A Yes.

13 Q What, if anything, did you observe of [REDACTED]
14 demeanor on March 20 of 2019?

15 A He was very hesitant on going with Mr. [REDACTED] He was
16 having a really hard time letting go of Ms. [REDACTED]
17 hand. It was only until she promised him -- [REDACTED]
18 [REDACTED] that she was going to stay in the adult wing of the
19 library that he let go and went with his father.

20 Q Were there any difficulties in -- at the outset of the
21 visit between -- in terms of [REDACTED] participation
22 in the visit?

23 A He wanted to go back to [REDACTED]

24 Q How long -- how long did those difficulties persist
25 during the visit on March 20th, 2019?

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[REDACTED] - DIRECT

1 A No.

2 Q Okay. When you supervised the visit between [REDACTED]
3 and [REDACTED] on October 16th, 2018, were you in a
4 position to observe the interactions between father and
5 son?

6 A Yes.

7 Q Did you observe how [REDACTED] reacted when the visit
8 started?

9 A Yes.

10 Q How did [REDACTED] react to his father at the outset of
11 the visit?

12 A Um, [REDACTED] did not want to take his father's hand
13 to go back to the room and he was crying and screaming
14 for a brief period.

15 Q You say a "brief period"?

16 A Ah, it looks to be about half of the visit, which the
17 visits are one hour, so half an hour.

18 Q For a half an hour he was carrying on, crying and
19 screaming?

20 A I would say, yes.

21 Q Looking at your note, did you express any concerns or
22 report any notes about consistency of the visits?

23 A Yes.

24 Q Did you also memorialize or write that you had concerns
25 about bonding between [REDACTED] and [REDACTED]

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DIRECT

1 A Yes.

2 MR. REID: Objection. It lacks foundation, not
3 an expert witness. I think the conclusion of bonding is
4 an expert opinion.

5 THE COURT: And I agree. I think she just said
6 she did, but what her opinions were haven't been asked
7 yet. So we're a little bit premature. I think I'll
8 grant -- or I'll sustain your objection if we get to that
9 point.

10 MR. HARRINGTON: Okay.

11 BY MR. HARRINGTON:

12 Q Did you -- does your summary reflect or do you recall
13 providing Mr. [REDACTED] with your contact information to
14 schedule further visits after October 16th, 2018,
15 correct?

16 A Yes, I did.

17 MR. HARRINGTON: I will move admission of
18 Exhibit Number 4, Your Honor.

19 THE COURT: Mr. Reid?

20 MR. REID: No objection.

21 THE COURT: Mr. Gramstrup?

22 MR. GRAMSTRUP: No objection.

23 THE COURT: Four is received.

24 Can I see that, please?

25 THE WITNESS: (Handing.)

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[REDACTED] - DIRECT

1 visit between Mr. [REDACTED] and [REDACTED] on July 2nd of
2 this year --

3 A Yes.

4 Q -- just last month?

5 A Yes.

6 Q Did that visit take place at the library in Rice Lake,
7 Wisconsin?

8 A Yes.

9 Q With respect to that visit, were you in a position to
10 observe [REDACTED] demeanor and his reaction to his
11 father?

12 A Yes.

13 Q Did you observe anything of particular concern when you
14 supervised the visit on July 2nd, 2019?

15 A Yes.

16 Q What did you observe?

17 A [REDACTED] did not want to go to the visit. He had
18 locked the car door several times, refused to unbuckle
19 his seatbelt, and tried running to the front of the van
20 to continue locking doors.

21 Q And how long did that behavior persist to your
22 observation?

23 A Over 15 minutes.

24 Q And how long were the visits, generally speaking, that
25 you observed between [REDACTED] and [REDACTED] in

[REDACTED] CROSS

1 children of your own?

2 A No.

3 MR. HARRINGTON: I'm going to object as to --
4 I'll withdraw the objection.

5 THE COURT: Okay, go ahead.

6 BY MR. REID:

7 Q Just based on your experience as a parent aide, three
8 hours or two -- two to three hours for a three-year old,
9 is that a long time --

10 A To be in the car?

11 Q -- to be in the car?

12 A Yes.

13 Q Specifically, on the last visit you supervised, when

14 [REDACTED] was locking himself in the van, was

15 [REDACTED] trying to interact with him?

16 A Yes.

17 Q So he didn't just stand there, like, he tried to help?

18 A He tried asking him to exit the vehicle, yes.

19 Q What was [REDACTED] -- for lack of a better word --
20 demeanor as all this was happening?

21 A Calm.

22 Q Calm.

23 MR. REID: No further questions.

24 THE COURT: Mr. Gramstrup?

25 MR. GRAMSTRUP: No questions, Your Honor.

1 Ladies and gentlemen, you may consider that
2 neglect in determining whether or not [REDACTED]
3 has failed to assume parental responsibility for his son.
4 And I submit to you that, on that basis also, he has.
5 You are allowed to consider whether or not he has
6 expressed concern for or interest in the support, care or
7 well-being of [REDACTED]

8 I, again, want to draw your attention to the
9 testimony of Ms. [REDACTED] and what was disclosed in
10 Exhibit 3. She testified to this information: Total
11 visitation appointments, 76, kept 32 out of 76; so he
12 missed 44 appointments; percentage of visits missed
13 57 percent.

14 Ladies and gentlemen, I submit to you that it is
15 clear, satisfactory and convincing evidence that you do
16 not have a substantial parental relationship with your
17 son when you are missing nearly six out of ten visit
18 opportunities with your son, when your son is less than
19 four years of age.

20 I want you to consider that and I want you to
21 think about that. And I ask you, on the basis of all of
22 that evidence, to conclude that he has failed to assume
23 parental responsibility for his son and that he does not
24 have a substantial relationship with his son.

25 When you look at the question of whether or not

1 protection and services and when you evaluate whether or
2 not he has failed to assume parental responsibility for
3 his son, it is clear, it is satisfactory, it's convincing
4 that he hasn't done the work that he needs to do.

5 It's absolutely clear. Mr. Reid argues --
6 counsel argues that there is a connection, there is a
7 bond. You are going to receive this instruction from the
8 Court on failure to assume parental responsibility. I
9 will not repeat or reiterate what I have already spoken.
10 But I will say you are allowed to consider all other
11 evidence bearing on that issue which assists you in
12 making this determination.

13 Ladies and gentlemen, he missed nearly six out
14 of ten opportunities that he had for a visit with his
15 son. He missed more than half of his visits. Where was
16 this bond that supposedly existed? If there was this
17 bond, the reasonable assumption that your common sense
18 should lead you to is that would have motivated him to
19 make more than four out of ten of the visits. He would
20 have made more than half, he would have made as many of
21 them as he could. And the evidence that you've heard
22 today, the unrefuted evidence that you've heard today, is
23 that he simply did not.

24 There is a bond, there is a connection. If that
25 were true, if that were a credible remark -- and it is

1 answer the following questions in the special verdict
2 form.

3 The first question I have answered. I have
4 answered "Yes," that [REDACTED] has been
5 adjudged to be in need of protection or services and
6 placed outside of the home for a cumulative total period
7 of six months or longer, pursuant to one or more court
8 orders containing the termination of parental rights
9 notice required by law.

10 You will then answer Question 2: Did the
11 Douglas County Department of Social Services make a
12 reasonable effort to provide the services ordered by the
13 Court? If you answer Question 2 "Yes," then answer the
14 following question: Has [REDACTED] failed to
15 meet the conditions established for the safe return of
16 [REDACTED] to [REDACTED] home?

17 Before [REDACTED] may be found in need
18 of continuing -- may be found in need -- let me start
19 that over again.

20 Before [REDACTED] may be found to be in
21 continuing need of protection or services, Douglas County
22 Department of Health and Human Services must prove the
23 following three elements by evidence that is clear,
24 satisfactory and convincing to a reasonable certainty:
25 First, that [REDACTED] was adjudged to be in

[REDACTED] - DIRECT

1 supervising visits between your son and your grandson?

2 A Yes.

3 Q And were you granted those visits?

4 A Yes.

5 Q How many of them were there?

6 A I would say at least 12.

7 Q And those visits, were they overnight visits?

8 A Yes.

9 Q Was there about an average length or did it vary?

10 A The longest one was about eight to nine days. It was
11 usually two to three days was the max except for that
12 exception where we had him a little longer to help out.

13 Q And what was that when you had him longer to help out?

14 A [REDACTED] was pregnant and she was having a baby.

15 Q Uh-huh.

16 A And she had a lot of children and we just offered to take
17 [REDACTED] for a little longer until she connected with her
18 baby and was able to care for them all again.

19 Q Okay. And she took you up on that?

20 A Yes.

21 Q Okay. And the social workers approved that?

22 A Yes.

23 Q So when your son (sic) was in foster care and visiting
24 you, was your son around?

25 A Yes. He was there every day.

[REDACTED] - DIRECT

1 Q Okay. Every day, all day? Every day for a couple hours?
2 About how long?

3 A He did leave periodically to do some of the things that
4 the Court assigned him to do.

5 Q Okay. So when your son was around, did he provide care?

6 A He did.

7 Q What kind of things did he do?

8 A He fed him food, he taught him words, he explained things
9 to him. At this point, [REDACTED] wasn't -- [REDACTED] wasn't
10 quite walking --

11 Q Um-hum.

12 A -- so we worked on walking, we worked on talking.

13 Q Um-hum.

14 A We took him to the library for story time.

15 Q Um-hum.

16 A And did things like that.

17 Q And these visits lasted until about the summer of 2017,
18 right?

19 A I believe so. My memory isn't the best on what date it
20 was.

21 Q During this time, did you ever see your son give your
22 grandson a birthday present or a gift?

23 A Yes. Birthday presents were always given, gifts were
24 always given for Christmas and my son always provided
25 clothing as [REDACTED] got bigger and seasons changed. He tried

[REDACTED] - DIRECT

1 to keep up with just giving those things, like T-shirts,
2 socks --

3 Q Um-hum. How do you --

4 A -- boots.

5 Q How do you know about the clothing?

6 A Because we went shopping together.

7 Q And who paid for the clothing?

8 A [REDACTED] had a job.

9 Q Um-hum. So, one of the visits was over his first
10 birthday, right?

11 A Yes.

12 Q Can you talk a little bit about his first birthday?

13 A We threw a party at Famous Dave's. Again, [REDACTED]
14 worked. His check was about \$700. He spent the whole
15 check to feed [REDACTED] her family and us to celebrate the
16 birthday. And he also spent at least \$500 on the
17 clothing. There was, like, this huge garbage bag of
18 clothing that he bought and gave to them, brand-new with
19 tags on them.

20 Q Um-hum. Excuse me, just a moment. I'm a little out of
21 order.

22 So, during the licensing process, did you have
23 trouble working with the licensing department?

24 A I did. There was some disconnection there.

25 Q Okay. What -- what was the main problem?

- DIRECT

1 A At one point, I lost contact with the main person. I
2 called and called and called and I was finally told that
3 he was out for maternity leave, that his wife had had a
4 baby, and I believe that lasted 12 weeks. No one told me
5 who took over -- if anyone else was taking his caseload.
6 And so I kinda let it slip for a while, until one day I
7 think the lady contacted me and she said: I reviewed
8 your paperwork and it looks like we've got a problem.

9 Q Okay. What was the problem?

10 MR. HARRINGTON: Your Honor, I'm going to object
11 on the basis of hearsay and foundation.

12 MS. BAYER: That's fine. I'll move on.

13 THE COURT: Okay.

14 BY MS. BAYER:

15 Q So, let me see, did you get licensed?

16 A No.

17 Q And how did you find that out?

18 A During the call I mentioned.

19 Q I don't think you mentioned a call yet.

20 A Well, that was when he said "hearsay." She called me and
21 said: We got a problem.

22 Q Oh, she called you and said: We have a problem, okay.

23 So -- and you didn't end up getting licensed?

24 A Yes.

25 Q And did you -- how did you react to finding that you

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- DIRECT

1 couldn't get a license?

2 MR. HARRINGTON: Object as to relevance.

3 MS. BAYER: Um-hum.

4 MR. HARRINGTON: What's the relevance of
5 [REDACTED] reaction to being licensed or not?

6 MS. BAYER: Well, because it goes to whether or
7 not the decision could have been appealed.

8 THE COURT: All right. Objection is overruled.
9 You can answer, ma'am. Thank you.

10 THE WITNESS: I asked her if there was anything
11 else I could do.

12 BY MS. BAYER:

13 Q And what did she say?

14 A She said no.

15 Q After you found out that you weren't licensable, did you
16 continue to have visits with your grandson?

17 A Two or three.

18 Q Would you have been -- and is it correct to say that
19 those visits eventually stopped?

20 A Yes.

21 Q Would you have been willing to continue with those visits
22 even if you had known you wouldn't be able to get
23 placement of him?

24 A Absolutely.

25 Q All right. You were present at the trial to terminate

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ATTORNEY RYAN REID - DIRECT

1 THE COURT: And have you talked about that with
2 your attorney, Ms. Bayer?

3 [REDACTED] Ah, no.

4 THE COURT: All right. Ms. Bayer, have you
5 talked to [REDACTED] about waiving the privilege?

6 MS. BAYER: I believe I did, but it might have
7 been a while back.

8 THE COURT: Okay.

9 MS. BAYER: It's theoretical. If I file this,
10 then you'll have to do this.

11 THE COURT: Mr. Reid, did you want me to inquire
12 any further with [REDACTED] or are you comfortable now?

13 MR. REID: I think that's fine.

14 THE COURT: Go ahead, Ms. Bayer.

15 MS. BAYER: Where was it?

16 THE WITNESS: I remember the question.

17 BY MS. BAYER:

18 Q Did you consider calling [REDACTED] my client's mother,
19 at the fact-finding hearing?

20 A I think -- so -- I can't remember specifically if I --
21 I -- I think the crux of the case -- so just to back up a
22 little bit.

23 Q Um-hum.

24 A The crux of the case from my perspective strategy-wise
25 was to focus on, you know, the sub(2), continuing need

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ATTORNEY RYAN REID - DIRECT

1 concerns.

2 Q Um-hum.

3 A I also, you know, tried to wrap in the failure to assume
4 aspects. So, because her part of the case or because
5 what she did or her participation was so early in the
6 case, I don't think it would have been helpful because a
7 lot of the more current lack of visits and some of the
8 issues at visits, I think, were more -- I think -- I
9 guess the strategy for me or the way I was trying to
10 present the case, um, I just didn't see it as being
11 helpful. I think some of our -- our communications
12 towards the end, as we were getting ready for trial,
13 weren't as good as they were at the beginning of our
14 representation. We did meet --

15 Q I'm sorry to interrupt. Was that your communications
16 with [REDACTED] your communication with [REDACTED]

17 A [REDACTED] my client.

18 Q Okay.

19 A So it's usually my habit to talk with people about
20 witnesses very early on. I don't think he mentioned any
21 witnesses specifically. I know we had meetings scheduled
22 at the Duluth Public Library, the downtown branch, that
23 [REDACTED] did not appear for, did not go to. I know I
24 attempted to call him and text him and he did not respond
25 to some of those out -- some of that outreach.

ATTORNEY RYAN REID - DIRECT

1 So, I guess, to answer your question, I think
2 based on the strategy at trial, I didn't think it would
3 be helpful, nor did my client request or think that it
4 would be helpful at that point, from my recollection.

5 Q Okay. Were you familiar with the statute on failure to
6 assume parental responsibility?

7 A I am.

8 Q And so you are aware that the determination of
9 substantial relationship is based on the child's entire
10 life and even prenatally, correct?

11 A Yes, under the totality of the circumstances. So I think
12 the way I saw -- again, I'm not saying I'm perfect, but I
13 think the way I saw the case in the totality, yes there
14 was a substantial interaction there.

15 Q Um-hum.

16 A But, that kind of teetered off and then stopped.

17 Q Um-hum.

18 A And I don't think with the other evidence of [REDACTED]
19 actions, coupled with his parents, I didn't really want
20 to get stuck in that -- I didn't want to get stuck in
21 that, as well.

22 So, I guess, taking all of that into account, I
23 figured -- or I didn't really want -- didn't want to have
24 to deal with the negatives of her as a witness --

25 Q Um-hum.

ATTORNEY RYAN REID - DIRECT

1 A -- weighed against the positives of talking about that
2 connection.

3 The other concern I had --

4 Q I'm sorry -- I'm sorry to interrupt you.

5 A Go ahead. The other concern.

6 Q Okay. The negative is [REDACTED] as the witness?

7 A I think some of the negative was lack of licensure.

8 Q Okay.

9 A They had significant times with the child, with [REDACTED] but
10 because they couldn't get licensed -- I think there was
11 concern with -- I can't remember if it was her that had
12 the criminal background or the father -- there was
13 definitely some issues with that. And I think, coupled
14 with some of [REDACTED] either -- I don't know if it was
15 pending at the time or some of his criminal issues, as
16 well, I think that's where I kind of weighed, Okay, so
17 there may be some positives, but there's also some
18 negatives with calling her as well. And I don't
19 recollect having a specific conversation with [REDACTED]
20 but I don't recall him saying: I really want you to call
21 my mom or my father as a witness either.

22 Q So you mentioned you were concerned that the licensing
23 denial would reflect badly?

24 A So I think the -- so -- yeah, I didn't really litigate
25 the County's case, but I think one of the things that the

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ATTORNEY RYAN REID - DIRECT

1 County had was that [REDACTED] didn't follow through or
2 [REDACTED] didn't show up.

3 Q Right.

4 A I didn't want to have to deal with -- so his parents, as
5 well, failed to follow up with St. Louis County, his
6 parents didn't follow through, and that's one of the
7 reasons why the licensure, coupled with some other
8 issues, didn't go through, was my understanding of
9 reading the case notes.

10 Q You didn't ask her her side of why there was
11 communication problems?

12 A I didn't, no.

13 Q And so do you recall case notes in which a St. Louis
14 County worker said that they hoped that the [REDACTED] would
15 get placement despite the barriers?

16 MR. HARRINGTON: Your Honor, I'm going to object
17 as to relevance.

18 MS. BAYER: Um-hum.

19 THE COURT: Ms. Bayer, what's the relevance?

20 MS. BAYER: So, the -- it's -- my position
21 basically is that had Mr. Reid dug into the licensing
22 issue, they would have found that there was conflicting
23 information as to whether or not they could have
24 appealed. I have a note I can try to offer into
25 evidence -- I don't have a social worker to certify it.

ATTORNEY RYAN REID - DIRECT

1 allege different -- there's different actions of my
2 motion, would it be -- do you think it would be all right
3 if I asked if Mr. Harrington and Mr. Gramstrup wanted to
4 cross on what I just asked or move on to the next
5 allegation? Or -- I'm sure they are very competent
6 attorneys and they can handle it at once, but...

7 THE COURT: I don't know.

8 I mean, Mr. Harrington?

9 MR. HARRINGTON: As a practical matter, Your
10 Honor, I think it's about a horse apiece. Just kind of
11 jumping back and forth, I think, makes for an odd record.

12 MS. BAYER: Okay.

13 THE COURT: Yeah, if we just --

14 MR. GRAMSTRUP: I agree.

15 THE COURT: -- proceed.

16 MS. BAYER: Okay.

17 BY MS. BAYER:

18 Q So, at trial, you recall that the petitioner introduced
19 specific evidence from some of the social workers about
20 how the visits went?

21 A Okay. Yes.

22 Q Um-hum. And they testified that [REDACTED] seemed to
23 prefer his foster mother, Mrs. [REDACTED] to his father,
24 [REDACTED] correct?

25 A I don't specifically recall, but I don't disagree with

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1 that either.

2 Q Okay. And he testified -- I'm sorry. And the reports
3 from the social workers was that he -- at those visits,
4 he didn't enjoy them and he didn't want to be with his
5 father?

6 A So I think some of the visits -- my recollection is there
7 were examples of good visits, there were examples of bad
8 visits. I -- there were visits that went well that
9 [REDACTED] did very well at them or -- my client. And then
10 there's some visits that didn't go well. There was
11 testimony that there were some issues. So I guess I'm
12 not disagreeing with your, um -- with your wording of it,
13 but there were -- there was testimony about visits;
14 that's correct -- about visits; that's correct.

15 Q Specifically visits that were testified about at trial,
16 there were no -- there was no testimony about safety
17 concerns, correct?

18 A I don't recall -- I can't -- I guess if you use a more
19 specific example. I don't believe that there were.

20 Q Um-hum. Did you receive my email of yesterday that
21 contained the transcripts so that you could review them?

22 A I did receive your email. I can't recall -- I believe a
23 day-and-a-half of testimony, but from my recollection of
24 discovery --

25 Q Um-hum.

1 A -- and being at the trial and preparing for trial --

2 Q Um-hum.

3 A -- there were good visits and there were bad visits.

4 Q Um-hum. Okay.

5 A Is there a specific page you want --

6 Q Yeah.

7 A -- me to review?

8 Q That's the thing, right, if we were in person I would
9 tell you what page I was looking for. So do you have a
10 copy of the transcript -- the thing is it's a couple
11 pages long.

12 A I do.

13 Q Since we're going to be adjourning the hearing, I would
14 ask if there's any objection to, at the date that we
15 continue it, to continue this line of questioning so
16 Mr. Reid has the chance to go through the transcripts? I
17 think that would make things go a lot more smoothly.

18 THE WITNESS: Well --

19 THE COURT: Mr. Reid was gone -- I just don't
20 know that we want to bring Mr. Reid back again. He's a
21 busy person, if you know what public defender's do up in
22 northern Wisconsin and what he has to do. It's not -- I
23 would prefer to have him done today, so that he
24 doesn't -- we don't have to call him back. I just --
25 we're short of public defenders up here and I'm very

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1 mindful of his time.

2 So if there's things you need to point out to
3 him and he can look -- he apparently has the transcript,
4 I'm guessing, in front of him. I know it's going to be a
5 little bit clunky, but if we can try to get through it,
6 that would be great. I mean, he answered the question to
7 the best of his ability at this point.

8 MS. BAYER: Um-hum.

9 BY MS. BAYER:

10 Q So I'll refer you to Page 213 of the transcript.

11 A Okay.

12 Q And, at the very top of the page, Line 2, the questioning
13 begins about: When the supervised visit between
14 [REDACTED] and [REDACTED] -- so would you take a
15 moment to review that and then let me know if there were
16 any safety concerns or issues of cooperation from

17 [REDACTED]

18 A I've reviewed the page.

19 Q Okay. Were there any problems listed with [REDACTED]
20 behavior?

21 A No.

22 Q Okay. So now let's turn to Page 215 of the transcript,
23 top of the page, where it references a visit on May 7th.

24 A Yes, I'm on Page 215.

25 Q Okay. Could you take a moment to read the testimony

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1 about that visit?

2 A (Reviews document.) Would you like me to continue to
3 Page 216?

4 Q Yes. No, actually. I think it's all on 215.

5 A I reviewed Page 215 of the transcript.

6 Q Is there any testimony about concerns with [REDACTED]
7 behavior or parenting as to that visit?

8 A No.

9 Q Okay. Could you review Page 219?

10 A (Reviews document.)

11 Q And, conveniently, at the top of Page 219, it talks about
12 a visit on July 2nd.

13 A I've reviewed Page 219.

14 Q And are there any issues with [REDACTED] behavior or
15 conduct at that visit?

16 A No.

17 Q So you never objected to testimony about those visits,
18 correct?

19 A It doesn't look like I did.

20 Q And you didn't specifically object that they were
21 prejudicial?

22 A I didn't object because -- I didn't object that they were
23 prejudicial because I didn't think that they were and I
24 don't think they are prejudicial now. I think that they
25 are visits that occurred.

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1 Q Um-hum. Are you --

2 A Yeah.

3 Q So you are familiar with TPR case law, correct?

4 A Yes.

5 Q And you are aware that there is -- there is to be no
6 testimony about the best interests of the child at
7 fact-finding?

8 A I am.

9 Q And that the child's wishes are not part of fact-finding?

10 A I think the case law -- yes, for the most part, I think
11 that's accurate. I do think that what happens at visits,
12 especially in the failure to assume/continuing need
13 context -- so, yes, it's difficult --

14 For a complete record, for a year I did TPR
15 prosecution. I've been with the public defender's office
16 since 2011. I've presented trainings about TPR. I think
17 presenting information about a visit -- I don't believe
18 in the information you had me review -- I think that they
19 are just visits that occurred. So I wouldn't have
20 objected, because I don't think that they were
21 prejudicial. If they were visits that went really well
22 for me, I would have drawn out those visits and they
23 would have been relevant and non-prejudicial, as well.
24 But that's -- again, that's my opinion.

25 Q So you said that efforts of -- that -- so you thought

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1 those visits were actually a little bit helpful, correct?

2 A No. I said if there were visits that were really, really
3 helpful for us --

4 Q Um-hum. Oh, I misunderstood. I'm sorry.

5 A Sorry.

6 Q That's fine.

7 A Sorry.

8 Q So moving on to Section VII of my motion. So you
9 objected to the letter that the [REDACTED] rote to the
10 CHIPS court about the best interests of [REDACTED] correct?

11 A Yes.

12 Q Right. And you objected you recall as to foundation and
13 relevance?

14 A I'm not -- if you could just --

15 Q Oh, sure. Do you want to review a copy of the letter?

16 A Well, I have the letter. Did I object at the
17 fact-finding or did I object at the disposition?

18 MS. BAYER: Ah, sorry, Judge. I don't want to
19 coach my witness.

20 BY MS. BAYER:

21 Q At the fact-finding?

22 A If you say I objected, I probably objected.

23 Q Okay. Did you consider making any objection that the
24 letter was prejudicial?

25 A I don't think I considered that.

1 to come in through this hearing. This is my only chance
2 to add things to the record. So please bear with me for
3 that reason.

4 THE COURT: Yeah, that -- I totally get it. I
5 have no problem with it. I just -- sometimes when I hear
6 things like that and then --

7 MS. BAYER: Um-hum.

8 THE COURT: -- is that really ineffective? Go
9 ahead. You can proceed.

10 BY MS. BAYER:

11 Q Aside from the hearsay objection, did you consider making
12 a prejudice objection to that?

13 A Just -- I mean, I want to answer your first question.

14 Q Sure.

15 A I didn't consider it hearsay and I didn't consider it
16 prejudicial at the time.

17 Q So moving on to Section IX of my motion. So the Court --
18 the relevant page for this, by the way, is Page 271 in
19 the transcripts. It's great because everything is near
20 the top of the page. I'll give you a moment to review
21 that.

22 A Just -- oh, okay.

23 Q That paragraph.

24 A Just the first paragraph?

25 Q Yes. It's, like, Lines 3 to 9.

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1 A I've reviewed that paragraph on Page 271.

2 Q Okay. So to summarize it for the record, the Court
3 answered Question 1 on the jury verdict form, correct?

4 A That's correct.

5 Q That, specifically, he found that -- I'll just read it to
6 make this clear: [REDACTED] has been adjudged
7 to be in need of protection or services and placed
8 outside the home for a cumulative total period of six
9 months or longer, pursuant to one or more court orders
10 containing the termination of parental rights notice
11 required by law." Correct, that's what it says?

12 A Yes, that's what the transcript says.

13 Q Okay. So, you, of course, reviewed the termination of
14 parental rights petition in this case, correct?

15 A I did.

16 Q And on the last page of that petition, it referenced a
17 change in the law that had recently occurred?

18 A Yes.

19 Q And is it correct to say that one of the elements of a
20 CHIPS finding -- one of the required elements has been
21 deleted from the law that you were working under now?

22 That was a really confusing question, I'm sorry.

23 A If you mean the law has changed? Yes.

24 Q Yes. The law has changed, correct?

25 A Correct.

1 Q Okay. And so under -- you were on the CHIPS file as
2 well, right?

3 A Yes.

4 Q And so he was provided with warnings at the CHIPS trial,
5 right?

6 A Yes.

7 Q But in the CHIPS case those weren't warnings under which
8 the petition was filed?

9 A Yeah. So, what I can -- I think the status of the law
10 right now at the time when this was litigated a year
11 ago -- and I believe one of my friends has a -- I think
12 she represents the father and the mother is petitioning
13 the Supreme Court as to this issue. I think a lot of
14 things were in flux during this time period. I think I
15 did not -- sorry. I don't know -- I don't want to jump
16 ahead, so I'll just stop myself.

17 Q That's fine. You know what I'm going to be asking you
18 anyway, so...

19 A Yes.

20 Q So, basically, the finding by the Court, on Page 271, at
21 the end of the trial was that he was answering the
22 special verdict form that the requirement that the orders
23 in the CHIPS case contained the termination of parental
24 rights notice required by law was met, correct?

25 A Correct.

1 Q And then you didn't object to that specific finding?

2 A I did not.

3 Q Right. And you testified that you didn't have a
4 strategic reason for doing that?

5 A I don't -- I mean, I wouldn't say -- I think my
6 position -- I think it's still up in the -- I mean,
7 again, I -- I think that the law is still in flux on
8 situations where the CHIPS case happened under old law.
9 The law was passed --

10 Q Um-hum.

11 A -- the TPR was taking place or filed under new law, I
12 think there's still a question of what -- what's the
13 right thing to do, what's -- so I think different people
14 are taking different perspectives and doing different
15 things.

16 Q Um-hum.

17 A Maybe I should have objected -- and I'll say that, maybe
18 I should have, just to make a better record --

19 Q Right.

20 A -- but I did not object. And I don't -- I can't say a
21 specific reason strategically for why I didn't.

22 Q Okay. And, then, so moving on to Section X of my motion,
23 it's a really similar issue. (Unintelligible) that the
24 finding wasn't met, you know, any more that there might
25 have been a constitutional issue. And you didn't object

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1 on constitutional grounds either?

2 A I did not.

3 Q Right. And you never argued that the old jury
4 instructions should have applied to your client rather
5 than the new ones?

6 A Right. And I would -- I guess -- right. And I guess my
7 position, again, would be I think it's still up in the
8 air what --

9 Q Right.

10 A -- what was the right thing to do or what -- so I
11 guess -- there wasn't a strategic reason for what I did.

12 Q Right. And I hate to keep hammering you with this, but I
13 do need to make sure I have a good record. I need to
14 move forward. So you talked about how you are familiar
15 with TPR case law; you've done these before?

16 A Correct.

17 Q Are you aware that there is published case law saying
18 that a change in the elements of the CHIPS statute can
19 lead to a fundamentally unfair procedure? The name of
20 the case being *Patricia A.P.*?

21 A I'm not necessarily familiar but, okay.

22 Q You didn't review that case going into the trial?

23 MR. HARRINGTON: Your Honor, I'm going to
24 object. I don't know that Ms. Bayer is doing it
25 intentionally, but it certainly appears to me when she's

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1 asking the questions, she's nodding her head to Mr. -- on
2 the screen to indicate what the response should be...
3 so --

4 THE COURT: I don't find --

5 MS. BAYER: I'm sorry.

6 THE COURT: I don't find it that way, so I just
7 think that's how she's been asking the whole time.

8 Go ahead, Ms. Bayer.

9 I think the question was, were you aware of -- I
10 can't remember the case, was it Elizabeth (sic) A.P.?

11 MS. BAYER: *Patricia A.P.*

12 THE WITNESS: I did not review the case before
13 the trial, no.

14 MS. BAYER: Thank you.

15 So, at this point, Your Honor, when I spoke to
16 Mr. Harrington and preparing for the case, we -- we did
17 agree to -- I suppose that he wouldn't object to me
18 asking that we do adjourn some of Mr. Reid's testimony to
19 another date. You've indicated that you don't want to do
20 that. Do I have any leeway at all in arguing that?

21 THE COURT: Well, I just -- I mean, obviously --
22 I don't have a problem with what parties agree to
23 99 percent of the time. I just get worried -- I guess I
24 get worried that we're taking up more of Mr. Reid's time
25 by doing it again, but if that's what you guys have

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1 Go ahead, Mr. Harrington.

2 MR. HARRINGTON: Thank you.

3 CROSS-EXAMINATION

4 BY MR. HARRINGTON:

5 Q Good afternoon, Mr. Reid. Can you hear me okay?

6 A I can. Good afternoon.

7 Q Thank you. I'm going to try to proceed in the same order
8 that preceding counsel just did. So I'm going to be
9 starting with that Roman Numeral Number V and the issue
10 of presenting the testimony of Ms. -- [REDACTED]
11 parents at the trial, okay?

12 A Okay.

13 Q Did I understand your testimony, in response to
14 Ms. Bayer's questions on those issues, that you had
15 reviewed the discovery that had been provided by the
16 Department in this case?

17 A Yes.

18 Q And that you were aware, by virtue of your review of that
19 discovery, that the parents had pursued foster care
20 licensing through St. Louis County, Minnesota?

21 A Yes.

22 Q And you were aware of the information contained in
23 Douglas County's records regarding St. Louis County's
24 denial of that foster care license?

25 A So, for sure, I can testify that I reviewed case notes

1 that dealt with the topic. I don't believe I reviewed
2 any independent information, but I did review information
3 in case notes and I believe -- I can't remember the
4 specifics, but I did review information about the foster
5 care license.

6 Q Yeah. I, again, I probably didn't ask the question as
7 eloquently as I could have. There was information in the
8 discovery you received from Douglas County about
9 St. Louis County's foster care license process, correct?

10 A Yes.

11 Q Okay. And you were familiar, then, with the information
12 that led to the denial of that foster care license; is
13 that correct?

14 A Yes.

15 Q And I believe you testified on direct examination that
16 where you recognized some positives from the parents'
17 testimony, there would have been some negatives that
18 would have gone along with that; did I understand that
19 testimony correctly?

20 A Yes.

21 Q And, to a certain extent, that was on the theme where you
22 perceived your client to have some deficiencies in his
23 follow-through, that there would be similar perceived
24 deficiencies on the part of his parents; is that a fair
25 summary of your testimony?

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1 A Yes. Um, I've tried a lot of cases with you, Attorney
2 Harrington, and you tend to pick up on patterns and you
3 tend to draw out, you know, past behaviors as a predictor
4 of the future and I was -- anyway, I don't want to
5 rewrite history, but trying to cut off at the pass some
6 behaviors from the parents that may be attributed to my
7 client.

8 Q Thank you. And I believe you alluded to, in your direct
9 exam testimony, that one of the parents may have had a
10 criminal record that impacted the foster care license in
11 St. Louis County; did I hear that correctly?

12 A Yes.

13 Q And is it also true that there was some evidence in the
14 discovery from Douglas County that there was a lack of
15 follow-through on the part of either one or both of
16 [REDACTED] parents in pursuing the foster care license
17 in St. Louis County; is that correct?

18 A Yes.

19 Q And so, to kind of summarize, based upon all of that, did
20 I understand your testimony on direct examination to be
21 that the decision not to call either [REDACTED] mother
22 or [REDACTED] father was a strategic decision based on
23 what you thought was the best defense for your client?

24 A Yes.

25 Q Okay. The -- in that section, you refer to some

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1 difficulties in communications with your client leading
2 up to trial; did I understand that testimony correctly?

3 A Yes.

4 Q I believe you testified that at least at the early parts
5 of the case you had -- I don't know if I could
6 characterize it as regular or frequent communication with
7 [REDACTED] but you did have multiple conversations with
8 [REDACTED] did I understand that right?

9 A Yes.

10 Q During those multiple conversations, did I understand
11 from your testimony on direct examination that he did not
12 mention or recommend specifically that his parents
13 testify as a part of the fact-finding phase?

14 A That's correct.

15 Q Would you normally consult with your client on issues of
16 strategy and presentation like that?

17 A Yes.

18 Q And I believe I also heard you to testify that later on
19 in the representation, but in the days leading up to the
20 trial, that there were -- that communications waned and
21 there were some difficulties; did I hear that testimony
22 correctly?

23 A Yes.

24 Q I believe you testified in response to Ms. Bayer's
25 questions that there was some trouble with [REDACTED] not

1 responding to calls and text messages from you?

2 A That's correct.

3 Q Over what span of time prior to trial did the
4 communication between you and [REDACTED] start to wane?

5 A Maybe four to six months. It would be -- I mean, just --
6 I mean, we had conversation, it was -- we scheduled
7 something at the library that he did not appear for. In
8 that time period, I would text him maybe on week one. He
9 would get to me maybe next week or the week after that.
10 So not as consistent.

11 Q So you are saying for a period of between four and six
12 months prior to the trial, he did not maintain
13 communication with you, at least at the level he was at
14 the beginning of the representation?

15 A That's accurate.

16 MS. BAYER: I'm sorry -- I'm sorry to interrupt.
17 Can you hear me?

18 THE WITNESS: Yes.

19 BY MR. HARRINGTON:

20 Q And --

21 MS. BAYER: I'm sorry to interrupt again. I
22 just missed the last 30 seconds of testimony. It looks
23 like the audio went out.

24 THE COURT: Okay. I could hear everything fine.
25 It was about the testimony -- and everything seems fine

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1 on my end. The testimony was about [REDACTED]
2 maintaining contact. What was the last thing that you
3 remember, Ms. Bayer?

4 MS. BAYER: Um, I think that was about
5 maintaining contact, as well. I think he said that the
6 communication waned to less than ideal about four to six
7 months before the start of the hearing.

8 THE COURT: And I know that Mr. Harrington then
9 didn't say anything for a little bit so...

10 MS. BAYER: Oh, that might have been it. I'm
11 sorry.

12 MR. HARRINGTON: Thank you.

13 BY MR. HARRINGTON:

14 Q Mr. Reid, would you agree with me that the petition as to
15 [REDACTED] was filed on November 30th of 2018?

16 A I would not disagree.

17 Q Okay. Fair enough. And it was exactly a year ago
18 yesterday that we tried this case for fact-finding
19 purposes; is that accurate?

20 A Yes.

21 Q So it was approximately nine months after the date of
22 filing that we tried this case?

23 A That sounds accurate.

24 Q So if for the nine months from the filing leading up to
25 the trial he did not have communications with you for a

1 period of between four to six months, that was a
2 substantial part of the representation; would you agree
3 with that?

4 A I would. And just so -- I mean, I want to make sure --
5 we had communication. It just wasn't as good as it was
6 in the beginning or as consistent or substantive, but we
7 had -- I mean, it's not like we didn't have any
8 communication, it just was harder to get ahold of him,
9 harder to get -- so...

10 Q Understood. Thank you.

11 And was it those -- you were asked on direct
12 examination about not calling the parents at disposition.
13 I understood your testimony to be that it was similarly
14 strategic considerations that prompted you to not call
15 either [REDACTED] mother or father; is that correct?

16 A Yes.

17 Q Moving on to, then, Section Number VI and the issue of
18 failing to object to evidence that [REDACTED] preferred
19 the foster parents to your client. Do you recall that
20 line of questioning from Ms. Bayer?

21 A I do.

22 Q And I believe you testified both in response to my
23 questions and to Ms. Bayer's questions that you have a
24 fairly lengthy career just in terms of prosecuting and
25 defending TPR cases. I believe, you testified it went

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1 back to 2011 or 2010?

2 A 2011; that's correct.

3 Q Okay. And so would it be fair to assume that in all of
4 that nearly 10 years of experience at this point, that
5 you've tried other cases involving failure to assume
6 parental responsibility?

7 A Yes.

8 Q And would you agree with me that -- and I believe you
9 testified to this -- that the standard for the factfinder
10 to determine whether or not a parent has a substantial
11 relationship is a totality of the circumstances analysis?

12 A That's correct.

13 Q Would you agree with me that totality of the
14 circumstances would mean that a factfinder consider all
15 evidence bearing upon that issue one way or the other?

16 A Yes.

17 Q And on -- I believe you offered this in response to the
18 question on direct examination. If, for example, records
19 from the Department in terms of the case notes or the
20 visit notes had reflected that visits between

21 [REDACTED] and [REDACTED] were exemplary or
22 outstanding; you would agree that that would have been
23 relevant testimony at the trial?

24 A Yes. And I do believe -- I mean -- yes.

25 Q And you would agree, then, that if there was evidence in

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1 either the case notes or in the visitation notes about
2 strengths -- a strong bond between your client and his
3 son, you would have developed that as -- you would have
4 tried to develop that at the trial?

5 A So I do believe -- my recollection is that there were
6 positive visits, there were visits that I talked about on
7 cross, maybe not specifically, but I know that there was
8 evidence that some visits did go well. So I know that
9 those were addressed.

10 Q And I agree with that. I'm asking you if you would agree
11 that if there was evidence of good visits or evidence of
12 a strong bond between your client and his son, that would
13 be both relevant and helpful to your defense?

14 A Yes.

15 Q So would you -- would you then agree that if there was
16 evidence of the contrary that there was not a bond or
17 that he might have bonded to somebody else, that would
18 also have been relevant on the issues of failure to
19 assume parental responsibility?

20 A It would be relevant. I would --

21 Q Thank you.

22 A -- do what I could to --

23 Q Thank you.

24 During your direct exam testimony, do you recall
25 Ms. Bayer asking you to review Pages 213, 215 and 219 of

1 the transcript in relation to this specific section of
2 her motion?

3 A Yes.

4 Q And she asked you questions in relation to best interests
5 of the child; do you recall that line of questioning?

6 A Yes.

7 Q Isn't it true that on neither of those pages that I just
8 referenced or even in any of the testimony was the best
9 interest of the child ever invoked or referenced in
10 direct or cross-examination of any of the witnesses?

11 A I think that's accurate.

12 Q Thank you.

13 Moving to the next section, Section VII. This
14 was on the letter that was admitted from [REDACTED]
15 [REDACTED] to [REDACTED] do you remember that line of
16 questioning from Ms. Bayer?

17 A I do.

18 Q Okay. And so that the record is clear, [REDACTED]
19 [REDACTED] who wrote that letter and gave that testimony,
20 she is the preadoptive home for [REDACTED] at this point in
21 time; is that correct or is that your recollection?

22 A That is my recollection.

23 Q And do you recall -- isn't it true that there was
24 testimony from Ms. [REDACTED] to her concerns about the
25 length of time [REDACTED] had been out of home?

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1 probably try to exclude it or get rid of it, but -- and I
2 think, my recollection of reviewing that -- or the
3 transcript, I think there was some reference to my
4 cross-examination. But, yes, I believe it's relevant.

5 Q And on the issue of hearsay, you are familiar with the --
6 would it be fair to say that you have at least passing
7 familiarity with the hearsay rules and their exceptions?

8 A Yes.

9 Q And would you agree that there's a residual or catch-all
10 exception to those hearsay rules?

11 A I mean, I would agree with the residual hearsay. I think
12 there's non-hearsay. I think there's non-hearsay uses.
13 I think that section -- I just don't think it's hearsay.

14 Q Thank you. I'm going to address my comments on
15 Sections IX and X of Ms. Bayer's outline here in as far
16 as they deal with the same issue, but in slightly
17 different contexts. Ms. Bayer asked you a question about
18 a case, **Patricia A.P.**; do you recall that line of
19 questioning?

20 A I do.

21 Q And I believe your testimony was that you did not review
22 that case in anticipation of the trial or during your
23 representation?

24 A That's correct.

25 Q Have you heard of that case before?

1 A I have not.

2 Q Okay. Would you agree with me -- and did I hear that
3 Ms. Bayer sent you a copy of the motion that's before the
4 Court this afternoon?

5 A She did send me a copy of the motion; that's correct.

6 Q If she wrote in her motion that under **State versus**
7 **Patricia A.P.**, it held that if the State substantially
8 changes the type of conduct that may lead to the loss of
9 rights without notice to the parent, the State applied
10 the fundamentally unfair procedure, if that's -- if -- if
11 that's reflected in your (sic) motion, would you either
12 agree or not disagree with me that that's what Ms. Bayer
13 characterized as the holding of that particular case?

14 A I would not disagree.

15 Q Okay. Are you aware that the Court of Appeals found that
16 the Legislature's 2019 amendment of the grounds under
17 48.415 sub(2) did not substantially change the type of
18 conduct that may lead to TPR?

19 A Am I familiar with that?

20 Q Were you aware or are you familiar with that?

21 A No, not specifically.

22 Q Okay. But, I believe you testified to knowing that
23 there's been litigation about that change in the law?

24 A Yes, I am aware that the state of -- yes, there's a lot
25 of -- there's a lot of things in flux with old law, new

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ATTORNEY RYAN REID - EXAM by Mr. Gramstrup

1 law, CHIPS old law, CHIPS new law.

2 Q And I believe you testified on direct examination that
3 you reviewed the petition; is that accurate?

4 A Yes.

5 Q And it was prominently indicated in the petition that the
6 Department was seeking to apply the new law, correct?

7 A Correct.

8 Q Would you have reviewed that information with [REDACTED]

9 A My recollection is I provided him with a copy of the
10 petition in full at our first meeting at the Duluth --
11 I'm sorry, St. Louis County library, downtown Duluth
12 location.

13 Q Thank you. Mr. Reid, on these particular points, I don't
14 have any more questions. When we reconvene at the
15 adjourned date I'll have more questions then. Thank you.

16 THE COURT: Mr. Gramstrup?

17 MR. GRAMSTRUP: Thank you, Your Honor.

18 EXAMINATION

19 BY MR. GRAMSTRUP:

20 Q Mr. Reid, you testified about some of the difficulties
21 you had in communicating with your client. But would
22 you -- would you say that you had enough contact that you
23 had enough -- that it was adequate or sufficient for you
24 to adequately prepare for trial?

25 A Yes.

1 Q And during your contacts with [REDACTED] did you talk
2 about the process of the trial, what the grounds were,
3 what the County needs to show, and discuss trial
4 strategy?

5 A Yes.

6 Q During any of those conversations, did he provide you
7 with any information about any witness; including, but
8 not limited to, his mother, who might have helpful
9 testimony -- might have had helpful testimony about
10 anything that you couldn't have been aware of through
11 your review of the discovery?

12 A So my recollection is I conducted an interview with
13 [REDACTED] spoke with [REDACTED] We talked a lot about
14 case strategy and what I wanted him to do during the
15 case. There was an individual, and I can't remember his
16 name, from Lifehouse, which is an organization in Duluth,
17 Minnesota, that helps indigent clients and people -- they
18 just help people. They were helping him with some
19 housing concerns and some other vocational skills. I
20 think -- I think I already said housing. So we had -- he
21 gave me that information specifically. But it's my habit
22 and course in preparing for trial to ask, Are there any
23 witnesses I need to know about? Are (sic) there anyone I
24 should talk to? And besides the Lifehouse individual,
25 which I can't recall his name, I don't believe [REDACTED]

1 ever directed me to his parents -- is my recollection.

2 Q Okay. Now, you were asked on direct about testimony
3 contained on pages 213, 215 and 219 of the transcripts
4 concerning those visits. At the time of trial or during
5 that testimony, do you recall as to whether or not you
6 viewed that testimony to at least be partially favorable
7 to your client?

8 A My -- I can read -- I can re-review those portions. I
9 don't think they were helpful to my client. But I don't
10 think that there was a way that I could have objected or
11 tried to exclude the information. I think that, you
12 know, I practiced in front of a judge that used to say:
13 What's good for the goose is good for the gander. If I
14 would have a really great example of a visit, I went into
15 great detail about that, I think that the State or the
16 County would have had opportunity to say: Well, there
17 were other bad visits as well. I don't think it would be
18 prejudicial -- or I mean, it would be prejudicial, but I
19 don't think -- I think the probative value is maybe
20 outweighed by the prejudicialness of the example.

21 Q Okay. Fair enough.

22 A So I don't like the information, but I don't think
23 there's a way to try to get it blocked or stopped.

24 Q Now this was touched on a bit, I think, by Attorney
25 Harrington, but you were asked a number of questions

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1 basically in the vein of, you know, why didn't you object
2 as to it being prejudicial, particularly with the
3 testimony we just talked about, I think with the letter
4 from the foster parents and a couple other matters as
5 well. You would agree that all evidence is prejudicial
6 in some respects to either one side or the other,
7 correct?

8 A Yes.

9 Q So the question that I want to ask you then is in
10 considering those -- that evidence as it came in, did you
11 consider that testimony or evidence so prejudicial that
12 it would have unduly aroused the sympathy, emotions and
13 biases of the jury?

14 A So I tend to object a lot at trial. I try to find ways
15 to block information or stop information that's harmful
16 to my case, be it a TPR, criminal case, whatever. I
17 mean, I tend to object a lot. When I heard that
18 information, I didn't think there was anything
19 objectionable or had a real reason besides just trying to
20 throw Andy (sic) off -- sorry, Attorney Harrington off
21 his game or some other reason. But it's not information
22 I liked and it's not good information for my client --

23 Q Right.

24 A -- but I don't think there was a reason to object and I
25 actually objected to the letter --

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ATTORNEY REID - REDIRECT

1 progressed, I don't believe the case notes made them
2 sound like they were improving, maybe they were staying
3 the same or possibly getting worse, from my recollection.
4 But I'm aware that there were visits with the family
5 during the pendency of the CHIPS case.

6 Q And --

7 A (Unintelligible) --

8 Q Thank you. Were you also aware that [REDACTED] had
9 supervised visits with his son from about the time of the
10 filing of the petition, 2019, until around the time of
11 the trial?

12 A Yes.

13 Q And did you have any strategic reason for not introducing
14 evidence of those?

15 A As I said, I do believe that there was information
16 brought out that visits were occurring. I think,
17 strategically, some of those visits were neutral or
18 possibly could have been -- I believe could have been
19 negative to go into the details of them. But my
20 recollection is that there was testimony about visits
21 occurring.

22 Q So you testified earlier that part of your strategy was
23 to focus on attacking reasonable efforts as to the
24 continuing CHIPS ground, correct?

25 A If that's what I said, yes.

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1 Q And one of the things that you challenged to that end was
2 the distance that he was placed in a foster home from
3 where the father lived, correct?

4 A Yes.

5 Q And you asked Ms. [REDACTED] -- I'm sorry, she had a
6 different name. You asked the initial assessment worker
7 about whether she had looked for placements closer to
8 Douglas County, correct?

9 A I believe so.

10 Q Did you have a reason for not asking the other social
11 workers who testified whether they looked for placements
12 closer to Douglas County?

13 A Um, so I guess my recollection -- as I believe you
14 stated, I asked the initial worker because it would have
15 been the initial worker that would have been most
16 involved in the initial placement. A subsequent ongoing
17 worker or a worker after that initial worker -- unless
18 there's an issue -- again, based on my training and
19 experience and my experience with other prior TPR's, once
20 a child is in a stable placement, there's -- unless
21 there's some reason, I don't know why the child would be
22 moved. I think discussing and asking the initial worker,
23 I think, would have been the best place to do so, but I
24 guess, strategically, that's why I didn't.

25 (WHEREUPON, Mr. Gramstrup joins the Zoom video

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1 at 10:42 a.m.)

2 THE COURT: I want to make sure we're clear,
3 Mr. Gramstrup has now joined us on Zoom, so the record
4 should reflect that.

5 Go ahead.

6 BY MS. BAYER:

7 Q Another part of your strategy attacking reasonable
8 efforts was the failure to provide parenting skills
9 instruction, correct?

10 A Yes.

11 Q And, as part of discovery, do you recall getting a note
12 in discovery stating that the service provider who was
13 providing visits thought it could have also provided
14 parenting skills services in the car?

15 A That sounds like something I reviewed.

16 Q And did you have any reason for not introducing testimony
17 about that?

18 A So I guess -- just to go back to a prior topic, and I'll
19 get to specifically answer your question. The visits
20 were kind of a mixed bag, I guess, is how I would
21 describe them. Some of the visits were good. Some of
22 the visits were bad or had some facts that weren't
23 helpful and some of the visits were just neutral. I
24 don't think strategically focusing on visits was helpful,
25 especially towards the middle and end of them. Some of

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1 the visits weren't attended; some of the visits he had to
2 call in, he didn't call in. So I think focusing on the
3 visits while they were occurring sometimes, overall,
4 there were some issues with them. So I think one of the
5 reasons I strategically didn't go into them was because
6 it kind of opened the door to getting more in detail to
7 the visits which I didn't really want to, because some of
8 the visits weren't so great or --

9 So as I go into the visits, that brings out
10 details that maybe wouldn't have been brought out or
11 weren't brought out because I didn't bring them out. So
12 I guess, strategically, getting out that there were
13 visits that occurred was more important than that they
14 could have happened in the car. I wanted to focus more
15 on the fact that they weren't offered at all.

16 I think there was some testimony that he had to
17 do certain things before the parent training or parenting
18 classes happened. I think that was discussed, but I
19 can't remember specifically.

20 Q That's right. That was my next question. There also was
21 a note in discovery, as long as you agree, stating that
22 the social worker would have referred him to parenting
23 skills once he got into drug treatment; you said you
24 recall that?

25 A I do recall that.

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1 Q And I think you've mostly answered why you didn't
2 introduce it, but did you have any reason, specific to
3 that particular note, for not introducing it?

4 A If I -- if I didn't -- I don't remember why I didn't, if
5 I didn't. I believe that it was discussed during
6 testimony, the timing of the programming offered.

7 Q Sorry, I'm just writing down.

8 A No problem.

9 Q So moving on to disposition. Could you tell us what your
10 strategy was at disposition, just generally?

11 A I think the strategy at disposition was to, with the
12 facts I had, try to make the best possible argument that
13 the best interest of the child was to not have my
14 client's parental rights terminated. My recollection was
15 that there wasn't a lot of contact between me and my
16 client before disposition. I believe I attempted to try
17 to meet with him. So that would have been the strategy.

18 Q We talked about [REDACTED] earlier, she's my client's
19 mother, and you didn't -- you had reasons for not calling
20 her at trial. Did you have reasons for not calling her
21 at disposition that were different from your earlier
22 reasons for not calling her at trial?

23 A I think the only additional change would have been there
24 was contact -- so as we discussed previously, there was
25 contact with the child early in the case. It wasn't a

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1 lot of contact closer to the disposition -- the
2 dispositional hearing. So I think the lack of recent
3 or -- lack of recent contact with the child would be hard
4 to argue that they have a substantial relationship. I
5 think the lack of attempts on the part of the parents to
6 contact the child and have contact with the child would
7 also be hard to argue that they had a substantial
8 relationship. It's something I could have presented, but
9 I did not.

10 Q So one of the things you asked the Court for was for more
11 time to see if our client could meet the conditions of
12 return, correct? Or do you recall that?

13 A I don't specifically recall, but...

14 Q Um-hum.

15 A I -- I think one of the things was that -- yes, I
16 wouldn't disagree with that.

17 Q And we've also noted that there was a statutory change
18 that -- or moved what the courts are calling the
19 nine-month look-ahead requirement?

20 A Correct.

21 Q So did you have any reason for choosing not to cite the
22 statutory change as a way of making an equitable or
23 fairness argument to give him more time?

24 A I think unlike -- unlike other TPR's I've had, I guess I
25 saw this as a case that if Mr. [REDACTED] had, even during

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1 the pendency of the TPR had done certain things, I think
2 the County would have been open to a consent decree or a
3 hold-open or some kind of situation where there could
4 have been a reunification, in my opinion. So I think the
5 argument to the Court, from my recollection, was give him
6 time to complete this, we don't need a TPR in this
7 situation. So I think that's, I guess, maybe why I made
8 that argument. I don't think the look-ahead period at
9 trial or I think the equitable argument is what I made at
10 disposition was that, that if he could just complete
11 these services, then he could probably reunify with his
12 child and that the services were pretty standard and I
13 think he could have completed that.

14 Q Just one more question --

15 A I think that answers it.

16 Q It does. Thank you.

17 I have just one more question. What are the
18 things he could have done that might have induced the
19 department to agree to a consent or hold-open?

20 A Just to be clear, the Department never made that
21 assertion. Just based on my experience, I think if he
22 could have completed the AODA assessment and begun
23 follow-through, had a stable residence, completed
24 parenting, attended visits on a consistent basis, better
25 communicated with the Department, I think that could have

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1 been the argument we could have made. I think that early
2 on in the case -- and I believe at the last -- just for
3 the record, I believe the last hearing, my client did
4 waive lawyer client confidentiality?

5 Q He did.

6 A Early on in the case I told him, I said, that this is a
7 case, you know, we can win or that you could have
8 dismissed or I think the County would be open to some
9 kind of situation and that was really early in the case
10 just looking at -- even before discovery. So I think if
11 he would have at least made a good faith effort to start
12 or complete some of those services, I think that would
13 have been an option. But that didn't happen. And I
14 think things either stayed the same or I would -- the
15 housing got a little more unstable as the case went on,
16 so...

17 Q All right. Thank you very much, Mr. Reid.

18 I have no further questions for him, Your Honor.

19 THE COURT: Mr. Harrington?

20 MR. HARRINGTON: Yes, thank you, Your Honor.

21 RECROSS-EXAMINATION

22 BY MR. HARRINGTON:

23 Q Mr. Reid, can you hear me okay?

24 A Yes, good morning.

25 Q Good morning. I only have a few questions for you,

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1 Mr. Reid. Regarding the AODA assessment and treatment
2 issue to which you just alluded, you do recall that there
3 was evidence presented regarding those issues at the
4 trial, correct?

5 A Yes, I believe that was discussed.

6 Q And the issue was that he may have completed an
7 assessment, but did not do the treatment that was
8 recommended by that assessment; is that your
9 recollection?

10 A That may be better than my recollection. I don't
11 remember that he completed it, but I know that there
12 wasn't any services after -- there wasn't any services
13 starting. So whether or not he completed the assessment,
14 the follow-through wasn't -- I know the follow-through
15 wasn't began or begun.

16 Q Thank you. And you would agree that the dispositional
17 order that was issued -- at issue in the TPR called for
18 him -- for Mr. [REDACTED] to do both the AODA assessment and
19 the recommended follow-up treatment, correct?

20 A That's correct.

21 Q And I believe I understood your testimony, in response to
22 Ms. Bayer's questions, to be that there was issues during
23 the CHIPS case of your former client's cooperation and
24 communication with the Department; did I understand that
25 right?

1 Just argument at the appropriate time.

2 THE COURT: Mr. Gramstrup, any witnesses or
3 evidence you want to present?

4 MR. GRAMSTRUP: No.

5 THE COURT: All right. Ms. Bayer, argument?

6 MS. BAYER: Actually, Your Honor, there is one
7 other matter. I wanted to get the witnesses taken care
8 of right away so they could move on with their day.

9 THE COURT: Okay.

10 MS. BAYER: Mr. Harrington and I spoke about a
11 stipulation that we wanted to place on the record about
12 the number of visits at the end of the case.

13 THE COURT: Mr. Harrington?

14 MR. HARRINGTON: That's correct, Your Honor.
15 I'll let Ms. Bayer recite it.

16 MS. BAYER: One moment, please, I'll pull it up.

17 Mr. Harrington, please interrupt me at any time
18 if I misspeak or get something wrong.

19 The stipulation is that between February 28th,
20 2019, and August 20th, 2019, the father had supervised
21 visitation with his son 11 times. The dates of those
22 visits were: February 28th, March 14th, March 20th,
23 April 15th, May 7th, June 4th, June 18th, June 25th,
24 July 2nd, July 16th, and August 20th. One of those --
25 one also potential visit was cancelled by my client due

1 to my client being ill. One was cancelled due to a
2 snowstorm. And one was cancelled by the Department, but
3 they made up the time by giving him a two-hour visit the
4 next week. And he did visit with his son, although it
5 was not a formal supervised visit, on May 29th of 2019.
6 That was during or after a court date.

7 I'll also stipulate that in the month before the
8 TPR trial he missed two visits without excuse on
9 August 2nd and August 13th, but did not have any other
10 unexcused absences during that period of time.

11 Did I get it right?

12 MR. HARRINGTON: I don't know that the May 29th,
13 2019, visit was actually a visit, other than that they
14 were in the courtroom at the same time. Beyond that,
15 Ms. Bayer has accurately recited the stipulation.

16 THE COURT: All right.

17 [REDACTED]: It was (unintelligible)
18 the courtroom.

19 THE COURT: All right, Ms. Bayer, go ahead.

20 MS. BAYER: With argument, Your Honor?

21 THE COURT: Yep.

22 MS. BAYER: So I'll start by talking about the
23 visits. The point that I raised in my written motion is
24 that trial counsel didn't introduce testimony rebutting
25 the Department's allegation that my client missed

1 connected to specific facts that the Court not terminate
2 his rights or give him more time.

3 And given that there was other testimony that
4 could have supported it better, I'm arguing that his --
5 trial counsel's deciding not to introduce any of that
6 also constitutes ineffective assistance of counsel.

7 I will close by renewing my client's request
8 that the Court find that my client didn't have effective
9 assistance of counsel and grant him a new trial. Thank
10 you.

11 THE COURT: Thank you, Ms. Bayer.

12 Mr. Harrington?

13 MR. HARRINGTON: Thank you, Your Honor. On
14 behalf of the County and the Department of Health and
15 Human Services, I am asking that the motion be denied.
16 For there to be a showing of ineffective assistance of
17 counsel, there must be a showing that Mr. Reid's
18 performance was both deficient and because of that
19 deficiency, [REDACTED] was prejudiced. I believe the
20 record that was presented at trial, the record that was
21 presented at the previous hearing, and the record that's
22 been presented today supports that Mr. Reid provided
23 effective assistance based upon his strategic decisions,
24 based on his reading of the law and his experience as an
25 attorney, with particular experience in the area of

1 termination of parental rights.

2 I would submit even if the Court did find that
3 Mr. Reid's performance was somehow deficient, it
4 certainly was not prejudicial. I would first refer the
5 Court to the case -- excuse me -- **State versus Wheat,**
6 **W-H-E-A-T**; 2002 Wisconsin Appeal 153, at Paragraph 14. I
7 cite that for the very simple proposition that trial
8 counsel is not deficient when they fail to bring losing
9 arguments. And that would have been the issue in this
10 particular case.

11 I first start with the statutory change that
12 Ms. Bayer left off on. With respect to the Eau Claire
13 County case that she cited, **Eau Claire County Department**
14 **of Health Services versus S.E.**, I would like to read to
15 the Court from a couple of paragraphs in that opinion.
16 In that opinion, the mother was challenging the TPR and
17 her name was Sophie. Starting at Paragraph 35 of that
18 opinion: To begin, she confuses a TPR ground with its
19 corresponding elements. Section 48.415 sub. (2) makes
20 the written notice in the CHIPS statute, Wisconsin
21 Statute Section 48.356, sub. (2), an element to prove in
22 a TPR case is grounded in continuing CHIPS to ensure that
23 a parents whose rights have been terminated has, at least
24 once, received written notice to that effect. Citing to
25 **St. Croix County DHHS versus Michael D.**, 2016 Wisconsin

1 35, at Paragraph 17, 368 Wis. 2d 170, 880 N.W.2d 107.

2 The 15 out of 22-month timeframe however is not one of
3 the 12 TPR grounds provided by statute; rather, it is one
4 of the elements a petitioner must prove if it alleges a
5 parent's right should be terminated under paragraph A of
6 the continuing CHIPS ground for a TPR. Again, Wisconsin
7 Statutes, Sections 48.356 and 48.415 sub. (2), sub. (a),
8 are only that a parent be given notice of which TPR
9 grounds may be used to terminate his or her parental
10 rights. Section 48.415 enumerates only 12 grounds for
11 TPR, referring to Wisconsin Statute Section
12 48.15 (sic) -- 415, Sections (1) through (10) --

13 (Interruption by the court reporter.)

14 THE COURT: Wait. Mr. Harrington, you've got to
15 slow way down. You started off fast and you've only
16 gotten faster. So please slow down.

17 MR. HARRINGTON: Yes, Your Honor, I apologize.

18 Each ground in turn has elements that shall be
19 established by the petitioning party, but these elements
20 are not the TPR grounds themselves. Accordingly, for
21 Sophie's arguments to be correct, she must read language
22 requiring notice of a particular TPR grounds' elements
23 into the statutes which contravenes a cardinal rule of
24 statutory interpretation.

25 That is exactly the issue that is before the

1 Court this morning. This change did not, ah -- the -- I
2 would submit that [REDACTED] is not in the same position
3 as Sophie was in *Eau Claire County versus S.E.* The Court
4 of Appeals in that case, which was just decided within
5 the last five months, indicated that this was not a
6 substantial change to the law, taking it outside of the
7 application of *Patricia A.P.* And, again, taking it
8 outside of the due process challenge that was asserted in
9 the written motion and in the arguments today.

10 On the issue of whether or not a parent would
11 prevail on one ground if they prevailed on the other, I
12 ask the Court to reject that notion completely. There's
13 no evidence in the record and there's nothing to support
14 the stance that if a parent were to prevail on the ground
15 of continuing need of protection or services or if they
16 would prevail on the ground of failure to assume parental
17 responsibility, that they would have any corresponding
18 better chance on the other grounds. There's simply no
19 evidence in the facts of this case or in the law in
20 general to support that entirely speculative proposition.

21 On the issue of the continuing need of
22 protection or services, even if we take out all of the
23 evidence that we heard today and all the evidence that we
24 heard at the previous hearing from Mr. Reid, all of those
25 focused on the visits, the nature of those visits and the

1 strategic reasons for not pursuing certain aspects of
2 those visits.

3 However, I would point out to the Court that on
4 the issue of continuing need of protection or services,
5 the issue of whether or not deciding a parent has failed
6 to meet those conditions for safe return is as of the
7 date the petition was filed, which was in November of
8 2018. The testimony from Ms. [REDACTED] at the trial was
9 that, as of September of 2018, Mr. [REDACTED] had missed
10 57 percent of his visits up to that point. We heard
11 testimony at the trial from [REDACTED] that there was an
12 additional visit in October of 2018 and other than the --
13 other than that, even taking into account the visits that
14 were stipulated to today --

15 MS. BAYER: (Indicating.)

16 MR. CARRINGTON: -- all of those came after the
17 filing of the petition and would not have affected the
18 grounds.

19 Ms. Bayer is waving her hands.

20 THE COURT: Yep.

21 MS. BAYER: I'm sorry. I think I might have
22 missed something. So Mr. Harrington said that the
23 failure to assume parental responsibility had to be
24 calculated based on evidence before the date the petition
25 was filed?

1 MR. HARRINGTON: That's not what I said.

2 MS. BAYER: Okay. Then I misheard you. That's
3 why I interrupted.

4 THE COURT: Go ahead, Mr. Harrington, and slow
5 down.

6 MR. HARRINGTON: Thank you.

7 Ms. Bayer has essentially conceded today on
8 behalf of her client that, as of the date of filing,
9 57 percent of the visits had been met -- or had been
10 missed, excuse me.

11 On the issue that Attorney Bayer raises on the
12 testimony from Ms. [REDACTED] formerly Ms. [REDACTED] on
13 the contents of the permanency plan review order. We
14 discussed that a little bit at the previous hearing on
15 the hearsay issue, but even if we were to take that
16 particular evidence out, there was still more than ample
17 testimony to support the jury's finding that the
18 Department made reasonable efforts to provide the
19 services that had been ordered by the Court.

20 The unrefuted testimony at the trial and the
21 unrefuted testimony over the course of the last two
22 hearings is that for the relatively infrequent times that
23 Mr. [REDACTED] was participating, the Department was
24 transporting Mr. [REDACTED] from Superior down to Rice Lake.
25 He was transported from Superior down to the foster

1 parent's residence in Loyal, Wisconsin. And the
2 testimony was that -- at the trial -- was that that was
3 between a six and eight-hour round trip. The unrefuted
4 testimony was that the Department made referrals for
5 Mr. [REDACTED] to do the AODA assessment and to do the
6 treatment. And the unrefuted testimony is that he did
7 not comply with those.

8 So where the standard on appeal would be whether
9 or not there's any evidence from which a jury could have
10 concluded that the Department made reasonable efforts,
11 there's ample evidence in the record from that even if
12 you exclude the testimony given by Ms. [REDACTED] or the
13 evidence received on that basis.

14 Again, the testimony that was received at trial
15 was that Mr. [REDACTED] was not cooperating. It's explicit
16 in the instruction that a parent's level of cooperation
17 is relevant on the issue of reasonable efforts.
18 Mr. [REDACTED] (sic) -- or, excuse me, Mr. Reid spoke to that
19 again this morning as he did at the previous hearing on
20 this motion.

21 The testimony was that Mr. [REDACTED] was not
22 cooperating. Again, that has been an issue at the trial
23 and at the previous two hearings.

24 On that issue, on the elements of continuing
25 need of protection or services, all of those elements

1 THE COURT: All right. I'll start over. I
2 mean, there's the unusual circumstance where, you know,
3 jury instructions regarding a win on one versus a win on
4 the other, as I indicated -- I don't know what the
5 parties heard, but I don't think it was the argument
6 that, you know, the jury was going to say: Well, we
7 didn't find grounds on one, we won't find grounds on the
8 other because we didn't find ground on one. I don't
9 think that was Ms. Bayer's intent in her argument.
10 Clearly, juries are presumed to follow instructions and
11 to make their decisions independently of what -- one
12 ground versus another.

13 That being said, looking at -- in this
14 circumstance, I find Mr. Reid to be credible. I find his
15 reasoning to be credible. Quite frankly, looking at his
16 overall performance, he's under the spotlight under these
17 ineffective assistance of counsel. And, certainly,
18 hindsight is 20/20. And I think if you look at anybody's
19 trials, whether it be the Judge, attorneys or otherwise,
20 there are decisions that we all would do differently
21 depending on what we knew later on or what happened later
22 on. But I do find Mr. Reid credible. And, quite
23 frankly, I find his performance to be -- he did a good
24 job on the case overall. I felt he did represent his
25 client zealously and effectively.

1 Now looking at each individual grounds and
2 that -- and, overall, I don't believe he was deficient in
3 his performance at all.

4 And I'll go step-by-step through the motion.
5 With regards to the first one, for failing to introduce
6 evidence that he saw his son more often than the
7 petitioner says he did. Well, I don't think that's true.
8 I think that statement is untrue. During the period of
9 time looked at, everybody agrees it was 50 (sic)
10 percent -- or 57 percent of the time, I don't think
11 there's a disagreement with. I think what the -- what
12 the father is looking at is: Well, let's look at these
13 other visits. I was better closer to the time of the
14 TPR. Even if that evidence would have come in, I mean,
15 it's one of those things, too little too late. And does
16 that, by itself, make it prejudicial? And I don't think
17 so.

18 I think that the -- and a lot of this visit
19 stuff, I believe Mr. Reid and what he was talking about.
20 I wanted to avoid some of that. I wanted to take the --
21 you know, I didn't want to spend a lot of time on it.
22 And I think that was a good strategy. I wouldn't want --
23 he missed 57 percent or whatever percentage. You don't
24 want to dwell on those things. You don't want to dwell
25 on visits, part of the visits when they don't go well

1 don't look at your client favorably.

2 And I know there's also some information
3 presented well, you know, and we'll go line-by-line then
4 with Number II. Introduce -- failing to introduce
5 testimony that Mr. [REDACTED] had been visiting his son
6 regularly in the six months prior. Even assuming that
7 comes in, I still don't -- you still -- you've got to
8 take the good with the bad. So that stuff comes in, well
9 what happened during some of those visits? What
10 happened -- you know, he missed those last two. Even if
11 that comes in, I don't know that that is ineffective -- I
12 just don't see how that's prejudice for not bringing it
13 up. I think that Mr. Reid had good reasons why not to.

14 And that's, of course, assuming that it comes in
15 and how it comes in. Again, we're speculating on what
16 would happen, that it would have some type of impact on
17 the outcome. And, in my opinion, even if it all came in
18 100 percent favorably to the father, I don't think
19 there's any change in the outcome at all.

20 You look at this case, unfortunately, Mr. [REDACTED]
21 didn't do what the Department required of him. The
22 visits -- I understand it being a great distance away.
23 But it wasn't like Mr. [REDACTED] was pining to get more
24 visits or do more. He did less than the bare minimum,
25 even visits during the period of time where he had his

1 most visits. I mean, this isn't a circumstance where
2 he's trying to get more times or trying to get his child
3 back. He's just kinda doing the bare minimum.

4 And he wasn't really being cooperative. I mean,
5 that's the context of it. Mr. [REDACTED] did less than the
6 minimum and, in fact, wasn't complying with the order
7 during the period that was important in this case. It
8 wasn't until, you know, we already have the proceedings
9 going that he did the bare minimum. Before that, he
10 didn't. He didn't do the bare minimum and the jury heard
11 that; the jury heard what was going on.

12 So, looking, again, the next, Number III,
13 ineffective for failing to introduce testimony showing
14 that Douglas County told the service provider not to
15 provide parenting skills instructions on the way to and
16 from visits. I mean, how is that ineffective? I just --
17 I don't get it by any stretch of the imagination. There
18 hasn't been any evidence shown, first of all, what those
19 parenting skills would have been and what would have been
20 provided during a car ride and that somehow that would
21 have impacted the jury's decision.

22 Again, it's just -- it's totally sheer
23 speculation that there would be some type of
24 difference -- first of all, that it would be prejudice or
25 that it's deficient performance. I mean, it's clear

1 Then we move on to Number V, failing to
2 introduce testimony from the parents at trial. And,
3 again, you know, Mr. Reid had strategic reasons to -- he
4 talked to witnesses, he talked to people; he had his own
5 reasoning why. And I guess, I don't know what they would
6 have added to it. I mean, we heard some testimony at the
7 first hearing and I don't think that anything Mr. [REDACTED]
8 mother testified to was really of the point that would
9 have made any difference. I certainly don't think it's
10 prejudicial or there's any prejudice to it.

11 Quite frankly, I have some credibility concerns
12 myself with that testimony. I know that's not for me to
13 decide, that would have been for a jury to decide. I
14 just don't see how he would have went to any of the
15 issues that we had at play. And, certainly, I don't
16 think that the record supports that their testimony
17 questions the outcome of this trial whatsoever.

18 Failing to object to evidence that [REDACTED]
19 preferred his foster mother to [REDACTED] And, again,
20 it's a circumstance, first of all, if it was objected to
21 would I have granted or sustained the objection or not?
22 And, in my opinion, I wouldn't sustain the objection,
23 anyway. You know, there's some probative value to it and
24 I know that there's this -- the intent to try to somehow
25 show: Well, it's only [REDACTED] -- you know, what

1 he's doing. It's really not what the child considers or
2 not. It's really a totality of the circumstances. You
3 can't look at context of how [REDACTED] behaves without
4 seeing other people. If we only heard from [REDACTED]
5 obviously, we don't have a trial. We just have [REDACTED]
6 testifying what he observed and what he did, not what
7 other people -- and how he reacted to it. I think that I
8 would not have granted -- or I would not have sustained
9 the objection anyway.

10 But assuming I didn't, I still don't see it
11 being prejudicial. Did the fact that that evidence came
12 in prejudice [REDACTED] to the point where the outcome of
13 the trial is somehow in doubt? And I know the standard
14 is even higher than that. But I -- there's no doubt in
15 my mind what this -- the outcome of the trial. I think
16 that any of these things, by themselves, as I indicated,
17 aren't something that leads me to conclude there's some
18 reasonable probability of a different outcome, but
19 certainly not this one by itself.

20 Looking at Number VII, failing to object to the
21 letter from the foster parent.

22 MS. BAYER: I'm sorry to interrupt, Your Honor,
23 can you hear me?

24 THE COURT: Yep.

25 MS. BAYER: I'm conceding that ground. The way

1 doubt about it. But it also goes to the totality of the
2 circumstances of what the jury can consider. So I just
3 don't see it being prejudicial and I don't see it being
4 deficient, because any attorney would see it would come
5 in anyway.

6 Failing -- the next one, IX, comes into
7 discussing about, again, the whole revised statute and
8 the objection. I agree with Mr. Harrington entirely.
9 This is a circumstance where maybe -- at best, the law is
10 unsettled. And I don't think an attorney -- and that is
11 the **Wheat** case -- an attorney can't be deficient for
12 arguing something where the law is either unsettled or
13 they would lose that argument. And, at best, the law is
14 unsettled at the time. And, at worst, it was settled and
15 it was against Mr. Reid and his argument.

16 So I don't think there's any deficient
17 performance, at best, that the law being unsettled and
18 making an argument under unsettled law. At worst, in
19 this case, I think the law, at this point, supports that
20 I would have denied -- or I would have not granted -- or
21 I would have overruled any objection, anyway. Because
22 the Eau Claire case seems to me to be directly on point.
23 Maybe it turns out it gets -- on appeal, it gets reversed
24 by the Supreme Court or something. I suppose they could
25 do that.

1 But when the law is unsettled, I don't think
2 it's deficient performance to not make unsettled
3 arguments. And, certainly, at this point, it's not
4 prejudicial. So that's, to me, the Number IX.

5 And then Number X, again, it's kind of the same
6 thing, not arguing the due process argument. And, again,
7 I just don't think that that's something that Mr. Reid is
8 required to do to be effective in his assistance of
9 counsel. I don't think it's deficient performance.

10 And then, I mean, this general, he was
11 ineffective for failing to meaningfully defend [REDACTED] at
12 disposition. I just -- that's just a loaded generality
13 of what he did or didn't do. So he didn't call any
14 witnesses, you know, he made some arguments, basically.
15 I mean, there's no real -- it's just basically saying he
16 didn't do a good enough job, I guess, and there's
17 arguments what he should have done.

18 And I think part of it is, and Mr. Reid said it,
19 he didn't have the greatest contact with his client. And
20 it's hard to make a good argument when you are not having
21 good contact with the client. And I understand, you
22 know, there's some things maybe he could have done
23 differently.

24 In my opinion, of course, I'm deciding
25 disposition in the best interests. I just -- I don't

1 think any of those reasonings from Ms. Bayer what he
2 could have done or what he should have done, would have
3 carried the weight with me. I think it's one of those
4 circumstances, unfortunately, I looked at Mr. [REDACTED]
5 where he should have been making some more affirmative
6 efforts on his part way before. And, in my opinion, the
7 Department had been making more efforts than probably was
8 required by statute.

9 And then, as far as, you know, the best interest
10 of [REDACTED] The best interest, is to terminate, as I
11 indicated, even taking into consideration some of the
12 arguments that Ms. Bayer would like to -- Mr. Reid to
13 have argued. I just -- I don't think it was even a close
14 call, unfortunately.

15 I certainly feel -- and one of the things, I
16 don't like termination of parental rights, because
17 there's such a finality to it and such a major thing
18 that's going on for parents. But I just think it was --
19 Mr. Reid did as good a job as he could with what he had.
20 He could have made some other arguments, but it wouldn't
21 have changed the outcome, in my opinion.

22 So under the circumstances, in my opinion, I
23 don't think that Mr. Reid was deficient in his
24 performance whatsoever. And as far as it being
25 prejudice, as I indicated, there's no prejudice to

1 Mr. [REDACTED] -- I mean, I look at it where you look at the
2 reasonable probability of a different outcome. And I
3 just -- even when you look at the totality of the
4 circumstances, I just don't see it.

5 There's things that Mr. -- we can all agree,
6 maybe in hindsight, could have been done differently.
7 But that's not what the standard is. The standard isn't
8 being an armchair quarterback and deciding what should
9 have been done differently -- could have been done
10 differently in hindsight. The standard is whether there
11 was deficient performance and whether that prejudiced
12 Mr. [REDACTED] And it didn't prejudice him even when you
13 look at the totality of the circumstances.

14 So the motion regarding post-dispositional
15 relief is denied. I'm not granting a new trial or new
16 proceedings.

17 And, Mr. Harrington, would you do an order
18 consistent with this opinion?

19 MS. BAYER: I can do it.

20 THE COURT: Mr. Harrington?

21 MR. HARRINGTON: Yes, Your Honor, I can.

22 MS. BAYER: I can do it --

23 THE COURT: Thank you, Mr. Harrington. I
24 appreciate it.

25 I think that's it for today. Thank you.

Wisconsin Legislative Council

AMENDMENT MEMO



Memo published: December 20, 2019

Contact: Anne Sappenfield, Director, or Rachel E. Snyder, Staff Attorney

2019 Assembly Bill 559

Assembly Substitute Amendment 1 and Assembly Amendment 1 to Assembly Substitute Amendment 1

2019 ASSEMBLY BILL 559

2019 Assembly Bill 559 generally does the following:

- Eliminates the right to a jury trial in an involuntary termination of parental rights (TPR) proceeding.
- Provides that the first review of a child's permanency plan be done through a hearing to the court within six months after the date on which the child was removed from the home.
- Creates a new ground for finding that a child is need of protection of services (CHIPS) because the child is deemed "drug-affected."
- Modifies the following existing grounds for involuntary TPR: (1) abandonment; (2) failure to assume parental responsibility; (3) continuing need of protection or services; and (4) continuing denial of periods of physical placement or visitation.
- Creates the following new grounds for involuntary TPR: (1) parental incarceration; and (2) drug-affected child.

ASSEMBLY SUBSTITUTE AMENDMENT 1

Jury Trials and Permanency Plan Reviews

Assembly Substitute Amendment 1 retains the bill provisions regarding TPR jury trials and permanency plan reviews. In other words, the substitute amendment eliminates the right to a jury trial in an involuntary TPR proceeding and provides that the first review of a child's permanency plan be done through a hearing to the court within six months after the date on which the child was removed from the home.

CHIPS Ground for Drug-Affected Child

The substitute amendment generally retains the bill provisions regarding the definition of a drug-affected child and the CHIPS ground with some modifications. Under the substitute amendment, a "drug-affected child" is a child who suffered prenatal exposure to a controlled substance or alcohol, used by the mother for a nonmedical purpose, as evidenced by one of the following:

- Withdrawal symptoms in the child at birth.
- A positive result from a toxicology test of the mother or child at the time of the child's birth.

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- Developmental delays or other symptoms during the child's first year of life that have been diagnosed as fetal alcohol spectrum disorder or as caused by prenatal exposure to a controlled substance.

"Drug-affected child" also includes a child whose basic needs and safety have been adversely affected by a parent or guardian's chronic and severe use of alcohol or a controlled substance. The substitute amendment cross-references a current law description of basic needs. Under current law, "basic needs" include the need for adequate food, clothing, and shelter; the need to be free from physical, sexual, or emotional injury or exploitation; the need to develop physically, mentally, and emotionally to their potential; and the need for a safe and permanent family.

The substitute amendment also provides that the CHIPS ground for a drug-affected child applies only to a petition that is filed within 18 months of the child's birth.

Modifying Grounds for Involuntary TPR

The substitute amendment does not include the bill provisions modifying: (1) abandonment; (2) failure to assume parental responsibility; and (3) continuing need of protection or services. However, it does retain the provisions relating to the involuntary TPR ground based on continuing denial of periods of physical placement or visitation.

Continuing Denial of Periods of Physical Placement or Visitation

Under current law, the continuing denial of periods of physical placement or visitation TPR ground may be established by proving all of the following:

- The parent has been denied periods of physical placement by court order in an action affecting the family or has been denied visitation under a CHIPS or JIPS order.
- That at least one year has elapsed since the order denying periods of physical placement or visitation was issued and the order has not been subsequently modified to permit physical placement or visitation.

Under the substitute amendment, the one year timeline may begin when the court enters an order for temporary custody, when the child is placed outside the home under a consent decree, or when a court-approved permanency plan places the child outside the home.

TPR Warning

Under current law, whenever a court orders that a child be placed outside the home, orders continued placement outside the home, or denies a parent visitation under a CHIPS or JIPS disposition or change in placement, the court must warn the parent or parents who appear in court of any TPR grounds that may be applicable and the conditions necessary for the child to be returned to the home or for the parent to be granted visitation.

The substitute amendment creates a new provision requiring that the warning must be given, both orally and in writing, when the parent or parents appear in court at the time the court enters an order for temporary custody or a consent decree. The substitute amendment also provides that the warning must include any conditions for the parent to be granted visitation with the child, if such conditions are established.

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New Grounds for Involuntary TPR

Like the bill, the substitute amendment creates two new grounds for involuntary TPR: (1) parental incarceration; and (2) drug-affected child. The substitute amendment generally retains the provisions of the bill relating to parental incarceration, with some modification, but significantly modifies the elements required to establish the drug-affected child TPR ground.

Parental Incarceration

Under the substitute amendment, the parental incarceration TPR ground is established by proving the following:

- That the child has been adjudged CHIPS and, while the parent is incarcerated, has been placed, or is continued in placement, outside the home.
- That the parent is incarcerated at the time of the TPR fact-finding hearing.
- That the parent is likely to continue to be incarcerated for a substantial period of the child's minority. In determining whether the parent is likely to continue to be incarcerated for a substantial period of the child's minority, the court may consider whether the parent has a history of repeated incarceration.

Drug-Affected Child

The bill provides that the drug-affected child ground may be established by proving that the child has been adjudged CHIPS as a drug-affected child, based on either prenatal exposure to alcohol or a controlled substance or because child's basic needs and safety have been adversely affected by a parent's chronic and severe use of alcohol or a controlled substance. The bill also provides parents with an affirmative defense, meaning that the ground may not be established if the parent proves the following by a preponderance of the evidence:

- That the parent enrolled in a substance abuse treatment and recovery program within 90 days of the birth of the child or the placement of the child outside the home pursuant to a CHIPS dispositional order.
- That the parent continues to maintain substantial compliance with a substance abuse treatment or recovery program.

The substitute amendment does not include an affirmative defense for parents. It instead provides that the drug-affected child ground may be established if the party petitioning for involuntary TPR proves all of the following:

- That the child has been adjudged CHIPS as a drug-affected child because his or her basic needs and safety have been adversely affected by a parent or guardian's chronic and severe use of alcohol or a controlled substance and has been placed outside the home in a CHIPS proceeding.
- That one of the following applies:
 - The parent has not made reasonable efforts to enroll in a substance use disorder treatment or recovery program within 90 days of the placement of the child outside the home pursuant to one or more orders in the CHIPS proceeding.
 - The parent enrolled in a substance use disorder treatment or recovery program after placement of the child outside the home pursuant to one or more orders in the CHIPS proceeding but has not maintained substantial compliance with the program.
- That the parent is not participating in a drug court program.

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- That there is a substantial likelihood that the parent will not meet the conditions for the safe return of the child to the home by the anticipated date that the child's permanency goal will be achieved, as specified in the child's permanency plan.

ASSEMBLY AMENDMENT 1 TO ASSEMBLY SUBSTITUTE AMENDMENT 1

The amendment clarifies the relevant date for purposes of one of the elements under the new drug-affected child involuntary TPR ground. Specifically, under the amendment, the petitioner must prove that there is a substantial likelihood that the parent will not meet the conditions for the safe return of the child to the home by the date established by the court or a review panel at the child's most recent permanency review or permanency hearing prior to the filing of the TPR petition.

BILL HISTORY

2019 Assembly Bill 559 was introduced by Representative Dittrich on October 23, 2019. Representative Dittrich offered Assembly Substitute Amendment 1 on December 6, 2019, and offered Assembly Amendment 1 to Assembly Substitute Amendment 1 on December 12, 2019. On December 17, 2019, the Assembly Committee on Family Law recommended adoption of the amendment on a vote of Ayes, 9; Noes, 0; adoption of the substitute amendment, as amended, on a vote of Ayes, 8; Noes, 1; and passage of the bill, as amended, on a vote of Ayes, 7; Noes, 2.

AS:RES:ty

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 15, 2020

Sheila T. Reiff
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 No. 2019AP573

Cir. Ct. No. 2017TP87

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

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

A. C.-E.,

PETITIONER-RESPONDENT,

V.

I. M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waupaca County:
VICKI L. CLUSSMAN, Judge. *Affirmed.*

No. 2019AP573

¶1 NASHOLD, J.¹ I.M. appeals an order of the circuit court terminating his parental rights to his child, E.M.C. I affirm.

BACKGROUND

¶2 E.M.C. was born in September of 2013, and was nearly five years old at the time of the trial in this case. On November 15, 2017, E.M.C.'s mother, A.C.-E., filed a petition to terminate I.M.'s parental rights to E.M.C. The petition was amended August 13, 2018. The petition alleged two grounds for termination, "abandonment," *see* WIS. STAT. § 48.415(1), and "failure to assume parental responsibility," *see* § 48.415(6). I.M. contested the petition, and the circuit court held a two-day jury trial featuring the testimony of eight witnesses (the grounds phase of the termination of parental rights proceeding).

¶3 During the trial, I.M. admitted that he failed to visit or communicate with E.M.C. for multiple periods in excess of six months, which, absent a valid "good cause" defense, would qualify as "abandonment" pursuant to WIS. STAT. § 48.415(1)(a)3. and (c)1. Specifically, I.M. testified that he had no contact with E.M.C. between December 2013 and July 2014, and again from November 28, 2014, to October of 2016. He also agreed that, from July 2014 through November 2014, he saw E.M.C. only twice. I.M. testified that, during some of these time periods, he called and texted A.C.-E. to try to see E.M.C. but that she did not respond. I.M. admitted that he did not send any cards or gifts to E.M.C. during 2015, nor did he buy anything for E.M.C. during the first four months of 2016. I.M. also testified that, at least as of October 2016 and beyond, he was a "complete stranger" to E.M.C. I.M.'s mother testified that she did not know why I.M. did not

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

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have contact with E.M.C. from December 2013 through July 2014 and opined that I.M.'s failure to see E.M.C. in 2015 was because I.M. "didn't want to grow up." She testified that she would "scold" I.M. and that she thought it "was foolish on his part to not find a way to be closer to his daughter."

¶4 The evidence is also undisputed that I.M. did not know who E.M.C.'s doctors were, anything about E.M.C.'s medical history, whether she went to school or day care, who her best friend was, or what E.M.C.'s favorite toy, favorite color, or favorite holiday was. In addition, A.C.-E. testified that, from November of 2014 to October 2016, I.M. failed to provide financial support, gifts, or other support, with the exception of buying diapers once. A.C.-E. further testified that at no time prior to her filing her November 2017 termination of parental rights (TPR) action did I.M. ever ask her about E.M.C.'s well-being, even when A.C.-E. informed I.M. that E.M.C. was sick with a high temperature. In addition, the court admitted a letter from A.C.-E.'s physician stating that I.M. had not attended any of A.C.-E.'s prenatal appointments or any well-child or sick-child appointments after E.M.C.'s birth.

¶5 In June of 2014, I.M. sought to initiate paternity proceedings and on June 20, 2014, the State of Wisconsin filed a paternity action on I.M.'s behalf. However, in an order filed August 1, 2014, the court granted the State's motion to dismiss in response to A.C.-E. filing a "good cause" petition, in which she stated that she feared I.M. Attached to the petition were letters from two other women, including her cousin (who is discussed below), stating that I.M. had been abusive to them. It is also undisputed that I.M. retained a private attorney and on June 10, 2015, filed a petition to establish paternity, custody, and placement. I.M. was eventually found to be the father and was granted visitation rights.

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¶6 Scheduled visits began on October 29, 2016, and were scheduled to occur for a two-hour period every Saturday at the play area of a shopping mall and at a public library. A.C.-E. testified that, during these visits, I.M. never interacted in any way with E.M.C. A.C.-E. began recording the visits, and the videos were shown to the jury. In the videos, I.M. does not acknowledge E.M.C. in any way. I.M. admitted during the trial that he did not interact with E.M.C.² at the supervised visits at either the mall or the library but stated that it was because A.C.-E. failed to introduce him to E.M.C., that A.C.-E. often brought a laptop or other family members along, including her cousin who had accused him of sexual assault, and that he felt uncomfortable interacting with E.M.C. because he was a “complete stranger to her.” As captured on video, I.M. did play with a little boy who I.M. testified he did not know. The video showed that, although E.M.C. stood near the boy and right in front of I.M., I.M. did not acknowledge her and instead spent between 15 and 20 minutes of his two-hour supervised visit playing with the boy. A.C.-E. testified that I.M. never explained to her why he refused to interact with E.M.C. and that I.M.’s ex-girlfriend told her that the only reason he was doing “this” was to make A.C.-E. miserable. I.M. admitted that he never brought any toys or any activities to do with E.M.C. at the visits.

¶7 Both I.M. and A.C.-E. cancelled some of the scheduled visits for various reasons. In the summer of 2017, A.C.-E. cancelled several visits in advance, in part because, as she informed I.M., she was due to have her second child. On September 12, 2017, I.M. filed a motion to show cause why A.C.-E. should not be

² I.M. testified that he sometimes tried to get E.M.C.’s attention by smiling or waving at her, or whispering her name, but that he did not get anywhere with that. He also acknowledged that such actions were “probably not” captured in any of the videos.

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held in contempt regarding the visitations. However, because A.C.-E. filed the TPR action in November 2017, the contempt motion was not decided.

¶8 At trial, I.M. attempted to establish that he had a legally cognizable reason for not having been more involved in E.M.C.'s life. On this point, I.M. suggested that A.C.-E. interfered with his attempts to see E.M.C. by not responding to his calls or texts requesting to see E.M.C., failing to introduce E.M.C. to I.M., and bringing other people to the scheduled visitations. I.M. introduced text messages between himself and A.C.-E. The texts show that from December 3, 2014, through September 4, 2015, I.M. attempted to set up visits with E.M.C. for either himself or his parents on only five days. In some of the texts, A.C.-E. agrees or suggests an alternative time, while other texts show that she occasionally did not respond to his requests.

¶9 A.C.-E. offered a narrative contrary to I.M.'s assertions that his lack of contact with E.M.C. was due to her interference. She testified that, aside from the scheduled visits starting in October 2016, I.M.'s attempts to see E.M.C. were minimal; that she had never refused I.M. the opportunity to visit with E.M.C.; and that, when visits occurred, I.M. did not interact with E.M.C. and left many visits early. A.C.-E. also testified that she was afraid of I.M. and that I.M. used requests to see E.M.C. as a pretext for trying to have sexual relations with A.C.-E. rather than to interact with E.M.C.

¶10 Ultimately, the jury found that A.C.-E. had established both grounds for termination.³ Following the trial, the circuit court held a dispositional hearing

³ One of the twelve jurors dissented on the issue of whether there was good cause for I.M.'s failure to visit E.M.C. during the relevant time periods. Two jurors, including the one who dissented on good cause, dissented on the issue of whether I.M. had failed to assume parental responsibility.

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and concluded that it was in E.M.C.'s best interests to terminate I.M.'s parental rights. On November 12, 2018, the circuit court filed a written order terminating I.M.'s parental rights.

¶11 Following the circuit court's order, I.M. filed a notice of intent to pursue postdisposition relief. I.M. subsequently filed a postdisposition motion requesting a fact-finding hearing to reconstruct unrecorded sidebars and for a new trial based on ineffective assistance of counsel. On November 13, 2019, the circuit court held a hearing on I.M.'s postdisposition motion. On December 12, 2019, the circuit court issued a written order denying I.M.'s motion. I.M. appeals the order terminating his parental rights.

DISCUSSION

¶12 I.M. raises three primary issues on appeal. First, he challenges evidence and argument introduced by A.C.-E. that he contends impermissibly commented on E.M.C.'s best interests during the grounds phase of the TPR proceeding. Second, I.M. challenges the circuit court's admission of what he characterizes as other acts evidence. Third, he contends that his counsel was ineffective for failing to make a hearsay objection to a letter from a physician introduced at trial, which stated that I.M. had not attended any prenatal or postnatal appointments for E.M.C. I discuss these arguments below, setting forth additional relevant facts as necessary.

I. TPR Standards

¶13 TPR proceedings are divided into two parts: the grounds phase and the dispositional phase. *Waukesha Cty. Dep't of Soc. Servs. v. C.E.W.*, 124 Wis. 2d 47, 60, 368 N.W.2d 47 (1985); see WIS. STAT. § 48.424; see generally *Steven V.*

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v. Kelley H., 2004 WI 47, ¶¶21-27, 271 Wis. 2d 1, 678 N.W.2d 856 (discussing the involuntary TPR process). During the grounds phase, the petitioner must prove by clear and convincing evidence that at least one of the statutorily enumerated grounds for the termination of parental rights exists. *Steven V.*, 271 Wis. 2d 1, ¶24; *see* WIS. STAT. § 48.415. If a petitioner proves one or more of the grounds for termination by clear and convincing evidence, “the court shall find the parent unfit.” *Steven V.*, 271 Wis. 2d 1, ¶25 (quoted source omitted).

¶14 In this case, as previously discussed, A.C.-E. alleged two grounds for terminating I.M.’s parental rights: abandonment and failure to assume parental responsibility. *See* WIS. STAT. § 48.415(1) and 48.415(6). As relevant here, a petitioner can show that the parent has abandoned the child if “[t]he child has been left by the parent with any person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of 6 months or longer.” *See* § 48.415(1)(a)3. The defending parent has an affirmative defense to this ground if the parent shows “good cause” for having failed to communicate with or visit the child during the relevant time period. *See* § 48.415(1)(c).

¶15 The failure to assume parental responsibility ground is established by showing that the parent has not had a “substantial parental relationship” with the child. WIS. STAT. § 48.415(6)(a). A “substantial parental relationship” is defined as

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

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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.

WIS. STAT. § 48.415(6)(b).

¶16 If the petitioner establishes at least one of the grounds for the involuntary termination of the parent's rights, then the court "shall find the parent unfit" and the TPR proceedings move into the dispositional phase. *See Steven V.*, 271 Wis. 2d 1, ¶¶24-27. During the dispositional phase, the court must decide whether it is in the "best interests" of the child to terminate the parent's rights. *Id.*, ¶27; WIS. STAT. § 48.426(2). The outcome of the dispositional phase is not predetermined by the outcome of the grounds phase, and the court may conclude that termination of a parent's rights is warranted or unwarranted. *See Sheboygan Cty. DHHS v. Julie A.B.*, 2002 WI 95, ¶28, 255 Wis. 2d 170, 648 N.W.2d 402. In line with this bifurcated structure, "the best interests standard is confined to the dispositional phase ... at the [grounds phase], the best interests of the child are not to be considered." *Door Cty. DHFS v. Scott S.*, 230 Wis. 2d 460, 468, 602 N.W.2d 167 (Ct. App. 1999).

II. Best Interests Evidence and Argument

¶17 Prior to the grounds phase, I.M. filed a motion in limine, asking the circuit court to prohibit A.C.-E. and the guardian ad litem from "introducing any evidence, expressing any opinions, or making any reference to the best interests of the child." The circuit court denied the motion with respect to the best interests of the child, reasoning that, because there was a standard jury instruction specifically instructing the jury not to consider the best interests of the child, the court need not exclude such evidence or argument at that time. *See WIS JI—CHILDREN 301.*

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¶18 On appeal, I.M. argues that the circuit court's denial of his motion in limine was erroneous because it allowed A.C.-E. to introduce evidence and argument that I.M. asserts was solely relevant to E.M.C.'s best interests, contrary to case law establishing that the best interests of the child cannot be considered at the grounds phase. In the alternative, I.M. argues that, if this court determines that the motion in limine was insufficient to preserve his objections and that objections were required as the evidence and arguments arose, then: (a) his trial counsel was deficient for failing to object during presentation of the evidence and arguments; or (b) a new trial should be ordered in the interest of justice. I assume, without deciding, that the motion in limine preserved the issue and, therefore, do not reach I.M.'s arguments in the alternative.

¶19 The specific evidence that I.M. argues falls into the "best interests" category consists of: (a) 19 photographs showing E.M.C. with A.C.-E. and members of her family, including A.C.-E.'s husband and their child (E.M.C.'s younger sibling); (b) testimony from A.C.-E. describing the photographs; and (c) testimony from A.C.-E. that E.M.C. thinks of A.C.-E.'s husband as her father. I.M. also challenges A.C.-E.'s counsel's statements during opening argument that "we're here about [E.M.C.], that's what this case is really about" and that E.M.C. is a "bright, precocious little girl," as well as the A.C.-E.'s counsel's statement during closing argument that "That's the father right there. That's the person that's been the father for [E.M.C.]," referring to A.C.-E.'s husband. I.M. argues that this evidence and argument was relevant solely to E.M.C.'s "best interests" and was therefore impermissible at the grounds phase of the TPR proceeding.

¶20 This court reviews a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. *See Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. "An appellate court will

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sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach.” *State v. Sullivan*, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). When a circuit court fails to delineate the factors that influenced its discretionary decision, “appellate courts independently review the record to determine whether it provides a basis for the circuit court’s exercise of discretion.” *Id.* at 781. “We look for reasons to sustain a trial court’s discretionary decision.” *Farmer’s Auto. Ins. Ass’n v. Union Pac. Ry. Co.*, 2009 WI 73, ¶32, 319 Wis. 2d 52, 768 N.W.2d 596.

¶21 In this case, the circuit court did not provide a detailed analysis for allowing in the evidence at issue here. However, an independent review of the record shows that the evidence and argument at issue did not constitute an improper invocation of E.M.C.’s best interests under relevant case law.⁴

¶22 I.M. first relies on *Steven V.* This case is not on point. First, *Steven V.* does not address the type of evidence and comments at issue here. Relevant to this case, *Steven V.* holds only that, although the “consistent legislative objective throughout the Children’s Code” is “the best interests of the child” in TPR cases, the best interests of the child do not “prevail” until the dispositional phase, “at

⁴ I.M.’s contention in the circuit court and on appeal is that admission of the evidence and argument at issue violated precedent holding that the best interests of the child standard is confined to the dispositional phase and should not be considered at the grounds phase. However, to the extent I.M. also means to assert a more general relevancy argument with respect to the evidence, he does not develop that argument and it may be rejected on that ground. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Nevertheless, I further conclude that the evidence regarding A.C.-E.’s husband’s relationship with E.M.C. was relevant to the issues of abandonment and failure to assume parental responsibility in that it tended to show that I.M. had failed to be present in E.M.C.’s life in the way that a father should and that, as a result, E.M.C. did not know I.M. and thought of someone else as her father. See *State v. White*, 2004 WI App 78, ¶14, 271 Wis. 2d 742, 680 N.W.2d 362 (relevancy “is not a high hurdle; evidence is relevant if it ‘tends to cast any light’ on the controversy” (quoted source and internal quotation marks omitted).

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which the child's best interests are paramount." *Steven V.*, 271 Wis. 2d 1, ¶26. This language does not assist I.M. because it was clear in this case from the jury instructions, the special verdict form, and counsels' arguments that the jury's duty was to determine whether I.M. had abandoned E.M.C. or failed to assume parental responsibility for her, and that the jury should not consider the best interests of the child.

¶23 Notably, consistent with WIS JI—CHILDREN 301, the circuit court instructed the jury that "[c]onsideration of the best interest of the child is a matter for the Court in proceedings which will be conducted in the future, it is not a consideration for the jury." The court further instructed the jury regarding the requirements for finding abandonment and failure to assume parental responsibility. Jurors are presumed to follow jury instructions. *See State v. Grande*, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992). Further, not once did either A.C.-E. or the guardian ad litem refer to the "best interests" of the child. Instead, they repeatedly focused on the allegations of abandonment and failure to assume parental responsibility. In addition, the special verdict form that was required to be completed by the jury and the arguments by the parties made it clear that the issues for the jury were to whether I.M. abandoned E.M.C. or failed to assume parental responsibility.

¶24 The other three cases upon which I.M. relies are equally unavailing. *C.E.W.* addressed whether the guardian ad litem was permitted to make peremptory strikes or present arguments to the jury; it did not address evidence or argument similar to that complained of here. *See C.E.W.*, 124 Wis. 2d at 62. In concluding that the guardian ad litem was allowed to exercise peremptory challenges and make arguments to the jury during the grounds phase (also known as the fact-finding hearing), the court noted that "the best interests of the child standard does not apply

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to the fact finding hearing” and that the guardian ad litem could not “invoke the best interests of the child in statements to the jury.” *Id.* at 64, 70. As stated above, in this case neither the guardian ad litem nor A.C.-E. applied or invoked the best interests of the child standard.

¶25 *D.B. v. Waukesha County Human Services Department*, 153 Wis. 2d 761, 451 N.W.2d 799 (Ct. App. 1989),⁵ addressed whether the court improperly introduced the guardian ad litem to the jury “as the attorney appointed to represent J.A.B.’s ‘best interests.’” *Id.* at 764. Relying on *C.E.W.*, the appellant in *D.B.* argued that such statements improperly injected into the fact-finding proceedings the best interests of the child standard. *D.B.*, 153 Wis. 2d at 769. This court disagreed, concluding that “*C.E.W.* does not place restrictions upon the *court’s* conduct toward the guardian ad litem; it restricts the *guardian ad litem’s* conduct.” *Id.* at 770. The *D.B.* court further stated that, even if *C.E.W.* were meant to be more broadly read, the circuit court “did not instruct the jury to consider or determine the best interest of the child. Rather, it simply explained to the jury at the outset what role the guardian ad litem plays in the proceedings.” *D.B.*, 153 Wis. 2d at 770. The court further held that “such an introduction is not only informative, it is desirable,” and “is not error.” *Id.*

¶26 The final case I.M. relies on, *Scott S.*, not only fails to support I.M.’s position but actually cuts against it. In *Scott S.*, this court rejected the appellant’s argument that a new trial was warranted due to the following statements from the guardian ad litem during arguments to the jury: “I believe in the *best interests of that little girl* Kristeena, that she is entitled to have you look very carefully and answer -- these questions in the way that is absolutely clear from the testimony

⁵ I.M. refers to the name of this case as *In the Interest of J.A.B.*

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today,” and “I am here because my mission is to try to protect Kristeena’s ... best interests, to try and help you understand what is in the best interests of Kristeena” *Scott S.*, 230 Wis. 2d at 468. Unlike in the instant case where E.M.C.’s “best interests” were not mentioned, in *Scott S.* the arguments in question specifically referred to the “best interests” of the child, and did so more than once. Nevertheless, this court concluded that the arguments did not warrant a new trial, thereby undercutting I.M.’s argument here. Even further undermining I.M.’s position is this court’s conclusion that “[o]nly when the court or the GAL instruct the jury that it should consider the best interests of the child is there reversible error.” *Id.* at 469. Here, neither the court nor the guardian ad litem instructed the jury that it should consider E.M.C.’s best interests. Therefore, under *Scott S.*, there is no reversible error.⁶

¶27 Finally, I conclude that, in the context of the entirety of A.C.-E.’s opening and closing arguments and the evidence of abandonment and failure to assume parental responsibility set forth above, any error in allowing the evidence and argument was harmless, particularly given that the jury was specifically instructed not to consider E.M.C.’s best interests. See *Martindale*, 246 Wis. 2d 67, ¶30 (erroneous ruling on the admission of evidence is subject to a harmless error analysis); *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768 (“If the error at issue is not sufficient to undermine the reviewing court’s confidence in the outcome of the proceeding, the error is harmless.”). With regard

⁶ I.M. incorrectly argues that this language from *Door Cty. DHFS v. Scott S.*, 230 Wis. 2d 460, 602 N.W.2d 167 (Ct. App. 1999), is simply an “unfortunate paraphrase of a passage in [*D.B.*].” Although the language may be “unfortunate” from I.M.’s standpoint, it is nevertheless precedent. Likewise unconvincing is I.M.’s assertion that this language represents an impermissible modification of *D.B. v. Waukesha County Human Services Department*, 153 Wis. 2d 761, 451 N.W.2d 799 (Ct. App. 1989), in violation of *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). Instead, the language at issue is simply a reasonable interpretation of *D.B.*

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to abandonment, the evidence showed that I.M. had no contact with E.M.C. for two periods of time that were each over six months, from December 2013 to July 2014, and from November 28, 2014, through October 29, 2016. With respect to I.M.'s good cause defense and the allegation that he failed to assume parental responsibility, the record contains overwhelming evidence that, despite bringing the two court proceedings to establish paternity and visitation, I.M.'s expressions of support and care for E.M.C. were minimal, as were his efforts at seeing E.M.C. or interacting with her in any meaningful way.

III. Evidence of Sexual Misconduct and Domestic Abuse

¶28 Prior to trial, I.M. filed a motion in limine to exclude any mention of acts of domestic or sexual abuse and any evidence regarding I.M. being called a “sex addict” by an ex-girlfriend. A.C.-E. responded that the “sex addict” and sexual misconduct evidence was relevant to show that I.M.'s visits with E.M.C. and A.C.-E. were not actually to spend time with E.M.C., but rather to have sex with A.C.-E. A.C.-E. also asserted that both the domestic and sexual abuse evidence was relevant to respond to I.M.'s assertions that A.C.-E. was insufficiently responsive to his requests to see E.M.C., in that the evidence showed that A.C.-E. was fearful of him. The circuit court declined to categorically exclude the evidence, stating:

I think as far as the purpose of the visits and the reason for the visits, that is admissible evidence and I will allow that to be explored through the testimony. If there are any—since this is somewhat vague—if there are any specific objections as they come up, I'll rule on them. But I think certainly the reason for the visits is relevant to this case and I will allow that to be introduced.

¶29 During trial, I.M. objected to some of the evidence that he now argues was improperly admitted but did not object to other evidence. On appeal, I.M. does not assert that his trial counsel was ineffective for failing to object; he instead argues

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that the objections are preserved for review by his motion in limine. Assuming without deciding that the motion in limine preserved I.M.'s objections, I conclude that the circuit court did not erroneously exercise its discretion in admitting the evidence at issue and that any error was harmless.

¶30 I.M. challenges admissibility of the following evidence:

- A.C.-E.'s testimony that, while she was three or four months pregnant with E.M.C., I.M. told her in response to the neighbors being loud that he thought it was funny that the fathers were out drinking and doing cocaine while the mothers stayed at home with their children. He told A.C.-E. that their relationship would be like that when E.M.C. was born, and when A.C.-E. challenged this statement, I.M. pushed A.C.-E. against the wall, choked her, and told her not to talk back to him.
- A.C.-E.'s testimony regarding an incident that took place after E.M.C. was born, when I.M. and A.C.-E. were still dating, which A.C.-E. described as follows. During childbirth, A.C.-E. had an episiotomy and received stitches as a result. Her doctor told her to refrain from sexual intercourse for six weeks while the injuries healed. About four weeks after E.M.C.'s birth, I.M. came over to see E.M.C. and A.C.-E. Instead of spending time with E.M.C., I.M. made sexual advances towards A.C.-E. A.C.-E. told I.M. that she would not have sex with him, and that she could not have sex for six weeks. However, despite A.C.-E. telling I.M. no, I.M. pulled down A.C.-E.'s shorts and had sex with her. A.C.-E. broke off their relationship following this incident.

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- Testimony about an incident involving A.C.-E.'s cousin, L.B., in which, during a family game night hosted at A.C.-E.'s mother's house, L.B. came out of the bathroom in the middle of the night, whereupon I.M. pushed L.B. back into the bathroom, tried to put his hands down her pants, kiss her, and told her, "Come on, let's do it." L.B. refused I.M.'s request and ran up the stairs towards her room. I.M. followed L.B. up the stairs, touching L.B.'s buttocks and grabbing her along the way. L.B. got into her room and closed and locked the door behind her. L.B. told A.C.-E. about the incident the next morning.
- Evidence in the form of a Facebook message to A.C.-E. from I.M.'s ex-girlfriend, B.O., in which B.O. states that I.M. is a "sex addict" and testimony from B.O. and A.C.-E. regarding the message.

¶31 As a preliminary matter, I note that I.M. characterizes the evidence he challenges as "other acts" evidence under WIS. STAT. § 904.04(2) and states that it is therefore subject to the analysis set forth in *Sullivan*, 216 Wis. 2d 768.⁷ However, although I.M. sets forth the *Sullivan* standards at the beginning of his argument section, he argues only that the evidence was not relevant under WIS. STAT. § 904.01, and was unfairly prejudicial under WIS. STAT. § 904.03. I therefore only address these relevancy and unfair prejudice arguments.

⁷ With the exception of testimony regarding A.C.-E.'s cousin, it is questionable whether the conduct at issue constitutes "other acts" evidence as "other acts" are "'crimes, wrongs, or acts' that occurred at some time and place *other* than the event being litigated." See *State v. Payano*, 2009 WI 86, ¶53 n.8, 320 Wis. 2d 348, 768 N.W.2d 832 (quoting 7 DANIEL BLINKA, WISCONSIN PRACTICE SERIES: WISCONSIN EVIDENCE § 404.1, at 145-46 (3d ed. 2008)). However, this issue need not be decided.

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A. Relevancy

¶32 Relevant evidence means “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 that it would be without the evidence.” WIS. STAT. § 904.01. As stated, this court reviews a circuit court’s decision to admit or exclude evidence under an erroneous exercise of discretion standard. *See Martindale*, 246 Wis. 2d 67, ¶28. For the reasons below, I.M. has failed to establish that the circuit court erroneously exercised its discretion.

¶33 First, the evidence regarding I.M. pushing and choking A.C.-E. while she was pregnant was relevant to the issue of whether I.M. failed to assume parental responsibility, which is established by showing that the parent has not had a “substantial parental relationship” with the child. *See* WIS. STAT. § 48.415(6)(a). In evaluating whether a “substantial parental relationship” exists, the court may consider “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.” WIS. STAT. § 48.415(6)(b). Pushing A.C.-E. up against the wall and choking her when she was pregnant with their child is relevant to whether I.M. expressed concern for A.C.-E.’s support, care or well-being.

¶34 Second, the sexual misconduct and domestic abuse evidence was relevant to the issues of whether I.M. had good cause for abandoning E.M.C. and whether I.M. failed to assume parental responsibility. As previously discussed, I.M. admitted that he had no contact with E.M.C. between December 2013 and July 2014, and again from November 28, 2014, through October 29, 2016. He further admitted that, from July 2014 through November 28, 2014, he only had two visits with

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E.M.C. However, I.M. also testified that A.C.-E. had frustrated his attempts to become involved in E.M.C.'s life by not responding to his requests to see E.M.C. or by not being available to meet. I.M.'s attorney argued that the alleged interference provided "good cause" for excusing the periods of abandonment and justification for his lack of parental responsibility.

¶35 A.C.-E. testified that she never "refused" any of I.M.'s requests to see E.M.C., but that also she was afraid of I.M. A.C.-E.'s position was that I.M. was not genuinely interested in parenting E.M.C. and was using requests to see E.M.C. as a pretext for a chance to see A.C.-E. with the hope of having sex with her. The evidence of domestic and sexual abuse was relevant in that it explained why A.C.-E. may have been less than fully responsive to I.M.'s requests to see E.M.C., namely, out of fear of I.M., which in turn undermines I.M.'s good cause defense to abandonment and supports A.C.-E.'s allegation of failure to assume parental responsibility.

¶36 I.M. counters that evidence supporting A.C.-E.'s fear of I.M. was not relevant because A.C.-E. testified that she always cooperated with I.M.'s requests to see E.M.C. I.M.'s argument is that if A.C.-E. claims that she always cooperated, then A.C.-E. cannot simultaneously offer evidence that she did not cooperate out of fear. However, the jury was not required to accept A.C.-E.'s statements that she did not impede I.M. from visiting E.M.C. "The function of the jury is to decide which evidence is credible and which is not and how conflicts in the evidence are to be resolved." *State v. Poellinger*, 153 Wis. 2d 493, 503, 451 N.W.2d 752 (1990); *see also State v. Perkins*, 2004 WI App 213, ¶15, 277 Wis. 2d 243, 689 N.W.2d 684. The jury was therefore free to credit as much or as little of A.C.-E.'s and I.M.'s testimony as it saw fit. Thus, to the extent that there was a conflict either within A.C.-E.'s own testimony, or between A.C.-E.'s and I.M.'s testimony, it was the

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jury's job to resolve the conflict. By extension, despite her testimony and arguments to the contrary, the jury could have reasonably concluded that A.C.-E. impeded I.M.'s attempts to see E.M.C., making evidence about why she did so relevant..

¶37 Further, the evidence related to I.M.'s sexual conduct was relevant to show that I.M.'s efforts to meet with A.C.-E. and E.M.C. were pretextual, namely, for the purpose of having sex with A.C.-E., rather than to actually interact with and care for E.M.C. In showing that I.M. was not interested in seeing and spending time with E.M.C. but was instead motivated to get together with A.C.-E. to have sex with her, the sexual conduct evidence undermined I.M.'s good cause defense to the abandonment allegation and bolstered A.C.-E.'s allegation of failure to assume parental responsibility.

¶38 I.M. argues that the evidence that I.M. sought to have a sexual relationship with A.C.-E. was not relevant because "[p]eople can be parents and sexual partners" and "the parent's *motive* for assuming a parental role is irrelevant to statutory grounds for termination." This argument misses the mark because the evidence was not introduced to show that I.M. had a motive for "assuming a parental role," but to show that he assumed no parental role. The evidence supported A.C.-E.'s claims that I.M. used requests for child visits as a ruse to try to have sexual encounters with A.C.-E. and that, during his visits, he ignored E.M.C. and instead focused on obtaining sex from A.C.-E.

B. Undue Prejudice and Harmless Error

¶39 I.M. asserts that the sexual misconduct and domestic abuse evidence was unduly prejudicial under WIS. STAT. § 904.03. However, having determined the evidence was relevant, and in light of the overwhelming evidence set forth above regarding I.M.'s abandonment of E.M.C., lack of good cause, and failure to assume

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parental responsibility, I cannot conclude that the probative value of the challenged evidence was “*substantially* outweighed by the danger of unfair prejudice,” as required for exclusion under WIS. STAT. § 904.03. Further, based on this same overwhelming evidence of abandonment and failure to assume parental responsibility, even if the court erroneously exercised its discretion in admitting the challenged evidence, I conclude that any error was harmless. *See, e.g., Martindale*, 246 Wis. 2d 67, ¶30; *Evelyn C.R.*, 246 Wis. 2d 1, ¶28.

IV. Ineffective Assistance of Counsel

¶40 Parents are entitled to the effective assistance of counsel during TPR proceedings. *Oneida Cty. Dep’t of Soc. Servs. v. Nicole W.*, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652; *see also A.S. v. State*, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992) (adopting ineffective assistance of counsel standard for TPR proceedings). The test for ineffective assistance of counsel during TPR proceedings is the same as the two-prong *Strickland*⁸ test applicable to criminal cases. *See Nicole W.*, 299 Wis. 2d 637, ¶33. Under *Strickland v. Washington*, 466 U.S. 668 (1984), to show that counsel was ineffective, a parent must demonstrate: that (1) counsel was deficient; and (2) counsel’s deficiency prejudiced the parent. *Id.* at 687. Counsel’s performance is deficient if it fell outside the “wide range of professional competent assistance.” *State v. Pico*, 2018 WI 66, ¶19, 382 Wis. 2d 273, 914 N.W.2d 95 (quoting *Strickland*, 466 U.S. at 690; internal quotation marks omitted). When assessing deficient performance, “[t]he question is whether an attorney’s representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.” *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 88, (2011); internal quotation marks

⁸ *See Strickland v. Washington*, 466 U.S. 668 (1984).

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omitted). The prejudice prong requires establishing “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*, ¶20 (quoting *Strickland*, 466 U.S. at 694; internal quotation marks omitted). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (internal quotation marks and quoted source omitted).

¶41 During the trial, A.C.-E. and I.M. offered competing testimony about whether I.M. accompanied A.C.-E. to her prenatal doctor appointments. *See L.K. v. B.B.*, 113 Wis. 2d 429, 438-39, 335 N.W.2d 846 (1983) (parent’s actions prior to child’s birth, including interest in prenatal care, are relevant to determining whether a parent has failed to assume parental responsibility). A.C.-E. testified that I.M. did not attend any of her prenatal or postnatal doctor appointments. I.M. testified that he attended some prenatal appointments.

¶42 A.C.-E. introduced a signed letter by her doctor, stating that I.M. was not present at any of the prenatal appointments, nor did the doctor see I.M. at any of the well-child or sick-child appointments. I.M.’s counsel did not object to the introduction of the letter. At the postdisposition hearing, I.M.’s counsel testified that she had agreed with A.C.-E.’s counsel that she would not object to the introduction of the letter; however, she could not recall a reason for this decision.

¶43 On appeal, I.M. argues that his counsel was ineffective for failing to object to the introduction of the letter from A.C.-E.’s doctor because it was inadmissible hearsay. *See* WIS. STAT. § 908.02. He argues that this alleged deficiency was prejudicial because it bolstered A.C.-E.’s testimony that I.M. did not attend any doctor’s appointments, thereby supporting A.C.-E.’s claim that I.M. failed to establish a parental relationship with E.M.C. *See* WIS. STAT.

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§ 48.415(6)(a) (failure to assume parental responsibility ground is established by showing the parent has not had a “substantial parental relationship” with the child).

¶44 I reject I.M.’s ineffective assistance of counsel claim because I.M. has not demonstrated that the alleged deficiency was prejudicial.⁹ In the context of the entire two-day trial, whatever probative value I.M.’s presence or absence from the doctor visits may have had was *de minimis*. Accordingly, I.M. has failed to demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *See Pico*, 382 Wis. 2d 273, ¶20 (quoting *Strickland*, 466 U.S. at 694; internal quotation marks omitted).

CONCLUSION

¶45 For the reasons set forth above, the circuit court’s order is affirmed.

By the Court.—Order affirmed.

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

⁹ Because I conclude that I.M. has not shown that he was prejudiced by his counsel’s performance, I do not address whether I.M.’s counsel was deficient. *See State v. Mayo*, 2007 WI 78, ¶61, 301 Wis. 2d 642, 734 N.W.2d 115 (reviewing court “need not address both the performance and the prejudice elements, if the defendant cannot make a sufficient showing as to one or the other element”).

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 13, 2020

Sheila T. Reiff
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. 2019AP1324
2019AP1325**

**Cir. Ct. Nos. 2018TP42
2018TP43**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 2019AP1324

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

H. P.,

RESPONDENT-APPELLANT.

Nos. 2019AP1324
2019AP1325

No. 2019AP1325

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO J. B.,
A PERSON UNDER THE AGE OF 18:**

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

H. P.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Brown County:
TIMOTHY A. HINKFUSS, Judge. *Affirmed.*

¶1 HRUZ, J.¹ In these consolidated appeals, Haley² appeals nonfinal orders of the circuit court in two termination of parental rights (TPR) cases pertaining to her children, Rachel and Jack.³ Those orders denied Haley's motion asking the circuit court to determine that the Brown County Department of Human Services (the Department) must prove the elements of the continuing CHIPS

¹ These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

² For ease of reading, we refer to H.P. and her children, R.B. and J.B., using pseudonyms, rather than their initials.

³ By order dated August 30, 2019, this court granted Haley's petitions for leave to appeal the non-final orders. *See* WIS. STAT. § 808.03(2). Subsequently, on September 17, 2019, we ordered Haley's appeals to be consolidated for briefing and disposition. *See* WIS. STAT. RULE 809.10(3).

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ground⁴ for a TPR as previously set forth in WIS. STAT. § 48.415(2)(a) (2015-16), as opposed to the elements now set forth by § 48.415(2)(a) (2017-18).⁵

¶2 Haley contends the Department cannot use the amended version of WIS. STAT. § 48.415(2)(a) as a basis to terminate her parental rights because its elements changed during the pendency of her CHIPS cases, such that applying the current statutory elements would violate her constitutional rights to procedural due process. For the reasons set forth herein, we disagree. Haley's TPR proceedings must employ the amended, and current, version of § 48.415(2)(a), and such an application of the statute to her circumstances does not violate her due process rights. We therefore affirm the orders of the circuit court.

BACKGROUND

¶3 The following facts are undisputed on appeal. In June 2016, Rachel and Jack were each found to be a child in need of protection or services, but they remained in their parents' care. The Department took temporary physical custody of Rachel and Jack in February 2017, and on March 13, 2017, the children were formally placed outside of Haley's home by court order. On that same date, Haley received notice, as required by WIS. STAT. § 48.356, that the Department might

⁴ We follow the lead of the parties and prior case law by referring to the particular TPR ground at issue as the "continuing CHIPS" ground for TPR. *See, e.g., St. Croix Cty. DHHS v. Michael D.*, 2016 WI 35, ¶1, 368 Wis. 2d 170, 880 N.W.2d 107. "CHIPS" is a commonly used acronym for "child in need of protection or services." *See id.*, ¶6.

⁵ For ease of reading and consistency with prior case law, we refer to WIS. STAT. § 48.415(2)(a) (2015-16) as the "prior version" and to § 48.415(2)(a) (2017-18) as the "amended version." *See Dane Cty. DHS v. J.R.*, 2020 WI App 5, ¶2 n.3, 390 Wis. 2d 326, 938 N.W.2d 614 (2019).

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seek to terminate her parental rights based upon continuing CHIPS, under the prior version of WIS. STAT. § 48.415(2)(a).⁶

¶4 The CHIPS orders placing Rachel and Jack outside of Haley's home were revised in June 2017 and then again in July 2018. Haley had been again warned that her parental rights were in jeopardy in June 2017 on the basis of continuing CHIPS. Effective on April 6, 2018, and before the second revision of the CHIPS orders, the legislature changed one of the continuing CHIPS ground's elements by amending WIS. STAT. § 48.415(2)(a)3. (2015-16). *See* 2017 Wis. Act 256, § 1. This change is explained further below.

¶5 When the CHIPS orders were revised a second time in July 2018, Haley again received notice that her parental rights could be terminated on the basis of continuing CHIPS. This time, the notice referenced the amended version of WIS. STAT. § 48.415(2)(a) and included the elements as set forth in that version.

¶6 On November 8, 2018, the Department filed petitions to terminate Haley's parental rights to Rachel and Jack.⁷ In each petition, the Department alleged continuing CHIPS as the ground for termination pursuant to the amended version of WIS. STAT. § 48.415(2)(a).

⁶ Both the prior and amended versions of the statute provide that the petitioner must prove that: (1) the child has been adjudged to be in need of protection or services and placed outside the home for six months or more pursuant to one or more court orders containing the statutorily required notice of potential TPR grounds; (2) reasonable efforts were made to provide the services to the parent or child ordered by the court; and (3) the parent failed to meet the conditions established by the court in the CHIPS order for the safe return of the child to the home. *See* WIS. STAT. § 48.415(2)(a)1.-3. (2015-16) and § 48.415(2)(a)1.-3. (2017-18).

⁷ The Department also petitioned to terminate the parental rights of Rachel and Jack's father. His parental rights are not at issue in this appeal.

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¶7 In May 2019, prior to trial at the grounds phase, Haley moved to have her TPR cases proceed under the prior version of WIS. STAT. § 48.415(2)(a). The Department opposed the motion. Following a hearing on the matter, the circuit court determined that the cases would proceed under the amended, and current, version of § 48.415(2)(a). Haley now appeals.

DISCUSSION

¶8 When our legislature amended WIS. STAT. § 48.415(2)(a)3. in April 2018, it changed the elements that the petitioner must prove at the grounds phase of a TPR proceeding based on a continuing CHIPS. The prior version of subdivision 3. required the petitioner to show that there is a “substantial likelihood” that the parent will not meet “the conditions established for the safe return of the child to the home” within “the 9-month period following the fact-finding hearing.” We have previously referred to this requirement as the “9-month failure to meet requirement.” *See Dane Cty. DHS v. J.R.*, 2020 WI App 5, ¶13, 390 Wis. 2d 326, 938 N.W.2d 614 (2019).

¶9 Our legislature eliminated the 9-month failure to meet requirement when it amended WIS. STAT. § 48.415(2)(a)3. *See* 2017 Wis. Act 256, § 1. Subdivision 3. now provides:

[I]f the child has been placed outside the home for less than 15 of the most recent 22 months, [the petitioner must show] that there is a substantial likelihood that the parent will not meet the[] conditions [established for the safe return of the child to the parent’s home] as of the date on which the child will have been placed outside the home for 15 of the most recent 22 months, not including any period during which the child was a runaway from the out-of-home placement or was residing in a trial reunification home.

Sec. 48.415(2)(a)3.

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¶10 The sole issue Haley raises on appeal is an “as-applied” constitutional challenge to the use of the amended version of WIS. STAT. § 48.415(2)(a) in her TPR proceedings. An as-applied constitutional challenge “is a claim that a statute is unconstitutional as it relates to the facts of a particular case or to a particular party.” *State v. Pocian*, 2012 WI App 58, ¶6, 341 Wis. 2d 380, 814 N.W.2d 894. Haley has the burden of proving that the statute as applied to her is unconstitutional “beyond a reasonable doubt.” *See id.* An “as-applied” constitutional challenge to the application of a particular statute is a question of law that we review de novo. *J.R.*, 390 Wis. 2d 326, ¶51 (citing *State v. Smith*, 2010 WI 16, ¶8, 323 Wis. 2d 377, 780 N.W.2d 90).

¶11 Specifically, Haley asserts the amended version of WIS. STAT. § 48.415(2)(a) is unconstitutional as applied to her because it violates her “due process right to fair notice and time to conform her conduct to the law.” Due process is implicated in TPR proceedings because when “the State moves to destroy weakened familial bonds, it must provide parents with fundamentally fair procedures.” *Steven V. v. Kelley H.*, 2004 WI 47, ¶23, 271 Wis. 2d 1, 678 N.W.2d 856 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982)). The State provides fundamentally fair procedures by providing parents a hearing, prescribing the petitioner’s burden of proof as “clear and convincing evidence,” *id.*, and providing fair notice of any substantive change to a parent’s conduct that could lead to a TPR, *see State v. Patricia A.P.*, 195 Wis. 2d 855, 863, 537 N.W.2d 47 (Ct. App. 1995). Outside of these two requirements, our legislature “unquestionably has the prerogative to determine the grounds of unfitness upon which to initiate TPR proceedings.” *Eau Claire Cty. DHS v. S.E.*, No. 2019AP894, slip. op. recommended for publication ¶37 (WI App May 13, 2020).

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¶12 Haley first argues that applying the amended version of WIS. STAT. § 48.415(2)(a) violates her right to procedural due process under our decision in *Patricia A.P.* In that case, we held that when a parent is warned that his or her rights to a child may be lost because of the parent's future conduct, "if the State *substantially changes the type of conduct* that may lead to the loss of rights without notice to the parent, the State applies a fundamentally unfair procedure." *Patricia A.P.*, 195 Wis.2d at 863 (emphasis added). Haley maintains that a similar "substantial change" occurred in these cases when the legislature amended § 48.415(2)(a).

¶13 We disagree for the reasons we set forth in *S.E.*, a decision recommended for publication and issued today. Haley raises the same argument that the parent raised in *S.E.*, which we rejected because we determined the change between the prior version and the amended version of WIS. STAT. § 48.415(2)(a) was not substantive. See *S.E.*, No. 2019AP894, ¶¶20-23. Haley's argument in this regard therefore lacks merit.

¶14 Haley also maintains that the change between the prior version and the amended version of WIS. STAT. § 48.415(2)(a) is substantive because CHIPS proceedings and TPR proceedings are "inextricably intertwined." This is so, in Haley's view, because the "TPR warnings in CHIPS case[s] are an element of the TPR claim."

¶15 We disagree that the relationship CHIPS cases and TPR cases share—however "interconnected" they may be—makes the change between the prior version and the amended version of WIS. STAT. § 48.415(2)(a) substantive.

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It is well established that CHIPS cases and TPR cases are separate proceedings. *See, e.g., J.R.*, 390 Wis. 2d 326, ¶¶23, 38.⁸ In light of our case law on this issue, Haley has otherwise not shown how any “interconnectedness” between CHIPS cases and TPR cases means that the change between the prior version and the amended version of § 48.415(2)(a) is substantive.

¶16 Lastly, Haley argues she was deprived of her constitutional right to “fair notice” of the change in WIS. STAT. § 48.415(2)(a)’s elements that the Department would have to prove at the grounds phase. She contends she was not given “a reasonable amount of time to conform her conduct to what is required by law.” Haley maintains that the change eliminated her ability to show that she could meet the conditions of Rachel and Jack’s return within nine months of the grounds hearing because her children “had already been out of the home for fifteen months” when Haley received TPR warnings reflecting the amended version of § 48.415(2)(a). Thus, in her view, the “grounds under the continuing CHIPS claim were complete.”

¶17 Haley’s argument has three flaws. First, the change between the prior version and the amended version of WIS. STAT. § 48.415(2)(a) did not deprive Haley of her ability to conform her conduct to avoid a TPR. We emphasize that Haley, at all times, knew that her parental rights would be in jeopardy if the Department made reasonable efforts to provide the required

⁸ In her brief-in-chief, Haley acknowledges that *J.R.*—a case we rely on here as well as in *S.E.*—was recommended for publication during briefing on these appeals. Curiously, Haley never discusses how *J.R.* impacts her case in either her brief-in-chief, her reply brief, or in a supplemental letter to this court. The Department also fails to address *J.R.* *J.R.* was published after briefing in this case ended.

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services and she failed to act upon those services for an extended period of time, regardless of whether the TPR cases proceeded under the prior or the amended version of the statute. Other than arguing that the change between the statutes was a substantial change to her TPR proceedings—an argument that we have already rejected—Haley has not shown that she has a due process right to be prospectively given “a reasonable amount of time to conform her conduct to what is required by law.” *See S.E.*, No. 2019AP894, ¶¶24-25.

¶18 Second, Haley presupposes that the Department has proven the TPR grounds, even though no grounds hearing has yet taken place. As such, none of the continuing CHIPS ground’s elements have been established. Further, she ignores that even if the trier of fact were to draw the same conclusion as Haley that Rachel and Jack have been already placed outside of Haley’s home for at least fifteen of the last twenty-two months, there are additional elements in the continuing CHIPS ground that the Department would need to prove. Namely, the Department would need to prove that Rachel and Jack were placed outside the home by valid CHIPS orders containing the duty to warn requirements prescribed by WIS. STAT. § 48.356(2), *see* WIS. STAT. § 48.415(2)(a)1., that the agency responsible for the care of Rachel and Jack made a “reasonable effort” to provide the services ordered by the circuit court, *see* § 48.415(2)(a)2., and that Haley “has failed” to meet the conditions established for the safe return of Rachel and Jack, *see* § 48.415(2)(a)3.

¶19 Third, and relatedly, Haley’s argument rests on hypothetical facts. She presents no facts demonstrating that the Department would be unable to meet its burden of proof under the prior version of WIS. STAT. § 48.415(2)(a), but could meet its burden under the amended version. *See S.E.*, No. 2019AP894, ¶19 n.12

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(citing *J.R.*, 390 Wis. 2d 326, ¶53). Haley, consequently, “has not demonstrated that application of the prior version of ... § 48.415(2)(a), as compared to application of the amended version of § 48.415(2)(a) would make a difference” to the result in her TPR proceedings. See *S.E.*, No. 2019AP894, ¶19 n.12 (quoting *J.R.*, 390 Wis. 2d 326, ¶53). In all, Haley has not proven that the application of the amended version of § 48.415(2)(a) in her TPR proceedings deprived her of due process.

By the Court.—Orders affirmed.

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

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 12, 2020

Sheila T. Reiff
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 No. 2019AP1520
STATE OF WISCONSIN**

Cir. Ct. No. 2018TP1

**IN COURT OF APPEALS
DISTRICT III**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO C. P.-D.,
A PERSON UNDER THE AGE OF 18:**

**IRON COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,**

V.

N. H.-D.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Iron County:
KEVIN G. KLEIN, Judge. *Affirmed.*

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¶1 HRUZ, J.¹ Natalie appeals a circuit court order involuntarily terminating her parental rights to her son, Charlie.² She asserts her due process rights were violated during the grounds phase of her termination of parental rights (TPR) proceedings. Natalie also appeals, at least in part, the denial of her postdispositional motion in which she alleged her trial counsel provided ineffective assistance during the jury trial in the grounds phase. We affirm.

BACKGROUND

¶2 Charlie was born on October 6, 2009. In February 2016, the circuit court found him to be a Child in Need of Protection or Services (CHIPS) under WIS. STAT. § 48.13(10), and he was placed outside of Natalie's home.

¶3 In March 2018, the Iron County Department of Human Services (the Department) petitioned to terminate involuntarily Natalie's parental rights. The Department later filed an amended TPR petition, alleging two grounds for termination: (1) continuing need of protection or services (known as "continuing CHIPS"³); and (2) failure to assume parental responsibility. *See* WIS. STAT. § 48.415(2), (6).

¶4 Natalie contested the TPR petition and requested a jury trial. After a three-day trial in July 2018, the jury found that both of the alleged grounds to terminate Natalie's parental rights existed, and the circuit court therefore found

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

² For ease of reading, we refer to N.H.-D. and her son, C.P.-D., using pseudonyms, rather than their initials.

³ *See St. Croix Cty. DHS v. Michael D.*, 2016 WI 35, ¶1, 368 Wis. 2d 170, 880 N.W.2d 107.

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Natalie to be an unfit parent. Following a dispositional hearing, the court concluded that the termination of Natalie's parental rights was in Charlie's best interests, and it terminated her parental rights. Natalie appealed.

¶5 On September 9, 2019, Natalie, by new counsel appointed for her appeal, moved this court under WIS. STAT. RULE 809.107(6)(am) to remand the matter for a postdispositional hearing. Natalie alleged that she was entitled to a new trial because she had been denied the effective assistance of trial counsel for a variety of reasons. On September 16, 2019, we granted her motion to remand.

¶6 The circuit court then held a *Machner*⁴ hearing on Natalie's motion. Samuel Filippo, Natalie's trial counsel, testified. Following his testimony, the court denied Natalie's motion. It concluded that Filippo did not perform deficiently at the grounds trial and, even if he did, his alleged errors did not prejudice Natalie. Natalie now appeals, and additional facts are provided as necessary below.

DISCUSSION

¶7 Natalie purports to raise four issues on appeal. Her first three arguments assert that her "due process rights" were violated in various ways throughout the grounds phase trial. Natalie then raises a specific claim of ineffective assistance on the part of her trial counsel. We address first Natalie's claimed due process arguments.

⁴ See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

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I. Due Process Violations

¶8 Natalie argues that her due process rights were violated during the grounds trial for three reasons: (1) evidence predating Charlie’s birth was admitted to help prove the two TPR grounds; (2) evidence was introduced that was relevant to the dispositional phase, not the grounds phase; and (3) the guardian ad litem (GAL) made statements during closing arguments that “impermissibly invited the jury” to consider Charlie’s best interests.⁵ Natalie’s arguments, however, are both procedurally and substantively flawed.

¶9 Procedurally, Natalie forfeited her “due process” arguments for our review on appeal. As relevant here, forfeiture is the failure to timely assert an objection to an alleged error. *See State v. Ndina*, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612. The purpose of the forfeiture rule “is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal.” *Id.*, ¶30.

The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from “sandbagging” opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.

Id.

¶10 Because the forfeiture rule is one of judicial administration, a court may chose to ignore forfeiture and reach the merits of a claim. *State v. Coffee*, 2020

⁵ During the grounds phase of TPR proceedings, “the parent’s rights are paramount.” *Sheboygan Cty. DHHS v. Julie A.B.*, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402. Conversely, during the dispositional phase of TPR proceedings, the focus shifts to the child’s best interests. *Id.*, ¶28.

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WI 1, ¶21, ___ Wis. 2d ___, ___ N.W.2d ___. Furthermore, if a court decides that a party has forfeited a claim in a case where the party has a constitutional right to an attorney and one has been appointed, the normal procedure is to address that claim within the rubric of ineffective assistance of counsel. *See id.*, ¶22; *A.S. v. State*, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992) (extending claims of ineffective assistance of counsel to TPR proceedings).

¶11 Natalie plainly forfeited her three “due process” arguments because she did not object at trial when any of the alleged errors occurred—much less object on grounds of a due process violation. Furthermore, the errors Natalie alleges do not involve those fundamental constitutional rights that cannot be forfeited but, rather, must be intentionally waived. *See Coffee*, 2020 WI 1, ¶20 (explaining that these rights include the rights to counsel, to refrain from self-incrimination, and to a jury trial). As we explain in more detail immediately below, the “due process” arguments she raises do not—at least in the way she develops them—implicate any discernible due process rights.

¶12 Substantively, Natalie’s due process arguments are undeveloped. She does not explain how the unobjected-to admission of the two sets of evidence and the remarks at closing arguments amounted to a due process violation.

¶13 We also cannot discern whether Natalie is claiming a procedural or substantive due process violation. Indeed, she never ties any of her arguments to any standard for establishing a violation of due process. Her procedural due process rights were afforded, inasmuch as she had notice and a right to be heard, *see Steven V. v. Kelley H.*, 2004 WI 47, ¶¶23, 44, 271 Wis. 2d 1, 678 N.W.2d 856, and she exercised the latter right by demanding and receiving a jury trial. Further, if Natalie is contending that one of her substantive due process rights was violated,

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nowhere does she identify exactly which of her constitutionally protected rights was infringed upon. We need not address undeveloped arguments. *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Thus, even if we chose not to apply the forfeiture rule, we would nonetheless decline to address Natalie's arguments because they are undeveloped.

¶14 Still, and in the interest of thoroughness given that Natalie's parental rights are at stake, we could address the alleged errors Natalie raises as implicating her trial counsel's inaction and lack of objection on evidentiary matters and during closing arguments. Again, when a party forfeits its alleged errors because they do not involve certain fundamental constitutional rights, the proper framework for us to address these issues is within the rubric of ineffective assistance of counsel. *See Coffee*, 2020 WI 1, ¶22. Nonetheless, we note that Natalie makes no developed ineffective assistance of counsel argument related to the three errors she alleges.⁶

¶15 Natalie apparently understands this rule regarding unobjected-to errors as a general matter because, as discussed below, she does raise on appeal one ineffective assistance of counsel claim. Notably, in the postdispositional proceedings in the circuit court, Natalie's arguments regarding the allegedly improper admission of evidence predating Charlie's birth and evidence relevant to the dispositional phase were both made in the context of alleging her counsel was constitutionally ineffective in failing to object to these errors. Yet, she neither claims nor argues ineffective assistance of counsel in relation to her three alleged "due process" violations on appeal.

⁶ As we have previously noted, Natalie raises only one claim of ineffective assistance of counsel. The grounds underlying that claim are neither identical nor argued in the alternative to the merits of her three "due process" arguments.

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¶16 In all, Natalie’s failure to explain either how her procedural due process rights were violated or which of her substantive due process rights was violated, as well as her decision not to advance her arguments under the rubric of ineffective assistance of counsel, prevent our review of her first three arguments. We therefore do not, and frankly cannot, address their merits.

II. Ineffective Assistance of Counsel

¶17 Natalie next argues that Filippo, her trial counsel, performed deficiently during the grounds trial. Specifically, she contends the Department and GAL improperly attacked her character “pervasively” throughout the trial, and Filippo’s failure to object to any of those attacks constituted deficient performance that prejudiced her defense. Whether Filippo was ineffective is a mixed question of fact and law. *See State v. Balliette*, 2011 WI 79, ¶19, 336 Wis. 2d 358, 805 N.W.2d 334. The circuit court’s findings of fact will not be disturbed unless they are clearly erroneous. *Id.* The ultimate conclusion of whether Filippo provided ineffective assistance, however, is a question of law that we review independently. *See id.*

¶18 A respondent in TPR proceedings has the constitutional right to the effective assistance of counsel. *See A.S.*, 168 Wis. 2d at 1005. Accordingly, we follow the same *Strickland v. Washington*, 466 U.S. 668 (1984), framework that is used in criminal cases. *A.S.*, 168 Wis. 2d at 1005. To establish ineffective assistance, a respondent must prove two elements: (1) counsel’s performance was deficient; and (2) that deficient performance prejudiced the respondent. *See State v. Sholar*, 2018 WI 53, ¶32, 381 Wis. 2d 560, 912 N.W.2d 89. “[T]he law affords counsel the benefit of the doubt; there is a presumption that counsel is effective unless shown otherwise” *Balliette*, 336 Wis. 2d 358, ¶27. Additionally, counsel’s decisions in choosing a trial strategy are to be given “great deference”—

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that is to say, a court “must be vigilant against the skewed perspective that may result from hindsight, and it may not second-guess counsel’s performance solely because the defense proved unsuccessful.” *Id.*, ¶¶25-26.

¶19 Here, the continuing CHIPS ground required the Department to prove at trial that there was a substantial likelihood Natalie would not meet the conditions for Charlie’s return as specified in his CHIPS order. *See* WIS. STAT. § 48.415(2)(a)3. Those conditions of return included that Natalie obtain safe and stable housing, participate in a variety of programming, and cooperate with a social worker. They also required Natalie to learn about Charlie’s behavioral and mental health needs, and to create a plan to address those needs.

¶20 As best we can discern, Natalie contends that the Department and GAL improperly elicited testimony by asking “character impugning questions to which [Filippo] did not object.” She seems to argue that the elicited testimony was inadmissible character evidence under WIS. STAT. § 904.04, but she does so with only a passing reference to that statute.

¶21 Natalie provides nineteen examples of questions that she alleges were “character impugning” and designed to make “the jury judge” if she had become a “better” parent. In Natalie’s view, the Department’s and GAL’s asking witnesses to opine on whether Natalie had become “better” in a variety of ways misled the jury on its assessment of whether she could meet the conditions for Charlie’s return. Without reference to case law citable for precedential value, Natalie argues the continuing CHIPS ground’s elements “should be judged by an objective standard,” and, therefore, the “character impugning questions” the Department and GAL asked

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impermissibly changed the jury's inquiry into a "subjective assessment."⁷ We understand Natalie to argue that this shift from an "objective assessment" to a "subjective assessment" impermissibly lowered the Department's burden of proof to some standard below "clear and convincing evidence." See *Steven V.*, 271 Wis. 2d 1, ¶23. Ultimately, Natalie asserts Filippo was complicit in the jury being misled because he failed to object during the Department's and GAL's questioning, making his performance deficient.

¶22 Natalie's argument that Filippo performed deficiently lacks merit. The examples to which Natalie cites take the Department's and GAL's questions out of context. The questions at issue elicited responses on the issue of whether there was a substantial likelihood that Natalie could comply with Charlie's conditions of return. For example, the conditions involved issues of whether Natalie was able to consider the needs of her children (which, in Charlie's case, included certain mental health and behavioral needs) and to design a plan to address those needs. Natalie's "history of parental conduct may be relevant to predicting [her] chances of complying with conditions in the future, despite failing to do so to date." See *La Crosse Cty. DHS v. Tara P.*, 2002 WI App 84, ¶13, 252 Wis. 2d 179, 643 N.W.2d 194. Accordingly, a jury "must necessarily consider the parent's relevant character traits and patterns of behavior, and the likelihood that any problematic traits or propensities have been or can be modified in order to assure the safety of

⁷ Natalie primarily cites to only one case in support of her ineffective assistance of counsel claim—*State v. Patricia Marie F-K*, No. 1999AP206, unpublished slip op. (WI App Apr. 6, 1999). That case, however, may not be cited for precedential value because it is an unpublished authored opinion issued before July 1, 2009. See WIS. STAT. RULE 809.23(3)(b). Accordingly, we will not consider it. We admonish Natalie's appellate counsel that violations of the rules of appellate procedure may result in sanctions.

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the children.” *Id.*, ¶18. The questions of which Natalie complains were clearly related to these proper inquiries.

¶23 Furthermore, the circuit court found that the Department and the GAL did not act pejoratively toward Natalie during trial, as she now claims. The court found that there was not an “onslaught or barrage o[f] inappropriate questions,” and “in terms of the demeanor or context in the courtroom, there was nothing inappropriate.” Natalie makes no discernible argument that the court’s findings in this regard, which are informed by its oversight of the trial, are clearly erroneous. We therefore are not at liberty to disregard them. *See* WIS. STAT. § 805.17(2). In short, Filippo cannot have performed deficiently because raising meritless objections does not constitute deficient performance. *See State v. Swinson*, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12.

¶24 Additionally, Filippo testified he made strategic decisions not to object. At multiple times throughout the *Machner* hearing, Filippo explained he chose not to object to the Department’s and GAL’s questions because: (1) he did not want to risk the circuit court overruling his objection in front of the jury; and (2) he wanted to “keep[his] powder dry for an objection that might ... be more likely sustained.” Filippo reasoned that some of the lines of inquiry were related to evidence that the court had previously found admissible when it denied, pretrial, Natalie’s motion in limine. Filippo’s decisions not to object were strategic, and reasonably so, and we consequently afford them great deference. *See Balliete*, 336 Wis. 2d 358, ¶27. Given the circumstances, Filippo’s decision not to object cannot constitute deficient performance.

¶25 We also agree with the Department and the GAL that even assuming Filippo performed deficiently, Natalie cannot show prejudice. To establish

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prejudice, Natalie must establish that Filippo's errors were "unreasonable" and that they "*actually* had an adverse effect on the defense." *Id.*, ¶24. Ultimately, we evaluate whether there is a "reasonable probability" that, absent Filippo's errors, the result of the grounds trial would have been different such that the jury would have concluded that the TPR grounds the Department petitioned for did not exist. *See Sholar*, 381 Wis. 2d 560, ¶33.

¶26 Here, any import the jury gave to the allegedly objectionable questions and answers was minimal within the overall context of the trial, and the amount of other evidence used to prove up the grounds for TPR was substantial. As the circuit court noted, the allegedly objectionable information had been "sprinkled throughout" the three-day trial and was "in number ... not significant." Even assuming that errors occurred, they did not render the grounds trial "unfair and unreliable." *See id.* In all, Filippo provided effective assistance at Natalie's TPR proceedings.

By the Court.—Order affirmed.

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

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 15, 2020

Sheila T. Reiff
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. 2019AP2346
2019AP2347**

**Cir. Ct. Nos. 2018TP38
2018TP39**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

No. 2019AP2346

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO M.J.S., A PERSON UNDER
THE AGE OF 18:**

RACINE COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

S.M.F.,

RESPONDENT-APPELLANT.

No. 2019AP2347

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO N.D.S., A PERSON UNDER
THE AGE OF 18:**

RACINE COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

Nos. 2019AP2346
2019AP2347

V.

S.M.F.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Racine County:
DAVID W. PAULSON, Judge. *Affirmed.*

¶1 GUNDRUM, J.¹ S.M.F. appeals from orders of the circuit court terminating her parental rights to M.J.S. and N.D.S. She claims her trial counsel was ineffective because at the trial to determine whether grounds for termination existed, counsel stipulated to the use of the post-2018 WIS JI—CIVIL 324, Involuntary Termination Of Parental Rights: Continuing Need Of Protection Or Services jury instruction and failed to call certain witnesses to defend S.M.F. against the petition. She also contends the court's denial of her request for a mistrial following certain questioning of a witness by the State deprived her of a full and fair jury trial and "it is entirely probable that the accumulation of error ... suggest that the real controversy has not been tried here." For the following reasons, we affirm.

¹ These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

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Background

¶2 The State filed a petition to terminate S.M.F.'s parental rights to her two children, M.J.S. and N.D.S., on the following bases: 1) the children continued to be in need of protection and services (continuing CHIPS), pursuant to WIS. STAT. § 48.415(2), and 2) S.M.F. failed to assume parental responsibility, pursuant to § 48.415(6). After a trial on these two grounds for termination, the jury found that the State had proven both grounds. The court thereafter determined that it was in the best interests of the children that S.M.F.'s parental rights be terminated. S.M.F. subsequently filed a post-conviction motion claiming her counsel performed ineffectively at her trial. The court denied the motion after an evidentiary hearing. S.M.F. appeals.

Discussion

Ineffective Assistance

¶3 In order to prove ineffective assistance of counsel, S.M.F. bears the burden to show both that counsel's performance was deficient and that the deficient performance prejudiced her. *See A.S. v. State*, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). If she fails to prove either prong, we need not address whether the other prong was satisfied. *See Strickland*, 466 U.S. at 700.

¶4 Whether a parent proves ineffective assistance of counsel is a mixed question of fact and law. *See State v. Pitsch*, 124 Wis. 2d 628, 633–34, 369 N.W.2d 711 (1985). Factual determinations of the circuit court will be upheld unless they are clearly erroneous. *Id.* at 634. Whether trial counsel's performance

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was deficient and whether it prejudiced the parent are questions of law we review de novo. *See id.*

¶5 To prove deficient performance, the parent must show that counsel's specific acts or omissions were "outside the wide range of professionally competent assistance." *See Strickland*, 466 U.S. at 690. There is a strong presumption that a parent received adequate assistance and that counsel's decisions were justified in the exercise of reasonable professional judgment. *See State v. Domke*, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364; *State v. Kimbrough*, 2001 WI App 138, ¶¶31–35, 246 Wis. 2d 648, 630 N.W.2d 752. Counsel's performance is deficient only if the parent proves that counsel's challenged acts or omissions were objectively unreasonable under all the circumstances of the case. *See Kimbrough*, 246 Wis. 2d 648, ¶35. Scrutiny of trial counsel's decisions, conduct and overall performance is highly deferential. *Pitsch*, 124 Wis. 2d at 637. We will not find counsel to have performed deficiently unless the law commanding a particular action or forbearance by counsel is clear and settled. *State v. Morales-Pedrosa*, 2016 WI App 38, ¶16, 369 Wis. 2d 75, 879 N.W.2d 772; *State v. McMahon*, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994).

¶6 To prove prejudice, S.M.F. must show that the alleged errors of counsel were "of such magnitude that there is a reasonable probability that, absent the error, 'the result of the proceeding would have been different.'" *See State v. Erickson*, 227 Wis. 2d 758, 769, 596 N.W.2d 749 (1999) (quoting *Strickland*, 466 U.S. at 694). "It is not sufficient for the [parent] to show that his [or her] counsel's errors 'had some conceivable effect on the outcome of the proceeding.'"

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Domke, 337 Wis. 2d 268, ¶54 (quoting *State v. Carter*, 2010 WI 40, ¶37, 324 Wis. 2d 640, 782 N.W.2d 695).

Jury Instruction and Failure to Call Witnesses

¶7 The jury found two grounds to terminate S.M.F.'s parental rights: 1) continuing CHIPS and 2) failing to assume parental responsibility. To proceed to the disposition phase of the termination of parental rights proceedings, the State only needed to prove the existence of one of these grounds. See *Steven V. v. Kelley H.*, 2004 WI 47, ¶¶24–25, 271 Wis. 2d 1, 678 N.W.2d 856. Thus, in order to prevail now on appeal, S.M.F. needs to show that her counsel performed ineffectively with regard to both grounds. She has failed to do so.

¶8 S.M.F. spends much of her appellate briefing arguing that counsel was ineffective with regard to the continuing CHIPS ground for termination because counsel stipulated to the use of the post-2018 WIS JI—Civil 324, Involuntary Termination Of Parental Rights: Continuing Need Of Protection Or Services jury instruction instead of advocating for the use of the pre-2018 instruction.² We need not even address that issue because S.M.F. fails to show that counsel was ineffective with regard to the second ground for termination, failing to assume parental responsibility. As to this ground, under which the jury had to and did find that S.M.F. had “not had a substantial parental relationship with” M.J.S. and N.D.S., see WIS. STAT. § 48.415(6)(a), S.M.F. fails to develop any argument that counsel performed deficiently or that she was prejudiced by such performance.

² Through 2017 Wisconsin Act 256, the legislature amended WIS. STAT. § 48.415(2) in 2018, which led to the modification of the related jury instruction.

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¶9 Related to this failure-to-assume ground, S.M.F. complains that counsel failed to call S.M.F., S.M.F.'s therapist, and the children's foster parent as witnesses at trial. As to this "failure," S.M.F. writes only:

S.M.F. did not testify at the fact-finding hearing, but she did testify at the disposition hearing. That testimony included that S.M.F. had been the sole caregiver for much of the children's lives. S.M.F. had been involved in different therapy programs with the children, prior to their removal, to address their developmental delays.

S.M.F. then states: "All of the information here is relevant to both grounds alleged in the termination of parental rights petitions, but it was not presented to the jury at the fact-finding." The argument that counsel was ineffective with regard to this ground is woefully undeveloped and thus we will not address this issue. See *Wisconsin Conference Bd. of Trs. of United Methodist Church, Inc. v. Culver*, 2001 WI 55, ¶38, 243 Wis. 2d 394, 627 N.W.2d 469 (we do not address insufficiently developed arguments); *Barakat v. DHSS*, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (reviewing court need not address "amorphous and insufficiently developed" arguments); see also *Industrial Risk Insurers v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("[W]e will not abandon our neutrality to develop arguments" for the parties.). Furthermore, the question before us is not whether the information was "relevant" but whether counsel performed ineffectively. S.M.F. fails to make a case to overcome our strong deference to counsel's decisions, conduct and overall performance and makes no effort to develop an argument that there was a reasonable probability of a different result if counsel had called these three witnesses at trial.

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Mistrial

¶10 S.M.F. claims the circuit court erred in not granting her request for a mistrial after the State asked one of its witnesses, a Racine County Human Services case management supervisor, whether she “ever [had] a concern about [S.M.F.] maintaining a suitable residence, particularly drug activity out of her home?” S.M.F. has not shown that the court erred.

¶11 As we have stated:

Whether to grant a mistrial is a decision that lies within the sound discretion of the circuit court. The circuit court “must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. The denial of a motion for mistrial will be reversed only on a clear showing of an erroneous use of discretion” by the circuit court.

State v. Doss, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150 (citations omitted).

¶12 Following the State’s question, S.M.F.’s counsel objected and the circuit court sustained the objection before any response by the witness. Out of the presence of the jury, S.M.F. moved for a mistrial. As part of argument on this point, counsel indicated that S.M.F. did not want a specific curative instruction on the matter “because it would basically bring the jury back to” the issue. The court ultimately denied the motion for a mistrial, concluding that the unanswered question by the State was not so prejudicial that S.M.F. could not get a fair trial, especially in light of the fact that it had instructed the jury before the presentation of evidence that the jury “should not draw any inference from an unanswered question.”

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¶13 In the “Argument” section of her brief-in-chief, S.M.F. cites to cases identifying the law related to mistrials and curative instructions. Her actual “argument” related to her mistrial “issue,” however, consists only of:

The trial court did ultimately rule that the information, while relevant, was unfairly prejudicial and would lead to confusion. Nevertheless, the jury heard the *unanswered* question. There was not a curative instruction given to the jury about ignoring the statement. The prejudicial effect was never abated in this case. It is impossible to erase the prejudicial effect of a statement if no curative instruction is given under the circumstances of this case.

(Emphasis added.) As with her ineffective assistance of counsel issue, SMF again fails to sufficiently develop an argument on her mistrial issue as she fails to apply the law related to mistrials to the facts of this case. Specifically, her assertion as to prejudice is conclusory, and she develops no argument attempting to show that “the claimed error was sufficiently prejudicial to warrant a new trial.” *See Doss*, 312 Wis. 2d 570, ¶69. Therefore, we do not address her mistrial complaint. *See Associates Fin. Servs. Co. of Wis., Inc. v. Brown*, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (we do not address conclusory and undeveloped contentions).

¶14 While we could end our discussion there, we further point out that, as S.M.F. and the State (and the circuit court) note, the witness never answered the State’s question. As the State adds in its response brief: “No evidence was ever presented regarding drug activity out of S.M.F.’s home. In fact, drug activity was never mentioned again through the course of the trial.”

¶15 As to S.M.F.’s assertion that the circuit court never gave a curative instruction regarding this “drug activity” question by the State, we cannot overlook that her own counsel told the court that S.M.F. did not want a specific

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curative instruction “because it would basically bring the jury back to” the issue. Thus, if error did occur, S.M.F. invited it, and we do not review invited error. *See Shawn B.N. v. State*, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992). Moreover, as the court noted, it *did* instruct the jury, prior to the presentation of evidence, that it “should not draw any inference from an unanswered question,” and it further added, “because the law requires that your decision be made solely upon the competent evidence before you.” And the court also instructed the jury, both before and after the presentation of evidence, that it was “to decide the case solely on the evidence offered and received at trial” and the “[r]emarks of the attorneys are not evidence. If any remarks suggest certain facts not in evidence, disregard the suggestion.” As S.M.F. recognizes, the law holds that “[j]urors are presumed to have followed jury instructions.” *See State v. LaCount*, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780. We thus presume the jury here followed the court’s instructions and did not base its verdicts on the singular, unanswered question S.M.F. challenges.

The Real Controversy

¶16 S.M.F. also asserts that, “in the interest of justice,” we should exercise our discretionary reversal power under WIS. STAT. § 751.06, on the basis that “[i]t is entirely probable that the accumulation of error in these cases suggest that the real controversy has not been tried here.” She fails to persuade.

¶17 We are to exercise our power under WIS. STAT. § 751.06 “only in ‘exceptional cases.’” *See State v. Avery*, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60 (citation omitted). “The power to grant a new trial in the interest of justice is to be exercised ‘infrequently and judiciously.’” *Id.* (citation omitted). We “approach[] a request for a new trial with great caution” and “are reluctant to

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grant a new trial in the interest of justice.” *Id.* (citation omitted). S.M.F.’s “argument” on this point is again conclusory and undeveloped, only briefly referring back to her undeveloped contentions on the prior issues for support. S.M.F. has not convinced us that this is an “exceptional case” requiring reversal 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.

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 15, 2012

Diane M. Fremgen
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 No. 2011AP2599

Cir. Ct. No. 2011TP2

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

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

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

v.

SCOTT H.,

RESPONDENT-APPELLANT,

AMANDA H.,

RESPONDENT.

APPEAL from orders of the circuit court for Oneida County:
PATRICK F. O'MELIA, Judge. *Affirmed.*

No. 2011AP2599

¶1 MANGERSON, J.¹ Scott H. appeals an order terminating his parental rights to his son, Daman H., and an order denying postdisposition relief. Scott contends his trial counsel was ineffective. We affirm.

BACKGROUND

¶2 Daman was born to Scott and Amanda H. on November 19, 2008. Oneida County took custody of Daman at the hospital, and he has been in foster care his entire life.

¶3 On February 10, 2011, the County petitioned to terminate Scott's and Amanda's parental rights. As for grounds for termination, the petition alleged that Daman continued to be a child in need of protection or services, *see* WIS. STAT. § 48.415(2), and that Scott and Amanda had failed to assume parental responsibility, *see* WIS. STAT. § 48.415(6). Both parents contested the petition, and the court held a six-day joint jury trial.

¶4 On the second day of trial, case worker Sue Dervetski testified about a visit that occurred at Scott and Amanda's house in October 2009. When she arrived with Daman, Scott was watching a Charles Manson television show. As Scott got up to turn the television off, Dervetski looked at the screen and saw "a naked ... pregnant woman, ... on the ground in her blood." At the end of the visit, Dervetski told Scott that it appeared he was not ready for the visit because the Charles Manson program was not suitable for children and should have been turned off before they arrived. At that point, Scott became angry and began

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

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yelling at Dervetski in front of Daman. After this visit, future visits were removed to the agency because of worker safety concerns.

¶5 Later, during deliberations, the jury asked for a list of the court-ordered services so that it could answer one of the special verdict questions for the continuing CHIPS ground.² In response to the jury's request, the parties stipulated to sending four exhibits—three case plans and the CHIPS dispositional order—back to the jury. The exhibits totaled sixty-one pages and contained the court-ordered services as well as other information.

¶6 The jury found that Daman continued to be a child in need of protection or services and that Scott had failed to assume parental responsibility. Following a dispositional hearing, the court terminated Scott's parental rights.

¶7 Scott brought a postdisposition motion. The court denied his motion following a hearing. Additional facts will be discussed below.

² The special verdict form for the continuing CHIPS ground asked:

1. Has Daman been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?
2. Did the Oneida County Department of Social Services make a reasonable effort to provide the services ordered by the court to Scott [H.]?
3. Has Scott [H.] failed to meet the conditions established for the safe return of Daman to the [H.]s' home?
4. Is there a substantial likelihood that Scott [H.] will not meet these conditions within the nine-month period following the conclusion of this hearing?

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DISCUSSION

¶8 On appeal, Scott contends his trial counsel was ineffective in five ways. He asserts counsel was ineffective for sending the CHIPS documents to the jury and for failing to object to evidence that Scott watched a “gory” movie about Charles Manson. Scott also asserts counsel was ineffective in regard to the failure to assume parental responsibility ground because counsel failed to file a post-verdict motion challenging sufficiency of the evidence, failed to allege that ground was unconstitutional as applied, and failed to request a modified jury instruction.

¶9 A parent in a termination of parental rights action has the right to the effective assistance of counsel. *Oneida Cnty. Dept. of Social Servs. v. Nicole W.*, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652. To establish ineffective assistance of counsel, Scott must prove his counsel’s performance was deficient and he was prejudiced by this deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). To show deficient performance, he must show specific acts or omissions of counsel that were outside the wide range of professionally competent assistance. *See id.* at 690. Prejudice is proven if Scott shows “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *See id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* If Scott fails to establish either prong of the *Strickland* test, we need not determine whether the other prong is satisfied. *See id.* at 697.

CHIPS documents

¶10 Scott first argues his counsel was ineffective for allowing documents to be sent to the jury “that contained highly prejudicial statements.” Scott, in his statement of facts, highlights seventeen statements included in the exhibits sent to

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the jury. He contends counsel was deficient because, even though the court gave counsel the opportunity to redact these statements, counsel failed to do so. Moreover, at the *Machner*³ hearing, counsel testified she had no strategic reason for allowing those statements to be sent to the jury.

¶11 As for prejudice, Scott contends that we do “not need to spend considerable time analyzing all of the statements to determine whether the statements were prejudicial.” He instructs that “[i]t is sufficient to consider only the first one in order to reach the necessary conclusion that the unredacted statements undermine confidence in the outcome.” That statement provides:

Previous patterns of aggressive behavior have included that Mr. [H.] has a documented history of violent behavior, including assaultive criminal behavior in the past. These behaviors include profanities, temper outbursts, and throwing or kicking things. These behaviors are impulsive, are without provocation, and escalate quickly. His violent behavior has been directed toward Mrs. [H.] and in front of his children. In the past, it has also been observed to be directed toward his children.

¶12 Scott asserts this statement was the “most harmful” one revealed to the jury because there was no evidence in the record that he was “criminally aggressive” “towards Amanda and his children.” He also argues the County has the burden to prove he was not prejudiced by this information.

¶13 In an ineffective assistance of counsel framework, Scott, not the County, has the burden of proving he was prejudiced by trial counsel’s stipulation to send the exhibits to the jury. See *Strickland*, 446 U.S. at 694. We also observe the statement does not allege that Scott was “criminally aggressive” toward his

³ *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

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family—the statement says “violent.” The statement then describes Scott’s violent behavior as “profanities, temper outbursts, and throwing or kicking things.”

¶14 We conclude that, irrespective of whether counsel was deficient for sending that information to the jury, Scott was not prejudiced by any deficiency. First, we agree with the County that this information was largely cumulative to other evidence introduced at trial. There, Scott voluntarily revealed he had been in prison and discussed participating in “cage of rage” while there. Additionally, multiple witnesses testified about Scott’s anger problems—he yelled at workers; he yelled at Amanda; workers feared for their safety and felt threatened, visits had to be removed to the agency because of his behavior; and law enforcement was made available for visits. Moreover, the jury observed Scott’s inappropriate behavior during trial—he interrupted witness testimony and closing arguments; he argued with the court and counsel; he was not responsive during portions of cross-examination; and he walked out of trial on more than one occasion.

¶15 Second, there was substantial evidence in the record to support the jury’s determination that Daman continued to be a child in need of protection or services. Daman had been in foster care his entire life. As part of the conditions for Daman’s return, Scott was, in part, ordered to attend visits with Daman and engage in counseling. During trial, the case workers testified that Scott and Amanda had cancelled multiple visits during 2010 and 2011 and their excuses ranged from illness to working at a rummage sale to having tech support come to their house. One time when Scott and Amanda cancelled a visit for an illness, a case worker later observed them at the grocery store.

¶16 As for the counseling requirement, Scott’s counselor testified Scott attended only four appointments in June and July 2010, missed the following ones,

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and did not return the counselor's calls. The counselor never heard from Scott again. Although Scott testified he stopped going because he could not afford the \$4 copay, he admitted he never gave any bills to the County. Moreover, the jury observed Scott walk off the witness stand and out of the courtroom after the guardian ad litem asked him how many \$4 counseling sessions he could obtain for the \$40 per month he spends on tobacco.

¶17 Scott does not discuss how he was prejudiced by the remaining sixteen statements; however, our general observation is that, for the most part, the statements highlighted in Scott's statement of the facts are cumulative to other evidence in the record. For example, Scott volunteered information about his daughters, and other witnesses discussed Scott's scheduled visits with them. More than one witness testified Daman was doing well in foster care, law enforcement officers were made available for visits, and the County did not believe Scott had met the conditions for return.

¶18 In short, Scott has not shown a reasonable probability that the result of the proceeding would have been different if counsel had not stipulated to sending the CHIPS documents to the jury. *See Strickland*, 446 U.S. at 694.

Charles Manson television show

¶19 Scott next asserts his trial counsel was ineffective for failing to object to evidence that he "watched a gory television show about Charles Manson." (Some capitalization omitted.) Specifically, he objects to Dervetski's description of the program—that she observed "a naked ... pregnant woman, ... on the ground in her own blood." Scott contends counsel should have filed a motion in limine requesting that the worker "not testify about the specific facts of the show other than to say it was not appropriate for children." He asserts that he

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was prejudiced by counsel's failure because the "gory details are not relevant and are more prejudicial than probative."

¶20 Scott, however, has failed to establish how, in the context of a six-day jury trial, Dervetski's single reference to the details of the Charles Manson program was so prejudicial that it undermines our confidence in the trial's outcome. *See Strickland*, 446 U.S. at 694. We conclude Scott was not prejudiced by counsel's alleged failure to prevent the jury from learning the details of the television program. *See id.*

Failure to assume parental responsibility arguments

¶21 Scott's remaining allegations of ineffective assistance of counsel relate to the failure to assume parental responsibility ground. However, WIS. STAT. § 48.415 only requires a finding on one termination of parental rights ground. Because the jury found grounds to terminate Scott's parental rights based on a continuing CHIPS, we need not address his arguments related to failure to assume parental responsibility. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues needs to be addressed); *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("cases should be decided on the narrowest possible ground").

¶22 Scott, however, argues that we cannot affirm on one ground because of the doctrine of prejudicial spillover. In support, he cites *State v. McGuire*, 204 Wis. 2d 372, 556 N.W.2d 111 (Ct. App. 1996).

¶23 Scott's reliance on *McGuire* and prejudicial spillover is confusing and undeveloped. In essence, *McGuire* explains that if an appellate court vacates a conviction on one count, a defendant may be entitled to a new trial on the

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remaining count if he shows there was prejudicial spillover from the vacated count's evidence. *Id.* at 380-81. Here, however, we are not vacating the failure to assume parental responsibility determination, we are merely not addressing it because, as stated above, WIS. STAT. § 48.415 only requires a finding on one ground and the continuing CHIPS ground is sufficient.

¶24 Moreover, even if we were to consider applying prejudicial spillover, Scott only asserts we should invoke the doctrine because “the counts in this case not only overlap, they go to the very same finding—whether there are grounds to find Scott H. to be unfit.” However, in *McGuire*, the court observed a closer degree of overlap and similarity weighs *against* invoking the doctrine of prejudicial spillover. *See McGuire*, 204 Wis. 2d at 382.

By the Court.—Orders affirmed.

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

