STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2021AP1986

In re the Termination of Parental Rights to G.Q.W.,
a person under the age of 18

Chippewa County Department of Human Services,
Petitioner-Respondent.

v. Chippewa County Case No. 20TP50

J.W.,
Respondent-Appellant.

On Appeal from an Order Terminating the Parental Rights of J.W.
Entered in Chippewa County Circuit Court,
Honorable Benjamin Lane, presiding

BRIEF AND APPENDIX OF THE GUARDIAN AD LITEM

Deborah Asher
State Bar No. 1040986
Asher Law Office
33 W. Cedar St.
Chippewa Falls WI
daa@craysher.com

Guardian ad Litem

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PUBLISHED CASES

UNPUBLISHED CASES

OTHER AUTHORITIES

STATUTES

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Was sufficient clear and convincing evidence presented for a finding by the jury that the Chippewa County Department of Human Services made reasonable efforts to provide services to J.W. for her to reunify with G.Q.W.?

2. Was trial counsel for J.W. ineffective by failing to object to the guardian ad litem's opening and closing statements and to the case worker's testimony?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Guardian ad litem, appointed specifically for this appeal, does not believe oral argument is necessary. Written briefs cover all the issues on appeal. Publication is not necessary in that no new legal concepts or challenges are introduced.

STATEMENT OF THE CASE

I. INTRODUCTION

This is an appeal of a circuit court ruling to terminate the parental rights of J.W. pursuant to Wis. Stat. §48.415(2) Continuing Need of Protection and Services. Services were provided to J.W. throughout the child protection action, but J.W. was unwilling or unprepared to engage in services provided and did not take demonstrative steps to accomplish her conditions for return of the minor child, G.Q.W. The child remained out of the home for more than two years and there was a substantial likelihood that J.W. would not meet the conditions for return.

II. STANDARD OF REVIEW

The standard of review in a challenge to the sufficiency of the evidence is whether there is any credible evidence to sustain the verdict. *St. Croix HHS v. Michael D.*, 368 Wis. 2d 170, 880 N.W.2d 107, 2016 WI 35, ¶29 (2016) (Prosser and Bradley *concurring*. Abrahamson and A.W. Bradley *dissenting*.) *Citing Sheboygan Dept. HHS v. Tanya M.B.*, 2010 WI 55, 325 Wis. 2d 524, 785 N.W.2d 369 (2010) (Abrahamson *concurring*). On appeal, this court will not upset a verdict if any credible evidence supports it. *Douglas HHS v. J.S.*, 2022 WI App 7, 400 Wis. 2d 546, 970 N.W.2d 595, ¶9 (Wis. Ct. App. 2021) (unpublished) *citing Richards v. Mendivil,* 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996). The credibility of the witnesses and the weight afforded to their testimony are left to the jury. *Id.*

III. ARGUMENT

1. Was sufficient clear and convincing evidence presented for a finding by the jury that the Chippewa County Department of Human Services made reasonable efforts to provide services to J.W. for her to reunify with G.Q.W.?

Short answer: The jury determined Yes.

"Reasonable efforts" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court, taking into consideration the characteristics of the parents or child, the level of cooperation of the parent, and other relevant circumstances of the case. Wis. Stat. §48.415(2)(a)(2). In *Michael D.* the court acknowledged testimony by social workers and service providers regarding the efforts made to provide services to the parent. *Michael D.* at ¶¶30-32. See also generally *Tanya M.B.* (holding that the dispositional order need not specify the services or continuum of services to be provided).

At trial, the county presented testimony from the multiple individuals who detailed the services provided to J.W. Abigail Smasal, the case manager, detailed her efforts to coordinate the various services and her effort to explain the conditions of supervision, which were attached to the dispositional order.

Specifically, testimony by J.W.'s probation agent, Monica Handrahan, indicated that J.W. was offered services including "recovery court," for drug and alcohol dependency. *G.Q.W. Jury Trial Transcript,* (R:75 at 104), Hope House, housing for individuals going through recovery, (R:75 at 105), intensive outpatient treatment, and group counseling for trauma and dependency, (R:75 at 106).

According to the testimony of Ms. Handrahan, J.W completed intensive outpatient treatment, (R:75 at 108), but the remaining programming was either rejected by J.W. or she was dismissed from the program due to inconsistent attendance.

The ongoing case manager, Abigail Smasal testified that she reviewed the conditions in the dispositional order with J.W. and explained what each item meant. (R:75 at 116-124). Ms. Smasal testified that a referral was made for individual therapy for J.W. as well as treatment programs, as well as arrangements for J.W. to visit G.Q.W. According to Ms. Smasal, J.W. was inconsistent with her involvement in working on her conditions.

Notably on cross examination of Ms. Smasal, counsel for J.W. accurately raised the issue of the COVID-19 pandemic interfering with J.W.'s ability to work on her conditions. (R:75 at 142). Ms. Smasal in her testimony made a distinction between pre-pandemic services and adjustments made as a result of the COVID pandemic. However, Ms. Smasal insisted that services continued to be provided using a "virtual format." (R:75 at 142).

On redirect, Ms. Smasal testified to a variety of methods used to drug test J.W., including Ms. Smasal going to J.W.'s home to test her and providing a sweat patch. (R:75 at 151). Ms. Smasal stated that J.W. removed the patch and threw it away. (R:75 at 153).

Testimony from Kelly Begley of the Chippewa County Housing Authority reviewed concerted efforts to assist J.W. in securing housing over a two-year period.

(R:75 at 156-163). According to the testimony, J.W. was evicted for criminality and later, she simply did not bother to fill out the requisite forms. *Id.*

Testimony was taken from Victoria Zwiefelhofer, a psychotherapist and Katia Hauser, the contractor who supervised visits between J.W. and G.Q.W. Both testified that J.W. missed appointments and missed visits. Ms. Zwiefelhofer testified that J.W. was discharged from the program due to missed programming days. (R:75 at 169). Ms. Hauser testified that J.W. attended six visits with G.Q.W. and missed eleven visits. (R:75 at 175).

"Reasonable efforts" has two elements that must be considered: first "earnest and conscientious effort" made by the Department of Human Services, and secondly the "level of cooperation of the parent." Wis. Stat. §48.415(2)(a)(2). The parent's level of cooperation with the responsible agency must be a factor to consider when advancing to termination of parental rights. *Kenosha DHS v. Jodie W.* 293 Wis. 2d 530, 716 N.W.2d 845, 2006 WI 93, ¶50 (2006) (Wilcox *dissenting*). A relevant consideration in determining "reasonable effort" to provide services is the parents' level of cooperation. *Tanya M.B.* at ¶74 (*noting* that the respondents rejected services and were uncooperative with respect to their drug and alcohol treatment.)

Counsel for J.W. appears to argue rather than "reasonable efforts" that the Department should be making "active efforts" to provide services to J.W. Counsel noted failure by staff and service providers to provide transportation for J.W. to attend therapy or visits or to proactively assist J.W. in obtaining and maintaining

housing. *See generally* R:75, cross examination of Smasal, Zwiefelhofer, and Bauer. "Active efforts involve assisting the parent through the steps of a case plan, including accessing needed services and resources." Indian Child Welfare Act Final Rule, 81 Fed. Reg. 114, (2016) coded at 25 CFR 23. Active efforts by its plain meaning cannot merely be passive. *Id.* This is viewed by some child-welfare agencies as the "gold standard" of what services should be provided in child-welfare proceedings. *Id.* There is no indication in the record that G.Q.W. is Native American or that he fits the definition of Indian Child under the Indian Child Welfare Act. The Department had no obligation to provide "active efforts" to J.W. as both trial counsel and appellate counsel imply. In this matter, "reasonable efforts" was a sufficient level of services.

Stating her expectation that she deserves "active efforts" from the county, testimony by J.W. emphasized the lack of transportation and housing provided to her. (R:75 at 225-226). She noted that her probation agent provided referrals for drug and mental health treatment, not the Department. *Id.* J.W. testified that Ms. Smasal went to her home only ten times for drug testing, and otherwise J.W. was expected to travel to Chippewa Falls to be tested. (R:75 at 228).

During cross examination J.W. admitted to continuing to use drugs, not attending visits with G.Q.W., and being unable to attend meetings with Ms. Smasal. (R:75 at 240-244). Her primary explanation was lack of transportation, although J.W. subsequently admitted the longest period she had been sober was "about a month." (R:75 at 248).

While J.W. attempted to argue the efforts put forth by the Department were insufficient, she admitted to her lack of consistency, her homelessness, and her continued drug use as the reasons G.Q.W. was not living with her. (R:75 at 248). By her own admission, J.W. did not put forth the level of cooperation needed to successfully comply with the conditions in the dispositional order. Appellate counsel in her brief argues that the Department did not assist with transportation, connectivity[1], electronic devices, or housing for J.W., and therefore the efforts were insufficient. *See Appellant Brief* at 15-18. Again, these provisions do not qualify as "reasonable" but rather would be identified as the "gold standard" of services consistent with the Final Rule definition of "active efforts."

The testimony of the case manager, service providers, visit supervisor, and probation agent demonstrate a concerted effort by the Chippewa Department of Human Services to provide services to J.W. to assist her in fulfilling the conditions of return in her dispositional order in her child protection action. The services provided were reasonable and consistent. Given all the testimony there should be no dispute that sufficient credible evidence was presented at trial that reasonable services were provided to J.W.

The jury answered the four questions of the special verdict with Yes. Wis. JI-Children, 324

[1] Appellate Counsel in her brief (p.16) argues that J.W. was living in rural Fairchild through no choice of her own. The Department "was aware of J.W.'s connectivity problems" yet they did nothing to help mitigate the connectivity barriers. J.W. stated in direct examination that "a lot of times [she'd] have to go out to the van and go down the street to get the extra Wi-Fi." The Village of Fairchild town hall and the Fairchild Public Library have wi-fi. The public library has computers for public use. J.W. obviously knew there was wi-fi in town. Nothing prevented J.W. from utilizing these public resources.

2. Was trial counsel for J.W. ineffective by failing to object to the guardian ad litem's opening and closing statements and to the case worker's testimony?

Short answer: The trial court determined No.

"[The State of Wisconsin] adopted the *Strickland* analysis to determine whether trial counsel was ineffective in criminal cases. We believe that the *Strickland* test also has application to proceedings for the involuntary termination of parental rights." *M.D. v. Dane Cty*, 168 Wis. 2d 995, 1005; 485 N.W.2d 52, 55 (1992) *citing Strickland v. Washington*, 466 U.S. 668 (1984) and *State v. Harvey*, 139 Wis. 2d 353, 407 N.W.2d 235 (1987). *Strickland* adopted a two-pronged test, as follows: First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. *M.D.* at 1005. Both requirements must be met.

The guardian ad litem shall be an advocate for the best interests of the person . . . for whom the appointment is made. The guardian ad litem shall function independently, in the same manner as an attorney for a party to the action, and shall consider, but shall not be bound by, the wishes of that person or the positions of others as to the best interests of that person . . . . Wis. Stat. §48.235(3)(a).

While the "best interest" standard is the paramount consideration of the Children's Code, Wis. Stat. § 48.01(1), it does not dominate every step of every

proceeding. *Sheboygan Cty DHHS v. Julie A.B.*, 255 Wis. 2d 170, ¶21, 648 N.W.2d 402, 2002 WI 95 (2002). A contested termination of parental rights proceeding involves a two-step procedure. *Id. at* ¶24, *citing Evelyn C.R. v. Tykila S.*, 246 Wis. 2d 1, 629 N.W.2d 768, ¶22-23. The first step is the fact-finding hearing to determine whether grounds exist for the termination of parental rights. *Id. citing* Wis. Stat. §48.424(1). During this step the parent's constitutional rights are paramount. *Julie A.B.* at ¶24 *citing Evelyn C.R.* The second step is the dispositional phase in which the best interests of the child is the prevailing factor. *Julie A.B.* at ¶28. The dispositional phase is tried to the court, and the court determines whether or not to terminate parental rights. *Julie A.B.* at ¶29.

Often, introducing a guardian ad litem to a jury in a termination case can cause confusion when explaining that the guardian ad litem represents the child's interests, even if the guardian ad litem does not use the words "best interest." However, to simply explain to the jury at the outset what role the guardian ad litem plays in the proceedings . . . is not only informative, it is desirable. *In the interest of J.A.B.*, 153 Wis. 2d 761, 770, 451 N.W. 2d 799 (Wis. Ct. App. 1989).

Appellate counsel identifies three aspects of the guardian ad litem's opening statement in which she believes trial counsel for J.W. should have objected: 1) child had not had the opportunity to interact with his mother for most of his life; 2) termination is the first step to giving child permanency; 3) the jury will need to decide whether or not J.W. had the ability to meet the conditions of return.

Setting aside the court's instructions that the opening and closing statements are not evidence, and that the jury was not permitted to take notes during opening and closing statements (R:75 at 90), there was nothing in the guardian ad litem's comments that were not revealed during presentation of the evidence. The dispositional order, which was entered as Exhibit 1, revealed that removal of G.Q.W. occurred on June 18, 2019. The termination trial occurred on May 27, 2021, a full two years after removal. Counsel for J.W. identified the dates of removal in his opening statement for the purposes of aligning delivery of services with the COVID-19 pandemic. (R:75 at 94.) The length of time from removal until the termination jury trial was a central element of the trial. G.Q.W. was three years old at the time of the jury trial. The guardian ad litem was stating the obvious by saying G.Q.W. was "a small child not being able to have an interaction properly with his mother for the majority of his life." Given counsel for J.W. had already identified the length of time J.W. was separated from G.Q.W. an objection by counsel to the guardian ad litem opening statement would be frivolous.

With regard to the guardian ad litem stating that the termination proceeding is the first step towards permanence (R:75 at 95), that too had already been covered in the Petitioner's opening statement. Counsel for the County stated repeatedly the jury was to determine if grounds exist to terminate J.W.'s parental rights, and that the judge would determine whether or not J.W.'s parental rights should be terminated. (R:75 at 91-93.) Identifying that termination was the first step towards permanence is a patently obvious statement to make.

Third, counsel for J.W. objects to the guardian ad litem's suggestion that J.W. had the ability to complete her conditions for return. Since the holding in *Jodie W.* the courts routinely ask the respondent if there are any conditions of return that are impossible to obtain. *See Jodie W.* at ¶56. The question has become part of the colloquy. Testimony of Social Worker Smasal indicates she reviewed every condition of return with J.W. There were subsequent permanency plan hearings in which J.W. would have had an opportunity to identify conditions she was unable to fulfill. The guardian ad litem, in his opening statement, said J.W. "be looked at as not having the ability to complete those requirements . . ." While the comment may have been unconventional, it was not incorrect. Indeed, the guardian ad litem was stating the obvious. The jury was tasked to determine whether or not there were conditions impossible for J.W. to fulfill. Again, an objection at this juncture would frivolous, and potentially damaging, because it would draw attention to an otherwise short and routine opening statement by a guardian ad litem.

Appellate Counsel for J.W. further argues that the guardian ad litem's closing statement was similarly objectionable because he stated J.W. had the opportunity at the child protection disposition to identify conditions for return that were impossible to meet. Again, the question of ability to meet the conditions is now a standard element of a dispositional colloquy.

The *Strickland* test requires the defendant to show counsel's performance was so deficient that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the

deficient performance prejudiced the defense. *M.D.* at 1005. In this matter, neither element of the *Strickland* test was met. Failure to object to obvious statements made by the guardian ad litem neither reflects a deficiency in counsel nor does it substantially prejudice the defense.

Finally, Appellate Counsel for J.W. argues that since trial counsel failed to object to the testimony of the case worker, Abigail Smasal, causing his representation to be ineffective. Counsel argues that Ms. Smasal's testimony was conclusory and cumulative. Ms. Smasal testified to her own efforts to make referrals for J.W. for housing, therapy, AODA treatment, and then she testified to J.W.'s inaction. (R:75 at 128-129.) Comparing the testimony of Ms. Smasal to the review of testimony by the social worker and service providers in *Michael D.* at ¶¶ 30-37, the similarity is striking. J.W. verified she did not complete her conditions for return when she acknowledged it was due to her "inconsistency." (R:75 at 248.) Basically J.W. confirmed Ms. Smasal's testimony. Given J.W.'s admission that she did not complete the conditions for return, the second prong of the *Strickland* test must fail.

The trial court determined that trial counsel was not ineffective.

CONCLUSION

The statutory definition of reasonable efforts includes the parent's level of cooperation. Efforts are not intended to be spoon-fed, but rather a series of referrals to encourage the parent to take affirmative steps to accomplish the conditions of return. In this action there were multiple referrals made, but J.W. did not take advantage of them.

Counsel for the County presented a substantial amount of evidence that reasonable efforts were made over a two-year period, and that J.W. failed repeatedly to meet her goals for return. J.W. admitted that she continues to use illegal drugs and only obtained employment two months prior to trial. J.W. was self-contradictory when she lamented her lack of transportation but then is quoted saying she "took the van" to find better wi-fi.

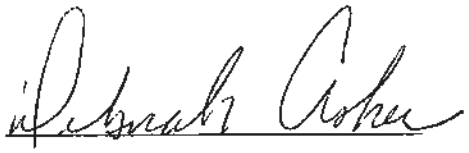
The Strickland test requires a showing of deficient performance by trial counsel that prejudiced the defense. In this case, the opening and closing statements by the guardian ad litem were both obvious and detailed in the testimony. The testimony of the on-going case manager was consistent with the need to carefully introduce evidence of reasonable efforts provided to J.W.

The outcome of J.W.'s case was not adversely affected by either the comments of the guardian ad litem or the testimony of the case manager, rather, the outcome of J.W.'s case was her failure to put forth a level of cooperation needed to reunify with G.Q.W.

A post judgment motion on ineffective assistance of counsel before the Honorable Benjamin Lane failed as well as a motion for post dispositional relief.

Therefore, J.W.'s challenge of the sufficiency of the evidence must fail, and her challenge of the effectiveness of her counsel must fail. The order terminating J.W.'s parental rights must be upheld and Appellate Counsel's request for remand for a new trial should be denied.

Respectfully submitted on this 5th day of May 2022

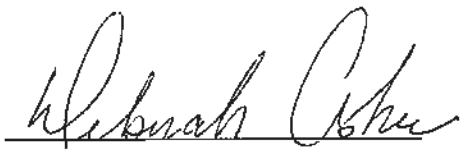


Deborah Asher
State Bar No. 1040986
Asher Law Office
33 W. Cedar St.
Chippewa Falls WI

Certification as to Form and Length

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19, Rule (Briefs and Appendix). The length of this brief is 3749 words long.

Dated this 5th day of May 2022



Deborah Asher
State Bar No. 1040986
Asher Law Office
33 W. Cedar St.
Chippewa Falls WI