STATE OF WISCONSIN

SUPREME COURT

CASE NO. 2024AP001101

In re the termination of parental rights to J.R.Q., Jr., a person under the age of 18:

KENOSHA COUNTY DIVISION OF CHILDREN & FAMILY SERVICES,

Petitioner-Respondent,

v.

K.E.H.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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PSEUDONYMS

As this is a confidential case, this petition refers to the family by the following pseudonyms:

Mother	K.E.H.	Kara
Father	J.R.Q.	James
Child	J.R.Q., Jr.	Josh
Child's half-brother/Mother's eldest son	K.C.	Caleb

ISSUE PRESENTED

The State sought to terminate Kara's parental rights to Josh based on two statutory grounds: continuing CHIPS and failure to assume parental responsibility. So, at trial, the issues were whether Josh needed protection or services and whether Kara had failed to assume parental responsibility. What should happen next to Josh was irrelevant, and drawing the jury's attention to that topic could only hurt Kara's chances. Still, evidence and argument about it came in. Her attorney didn't stop it.

Discussion of Johs's best interests wasn't the only source of unfairness here. Trial counsel's failure to prepare—by, for example, fully reviewing discovery—led her to elicit unnecessary, detrimental testimony during various cross-examinations. One topic on which such testimony centered was Josh's half-brother, Caleb, who had also been removed from Kara's care. Early in the trial, the circuit court barred the parties from discussing Caleb. The State and GAL complied. Trial counsel, shocking everyone, didn't.

Thus, when the jury considered whether the State had proved continuing CHIPS or failure to assume, trial counsel's errors and omissions meant they considered inadmissible information about Josh's best interests and Caleb's CHIPS case, as well as avoidable, unfavorable testimony from an array of witnesses. What's more, the questions the jury answered on this tainted deliberations landscape involved gray areas and judgment calls. Little was clear-cut.

For these reasons, Kara alleged that her trial attorney was ineffective. A *Machner* hearing followed, as case law requires.[1] Trial counsel offered reasonable explanations for some of her challenged acts and omissions, confessed error as to others, and admitted that she couldn't recall her rationale for the rest.

In rejecting Kara's ineffectiveness claim, the circuit court and court of appeals relied heavily on portions of trial counsel's testimony (her descriptions of reasonable strategic reasons and her discussions of her approach to trials generally). Both courts ignored trial counsel's failure to provide a rationale, reasonable or otherwise, for some of her challenged conduct.

This selective reliance on trial counsel's testimony raises questions about the analytic role counsel's proffered explanations should play. If it matters when counsel has a reasonable strategic reason for her actions, then it should matter when she doesn't. But, importantly, the test for deficient performance is objective—suggesting that what matters isn't a particular attorney's subjective decisionmaking at all. Indeed, the United States Supreme Court has held that "*Strickland* ... calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Harrington v. Richter*, 562 U.S. 86, 110 (2011).

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[1] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979); *see also A.S. v. Dane County*, 168 Wis. 2d 995, 1006, 485 N.W.2d 52 (1992).

Given this ambiguity in the lower courts' decisions and in the case law generally, Kara's case presents this Court with an opportunity to clarify the import of the "rationale testimony" that routinely comes in at *Machner* hearings—in TPR and criminal cases alike. And if it grants review to address that far-reaching issue, it can further resolve the ineffectiveness claim underlying this appeal.

There are thus two issues presented:

1. **What role do trial counsel's proffered explanations for her challenged acts or omissions play in the ineffectiveness analysis?**

   Neither lower court addressed this issue directly.

2. **Was Kara's trial lawyer ineffective?**

   Both lower courts answered "no."

CRITERIA FOR REVIEW

Kara asks this Court to address a point of persistent ambiguity in the ineffective-assistance-of-counsel analysis: whether and how courts reviewing ineffectiveness claims should consider an attorney's subjective reasons for her challenged conduct when assessing that conduct for objective reasonableness. This is a recurring legal question meriting review under Wis. Stat. § 809.62(1r)(c)3. It is also a "real and significant question of federal or state constitutional law" that warrants review under § 809.62(1r)(a): while Kara's right to effective assistance of counsel comes from Wis. Stat. § 48.23(2)(a), criminal defendants' analogous right comes from the Sixth Amendment to the United States Constitution and Article I, § 7 of the Wisconsin Constitution. *See generally A.S. v. Dane County*, 168 Wis. 2d 995, 1002-06, 485 N.W.2d 52 (1992) (including n.4).

STATEMENT OF THE CASE AND FACTS

A. Events before trial.

Josh was born on November 24, 2020. (5:1). He spent the first several months of his life with his mother, Kara, and half-brother, Caleb. (5:1; 100:33-34).

On Friday, May 21, 2021, when Josh was six months old, Kara took an extra dose of Xanax before a stressful court hearing. (*See* 92:94). She had long been prescribed Xanax, but in combination with Zoloft—which she'd recently been prescribed for post-partum depression—it caused concerning symptoms. (95:38, 86, 219). Those symptoms worsened after court and after Josh went to Grandma's (a frequent babysitter). (95:216-17). Kara eventually called 911. (95:217). She was admitted to the hospital and discharged a day or two later. (95:220). Kara's kids stayed with Grandma until Kara went home. (92:53).

A day or two later, Kara's kids were removed to foster care. (92:91; 95:222). (Josh's dad, James, was incarcerated. (20:1).)

A CHIPS case ensued, and over a year later, the State filed a petition to terminate Josh's parents' rights. (20; 4). The grounds alleged were that Josh was in continuing need of protection or services and that his parents had failed to assume parental responsibility. (5).

Attorney Brenda VanCuick was appointed to represent Kara. (23). She appeared with Kara for a continued initial appearance, and a jury trial was scheduled. (86:2, 5). (By that time, James had been deemed an unfit parent by default judgment. (*See* 86:4).) There was just one additional hearing before trial, during which the circuit court addressed witness lists and motions in limine—both of which VanCuick had filed late, raising objections. (81). Jury selection was a few days later. (101).

B. Trial.

Trial began on August 1, 2023, and ended five days later. (92; 97). What follows is a summary.

1. Opening statements.

Right out of the gate, the State urged the jury "to give [Josh] the permanency he deserves." (92:17). While this comment was the most explicit appeal to the jury's concern for the case's disposition, the State made more remarks on the topic, and VanCuick never objected. (*See* 92:19-20).

The State also discussed the CHIPS case preceding Josh's TPR case, emphasizing that the government's goal was "to get [Kara] clean and sober." (92:19). It explained that the TPR case only began once a judge decided Kara wasn't making enough progress, and that Josh should be adopted. (92:22). The State concluded by reviewing the elements of continuing CHIPS and failure to assume. (92:26-27).

VanCuick discussed Kara's fundamental right to parent Josh and the burden of proof on the State. (92:28-30). She then got into specifics, acknowledging that Kara was admitted to the hospital but explaining that Kara didn't overdose and lose consciousness; she just had a bad reaction to medication. (92:31). Finally, VanCuick argued that Kara and Josh have maintained a parent-child bond thanks to ongoing visitation, and that the agency tasked with helping Kara meet her conditions of return—the same one now seeking to terminate her rights—had failed to provide Kara with the full range of required services. (92:33-34).

Last came the GAL. (92:34). She said she represented Josh's interests, and what Josh "needed [was] his mom to accept the tools Social Services is giving to her." (92:37). VanCuick raised an improper-argument objection, which was sustained. (92:37-38).

2. Witnesses.

The State called seven witnesses. The GAL called none. VanCuick called Kara.

Allen Smith

The State's first witness was Allen Smith, the social worker who investigated the report regarding the Xanax incident. (92:39, 49-50). Smith testified that Kara had already been receiving services through Kenosha County's Division of Children and Family Services (DCFS) for seven months—longer than Josh had been alive. (92:51). He said Josh has an older brother, Caleb, who was six at the time of the Xanax incident. (92:53). He said DCFS staffer Felicia Parreno was working with Kara (in relation to Caleb) before Josh was born. (92:51).

Smith testified that he met with Kara once. (92:62). Kara told him she took extra Xanax on the day in question. (92:64-65). On cross, Smith clarified that Kara said she'd forgotten that she took her usual dose of Xanax, so she took another. (92:77). He also clarified that he had no safety concerns beyond the fact that Kara had taken extra Xanax. (92:78).

VanCuick didn't elicit anything else useful (or particularly relevant) from Smith. Confusingly, however, she asked about Kara's prior involvement with DCFS, including whether Kara had complied with the services already underway. (92:77-78). "I heard that there were some non-compliances," Smith answered. (92:78). Discovery, which VanCuick later confessed she didn't fully review, reflected the same. (*See* 93:61-70).

Felicia Parreno

Ongoing case manager Felicia Parreno was the State's second (and main) witness. (*See* 92:83). Parreno testified that she was

assigned to work with Kara before Josh was born, in connection with Caleb's CHIPS case. (92:83, 86). Parreno talked about the reasons underlying Caleb's case ("mom being under the influence"), and VanCuick didn't object. (92:86). Parreno also discussed the services Kara received in that case, namely in-home safety services, the "most intensive program" DCFS offers. (92:87). Again, VanCuick didn't object. After eliciting details about the program, the State asked whether Kara complied with the conditions imposed in Caleb's CHIPS case. (92:88-89). Here, VanCuick objected on relevance grounds, and the circuit court sustained the objection. (92:89).

Turning to Josh, Parreno testified that he had (unspecified) drugs in his system at birth. (92:90). She said she was concerned about Kara's medication usage and had safety concerns about the boys as a result. (92:91). The State asked Parreno whether her safety concerns were rooted solely in Kara's hospital admission, but VanCuick objected on relevance grounds, and again the circuit court sustained the objection. (92:91). An off-the-record sidebar followed, after which the State asked Parreno to focus only on the period from Kara's hospital admission forward. (92:92).

Parreno, like Smith, spoke with Kara in the days following her hospital admission. (92:92-93). She also collected documentation of the Xanax incident, including Kara's medical records. (92:95). Based on these sources, Parreno determined Josh wasn't safe with Kara. (92:96-97). She successfully sought to detain Josh and put him in foster care. (92:98-99).

Next, Parreno turned to Josh's CHIPS case. (92:99-100). She described Kara's conditions of return and the services DCFS was required to provide. (92:102-22). She said all Kara needed to do to have Josh come home was "[a]ctively engage in the services being provided" (not, apparently, fulfill her conditions). (92:122).

In the middle of Parreno's direct, the jury left for lunch and the circuit court discussed their off-the-record sidebar. (92:123-37). It had held, over the State's objection, that the pertinent timeframe was that related to Josh's CHIPS case—not Caleb's. (92:123-24).

When Parreno's direct examination continued, she clarified that Josh was removed a little over two years ago, lived with a foster family, and hadn't had overnights or trial reunifications with Kara. (92:148-49). The State then turned to permanency planning, asking Parreno to tell the jury why permanency is so important. (92:149-50). Parreno explained that Wisconsin doesn't want "kids to linger in care." (92:150). VanCuick didn't object.

Parreno next addressed Kara's conditions of return and described Kara's varying participation in services, emphasizing instances of noncompliance (e.g., missed urinalysis tests). (92:155-208). But she also acknowledged periods of progress, as when Kara was consistently "coming in and meeting with" her workers. (92:158). During Parreno's discussion of Kara's second condition of return, which required Kara to cooperate with DCFS, the State elicited testimony about a two-month period during which Kara wasn't consistently maintaining contact with workers. (92:168). The State invited Parreno to note that, while Kara's "whereabouts [were] unknown" during this time, Josh "remained in the same foster home." (92:17).

Towards the end of direct, Parreno testified that Kara hadn't made significant progress towards her conditions over two-plus years. (92:208). She also testified, over objection, that Kara lacked a "parental type relationship" with Josh, even though she took care of him for his first six months. (92:208-09).

There was a break in Parreno's testimony for the State's third witness. (*See* 92:211-12). When Parreno returned, she testified that she'd been trying to assist Kara with her conditions of return up to the day of trial. (92:244-45).

On cross, VanCuick asked about the opiates Parreno had said were in Josh's system at birth, and Parreno said she wasn't sure if Xanax was an opiate. (92:252-53).

Testimony then concluded for the day, with Parreno returning to the stand the following morning. (92:253-55; 93:8). VanCuick continued her cross-examination. (93:9). Parreno first clarified that the only substances in Josh's system at birth were those Kara was prescribed. (93:9). The cross then shifted to Josh's CHIPS order. (93:12). Parreno confirmed that Kara did well during supervised visits. (93:15). She reiterated that substance use was DCFS's sole safety concern at the outset of the case. (93:16). As time went on, however, Parreno said they worried about Kara's relationship with Josh's dad, James. (93:16-17). Confusingly, VanCuick followed up, eliciting the detrimental fact that police had responded to "an altercation with [James] and [Kara] towards [Kara's] mother." (93:17).

Eventually VanCuick turned to Kara's conditions of return. She asked whether the conditions were "standard" or if any addressed Kara's particular needs. (93:20). Parreno explained that she referred Kara to family treatment court but Kara chose not to participate. (93:20). VanCuick, apparently realizing she'd elicited more unfavorable testimony, asked Parreno how onerous family treatment court is (quite) and whether Kara would have had numerous obligations alongside it (yes). (93:20).

One obligation Kara failed to fulfill during Josh's CHIPS case was providing documentation that she was paying rent. (93:23-24). VanCuick elicited testimony that Kara was living with her mom and didn't have to pay rent—but also that Kara never provided documentation of other bills she'd paid. (93:24).

Kara did better, per Parreno, in terms of Josh's placement (she didn't interfere), signing releases (Kara signed many), and demonstrating parenting skills (she fulfilled this aspect of her conditions).

(93:34, 40). When they began discussing Kara's compliance with AODA-related conditions, VanCuick asked whether Kara's AODA evaluator had received information related to Kara's other child rather than Josh. (93:43). The State objected, and the jury exited. (93:43-44). A protracted sidebar followed.

The State started by explaining that VanCuick was—not for the first time—asking questions related to Caleb's CHIPS case. (93:47-48). In the State's view, VanCuick's question was "unbelievable." (93:48). The circuit court agreed, telling VanCuick, "you just opened the door ... and I ruled on that [issue] for your benefit.... I'm really kind of shocked actually that you … opened the door." (93:49). VanCuick responded that she didn't know what "open the door" meant. (93:51). The circuit court was puzzled: "[Y]ou just asked about the other child and I don't know how you don't understand that after all this time.... [N]ow they can go into it." (93:51). VanCuick said she didn't mean to open any doors, and the circuit court lamented that it didn't know what to do. (93:53). After the GAL noted that Caleb's case laid the groundwork for DCFS's response in Josh's case, the circuit court concluded: "[D]oor's open. That's it." (93:58).

After a break, the circuit court walked back its ruling, telling the State—over objection—not to go into Caleb's case. (93:58-61).

VanCuick offered her thoughts again: "I was not ... the attorney of record for the CHIPS case. I don't have any discovery except for a very few little overlap things about [Caleb] so I literally have no idea .... what happened. I don't know why [Caleb] was originally detained ... but the State and the GAL do so when they're talking about opening the door to other things I don't even know what those other things are ...." (93:61). The State noted that the history pertinent to Caleb was in Josh's CHIPS petition, and discovery includes every case note from the beginning of Kara's involvement with DCFS. (93:61-68). VanCuick then confessed: "I absolutely have to admit that

I d[id] not go over these [older notes] with a fine tooth comb." (93:68). VanCuick later acknowledged more ignorance, saying she didn't know anyone other than the ongoing case manager could even enter case notes; she thought everything she had was from Parreno. (93:70).

The circuit court tried to drill down on what additional records might exist from service providers outside DCFS. (93:70-72). The State maintained that all the records it knew of were in discovery. (93:70). VanCuick disagreed, triggering the following exchange:

> MS. VANCUICK: …. [T]he representation that the notes contain all of the information from [before Josh's CHIPS case] … I don't know that that's true….
>
> ....
>
> ... [I]f the argument is ... we know what happened with in home services because we have these notes[, then t]hat's not reliable.... I don't know if these are all of the times that In Home Safety Services [was at Kara's home]. As the Court pointed out are these summaries? Is this the whole ... report ... for the day?
>
> THE COURT: … [W]hy didn't you figure this out beforehand?
>
> ....
>
> MS. VANCUICK: It's related to [Caleb].
>
> THE COURT: ... [T]here was no motion in limine to deal with ... [Caleb] so a drug history is a drug history….
>
> ....

.... I've been trying to keep out the connection with another child.

.....

Not being very successful with that.... [B]ut, you know, history's history.... [S]omething doesn't just start on one day and then all of a sudden somebody's a full-fledged addict.

MS. VANCUICK: .... So I get that there needs to be some context …. There was testimony ... that services were already in place. That DCFS was already [involved]. So [for the State] to now say we're gonna question about these specific services.

I ... don't even have a CHIPS petition on [Caleb] .... [O]f course I'm going to focus on [Josh.] I'm not gonna focus on ... notes related to [Caleb], so—

THE COURT: Well, you should focus on all of it because there might be some favorable things for your client .... I don't know how you ... determine what you want to use or what doesn't matter or what motions in limine you want....

MS. VANCUICK: ... [T]he stuff that led up to [Caleb] I wouldn't even expect that the State would go into that and that's not relevant.

... [B]eside the ... crushing volume of pages that are involved in a TPR case to try to guess what could be out there from another child and then [to] try to track down records ... [is] difficult.

….

> THE COURT: … [O]n just trying to get a court record.... [Y]ou ... go to the Judge who [has] the case ....
>
> ....
>
> So don't be saying that it's difficult because [it] ... is not all that difficult...
>
> ... I mean, that's the other issue so you can't just say, well, it's gonna be a pain so I'm not gonna do it.
>
> MS. VANCUICK: It's not relevant ... so I wouldn't do it. Plus I wouldn't have access ....
>
> THE COURT: It could be relevant. What if it had good information for your client? What if she did a lot of good things [?] ....
>
> ....
>
> [THE GAL]: ... [I]f this case was gonna be limited to nothing coming in regarding [Caleb] then that could have been a motion up front ....
>
> ….
>
> MS. VANCUICK: That's hogwash.... I believe that the testimony that was allowed in went to context.... Services were already in place that led to the decision to remove....
>
> Now, try talking about getting into other things that I don't even have discovery on.... absolute hogwash ....

(93:75-82).

The dialogue continued. The circuit court asked the State to specify the topics prior to Josh's CHIPS case that it wanted Parreno to address. (93:82-87). When the State did, VanCuick protested that some of the facts were news to her. (93:88). The State pointed out where in Josh's CHIPS petition and discovery those facts were available. (93:89-91). As the disagreements escalated, even Kara commented, "This is nuts." (93:92).

The circuit court ultimately told the State, "You can talk about [Kara's] drug history. Don't relate it to [Caleb]." (93:94).

The jury returned, and VanCuick continued cross-examining Parreno. (93:101). She elicited more details about Kara's compliance with conditions. (93:101-121). She also asked two sets of questions that undermined Kara's case by helping to establish DCFS's reasonable efforts: Parreno testified that she has special training in dual-goal case management (relevant here because the goals for Josh became both reunification and adoption) and that she took various steps to try and help Kara overcome substance abuse. (93:114, 121).

On redirect, Parreno corrected earlier testimony, saying Josh wasn't positive for opiates at birth. (93:122-23). He tested positive for Xanax and Adderall, both of which Kara was prescribed. (93:123). Parreno also addressed a topic VanCuick had initially raised: family treatment court. (93:129-30). Parreno said the program is "an opportunity for [a parent] to get [her] child home more quickly." (93:130).

Later on redirect, Parreno testified that Kara met zero out of seven treatment recommendations made by her AODA evaluator. (93:143). Parreno specifically noted that Kara tested positive for cocaine once but never admitted to using any substances. (93:149).

On recross, VanCuick introduced releases Kara signed, elicited testimony about the relatively few UAs Kara had missed, and

clarified that at least one missed supervised visit was canceled by the foster parent rather than Kara. (93:168, 173, 176-78).

Sandra Malone

The State's third witness was Sandra Malone, a retired substance abuse counselor. (92:213). DCFS asked Malone to conduct an AODA assessment for Kara, and Malone did—meeting with Kara for about two hours across two days. (92:214, 217). Malone learned that Kara had been prescribed Xanax since she was 14 or 15. (92:216). Malone said Kara had mixed feelings about her Xanax use; she wasn't sure it was a problem. (92:217). Malone, however, concluded Kara was addicted. (92:218).

After the State introduced Malone's report, Malone stated that she diagnosed Kara with sedative hypnotic anxiolytic use disorder (a disorder involving antianxiety drugs). (92:219-22). She made a variety of recommendations, including that Kara see an AODA therapist and get her Xanax prescription from a mental health provider rather than a family doctor. (92:222-25).

The GAL examined Malone next. Malone said she wouldn't be optimistic about Kara's recovery if Kara didn't follow through on her recommendations. (92:229).

On cross, Malone confirmed that she had no idea whether Kara followed through on her recommendations or had made progress on her Xanax use. (92:229). Malone described a support group she'd recommended, but she didn't recall whether Kara had joined it. (92:231). Malone also acknowledged that she'd met with Kara via Zoom, not in person, which impeded her capacity to assess and treat Kara. (92:231-33). Finally, as with Smith, VanCuick's questioning of Malone turned in an unfavorable direction towards the end. VanCuick asked about the day Kara took an extra dose of Xanax and whether Malone had seen Kara. (92:236). She had. (92:236). VanCuick asked, "[D]o you

recall … if [Kara] appeared intoxicated ....?" (92:236). Malone answered, "Yes," adding, "I was concerned." (92:236).

On redirect, the State seized on this comment, asking why Kara seemed intoxicated. (92:240). Malone said Kara's slow movements and slow talking tipped her off. (92:240). Malone also spoke with Kara about her behavior, and Kara admitted she took extra Xanax. (92:241).

During a brief redirect by the GAL, Malone said taking too much Xanax is dangerous, and she has concerns about patients who have a habit of doing that. (92:242). But she didn't know whether Kara had that bad habit, and any prescribing doctor would address nonaddictive alternatives to Xanax with Kara. (92:243).

Dr. Kathryn Koenig-Leuck

In addition to Kara's AODA evaluator, the State called her psychological evaluator: Dr. Kathryn Koenig-Lueck. (93:184). Koenig met with Kara by Zoom for about two and a half hours, completing a cognitive screen and social-emotional functioning test, then diagnosing Kara with "intact intellectual functioning," persistent depressive disorder, generalized anxiety disorder, and ADHD by history. (93:188, 195-97). Koenig said Kara had concerns about her substance use but denied problematic use. (93:195, 198). The State elicited Koenig's recommendations for Kara (mainly individual therapy). (93:201-11).

After Koenig's testimony concluded for the day, the circuit court addressed two sidebars. One pertained to a sustained hearsay objection. (93:220-25). The other pertained to releases VanCuick had introduced when cross-examining Parreno. (93:226). At least one was signed for Caleb's case, not Josh's. (*See* 93:226). The circuit court again expressed frustration at VanCuick's failure to keep her questions confined to Josh, commenting: "I even asked ... if you're trying to undermine the trial because I was floored that you would go outside the timeframe." (93:226).

The next morning, Koenig returned and confirmed that Kara no-showed her first evaluation appointment. (95:7-8).

On cross, Koenig testified that Kara was prescribed medication by a mental health practitioner at the time of her psychological evaluation, as required by her conditions of return. (95:16). Koenig also clarified that her recommendations are meant to benefit a client; they aren't a mandatory checklist for achieving mental health. (95:21).

Renee Morin

The State's next witness was nurse practitioner Renee Morin, the mental health practitioner who prescribed Kara's medicine. (95:24). Morin began meeting with Kara in early 2022, by phone; she believed Kara was establishing care because she didn't feel heard by her prior provider. (95:27-28, 30). Morin conducted a medication evaluation and concluded that Kara didn't have a substance use issue at that time. (95:31-32). She detailed the drug use Kara self-reported: Percocet, which she stopped using on her own in 2019; alcohol on occasion; and Xanax, for which she had a prescription. (95:34-35). Morin stated that her goal was to assist Kara with reducing her Xanax use. (95:40-41). She also testified to the mental health diagnoses she gave Kara: major depressive disorder, generalized anxiety disorder, ADHD, and unspecified post-traumatic stress disorder. (95:43).

Morin met with Kara for about five months, at which point Kara was discharged for missing two appointments. (95:46, 56). Morin also explained that she struggled to get consent forms signed, despite mailing them to Kara. (95:46).

The GAL asked Morin whether Kara self-reported any overuse of Xanax, and Morin said she hadn't. (95:52). The GAL asked whether hearing about such overuse would have affected her prescription decision. (95:52). Morin said it would have but didn't elaborate. (95:52).

On cross, VanCuick wondered why Morin hadn't seen Malone's AODA assessment (unclear), whether DCFS had requested her notes from meeting with Kara (no, so Morin hadn't provided them), and whether Morin knew anything about Kara's prior prescriber (no). (95:54-58). Finally, VanCuick elicited the fact that, despite Morin's goal of reducing Kara's reliance on Xanax, Morin had *increased* Kara's dosage based on Kara's heightened stress. (95:68).

On redirect, Morin discussed that heightened stress, all of which stemmed from Kara's CHIPS cases. (95:75-76). Morin also discussed the ways Xanax overuse might impact parenting. (95:80-83).

VanCuick recrossed Morin on Kara's Xanax overuse. (95:85-87). She established—to the State's benefit, not her client's—that calling 911 after taking too much Xanax qualifies as an overdose. (95:86-87).

Bambi Sommer

The State's second-to-last witness was Bambi Sommer, who supervises Project Home and the supervised visitation program at Children's Hospital. (95:88-89). Sommer knew Kara through Project Home and described Kara's history there—including missed appointments and occasionally slow responses to Sommers's communications. (95:102-16).

Based on her review of case notes, Sommer also discussed Kara's level of compliance with each condition of return and testified that Kara didn't take much accountability. (95:120-41).

The GAL focused on Kara's failure to provide verification of her explanations for missed meetings, UAs, and the like. (95:141-43).

On cross, Sommer clarified that Project Home is a voluntary program; Kara wasn't required to participate. (95:152).

Vicki Cottone-Schultz

Finally, the State called supervised visitation worker Vicki Cottone-Schultz. (95:180-81). She described Kara's attendance issues and the rules implemented as a result. (95:185-97). She said that, when Kara did attend visits, there were no safety concerns. (95:192).

On cross, Cottone-Schultz reiterated that out of 75 visits scheduled while she was Kara's supervised visitation worker, there were 14 cancellations and seven no-shows by Kara, but zero safety concerns. (95:210). Kara had no trouble assuming a parental role, was affectionate, and brought toys, activities, and food. (95:211-13).

After Cottone-Schultz's testimony, the State rested. (95:213). The GAL called no witnesses. (95:214).

Kara

VanCuick called Kara. (95:215). Kara began by describing the day she landed in the hospital. (95:216). She had court that day (hence the extra Xanax) and brought Josh. (95:216). Her mom then picked up Josh; Caleb was still in school. (95:216). After some time passed, she was feeling sick and "passed out," then "[c]alled 911 ... as you're taught to do." (95:216). Her doctor said she fainted due to dehydration, stress, and her reaction to the combination of Xanax and Zoloft she'd taken. (95:217-19). She said she had never had a reaction like that before, nor any overdoses. (95:220).

Kara then discussed her conditions of return and detailed some of her experiences complying or falling short. (95:224-40). Kara acknowledged that her cooperativeness ebbed and flowed. (95:235-36). Ebbs were due to "different reasons": "Obviously being in this situation is not the easiest. It definitely takes a toll on mental health so there's been a few times where I've just … shut down .... Also, I've

had periods of cooperation and consistency and felt like we have not moved forward ... so it's discouraging ...." (95:236).

After an overnight break, Kara described her difficulties with her schedule, noting that she has a lot on her plate and no car. (96:11-15). She cited her lack of a car as the key reason she sometimes struggled to get to the Job Center for UAs. (96:12-15).

On cross, Kara confirmed that she had both of her sons at home prior to her hospital admission and now neither live with her. (96:39). She admitted using Percocet without a prescription several years ago and using Suboxone without a prescription more recently (in an effort to stay off Xanax). (96:41-42). But she said she no longer has a Xanax prescription and doesn't take it. (96:70). She also said she couldn't recall certain testimony from earlier in her trial, at which point the State accused her of "nodding off." (96:69).

After the GAL's examination and VanCuick's redirect addressed more of the same, evidence closed. (96:101).

3. Closing arguments.

The next morning, the circuit court instructed the jury, and closing arguments began. (97:3-17).

The State reviewed each witness and their role in Kara's life. (97:17-29). It commented, "Much like each of the people who played a role in providing safety to [Josh], today with your verdict you will each play a role in [Josh's] life when you find that yes grounds exist to terminate [Kara's] parental rights." (97:18). The State discussed Kara's drug use, DCFS's extended involvement with Kara, and Josh's lengthy stay with his foster family. (97:17-29). It reiterated its view that Kara had been nodding off during trial. (97:28).

The GAL's closing focused on permanency, though only grounds were at issue. (97:30-33). VanCuick objected to the following, and the circuit court sustained it: "At two and a half ... [Josh] is in a temporary home .... When he's five if we do nothing today will he still be in a temporary home? When he's 10?" (97:31). Later, with no objection, the GAL made the same point: "At some point [Josh] needs to not be subject to the excuses of his mother for not doing what she needed to do to get him home. At some point [Josh] just needs to be able to go and have permanence. That's all. [Josh] needs permanence and you're here today to decide if that time is now." (97:33).

VanCuick's closing addressed the fundamental right at stake and the applicable legal standards, including the State's burden. (97:34-47). She discussed the State's insinuation that Kara had previously overdosed, saying, "That's not true." (97:36). Finally, she conceded that Kara hadn't met her conditions of return but argued that DCFS hadn't made reasonable efforts to help her do so, and that Kara *had* assumed parental responsibility. (97:43, 47).

One quirk of VanCuick's closing: when addressing Kara's drug history, she misstated that Kara had used Methadone (rather than Suboxone, a similar drug Kara *had* used). (97:36). She never corrected the error, and the State seized on it in rebuttal. It said: "[W]e heard argument ... about [Kara] buying Methadone off the street. Do you recall the word Methadone ever being used in this trial once? ... So now in addition to the Suboxone she bought off the street in 2019 and 2020 apparently and the Percocet that she told Ms. Morin about when she did her prior substance use history ... [n]ow we're learning today that [Kara] also bought Methadone ...." (97:48).

VanCuick didn't object to this line of argument, even though it was premised on a slip of the tongue. The State then detailed differences between Methadone and Suboxone, though they weren't in evidence, and no evidence suggested Kara took the former. (97:48-49).

4. Deliberations and verdicts.

The jury sent three requests to the circuit court during deliberations. They first requested the CHIPS paperwork. (44). There was no objection to sending it back. (97:56). They also requested the child support paperwork, which was again sent back without objection. (43; 97:57). A third note sought "termination of parental rights." (45:1). The circuit court responded: "It is not clear what is being requested." (45:1). There was no follow-up.

The jury found that the State proved both grounds. (41; 42).

C. Disposition.

Before disposition, DCFS submitted its court report. (65). It addressed the conditions Kara hadn't fulfilled and the best-interests factors. (65:2-13). It said Josh's foster parents intended to adopt him, Josh was healthy, and the GAL supported termination. (65:12). It concluded by opining that termination was proper. (65:13).

Parreno and Kara both testified at the dispositional hearing. (*See* 100:2). Josh's father, James, also testified, as the hearing pertained to both parents. (*See* 100:2). This summary, however, addresses only the testimony, arguments, and decision regarding Kara.

Parreno described Josh and Caleb's history with DCFS. (100:7-12). The permanency plan for Caleb involved guardianship and placement with his paternal grandparents, but for Josh, DCFS considered adoption appropriate. (100:11-12, 25).

VanCuick asked about Parreno's review of workers' notes from Kara's visits with Josh. (100:28-29). "[B]ased on your review of those [visitation] reports," she asked, "is there a … strong bond between [Kara] and [Josh]?" (100:29). Parreno responded: "During the visits ... she does have that relationship with him." (100:29). Parreno went on

to say that Kara is affectionate with her children and interacts with them the whole time they're together. (100:29).

Later, the circuit court examined Parreno. (100:50). Parreno explained that DCFS recommended termination because Josh is in a stable home, it's the home he's lived in most of his life, and Kara has not been compliant with her conditions of return. (100:50).

Kara's examination by VanCuick was brief, and there was no cross. (100:65-76). She described some of the illnesses and transportation issues that kept her from visits. (100:66-67). She discussed her boys' loving sibling relationship. (100:67). She said Josh came to her for comfort during visits. (100:74). She noted that Caleb had to be removed from the foster parents Josh lived with, as they weren't able to handle Caleb's special needs; what would happen, she wondered, if issues arose with Josh as well? (100:74-75). She opined that it would do more harm than good to sever Josh's ties to his family. (100:74-75).

The GAL offered her report before the parties argued. (100:82). She said Josh had been in out-of-home care for most of his life, and the harm from termination would be substantially outweighed by the benefits of adoption. (100:82-83). The State agreed, addressing the statutory factors and arguing that they all pointed towards termination. (100:84-89). Finally, VanCuick went through the same factors, emphasizing the relationships that would be severed by termination and noting the continued uncertainty about the prospects of adoption. (100:90-94). VanCuick also pointed out that Kara had reached a level of stability. (100:94).

The circuit court found Josh's adoption "extremely likely" and held that the harm caused by severing his family relationships would be outweighed by adoption's benefits. (100:100-02, 104-05). It entered a TPR order. (100:112-13; 72; App. 148-50).

D. Postdisposition proceedings.

Kara moved for a new trial on the grounds that she received ineffective assistance of counsel. (130:2). She alleged that VanCuick performed deficiently in three main ways: by failing to keep Josh's best interests out of her trial, by failing to keep information about Caleb and his CHIPS case out, and by failing to competently cross-examine the State's witnesses. (130:26-27). Kara further alleged that, in combination, VanCuick's deficiencies were prejudicial. (130:33-36).

A *Machner* hearing followed. (*See* 138; App. 47-143). Based in large part on VanCuick's testimony, the circuit court denied relief. (138:79-95; 141; App. 27-46, 125-41). It declined to address prejudice, as it held that VanCuick wasn't deficient. (141:18; App. 44). The court noted that VanCuick was comfortable with her level of preparation, that she's experienced in TPR cases, and that the jury was properly instructed. (*See* 141; App. 27-46). It also held (conflating the deficient-performance and prejudice inquiries) that there was no evidence of any silver bullet in the discovery, so VanCuick's failure to review it with a fine-tooth comb didn't render her performance deficient. (141:12-13; App. 38-39).

E. Appeal.

Kara appealed. *See Kenosha Cnty. Div. Child. & Fam. Serv. v. K.E.H.*, Case No. 2024AP1101, unpublished slip op. (Wis. Ct. App. Feb. 26, 2025) (App. 3-25). The court of appeals held, first, that VanCuick adequately prepared for trial. *Id.*, ¶25 (App. 14). It then addressed an array of specific acts and omissions, concluding they were objectively reasonable. *Id.*, ¶¶26-41 (App. 15-19). Finally, the court of appeals held that Kara wasn't prejudiced, even if VanCuick was deficient. *Id.*, ¶21 (App. 23).

ARGUMENT

I. This Court should grant review to clarify whether and how reviewing courts should consider a trial attorney's subjective reasons for her challenged conduct when assessing that conduct for objective reasonableness.

Like a criminal defendant, a parent in a TPR case has the right to effective assistance of counsel. *A.S. v. Dane County*, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). To demonstrate a deprivation of that right, a parent must show that trial counsel performed deficiently and that her deficient performance was prejudicial. *Id.* at 1005 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). Deficient performance is that which falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. A parent proves prejudice by showing that, absent her attorney's errors, there is a reasonable probability that "the result of the proceeding would have been different." *Id.* at 698. "A reasonable probability is [one] sufficient to undermine confidence in the outcome." *Id.*

Before a reviewing court can determine whether counsel's challenged acts or omissions rendered her performance deficient, Wisconsin cases require that trial counsel testify about her decisionmaking. *State v. Machner*, 92 Wis. 2d 797, 804-05, 285 N.W.2d 905 (Ct. App. 1979). There are no exceptions. *State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). In *Machner*, in which the court of appeals first mandated that trial counsel "explain the reasons underlying his handling of a case," the court of appeals stated: "We cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies." 92 Wis. 2d at 804.

The purpose for a *Machner* hearing, then, is to give trial counsel the chance to describe her subjective state of mind when she made the choices that have been challenged as unreasonable. A *Machner*

hearing enables a reviewing court to hear *why* trial counsel did or didn't do certain things.

The problem is that the United States Supreme Court has deemed trial counsel's subjective state of mind—the "why" underlying her challenged acts and omissions—beside the point. *See Harrington*, 562 U.S. at 110. The test, after all, is objective. *Strickland*, 466 U.S. at 687-88. Thus, in determining whether an attorney performed deficiently, the question is "what a reasonably prudent attorney would do in similar circumstances." *State v. Sprang*, 2004 WI App 121, ¶25, 274 Wis. 2d 784, 683 N.W.2d 522. If counsel met that standard, then it doesn't matter why she did what she did; a decision rooted in a misapprehension of the facts or law still isn't deficient.

Given the objective standard for deficient performance, other jurisdictions—including the federal system—do not require trial counsel's testimony to establish an ineffectiveness claim. *Pidgeon v. Smith*, 785 F.3d 1165, 1171-72 (7th Cir. 2015). Nor do they always consider such testimony valuable. *See id.* at 1172-73. As these jurisdictions recognize, the objective test for deficient performance is hard to square with Wisconsin's insistence that trial counsel explain herself.

Given this tension, it is wonder Wisconsin courts take different approaches when considering trial counsel's testimony in their review of ineffectiveness claims. Consider a common basis for alleging ineffectiveness: failure to object to inadmissible, harmful testimony. In a relatively recent decision, the court of appeals ruled that a trial lawyer performed deficiently by failing to object to vouching testimony—not just because the testimony was objectionable, but also because, at the *Machner* hearing, trial counsel "denied any tactical or strategic reason for not objecting." *State v. Mader*, 2023 WI App 35, ¶34, 408 Wis. 2d 632, 993 N.W.2d 761. But the court of appeals has also recognized that *Machner* hearing testimony professing to justify a lawyer's acts or omissions as "trial strategy" won't on its own

"defeat a claim of ineffective assistance." *State v. Coleman*, 2015 WI App 38, ¶20, 362 Wis. 2d 447, 865 N.W.2d 190. What matters is whether a reasonably prudent lawyer under similar circumstances would have done what the attorney in question did—not whether the attorney in question had a reason.

Thus, some cases find deficient performance based in part on a trial lawyer's statement that he *lacked* a strategy and others find deficient performance despite a trial lawyer's statement that he *had* a strategy—while outside Wisconsin, cases question whether trial counsel's testimony can shed any light at all on the deficient-performance analysis. *See, e.g.*, *Pidgeon*, 785 F.3d at 1172-73.

There are, of course, instances in which trial counsel's testimony is critical to the ineffectiveness analysis. If off-the-record conversations counsel had with her client were a factor in counsel's decisionmaking, then counsel's testimony about those conversations will be necessary. In the plea breach context, for example, testimony from an attorney that he asked his client whether he should object to a plea breach—and the client said "no"—will, if believed, defeat an ineffectiveness claim. *See Sprang*, 274 Wis. 2d 784, ¶¶27-29. But the reason trial counsel's testimony matters in those cases is that it establishes the objective facts surrounding her challenged conduct—not because it reveals the subjective rationale underlying that conduct. In this way, trial counsel's testimony is like a police officer's at a suppression hearing: the officer's testimony regarding the objective facts leading up to his decision to pull a driver over are essential to the reviewing court's Fourth Amendment analysis, while the officer's subjective rationale for initiating the traffic stop is irrelevant. *State v. Kilgore*, 2016 WI App 47, ¶41, 370 Wis. 2d 198, 882 N.W.2d 493.

Wisconsin's universal *Machner* hearing requirement, and the language of the case that initially imposed it, has resulted in confusion. The deficient-performance test is objective; an attorney's

subjective state of mind simply doesn't matter. That's not to say an attorney's testimony will always be irrelevant. In some cases, as noted above, it's key. But the relevance of counsel's testimony is limited to the objective facts she can provide—facts to which a reviewing court can apply the longstanding objective test for deficient performance. The many cases suggesting otherwise misconstrue the applicable standard. This Court should grant review to clarify the law on this fundamental and significant point.

II. If this Court grants review to address the first issue presented, it should further determine whether Kara received ineffective assistance of counsel.

The circuit court determined that VanCuick was not deficient, so it never reached the prejudice prong of the ineffectiveness analysis. The court of appeals affirmed, concluding that VanCuick was not deficient and that, even if she was, Kara was not prejudiced. If this Court grants review to address the first (review-worthy) issue presented, it should further address Kara's ineffectiveness claim. In doing so, it will defer to the circuit court's findings of fact unless clearly erroneous but will independently determine the legal questions of deficient performance and prejudice. *J.S. v. J.T.*, 2023 WI App 62, ¶11, 409 Wis. 2d 767, 998 N.W.2d 855.

VanCuick made a multitude of unreasonable errors at Kara's trial. Many of them stemmed from simple underpreparation: VanCuick did not fully review discovery, barely spoke with Kara before trial, and examined witnesses with little sense of where their testimony would go—and it often went in unfavorable directions. But in addition to subjecting Kara to the foreseeable consequences of trying a case underprepared, VanCuick performed deficiently in two more specific ways. First, she permitted the State and GAL to ask questions and make arguments that appealed to jurors' concern for the disposition in this case. When the State and GAL discussed the value of

permanency, emphasized Josh's extended time in foster care, and generally painted a rosy picture of Josh's foster family—none of which mattered at the fact-finding stage—VanCuick didn't stop them. She thus failed to keep Josh's best interests out of the conversation, despite the damage it did to her client's chances. Second, VanCuick didn't grasp the prejudice inflicted by evidence about Caleb's removal from Kara's home or the ensuing CHIPS case. Despite the circuit court's repeated efforts to keep such evidence out, and the other attorneys' adherence to the circuit court's orders on the matter, VanCuick repeatedly invited testimony about Caleb's CHIPS case, opening the door to even more. In all these ways, VanCuick performed deficiently.

The record also shows that VanCuick's deficiencies prejudiced Kara. This was a trial about Kara's failure to fulfill the conditions imposed in Josh's CHIPS case and, to a lesser extent, her failure to maintain a parental relationship with Josh after he was removed from her care. It was not, as a matter of law, about what should happen next to Josh. Nor was it about Kara's compliance with the conditions imposed in Caleb's CHIPS case or whether Kara had maintained a parental relationship with Caleb following *his* removal from her care. But the State, GAL, and even VanCuick ensured the jury heard about and considered those matters—to Kara's detriment. What's more, in determining whether the State's evidence established grounds, Kara had the right to counsel who would competently rebut and contextualize that evidence—not intermittently make things worse. She didn't get that. Her attorney effectively cross-examined some of the State's witnesses some of the time. But she made too many objectively unreasonable errors, too many mistakes that hurt her client's chances by muddying the evidentiary waters with prejudicial material, to produce trustworthy verdicts.

Should this Court grant review to take up the first issue, it should hold that the cumulative effect of VanCuick's errors casts

doubt on the verdicts' reliability, such that it's reasonably probable competent representation would have produced a different outcome. In other words, it should deem VanCuick ineffective.

CONCLUSION

Kara respectfully requests that this Court grant review.

Dated this 14th day of March, 2025.

Respectfully submitted,

Electronically signed by Megan Sanders

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 7,966 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 14th day of March, 2025.

Signed:

Electronically signed by Megan Sanders

Megan Sanders
State Bar No. 1097296

SIGNATURE OF RESPONDENT-APPELLANT

IN SUPPORT OF PETITION FOR REVIEW

Sign name: [redacted]

Print name: [redacted]