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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

In re VERONICA E. et al., Persons
Coming Under the Juvenile Court Law.

BUTTE COUNTY DEPARTMENT OF EMPLOYMENT
AND SOCIAL SERVICES,

Plaintiff and Respondent,

v.

C. E. et al.,

Defendants and Appellants.

C064723

(Super. Ct. Nos.
J31069, J31070)

C. E., mother of minors Veronica E. and Alexander E.,
appeals from the dispositional orders of the juvenile court
adjudging the minors dependents and denying her reunification
services. (Welf. & Inst. Code, §§ 360, subd. (d), 361.5,
subd. (b), 395.)¹ Mother contends that the juvenile court

¹ Undesignated statutory references are to the Welfare and
Institutions Code.

erroneously denied her three *Marsden*² motions and that she received ineffective assistance of counsel. Mother, who has a long history of alcoholism, also contends that substantial evidence does not support the juvenile court's denial of services under the bypass provisions in section 361.5, subdivision (b)(13). We affirm.³

FACTUAL AND PROCEDURAL BACKGROUND

On March 8, 2004, the Butte County Department of Employment and Social Services (the Department) detained the minors, then ages three and five, because of mother's psychological issues and alcohol abuse. There had also been domestic violence in the home. According to a police report, on February 28, 2004, officers responded to a call regarding an overdose. When they reached the home, mother refused medical attention but admitted she had been drinking and told the officers that she wanted to kill herself. An officer placed her on a "section 5150 hold" and she was admitted to the Butte County Psychiatric Health Facility for a 72-hour evaluation.

On April 12, 2004, the juvenile court sustained section 300 petitions on behalf of the minors and adjudged the minors

² *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

³ Father (Ervin B.) purports to join in the arguments raised by mother in her opening brief. He did not raise any additional issues. As father lacks standing to join in any of mother's contentions, his appeal is dismissed. (See *In re Frank L.* (2000) 81 Cal.App.4th 700, 703 [parent cannot raise issues on appeal from dependency matter that do not affect his own rights]; *In re J.T.* (2011) 195 Cal.App.4th 707, 717-719 [same].)

dependent children. Reunification services, including substance abuse treatment, were provided. Mother maintained sobriety for six months and the minors were returned to her care in December 2004 with family maintenance services. Dependency was terminated on May 23, 2005, after mother had maintained another six months of sobriety.

According to the jurisdiction and disposition reports, on September 12, 2005, mother drank alcohol and took prescription drugs in an attempted suicide. The police were contacted. She was released from the Butte County Jail the following morning.

On September 13, 2005, the police responded to a Chico fire station because fire personnel had been contacted by a woman who requested help. According to the police report, when the responding officer arrived, mother looked at him, grabbed her daughter, and attempted to run away. After the officer stopped mother, she told the officer she had just picked the minors up from school and driven to the fire station to ask for help, although she did not specify the nature of the help she sought. Mother displayed objective symptoms of intoxication. A breathalyzer test later revealed that her blood-alcohol level was 0.24/0.23 percent. She was arrested for public intoxication and violation of her probation.

On December 7, 2005, mother was arrested and incarcerated for public intoxication and violation of probation. According to the police report, officers responded to the home after father requested a welfare check, stating that he had just talked to mother on the phone, that she sounded intoxicated,

and that the minors were with her. An officer reported that mother had red, watery eyes, slurred speech, was unsteady on her feet, and smelled of alcohol. She claimed she was not intoxicated and that she only had one beer earlier in the day. She displayed mood swings ranging from calm to crying, screaming and yelling. She was arrested for public intoxication. The minors were left in father's care.

On December 8, 2005, the minors were detained again and new section 300 petitions were filed. The petitions included allegations regarding the December 7, 2005 incident, in which mother had attempted suicide with alcohol and pills, as well as an allegation that mother had been driving while under the influence with the minors in the car. On February 8, 2006, the juvenile court adjudged the minors dependent children and placed the minors with the father with family maintenance services. Dependency was terminated on September 20, 2007, with primary custody to mother (although mother and father were living together).

On November 18, 2007, there was a report that mother was under the influence when she brought Veronica to Enloe Hospital for an abdominal injury reportedly sustained after Veronica fell out of a tree. According to the police report, a hospital staff person observed mother arrive in a vehicle. The police were called. Mother told the officer she had driven Veronica to the hospital. Mother displayed objective symptoms of intoxication. She admitted drinking, but not to excess. After field sobriety testing, the officer arrested mother for driving under the

influence. According to the jurisdiction and detention reports, mother's blood-alcohol level was 0.27 percent. Nondetained petitions were planned, but the investigating social worker, Pamela Richards, went on an extended vacation. The petitions were not completed, and the Department took no action with respect to this incident.

On January 10, 2008, police responded to the home on mother's report of domestic violence against her by father. According to the police report, the officers observed that mother had slurred speech, red, watery eyes, and appeared somewhat disoriented. Father told the officers that mother had been drinking for several days and was intoxicated that evening. He explained that mother had been the aggressor. The minors were present. Father was not arrested.

On November 30, 2008, officers responded to a report of attempted suicide. According to the police report, father told the officers that mother had been sober for the "last couple years," but had been drinking for the last two days. According to the disposition report, mother took a handful of pills, along with vodka, in front of the minors. She stated she wanted to kill herself and told the minors that she wanted her body cremated. Mother was transported to the hospital and the police requested an evaluation pursuant to section 5150.

On September 20, 2009, emergency medical technicians responding to a report of an "ill female" went to the hotel where mother, father and the minors lived. According to the police report, mother was thereafter transported to the

hospital. The police were dispatched to the hospital when one of the emergency medical technicians reported that mother had been physically assaulted and injured by father. When the officer spoke with mother at the hospital, he noticed a strong odor of alcohol. Mother admitted that she was an alcoholic and was under the influence at the time of the incident. Mother confirmed to the officer that there had been ongoing incidents of domestic violence between her and father, including some earlier that week.

According to the police report, mother told the officer that the most recent incident actually happened on September 18, 2009. She said she noticed \$50 missing from her purse, got angry and kicked at father's knee. He deflected the kick and hit her in the eye, causing her to fall between the beds in their hotel room. She claimed to have been unconscious for 15 to 30 minutes. She delayed reporting the incident because she was afraid that father would punish her, but she would not elaborate.

The officer then spoke with father, who denied the allegations. He said mother began yelling at him and he did not know why. She kicked him in the groin, and when she tried to kick him again, he defended himself by pushing her, and she fell to the floor. Later that evening they had another altercation during which mother "popped" him in the face. Father told the officer that mother "drinks a lot." Based on the statements and

the injuries the officer observed, the officer determined father was the primary aggressor and arrested him.⁴

On September 21, 2009, mother failed to pick up the minors, then ages nine and 11, from school. The minors waited for over an hour and, after the school was unable to contact the parents, they walked to a friend's house. When mother eventually arrived at the school, she was extremely intoxicated. She was not driving. She said that she was late picking the minors up because father had beaten her up and was in jail.

When the minors did not arrive at school the next day (September 22, 2009), the school called the Department. Social worker Pamela Richards then went to the Regal Inn, where mother was living, to check on the minors. When she arrived, mother was asleep. The minors reported that mother had been awake earlier and they were asked to wake her. Mother then came to the door and explained that father had beaten her and she was dizzy and having vision problems. At some point, the motel manager, Tommy Davis, came by and reminded mother to let him know when father was going to be released from jail so he could go pick him up. Richards had been talking to mother about domestic violence and the risk to the minors. Although Richards attempted to convince her otherwise, mother said she was not

⁴ At the contested jurisdiction hearing on December 1, 2009, father and the Department stipulated that father had not been charged by the district attorney as of that date. At the March 10, 2010 disposition hearing, father testified that he had not been charged with crimes arising out of the September 22, 2009 arrest.

going to press charges and was going to allow father to return to the motel. She stated that she did not have a driver's license and father provided the minors' transportation to school.

Mother also admitted that she had been drinking vodka earlier that morning (before Richards' contact with mother at 10:00 a.m.) and had not taken her prescribed medication, Adderral and an antidepressant. Richards noted mother repeatedly did not finish her sentences, swayed slightly while walking, and dropped a water bottle on the floor when trying to set it on the nightstand.

When Richards told mother she was going to call her supervisor to see what the Department could do for mother, mother became agitated. Mother began rushing around the room and throwing things (but not at anybody). She repeatedly yelled at Richards that she was going to kill Richards and would kill anyone who tried to take her children. At one point, she yelled this directly into Richards' face from a position approximately four inches away. Mother repeated her threat approximately 20 times. The minors were present. Veronica moved about the room to avoid being hit by the items mother threw. Alexander got under the covers on one of the beds and hid his head. Richards left the room and called the police.

When officers arrived, they noted that mother displayed objective signs of alcohol intoxication. They asked mother to take a breathalyzer test to determine her alcohol level, but she refused. She denied being intoxicated. Her behavior began to

escalate; she yelled profanities and refused to cooperate with the officers. Mother repeatedly yelled "fuck you" at the officers. She yelled other things at the officers including "[Y]ou hurt me. How can you hurt me. You're not my husband but he hurt me . . . and now you are." The officers had not done anything. Mother also accused the officers of wanting to take the minors away from her.

According to the police report, mother was ultimately placed under arrest for public intoxication. The minors were detained. In the arrest report, the reporting officer noted that mother was unsteady on her feet, had red, watery eyes, a blank stare, thick and rambling speech, and was argumentative and hostile. Mother was released from jail on September 23, 2009 and transported to the hospital to be treated for acute alcohol withdrawal. There is no evidence mother was treated for any alleged injuries arising out of the domestic violence incident.

On September 24, 2009, section 300 petitions were again filed on behalf of the minors. The petitions contained allegations under section 300, subdivisions (b) and (c).

As to both minors, the petitions alleged that the minors were at risk for physical harm under section 300, subdivision (b), for the following reasons:

"b-1. On September 20, the child's father was arrested for 273.5 (A) PC for assaulting the child's mother in the presence of the child.

"b-2. On September 21, 2009, the child's mother was found to be intoxicated by school personnel after coming to pick up her children over one hour late.

"b-3. On September 22, 2009, the child's mother was arrested for 647 (f) PC, for public intoxication after refusing to cooperate with a field sobriety test and yelling profanities in public.

"b-4. Prior to the arrest cited above in b-3, the child's mother in the presence of the child repeatedly threatened to kill the social worker.

"b-5. The child's mother admitted on September 22, 2009 to having consumed Vodka before 10 a.m. that day, had difficulty completing a sentence and swayed when walking.

"b-6. The child's mother stated that the child's father would return to the family residence upon release from jail as he was needed for transportation.

"b-7. The child's parents have a long history of domestic violence as evidenced by the prior Juvenile Court Dependencies of the child and more recently by contact with Chico Police Department on January 10, and November 30, 2008 in response to domestic violence.

"b-8. In July 2009, the child's mother was treated for detoxification due to alcoholism for ten days at Oroville Hospital.

"b-9. On September 22, 2009, when discharged from the Butte County Jail, the child's mother was transported to Oroville Hospital."

As to Alexander, the petition also alleged under section 300, subdivision (b), that "The child describes feeling very depressed when he observes his mother becoming upset, swearing and throwing things in his presence."

Under section 300, subdivision (c), the petitions alleged that the minors were suffering, or at substantial risk of suffering, serious emotional damage as a result of the subdivision (b) allegations and from having witnessed the incidents of domestic violence.

The juvenile court appointed counsel for the parents at the September 25, 2009 detention hearing and continued the matter to October 1, 2009 for a contested detention hearing. At the October 1, 2009 hearing, the juvenile court granted parents' request to have their court-appointed attorneys relieved and to allow them to represent themselves. The matter was continued for an additional week to allow parents time to prepare.

On October 7, 2009, the juvenile court conducted a contested detention hearing. Mother and father objected to the detention report, asserting that the report contained errors and hearsay and that they had not been provided discovery. The court overruled their objections. When asked if they had evidence to present, mother read a statement to the court in which she requested that the court return the minors to them immediately because neither parent had been charged with a crime and because the detention of the minors was without a warrant and illegal. She further asserted there was no evidence that the minors had been neglected or harmed

physically or emotionally. She claimed to have been arrested "unlawfully and with maltreatment." The parents presented no evidence. Their request for a continuance was denied and the court ordered the minors detained. County counsel indicated that the Department would provide services to both parents pending the disposition hearing.

At the initial jurisdiction hearing on November 19, 2009, parents requested that the court appoint attorney Dale Rasmussen to represent them. The juvenile court informed parents they could not choose the attorney that would be appointed for them, but noted that Rasmussen was next on the list and appointed him to represent mother. Attorney Christine Zebley was appointed to represent father. The hearing was continued.

The contested jurisdiction hearing went forward on December 1, 2009. Rasmussen orally demurred to the subdivision (c) allegations on the ground that the petitions did not set forth expert opinion supporting the allegation that there was a substantial risk of serious emotional damage to the minors. Zebley joined in the oral demurrer, similarly arguing that the facts alleged in the petitions were insufficient to establish a substantial risk of serious emotional damage to the minors. The juvenile court overruled the demurrers and proceeded with hearing testimony from Pamela Richards, the social worker who had prepared the detention and disposition reports. Thereafter, the court continued the hearing to December 8, 2009 for the second day of the contested hearing.

At the commencement of the second day, mother requested a *Marsden* hearing. The juvenile court conducted the *Marsden* hearing and denied mother's request to replace appointed counsel.⁵

After the *Marsden* hearing, county counsel informed the court that he was withdrawing the section 300, subdivision (c) allegations and that the parties had agreed to some minor modifications of the remaining allegations. The (b)(7) allegation was modified to reflect that during the domestic violence incidents on January 10 and November 30, 2008, father alleged that mother was drinking alcohol and that mother denied father's accusations. Both Rasmussen and Zebley made clear, however, that jurisdiction, as well as the petitions, were still being contested. The juvenile court then sustained the allegations in the petitions.

A disposition report was filed on January 8, 2010. Heather Murphy, the social worker who authored the report, recommended that father receive reunification services. She recommended that mother be denied services pursuant to the bypass provisions in section 361.5, subdivision (b)(13).⁶

⁵ We set forth more detail concerning mother's three *Marsden* motions in the Discussion.

⁶ Section 361.5, subdivision (b)(13) provides in pertinent part: "(b) Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, . . . : [¶] . . . [¶] That the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted

On February 18, 2010, at the commencement of the contested disposition hearing, mother requested a second *Marsden* hearing. The juvenile court conducted the *Marsden* hearing and again denied mother's request to replace appointed counsel. When proceedings resumed in open court, mother misbehaved and was directed to leave the courtroom. Counsel spoke with mother during a recess and she was permitted to come back into the courtroom before testimony began.⁷ After mother was allowed back

prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible."

⁷ After the *Marsden* hearing, the following occurred:

"THE COURT: Ma'am, you can have a seat in the jury box.

"[MOTHER]: When I'm ready. [¶] . . . [¶]

"THE COURT: [Mother], I'm aware that you are unhappy, but I'm going to have to ask you to step outside and we will proceed without you.

"[MOTHER]: You have anyway.

"THE COURT: Okay. Can you have her step out now. When you can contain yourself, we will let you in later, but you're going to step outside right now. Okay. Step outside, please. I'm not asking [father] to step outside. He's been perfectly civil. I'm asking you to step outside at this time."

On March 4, 2009, the second day of the disposition hearing, mother apologized for her behavior in a letter to the court. In the letter, mother described her behavior as "inappropriate" and stated, "I am sorry I spoke rudely and disrupted the proceedings."

into the courtroom, Rasmussen called social worker Heather Murphy to testify. After Murphy's testimony, the hearing was continued to March 4, 2010.

When the disposition hearing recommenced on March 4, mother filed a third request for a *Marsden* hearing. The juvenile court conducted the *Marsden* hearing and again denied mother's request to replace appointed counsel.

Rasmussen called several witnesses on behalf of mother -- a teacher, the manager of the motel where mother lived, a friend with whom mother attended Alcoholics Anonymous (AA) meetings, and father. Rasmussen obtained county counsel's agreement that mother could submit an offer of proof and mother also provided testimony. The court took judicial notice of the disposition report and the attached case plan in the first dependency case (filed May 4, 2004), and of the court files in the second dependency case.

At the conclusion of the disposition hearing, the juvenile court declared the minors dependents and ordered them to remain out of parents' custody. The court ordered reunification services for father but denied reunification services for mother pursuant to section 361.5, subdivision (b)(13), finding mother has history of extensive alcohol abuse and has both resisted court-ordered treatment within the three years prior to the instant petition and refused to comply with a program of court-ordered alcohol treatment on two prior occasions. Specifically, the court found mother had been ordered by the court in the 2004 dependency case to enter the Tri-Counties Residential Treatment

Program for 90 days of inpatient treatment, which "was being fully paid for by the county, [and] she was to enter and complete the Touchstone program and attend AA four times weekly." After she completed the inpatient program, she was to drug test, stay sober and show that she had the ability to live free from alcohol dependency. Mother reported that she checked herself out of the residential program after one month to "develop her own program." Although she did not comply with the court-ordered program, the case was subsequently dismissed in May 2005. Mother relapsed in September 2005. She was ordered in the second dependency case to attend 90 AA meetings in 90 days, and thereafter to attend AA three times weekly, refrain from drug and alcohol use, test, and show her ability to live free from alcohol. Although mother failed to turn in any AA logs to the social worker and the social worker did not believe she had engaged in the family maintenance case plan, dependency was dismissed in September 2007. Mother has thereafter continued to abuse alcohol. The court noted that mother admitted relapsing in March 2009, July 2009 and September 2009. During her testimony, mother actually also admitted relapsing in June 2004 and September 2005.

The juvenile court acknowledged that the minors and mother love one another but found that reunification services for mother would not be in the best interests of the minors. The minors had repeatedly been exposed to domestic violence, they had been detained on three separate occasions, and they had been in foster care for over a year and a half with at least two

different foster care providers. In light of the minors' need for stability and continuity, providing reunification services to mother was not in their best interests. Thus, the court found no exception to the bypass of services.

However, the court ordered reunification services for father. In doing so, the court indicated that continued visitation for mother would be appropriate.

DISCUSSION

I. Denial of Mother's Marsden Motions

Mother claims all three of her *Marsden* motions were erroneously denied. She contends that, at each of the three hearings, she had shown that her counsel was not providing adequate representation because he refused to present evidence and because he did not subpoena witnesses that would refute the jurisdictional allegations, show that mother could benefit from reunification services and establish that reunification services were in the best interests of the minors. She also claims the third *Marsden* motion should have been granted because, in addition to showing inadequate representation, she had shown there had been a breakdown in the attorney-client relationship.

A. Legal Standards

"Ineffective assistance of counsel is the underlying plank which supports the *Marsden* rule." (*People v. Maese* (1980) 105 Cal.App.3d 710, 723.) A party is entitled to discharge her appointed counsel only if the record clearly shows counsel is not providing adequate representation or that she and counsel have become so embroiled in conflict that ineffective

representation will likely result. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085 (*Barnett*); *In re Z.N.* (2009) 181 Cal.App.4th 282, 293-294 (*Z.N.*).) Mother has the burden of making the required showing. (See *People v. Bills* (1995) 38 Cal.App.4th 953, 961 [criminal defendant "bears a very heavy burden" of establishing inadequate representation so great as to substantially impair the defendant's right to the effective assistance of counsel].)

We review the trial court's denial of a *Marsden* motion for abuse of discretion, and will find such an abuse only where the client has shown that the failure to replace appointed counsel would substantially impair his or her right to assistance of counsel. (*Barnett, supra*, 17 Cal.4th at p. 1085, *Z.N., supra*, 181 Cal.App.4th at p. 294.) To the extent there was a credibility question between the client and counsel at the hearing, the trial court is entitled to accept counsel's explanation. (*People v. Smith* (1993) 6 Cal.4th 684, 696 (*Smith*).)

In assessing counsel's representation, consideration must be given to counsel's role. It is settled California law that appointed counsel has both the authority and the duty to control the proceedings, the scope of which includes such matters as deciding what witnesses to call, whether and how to conduct cross-examination, what motions to make, and most other strategic and tactical decisions. (*People v. McKenzie* (1983) 34 Cal.3d 616, 631; *In re Kerry O.* (1989) 210 Cal.App.3d 326, 333; *People v. Maese, supra*, 105 Cal.App.3d at p. 724.)

In criminal cases, the following have been held to be insufficient grounds for discharging appointed counsel: counsel and defendant disagreed on trial tactics (*People v. Carter* (2005) 36 Cal.4th 1114, 1199-1200; *People v. Williams* (1970) 2 Cal.3d 894, 906); counsel declined to make motions defendant wanted (*People v. Silva* (1988) 45 Cal.3d 604, 621-622); counsel refused to make a particular argument at a suppression hearing (*People v. Carr* (1972) 8 Cal.3d 287, 299). A client has no right to an attorney who accedes to all of the client's whims. (*Barnett, supra*, 17 Cal.4th at p. 1096.) Mother has offered no reason why the same rules should not apply to *Marsden* requests in the dependency context.

Instead, mother relies on excerpts of the American Bar Association Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases (2006) (hereafter, ABA Standards). Mother cites ABA Standard 7, which she notes requires the parent's attorney to "[a]dvocate for the client's goals and empower the client to direct the representation and make informed decisions based on thorough counsel." (ABA Stds., *supra*, std. 7, p. 12.) Mother further notes that ABA Standard 7 requires counsel to "understand the client's goals and pursue them vigorously," and warns that counsel "should be careful not to usurp the client's authority to decide the case goals." (*Ibid.*) However, the commentary to ABA Standard 7 provides that while the client is in charge of deciding case goals, "[t]he attorney has the responsibility to provide expertise, and to make strategic decisions about the best ways to achieve the

parent's goals." (ABA Stds., *supra*, com. to std. 7, p. 12.) ABA Standard 24, which mother did not discuss in her briefing and would apparently have us ignore, requires counsel to "[d]evelop a case theory and strategy to follow at hearings" (ABA Stds., *supra*, std. 24, p. 22.) According to ABA Standard 24, the case theory counsel develops "should . . . help the attorney decide what evidence to develop for hearings and the steps to take to move the case toward the client's ultimate goals (e.g., requesting increased visitation when a parent becomes engaged in services)." (*Ibid.*) These principles are consistent with authority granted counsel under California law, but mother has either confused her right to decide case objectives with counsel's duty and authority to decide how best to achieve those objectives, or she mistakenly believes she is entitled to dictate that her attorney implement her strategy and tactics.

Here, at each hearing, the juvenile court allowed mother ample opportunity to explain her dissatisfaction with counsel's performance, heard counsel's view of the matter, and determined ineffective representation was not occurring or likely to occur. The juvenile court did not abuse its discretion. There was no showing at any of these hearings that the failure to replace appointed counsel would substantially impair mother's right to assistance of counsel.

B. The First Marsden Motion

On December 8, 2009, the second day of the contested jurisdiction hearing before the Honorable James Reilley, mother

made her first *Marsden* motion. Before the hearing, mother submitted to the court a five-page explanation of her request to relieve Rasmussen dated December 7, 2009, a six-page letter dated November 30, 2009 mother had given to Rasmussen just before the hearing, in which she set forth things she "expected" him to do,⁸ and a copy of the ABA Standards. At the beginning of

⁸ In the November 30 letter, mother told Rasmussen: "I'm hereby asking that you take my case to trial and make the caseworker prove all the charges. Since they are false charges, I think it would be in my best interest, and in the best interest of my children, if I were to fight to prove my innocence with a full trial. Do not under any circumstances ask me to plead guilty to false charges against me. [¶] I expect you to be 100% aware of what is happening with my case at all times, and to inform me immediately of any changes. Just tell me what to do also to produce evidence, and I can probably do it. [¶] I expect you to not balk at producing evidence that there may have been false documents criminally produced with my 'signature' in order to obtain information from a social worker at a hospital that I [sic] having 'a confidential visit with me [sic] to find out if there was anything that I needed'. . . . [¶] I have proof that the first detention on March 8, 2005 was planned and know the people who conspired against my family. I will share that information with you as well. [¶] I expect you to obtain and share with me a complete copy of the case file including all case narratives. [¶] I expect you to help me compile substantial evidence to prove my innocence in this case by preponderance of the evidence. [¶] I expect you to produce legal paperwork including a complete response to all caseworker reports, declarations supporting my side of the case, and other documents as needed, and to present those documents to the judge or juvenile court referee who hears our case. . . . [¶] Dale, I also beg and expect you to do everything you can to prevent my name from being included on the central index, blacklisting people from working with children. I am innocent and my name should not be included on that list. [¶] And lastly could you ask the court for more time with the children. . . . PLEASE get that for me. Especially for Christmas. . . ."

the *Marsden* hearing, Judge Reilley indicated he had read mother's submissions.

1. Mother's written complaints

Mother discussed her attention deficit hyperactivity disorder (hereafter, ADHD) in her December 7 letter to the court, stating, "I tried to explain my ADHD and how that contributes to antisocial (not illegal or dangerous) behavior and how I am learning coping skills. He said it had no bearing on the case. As ADHD is a recognized disability by the federal and state governments[,] I have protection from certain events that have occurred in this case and from those in the past that would help my defense. He did not even want to discuss it."

In the November 30 letter to Rasmussen, she wrote, "ADHD is a condition that, especially when diagnosed and treated late in life, will likely be combined with alcoholism (also a genetic disease in my family), depression and . . . anxiety disorder. I was diagnosed three years ago last April by a panel of doctors contracted by the State of California to substantiate a claim of disability. . . . I have all of the paperwork from the team of examiners from and started drug treatment in spring of 2007. [*Sic.*] However, there were problems with insurance and my medications were not only changed several times trying to find the right one and the right dosage, there were days and weeks when I did not have any at all. My counselor through Vocational Rehabilitation retired and his replacement decided not to continue my counseling. That did not help. . . ."

Mother also stated in her letter to the court that she requested that psychological assessments be done on the minors "to prove that they were not severely emotionally abused or likely to be so" until they were detained. She stated that she told Rasmussen "I had witnesses I needed to question[] to either speak positively of my character and or parenting skills and of the physical, mental, emotional and spiritual health of my children until Ms. Richards had them detained."

Mother indicated that she wanted to challenge the detention (which had been previously litigated while mother was representing herself) based now on a claim that she had the ability to care for the minors on the day they were detained. She implied she had "witnesses to testify to my state of mind and body at the time of the arrest which would unfound [*sic*] the basis of the detention (unable to provide care)." She further stated, "Mr. Rasmussen did not want to look at the police report which proves they wrote the citation for a public nuisance charge (the excuse to have be [*sic*] removed) was written before they even met with me."

Mother further wanted to challenge the detention on the ground that the Department obtained "confidential, sensitive documents from a social worker at Oroville Hospital which revealed false, incriminating and libelous information" and that this information was obtained in violation of her HIPAA⁹ rights.

⁹ Health Insurance Portability and Accountability Act of 1996. (42 U.S.C. § 1320d et seq.)

She complained that Rasmussen refused to investigate this or "request original documents."

Mother further complained about the Department's reports, saying that there had never been any proof that she was suicidal and that she "offered Mr. Rasmussen proof from the police department, the district attorney's office and the office of Butte County Behavioral Health to those effects [sic]. He refused to see them." She also complained that Rasmussen "needed to point out that all though [sic] there have been numerous arrests[,] I have not been charged with anything in twenty years in Chico except for one six-year-old DUI and one misdemeanor." And she stated, "I needed testimony to belie the very damaging impression made in the Jurisdiction Report that I have been in a constant state of inebriation for most of my adult life -- which is vastly untrue."

She further alleged in her letter to the court that at the beginning of the hearing on December 1, Rasmussen violated her rights "by submitting [to] the detention and jurisdiction hearing reports on my behalf and by waiving my right to a full trial on the issues and the contested allegations, facts and charges." She explained that at their meeting the day after the December 1 hearing, she told Rasmussen that "his performance at the opening day of the hearing . . . was absolutely unacceptable and changes had to be made in order for him to adequately, effectively, and legally defend me."

2. Colloquy during the first *Marsden* hearing

Rasmussen noted that he had not been provided with mother's submissions as required by the local rules,¹⁰ and indicated he would waive that requirement to expedite the hearing. Mother told the court she had been unaware "that was the protocol." Rasmussen offered to outline the differences between his approach and mother's desires as a way to start the hearing.

¹⁰ Butte County Superior Court rule 17.9, effective in 2010, provided in pertinent part as follows:

"(A) Complaints concerning the Court-Appointed Juvenile Attorneys shall be dealt with as follows:

"1. Any party to a juvenile court proceeding may lodge a written complaint with the Presiding Judge of the Juvenile Court concerning the performance of his or her appointed attorney in a juvenile court proceeding. . . .

"2. Upon receipt of a written complaint, the Court shall notify the attorney in question of the complaint, shall provide the attorney with a copy of the complaint, and shall give the attorney fifteen (15) days from the date of the notice to respond to the complaint in writing.

"3. After response has been filed by the attorney or the time for the submission of a response has passed, the Court shall review the complaint and the response, if any, to determine whether the attorney . . . has acted incompetently. The Court may ask the complainant or the attorney for additional information prior to making a determination on the complaint.

"4. If, after reviewing the complaint, the response, and any additional information, the Court, either in writing or at oral hearing, finds that the attorney acted . . . incompetently, the Court shall take appropriate action.

"5. The Court shall notify the attorney and complaining party either in writing or by oral ruling at closed hearing of the determination of the complaint. The Court's determination shall be final."

Rasmussen indicated that he had had two lengthy meetings with mother in which he described his approach. He had, indeed, informed mother that many of the items outlined in her letter were "not relevant or extremely burdensome" to him and the court process. While he did not "parse out" what things he would be doing that fell within her demands, he told her that he "would not be doing every single thing that she demanded." He stated he would, however, do those things necessary to protect her interest in the minors, to protect her reunification with the minors, to promote contact and visitation with the minors, and to present relevant evidence at the jurisdiction hearing. He felt he was communicating fairly well with mother at that point and requested that he not be relieved.

Mother responded that Rasmussen told her he wanted to work for reunification, but she was of the opinion that reunification was not likely unless some of the information in the jurisdiction report was "stricken, revised, challenged, or at least augmented by some positive comments from people."

She complained that nothing was said in the jurisdiction report about her ADHD. She told the court that her ADHD "is not an excuse but a contributing factor and something I have been working on. I didn't find out until late that I had ADHD. By that time, the compulsion to drink had kicked in about eight and a half years ago and that is when I started using it rather than just drinking to go keep me focused and calm." She further stated she wanted to present some of the efforts she made at sobriety, although she acknowledged an understanding that this

information would be provided when reunification was addressed at the disposition hearing. Nevertheless, she thought it important to change her image in the jurisdiction report. Mother stated there had been periods of sobriety, although there had been occasions when she relapsed "limited to what there has been a report on." "It is just that when I do drink, I bring it to the public's attention as you can see."

Mother went on to tell the court, "I do have a problem with authority figures, and the Chico Police Department have [sic] responded accordingly. And I am . . . on their list to rule [sic] the tape every time they have contact with me as you can see. So does Enloe Hospital. . . . I have several complaints with Enloe and with the Chico Police Department, which have not put me at a fair leg with them. But I have in 20 years been charged and found guilty of one DUI six years ago and one misdemeanor I pled to yesterday. It was a DUI and they put it to a misdemeanor[, Penal Code section] 673(f) [sic], I think. And the 5150s offered to furnish proof that those were all dismissed in terms of suicidal ideation. That was just drama activity that is typical of somebody with ADHD without medication and solely compounded with consumption of alcohol."

Mother stated she wanted the minors to be interviewed by the court in "closed chambers" and to be psychologically assessed to establish they had not sustained severe emotional damage, the legal definition with which she was familiar from the National Adoption Commission Clearinghouse. "None of it applies."

Rasmussen responded that it seemed he had not adequately explained to mother the difference between jurisdiction and disposition, and that some of the information he had concluded was irrelevant to jurisdiction could perhaps be relevant to disposition. In response to mother's complaint that Rasmussen was not calling witnesses or presenting documents, he explained that based on the testimony of the social worker so far, "there were four specific allegations contained in the petition, and in my opinion there is already ample evidence to sustain jurisdiction on the (b) allegations. I don't see any profit to my client to bring other witnesses in. I see a danger in a tactical and strategical [sic] sense of bringing in more information than I would like to see, particularly in subpoenaing her children, which I don't like to do generally. I cannot see how it's going to help our case. In other words, if the Court has jurisdiction, all we can do is mess it up some more." He further commented that he did not believe they could reargue the detention since there had already been a contested hearing, and reiterated that it would not be productive to introduce witnesses or documents not relevant to jurisdiction.

Mother then argued that her alcohol use had not caused the minors emotional damage and that the four incidents Rasmussen mentioned had been tied to the emotional abuse allegations. She repeated her request that the minors be interviewed and subjected to psychological examinations. The juvenile court commented that both Rasmussen and Zebley had raised appropriate

questions regarding the section 300, subdivision (c) emotional damage allegation.

Mother interrupted, "He's already given up. He just stated that." The juvenile court corrected her, stating "he did not just state that." The court then noted that if there was a finding of jurisdiction, there would be a disposition hearing involving issues related to reunification. Thereafter, the court ruled, "But based on everything that has been presented, I am confident that Mr. Rasmussen can represent you well. So your request is respectfully denied."

The following then took place:

"[MOTHER]: So you therefore deny me my rights as well --

"THE COURT: Right now --

"[MOTHER]: -- on the record.

"THE COURT: I am denying your request to have Mr. Rasmussen relieved and another public defender appointed for you.

"[MOTHER]: Can you cite any reason why, sir?

"THE COURT: I think I just did. And that's all I'm going to state on the record right now."

3. Analysis

On appeal, mother essentially repeats the same contentions made at the *Marsden* hearing and further asserts that counsel refused to present a defense at the jurisdiction hearing. We read what occurred differently. Mother failed to demonstrate that her counsel was not providing adequate representation or that he would not do so in the future. Counsel's actions were

not unreasonable, but some of mother's demands were. As we have noted, while the client decides the objectives -- for example, to contest jurisdiction -- counsel decides the tactics and strategy to employ to achieve those objectives.

As for mother's objective of revisiting detention after she was unsuccessful in her attempt to contest detention on her own, counsel explained he had determined that challenges to the initial detention were inappropriate. We find no fault with counsel's opinion and view his position as reasonable. Indeed, on appeal, mother does not state how the outcome of the detention hearing, in which she represented herself, could have been successfully challenged at that point.

As for the evidence she wished to present at the jurisdiction hearing pertaining to ADHD and her positive character traits, counsel's assessment that such evidence would not benefit her at that stage and that the attempt to present such evidence might actually work to mother's detriment was also reasonable. Again, even on appeal, mother fails to demonstrate how the proposed evidence would tend to negate any of the section 300, subdivision (b) allegations.

With respect to psychological testing for the minors and having them testify, counsel explained that he did not believe it would help mother at jurisdiction. The evidence mother sought to introduce would have been relevant to the section 300, subdivision (c) allegations of serious emotional damage or substantial risk of serious emotional damage, and as it turned out the minors' testimony was not necessary. Parents' counsel

effectively cross-examined the social worker on the matter and, demonstrative of the reasonableness of counsel's tactics, the Department voluntarily withdrew the subdivision (c) allegations at the beginning of the second day of the jurisdiction hearing, immediately after the instant *Marsden* hearing. Thus, the record discloses explicit and rational tactical purposes for counsel's decisions.

Mother's contention that "Rasmussen's refusal to subpoena witnesses that mother wanted to call should have been enough to demonstrate that he was failing to provide adequate representation" ignores the fact that the determination of what witnesses to call, if any, is counsel's decision. Under the circumstances presented here, it was reasonable to contest jurisdiction by focusing on the subdivision (c) allegations and examining the social worker without calling witnesses.

We also reject mother's claim that her attorney improperly argued against her by stating that he believed the Department had ample evidence to support jurisdiction. Rasmussen made these comments in response to mother's complaints about his failure to call additional witnesses. Rasmussen did not concede jurisdiction, as the *Marsden* hearing took place during a *contested* jurisdiction hearing. Nor did the juvenile court construe counsel's remarks as a concession to jurisdiction, as shown by the court's response to mother when she complained counsel had given up. Counsel's assessment that there was ample evidence on the "(b) allegations" was not a concession, but rather an explanation of his realistic strategic assessment

that there was nothing to gain by bringing in other witnesses; indeed, perhaps there was something to lose. Mother's contention that counsel submitted to jurisdiction is inconsistent with the record, which reflects that counsel reiterated, "we are contesting the jurisdiction and the petition."

Mother candidly admitted during the hearing that she has "a problem with authority figures," and further explained that she is apparently not in good standing with the local police agency and a local hospital. The court was free to consider mother's self-assessment in this regard.

In sum, the juvenile court did not abuse its discretion in denying mother's first motion.

C. The Second Marsden Motion

On February 18, 2010, at the commencement of the disposition hearing before the Honorable Tamara Mosbarger, mother requested another *Marsden* hearing. Mother submitted a seven-page letter dated February 17, 2010 outlining her complaints.

1. Mother's written complaints

Up to page four, mother's letter was essentially the same letter she submitted December 8, 2009. Thereafter, she added that she had met with Rasmussen only twice since the December hearing and that her phone calls and e-mails went unanswered.

Regarding her ADHD, for the first time mother indicated she was currently under the care of a psychiatrist, Dr. Michael Little. She had not mentioned that in either of the letters she

had previously given the court; nor had she mentioned it during the December 7 *Marsden* hearing. In her February 17, 2010 letter, mother stated that she had asked Rasmussen to have Dr. Little testify but Rasmussen refused. Mother did not state in her letter what Dr. Little would say if he testified. Instead, she asserted that Rasmussen told her, "any information regarding [her] status as a sufferer of ADHD or [her] progress toward dealing with the affliction was 'hearsay and irrelevant' to [her] case."

As for witnesses, in the first of the two meetings after the jurisdiction hearing, mother stated that Rasmussen asked mother to bring him a list of witnesses. In the second meeting, "he . . . proceeded to check off almost every witness that [she had] provided as irrelevant, for example, a baseball coach of Alexander's for the last three years who saw [her] children and [her] at least once -- usually twice a week for several hours for three months -- and could testify to [her] sound behavior and fitness as a mother." Rasmussen told mother that these "character" witnesses could not establish her sobriety because she could have been drinking outside of their presence and been sober when she was around them. She stated that Rasmussen "basically accus[ed] [her] of being a liar, continual drunk, and a fraud as a mother and as a professional."

During their meeting on February 15, Rasmussen told mother, "if [she] wanted witnesses at this or any hearing, that [she] would have to get them to come [her]self, knowing full well that gave [her] only two and one half days to make arrangements with

them." She stated that several people were willing to testify but could not do so on short notice.

Mother complained about Rasmussen's performance during the jurisdiction hearing, asserting that he had not challenged anything negative or false in the Department's report. She further complained that Rasmussen had refused to discuss his strategy, "which I am now certain is no strategy whatsoever." She threatened to "fire" Rasmussen and hire counsel or represent herself if Judge Mosbarger declined to relieve him. She claimed she had already talked to another attorney.

2. Colloquy during the second Marsden hearing

At the inception of the hearing, Rasmussen objected that he had again not been provided notice of mother's complaints pursuant to the local rules. In response to Rasmussen's request for a continuance so he could respond, the court deferred ruling until it heard from mother. The court told counsel he could thereafter renew his objection. The record does not reflect that the objection was renewed.

Mother told the court that she had asked Rasmussen to challenge the jurisdiction report and that he refused to do so, telling her, "There was . . . four times as much needed -- for the Court to get juris over the children." Mother stated that she wanted to dispute some of the history in the record -- specifically, she objected to Department reports including incidents that were characterized in the reports as "unfounded" -- and she wanted positive things about her included in the reports. She again stated she wanted the minors to speak to

the court because the minors "have privately to me disputed equivocal facts." She complained that Rasmussen "submitted to the jurisdiction report" against her express wishes.

As for her ADHD, all mother said during the hearing was, "I wanted someone that would take my primary condition of ADHD a little more seriously and how hard I've been trying to find the right doctor, the right medications to balance myself out so I don't self-medicate. So I don't act irrationally. . . . So I don't have problems with authority figures. So I don't act impulsively or say things that are on my mind that don't need to be said. That I can follow through with projects. I have 20 projects going. And I was diagnosed so late -- I was diagnosed by the State and was granted disability even though I applied for disability for my hips. They reviewed the record evidently and asked me to come in for [a] psychological evaluation, which surprised me. And about three weeks later I got a call saying I had been granted disability based on the mental illness of ADHD, chronic anxiety and depression, which commonly goes with my type of ADHD. It's the left temporal lobe." She went on to explain she had been sober for five months. She did not tell the court about conversations she allegedly had with Rasmussen regarding Dr. Little. Nor did mother mention that she wanted Dr. Little to testify or what Dr. Little might say if were called to testify.

Rasmussen informed the court that in preparing for the disposition hearing, he received funds for an investigator. Thereafter, he and his investigator reviewed the jurisdiction

report, including its extensive list of police reports, hospital reports, and other materials, but determined there were no witnesses contained therein that would help mother at disposition. He and the investigator reviewed mother's list of requested witnesses with mother, but found only one, a current teacher of the minors, that he opined meritorious of being subpoenaed. The investigator attempted to subpoena the teacher but discovered she was unavailable on the hearing date, so counsel exercised his discretion to forgo her testimony. Mother still wanted a number of other people present, and Rasmussen agreed that if she got them to the hearing, he would talk to them and see if he would call them as witnesses. Mother explained that she was unable to get any of the witnesses to the hearing on such short notice.

When the juvenile court asked counsel about having the minors speak with the court, counsel stated that he had told mother that he was "very uneasy about demanding that the children be present" and he did not feel it was relevant to whether mother would get services in this case. He believed dragging the minors to court to have them inconvenienced, and possibly scared or upset or feeling disloyal to mother, was not "a good tactical move."

Regarding mother's contention that the detention and jurisdiction reports contained inaccuracies, Rasmussen told the court that he tried to explain the legal ramifications of the information in those reports in connection with tactical decisions and courses of action. But he also noted that keeping

mother "on track" was a challenge. He explained that the information mother had was not relevant to jurisdiction, that the Department had enough information to prove jurisdiction, and that it was not in mother's best interest to introduce more evidence at the jurisdiction hearing.

When asked if the witnesses mother wanted him to call went "to rebutting the basis for the bypass, which is [mother's] chronic alcoholism and failure to treat," Rasmussen responded that his "best impression is that, no, they do not" -- that most of the witnesses would be "some variety of . . . character witness," but that "[n]one of the witnesses, to [his] understanding, rebut the essential premises [sic] which is that she was resistant to Court-ordered treatment in a three-year period prior to the detention."

Based on the information provided, the juvenile court denied mother's second motion. The court indicated it wanted to proceed with the testimony of the social worker and would entertain a request for a continuance to have the teacher testify.

We find no abuse of discretion in the juvenile court's ruling. The record affirmatively provides counsel's tactical reasons for not calling the minors and other witnesses mother wanted. (See *People v. Fosselman* (1983) 33 Cal.3d 572, 581-582; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059.) Counsel is not required to indulge in idle acts or call irrelevant witnesses in order to appear competent. (*People v. Terrell* (1999) 69 Cal.App.4th 1246, 1252-1253 (*Terrell*).)

We reject mother's argument on appeal that she established counsel was providing ineffective representation because the minors' testimony could be relevant on the issue of denial of services. Mother points out that despite the existence of grounds for denying services, reunification services may still be provided if the parent establishes that it would be in the minors' best interests. (§ 361.5, subd. (c), 2d par.) While this statement of law is correct, counsel's decision not to call the minors as witnesses was still tactically reasonable.

First, the minors' bond with mother was not the subject about which mother was seeking to have the children speak. She wanted them to refute facts that supported the initial detention. Second, evidence of the minors' bond with mother, which may be relevant to a determination of their best interests, did not appear to be a subject of dispute. Third, the minors' testimony is not the sole means by which counsel could present such evidence. And fourth, even assuming a strong bond between mother and the minors, much more than a bond would be needed to avoid denial of services. When section 361.5, subdivision (b)(13) is found applicable, the juvenile court "shall not order reunification for a parent . . . unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child." (§ 361.5, subd. (c), 2d par.) "To determine whether reunification is in the child's best interest, the court considers the parent's current efforts, fitness, and history; the seriousness of the problem that led to the dependency; the strength of the parent-

child and caretaker-child bonds; and the child's need for stability and continuity." (*In re Allison J.* (2010) 190 Cal.App.4th 1106, 1116 (*Allison J.*)).) Thus, counsel could reasonably determine it best to forgo the minors' testimony, especially considering the fact that damaging testimony related to the occasions when the minors observed mother in an intoxicated state, their observations of mother's erratic behavior, and their observations of the domestic violence in the home, could be elicited by opposing counsel on cross-examination or by the court.

The juvenile court did not abuse its discretion in denying mother's second *Marsden* motion.

D. The Third Marsden Motion

When the juvenile court continued the disposition hearing on February 18, it told the parties, "I'm going to continue this matter because [mother] had indicated she had at least one witness she was interested in calling and was unsuccessful in having her appear today, and I would like her to meet with Mr. Rasmussen and see if there [are] any other witnesses that would assist with regards to this case." The court went on to emphasize that the issues it perceived were the bypass questions of whether mother had a history of alcohol abuse and had resisted court-ordered treatment during the three-year period prior to the filing of the current petitions or had failed or refused to comply with a treatment program in her case plan on at least two prior occasions. The court further emphasized that any witnesses mother called should be relevant to those issues,

not whether she is "a good mom" or whether she loves the minors. The court further indicated it would require an offer of proof regarding any witnesses who were not going to address the bypass issues.

On March 4, 2010, the second day of the disposition hearing, mother made a third *Marsden* motion. In her written motion, mother asserted that she and counsel had "become so embroiled in such an irreconcilable conflict that ineffective representation is likely to result." Attached to the motion was the mother's letter to Rasmussen dated March 1, 2010. The court indicated that it had received the written motion.

1. Mother's written complaints

In her March 1 letter, mother stated that her meetings with Rasmussen have "followed the same pattern" of Rasmussen continually telling her that evidence and witnesses she wanted him to present were irrelevant. She stated that at each meeting, she had given him documentary evidence or names of witnesses and each time, he would tell her the information was "pointless" and yell at her that strategy was his decision. She accused him of not following through on the things he told the court he would do, being biased against her, behaving like an agent for the prosecution, and having no strategy at all, "unless it is to make certain [mother's] family is torn asunder."

Mother complained that counsel was not following up on "blatant" HIPAA violations regarding records the Department obtained from Oroville Hospital in September 2009, asserting

that those records had been obtained by forgery and/or fraud. She contended that revealing this fraud would cause "this case to dissolve in a heartbeat" and implied that Rasmussen had a monetary motivation for refusing to look into this because he and Department personnel are paid by the County, and the alleged HIPPA violations would expose the County to civil liability.

Mother further complained that counsel did not contact her or respond to her calls or e-mails between the jurisdiction and disposition hearings. After the disposition hearing was continued, he did not meet with her until 16 days later. At that meeting, she told him she became aware that he and his investigator had either "flatly lied" to her or neither of them knew much about dependency law or standards of practice. She did not say what lies she had allegedly been told.

As for her ADHD, mother wrote: "I have tried to discuss many times with you the diagnoses that prove I suffer from ADD/ADHD, the symptomatology [*sic*] connected with that disorder and how that relates to some of my out-of-the-norm behavior and my use of alcohol in an effort to self-medicate. Anxiety and depression frequently accompany ADHD, as in my case, and a preponderance of untreated ADHD sufferers turn to alcohol and/or drugs in an effort to find some relief from those symptoms.

. . . These diagnoses are based in [*sic*] detailed assessments carried out by no less than four or five highly trained and qualified psychiatrists, the most recent being the expert opinions expressed by Dr. Michael Little, a psychiatrist with Feather River Behavioral Health in Paradise. Dr. Little is my

psychiatrist and is currently treating me for adult-diagnosed ADD/ADHD. Part of his program for treatment is settling on the correct combination of medication that will be effective in controlling the symptoms of ADHD, anxiety and depression. Dr. Little's stated prognosis [*sic*] is that my use and abuse of alcohol is a direct outgrowth and a component of the symptomatology [*sic*] of my ADHD. His professional opinion is that *if I can find the correct combinations of medications to control the ADHD, and its attendant anxiety and depression, the likelihood that I will in a far better position to control my alcohol problems.*¹¹ You were informed of this many times during the course of our meetings. After Judge Mosbarger said on February 18 that she wanted to hear from witnesses who could testify competently about the likelihood of my continued sobriety, I pointed this out to you again and your assessment that any written communication from Dr. Little to the court would be nothing more than hearsay. I specifically requested you to subpoena him, which request you specifically refused to

¹¹ This was a more equivocal statement than what counsel asserted at oral argument. At oral argument, counsel said mother told the court her psychiatrist would testify in substance that "the reason she has so much trouble with alcohol -- *she is not an alcoholic in the sense of chronic use of alcohol*, but that she has ADHD, that people with ADHD often use alcohol in place of medication and that "*if she got on appropriate medication, she would not have so much trouble with alcohol.*" We find nothing in the record of the Marsden hearing that supports the unequivocal statement that appropriate medication would reduce mother's alcohol abuse. We discuss the implications of what mother actually told the court, *post*.

do, based on your evaluation that the judge does not like to keep health care professionals standing around waiting to testify. Dr. Little would be a key witness for me and you refused to call him." (Italics added.) This was the first time mother gave the court any clue as to what Dr. Little *might* say were he to testify.

2. Colloquy during the third *Marsden* hearing

At the beginning of the hearing, Rasmussen told the court that he had not been served with mother's third *Marsden* motion and he had no notice of the motion as required by local rule. He requested that the court summarily deny mother's motion and that he be relieved as mother's counsel on his own motion "because I don't believe I can work with [mother] anymore." When the court asked Rasmussen whether he thought there had been a breakdown in the relationship to the extent that he could not work with mother, Rasmussen said that he did not think that had been the case before the third *Marsden* motion, but that he was currently of that opinion. When asked if he thought there was a personality conflict, Rasmussen said that there was at that point. He added that certain times mother did not understand what was happening procedurally and that he was unable to help her understand so they could productively move forward to prepare for the hearings.

The court then asked mother the basis for the motion. Mother stated that she had begged counsel to have the minors present because of their strong bond. The following then took place:

"THE COURT: Okay. The bond between your kids is not relevant to the family reunification services. That would certainly be relevant if we were at issue with regards to termination of parental rights, but that is not the issue we're looking at here. Whether or not you have a chronic alcoholism problem is the issue we're looking at.

"[MOTHER]: What do you mean by chronic?

"THE COURT: Okay. So the Court is going to deny your request, Mr. Rasmussen.

"[MOTHER]: I also asked for Dr. Little to be here. He is the psychologist that is treating me for ADHD. He is also maintaining -- examining my alcoholism. Has requested meetings. I talked -- was on court probation for three years for drunk in public, and keep logs for them as well, and test for them if they like. They actually pulled me over twice just to search my car. Kind of cool because there was nothing there.

"THE COURT: Okay.

"[MOTHER]: But I asked Mr. Little to be here, and [Rasmussen] stated that he didn't want to irritate you because you don't like professionals sitting around during lengthy court proceedings waiting to talk and disrupt their schedules. And I had a bunch of letters from people in the program and my sponsor. And they were inadmissible as far as [Rasmussen] was concerned 'cause they were construed as hearsay even if submitted under penalty of perjury. So I lost a whole bunch of witnesses that couldn't be here or that couldn't - he wouldn't subpoena to try and prove my efforts in the past. And not

excuses certainly but -- and not even reasons. It's difficult for me to explain my efforts and achieve sobriety from a lay and even legal practical standpoint and also to admit [the] great responsibility that I have in creating these circumstances that my family is in now.

"THE COURT: Okay. The Court -- having heard from Mr. Rasmussen and [mother], I'm finding that Mr. Rasmussen has properly represented the defendant and will continue to do so. I find that there has not been a breakdown in the relationship between the attorney and [mother] of such kind as . . . would make it impossible for Mr. Rasmussen to properly represent the defendant. I find that any deterioration in the relationship has been occasioned by [mother's] willful attitude. And there's no reason why in the future she cannot be adequately represented by Mr. Rasmussen, if she wants to be. So the motion is denied."

3. Analysis

Again, we find no abuse of discretion in the juvenile court's ruling.

Regarding the purported breakdown in the attorney-client relationship, this case is very much like *Z.N.* In that case, counsel for the mother asked leave to withdraw on the grounds that she felt she and her client did not get along and that their communication was "severely broken down." (*Z.N.*, *supra*, 181 Cal.App.4th at p. 289.) Counsel stated, "I cannot represent [mother] anymore" and insisted, "at this point there is no way we can work together, even through the remainder of [the section 366.26] hearing." (*Id.* at pp. 289 & 291.) The juvenile

court denied the motion, and the Court of Appeal held that the juvenile court did not abuse its discretion in doing so. There is no abuse of discretion where the reason for the breakdown in the attorney-client relationship is the voluntary conduct of the client. (*Id.* at p. 294.)

Here, as in *Z.N.*, the juvenile court found that counsel was able to continue providing adequate representation and that any deterioration in the attorney-client relationship was due to mother's willful attitude. We conclude that the court did not abuse its discretion in so finding.

Almost immediately after counsel was appointed, mother presented him with demands setting forth exactly what she "expected" from him. Despite repeated explanations as to why many of her demands would not be met, and repeated explanations that tactics, including what evidence to present, was to be decided by counsel, mother has persevered with her demands and dissatisfaction. That mother presented a difficult challenge for counsel is apparent from mother's in-court conduct. Her railing against Judge Reilly and the misbehavior that resulted in Judge Mosbarger ejecting mother from the courtroom after the second *Marsden* hearing are illustrative of mother's behavioral problems. Indeed, as we have previously noted, during the first and second *Marsden* hearings, mother admitted having trouble dealing with authority figures. Mother "may not force the substitution of counsel by [her] own conduct that manufactures a conflict." (*Smith, supra*, 6 Cal.4th at p. 696.) The juvenile court did not abuse its discretion in denying mother's motion on

the ground that there was an irreconcilable conflict between mother and counsel.

We also reject mother's renewed complaints about Rasmussen not calling witnesses at the jurisdiction hearing. Rasmussen's strategic decision to wait until the disposition hearing was reasonable. And Rasmussen did call witnesses relevant to the bypass issues at the disposition hearing.

Likewise, we reject mother's complaints about evidence concerning her ADHD and the potential testimony of Dr. Little, who she variously described as her psychiatrist or psychologist. Mother contends that these complaints demonstrated to the juvenile court a substantial likelihood that she was not receiving adequate representation. Mother complains that Dr. Little's testimony was relevant on the section 361.5, subdivision (b)(13) issue of whether mother was resistant to treatment. On this point, mother contends that Dr. Little's testimony could have established that her resistance was the result of not having previously received effective treatment because of the need to treat her previously undiagnosed ADHD in order to treat her alcoholism. Citing *In re Ethan N.* (2004) 122 Cal.App.4th 55, 66 (*Ethan N.*), mother also contends that Dr. Little's testimony would have been relevant on her section 361.5, subdivision (c)¹² claim because the testimony

¹² Section 361.5, subdivision (c) provides in pertinent part:

"(c) [¶] . . . [¶] The court shall not order reunification for a parent or guardian described in paragraph . . . (13) . . .

would have been probative of the gravity of her problem and her current efforts to address the problem.¹³

Mother's argument overstates the relevance and probative value of Dr. Little's potential testimony, as it was explained by mother to the juvenile court. Mother's clearest explanation of what Dr. Little would say was in her letter dated March 1, 2010, which was attached to her third *Marsden* motion. There, mother stated that "[p]art of his program for treatment is settling on the correct combination of medications that will be effective in controlling the symptoms of ADHD, anxiety and

of subdivision (b) unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child."

¹³ In her reply brief, mother argues that respondent did not respond to these contentions in its briefing and, therefore, we should deem the failure to respond a concession. While respondent's failure to address mother's argument in its respondent's brief may have been "unwise as a tactical matter," the law does not require us to treat the failure to respond as a concession that the argument has merit. (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; see also *Kruger v. Department of Motor Vehicles* (1993) 13 Cal.App.4th 541, 546 ["We are aware of no rule of law which would compel this court . . . to resolve the various legal issues advanced by appellant in his favor solely because respondent had failed to address them adequately or at all"].) Even when a respondent files no brief at all, that failure is rarely treated as a concession of the appeal's merit. Instead, most courts "follow the better practice of examining the record on the basis of appellant's brief and reversing only if prejudicial error is found." (*Roos v. Kimmel* (1997) 55 Cal.App.4th 573, 594, fn. 12, and cases cited therein; see also Cal. Rules of Court, rule 8.220(a)(2) [in absence of respondent's brief, "the court may decide the appeal on the record, the opening brief, and any oral argument by the appellant"].)

depression." She then claimed that Dr. Little opined that "*if* [mother] can find the correct combinations of medications to control the ADHD, and its attendant anxiety and depression," *then* there is a "*likelihood* that [she] will be in a far *better position* to control [her] alcohol problems." (Italics added.) As we shall explain, the failure to procure and present this evidence does not demonstrate mother was not receiving effective representation.¹⁴

Subdivision (b)(13) of section 361.5 reflects a legislative determination that when a parent is shown to be a chronic substance abuser who has resisted prior treatment for substance abuse, reunification services are likely to be futile and attempts to facilitate reunification do not serve the child's interests. (*William B.*, *supra*, 163 Cal.App.4th at p. 1228; *In re Kenneth M.* (2004) 123 Cal.App.4th 16, 20; *In re Levi U.* (2000) 78 Cal.App.4th 191, 200.) Experience tells us that such a parent has a high risk of reabuse. (See *In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 478.) "This risk places the parent's interest in reunifying with her child directly at odds with the child's compelling right to a 'placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child.'" (*In re Marilyn H.* (1993)

¹⁴ Mother does not contend on appeal that the juvenile court failed to adequately investigate this *Marsden* claim. (*People v. Maese* (1985) 168 Cal.App.3d 803, 808-809; *People v. Penrod* (1980) 112 Cal.App.3d 738, 746-747; *People v. Groce* (1971) 18 Cal.App.3d 292, 296.) Therefore, we need not consider that issue and we express no opinion on the matter.

5 Cal.4th 295, 306.)" (*William B., supra*, 163 Cal.App.4th at p. 1228.) Thus, when the juvenile court determines by clear and convincing evidence that the circumstances in section 361.5, subdivision (b)(13) exist, reunification services cannot be ordered unless "the court finds, by clear and convincing evidence, that reunification is in the best interest of the child." (§ 361.5, subd. (c), 2d par.; *D.B. v. Superior Court* (2009) 171 Cal.App.4th 197, 202.)

With this in mind, the juvenile court focused on whether mother fell within the provisions of section 361.5, subdivision (b)(13), by having resisted court-ordered treatment. Contrary to mother's assertion on appeal, Dr. Little's proffered opinion, as she described it, would not affect the juvenile court's section 361.5, subdivision (b)(13) analysis. As more fully developed in connection with our discussion of mother's challenge to the juvenile court's section 361.5, subdivision (b)(13) finding, *post*, that subdivision involves an analysis of whether mother resisted court-ordered treatment. It does *not*, however, involve an analysis of the suitability of the court-ordered treatment for a specific individual's specialized needs. Thus, the evidence would have been irrelevant to the extent it would have been offered to prove that point.

While Dr. Little's proffered opinion was irrelevant to a section 361.5, subdivision (b)(13) analysis, it would have some relevance to an analysis of the best interests of the minor under section 361.5, subdivision (c). The proposed evidence as stated by mother, however, was not very probative on this issue

and, in our judgment, would not have assisted her on this theory. Dr. Little's opinion, as described to the court by mother, had caveats. There was a "likelihood" only of her being in "a *far better position* to control [her] alcohol problems." But even then, being in far better position was contingent on "if" the "correct combination of medications" could be found to control her ADHD, anxiety *and* depression. This fell short of assuring mother would no longer be resistant to treatment and that postponing adoption for a new, yet to be determined and unproven treatment regimen was in the minors' best interests.¹⁵

As previously explained, a determination of whether reunification is in the child's best interest requires consideration of "the parent's current efforts, fitness, and history; the seriousness of the problem that led to the dependency; the strength of the parent-child and caretaker-child bonds; and the child's need for stability and continuity." (*Allison J.*, *supra*, 190 Cal.App.4th at p. 1116; see also *Ethan N.*, *supra*, 122 Cal.App.4th at pp. 66-67.)

In *William B.*, the minors were detained and returned to their parents three times, while the parents were provided extensive services to address their drug dependency. The juvenile court found by clear and convincing evidence that both parents had a history of chronic drug use and had resisted court-ordered treatment but nonetheless gave the mother "one

¹⁵ See footnote 11, *ante*.

more chance'" and ordered reunification services. (*William B.*, *supra*, 163 Cal.App.4th at pp. 1223, 1226.) The appellate court reversed. (*Id.* at pp. 1227-1229.) Regardless of a child's bond to his mother, the best interests of a child are not served by merely postponing the child's chance for stability and continuity and subjecting the child to another failed placement with the parent. (*Id.* at p. 1229.) In *William B.*, the children had been repeatedly removed from the parents' custody because of the parents' substance abuse. Under those circumstances, the court held that "at least part of the best interest analysis must be a finding that further reunification services have a likelihood of success." (*Id.* at p. 1228.)

As noted in *William B.*, "[s]ubstance abuse is notoriously difficult for a parent to overcome, even when faced with the loss of her children. [Citation.] And the mother's history demonstrated such a difficulty." (*William B.*, *supra*, 163 Cal.App.4th at p. 1228.) Similar to the mother in *William B.*, mother here has a longstanding alcohol abuse history spanning over a decade. She has a significant child welfare history resulting in the removal of the minors from her custody on three separate occasions. She also has a history of complying with services, maintaining her sobriety while under supervision, and then returning to alcohol abuse shortly after dependency is terminated.

We recognize that mother claimed to have five months of sobriety and to be on a new medication regimen at the time of the hearing. However, as noted, mother has had long periods of

sobriety (at least 12 months) in the past and then resumed her alcohol abuse. Additionally, it appears that her new medication regimen was, indeed, quite new, rendering her permanent adjustment to it impossible to determine.¹⁶ Although counsel stated mother's "new" medication regimen (consisting of Adderall, Cymbalta and Ativan) was "having some [e]ffect on her ability to control herself," mother had an outburst in court during the February 18, 2010 hearing only two weeks earlier. Indeed, that outburst came moments after the *Marsden* hearing, during which mother stated that she had been "trying to find the right doctor, the right medications" to balance herself so she did not self-medicate, act irrationally and impulsively, and have problems with authority figures. Later, during her testimony at the March disposition hearing, mother associated her misbehavior with her ADHD, stating "I am still trying to understand a bit more about ADHD and why my outburst in court, for example, was extremely inappropriate." Assuming mother's outburst was the result of ADHD, it is apparent that whatever new treatment mother was undergoing had not been completely effective at that point.

Reunification services, when provided, are presumptively limited to a period of 12 months, not to exceed 18 months, from

¹⁶ Medical records reflect mother's medications varied greatly during the period between April 2008 and the time of the minors' most recent detention in September 2009. At the time of the February 18, 2010 hearing, mother explained to the court that she had "been trying" to find the right doctor and medications to treat her ADHD and was seeing Dr. Little at the time.

the date a child (over the age of three) was initially removed from parental custody and entered into foster care. (§ 361.5, subd. (a)(1), (3); *In re A.C.* (2008) 169 Cal.App.4th 636, 642-643.) Here, the minors were initially removed on September 22, 2009. In light of mother's history of maintaining long periods of sobriety while under supervision and then resuming alcohol abuse, the time it would take to determine the effectiveness of her new medication regime *and* to maintain sobriety long enough to risk returning the minors to her custody again would exceed the statutory period of reunification services. "'Childhood does not wait for the parent to become adequate.'" (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1016.)

In a situation such as this, with minors who have been repeatedly removed from mother's custody, a best interests finding requires a likelihood that reunification services would succeed. (*William B., supra*, 163 Cal.App.4th at pp. 1228-1229.) In sum, even with the proposed testimony of Dr. Little, as outlined by mother, there would be no substantial evidence to support a finding that reunification, this time, would be permanent and would provide the minors with "permanency and stability throughout the remainder of their childhoods." (*Id.* at p. 1229.) This must have been readily apparent to both mother's counsel and the juvenile court. Accordingly, mother's complaints about counsel's failure to subpoena Dr. Little did not demonstrate a substantial likelihood that she was not receiving adequate representation.

II. Effective Assistance of Counsel

Mother also contends she was denied her constitutional right to effective assistance of counsel. Here again, she faults counsel for failing to call Dr. Little as a witness at the disposition hearing to explain how her alcohol abuse and ADHD were related to rebut the contention that she is resistant to treatment. And again, she faults counsel for failing to call the minors as witnesses at the disposition hearing to testify about their bond with mother and "whether they wished to maintain that bond and reunify with her." She argues the testimony was necessary to "corroborate" mother's evidence that she had a positive and nurturing relationship with the minors. Mother fails to meet her burden of establishing she received inadequate counsel.

To establish ineffective assistance of counsel, mother must show (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance prejudiced defendant.

(*Strickland v. Washington* (1984) 466 U.S. 668, 688, 691-692 [80 L.Ed.2d 674] (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217 (*Ledesma*); *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1667-1668 (*Kristin H.*)) "'Surmounting *Strickland's* high bar is never an easy task.' [Citation.]" (*Harrington v. Richter* (2011) ___ U.S. ___, ___ [178 L.Ed.2d 624, 642 (*Richter*); *Padilla v. Kentucky* (2010) ___ U.S. ___ [176 L.Ed.2d 284, 298].)

"A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance. [Citation.]" (*Richter, supra*, ___ U.S. at p. ___ [178 L.Ed.2d at p. 642].) While not apparently understood by mother, we note that an "attorney can avoid activities that appear 'distractive from more important duties'" and counsel is entitled "to balance limited resources in accord with effective trial tactics and strategies. [Citations.]" (*Ibid.*)

The performance inquiry must take into account all the circumstances. (*Strickland, supra*, 466 U.S. at p. 688.) We look to whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance (*id.* at p. 689), and reversal on the ground of inadequate counsel is appropriate only if the record affirmatively reveals no rational tactical purpose for counsel's act or omission (*Terrell, supra*, 69 Cal.App.4th at pp. 1252-1253).

Moreover, to carry her burden, mother must prove prejudice as a "'demonstrable reality.'" (*People v. McPeters* (1992) 2 Cal.4th 1148, 1177.) "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding'" (*Richter, supra*, ___ U.S. at p. ___ [178 L.Ed.2d at p. 642]), and ineffective assistance of counsel cannot be established by mere speculation regarding the "'likely'" testimony of potentially available witnesses (*People v. Medina* (1995) 11 Cal.4th 694, 773 (*Medina*); accord, *People v. Williams*

(1988) 44 Cal.3d 1127, 1153-1154). Thus, to show prejudice, mother must show a reasonable probability that she would have received a more favorable result had counsel's performance not been deficient. (*Strickland, supra*, 466 U.S. at pp. 693-694; *Ledesma, supra*, 43 Cal.3d at pp. 217-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra*, 466 U.S. at p. 694; accord, *Ledesma, supra*, 43 Cal.3d at p. 218; *People v. Williams* (1997) 16 Cal.4th 153, 215.)

A. Counsel's Performance

Here, the record does not affirmatively demonstrate that counsel's decision not to call mother's psychiatrist or the minors was objectively unreasonable.

As we have explained, whether mother had been ordered to participate in treatment that was not effective for her was not relevant and thus, Dr. Little's testimony was not relevant to the extent it could have been offered to make that point. Nor would his testimony have provided substantial evidence to support a finding that reunification services were in the best interests of the minors under these circumstances.

As we have noted, the minors' testimony was unnecessary. Evidence that mother had a loving relationship with the minors was provided during Rasmussen's cross-examination of Heather Murphy, the social worker who wrote the disposition report, and other witnesses Rasmussen called to testify -- Carla Albert, the minors' teacher, Tommy Davis, the hotel manager, father, and through mother's own testimony. Putting the minors on the

witness stand and exposing them to cross-examination would have created the potential for adverse evidence concerning the minors' observations of mother's alcohol abuse, the extent of that abuse, and negative inferences concerning the impact on them. Given the availability of evidence concerning the bond between mother and the minors from alternative means, the reasonableness of counsel's strategic decision is apparent. Moreover, as we have explained, much more than a loving relationship or bond with the minors would have been required for the juvenile court to find reunification services to be in the minors' best interests. (*William B.*, *supra*, 163 Cal.App.4th at p. 1229.)

B. Prejudice

Even assuming counsel's failure to call these witnesses was objectively unreasonable for the reasons mother alleges, mother has not established prejudice. Mother bases her argument on the mere speculation that the psychiatrist and the minors were ready, willing and able to testify and that they would have offered only helpful testimony. As we have noted, mere conjecture is not adequate to establish a prejudicial effect. (*Richter*, *supra*, ___ U.S. at p. ___ [178 L.Ed.2d at p. 642]; *People v. Williams*, *supra*, 44 Cal.3d at pp. 1153-1154; *Medina*, *supra*, 11 Cal.4th at p. 773.) Such claims must be supported by declarations or other proffered testimony establishing both the substance of the omitted evidence and its likelihood for exonerating the accused. (See, e.g., *In re Hall* (1981) 30 Cal.3d 408; see also *People v. Jackson* (1980) 28 Cal.3d 264,

293-296, overruled on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.)¹⁷ We cannot evaluate alleged deficiencies in counsel's representation on mother's unsubstantiated speculation. (*People v. Cox* (1991) 53 Cal.3d 618, 662, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

We note that mother's offer of proof does not enhance her speculation about Dr. Little's testimony or that she would have received a more favorable result if he had testified.

¹⁷ At oral argument counsel for mother contended that mother's case is "squarely within" *Kristin H.* We disagree. As counsel acknowledged, mother has not sought habeas corpus relief here. The mother in *Kristin H.* did. (*Kristin H.*, *supra*, 46 Cal.App.4th at pp. 1642, 1658, 1567.) In support of her petition, the mother in *Kristin H.* submitted a declaration from her psychiatrist (*id.* at p. 1658), in which his "reputable credentials" were set forth (*id.* at p. 1672) and he disputed the findings made by the department's expert (*ibid.*). The psychiatrist also wrote a report, which had been provided to counsel prior to the disposition hearing, and which was also submitted to the court in support of the petition. In the declaration and report, mother's psychiatrist detailed his diagnosis and reasons for his disagreement with the department's expert. Counsel elected to not call the psychiatrist as a witness. (*Kristin H.*, *supra*, at pp. 1668-1671.) Even with that evidence, the appellate court observed, "We can only speculate as to what would have happened in the proceedings below had the court had before it [the psychiatrist's] evaluation, which presented the mother in a more favorable light, rejected the notion that she required medication and strongly recommended that the child be returned to her custody. [¶] The determination of prejudice in this case is most appropriately addressed in the trial court." (*Id.* at p. 672.) The instant case, where mother elected not to proceed by habeas corpus petition and provided nothing more than her own recitation of an ambiguous and equivocal opinion her expert might offer, is nothing like *Kristin H.*

Concerning her ADHD, mother proffered: "Number 1, Mother has been diagnosed with ADHD on or about March 2006. [¶] Number 2, the mother is currently on prescribed medication for the ADHD and her associated anxiety and depression. [¶] Number 3, *much* of Mother's past alcohol use has been linked to anxiety caused by ADHD." (Italics added.) The efficacy of the prescribed medications was unstated. Also, quantifying the causal connection between her ADHD and her alcohol abuse by using the word "much" means that there are other reasons why mother abused alcohol.

Moreover, mother's own testimony undercut what she claimed Dr. Little could have said had he testified. When she was asked, "Do you have any insights as to why your sobriety didn't succeed in the past," mother did not say it was because of her ADHD and not having the proper medications. Instead she responded that it was because she thought, "I can do it myself. I didn't like people telling me what to do. And right now I am teachable. I do what I'm told, I don't even ask why, even if it doesn't seem like the right thing to do. It's worked for them and so far it's working for me."

Mother has not met her burden of establishing that counsel's asserted failure to offer the testimony of her psychiatrist or the minors deprived her of her constitutional right to effective assistance of counsel.

III

Denial of Reunification Services

Finally, mother argues she was erroneously denied reunification services. She contends that substantial evidence does not support either prong of section 361.5, subdivision (b)(13) -- (1) that during the three-year period immediately prior to the filing of the petition, she "resisted prior court-ordered treatment" or (2) that on at least two prior occasions, she "failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1." Respondent contends substantial evidence supports both prongs.

Section 361.5, subdivision (b) provides that reunification services may be bypassed if one of the enumerated bases for denying services is established by clear and convincing evidence. An order denying services under section 361.5, subdivision (b) is reviewed for substantial evidence.

(Cheryl P. v. Superior Court (2006) 139 Cal.App.4th 87, 96.) Consequently, if there is substantial evidence on either prong, we must uphold the juvenile court's bypass determination.

One of the bases relied on by the juvenile court for denying reunification services is set forth in the first prong of section 361.5, subdivision (b)(13), which provides that services may be denied when a parent "has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three year period immediately prior to the filing of the

[current] petition." Numerous cases have held that the requirement of resistance to court-ordered treatment in this subdivision may be satisfied with evidence that the parent participated in court-ordered treatment but subsequently, within three years prior to the filing of the current petition, returned to substance abuse. (See, e.g., *In re Brooke C.* (2005) 127 Cal.App.4th 377, 382; *In re Brian M.* (2000) 82 Cal.App.4th 1398, 1402-1403 (*Brian M.*); *Laura B. v. Superior Court* (1998) 68 Cal.App.4th 776, 780 (*Laura B.*); *Randi R. v. Superior Court* (1998) 64 Cal.App.4th 67, 73.)

In *Brian M.*, the court held that resistance to treatment is established by a showing that "the parent underwent or enrolled in substance abuse rehabilitation" and, during the three-year period before the petition was filed, "demonstrated resistance to rehabilitation." (*Brian M.*, *supra*, 82 Cal.App.4th at p. 1402.) Contrary to mother's assertion, she did not have to successfully complete the court-ordered treatment to fall within this provision, nor must the treatment have occurred during the three-year period. Only the resistance to the treatment need have occurred within the statutory period. (*Karen H. v. Superior Court* (2001) 91 Cal.App.4th 501, 504-505; *Laura B.*, *supra*, 68 Cal.App.4th at p. 780.)

As the juvenile court found, mother has demonstrated a resistance to rehabilitation, having twice resumed the abuse of alcohol after completing case plans. During the first dependency proceedings involving the minors, mother was ordered by the court to participate in a residential treatment program.

Although she enrolled in a program, she checked herself out after a month without completing it. She nonetheless otherwise completed her case plan and jurisdiction was terminated. Within months, mother resumed her alcohol abuse and a second dependency petition was required. Although mother failed to turn in her AA logs to show compliance with the court's orders in that case, she succeeded in regaining custody of the minors. However, again, within two months of the dismissal of that case, and within the three years prior to the filing of the current petition, mother resumed her alcohol abuse.

The record establishes that mother has either admitted or has been found to have been consuming alcohol on multiple occasions between the dismissal of the second dependency case in September 2007 and the filing of the instant petitions on September 24, 2009. We have already chronicled police contacts where mother was found to be intoxicated. To summarize, mother was found by police officers to have been drinking alcohol on November 18, 2007 (blood-alcohol level of .27 percent), on January 10, 2008, and on September 20, 2009. A school official reported that mother was intoxicated when she showed up late to pick the minors up from school on September 21, 2009. And on September 22, 2009, officers once again found mother in an intoxicated state after a social worker called for police assistance. These reports would be enough to support the juvenile court's finding.

Medical records paint an even more troubled picture. According to medical records, mother was taken to Enloe Medical

Center on April 3, 2008. Her blood-alcohol level was a startling 0.428 percent. She returned to Enloe Medical Center on April 11, 2008, seeking assistance with alcohol withdrawal symptoms, reporting that her last drink was on April 8, 2008. She was extremely intoxicated when she arrived at Enloe Medical Center on August 12, 2008 with suicidal ideations and again, when she was brought in on August 16, 2008, with blood-alcohol levels of .367 and .390 percent, respectively. As we have noted, she was placed on a psychiatric hold on November 30, 2008 after she took a handful of pills and drank vodka in front of the minors and told them she wanted to be cremated when she was dead. She admitted drinking in March 2009, and admitted she was drinking again when she arrived at Oroville Hospital on July 22, 2009 claiming she wanted to quit drinking but was afraid of the "DT's."

Yet, despite this history, mother is still unable to acknowledge the severity of her substance abuse problem, as she claims she is a "very high-functioning drunk" and told the social worker that "it's only alcohol" and she "only had a few relapses." Her representation in her brief on appeal -- that she had only three "short" relapses (in March, July and September 2009) and had been sober for the year and a half prior to that time, is plainly contradicted by the evidence.

Moreover, we note that not only had mother checked herself out of inpatient treatment in the past, she apparently does not currently see a need for inpatient treatment. She told social worker Murphy that she did not "like the idea" of residential

treatment. Mother's own friend from AA, who testified on mother's behalf, testified that residential treatment had been helpful for her and she encouraged mother to check into a residential treatment program, but mother declined to do so.¹⁸

Quite simply, mother's history falls squarely within the definition of resistance to treatment. Thus, because we uphold the juvenile court's determination that mother resisted treatment under section 361.5, subdivision (b)(13), we need not determine whether the findings under the other provision contained in that subdivision, i.e., that mother failed or refused to comply with a court-ordered drug treatment program on

¹⁸ Mother's friend is an example of a witness whose testimony can be a double-edged sword, and highlights the difficult strategic decisions trial counsel must make in deciding what witnesses to call. On the one hand, a witness might be in a position to provide seemingly helpful information. On the other hand, if the witness is truthful, cross-examination will reveal damaging information. While it was reasonable to call this witness on behalf of mother to testify about mother's efforts and prospects for sobriety, it would have also been reasonable to not call her in light of the testimony that mother refuses to enter into residential treatment, even after having been encouraged to do so.

We also note that the same witness gave testimony that is seemingly inconsistent with mother's representations of what Dr. Little would say if he had been called to testify. In response to the question of what mother had told the friend about how the diagnosis of ADHD related to mother's past alcohol abuse, the friend testified that mother said, "Basically that medication and alcohol don't go together and so that's what's made her sobriety so much more important for her." The friend did not say mother told her that mother's alcoholism was related to her ADHD.

at least two occasions are correct. (*Randi R., supra*,
64 Cal.App.4th at p. 72.)¹⁹

DISPOSITION

The judgment is affirmed. The stay previously issued by
this court shall be dissolved upon issuance of the remittitur.

MURRAY, J.

We concur:

NICHOLSON, Acting P. J.

HULL, J.

¹⁹ Thus, we express no opinion on the validity of mother's
contention that Alcoholics Anonymous is not a "treatment"
program within the meaning of the statute.