COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2015AP1463
2015AP1464

Cir. Ct. Nos. 2014TP9
2014TP10

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

NO. 2015AP1463

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

PIERCE COUNTY,

PETITIONER-RESPONDENT,

V.

C. S.,

RESPONDENT-APPELLANT,

C. S.,

RESPONDENT.

NO. 2015AP1464

IN RE THE TERMINATION OF PARENTAL RIGHTS TO K. S.,
A PERSON UNDER THE AGE OF 18:

PIERCE COUNTY,

PETITIONER-RESPONDENT,

V.

C. S.,

RESPONDENT-APPELLANT,

C. S.,

RESPONDENT.

APPEALS from orders of the circuit court for Pierce County: JOSEPH D. BOLES, Judge. *Affirmed*.

¶1 STARK, P.J.[1] C. S. appeals orders terminating her parental rights to her sons, D. S. and K. S., and an order denying her postdisposition motion. C. S. argues her first trial attorney was ineffective by failing to object to the circuit court's determination that C. S. had waived her right to request a jury trial, and her second trial attorney was ineffective by failing to prepare adequately for the continued dispositional hearing. C. S. also argues the circuit court erred by denying her second trial attorney's request for a continuance; by admitting D. S.'s therapist's testimony regarding C. S.'s relationships with the children; by concluding the termination of C. S.'s parental rights was in the children's best interest; and by relying on inaccurate information and information outside the record when denying C. S.'s postdisposition motion. We reject these arguments and affirm.

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

BACKGROUND

¶2 D. S. was born in September 2008, and K. S. was born in March 2010. They were removed from C. S.'s home by the Pierce County Department of Human Services (the County) on November 29, 2012, and placed in the foster home of L. S. and V. S. On January 4, 2013, both children were found to be in need of protection or services (CHIPS), and dispositional orders were entered continuing their placement in the S.s' foster home.

¶3 Over one year later, on April 9, 2014, the County filed petitions to terminate C. S.'s parental rights to D. S. and K. S., alleging as grounds that both children were in continuing need of protection or services, pursuant to WIS. STAT. § 48.415(2).[2] C. S. was unrepresented at the initial hearing on May 13, 2014. The circuit court informed C. S. she had the right to an attorney, and C. S. confirmed she wanted an attorney to represent her. The court then found good cause to adjourn the initial hearing and stated, "[W]e would complete the initial at a later date … and I would inform the parties of the right to a jury trial, substitution of judge, and take care of all of the other matters that need to be addressed at the initial appearance."

¶4 An adjourned initial hearing was scheduled for June 5, 2014. However, C. S. did not attend that hearing. The guardian ad litem (GAL) informed the court C. S. was sitting outside the courthouse in her vehicle. The GAL further stated an attorney from the public defender's officer had gone outside

[2] The County also petitioned to terminate the children's father's parental rights. The father ultimately consented to termination, and the termination of his rights is not at issue in these appeals.

to meet with C. S., but C. S. "indicated that she did not wish to participate in the proceeding." On the County's motion, the court then found C. S. in default. Based on the testimony of Kim Stensland, the social worker assigned to the case, the court concluded grounds existed to terminate C. S.'s parental rights.

¶5 Attorney Donald Schwab was subsequently appointed to represent C. S. On August 27, 2014, Schwab filed a Motion to Vacate Default Judgment. At the hearing on that motion, C. S.'s therapist, Robin Ricard, testified C. S. suffered from posttraumatic stress disorder caused by a previous termination of her parental rights to another child. Ricard further testified C. S.'s behavior on the day of the adjourned initial hearing was caused by her posttraumatic stress disorder.

¶6 Based on Ricard's testimony, the circuit court vacated its finding that grounds existed to terminate C. S.'s parental rights. However, the court ruled that, by not attending the adjourned initial hearing, C. S. had waived her right to request a jury trial. The court then stated:

> If anyone disagrees with my analysis on the waiver of jury demand … be sure and raise that so—at any point where I can make a ruling specifically on that. I'm making that ruling after looking at the record myself, but again, if that's something that is going to be raised … as an issue, I'd like to see that raised here within a week. Any motions on that would have to be filed within one week from today or get waived.

Schwab did not file any motion challenging the court's conclusion that C. S. had waived her right to request a jury trial.

¶7 A grounds hearing was held on October 31, 2014. To establish that D. S. and K. S. were in continuing need of protection or services, the County was required to prove, by clear and convincing evidence, that: (1) the children had

been adjudged to be in need of protection or services and placed outside C. S.'s home for a total period of six months or longer pursuant to one or more court orders; (2) the County made a reasonable effort to provide the services ordered by the court; (3) C. S. failed to meet the conditions established for the children's safe return; and (4) there was a substantial likelihood C. S. would not meet those conditions within the nine-month period following the hearing. *See* WIS. STAT. § 48.415(2); ***Waukesha Cty. Dep't of Health & Human Servs. v. Teodoro E.***, 2008 WI App 16, ¶20, 307 Wis. 2d 372, 745 N.W.2d 701.

¶8 The first two of these factors were undisputed. With respect to the third and fourth factors, the CHIPS orders required C. S., among other things, to complete an AODA evaluation and follow through with any recommended treatment, to demonstrate success on her Suboxone[3] program, to remain free from all drugs, and to complete random urinalysis testing. The circuit court found that C. S. had failed to remain free from all drugs because the evidence showed she had used methamphetamine during the time period between the entry of the CHIPS orders and the filing of the petitions to terminate her parental rights. The court also found it was substantially likely C. S. would not become drug-free by the end of the nine-month period following the hearing. Accordingly, the court concluded grounds existed to terminate C. S.'s parental rights.

¶9 The dispositional hearing began on November 26, 2014. After the County finished calling its witnesses, but before C. S. began presenting her case, the circuit court proposed appointing an independent expert to conduct a bond

[3] According to Dr. Walid Mikhail, a physician who treated C. S. for opiate dependence and polydrug abuse, Suboxone is a medication that "keeps people from continuing to use heroin[.]"

study—that is, to evaluate whether the children had substantial relationships with C. S., and whether they would be harmed by severing those relationships. The parties agreed to the court's proposal. The court therefore found good cause to continue the dispositional hearing and ordered the GAL to find an appropriate professional to conduct the bond study.

¶10 On December 4, 2014, psychologist Harlan Heinz was appointed to conduct the bond study. Shortly thereafter, Schwab withdrew as C. S.'s attorney. On January 29, 2015, the GAL moved the circuit court to find C. S. in contempt for refusing to meet with Heinz. The circuit court held a hearing on the GAL's motion, which C. S. did not attend. The GAL explained that Heinz was unable to complete the bond study without C. S.'s participation. The GAL further stated C. S. had initially complained about the distance between her home and Heinz's office in Eau Claire, but even after the County offered her gas cards to cover the cost of fuel, she still refused to participate. The court then inquired whether Heinz would be able to offer an opinion based solely on interviews with the children. Stensland, the social worker, indicated she would follow up with Heinz regarding that possibility. Stensland also suggested that D. S.'s therapist, Kathryn Van Dusartz, might be able to offer an opinion regarding the children's relationships with C. S. The court agreed that Van Dusartz's opinion "would be helpful[.]" Ultimately, Van Dusartz was the only witness to testify regarding C. S.'s relationships with the children.

¶11 The continued dispositional hearing was scheduled for April 23, 2015. On March 31, 2015, attorney Melissa Petersen was appointed as counsel for C. S. On April 14, Petersen wrote to the court requesting a continuance of the April 23 hearing. Petersen asserted it would be difficult for her to meet with C. S. and read the relevant materials before April 23.

¶12 The court did not address Petersen's request for a continuance prior to the April 23 hearing. Petersen therefore renewed her request at the beginning of the hearing. Alternatively, she asked the court to allow her to withdraw, asserting she was not prepared to proceed and would be "ineffective counsel for [C. S.]" Specifically, Petersen stated she: (1) had not reviewed all the discovery; (2) did not know until two days before that a portion of the dispositional hearing had already been completed; (3) had not ordered a transcript of the first portion of the hearing and, therefore, did not know which issues it had covered; (4) had only recently learned that Van Dusartz would be testifying on the issue of the children's relationships with C. S.; and (5) had not received Van Dusartz's therapy notes until that morning and had not had adequate time to review them. Petersen also asserted that, given additional time, C. S. would meet with Heinz to allow him to complete the bond study. The court denied Petersen's request for a continuance, as well as her request to withdraw. It did, however, give Petersen twenty minutes to review Van Dusartz's therapy notes in order to prepare for cross-examination.

¶13 Van Dusartz testified she had been D. S.'s therapist since May 2014, and she had also seen K. S. three or four times during the month before the hearing. During her sessions with D. S., he typically used the word "mom" to refer to his foster mother. D. S. never used expressions of love or affection when discussing C. S. Neither D. S. nor K. S. reported missing C. S. Van Dusartz stated D. S.'s relationship with C. S. was "not something that he [was] bringing into [his therapy sessions], anyway, in the forefront of his mind." She therefore testified that, in her professional opinion, D. S. did not have a substantial relationship with C. S.

¶14 When asked whether severing the children's relationships with C. S. would be harmful to them, Van Dusartz responded:

> I can't speak to [K. S.] I haven't seen him enough to know, and I certainly don't have a crystal ball. My concern is that the longer these children languish in an unpredictable situation, the longer they're away from clear, regulated kind of healthy emotion, that's really harmful to them. … I'm not able to speak to what might happen if—if they're separated from their mom, but it seems to me they've gone through some substantial grief at this period already; that they sort of have it compartmentalized into, you know, we see our mom in this capacity this way, but that it—it's not a substantial piece of what they're bringing to the table every day.

Upon subsequent questioning by the court, Van Dusartz clarified that severing the children's relationships with C. S. would be harmful to them, "but not as harmful as continuing on with the instability[.]"

¶15 Following Van Dusartz's testimony, Stensland briefly testified regarding the County's efforts to facilitate C. S.'s participation in the bond study. Petersen then presented the testimony of C. S. and C. S.'s mother. C. S.'s mother testified she and C. S.'s father wanted the court to award them guardianship of the children. She also testified they would be willing to adopt the children.

¶16 In an oral ruling, the circuit court concluded termination of C. S.'s parental rights was in the children's best interests. Orders terminating C. S.'s parental rights were filed on April 27, 2015. Thereafter, C. S. filed a motion for postdisposition relief, asserting Schwab and Petersen had rendered ineffective assistance. The circuit court held a postdisposition hearing, at which Schwab, Petersen, and C. S. testified. Following the hearing, the court concluded neither Schwab nor Petersen was ineffective, and it therefore denied C. S.'s postdisposition motion.

¶17 C. S. renews her ineffective assistance arguments on appeal, and she also argues the circuit court committed various errors requiring reversal. Additional facts are included in the discussion section as necessary.

DISCUSSION

I. Ineffective assistance

¶18 A parent in a termination of parental rights (TPR) action has a right to the effective assistance of counsel. ***Oneida Cty. Dep't of Social Servs. v. Nicole W.***, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652. In order to prove ineffective assistance of counsel, a parent must show both that counsel's performance was deficient and that the deficient performance prejudiced the parent. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***A.S. v. State***, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992) (***Strickland*** test for ineffective assistance created in criminal law context, but also applies to involuntary TPR proceedings). To establish deficient performance, a parent must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See* ***Strickland***, 466 U.S. at 687. To establish prejudice, a parent must show there is a reasonable probability the result of the proceeding would have been different absent counsel's deficient performance. *See* ***id.*** at 694. If the parent fails to prove either deficient performance or prejudice, we need not address whether the other prong was satisfied. *See* ***id.*** at 697.

¶19 An ineffective assistance of counsel claim presents a mixed question of fact and law. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will uphold the circuit court's factual findings unless they are clearly

erroneous. ***Id.*** at 634. However, whether those facts fulfill the legal standard for ineffective assistance is a question of law that we review independently. ***Id.***

A. Attorney Schwab

¶20 C. S. first argues attorney Schwab rendered ineffective assistance by failing to object to the circuit court's determination that she waived her statutory right to request a jury trial by failing to appear at the adjourned initial hearing.[4] Even if we assume counsel performed deficiently in this respect, we conclude his deficient performance did not prejudice C. S. C. S. argues it is reasonably probable the outcome of the grounds hearing would have been different had the case been tried to a jury, rather than the court. Specifically, she argues it is "quite possible" jury members would have had "different experiences and beliefs regarding addiction" than those of the circuit court and, consequently, they may have concluded it was substantially likely she would become drug-free in the nine months following the hearing.

[4] We question whether reversal is warranted based solely on the circuit court's failure to advise C. S. of her right to request a jury trial. *See* ***M.W. v. Monroe Cty. Dep't of Human Servs.***, 116 Wis. 2d 432, 433, 342 N.W.2d 410 (1984) ("We reverse and remand for new proceedings because the trial judge failed to follow the directions of sec. 48.23(2), Stats., in respect to representation by counsel, and failed to inform the parents of their right to a jury trial as required by sec. 48.422(1) and (4)."). However, C. S. does not argue we should reverse on this basis, and we will not develop the argument for her. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("[W]e will not abandon our neutrality to develop arguments" for the parties.).

In addition, we observe that C. S. frames her argument regarding her right to request a jury trial solely in terms of ineffective assistance of counsel, and she analyzes the issue using the framework set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). She does not argue counsel's failure to challenge the circuit court's jury trial waiver determination was structural error or was per se prejudicial.

¶21 A mere possibility of a different result, however, is insufficient to demonstrate prejudice. Again, C. S. must show it is reasonably probable a jury trial would have produced a different result. This she cannot do. The evidence presented at the grounds hearing overwhelmingly showed it was substantially likely C. S. would not become drug-free in the next nine months.

¶22 For instance, multiple witnesses testified C. S. had repeatedly refused to take, or failed, random drug tests following the entry of the CHIPS orders. Marie Christiansen, who performed an AODA assessment of C. S. in April 2014, testified C. S. self-reported using one-quarter gram of methamphetamine per day. Christiansen further testified that, following the AODA assessment, she recommended C. S. complete an eleven-week outpatient treatment program. C. S. began the program on May 6, 2014, and attended two treatment sessions. However, she missed the next three sessions and was therefore discharged from the program for noncompliance.

¶23 C. S. testified she was thirty-four years old and had used drugs on and off for her entire adult life. She admitted using methamphetamine "numerous" times between the date the CHIPS orders were entered and the filing of the TPR petitions. She conceded she was aware the CHIPS orders required her to refrain from using drugs, but she chose to do so anyway. She further admitted using methamphetamine four days before the grounds hearing.

¶24 When asked why she waited until after the TPR petitions were filed to complete the AODA assessment required by the CHIPS orders, C. S. stated she "had a lot going on" after her parental rights to another child were terminated. When asked why she did not follow through with the recommended treatment, C. S. testified, "There was a court hearing in May, and I believe it was when the

TPR was going to happen. I—I gave up. I just—if I don't have my boys, why be sober, was my attitude." She conceded she had taken no steps to address her methamphetamine addiction since May 2014. She stated, "I was told [by the County] [the children] were transitioning without Mommy. Why would I?" She also testified she "would walk out this door right now and enter treatment for [her] kids[,]" but she had not done so because "this system has been brutal" to her family. She further testified, "I don't want to be sober if I don't have my children."

¶25 On this record, there is no reasonable probability a jury would not have concluded it was substantially likely C. S. would not become drug-free within the nine months following the grounds hearing. C. S. admitted using methamphetamine on numerous occasions after the CHIPS orders were entered, despite knowing that doing so could result in the termination of her parental rights. Although she eventually underwent an AODA assessment, she failed to follow through with the recommended treatment. Moreover, she stated multiple times that she intended to continue using methamphetamine if she lost her parental rights. Given these facts, it is not reasonably probable a different outcome would have resulted had the grounds hearing been held before a jury instead of the court.

¶26 On appeal, C. S. emphasizes Christiansen's testimony that the treatment program she recommended for C. S. would take eleven weeks, and there was no reason C. S. could not complete the program within the next nine months. C. S. also highlights Dr. Mikhail's testimony that her drug addiction was "very treatable" and could be treated within nine months. However, the fact that C. S.'s addiction could, theoretically, be treated within nine months does not convince us it is reasonably probable a jury would have concluded it was not substantially likely C. S. would not become sober within nine months. Substantial evidence

was introduced at the grounds hearing calling into question whether C. S. would actually seek treatment and, if she did, whether she would complete it. Based on this evidence, it is not reasonably probable the result of the grounds hearing would have been different had it been considered by a jury.

B. Attorney Petersen

¶27 C. S. also argues attorney Petersen was ineffective in seven respects.[5] First, she alleges Petersen was ineffective by failing to "investigate and introduce available evidence to disprove the testimony of Kathryn Van Dusartz regarding whether there was a substantial relationship between [C. S.] and her children." Specifically, she asserts Petersen should have arranged for another expert to evaluate her relationships with the children. However, in its postdisposition order, the circuit court stated it "would have denied any request for either party to retain an expert to conduct an assessment of the bond between mother and children because further delay would have been harmful to the children and would not have produced reliable evidence." Moreover, there is no evidence in the record suggesting that Petersen would have been able to find an expert to conduct such an evaluation between her appointment on March 31, 2015, and the continued dispositional hearing on April 23. In addition, while C. S. assumes the expert's findings would have been favorable to her, that is pure speculation. On these facts, we conclude Petersen's failure to retain an expert to evaluate C. S.'s relationship with her children was not prejudicial.

[5] The County concedes on appeal that Petersen "was inadequately prepared for the [continued dispositional] hearing," and that her inadequate preparation constituted deficient performance. We are not, however, obligated to accept a party's concession of law. *See* ***State v. Carter***, 2010 WI 77, ¶50, 327 Wis. 2d 1, 785 N.W.2d 516.

¶28 Second, C. S. argues Petersen's lack of preparation for the continued dispositional hearing prevented her from vigorously cross-examining Van Dusartz. We disagree. Instead, we agree with the circuit court that Petersen's cross-examination of Van Dusartz "brought out all salient points in support of her client's position." For instance, Petersen elicited an admission from Van Dusartz that she had never observed C. S.'s interactions with the children. Petersen also suggested, through her questioning, that the reason the children did not mention C. S. during their sessions with Van Dusartz was that they were only allowed to see C. S. for one hour per week. Van Dusartz also conceded on cross-examination that: (1) D. S. once made a statement to her about his foster mother "stealing him" from C. S.; (2) the children's foster home was at times chaotic or disorderly, which sometimes prompted negative reactions from D. S.; (3) D. S. reported enjoying his visits with C. S. and being jealous if she spent more time with K. S. than with him; and (4) C. S. was not the focus of D. S.'s therapy sessions until after the TPR petitions were filed. Petersen's cross-examination of Van Dusartz was adequate and does not constitute deficient performance.

¶29 Third, C. S. argues Petersen was ineffective by failing to hire an expert "to review the therapy record and the work conducted by [Van Dusartz] to potentially discredit her testimony." Assuming without deciding that Petersen performed deficiently in this respect, we conclude the deficiency did not prejudice C. S. C. S. cites no evidence Petersen would have been able to find an expert to review the therapy record, and, had she done so, there is no evidence regarding what the expert's opinion would have been. C. S.'s assertion that the expert would "potentially" have discredited Van Dusartz's testimony is purely speculative. She has therefore failed to convince us it is reasonably probable the result of the

dispositional hearing would have been different had Petersen hired an expert to review the therapy record.

¶30 Fourth, C. S. argues Petersen was ineffective by failing to explain to C. S. at an earlier date the importance of meeting with Heinz to allow him to evaluate her relationship with the children. Again, even assuming Petersen performed deficiently, C. S. has failed to show prejudice. She cannot point to any evidence that Heinz would have been able to conduct the evaluation prior to the continued dispositional hearing, and she can only speculate as to whether Heinz's conclusions would have been favorable to her.

¶31 Fifth, C. S. contends Petersen was ineffective by failing to ask the circuit court to order a grandparent study before the continued dispositional hearing. At the conclusion of that hearing, Petersen argued the court should consider granting C. S.'s parents guardianship of the children instead of terminating C. S.'s parental rights. C. S. asserts that, had a grandparent study been conducted, and had it demonstrated the existence of a substantial relationship between the children and C. S.'s parents, it is reasonably probable the court would have awarded C. S.'s parents a guardianship. The record shows, however, that Petersen did request a grandparent study in her April 14, 2015 letter to the court. Accordingly, Petersen did not perform deficiently in this respect.

¶32 Sixth, C. S. argues Petersen was ineffective by eliciting prejudicial testimony while questioning her. Specifically, Petersen asked C. S. whether D. S. and K. S. ever called her by their foster mother's name. C. S. replied, "[A]ll the time," adding, "They'll go, [L.], I mean Mom[.]" C. S. argues this testimony was prejudicial because it "would suggest to a trier of fact that the[] boys viewed [their foster mother] as at least another mother figure, thus undermining [C. S.'s]

position that she and the[] boys had a substantial relationship." We disagree. C. S.'s testimony that her children sometimes called her by their foster mother's name was consistent with Van Dusartz's testimony regarding the children's relationships with C. S. It was also consistent with the foster mother's testimony that the children sometimes called her by her first name but had also asked for permission to call her "mom." Given the testimony of Van Dusartz and the foster mother, it is not reasonably probable the circuit court would have reached a different result absent C. S.'s brief testimony that the children sometimes called her by their foster mother's name.

¶33 Seventh, C. S. argues Petersen was ineffective by failing to depose Stensland or call her to testify at the continued dispositional hearing regarding allegations that D. S. had been molested by another child in his foster home. When questioning Van Dusartz, Petersen asked, "When [D. S.] came into your care, isn't it true that [D. S.] was allegedly molested by the foster parents' 10-year-old daughter?" Van Dusartz responded she was not aware of any molestation allegations. At the postdisposition hearing, Petersen testified C. S. had told her Stensland told C. S. that D. S. was sexually molested by one of his foster parents' children.

¶34 We agree with C. S. that Petersen performed deficiently by failing to investigate the molestation claim further—for instance, by deposing Stensland. If true, the molestation of D. S. by another child in his foster home would have shown that the foster home was not a stable and appropriate environment for D. S. and K. S. However, on the record before us, we cannot conclude Petersen's deficiency in failing to investigate the molestation claim prejudiced C. S. There is nothing in the record to indicate what testimony Stensland would have provided had she been asked about the molestation claim. C. S.'s postdisposition attorney

could have called Stensland to testify at the postdisposition hearing, in which case Stensland could have clarified whether she told C. S. that D. S. had been molested in the foster home. Stensland also could have explained what sort of investigation, if any, the County conducted with respect to the molestation claim, and whether it concluded that claim was founded. Without knowing what Stensland's testimony would have been, we simply cannot say that it is reasonably probable the result of the dispositional hearing would have been different had Petersen called Stensland to testify. Consequently, we cannot conclude this deficiency prejudiced C. S.

¶35 Finally, C. S. argues Petersen's deficiencies, when considered together, establish cumulative prejudice. *See* ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305 ("[P]rejudice should be assessed based on the cumulative effect of counsel's deficiencies."). We disagree. Petersen's alleged deficiencies, considered either separately or cumulatively, do not undermine our confidence in the outcome. C. S.'s erratic behavior and lack of cooperation with the circuit court's order to complete the bond study, along with the court's extensive and well-reasoned analysis regarding the children's best interest, *see infra*, ¶¶47-54, lead us to conclude there was no reasonable probability of a different outcome, despite Petersen's asserted deficiencies. We therefore reject C. S.'s argument that Petersen was ineffective.

II. Denial of Petersen's request for a continuance

¶36 C. S. next argues the circuit court erred by denying Petersen's request for a continuance of the continued dispositional hearing. We will not reverse a circuit court's decision to grant or deny a continuance absent an erroneous exercise of discretion. ***State v. Leighton***, 2000 WI App 156, ¶27, 237 Wis. 2d 709, 616 N.W.2d 126. "A court properly exercises its discretion when it

correctly applies accepted legal standards to the facts of record and uses a rational process to reach a reasonable conclusion." ***State v. Kruzycki***, 192 Wis. 2d 509, 525, 531 N.W.2d 429 (Ct. App. 1995). "When we review a discretionary decision, we consider only whether the trial court properly exercised its discretion, putting to one side whether we would have made the same ruling." ***Id.***

¶37 When considering a request for a continuance, a circuit court must weigh the following factors:

> (1) the length of the delay requested; (2) whether the "lead" counsel has associates prepared to try the case in his [or her] absence; (3) whether other continuances had been requested and received by the defendant; (4) the convenience or inconvenience to the parties, witnesses and the court; (5) whether the delay seems to be for legitimate reasons or whether its purpose is dilatory; (6) other relevant factors.

Leighton, 237 Wis. 2d 709, ¶28. The circuit court did not expressly address these factors when denying Petersen's request for a continuance. However, when a circuit court fails to explain its reasoning, we may search the record to determine whether it supports the court's discretionary decision. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. Here, we conclude the record supports the court's decision to deny the requested continuance.

¶38 Admittedly, some of the relevant factors supported granting a continuance. For instance, there is no evidence Petersen had any associates who were prepared to try the case, and C. S. had not requested any prior continuances. In addition, the County does not cite any evidence that granting a continuance would have been particularly inconvenient to the parties, the witnesses, or the court. Further, Petersen appears to have made her continuance request for the

legitimate purpose of gaining additional time to prepare for the continued dispositional hearing.

¶39 However, other relevant factors support the circuit court's decision to deny Petersen's continuance request. By the time Petersen made her request, the children had been out of C. S.'s home for two years and four months. The circuit court had already continued the dispositional hearing to allow for completion of a bond study, but C. S. refused to participate in that study. In opposition to Petersen's continuance request, the GAL opined that further delay would not be in the children's best interests because they needed permanency and stability and would benefit from a "final outcome." Petersen did not specify, at the time, the length of delay she was requesting. Without that information, the circuit court could have reasonably determined that a delay of uncertain duration would have been harmful to the children, and that their need for permanency and stability outweighed the factors that supported granting a continuance. Consequently, we cannot conclude the court erroneously exercised its discretion by denying Petersen's request.[6]

III. Admission of Van Dusartz's testimony

¶40 C. S. next argues the circuit court erred by admitting Van Dusartz's testimony regarding C. S.'s relationships with the children. We review the

[6] C. S. asserts that, under certain circumstances, denial of a continuance, even if a proper exercise of discretion, may nevertheless result in prejudice so substantial that a new trial is required. C. S. argues that is the case here because Petersen had inadequate time to prepare for the continued dispositional hearing and therefore performed deficiently, which prejudiced C. S.'s defense. However, we have already concluded Petersen either did not perform deficiently, or C. S. was not prejudiced by her deficient performance. We therefore reject C. S.'s argument that denial of Petersen's continuance request resulted in such substantial prejudice that reversal is required.

admission of expert testimony for an erroneous exercise of discretion. ***State v. Giese***, 2014 WI App 92, ¶16, 356 Wis. 2d 796, 854 N.W.2d 687.

¶41 WISCONSIN STAT. § 907.02(1) provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

C. S. argues Van Dusartz's testimony fell short of this standard because Van Dusartz was not qualified to testify about C. S.'s relationships with the children. We disagree. Van Dusartz testified she is a mental health therapist and licensed professional counselor with a master's degree in community counseling. At the time of the continued dispositional hearing, she had been in practice for twenty-five years. She further testified she had been seeing D. S. once per week or once every two weeks for nearly one year. She had also seen K. S. three or four times during the month before the continued dispositional hearing. In addition, she had provided counseling for C. S. from May to September 2012. On this record, Van Dusartz was "qualified as an expert by knowledge, skill, experience, training, or education" to testify regarding C. S.'s relationships with the children. *See* ***id.***

¶42 C. S. also argues Van Dusartz's testimony on this subject was inadmissible because there was no showing that her opinions were "based upon sufficient facts or data," that they were "the product of reliable principles and methods," or that she had "applied the principles and methods reliably to the facts of the case." *See* ***id.*** More specifically, citing ***Daubert v. Merrell Dow***

Pharmaceuticals, Inc., 509 U.S. 579, 593-94 (1993), C. S. contends no information was presented regarding: "(a) whether [Van Dusartz's] theory or technique can and has been tested; (b) whether the theory or technique has been subjected to peer review and publication; (c) the known or potential rate of error for the technique; and (d) the theory or technique's general degree of acceptance in the relevant scientific community."

¶43 WISCONSIN STAT. § 907.02(1) codifies ***Daubert***'s reliability standard for the admission of expert testimony. However, ***Daubert*** itself acknowledged that its test for the admissibility of expert testimony is "flexible." ***Daubert***, 509 U.S. at 594. In ***Kumho Tire Co. v. Carmichael***, 526 U.S. 137, 150 (1999), the United States Supreme Court clarified that the applicability of the factors mentioned in ***Daubert*** "depends upon the particular circumstances of the particular case at issue." The ***Kumho Tire*** Court further stated the list of factors in ***Daubert*** was "meant to be helpful, not definitive." ***Kumho Tire***, 526 U.S. at 151. Further, the Court stated trial judges should have "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." ***Id.*** at 152. The Court also clarified that an expert may "draw a conclusion from a set of observations based on extensive and specialized experience." ***Id.*** at 156.

¶44 In ***Seifert ex rel. Scoptur v. Balink***, 2015 WI App 59, 364 Wis. 2d 692, 869 N.W.2d 493, we affirmed the circuit court's decision to permit testimony by a medical expert, despite the fact that the testimony did not neatly align with the ***Daubert*** factors. The medical expert in ***Seifert*** testified the care provided by the physician-defendant fell below the requisite standard of care. ***Seifert***, 364 Wis. 2d 692, ¶¶5-7. The defendant argued the expert's opinions were not the product of reliable principles or methods, as required by WIS. STAT. § 907.02(1)

and ***Daubert***, but were instead based on the expert's own personal preferences derived from his experience practicing medicine. ***Seifert***, 364 Wis. 2d 692, ¶¶16, 28. Because those preferences could not be "challenged in some objective sense," the defendant argued they were unreliable and therefore inadmissible. ***Id.***, ¶28 (citation omitted). We rejected this argument, concluding the expert's knowledge and experience as a practicing physician were sufficient indicators of his testimony's reliability. ***Id.***, ¶29.

¶45 Similarly, Van Dusartz's testimony regarding the relationships between C. S. and her children is not amenable to analysis under the factors listed in ***Daubert***. Van Dusartz was asked to give an opinion as to whether the children had substantial relationships with C. S., and whether severing those relationships would harm the children. To do so, Van Dusartz did not employ a theory or technique that is susceptible to testing or peer review or has a known or potential rate of error. Instead, she relied on her twenty-five years of experience as a therapist and her observations of the children during their therapy sessions. Under the circumstances, this provided a sufficient basis for the circuit court to conclude Van Dusartz's testimony met the reliability standard set forth in WIS. STAT. § 907.02(1).

¶46 Moreover, C. S.'s specific criticisms of Van Dusartz's testimony go to its weight, rather than its admissibility. For instance, C. S. complains that Van Dusartz never observed the children interacting with C. S. and did not meet with C. S. to discuss her relationships with the children. C. S. also notes that Van Dusartz did not conduct a formal bond study. These deficiencies could have

provided a basis for a fact finder to discount Van Dusartz's opinions; they did not, however, provide a basis for the circuit court to exclude her testimony.[7]

IV. Best interests of the children

¶47 C. S. next argues the circuit court erred by concluding the termination of her parental rights was in the children's best interests. "A determination of the best interests of the child in a termination proceeding … is committed to the sound discretion of the circuit court." ***David S. v. Laura S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993).

¶48 When determining the best interests of the child, a court must consider the six factors listed in WIS. STAT. § 48.426(3). Here, the circuit court expressly addressed these factors before concluding the termination of C. S.'s parental rights was in the children's best interests. First, the court noted there was a "significant likelihood" the children would be adopted by their foster parents if C. S.'s parental rights were terminated. *See* WIS. STAT. § 48.426(3)(a).

¶49 Second, the court considered the ages and health of the children. *See* WIS. STAT. § 48.426(3)(b). The court noted that D. S. was six years old and K. S. was five years old, and they had been out of C. S.'s home for about two years. The court observed the children were in good physical health, but their mental health was "a huge concern," as both children suffered from dysregulated moods and D. S. exhibited homicidal and suicidal ideations. The court stated, "I have to believe that the instability created by the parental relationship has a factor in that

[7] C. S. also argues Van Dusartz's testimony was not admissible as the testimony of a lay witness. Because we conclude Van Dusartz's testimony was properly admitted as expert testimony, we need not address this argument.

diagnosis, and that stability is something that is just demanded." The court further credited Van Dusartz's testimony that "the stability of a home with two parents and with consistency both in parenting and in just being there is extremely important[.]" The court therefore concluded this factor weighed in favor of termination.

¶50 Third, the court considered whether the children had substantial relationships with C. S. or her family members, and whether severing those relationships would harm the children. *See* WIS. STAT. § 48.426(3)(c). The court acknowledged these relationships were substantial. However, it explained:

> So, whether it would be harmful to the child to sever these relationships. I—I have to say that I thought Ms. Van Dusartz's answer to this question was excellent in this way: She didn't just come out and say, nah, it won't hurt the kids. She didn't say that. What she said is that it very well might harm the children to sever these relationships, but that the need for stability and consistency would be—if that isn't met, that's more harmful. And so I think that given the entire situation, that even though there is harm that would come from this, it's not as much harm as would be created by lack of consistency and permanency and stability.

¶51 Fourth, the court considered the children's wishes, *see* WIS. STAT. § 48.426(3)(d), noting the children had expressed a desire to be with C. S., but they had also expressed "that they love being where they're at, and they love the home that they're in, too." Given this inconsistency, and the children's young ages, the court determined it would give their wishes "less weight[.]"

¶52 Fifth, the court considered the duration of the children's separation from C. S. *See* WIS. STAT. § 48.426(3)(e). The court noted that, although the children had been taken from C. S.'s home, they had continued seeing C. S. and her parents "on a fairly regular basis." However, the court observed that C. S.'s

contact with the children had been "much more sporadic, and there were times when she didn't see the children when she had the right to[.]" Ultimately, the court concluded the children's separation from C. S. "again relates to the demand for permanence, which is clearly in the children's best interest[.]"

¶53 Sixth, the court considered whether the children would be able to enter into more stable and permanent family relationships as a result of the terminations, taking into account their current placement, the likelihood of future placements, and the results of prior placements. *See* WIS. STAT. § 48.426(3)(f). The court observed the children's current placement was very stable, and their foster parents had "proven to be excellent parents … under very difficult circumstances[.]" The court noted the children had been placed in their current foster home since their removal from C. S.'s care, "[a]nd so … we've got two years already of this excellent stability, and the contemplation is that that will continue and that the [foster parents] will be successful in the adoption process." Finally, the court observed it was likely the foster parents would permit continued contact with C. S. and her family if they succeeded in adopting the children.

¶54 After considering these factors, the court concluded:

> So weighing everything out—and the hardest part of this decision was this whole severing of a substantial relationship. But again, I think that Ms. Van Dusartz's testimony there was very important and convincing, in terms—and believable, in terms of realizing, yes, there is potentially going to be some harm there, but that that harm would be much more harmful not to have the stability and the permanence that the adoptive—pre-adoptive home with the [foster parents] and that placement provides.
>
> And so based on all of that, I think—and when I weigh out all six of those factors, it's very clear that the parental rights of [C. S.] should be terminated.

The record therefore shows that the court appropriately considered each of the six required statutory factors. The court then weighed those factors and concluded terminating C. S.'s parental rights was in the children's best interests. On this record, we cannot conclude the court erroneously exercised its discretion.

¶55 C. S. nevertheless argues the circuit court erred by failing to consider "two very important issues directly relevant to the children's best interest." First, she argues the court failed to consider the fact that she was undergoing treatment for her drug addiction as of the date of the continued dispositional hearing. C. S. contends the fact that she was obtaining treatment "was clearly relevant to whether her rights should have been terminated[.]" The court concluded C. S.'s progress in treatment was relevant only to the grounds phase and did not bear on whether it would be in the children's best interests to terminate her parental rights. Although the court phrased its ruling on this point in terms of relevance, the court could have reasonably concluded any progress C. S. may have made in treatment did not outweigh other factors favoring the termination of her parental rights. In light of the court's extensive consideration of the factors listed in WIS. STAT. § 48.426(3), it did not erroneously exercise its discretion by failing to consider C. S.'s progress in treatment.

¶56 C. S. also argues the court erred by failing to explain its decision not to grant her parents guardianship of the children. Although the court did not expressly address the guardianship issue, we conclude the record supports its discretionary decision not to award C. S.'s parents guardianship. Testimony at the continued dispositional hearing showed that C. S. was living in her parents' basement. C. S.'s mother indicated there was no plan for C. S. to move out. At the grounds hearing, C. S.'s mother provided ambiguous responses when asked whether she would ask C. S. to leave the basement if she found out C. S. was

using methamphetamine. On this record, the court could reasonably conclude awarding C. S.'s parents guardianship of the children would not be in the children's best interests because doing so might expose the children to C. S.'s continued drug use. The court could also reasonably conclude the children's need for stability and permanency favored allowing them to remain with their foster parents. Accordingly, the court did not erroneously exercise its discretion by terminating C. S.'s parental rights instead of granting her parents guardianship of the children.

V. Reliance on inaccurate information and information outside the record

¶57 Finally, C. S. argues the circuit court violated her right to due process by relying on inaccurate information and information outside the record when denying her postdisposition motion. C. S. analogizes this situation to one in which a court relies on inaccurate information when sentencing a criminal defendant. Assuming without deciding that analogy is appropriate, in that context, a defendant must show both that the information was inaccurate and that the circuit court actually relied on the information. *See* ***State v. Travis***, 2013 WI 38, ¶21, 347 Wis. 2d 142, 832 N.W.2d 491. "Whether the circuit court 'actually relied' on the incorrect information … turns on whether the circuit court gave 'explicit attention' or 'specific consideration' to the inaccurate information[.]" ***Id.***, ¶28 (quoting ***State v. Tiepelman***, 2006 WI 66, ¶14, 291 Wis. 2d 179, 717 N.W.2d 1). If the defendant shows actual reliance on inaccurate information, the burden shifts to the State to prove the error was harmless. ***Id.***, ¶23. The State can meet its burden by demonstrating that the sentencing court would have imposed the same sentence absent the error. ***Id.***, ¶73.

¶58 The parties agree that three statements in the circuit court's postdisposition order are either inaccurate or are based on information outside the record. First, the court stated Schwab "was aware that a jury in a previous case had terminated the parental rights of C. S. to a child born to C. S. with drugs in her system." The record contains no information supporting this statement. Second, the court stated C. S. became upset and left the May 13, 2014 hearing without the court's permission. Third, the court stated C. S. fired Schwab. These latter two statements are demonstrably false.

¶59 We further agree with C. S. that the circuit court actually relied on these three statements when denying her postdisposition motion. Nevertheless, we conclude the court's error in doing so was harmless. The first challenged statement—regarding Schwab's awareness that a jury had previously terminated C. S.'s parental rights to another child—was made to provide context for Schwab's recommendation that C. S. not challenge the court's determination she had waived her right to request a jury trial. Reading the challenged statement in context, it is clear the court included the statement in the postdisposition order to show that Schwab had a strategic reason for making that recommendation and therefore did not perform deficiently. However, regardless of whether Schwab performed deficiently by recommending that C. S. not challenge the court's waiver determination, the court concluded his performance did not prejudice C. S. because "there [was] no reasonable probability that a jury would have found that the grounds for termination of her parental rights had not been proved." We agree with that conclusion, for the reasons stated above. *See supra*, ¶¶21-26. Consequently, the circuit court would have properly rejected C. S.'s argument that Schwab was ineffective, even absent its erroneous belief that Schwab knew a jury had previously terminated C. S.'s parental rights to another child.

¶60 The circuit court's erroneous belief that C. S. became upset and left the courtroom without permission during the May 13, 2014 hearing was also harmless. C. S. seems to suggest this inaccurate statement contributed to the court's conclusion her testimony was not credible because she was "evasive, combative, volatile, irrational, out of control, and clearly unstable." There was sufficient other evidence in the record, however, to support that conclusion. For instance, it is undisputed that C. S. refused to participate in the adjourned initial hearing on June 5, 2014. C. S. also refused to meet with Heinz to allow him to complete a bond study. In addition, C. S. exclaimed, "You've got to be kidding me[,]" and left the courtroom during the court's oral ruling terminating her parental rights. At the postdisposition hearing, Schwab described C. S. as "very volatile" and stated, "[T]o say that [C. S.] was a difficult client would be putting it mildly." On this record, the circuit court would have determined C. S. was evasive, volatile, and combative, even without its erroneous belief that she left the May 13, 2014 initial hearing.

¶61 The court's inaccurate statement that C. S. fired Schwab was also harmless. In his affidavit in support of his motion to withdraw from representing C. S., Schwab averred his ability to represent C. S. was "compromised[,] in that there has been a breakdown of communication, trust, and the working relationship with [C. S.]" At the postdisposition hearing, Schwab testified he moved to withdraw after C. S. "blew up" at him following the court's determination that she had waived her right to request a jury trial. He also stated, "[S]he was always badmouthing me. A couple of social workers told me, you would not believe what she's saying about you on Facebook and other social media, and I'd had enough and I asked to get off the case." The record therefore shows that, even if C. S. did not technically fire Schwab, she made it so difficult for him to represent her that

he chose to withdraw. Under these circumstances, we cannot say the court would have granted C. S.'s postdisposition motion absent its erroneous belief that C. S. fired Schwab. Accordingly, the court's erroneous reliance on that information was harmless.

By the Court.—Orders affirmed.

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