COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2123 **Cir. Ct. No. 2012TP21**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE TERMINATION OF PARENTAL RIGHTS TO MICHAEL W. M., A PERSON UNDER THE AGE OF 18:

AARON W. M.,

PETITIONER-RESPONDENT,

V.

BRITANY T. H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Wood County: NICHOLAS J. BRAZEAU, JR., Judge. *Affirmed*.

¶1 KLOPPENBURG, J.[1] Britany T.H. appeals an order terminating her parental rights to her son, Michael W.M. Britany argues that the circuit court erred in denying her postjudgment motion for a new trial on the basis of ineffective assistance of counsel, and she also argues that this court should grant her a new trial in the interest of justice. For the reasons set forth below, I affirm the order terminating Britany's parental rights to Michael.

BACKGROUND

¶2 In September 2012, Aaron W.M. petitioned for the termination of Britany's parental rights to their son, Michael. The grounds alleged included six-month abandonment and failure to assume parental responsibility. As pertinent here, the statutory provisions describing these grounds are found in WIS. STAT. § 48.415 and read as follows:

> At the fact-finding hearing the court or jury shall determine whether grounds exist for the termination of parental rights…. Grounds for termination of parental rights shall be one of the following:
>
> **(1)** ABANDONMENT. (a) Abandonment, which, subject to par. (c) ["good cause" defenses], shall be established by proving any of the following:
>
> ….
>
> 3. The child has been left by the parent with any person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of 6 months or longer.
>
> ….

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

(c) Abandonment is not established under par. (a) 2. or 3. if the parent proves all of the following by a preponderance of the evidence:

1. That the parent had good cause for having failed to visit with the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.

2. That the parent had good cause for having failed to communicate with the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.

3. If the parent proves good cause under subd. 2., including good cause based on evidence that the child's age or condition would have rendered any communication with the child meaningless, that one of the following occurred:

a. The parent communicated about the child with the person or persons who had physical custody of the child during the time period specified in par. (a) 2. or 3., whichever is applicable ....

b. The parent had good cause for having failed to communicate about the child with the person or persons who had physical custody of the child or the agency responsible for the care of the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.

….

(6) FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.

(b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, [and] whether the person has neglected or refused to provide care or support for the child ….

¶3 Britany contested the petition and invoked her right to a jury trial at the fact-finding hearing. The following facts are based on the evidence presented at the fact-finding hearing. Michael was born in July 2006. Britany was fifteen years old when Michael was born, and Aaron was seventeen years old. From July 2006 through November 2007, Aaron, Britany, and Michael lived together in Wisconsin at either Aaron's parents' house or Britany's parents' house. During this period, Aaron and Britany both provided daily care for Michael.

¶4 At the fact-finding hearing, Aaron testified as follows. In November 2007, Aaron enlisted in the Army. After his enlistment, Aaron was in basic training in South Carolina for twelve weeks and advanced training in Georgia for twelve weeks. While Aaron was in training, Britany cared for Michael "at least part of the time." In 2008, Britany called Aaron and told him "that she couldn't do it any more by herself, [and] that [he] needed to come get [his] son." Aaron subsequently requested leave to return home, but his request was denied.

¶5 As a result, in the summer of 2008 Aaron went absent without leave (AWOL) from the Army and returned to Wisconsin. Upon Aaron's return, Aaron and Britany agreed to "fifty-fifty placement" of Michael. This shared placement arrangement continued until later in 2008, when Aaron was arrested for being AWOL from the Army. Aaron was returned to Army service and sent to Fort Hood, Texas.

¶6 After Aaron returned to the Army, Michael was in Britany's care. Michael remained in Britany's care until the summer of 2009, when Michael began residing with Aaron's parents. Michael resided with Aaron's parents from the summer of 2009 through January 2010. During this period, Britany visited Michael a number of times.

¶7 Aaron received an honorable family care discharge from the Army in January 2010. At that time, Aaron obtained primary physical placement of Michael. Aaron and Michael moved to an apartment in Wisconsin. Britany knew the address of the apartment, and she also knew Aaron's phone number.

¶8 From January 2010 to September 2012, when the fact-finding hearing took place, Britany visited Michael twice. Britany's last visit with Michael occurred in December 2010 or January 2011. Since that visit, Britany has not spoken to Michael on the phone, Britany has not contacted Aaron with questions about Michael's doctor or schooling, and Aaron has not received any cards, letters, or gifts from Britany for Michael.

¶9 At the fact-finding hearing, Britany testified as follows. Michael lived with Britany when Aaron entered the Army. Britany eventually allowed Aaron to have primary physical placement of Michael because Aaron told her that "if [she] didn't, he would take [her] to court and use [her] past against [her] to take Michael away." Additionally, Britany had nowhere to live and it therefore "made sense … to give Aaron … primary [physical] placement of Michael."

¶10 Britany testified that there were no limits placed on her ability to see Michael. Britany had a one-day visit with Michael in January 2011, and that was her last visit with him. She never sent Michael birthday or Christmas presents. For a year and a half, Britany did not attempt to contact Michael. She knew where Michael was and could have contacted him, as she had Aaron's phone number and also Aaron's wife Elizabeth's phone number.

¶11 Britany explained that she did not attempt to arrange visitation with Michael because she "didn't want to be belittled when [she] would call." Britany testified that she was required to speak with Elizabeth if she wanted to see

Michael, and that she felt "belittled" and "horrible" after her conversations with Elizabeth.

¶12 Britany paid child support between October 2011 and June 2012. In June 2012, Britany filed paperwork with the court to "try … to see Michael." Britany missed the court date, and she did not follow up on the missed court date.

¶13 At the close of the fact-finding hearing, the jury found that grounds existed to terminate Britany's parental rights to Michael based on abandonment and failure to assume parental responsibility. The jury also found that Britany did not have good cause for having failed to visit with Michael. At the dispositional hearing, the circuit court concluded that termination of Britany's parental rights was in Michael's best interest, and entered an order terminating Britany's parental rights.

¶14 Britany appealed the circuit court's order terminating her parental rights, and moved for a remand for an evidentiary hearing pursuant to WIS. STAT. RULE 809.107(6)(am). This court remanded the case to the circuit court for postjudgment proceedings.

¶15 Britany filed a motion for a new trial with the circuit court, contending that the court should order a new trial because Britany's trial counsel was ineffective or, alternatively, in the interest of justice. The court held a postjudgment evidentiary hearing, at which Britany's trial counsel testified. The court assumed without deciding that Britany's trial counsel was deficient but concluded that there was no prejudice. The court also determined that Britany was not entitled to a new trial in the interest of justice. The court therefore denied Britany's motion for a new trial.

ANALYSIS

¶16 On appeal, Britany raises two main arguments. I understand Britany's first argument to be that the circuit court erred in concluding that Britany was not prejudiced by her trial counsel's errors, and that "[a] new trial should have been ordered" because Britany's trial counsel was ineffective. Britany's second argument is that this court should grant her a new trial in the interest of justice. For the reasons that follow, I reject Britany's arguments.

Ineffective Assistance of Counsel

¶17 Ineffective assistance of counsel claims in termination of parental rights proceedings are analyzed under the two-part test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Oneida Cnty. Dep't of Soc. Servs. v. Nicole W.***, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652. To show ineffective assistance of counsel, the parent must demonstrate both that trial counsel's performance was deficient and that the deficient performance prejudiced the parent's defense. ***Strickland***, 466 U.S. at 687. Whether counsel's actions constitute ineffective assistance presents a mixed question of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not reverse the circuit court's factual findings unless they are clearly erroneous. ***Id.*** at 634. However, whether counsel's performance was deficient and whether the parent was prejudiced are questions of law, which we review *de novo*. ***Id.***

¶18 Courts may decide ineffective assistance of counsel claims based on prejudice without considering whether counsel's performance was deficient. ***State v. Roberson***, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111. To show prejudice, the parent must show that counsel's alleged errors actually had some adverse effect on the defense. ***Strickland***, 466 U.S. at 693. The parent cannot

meet this burden by simply showing that an error had some conceivable effect on the outcome. ***Id.*** Instead, the parent must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶19 Britany argues that she was prejudiced by her trial counsel's failure to object to or move to strike parts of Aaron's testimony at the fact-finding hearing, and by her trial counsel's failure to object to a "golden rule" argument made by Aaron's trial counsel during closing arguments. I address each of Britany's ineffective assistance of counsel arguments in turn.

Failure to Object to or Move to Strike Aaron's Testimony

¶20 First, Britany argues that Aaron lacked personal knowledge regarding the following matters to which he testified: (1) Britany took Michael to parties and friends' houses; (2) Aaron's mother often took care of Michael; (3) before Britany "sign[ed] over Michael to Aaron, Michael had been with Aaron's parents for four weeks"; and (4) Michael was "run over by a John Deere Gator while in Britany's care." Britany contends that her trial counsel should have objected to this testimony.

¶21 Second, Britany contends that Aaron's testimony that Elizabeth told him "she had a heated conversation with Britany about Britany needing to be a better mom" was hearsay, and that her trial counsel should have objected to this testimony.

¶22 Third, Britany contends that Aaron lacked foundation to testify regarding Exhibit 2, which consisted of photographs that allegedly depicted where

Britany and Michael lived while Aaron was in the Army. Britany's trial counsel objected to Aaron's testimony regarding Exhibit 2, and Exhibit 2 was not admitted into evidence. However, Britany contends that her trial counsel should also have moved to strike Aaron's testimony from the record.

¶23 Even if Britany's trial counsel was deficient for not objecting to or moving to strike the allegedly inadmissible testimony described above, Britany has failed to show that the result of the fact-finding hearing would have been different absent these errors. Based on my review of the record, there was overwhelming evidence from which the jury could have determined that Britany had abandoned Michael without good cause and had failed to assume parental responsibility, pursuant to WIS. STAT. § 48.415. I now summarize the pertinent evidence.

¶24 As to abandonment, the evidence was as follows. As of January 2010, Aaron had primary physical placement of Michael. Britany's last visit with Michael was in December 2010 or January 2011. For over a year, Britany did not attempt to contact Michael despite the fact that she knew where Michael was and knew Aaron's phone number. Britany admitted that she "could have contacted [Michael]."

¶25 Regarding a "good cause" defense to the abandonment allegation, Britany argues that her trial counsel's errors "affected the extent to which the jury might accept" Britany's fear of being belittled by Elizabeth as good cause for abandonment. However, regarding the "belittling," Britany testified as follows:

> Q: You … indicated that at some point in time you had a conversation with the stepmother, Elizabeth, true?
>
> A: Yes.

> Q: And you felt that she intimidated you, correct?
>
> A: Belittled me.
>
> Q: So her belittling you, what does that have to do with not seeing your child?
>
> A: It doesn't.

There was no other evidence from which the jury could find that Britany had good cause for failing to visit or communicate with Michael.

¶26 As to failure to assume parental responsibility, the evidence was as follows. Britany has not seen Michael since December 2010 or January 2011, and she also has not spoken to him on the phone. Since that time, Aaron has not received any cards, letters, or gifts from Britany for Michael, and Britany has not called Aaron to ask about Michael's doctor or schooling. Additionally, Britany does not know where Michael goes to school.

¶27 Based on the evidence summarized above, the jury could have determined that Britany had abandoned Michael without good cause and had failed to assume parental responsibility. Accordingly, even if Aaron's allegedly inadmissible testimony had an adverse effect, Britany has not demonstrated a reasonable probability that, but for her trial counsel's failure to object to or move to strike the testimony, the result of the fact-finding hearing would have been different.

Failure to Object to "Golden Rule" Argument

¶28 Britany also argues that her trial counsel was ineffective for failing to object to what she describes as an improper "golden rule" argument that Aaron's trial counsel made during closing arguments. During that closing argument, Aaron's trial counsel stated: "I ask you to use your common sense; and

if that were your child, I would submit to you that Britany [] did not exercise the daily supervision, education, protection and care for Michael [].” Britany asserts that because of this statement, “[t]he jury, in effect, was asked to render a verdict based upon what the jurors would have wanted for their own children rather than to evaluate the facts and applicable law.”

¶29 A “golden rule” argument “is a ‘do unto others’ argument that shifts the jurors’ attention from the parties and the evidence before them to matters relating to their own feelings, emotions and biases.” ***Dostal v. Millers Nat. Ins. Co.***, 137 Wis. 2d 242, 260, 404 N.W.2d 90 (Ct. App. 1987). Such an argument “asks the jurors to internalize and personalize the case, rather than to search for the truth from the evidence, and it is universally recognized as improper argument.” ***Id.***

¶30 Assuming without deciding that the remark by Aaron’s trial counsel was an improper “golden rule” argument, and that Britany’s trial counsel was deficient for failing to object to it, Britany has not shown that the result of the fact-finding hearing would have been different had her trial counsel objected. The remark consisted of a single sentence offered during closing arguments, and came after the jury had heard two days of testimony regarding Britany’s parental relationship with Michael. As explained above, there was substantial evidence supporting the abandonment and failure to assume parental responsibility allegations. I therefore conclude that Britany has not shown that this error prejudiced her defense.

¶31 Because I conclude that Britany was not prejudiced by her trial counsel’s failure to object to or move to strike Aaron’s testimony, or by her trial

counsel's failure to object to the "golden rule" statement during closing argument, I do not order a new trial on the basis of ineffective assistance of counsel.

New Trial in the Interest of Justice

¶32 Britany argues that if this court does not order a new trial due to ineffective assistance of counsel, this court should grant her a new trial in the interest of justice pursuant to our discretionary authority under Wis. Stat. § 752.35, because the real controversy has not been fully tried. The arguments that Britany offers in support are largely a rehash of arguments that I have rejected above. In addition, Britany's arguments are not supported by legal reasoning, and are therefore undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider undeveloped arguments). I decline to order a new trial in the interest of justice.

CONCLUSION

¶33 For the reasons set forth above, I affirm the circuit court's order terminating Britany T.H.'s parental rights to Michael W.M.

By the Court.—Order affirmed.

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