COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2016AP1233
2016AP1234

Cir. Ct. Nos. 2015TP78
2015TP79

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

NO. 2016AP1233

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

PORTAGE COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

D. B.,

RESPONDENT-APPELLANT.

NO. 2016AP1234

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

PORTAGE COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

D. B.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Portage County: GUY D. DUTCHER, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] D.B. appeals the circuit court's orders terminating her parental rights to her children A.R. and G.R. D.B. argues (1) that, during the grounds phase of the proceedings, the circuit court committed prejudicial error when the court admitted "bonding" evidence; (2) that D.B.'s counsel was ineffective by failing to object to this evidence; (3) that the circuit court erred when it denied D.B.'s motion for a new trial; and (4) that, during the dispositional phase of the proceedings, the circuit court erred by failing to consider whether the children had substantial relationships with D.B. and other family members or whether severing those relationships would he harmful. For the reasons below, I affirm.

Background

¶2 The Portage County Department of Health and Human Services petitioned to terminate D.B.'s parental rights to A.R. and G.R., alleging as the sole

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

ground for termination that A.R. and G.R. were in continuing need of protection or services (CHIPS). *See* WIS. STAT. § 48.415(2). According to the allegations in the petitions, the children were adjudged CHIPS in December 2011 and were removed from D.B.'s home in July 2012, when A.R. was eight and G.R. was seven.

¶3 In order to establish the continuing CHIPS ground alleged in the petitions, the Department needed to prove the following elements:

> (1) that A.R. and G.R were adjudged CHIPS and were placed or continued in placement outside D.B.'s home for a cumulative period of six months or longer pursuant to one or more court orders containing the termination of parental rights warnings required by law;
>
> (2) that the Department has made a reasonable effort to provide services ordered by the court;
>
> (3) that D.B. has failed to meet the conditions for the safe return of the children to her home; and
>
> (4) that there is a substantial likelihood that D.B. will not meet the conditions for the safe return of the children within the nine-month period immediately following the conclusion of the fact-finding hearing.

See WIS. STAT. § 48.415(2)(a); WIS JI—CHILDREN 324A.

¶4 The first element was undisputed, and the court directed a verdict on that element. As to the remaining elements, the jury found that the Department met its burden, thus establishing grounds for termination. I discuss evidence of these elements below.

¶5 The case proceeded to the dispositional phase, and the circuit court exercised its discretion to terminate D.B.'s parental rights to A.R. and G.R. Post-disposition, D.B. moved for a new trial, alleging circuit court error and ineffective

assistance of counsel relating to what D.B. now refers to as "bonding" evidence that the jury heard. The court denied the motion.

¶6 In the discussion section that follows, I reference additional facts as needed.

Discussion

A. D.B.s First Two Arguments—Whether The Circuit Court Committed Prejudicial Error By Admitting "Bonding" Evidence During The Grounds Phase And Whether Counsel Was Ineffective By Failing To Object To That Evidence

¶7 During the jury trial on the grounds phase, the circuit court admitted evidence that D.B. refers to as "bonding" evidence. D.B.'s attorney did not object to that evidence.

¶8 The evidence came in several forms, but is most pointedly illustrated by portions of the Department's psychological expert's testimony. In particular, that expert testified that an assessment of D.B.'s parenting "did not demonstrate healthy bonding, and it, essentially, determined that the relationship between that mother and those children was not working effectively." Similarly, the expert testified that the children's "needs were not being fulfilled" by D.B.

¶9 D.B. argues that the circuit court committed prejudicial error by admitting this evidence and that counsel was ineffective by failing to object to it. The general rule is that a failure to object forfeits the right to direct review of an issue. *See, e.g.*, ***State v. Jones***, 2010 WI App 133, ¶25, 329 Wis. 2d 498, 791 N.W.2d 390. I see no reason to depart from that rule here and, therefore, limit

my analysis of the "bonding" evidence to whether D.B.'s counsel was ineffective by failing to object to it.

¶10 To obtain relief based on ineffective assistance of counsel, D.B. has the burden to show both deficient performance and resulting prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If D.B.'s argument falls short with respect to either, her claim of ineffective assistance fails. *See* ***State v. Smith***, 2003 WI App 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854 ("A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one.").

¶11 Here, I assume without deciding that counsel performed deficiently by failing to object to the "bonding" evidence, and I further assume without deciding that, had counsel objected, the evidence should have been excluded. Even so, for the reasons that follow I conclude that D.B.'s argument falls short on prejudice.

¶12 To demonstrate prejudice, D.B. must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding[s] would have been different." *See* ***Strickland***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶13 D.B. asserts that the "bonding" evidence resulted in prejudice because it "allowed the jury to view and consider all evidence at trial through the prism of a mother who has no emotional bond with her children." According to D.B., a jury hearing such evidence could not have fairly evaluated the other evidence against D.B.

¶14 There can be no doubt that the "bonding" evidence was damaging and likely affected the jury's view of D.B.'s parenting capabilities. But, contrary to D.B.'s assertions, the question is not whether this evidence influenced the jury's view of other evidence and D.B. Rather, as already indicated, D.B. must show that, absent the "bonding" evidence, there is a reasonable probability that the jury's verdict would have been different. D.B. fails to address the interaction of the "bonding" evidence and the *other* evidence at trial. D.B. does not show, for example, that the other evidence was somehow weak or questionable, such that the bonding evidence would have made a difference. Thus, D.B. has failed to show prejudice, and I affirm on this topic for that reason. I could stop my analysis here, but I choose to briefly explain why I am confident that D.B. could not have demonstrated prejudice even if she had presented a fully developed argument. That is, I will explain why I am confident that the jury would have reached the same verdict with or without the "bonding" evidence.

¶15 The other evidence at trial overwhelmingly showed that, despite the Department's extensive efforts to provide services to D.B., D.B. failed to meet several return conditions for over three years and was unlikely to meet those conditions going forward. As we shall now see, D.B.'s apparent inability to meet conditions was based significantly, although not solely, on D.B.'s refusal to consistently address her own mental health needs. I need not summarize the evidence as to each condition. It is enough to focus on some of the more pertinent examples.

¶16 One of the return conditions required D.B. to take medications as recommended or prescribed by a psychiatric care provider. A social worker who worked with D.B. for over two years testified that D.B. did not meet this condition

because D.B. periodically let her medical coverage lapse, such that she would run out of medication and not get refills. According to the social worker, even when the social worker helped D.B. complete paperwork to reinstate medical coverage, D.B. would sometimes claim that she did not have time to get prescriptions filled and, consequently, would be off her medication for three weeks or a full month at a time. The social worker testified that, although she coached D.B. on how to maintain medical coverage and to fill prescriptions, D.B. never got to the point where she could do these things on her own.

¶17 Another condition required D.B. to participate in individual therapy. The social worker testified that, although D.B. sometimes went to therapy, D.B. would be "passive" during therapy sessions and was repeatedly "terminated" from therapy services because she missed appointments or because she failed to make progress. When D.B. testified, she admitted to cancelling therapy appointments, and she provided no persuasive reason to think that, going forward, she would do better in consistently attending therapy.

¶18 Other return conditions required D.B. to attend her children's medical, counseling, and school appointments, and to communicate regularly with the school nurse and with G.R.'s health care providers to ensure that G.R.'s insulin-dependent diabetes was managed properly. Again, the evidence was clear that, despite the Department's efforts, D.B. failed to meet these conditions and was unlikely to meet them in the future. The social worker testified that, despite transportation assistance and other help from the Department, D.B. failed to consistently attend the required appointments and that D.B. never had regular contact with the children's school. G.R.'s pediatrician testified that D.B. was not up to date on G.R.'s medical needs, that D.B. had not attended G.R.'s frequent

medical appointments since January 2014 (a period of 22 months), and that the pediatrician's records showed no indication that D.B. called his office during that time. D.B. admitted that she had minimal contact with the children's school in the year leading up to trial, that she failed to attend many of the children's medical appointments, and that she did not call the children's health care providers to follow up after the children's medical appointments. When asked about calculating G.R.'s insulin dosage based on his "carbs" intake, D.B.'s unclear answer demonstrated that she did not understand G.R.'s medical needs in that respect. When asked to provide names of her children's teachers and the school nurse, D.B. testified that she did not remember them.

¶19 More broadly, a second social worker assigned to work with D.B. starting in mid-2014 testified that, although D.B. showed slight recent progress toward meeting return conditions, D.B. had still failed to fully meet *any* conditions. That social worker testified that D.B. never reached a point where she was able to safely care for her children independently, and pointed out that D.B.'s minimal recent progress was not enough for D.B. to move beyond supervised visits with the children. In closing arguments, the Department's attorney and the guardian ad litem highlighted that D.B. admitted to failing to meet return conditions despite having had an extraordinarily long period of time—more than three years—to do so.

¶20 D.B.'s only plausible defense appeared to be to suggest that the Department failed to make sufficient efforts to ensure that D.B.'s mental health needs had been timely assessed and treated. But this defense, while perhaps D.B.'s best one, was weak. It flew in the face of clear evidence, including evidence described above, that D.B. failed to consistently utilize or cooperate with

the mental health services and medications that she *did* receive. Further, as the jury was instructed, the Department's efforts to provide services needed to be *reasonable*, not exhaustive. *See* WIS. STAT. § 48.415(2)(a)2.

¶21 On appeal, D.B. asserts that "none of the return conditions which D.B. failed to meet was so onerous that D.B. could not reasonably have met such condition[s] in the nine months subsequent to trial. She could have." But D.B. does not support this assertion with any citations to evidence supporting a finding that D.B. was likely to meet conditions going forward. D.B.'s bald assertion is no more persuasive now than it would have been at trial.

¶22 As the circuit court aptly observed in denying D.B.'s motion for a new trial, "from a 'grounds' standpoint, this case was a slam-dunk. It was a very, very clear, well-grounded petition." I agree with the circuit court's observation and conclude that there is no reasonable probability of a different result absent the "bonding" evidence.

B. D.B.'s Third Argument—Whether The Circuit Court Erred When It Denied D.B.'s Motion For a New Trial

¶23 D.B. argues that the circuit court erred when it denied her motion for a new trial. This argument, like D.B.'s other arguments so far, is based on the court's admission of the "bonding" evidence and, as far as I can tell, adds nothing to arguments that I have already rejected. I therefore also reject D.B.'s new trial argument.

C. D.B.'s Fourth Argument—Whether The Circuit Court Erred During The Dispositional Phase

¶24 What remains is D.B.'s argument that the circuit court erred during the dispositional phase of the proceedings. During this phase, the court must consider six statutory factors before exercising its discretion to terminate parental rights. *See* WIS. STAT. § 48.426(3); ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 153-54, 551 N.W.2d 855 (Ct. App. 1996). Our supreme court has explained that the court "should explain the basis for its disposition, on the record, by alluding specifically to the[se] factors." *See* ***Sheboygan Cty. DHHS v. Julie A.B.***, 2002 WI 95, ¶30, 255 Wis. 2d 170, 648 N.W.2d 402.

¶25 The only factor at issue here is whether the child "has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships." *See* WIS. STAT. § 48.426(3)(c).[2] D.B. argues that the circuit court failed to consider whether A.R. and G.R. had substantial relationships with D.B., their adult sister, and their great-grandmother, and that the court also failed to adequately consider whether severing those relationships would be harmful to the children. I reject this argument, addressing each family member separately below.

[2] The other five factors are the likelihood of the child's adoption after termination; the age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home; the wishes of the child; the duration of the separation of the parent from the child; and whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements, and the results of prior placements. *See* WIS. STAT. § 48.426(3).

1. Children's Relationship With D.B.

¶26 During the dispositional hearing, there was testimony and argument regarding A.R.'s and G.R.'s lack of a substantial relationship with D.B. That evidence included D.B.'s testimony admitting that she no longer had a substantial relationship with A.R. and that her relationship with G.R., by comparison, was only "a little bit better."

¶27 When it ruled, the court addressed D.B. directly, stating: "You've acknowledged, to your credit, that you really don't have a relationship with the kids now. It's superficial, at best, … the net result of something which is going through the motions." In addition, the court stated: "I really didn't hear any information that would suggest there was a meaningful, substantive interaction with the kids in the three-and-a-half years since they were taken away."

¶28 These statements by the court, along with the court's many findings on other factors, clearly show the court's determination that A.R. and G.R. no longer had a substantial relationship with D.B., and that any possible harm in severing their remaining ties to D.B. was easily outweighed by other factors. The fact that the court does not use the statute's exact wording when discussing a factor does not mean that the court failed to consider that factor.

2. Children's Relationship With Their Adult Sister T.R.

¶29 The circuit court heard testimony regarding A.R.'s and G.R.'s relationship with their adult sister T.R. That evidence, although somewhat mixed, largely suggested that the children no longer had a substantial relationship with T.R. The testimony showed that, although T.R. had resided with A.R. and G.R. for several years, starting when the children were born, T.R. had limited contact

with the children after 2012 and had not seen or communicated with the children since at least a year and a half before the dispositional hearing. T.R. testified that it would hurt *her* to lose her relationship with the children, but also testified that she had "no idea" if it would be harmful to *them*.

¶30 When it ruled, the court made few references to T.R. As pertinent here, the court said only the following in the course of addressing D.B.: "I have to do what's best for the kids, not what's best for you, and not what's best for your older daughter."

¶31 Ideally, the court would have said more about the children's relationship, or lack thereof, with T.R. However, in the context of the evidence on that topic and the court's other findings, I conclude that the most reasonable way to read the court's reference to T.R. is as a reasonable determination that the children no longer had a substantial relationship with T.R. and that any harm in severing their ties to T.R. was outweighed by other pertinent factors. Thus, the court adequately considered the substantial relationships factor with respect to the children's relationship with T.R.

¶32 Moreover, I observe that, even if the court had found that A.R. and G.R. still had a substantial relationship with T.R., it is obvious that such a finding would not have changed the court's decision. On the whole, the court's underlying findings make clear that the court held the completely reasonable view that, regardless of the children's relationship with T.R., greater harm would come to the children if D.B.'s parental rights were not terminated.

3. Children's Relationship With Their Great-Grandmother

¶33 D.B. is correct that the circuit court gave *no* express consideration to the children's relationship with their great-grandmother, but I see no error here. The only pertinent evidence was that the children had not seen their great-grandmother in "years"; that she sometimes sent them letters and pictures; and that the potential adoptive parents planned to allow contact between the children and their great-grandmother to continue. D.B. did not suggest that there was any dispute as to this evidence. Under the circumstances, I conclude that the court did not need to address this relationship on the record. It would be absurd to interpret the statute to require the court to address a child's relationship with every extended family member, no matter how distant and when there is no dispute as to the nature of the relationship or the lack of consequences to the relationship upon termination of parental rights.

Conclusion

¶34 For the reasons above, I affirm the circuit court's orders terminating D.B.'s parental rights to A.R. and G.R.

By the Court.—Orders affirmed.

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