COURT OF APPEALS
DECISION
DATED AND FILED

November 30, 2017

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. 2016AP2229
2016AP2230

Cir. Ct. Nos. 2011TP348
2011TP349

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

D. C.,

RESPONDENT-APPELLANT.

IN RE THE TERMINATION OF PARENTAL RIGHTS TO D. E. R.-C., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

D. C.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: DAVID C. SWANSON and LAURA GRAMLING PEREZ, Judges. *Affirmed.*

¶1 KLOPPENBURG, J.[1] D.C. seeks reversal of the orders terminating her parental rights to A.RC. and D.RC., and the post-dispositional order denying D.C.'s motion to vacate based on the ground of ineffective assistance of counsel. D.C.'s sole argument on appeal is that her trial counsel provided ineffective assistance by failing to object to the circuit court's proposed jury instructions and to request alternative jury instructions during the grounds phase of the termination of parental rights proceeding. As explained below, D.C. fails to show that the alleged deficient performance as to the jury instructions prejudiced her defense. Therefore, I affirm.

BACKGROUND

¶2 In February 2009, D.C. adopted A.RC and D.RC. In June 2010, A.RC. and D.RC. were taken into temporary physical custody following reports that D.C. physically and sexually abused A.RC. D.C. was criminally charged and convicted of felony child abuse of A.RC, and was incarcerated for this crime in March 2011. As a result of the conviction and incarceration, D.C. was prohibited from contact with A.RC. The no contact order did not prohibit contact with D.RC.

¶3 On November 11, 2010, the circuit court found A.RC and D.RC. to be children in continuing need of protection and services (CHIPS). Based upon

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2)(3) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

that finding, the circuit court entered a dispositional order placing the children outside the home of D.C.

¶4 On November 30, 2011, the State petitioned for the termination of D.C.'s parental rights to A.RC. and D.RC. on two separate grounds: continuing CHIPS based on D.C.'s failure to meet the conditions established for the safe return of the children to D.C.'s home, and D.C.'s failure to assume parental responsibility. The initial appearance occurred on December 21, 2011, and the trial took place in January 2016. Meanwhile, D.C. was released from prison in September 2012.

¶5 At the final pretrial conference in February 2015, D.C.'s counsel requested the following jury instructions: (1) as to both the continuing CHIPS and failure to assume parental responsibility grounds, an instruction that D.C. "was prohibited from having visitation with [A.RC.] and [D.RC.]" for a certain time period; (2) as to the continuing CHIPS ground, a curative instruction on impossibility to perform due to incarceration; and (3) as to the failure to assume parental responsibility ground, a curative jury instruction for the "incarcerated parent." The circuit court noted that, even in the absence of the requested jury instructions, D.C. could present evidence as to why she could not meet the conditions of return and why she could not establish a substantial parental relationship. The circuit court did not rule on the requests and told counsel that it would address the requests on the morning of trial.

¶6 After the February 2015 final pretrial conference, the case was assigned to a different judge and D.C. was represented by new counsel (referred to as D.C.'s trial counsel in this opinion). As stated, the trial was held in January 2016.

¶7 Before trial, the circuit court distributed its proposed jury instructions to the parties; D.C's trial counsel did not object to these proposed jury instructions. At trial, the circuit court, as pertinent here, read the standard instructions for the continuing CHIPS ground and the failure to assume parental responsibility ground. The court did not read the alternative instructions requested by D.C.'s previous counsel.

¶8 The jury returned unanimous verdicts on both grounds for termination of D.C.'s parental rights as to both children, and the circuit court subsequently found that it was in the best interests of both children to terminate D.C.'s parental rights.

¶9 D.C. filed a timely notice of intent preserving her appellate rights and appellate counsel filed a no-merit notice of appeal and report. This court rejected the no-merit report and remanded for post-disposition proceedings pertaining to issues of ineffective assistance of counsel.

¶10 At the remand hearing, the post-disposition circuit court defined the scope of the issue: "Counsel did not … object to the version of the jury instructions that [the circuit court] said very clearly on the record [it] was going to use and so waived any potential objections at that point. And so really the issue here is ineffective assistance of counsel in connection with that waiver." D.C.'s trial counsel testified that she did not object to the court's proposed standard jury instructions because D.C. "had been out of custody for several years prior to us going to trial in January of 2016.... I made the strategic decision not to keep putting the fact that [D.C. was] incarcerated, especially for child abuse, in front of the jury."

¶11 On September 5, 2017, the circuit court on remand denied D.C.'s request to vacate the jury verdict on the ground of ineffective assistance of counsel. D.C. appeals.

DISCUSSION

¶12 "Wisconsin has a two-part statutory procedure for the involuntary termination of parental rights." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. "In the first, or 'grounds' phase of the proceeding, the petitioner must prove by clear and convincing evidence that one or more of the statutorily enumerated grounds for termination of parental rights exist." ***Id***. "If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit." ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶18, 333 Wis. 2d 273, 797 N.W.2d 854 (quoted sources omitted). The second phase, the dispositional hearing, "occurs only after the fact-finder finds Wis. Stat. § 48.415 ground has been proved and the court has made a finding of unfitness. In this step, the best interest of the child is the 'prevailing factor.'" ***Id.***, ¶19 (citations omitted).

¶13 This appeal concerns the first step, establishing the statutory grounds for termination of parental rights, specifically here, continuing CHIPS and failure to assume parental responsibility. *See* WIS. STAT. § 48.415(2) and (6). D.C. alleges that her trial counsel provided ineffective assistance for failing to object to the circuit court's proposed jury instructions and to request alternative instructions during the grounds phase of her termination of parental rights proceeding. As explained below, D.C.'s argument fails because she does not show that trial counsel's performance prejudiced her defense.

¶14 A parent in a termination of parental rights proceeding 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. 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 conduct constituted ineffective assistance is a question of law, which we decide de novo. ***Id.***

¶15 An ineffective assistance of counsel claim in a termination of parental rights proceeding is analyzed under the two-part test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Nicole W.***, 299 Wis. 2d 637, ¶33. To show ineffective assistance of counsel, a parent has the burden to demonstrate both that trial counsel's performance was deficient and that the deficient performance prejudiced the parent's defense. *See* ***Strickland***, 466 U.S. at 687. If D.C. fails to prove either deficient performance or prejudice, the appellate court need not address whether the other prong was satisfied. *See* ***id***. at 697.

¶16 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.***

¶17 D.C. argues at length about why the failure of her trial counsel to object to the circuit court's jury instructions and to request alternative jury instructions was deficient. However, beyond stating that "There was nothing to be

lost, and, possibly, everything to be gained for D.C. if the jury had been given the [alternative] instructions," and suggesting that there would have been no "harm" in submitting the alternative instructions, D.C. does not develop an argument as to how the result of the proceeding would have been different but for these alleged errors. Accordingly, I do not consider the merits of her argument further. *See* ***Clean Wisconsin, Inc. v. PSC***, 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768 ("[The appellate court] will not address undeveloped arguments.").

¶18 In addition, D.C. does not in her reply brief address the State's arguments in its response brief that there was no prejudice. The State argues that the jury would have reached the same results even if the alternative instructions were read to the jury because of the "ample evidence" of D.C.'s failure to complete her conditions of return under the continuing CHIPs and her failure to assume parental responsibility as to A.RC. and D.RC. both (1) when she was not incarcerated, and (2) given the opportunities for her to do so despite the no-contact order as to A.RC. D.C.'s failure to respond to these arguments in her reply brief is taken as a concession that the State's arguments are correct. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (an appellant's failure to respond in a reply brief to the arguments in a response brief may be deemed a concession).

CONCLUSION

¶19 In sum, D.C. has failed to show that any alleged deficient performance by her trial counsel prejudiced her defense, and therefore, I affirm.

By the Court.—Orders affirmed.

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