**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 30, 2015**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2014AP2291** **Cir. Ct. No. 2013TP93**

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

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

**DANE COUNTY DEPARTMENT OF HUMAN SERVICES,**

**PETITIONER-RESPONDENT,**

**V.**

**D. M.,**

**RESPONDENT-APPELLANT.**

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] D.M. appeals from an order of the circuit court terminating her parental rights to D.L. The grounds for termination at issue in this

[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.

appeal are abandonment, and failure to assume parental responsibility. *See* WIS. STAT. §§ 48.415(1) and (6). D.M. argues that she received ineffective assistance of counsel, that the circuit court erred in directing a verdict in favor of the County on an issue, and that she is entitled to a new trial in the interest of justice. I affirm for the reasons discussed below.

## BACKGROUND

¶2 D.M. is the biological mother of D.L. who was born in July 2011. In August 2011, D.L. was placed outside the home in response to concerns that D.M. was not getting D.L. necessary medical treatment. In December 2011, a dispositional order was entered determining D.L. to be a child in need of protection or services and continuing her placement outside the home.

¶3 In September 2013, Dane County Department of Human Services filed a petition to terminate D.M.'s parental rights to D.L. The petition alleged grounds of abandonment, *see* WIS. STAT. § 48.415(1)(a)2., and failure to assume parental responsibility, *see* WIS. STAT. § 48.415(6).[2] A fact-finding hearing was held before a jury over a period of three days. At the close of evidence, the County moved the court for a directed verdict on three special verdict questions, which related to the ground of abandonment. The circuit court granted the County's motion. Following its deliberations, the jury found that D.M. did not have good cause for not visiting or communicating with D.L. during either of the asserted time periods of alleged abandonment, and the jury found that D.M. had failed to assume parental responsibility for D.L.

[2] The County also alleged continuing CHIPS as a basis for termination, but later dismissed that ground.

¶4 A dispositional hearing was subsequently held, after which the circuit court entered an order terminating D.M.'s parental rights to D.L. D.M. moved the circuit court for a new trial, alleging multiple instances of ineffective assistance of counsel and alleging that a new trial was warranted in the interest of justice. Following an evidentiary hearing, the court denied D.M.'s motion. D.M. appeals.

## DISCUSSION

¶5 D.M. contends on appeal that her trial counsel was ineffective, that the court erred in granting the County's motion for a directed verdict on one of three issues for which verdicts were directed, and that she is entitled to a new trial in the interest of justice on the grounds phase.[3] I address each issue in turn below.

### A. Trial Counsel's Effectiveness

¶6 A parent in a termination of parental rights action has the right to the effective assistance of counsel. ***Oneida Cty. Dep't of Soc. Servs. v. Nicole W.***, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652. Our review of a claim of ineffective assistance of counsel presents a mixed standard of review. The circuit court's factual findings will be upheld unless clearly erroneous, however, we review independently the application of legal principles to those facts. ***State v. Manuel***, 2005 WI 75, ¶26, 281 Wis. 2d 554, 697 N.W.2d 811.

[3] To the extent I have not addressed any other of D.M.'s arguments, those arguments are insufficiently developed and/or are without merit. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶7 To establish that her trial counsel was ineffective, D.M. must demonstrate that counsel's performance was deficient and that she was prejudiced by this deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***Nicole W.***, 299 Wis. 2d 637, ¶33 (applying the two-part ***Strickland*** test in an involuntary termination of parental rights proceeding). To show that counsel's performance was deficient, D.M. must point to specific acts or omissions by her attorney that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To show prejudice, D.M. 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. If D.M. fails to establish either prong of the ***Strickland*** test, I need not determine whether the other prong is satisfied. ***Id.*** at 697.

¶8 D.M. contends that her trial counsel performed deficiently by failing to raise a constitutional challenge to the application of WIS. STAT. § 48.415(1), the ground of abandonment in this case. The County asserted two periods of abandonment: January 3, 2012 to May 1, 2012, and May 15, 2013 to September 16, 2013. D.M. argues that counsel should have raised the constitutional challenge because during both alleged periods of abandonment, the County "prohibited contact" with D.L. and it is "unfair, … inequitable," and contrary to law for the County to count as abandonment any time periods in which the County prohibited her from contacting D.L. However, as I explain below, D.M. has failed to show that the County prohibited her from visiting D.L., and has thus failed to show that even if this specific constitutional argument had been made at trial, the outcome of the proceeding would have been different. *See* ***Strickland***, 466 U.S. at 694.

¶9 In support of her argument that the County prohibited her from visiting D.L. during the first period of alleged abandonment, D.M. asserts that the County put D.M.'s visits with D.L. "on hold" until D.M. met with her social worker, Sara Hokkanen. Hokkanen testified that after D.M. missed three consecutive scheduled visitations, D.M. was notified that her visits with D.L. were being placed on hold until D.M. met with Hokkanen "to create a plan for [D.M.] to see [her] daughter." D.M. does not argue that she was unable to meet with Hokkanen or that the County placed any other restrictions on her that were impossible for her to satisfy in order for her to resume her visitations with D.L. D.M. also asserts that Hokkanen scheduled visits with D.L. on Tuesdays despite having been told by D.M. that Tuesday's "would not work with [D.M.'s] work schedule." Hokkanen testified that D.M. had indicated to her that Tuesday visitations would not work because of D.M.'s work schedule, but that D.M. failed to verify her work schedule and refused Hokkanen's request to speak with D.M.'s supervisor, informing Hokkanen that it was "not [Hokkanen's] business." Hokkanen testified that specific visitation schedules are set each week in order to accommodate the schedules of not only the parent, but also the child, who may be attending school and have other appointments, the foster family, and the DHS workers involved. Hokkanen testified that if she could have verified that D.M. had a work conflict with the scheduled Tuesday visitations, an attempt would have been made to adjust the visitation time to accommodate D.M. D.M. does not argue that she was unable to provide verification of her conflict with the visitation schedule.

¶10 With regard to the second period of alleged abandonment, D.M. asserts in conclusory fashion that the County "never allowed [D.M.] to visit with [D.L.]" However, Hokkanen testified at trial that during this time, D.M. could

have attended visits with D.L., but that D.M. did not do so, and the County presented evidence that Hokkanen offered D.M. visitation time with D.L. during that time period, but that D.M. declined that visitation.

¶11 D.M. next contends that her trial counsel performed deficiently by failing to argue that WIS. STAT. § 48.415(6) is unconstitutional as applied to her. Section 48.415(6) addresses the failure to assume parental responsibility and it provides that the "[f]ailure to assume parental responsibility … 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." A "substantial parental relationship" means "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." Sec. 48.415(6)(b).

¶12 D.M. argues that her trial counsel should have argued that WIS. STAT. § 48.415(6) is unconstitutional as applied to her because it is "fundamentally unfair" for the County to seek the termination of her parental rights on the basis that she had not assumed her parental duties when the County, by removing D.L. from her care, "made it *impossible* for [her] to assume daily responsibility for her child" or "to exercise significant responsibility for the 'daily supervision, education, … protection and care of her child.'" (Emphasis added.) D.M. argues that it was impossible for her to assume daily responsibility for D.L. because D.L. was removed from her care; however, D.M. does not argue that the County made it impossible for her to satisfy the requirements established by the County for D.L.'s return to her custody. Nor does D.M. argue that the County made it impossible for her to "express[] concern for or interest in the support, care or well-being" of D.L., a factor the fact finder may consider in determining whether a person has failed to assume parental responsibility. *See* § 48.415(6)(b).

D.M. has failed to make a sufficient showing that counsel was deficient in failing to make an as applied challenge to § 48.415(6), and I therefore conclude that counsel was not ineffective.[4]

¶13 D.M. next contends that her trial counsel was ineffective for not objecting to an instruction given to the jury that "a substantial parental relationship with the child" requires daily care and supervision. Even if counsel was deficient for failing to make such an objection, D.M. does not explain how the result of the proceeding would have been different had counsel made the objection, and thus has failed to show that she suffered any prejudice. I therefore conclude that counsel was not ineffective.

¶14 Finally, D.M. contends that her trial counsel was deficient in failing to object to the jury being given the WISCONSIN JURY INSTRUCTION—CHILDREN 313 because the burdens of proof stated in that instruction are "confusing" and may have led the jury to believe that the County's burden of proof was lower than it really was.

¶15 Assuming, without deciding, that trial counsel's failure to object to the use of the jury instruction constituted deficient performance, D.M. nevertheless fails to show that such deficiency prejudiced her. WISCONSIN JI—CHILDREN 313 contains six special verdict questions. The petitioner, the County in this case, bears the burden of answering the first two questions by clear and convincing evidence. If those questions are answered in the affirmative, the parent

[4] To the extent that D.M. is also arguing that the evidence was insufficient to sustain the jury's verdict that she failed to assume parental responsibility because the County made it impossible for her to do so, that argument is not developed and is without merit for the reasons explained in ¶12. *See* ***Pettit,*** 171 Wis. 2d at 646-47.

bears the burden to prove the remaining four questions by the "greater weight of the credible evidence, to a reasonable certainty." WIS. JI—CHILDREN 313.

¶16 In this case, the circuit court, rather than the jury, answered the first and second special verdict questions. D.M. does not argue that the court was likely to be misled by the "confusing" instruction. Nor does D.M. explain how an objection to that instruction would have affected the outcome of the trial. I therefore conclude that trial counsel was not ineffective for failing to object to the use of the instruction.

B. Directed Verdict

¶17 D.M. argues the court erred in granting the County's motion for a directed verdict on the issue of whether D.M. had failed to visit or communicate with D.L. for a period of three months or longer.

¶18 A circuit court may direct a verdict only when the evidence presented is so clear and convincing that a reasonable jury, properly instructed, could make only one finding. *See* ***Leen v. Butter Co***., 177 Wis. 2d 150, 155, 501 N.W.2d 847 (Ct. App. 1993). In determining whether a properly instructed jury could have made only one finding, this court views the evidence in the light most favorable to the party against whom the verdict was directed. ***Id.***

¶19 D.M. argues that the court erred in directing the verdict on this issue because the court "counted time where [D.M.] had been prohibited from visiting," which she argues cannot be counted as abandonment. However, as explained above in ¶¶8-10, D.M. has not shown that the County prohibited her from visiting D.L.

¶20 D.M. also argues that the court erred in directing the verdict on this issue because she testified that she had "had contact with [D.L.] approximately [ten] times during the first period of alleged abandonment when she went to visits that [D.L.] had with [D.L.'s] father," and that the County was aware that she was present at those visits. D.M. argues that these visits occurred "in the spring and summer," but is unable to specify a specific date for any of those visits.

¶21 The County agrees with D.M. that there is evidence that she visited D.L. during D.L.'s father's visitations sometime in the spring and summer of 2012. The County argues, however, that those visits could not have taken place during the first period of alleged abandonment because during that time period, D.L.'s father's visitation was supervised by DHS staff and D.M. was not present at those visits.

¶22 D.M. testified at trial that around the time of the first period of alleged abandonment, she visited D.L. by attending D.L.'s visits with D.L.'s father. D.M. was not able to specify when those visits occurred other than to state that they took place sometime in the spring or summer. The first period of alleged abandonment was from January 3, 2012 until May 1, 2012. Hokkanen testified that prior to June 2012, D.L.'s father's visits were supervised by DHS staff and that D.L. was not present at those visits. Hokkanen testified that between June 2012 and August 2012, D.L.'s father had unsupervised visits with D.L. and that she and other DHS staff were aware that D.M. had attended some of the father's unsupervised visits.

¶23 Hokkanen's testimony establishes that D.M.'s visit with D.L. during D.L.'s father's visits could not have occurred during the first alleged period of

abandonment. D.M. has not directed this court to any evidence contradicting that testimony.

¶24 Accordingly, I conclude that the circuit court did not err in directing the verdict in favor of the County.

C. New Trial in the Interest of Justice

¶25 D.M. contends that this court should reverse under WIS. STAT. § 752.35 on the ground that the real controversy was not fully tried, due to the confusing language of the jury instructions and the "fundamental[] unfair[ness]" of the County prohibiting D.M.'s contact with D.L. D.M.'s argument in this regard is conclusory. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (this court does not generally consider conclusory assertions and undeveloped arguments). Regardless, I conclude that real controversy was fully tried and decline to exercise my discretion to reverse on that ground.

CONCLUSION

¶26 For the reasons discussed above, I affirm.

*By the Court.*—Order affirmed.

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