COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 2015

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. 2015AP898
2015AP899

Cir. Ct. Nos. 2014TP2
2014TP3

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

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

SAUK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

A. C.,

RESPONDENT-APPELLANT.

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

SAUK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

A. C.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Sauk County: PATRICK J. TAGGART, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] A.C. appeals from orders of the circuit court terminating her parental rights to S.W. and M.W. on the basis that they were in continuing need of protection or services. *See* WIS. STAT. § 48.415(2). A.C. contends that she is entitled to a new trial on the grounds phase because she received ineffective assistance of counsel and in the interest of justice. For the reasons discussed below, I affirm.

BACKGROUND

¶2 A.C. is the biological mother of S.W., who was born in April 2009, and M.W., who was born in April 2011. In October 2013, dispositional orders were entered determining S.W. and M.W. to each be a child in need of protection or services due to neglect, and placing them outside their home. In May 2014, Sauk County Department of Human Services petitioned the circuit court for the termination of A.C.'s parental rights to S.W. and M.W. on the basis that each was in continuing need of protection or services. *See* WIS. STAT. § 48.415(2).

¶3 A fact-finding trial on the issue of whether grounds existed for termination of A.C.'s parental rights was held before a jury over a period of three days. The jury found that S.W. and M.W. were determined to be in need of protection or services and placed outside the home for six months or longer, that Sauk County Department of Human Services had made a reasonable effort to

[1] These appeals are 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.

provide services as ordered by the circuit court, that A.C. failed to meet the conditions established for the safe return of S.W. and M.W. to A.C.'s home, and that there is not a substantial likelihood that A.C. would meet those conditions in the following nine months. *See* WIS. STAT. §§ 48.415(2)(a)2.a. & b., and 48.415(2)(a)3.

¶4 A dispositional hearing was subsequently held, after which the circuit court entered orders terminating A.C.'s parental rights to S.W. and M.W. A.C. moved the circuit court for an order vacating the orders terminating her parental rights to S.W. and M.W. and for a new trial on the issue of grounds, on the basis that she received ineffective assistance of counsel and in the interest of justice. Prior to the evidentiary hearing on A.C.'s motion, A.C.'s trial counsel passed away. However, all parties agreed that because there was a record of trial counsel's reasoning, the hearing could proceed in counsel's absence. Following the hearing, the circuit court denied A.C.'s motion. A.C. appeals.

DISCUSSION

A. Trial Counsel's Effectiveness

¶5 A.C. contends that the order terminating her parental rights should be vacated and that she should be given a new trial on the issue of grounds because her trial counsel was ineffective.

¶6 A parent in a termination of parental rights action has the right to the effective assistance of counsel. ***Oneida Cty. Dept. of Social 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.

¶7 To establish that her trial counsel was ineffective, A.C. 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, A.C. 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, A.C. 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 A.C. fails to establish one prong of the ***Strickland*** test, I need not determine whether the other prong is satisfied. ***Id.*** at 697.

¶8 A.C. argues that her trial counsel performed deficiently by: (1) failing to seek a pretrial order prohibiting any evidence that A.C.'s parental rights had been terminated to another child, T.W., who is not party to this action; (2) by failing to object earlier to testimony that her rights had been terminated as to T.W.; (3) by failing to seek a pretrial order prohibiting any evidence about T.W. and S.C., a fourth child of A.C.'s, in general; and (4) by failing to object at trial to testimony about them. Relevant to A.C.'s arguments are the following facts.

¶9 Prior to trial, Sauk County moved *in limine* to present evidence at trial of A.C.'s entire case history and involvement with Department of Human Services, including evidence related to T.W. and S.C. At the hearing on Sauk County's motion *in limine*, A.C.'s trial counsel stated that she did not object to

evidence related to A.C.'s case history and involvement with the Department of Human Services. Counsel further stated that she was "concern[ed]" about evidence being presented to the jury about T.W. and S.C., and that she objected to any reference at trial to A.C.'s parental rights being terminated as to T.W., but did not object to evidence related to S.C. because she believed that there were "thing[s]" that could help A.C.'s case. The parties ultimately agreed at the hearing that evidence related to T.W. and S.C. was "relevant to a point, and if it [went] beyond that [counsel would] address that to [the court] … outside the presence of the jury." The order entered by the circuit court provided in part that Sauk County could present evidence of "[A.C.'s] entire case history and involvement with the Sauk County Department of Human Services, including evidence relating to two other children of hers, [T.W.] and [S.C.], which were removed from her care and have not been returned."

¶10 At trial, Joel Petty, a psychotherapist who provided services to A.C., testified that he provided services to A.C. beginning in February 2013. Counsel for Sauk County asked Petty "what was the purpose of the therapy at that time? What were the goals, or what was the treatment that you were going to provide to [A.C.]?" Petty responded: "At that time [A.C.] was interested in services involving her oldest child, and eventually there was a termination of parental rights. So one of the issues was adjusting to that, the loss of the child …." Following a few additional questions, counsel for Sauk County asked Petty: "How did [A.C.] present during the sessions that you had with her," to which Petty responded, "Her life at that time was relatively tumultuous. She had separation from her oldest child that had been adopted." Following Petty's answer, A.C.'s trial counsel moved the circuit court for a mistrial on the basis that Petty had indicated twice that A.C.'s parental rights to T.W. had been terminated. A.C.'s

trial counsel explained to the court that she did not request a side bar or object after Petty's first reference to the termination of A.C.'s parental rights to T.W. because she did not want to "call attention to it and make it worse," but that in light of the subsequent reference to the termination of A.C.'s parental rights to T.W., a new trial was warranted. Counsel for Sauk County responded that she had not anticipated that Petty would reference the termination of A.C.'s parental rights to T.W. and that she did not intend to elicit such testimony. Counsel pointed out, however, that there was not an order specifically prohibiting such evidence. Ultimately, the circuit court denied the motion for mistrial. The court stated that although the evidence violated an understanding between the parties, it was not a violation of the court's order, and that a curative instruction would remedy any prejudice resulting from the evidence.

¶11 A.C. argues first that her trial counsel should have objected pretrial to any evidence related to the termination of A.C.'s parental rights to T.W. The parties agreed that the State would not seek to introduce evidence that A.C.'s parental rights to T.W. had been terminated. Although Petty testified that A.C.'s parental rights to T.W. had been terminated, there is no indication in the record that Sauk County sought such testimony. Instead, it appears from the record that Petty offered that testimony upon his own volition. A.C. has not argued that Petty would not have testified in the same manner had A.C. requested that the court's order on Sauk County's motion *in limine* specifically exclude evidence related to A.C.'s parental rights to T.W., and I see no reason why it would not be the same. Accordingly, I conclude that A.C.'s trial counsel was not deficient in her actions related to Petty's testimony that A.C.'s parental rights to T.W. had been terminated.

¶12 Next, A.C. argues that her trial counsel's performance was deficient because counsel "should have asked to approach the bench as soon as it became apparent that the witness was telling the jury about the prior termination." However, A.C.'s trial counsel explained to the circuit court that she did not object when Petty first testified that A.C.'s parental rights to T.W. had been terminated because she did not wish to draw attention to that evidence. Appellate courts "will not second-guess a reasonable trial strategy, but [] may conclude that an attorney's performance was deficient if it was based on an 'irrational trial tactic' or 'based upon caprice rather than upon judgment.'" ***State v. Domke***, 2011 WI 95, ¶49, 337 Wis. 2d 268, 805 N.W.2d 364 (quoted source omitted). A.C. does not argue that trial counsel's failure to object in the first instance was "irrational" or "based upon caprice," and I conclude that counsel's reasoning was not. Accordingly, I conclude that counsel was not deficient.

¶13 Finally, A.C. argues that her trial counsel performed deficiently by failing to seek a pretrial order prohibiting any evidence about T.W. and S.C. in general, and in failing to object at trial to testimony about them. Sauk County argues that trial counsel was not deficient in failing to object to evidence related to T.W. and S.C. because the evidence was relevant to prove that Sauk County had made reasonable efforts to provide the services ordered by the court and that there was a substantial likelihood that A.C. would not meet the conditions of return within the next nine months. *See* WIS. STAT. §§ 48.415(2)(a)2.a. & b., and 48.415(2)(a)3. A.C. acknowledges that "history of parental conduct may be relevant to predicting a parent's chances of complying with conditions in the future, despite failing to do so to date." ***La Crosse Cty. Dep't of Human Servs. v. Tara P.***, 2002 WI App 84, ¶13, 252 Wis. 2d 179, 643 N.W.2d 194. She argues, however, that evidence related to T.W. and S.C. was not relevant in this case

because they were not subject to the termination proceeding, and evidence about T.W. and S.C. did not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable." *See* WIS. STAT. § 904.01.

¶14 The circuit court determined that evidence related to T.W. and S.C. was relevant to establish that there was a substantial likelihood that A.C. would not meet the conditions of return established by the court within the next nine months. *See* WIS. STAT. § 48.415(2)(a)3. I agree.

¶15 A.C. argues in the alternative that even if the evidence was relevant, it was inadmissible under WIS. STAT. § 904.03 because the probative value of the evidence was outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. A.C. asserts that because the issue before the jury was whether Sauk County had proven grounds existed for termination of A.C.'s parental rights to S.W. and M.W., presenting the jury with information about T.W. and S.C. was "confus[ing] and misle[ading] [to] the jury." A.C. also asserts that evidence about T.W. and S.C. was "likely [to] arouse[] the jury's sympathies and create[] a desire to punish [A.C.]" because it "'conveyed an underlying message about the character of the defendant that a jury would find hard to ignore.'" ***State v. Jackson***, 216 Wis. 2d 646, 667, 575 N.W.2d 475 (1998).

¶16 A.C. does not explain how or why the evidence was confusing or misleading, and her assertion that the evidence would cause the jury to seek to punish her is not developed and is, at best, speculative. In short, A.C. has not shown that the evidence was inadmissible because it was unduly prejudicial.

¶17 Because I agree with the circuit court that the evidence was relevant and because A.C. has failed to make a showing that the evidence was unfairly

prejudicial, I conclude that A.C. has failed to establish that her trial counsel was deficient in failing to object to that evidence.

¶18 However, even if the evidence was inadmissible and counsel was deficient in failing to object to evidence about T.W. and S.C., A.C. has not established that she suffered any prejudice. To show prejudice, A.C. must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. A.C. has not met this burden.

¶19 The jury was instructed by the circuit court as follows: "Testimony was presented during the trial regarding two of [A.C.'s] other children. You are only to consider this testimony as background evidence. Your determinations in this case are only in regards to [S.W.] and [M.W.]." This court presumes that the jury follows the instructions given to it. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (1989). A.C. argues the instruction was "confus[ing] and misle[ading]," and that the instruction was defective because it should have provided the jury with additional information on what is meant as "background evidence." However, A.C. has not directed this court to where in the record an objection to the instruction was made, nor does she argue that counsel was deficient in failing to raise an objection to the instruction. Accordingly, any objection to the instruction is forfeited. *See* ***State v. Rogers***, 196 Wis. 2d 817, 826-29, 539 N.W.2d 897 (Ct. App. 1995) (a failure to raise a specific challenge before the circuit court forfeits the right to raise that challenge on appeal).

¶20 A.C. also seems to be arguing that the result of the proceeding would have been different because two jurors dissented on the issue of whether Sauk County established that there was a substantial likelihood that A.C. would not

meet the conditions of return within the next nine months. I fail to follow A.C.'s logic. To the extent she is arguing that the remaining jurors would have found against Sauk County on that issue had evidence about T.W. and S.C. been excluded, her argument is speculative and without support. One could just as easily speculate that the fact that two jurors dissented demonstrates the lack of prejudice.

¶21 Accordingly, for the reasons discussed above, I conclude that A.C.'s trial counsel was not ineffective.

B. New Trial in the Interest of Justice

¶22 A.C. contends that this court should reverse the orders of termination in the interest of justice under WIS. STAT. § 752.35 on the ground that the real controversy was not fully tried due to Petty's testimony that A.C.'s parental rights to T.W. had been terminated.

¶23 Only two passing references were made regarding the termination of A.C.'s parental rights to T.W. over the course of a three-day trial, the jury was instructed that its determinations related only to S.W. and M.W., and the jury was instructed that any testimony about T.W. was to be treated only as "background evidence." I conclude that the real controversy was fully tried, and that a new trial in the interest of justice is not warranted.

CONCLUSION

¶24 For the reasons discussed above, I affirm.

By the Court.—Orders affirmed.

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