COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1872 **Cir. Ct. No. 2013TP32**

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

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

RACINE COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

L.H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: JOHN S. JUDE, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] L.H. appeals from the trial court's order terminating her parental rights to C.M. and the court's denial of her posttermination motion. She argues she is entitled to a new trial because (1) improper evidence was introduced during the fact-finding hearing that C.M. had "bonded" with his foster family, (2) the trial court erroneously instructed the jury with regard to the "five-sixths verdict" rule, and (3) she did not receive the proper number of peremptory strikes. She further argues that because her trial counsel failed to object to the above, counsel provided her ineffective representation. Lastly, she claims the trial court erred in denying her motion for a new trial. We affirm.

Background

¶2 Racine County filed a petition to terminate L.H.'s and C.M.M.'s parental rights to C.M. on the grounds that C.M. was a child in "continuing need of protection or services," under WIS. STAT. § 48.415(2), and L.H. and C.M.M. "fail[ed] to assume parental responsibility" for C.M., under § 48.415(6). C.M.M., C.M.'s father, failed to personally appear for the fact-finding hearing on the petition—the first phase of a termination of parental rights (TPR) proceeding.[2] The following matters relevant to L.H.'s appeal took place at the fact-finding hearing on whether grounds existed for the termination of L.H.'s and C.M.M.'s parental rights. *See* WIS. STAT. § 48.424(1).

[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.

[2] Termination of C.M.M.'s parental rights to C.M. are not at issue in this appeal.

¶3 For this hearing before a jury, L.H. and C.M.M. were afforded three peremptory strikes each, and the County and guardian ad litem were afforded three strikes between them. Thirteen jurors were selected for the hearing, including one alternate juror.

¶4 L.H. testified first at the hearing. She gave birth to C.M. by emergency C-section on February 1, 2012, when she was seven months pregnant. C.M. was born with significant health issues. L.H. received a lesson in taking care of his feeding tube, and she sometimes took care of his tube when he was at Children's Hospital. In March 2012, C.M. was discharged from the hospital and began living in a foster home. L.H. regularly visited C.M. until October 2012, but after that her visits with C.M. "became far and few between." L.H. testified that at no time since C.M.'s birth has he ever lived in the same residence with her or even been with her in her residence.

¶5 Regarding her living arrangements since C.M.'s birth, L.H. testified as follows. From the time of C.M.'s birth through the time she was evicted in July 2012, L.H. lived in an apartment in Burlington. After the eviction, L.H. lived in a hotel for some time. In October 2012, she moved into a homeless shelter in Racine. In or around November 2012, she was asked to leave the shelter and thereafter, until approximately April 2014, she stayed in at least seven different locations in Milwaukee, including a church shelter, which she was asked to leave in January 2014. In April 2014, L.H. moved into a homeless shelter in Racine for approximately two months before leaving to live in an apartment in Racine. She testified she had "a relapse" and was evicted from that apartment. For the two and a half months prior to trial, she had been living at a homeless shelter in Burlington. L.H. testified her sole source of income was social security disability, but she also received food stamps.

¶6 L.H. also testified regarding her history of substance abuse and attempts to remain sober, acknowledging she tested positive for cocaine use in November 2011 (while pregnant with C.M.), participating in "A.A.," "relaps[ing]" in December 2011, smoking "weed," and dealing with mental health issues her "entire life." She initially indicated she had no positive drug tests between March 19, 2012, and January 2013, but when asked about specific dates therein, she confirmed testing positive for cocaine use on April 27 and May 22, 2012, and for "K-2" use on June 5, 2012. In October 2013, around the time of her first appearance on the petition for termination of her parental rights, L.H. was discharged from an alcohol and other drug abuse (AODA) recovery program due to her lack of attendance. She then participated in another program through a church, but confirmed she was "ultimately asked to leave that program" in January 2014. She testified regarding several drug tests that came back negative, but also to missing multiple scheduled tests in early 2014. In fall of 2014, L.H. began missing appointments in a women's AODA and trauma recovery program, Women of Worth, and was discharged. At the time of trial, L.H. was engaged in counseling through the HOPE center in Racine.

¶7 An initial assessment worker for Racine County Human Services testified next.[3] She began working with L.H. immediately after L.H. gave birth to C.M. when L.H. tested positive for "several different drugs" and C.M. tested positive for cocaine. L.H. had told the assessment worker that she had used drugs "right before going into" the hospital. The assessment worker confirmed that when she visited L.H. and C.M.M. at their home in Burlington on March 6, 2012,

[3] At the time of trial, this individual was a case manager outreach coordinator working out of Children's Hospital.

she informed them that before the County would allow them to have C.M., they would have to show they were drug free, had an adequate and safe home for C.M., and could provide appropriately for his care. L.H. failed to appear for a scheduled drug test on March 9, 2012, reporting she missed the test because she had to be in Kenosha in relation to a pending criminal case she had for possession of drug paraphernalia. L.H. and C.M.M. told the assessment worker they would not cooperate with drug tests; as a result, the assessment worker and her supervisor made the decision to not allow them to have C.M. upon his discharge from the hospital, but rather took C.M. into temporary physical custody. Following the temporary physical custody hearing on March 16, and despite the court ordering that L.H. and C.M.M. not have visitation with C.M. until they provided a "clean" drug test, L.H. and C.M.M. refused to submit to a drug test. The assessment worker ended her involvement with this case on March 20, 2012.

¶8 A case manager[4] for Racine County Human Services testified she worked with L.H. and C.M.M. from March 20 until June 29, 2012. When she received the case, L.H. was very compliant and willing to work with her, and "[i]t appeared as though the family was capable of caring for" C.M. after some training. L.H. participated in classes to learn certain skills to provide for C.M.'s needs and had been progressively building up those skills. She testified to L.H. visiting C.M. at the foster home, to C.M.'s on-going health problems, and to L.H. receiving mental health treatment, including being on psychotropic medications; but confirmed L.H.'s mental health issues did not appear to interfere with L.H.'s ability to care for C.M. during her visits with him. She acknowledged L.H. never

[4] At the time of trial, the case manager had become a supervisor.

had placement of C.M. or took care of his needs in a situation that was not supervised.

¶9 The caseworker testified that the "wheels came off" due to drug usage. Throughout the three months she had the case, L.H. had multiple negative drug tests but also had positive tests and/or admitted to drug use, including cocaine and marijuana use, on April 27, May 15, May 22 and June 20, 2012. L.H. displayed "evasive behaviors" to avoid coming in at times for drug tests, and had a "lack of follow through with AODA services."

¶10 A Racine County social worker testified she had responsibility for this case for three and a half months beginning July 2012. She reported an instance in August 2012 where L.H. "blacked out" and emergency personnel were called to her apartment and that L.H. reported suffering from seizures. The blackout incident was significant because C.M. had "exceptional needs" and needed to be "closely monitored 24 hours a day." The social worker noted that at that time C.M.M. served as a "paid personal care provider" for L.H.'s own needs. She testified the seizures and blackouts could be a long-term issue or the result of L.H.'s traumatic pregnancy. An AODA counselor had informed the social worker that seizures and blackouts also could be the result of "chemical dependency and drug alcohol abuse."

¶11 The social worker testified that during the time she worked on this case, L.H. continued to visit C.M. about once a week at the foster home. During the visits, L.H. was "attentive and nurturing" toward C.M., and C.M. responded favorably to the attention he received from L.H. On one occasion, however, the foster mother reported concerns about L.H. being "too lethargic," perhaps "having some medical issue."

¶12 The social worker testified L.H. was taking medication and receiving services for her mental health issues. She stated that the barriers to L.H.'s reunification with C.M. were the need for L.H. to "maintain[] sobriety" and "compliance with mental health," L.H.'s "relationship with [C.M.]," finances "because [C.M.] needed 24 hours care," and [C.M.'s] need to be in a stable environment. She had concerns about how L.H. managed her finances, particularly "how she was spending her money." The social worker testified that during her tenure on the case, at no point was L.H. responsible for C.M.'s daily care or taking care of him in an unsupervised manner.

¶13 An AODA counselor testified that based upon her direct assessment of L.H. in June 2012, L.H. was suffering from alcohol and cocaine dependency and marijuana abuse, and "had a long-standing substance abuse problem." The counselor established a plan with L.H. to reach sobriety, and noted that during her sessions L.H. was "cooperative" and "meeting the expectations," but that L.H. was eventually discharged from the program due to her poor attendance. She indicated that both "blackouts" and seizures could be connected to drug and alcohol use or withdrawals, but there could also be other causes of seizures.

¶14 A family program director for a homeless shelter in the city of Racine testified that L.H. first stayed at her shelter from November 1 through 8, 2012. Based upon a program designed to "kind of track the homeless," she stated L.H. also stayed at a shelter in Milwaukee from May 12 through 28, 2013, and stayed with the "community health path program" from July 23 through September 23, 2013. L.H. returned to the director's Racine shelter on May 13, 2014, and stayed until July 4. Part of the program at the Racine shelter requires participants to stay "clean and sober," take parenting classes, and save money to afford more permanent, independent housing. L.H.

satisfied the "clean and sober" requirement for the two months she was at the shelter, but when she had a "weekend pass" from June 6 through 8, 2014, L.H. reported spending $600 taking her sixteen-year-old daughter to Pridefest in Milwaukee. L.H. left the shelter in July 2014 after obtaining an apartment. The director advised her to "stay away from" the particular apartment she chose because it had "high drug traffic," testifying L.H. "wasn't strong enough." L.H. subsequently attempted multiple times to come back to the shelter, but it would not take her back because her income was too high. The director testified that L.H. completed phase one of the Women of Worth recovery program after she left the Racine shelter, but did not complete phase two.

¶15 Several of C.M.'s caregivers also testified. A speech therapist testified she saw C.M. at least once a month, and sometimes once a week, from May 2012 until February 2015, when C.M. turned three and left her program. When she stopped working with him, C.M. had impaired vision and "global developmental disorder." He was not able to speak but was "just able to make sounds," and was fed with "a J-tube," "where the food goes into the intestines," which was a "long-term" condition. The speech therapist opined that C.M. will never be able to eat by mouth.

¶16 The speech therapist testified she observed C.M. with L.H. on only one occasion, "[w]hen he was still an infant" at his first foster home in 2012, and the interaction between L.H. and C.M. was appropriate. She did not recall L.H. ever calling her to inquire about the therapy she was providing C.M. When the County asked, without objection, who she believed C.M. "is bonded to since you have been working with him," the therapist responded, "[the foster mother] and the family," who were C.M.'s "most recent caregiver." The therapist also

confirmed she believed C.M. "has bonded to" the foster mother's own children, which included some teenagers as well as younger children.

¶17 An occupational therapist testified she had been working with C.M. regularly from when he was two months old until he turned three years old, and she explained some of C.M.'s abilities and limitations. She had met L.H. on "a couple of occasions" at C.M.'s first foster home. L.H. had inquired at that time how C.M. was doing and what she needed to do for him. The occupational therapist testified to her belief that C.M. moved to his current foster home when he was around one year old, and she had not seen L.H. there. L.H. never called her or sent her a letter seeking information, but regular reports were sent to L.H.'s current caseworker. When asked if, based upon her training and experience, she would "recognize a child who has bonded to a particular adult," she responded, "[a]bsolutely." When then asked, without objection, who C.M. is "bonded to as his adult," she responded, "[h]is foster parents … [a]nd the sibling."

¶18 The occupational therapist then testified, without objection, regarding a doctor appointment she attended with L.H., the foster mother, and C.M. when C.M. was two years old.

> [County:] Did anything happen at that [doctor] appointment that was dispositive of who has bonded to [C.M.]?
>
> [Occupational Therapist:] Yes. Because [the foster mother] and [the doctor] had stepped out to have a discussion and [L.H.] and I and [C.M.] stayed in the room. He immediately got very upset that [the foster mother] had left, and so he was inconsolable. Just kept looking toward the door. Then I tried consoling him by holding him and distracting him. Then we needed to get [the foster mother] to calm him down.
>
> [County:] Did [L.H.] attempt to comfort [C.M.] at that time?

> [Occupational Therapist:] Not that I recall. She was looking toward the door for [the foster mother] to come back.

¶19 C.M.'s doctor—a pediatric rehabilitation specialist at Children's Hospital—testified she first saw C.M. when he was six weeks old. She explained C.M.'s current medical and developmental condition, which she termed "stalled" and with "significant developmental delays." She remembered meeting L.H. in 2014 at one of the doctor's approximately every six-to-eight-month appointments with C.M. and his foster mother. When asked who C.M. was bonded with, the doctor noted that C.M. was autistic and therefore identifying the bond "is a little bit different than that of a typical child," so C.M.'s action of climbing into the foster mother's lap and placing his face next to hers could be "affection" or could be "attachment." She confirmed it was "hard to say with a child who is autistic."

¶20 The current caseworker testified she has been on this case since October 2012. She had explained to L.H. that if L.H. "fail[ed] to drop [urine for a drug test] within two hours of being requested, that it's presumed dirty." She further testified it was reported to her that L.H. was "disengaging" in her AODA treatment, was a "no show[]" and "no call[]" and was "not following through." The caseworker noted L.H. had appeared and passed multiple drug tests, but also testified she had failed to appear for multiple drug test requests, self-reported drug use, and failed drug tests. She further testified to L.H.'s refusal to sign releases so the caseworker "could get her involved in services"; L.H.'s failure to later follow through on a referral to a program to assist her with housing; L.H.'s discharge, due to her failure to participate, from another, multi-faceted program that could have assisted L.H. in obtaining services to assist her in "be[ing] stable in [her] mental health and [her] addiction"; and L.H.'s agreement to sign releases to be enrolled with a Milwaukee provider to administer drug tests when requested by the

caseworker. She also testified to L.H.'s current participation in AODA programming conducted through the shelter where L.H. was residing at the time of trial.

¶21 After the close of testimony, the trial court and parties held a jury instruction conference. Without objection, the court gave the following jury instructions relevant to this appeal. As to WIS. STAT. § 48.415(6), failure to assume parental responsibility, the court instructed the jury as follows:

> The petition also in the case that [L.H.] and/or [C.M.M.] has failed to assume parental responsibility which is grounds for termination of parental rights. Your role as jurors will be to answer the following question in the special verdict. Has [L.H.] and/or [C.M.M.] failed to assume parental responsibility for [C.M.? T]o establish a failure to assume parental responsibility, the State of Wisconsin must prove by evidence which is clear, satisfactory [and] convincing to a reasonable certainty that [L.H.] and/or [C.M.M.] has not had [a] substantial parental relationship with [C.M.] The term, quote, substantial parental relationship, unquote, means the acceptance, exercise of significant responsibility for the daily supervision, education, protection and care of [C.M.] Substantial relationship is assessed based on the totality of the circumstances throughout the child's entire life.
>
> In evaluating whether [L.H.] and/or [C.M.M.] has had a substantial parental relationship with [C.M.], you may consider factors including but not limited to whether [L.H.] and/or [C.M.M.] has expressed concern for or interest in the support, care or well-being of [C.M.] Whether [L.H.] and/or [C.M.M.] has neglected or refused to provide care or support for [C.M.] Whether [L.H.] or [C.M.M.] exposed [C.M.] to [a] hazardous living environment. Whether with respect to the person who is the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy and all other evidence bearing on that issue which assists you in making this determination.
>
> You May consider the reason for [L.H.'s] and/or [C.M.M.'s] lack of involvement when you assess all of the circumstances throughout [C.M.'s] entire life.

> ….
>
> Before you may answer the special verdict question, you must be convinced by evidence that is clear, satisfactory and convincing to a reasonable certainty that the answer should be answered yes. If you are not so convinced you must answer the question no.

See WIS JI—CHILDREN 346 (2015). As to the five-sixths verdict, the court instructed:

> Now, agreement by ten or more jurors is sufficient to become your verdict. Jurors have a duty to consult with one another and deliberate for the purpose of reaching agreement. If you can do so consistently with your duty as juror, at least the same ten jurors should agree on all the answers. I ask you to be unanimous if you can. Bottom of the verdict you will find a place provided where dissenting jurors, if there be any, will sign their names and state the answer or answers with which they do not agree. Either the blank lines or the special line below them may be used for that purpose. You will see on the form two lines for dissenting jurors.

See WIS JI—CIVIL 180 (2011).

¶22 The court also provided two sets of special verdicts to the jury, one for L.H. and a separate set for C.M.M. Each special verdict set contained one special verdict for the CHIPS ground (containing four questions, the first question answered by the court) and one for the failure to assume parental responsibility ground. The jury sent out one question during deliberations, requesting the original dispositional order dated May 29, 2012, which the court provided. In a ten-to-two vote, the jury found both grounds existed to terminate L.H.'s parental

rights to C.M. After a dispositional hearing,[5] the court terminated L.H.'s parental rights.

¶23 L.H. filed a posttermination motion for a new trial, alleging the trial court erred when it (1) allowed evidence to be introduced during the fact-finding hearing that C.M. had "bonded" with his foster family, (2) erroneously instructed the jury with regard to the "five-sixths verdict" rule, and (3) only provided L.H. with three peremptory strikes when she was entitled to four. She further argued that because her trial counsel failed to object to the above, she received ineffective assistance of counsel. After a ***Machner***[6] hearing, the court denied her motion. L.H. appeals. Additional facts are set forth as needed.

Discussion

¶24 For parental rights to a child to be terminated, a petitioner, here Racine County, must first prove by clear and convincing evidence one or more of the statutory grounds for termination. ***Evelyn C. R. v. Tykila S.***, 2001 WI 110, ¶21, 246 Wis. 2d 1, 629 N.W.2d 768; *see also* WIS. STAT. § 48.415.

¶25 Because L.H. failed to timely object at trial to any of the errors she raises on appeal, she forfeited her opportunity to directly contest them. *See* ***State v. Haywood***, 2009 WI App 178, ¶15 & n.5, 322 Wis. 2d 691, 777 N.W.2d 921. However, she asserts her trial counsel performed ineffectively in failing to raise these issues before the trial court; accordingly, we consider them under the rubric

[5] Neither L.H. nor C.M.M. personally appeared at the dispositional hearing and the court found both in default. L.H.'s counsel informed the court he had most recently spoken to L.H. that day and she "informed" him "she decline[d] to appear" at the hearing.

[6] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

of ineffective assistance of counsel.[7] ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31 ("The absence of any objection warrants that we … 'address waiver within the rubric of the ineffective assistance of counsel.'" (citation omitted)); ***A.S. v. State***, 168 Wis. 2d 995, 1002-05, 485 N.W.2d 52 (1992) (parents are entitled to effective assistance of counsel in TPR cases, which effectiveness is determined using the test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984)).

¶26 To establish ineffective assistance of counsel, L.H. must show that her counsel's performance was deficient and prejudicial. ***Strickland***, 466 U.S. at 687. If she fails to prove one prong, we need not address the other. ***Id.*** at 697.

¶27 To prove deficient performance, she must establish that counsel's conduct fell below an objective standard of reasonableness. ***State v. Thiel***, 2003 WI 111, ¶¶18-19, 264 Wis. 2d 571, 665 N.W.2d 305. There is a strong presumption that a parent received adequate assistance and that counsel's decisions were justified in the exercise of reasonable professional judgment. *See* ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364; ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. Counsel's performance is deficient only if the parent proves that counsel's challenged acts or omissions were objectively unreasonable under all the circumstances of the case. *See* ***Kimbrough***, 246 Wis. 2d 648, ¶35.

¶28 To prove prejudice, L.H. must show the alleged errors of counsel were "of such magnitude that there is a reasonable probability that, absent the

[7] While L.H. mentions in her briefing due process concerns and that she did not receive a fair trial, she fails to develop any legal arguments for such issues.

errors, 'the result of the proceeding would have been different.'" ***State v. Erickson***, 227 Wis. 2d 758, 769, 596 N.W.2d 749 (1999) (quoting ***Strickland***, 466 U.S. at 694).

¶29 Our review of an ineffective-assistance-of-counsel claim presents a mixed question of fact and law. ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500. We will not disturb the trial court's findings of fact unless they are clearly erroneous. ***Id.*** The ultimate determination of whether counsel's performance constitutes ineffective assistance of counsel, however, presents a question of law. ***Thiel***, 264 Wis. 2d 571, ¶21. We review de novo the legal questions of whether counsel's performance was constitutionally deficient and whether the deficient performance was prejudicial to a level that undermines the reliability of the proceeding. ***Id.***, ¶24.

Evidence that C.M. had "bonded" with the foster family

¶30 L.H. claims her trial counsel was ineffective for not objecting to the testimony of C.M.'s speech and occupational therapists that C.M. had bonded with the foster mother and family, not L.H. We disagree.

¶31 At the ***Machner*** hearing, trial counsel explained he considered objecting to the challenged testimony of these witnesses but did not because he was concerned doing so "might give the jury cause to think we were trying to hide something or prevent something from coming in." Counsel believed L.H. was "better off by not objecting to it" because counsel "believed that we wanted to present the mother in the best light possible."

¶32 Despite L.H.'s posttermination arguments to the contrary, the posttermination court[8] found the "bonding" evidence to be relevant on the issue of whether L.H. failed to assume parental responsibility for C.M., one of the two considered grounds for termination. The court stated that "[f]ailure to assume parental responsibility envisions more than just a babysitter or caretaker, or financial support payor. This envisions a parental relationship that includes bonding, guiding, nurturing, passing on values, those attributes which we expect of parents." Citing our supreme court's decisions in ***Tammy W.-G. v. Jacob T.***, 2011 WI 30, 333 Wis. 2d 273, 797 N.W.2d 854, and ***State v. Bobby G.***, 2007 WI 77, 301 Wis. 2d 531, 734 N.W.2d 81, the court noted that the test to apply in evaluating the parental relationship is a "totality-of-the-circumstances" test and that the list of factors the fact finder is to consider is nonexclusive. The court added: "The relevancy of the testimony of the two therapists goes to [C.M.'s] ability to develop a relationship. It goes to whether [L.H.] has a parental relationship with [C.M.]" The court further concluded the probative value of the evidence "outweigh[ed] any prejudicial effect."

¶33 In determining whether L.H. failed to assume parental responsibility for C.M., the jury was to consider whether L.H. had "a substantial parental relationship" with C.M. The instruction before the jury on this question was that

> "substantial parental relationship" … means the acceptance, exercise of significant responsibility for the daily supervision, education, protection and care of [C.M.] Substantial relationship is assessed based on the totality of the circumstances throughout the child's entire life.

[8] We note the same judge presided over both the fact-finding hearing and the posttermination proceedings.

> In evaluating whether [L.H.] … has had a substantial relationship with [C.M.], you may consider factors including but not limited to whether [L.H.] … has expressed concern for or interest in the support, care or well-being of [C.M.] Whether [L.H.] … has neglected or refused to provide care or support for [C.M.]….

See WIS JI—CIVIL 346; *see also* WIS. STAT. § 48.415(6). We find no error in the posttermination court's determination that the bonding evidence provided by the therapist witnesses was relevant to the question of whether L.H. had failed to assume parental responsibility for C.M., and that the probative value outweighed any prejudicial effect. Whether L.H. and C.M. had an established bond is relevant to the question of whether L.H. had exercised "significant responsibility for the daily supervision … and care" of C.M. Simply put, if L.H. was exercising such daily supervision and care of C.M., there would likely have been a bond between them.

¶34 Trial counsel's concern—wanting to present L.H. to the jury in the "best light possible" and not give the appearance they were "trying to hide something"—was a reasonable concern. Had trial counsel objected to the testimony at trial, the objection likely would have been overruled. With that, the testimony not only would have still come in to evidence, it would have been highlighted for the jury, with L.H. also appearing as if she was trying to hide

something. Counsel's strategy in deciding not to object was a reasonable one, and counsel did not perform deficiently by not objecting.[9]

Five-Sixths Verdict

¶35 Four separate verdicts were given to the jury; two for L.H. and two for C.M.M. The verdicts for L.H. and C.M.M. on the CHIPS ground each contained four questions. The verdicts for L.H. and C.M.M. on the failure to assume parental responsibility ground each contained only one question. For each parent, the jury needed to find only one ground for termination in order for the matter to advance to the disposition phase of the proceedings. *See* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶¶24-25, 271 Wis. 2d 1, 678 N.W.2d 856.

¶36 The parties and the trial court agree that the language in the five-sixths instruction—"at least the same ten jurors should agree in all the answers"—was incorrectly worded[10] for a situation, as in this case, where there is more than

[9] On appeal, L.H. suggests, in one sentence, that "trial counsel could have sought to exclude such evidence via a motion in limine or even at trial without giving the appearance that L.H. was 'trying to hide' something." L.H. fails to in any way explain how trial counsel should have known in advance of trial that such testimony might be provided so as to bring a motion in limine, and fails to explain what tactics counsel should have employed when the "bonding" questions arose at trial so as not to appear as if L.H. was "trying to hide something." In short, L.H. fails to develop these "arguments," so we do not consider them. *See* ***ABKA Ltd. P'ship v. Board of Review***, 231 Wis. 2d 328, 349 n.9, 603 N.W.2d 217 (1999) (we do not address undeveloped arguments).

[10] L.H. states:

> The five-sixths rule does not require that the same ten jurors must agree on every question. ***Nommensen v. American Continental Ins.***, 2000 WI App 230, ¶18, 239 Wis. 2d 129, 619 N.W.2d 137.… Rather, the rule requires that the same ten jurors must agree on all questions necessary to support a judgment on a particular claim. ***Id.***; *see also*[] ***Waters*** [***ex rel. Skow***] ***v. Pertzborn***, 2001 WI 62, ¶26, 243 Wis. 2d 703, 627 N.W.2d 497.

one ground alleged for termination of parental rights. The error appears clear based upon a reading of ***Waukesha County Department of Social Services v. C.E.W.***, 124 Wis. 2d 47, 70-72, 368 N.W.2d 47 (1985).[11] However, as ***C.E.W.*** also indicates, even if the instruction was erroneous and L.H.'s trial counsel should have objected to it, before we may reverse and remand for a new trial, we must conclude L.H. actually was prejudiced by the error. *See* ***id.*** at 72; *see also* ***State v. Gordon***, 2003 WI 69, ¶41, 262 Wis. 2d 380, 663 N.W.2d 765. We are unable to reach that conclusion.

¶37 As the County points out, the jury gave separate attention to the various verdicts and the various questions on each verdict. On the CHIPS verdict for both L.H. and C.M.M., the first question asked if C.M. had been adjudged in need and had been placed outside of the home for six or more months pursuant to a court order containing the required termination of parental rights notice. Because there was no dispute on this issue with regard to either L.H. or C.M.M., the court answered this question "Yes" on both L.H.'s and C.M.M.'s verdict. The second question on the CHIPS verdict asked if the County made a reasonable effort to provide court-ordered services. The jury answered this question "Yes" on both L.H.'s and C.M.M.'s verdict, with a ten-to-two vote on L.H.'s and a unanimous vote on C.M.M.'s. The third question asked, on their respective verdicts, if L.H. and C.M.M. "failed to meet the conditions established for the safe return" of C.M. to their respective homes. The jury unanimously answered this

[11] In ***Waukesha County Department of Social Services v. C.E.W.***, 124 Wis. 2d 47, 70-72, 368 N.W.2d 47 (1985), the supreme court held the trial court erred in instructing the jury that "at least the same ten jurors should concur in all the answers made." This was so because "the six verdicts were independent, each verdict being separate and distinct from the others…. Thus there was no logical reason for the circuit court to impose the requirement of unanimity across verdicts." ***Id.***

question "Yes" on both L.H.'s and C.M.M.'s verdict. The final question asked if there was a substantial likelihood that L.H. and C.M.M., respectively, "will not meet these conditions within the nine-month period following the conclusion of this hearing." The jury answered this question "Yes" on both L.H.'s and C.M.M.'s verdict, with a ten-to-two vote on L.H.'s and a unanimous vote on C.M.M.'s.

¶38 The verdict related to the failure to assume parental responsibility ground asked for L.H., "[h]as [L.H.] failed to assume parental responsibility for [C.M.]?" and for C.M.M., "[h]as [C.M.M.] failed to assume parental responsibility for [C.M.]?" The jury answered this question "Yes" on both L.H.'s and C.M.M.'s verdict, with a ten-to-two vote on L.H.'s and a unanimous vote on C.M.M.'s.

¶39 On the issue of prejudice, L.H. relies on the general statement in ***Bobby G.***, 301 Wis. 2d 531, ¶63, that parents in termination of parental rights cases are "to be afforded 'heightened legal safeguards.'" She asserts that "heightened legal safeguards" are required in termination of parental rights cases, because such cases are more important than "breach of contract, personal injury, or other civil matter[s]." She argues that "in a termination of parental rights case, an erroneous instruction as we have here must be viewed as prejudicial," adding that the jury is presumed to have followed the erroneous instruction. In short, L.H. claims she was prejudiced by the erroneous instruction simply because it was erroneous.

¶40 We do not, however, simply presume prejudice because of error. The erroneous instruction language before us is nearly identical to the flawed language in ***C.E.W.***; yet after concluding the instruction there was erroneous—in that termination of parental rights case—our supreme court still indicated a

separate prejudice determination would be necessary.[12] ***C.E.W.***, 124 Wis. 2d at 72.

¶41 Lastly, L.H. argues "this was a 'close case' based on the fact that [she] received two (2) dissenting votes on each claim." This proves nothing. To conclude she was prejudiced, we would have to conclude there was a reasonable probability of a different result if trial counsel had objected and the error in the jury instruction had not been made. Here, there was significant evidence from which the jury could conclude, at a minimum, L.H. did not have a substantial parental relationship with C.M. and failed to assume parental responsibility for him. The evidence indicated that at no point since C.M.'s birth did L.H. accept and exercise significant responsibility "for the daily supervision, education, protection and care" of C.M. *See* WIS. STAT. § 48.415(6)(b). Further, she makes no argument to sway us that had the erroneous language not been utilized, there is a reasonable probability that one or more additional jurors would have joined the other two dissenters—assuming those two dissenters still would have dissented if the instructions had been worded differently. We have no basis to conclude L.H. was prejudiced by the erroneous jury instruction language other than speculation, and speculation cannot support a determination of prejudice. *See* ***Erickson***, 227 Wis. 2d at 774; *see also* ***State v. Domke***, 337 Wis. 2d 268, ¶54 ("It is not sufficient for the defendant to show that his counsel's errors 'had some conceivable effect on

[12] Because the ***C.E.W.*** court reversed the judgment on other grounds, it did not actually decide whether the erroneous instruction there was prejudicial. ***C.E.W.***, 124 Wis. 2d at 72.

the outcome of the proceeding.'" (quoting ***State v. Carter*** 2010 WI 40, ¶37, 324 Wis. 2d 640, 782 N.W.2d 695 (quoting ***Strickland***, 466 U.S. at 693)).[13]

Peremptory strikes

¶42 L.H. also argues her trial counsel was ineffective because counsel agreed to three peremptory strikes instead of the four strikes statutorily permitted under WIS. STAT. § 805.08(3). We need not decide whether counsel performed deficiently in failing to insist upon four peremptory strikes because L.H. has failed to establish a reasonable probability of a different result had counsel objected and L.H. been afforded an additional peremptory strike.

¶43 As L.H. acknowledges, in ***Erickson***—a criminal case—the supreme court held that "prejudice will not be presumed where a party is erroneously provided with fewer peremptory strikes than he or she should have received." *See* ***Erickson***, 227 Wis. 2d at 772. L.H. suggests, however, that because termination proceedings generally require "heightened legal safeguards," the interests at stake in such cases are greater than those in a criminal case. She asserts that even though our supreme court declined to presume prejudice in ***Erickson***—where the defendant received less peremptory strikes than what he was entitled to (but

[13] Looking to ***Runjo v. St. Paul Fire & Marine Insurance Co.***, 197 Wis. 2d 594, 603, 541 N.W.2d 173 (Ct. App. 1995), L.H. asserts we should determine whether she was prejudiced by considering whether the jury was probably misled. In ***Runjo***, however, we concluded it was the instructions combined with the verdict that "probably misled the jury and resulted in an inconsistent verdict" because they "in effect, allowed the jury to answer 'no' and 'yes' to the same question." ***Id.*** at 604-05. The erroneous instruction in this case did not present a similar problem. More significantly, however, as noted, the particular instruction here was nearly identical to that in ***C.E.W.*** The potential for misleading the jury *was the already-acknowledged basis* for the ***C.E.W.*** court determining the instruction was in error; yet, as noted, the court did not presume prejudice, but instead indicated a separate prejudice determination would be needed. ***C.E.W.***, 124 Wis. 2d at 71-72.

where, similar to the case here, the State and defendant received the same number of strikes) when counsel failed to raise the issue—we should presume prejudice in TPR cases.

¶44 We decline to adopt L.H.'s invitation to institute such a new rule. While a parent's rights to his or her child are unquestionably of great importance, so is a criminal defendant's liberty interest—like the defendant's liberty interest in ***Erickson*** not to automatically be sentenced to life in prison without the possibility of parole.[14] Such a sentence would not only deprive a defendant of his/her freedom from confinement for life, but would obviously also significantly impair the defendant's ability to parent any children he/she may have. We hold to the ***Erickson*** rule.

¶45 We point out that L.H. at no point suggests the jury she received was not actually fair and impartial. It is also undisputed all sides of this legal matter received an equal number of peremptory strikes. L.H. nonetheless states:

> Had L.H. received one more dissenting vote on each verdict, she would have won.… Had L.H. been able to replace at jury selection one of the jurors who ultimately made it on to the jury and voted against her, with a different juror, there is a reasonable probability that the outcome would have been different.

While we recognize that demonstrating prejudice is not easy in a circumstance such as this, that does not relieve L.H. of the burden of having to demonstrate it. *See*, *e.g.*, ***id.*** at 773. Here, there was no testimony provided by trial counsel that he

[14] In ***State v. Erickson***, 227 Wis. 2d 758, 596 N.W.2d 749 (1999), a conviction of the defendant "would automatically subject him to life in prison without the possibility of parole," which was the sentence he ultimate received. ***Id.*** at 762, 764. In ***Erickson***, "both the State and Erickson should have had a total of seven peremptory challenges rather than the four the court granted them." ***Id.*** at 762.

would even have used an additional peremptory strike if he had been afforded one. Importantly, L.H. has not provided us with any basis to conclude that a juror who voted in the majority, as opposed to one of the two dissenting jurors, would have been one of those stricken if counsel had utilized another peremptory strike. Further, there is no way of knowing how the juror who ultimately would have replaced that stricken juror would have voted. Additionally, any benefit L.H. may have realized with an additional strike may have been offset by the additional strike that also would have been afforded to the County. *See* ***id.*** at 773-74. With regard to the issue of peremptory strikes, L.H.'s claim of prejudice relies upon complete speculation of a different outcome, which is insufficient to demonstrate prejudice. *See* ***id.*** at 774.

By the Court.—Order affirmed.

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