COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 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. 2016AP121
2016AP122
2016AP123
2016AP124
2016AP125

Cir. Ct. No. 2013TP369
2013TP370
2013TP371
2013TP372
2013TP373

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

A. W.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

A. W.,

RESPONDENT-APPELLANT.

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO N. W.-F.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

A. W.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

A. W.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

A. W.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: MARK A. SANDERS, Judge. *Affirmed*.

¶1 KLOPPENBURG, P.J.[1] A.W. appeals the circuit court orders terminating her parental rights to her children R.W., A.R.W. N.W-F., R.R.W., and S.W, and the circuit court order denying her motion for post-disposition relief.[2] A.W. argues that: (1) her trial counsel was ineffective in allegedly advising her to withdraw the motion that her counsel had filed to vacate the court's default finding at the grounds phase of the proceeding; and (2) the circuit court erroneously exercised its discretion in not vacating the default finding so that she could refute

[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.

[2] The Honorable Mark A. Sanders issued the orders terminating A.W.'s parental rights. The Honorable Christopher R. Foley issued the order denying A.W.'s motion for post-disposition relief.

the "perjury" and false information provided throughout the proceeding. For the reasons stated below, I affirm.

BACKGROUND

¶2 The pertinent facts are as follows. The State filed petitions requesting termination of A.W.'s parental rights to her children, R.W., A.R.W., N.W-F., R.R.W., and S.W., in November 2013. The five children were born between 2002 and 2011, and had been most recently removed from A.W.'s home in December 2011. The TPR petitions alleged that grounds existed to terminate the parental rights of A.W. because A.W. had failed to assume parental responsibility under WIS. STAT. § 48.415(6) and because all five children remained children in need of protection or services (CHIPS) under WIS. STAT. § 48.415(2).

¶3 At the initial appearance on December 13, 2013, the circuit court ordered that A.W. "personally appear in court on time for each and every court appearance" or risk the possibility of being found in default. At the second adjourned initial appearance on February 11, 2014, A.W. did not appear and the court took the State's request for a finding of default under advisement. During the hearing, the court telephoned A.W. and, after informing her of upcoming court dates, again ordered her to appear at all future court dates or risk the possibility of being found in default.

¶4 At the scheduled final pretrial hearing on March 10, 2015, A.W. did not appear and the State and the guardian ad litem requested a finding of default. The circuit court telephoned A.W., who said that she did not intend to come to

court "[b]ecause it makes no sense for me to go to court and everybody listens to liars and I never get heard anyway." The court stated:

> You can decide to give up and to not participate. You're an adult and you're capable of making that decision. I don't really think that's the decision that you want to make. I think it's the decision that you're making because you're angry and frustrated and upset. I understand those feelings. The only way that you're going to have your opportunity to have a full day in court is to participate, if you come to court and make the State prove it and if you examine their witnesses and put on whatever evidence you want to but I can't make you do that.
>
> The decision about whether or not you participate rests on your shoulders. I want you to come to court. I want you to come to court for your kids. I want you to come to court for yourself. And I hope that you do that.

¶5 The circuit court set a new date, March 17, 2015, for the pretrial hearing, and asked that A.W. meet with her counsel and decide how she wanted to proceed before that hearing.

¶6 On March 17, 2015, the circuit court held the final pretrial hearing. A.W. did not appear. The State requested default and the circuit court indicated that there was a foundation for a default finding, but the court waited to give A.W. additional time to appear. When the court recalled the hearing a few hours later, A.W. was not in attendance and had not responded to her counsel's telephone message asking her to call the court. The court found A.W. in default as to the grounds alleged, "subject to prove-up" of those grounds by the State. The State then presented testimony as to the grounds alleged. The court found that the State proved by clear and convincing evidence that A.W. had failed to assume parental responsibility for each of the children, and that each of the children remained in

need of protection or services. The court found A.W. to be unfit and scheduled the case for a dispositional hearing.

¶7 On March 23, 2015, A.W.'s counsel filed a motion to vacate the default finding, explaining that on March 20 he had learned that A.W. had been hospitalized from March 17 to 19, and that she had not appeared at the March 17 hearing due to her hospitalization.

¶8 On March 23, 2015, the parties appeared for the dispositional hearing. A.W. was not in attendance when the hearing was called at 9:30 a.m. The circuit court telephoned A.W., waited for her to arrive, and recalled the hearing at 1:30 p.m., at which time A.W. was present.

¶9 The circuit court first addressed A.W.'s motion to vacate the default finding. A.W.'s trial counsel clarified that A.W. was very ill on March 17, went to the hospital for the day on March 18, and again went to the hospital for the day on March 19. The court questioned A.W., who reiterated what her counsel had stated, and added that she had called her doctor and received a call-back early on March 17. The court asked A.W. why she had not called the court or her counsel on the morning of March 17, and she replied that she did not think that she would have been able to get in touch with anyone. The court told A.W. that it would like to see "some confirmation from your doctor that you called him" as well as "some confirmation about the 18th and the 19th also ... just something from the hospital to say that you were there." A.W. told the court, "I can bring in the paperwork if you need it." The court explained that it needed this additional information from A.W. in order to vacate the default finding:

> Well, we're kind of at a pretty important stage at this whole proceeding. This is a critical moment, whether or not the default stays in place or not. Because if it stays in place, then you would have lost your right to have a trial and we would just start the dispositional hearing. If it doesn't stay in place, if I lift that finding, then we'd have to reschedule the trial date and proceed from there because we did originally have the trial set for today. So in order for me to make a decision about that, I need more information.

A.W. stated, "We can proceed." The court then explained:

> Well, I'm not sure what you want me to do because here's the deal, if you want me to go ahead and proceed with disposition, I'm happy to do that. That's what we're scheduled for and we're able to go ahead and proceed with disposition. Your lawyer filed a motion, a request that I change my mind about finding you in default for not being here last week and I'm willing to do that, but I just need information that puts me in a position where I can do that. And I understand what you're telling me today, and that's helpful, but the more concrete the information I have, the better off we all are. That's why I need information from your doctor and from the hospitals that will confirm those things.

The court stated that A.W. could have one or two days to provide the additional information, and A.W. responded, "I think we've waited long enough. We can proceed."

¶10 The circuit court adjourned the proceedings for fifteen minutes to give A.W. time to discuss the matter with her counsel. Upon resuming the hearing, counsel reported:

> I explained to [A.W.] if the Court grants her motion to vacate the default finding, that she would be entitled to a trial on the grounds phase of the case, and that the Court would set a date for that in some future time and she would have an opportunity to contest those issues .... She has informed me that she does not want to have the Court vacate the default finding and that she wants to proceed with the dispositional hearing. Now, I do want the record

> to be clear that in no way did I recommend that [A.W.] — that she pursue the latter course. This is her decision entirely, not the product of any recommendation or pressure from me, but it seems from discussing this at length with her that this really is what she wants to do.

¶11 The circuit court deemed the motion to vacate withdrawn and proceeded to the dispositional hearing.

¶12 The dispositional hearing took place from March 23 to March 27, 2015, with both the State and A.W. providing evidence that included testimony by A.W. On March 27, 2015, the circuit court made its decision to terminate the parental rights of A.W. as to all five children.

¶13 A.W. filed a timely notice of intent to appeal, and this court remanded the case to the circuit court for a post-disposition hearing on A.W.'s claims of ineffective assistance of counsel and false testimony. The circuit court held the post-disposition hearing and denied A.W.'s post-disposition motion for relief. This appeal follows.

DISCUSSION

¶14 "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.*** "[I]f 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 a Wis. Stat. § 48.415 ground has been proved and the court has made a finding of unfitness." ***Id.***, ¶19. The prevailing factor at the dispositional phase in a termination case is the best interests of the child. ***David S. v. Laura S.***, 179 Wis. 2d 114, 149, 507 N.W.2d 94 (1993). The decision whether to terminate parental rights is committed to the circuit court's discretion. ***Id.*** at 150.

¶15 This appeal centers on the grounds phase, specifically the circuit court's decision finding A.W. in default at that phase and proceeding to hear the State's proof of the grounds alleged for termination of A.W.'s parental rights without a trial. As stated, A.W. argues that: (1) her trial counsel was ineffective in allegedly advising her to withdraw the motion that her counsel had filed to vacate the court's default finding at the grounds phase of the proceeding; and (2) the circuit court erroneously exercised its discretion in not vacating the default finding so that she could refute the "perjury" and false information provided throughout the proceeding. I address and reject each argument in turn.

I. Ineffective Assistance of Counsel

¶16 To obtain relief based on ineffective assistance of counsel, A.W. has the burden to show both deficient performance and prejudice resulting therefrom. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If A.W.'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.").

¶17 Here, A.W. fails to establish deficient performance. A.W. asserts that her trial counsel "wrongly advised" her to withdraw the motion that her counsel had filed to vacate the default finding. However, A.W. concedes that the transcripts from both the dispositional hearing at which the circuit court deemed the motion withdrawn, and the post-disposition hearing at which the circuit court denied relief, "contradict [her] recent assertions." She is correct.

¶18 At the dispositional hearing on March 23, 2015, as related above, the circuit court stated that it would give A.W. time to provide the additional information needed to support her motion to vacate the default finding; when A.W. declined the offer, the court gave A.W. time to discuss the matter with counsel; when the parties reconvened, counsel emphatically stated that he recommended against her withdrawing the motion to vacate the default and proceeding with the dispositional hearing; with A.W. still wishing to so proceed, the court deemed the motion to vacate the default withdrawn and then proceeded to the dispositional hearing.

¶19 At the post-disposition hearing in September 2016, A.W.'s counsel testified as follows as to what took place at the March 23, 2015 hearing:

> I'm sure I did not in any way recommend that [A.W.] withdraw the motion [to vacate]. Because, to me, in these courts, once there's a finding of unfitness it's almost tantamount to an ultimate termination of parental rights. So that's nothing I ever recommend that a client do.
>
> ....
>
> ... I am sure I did not. I wouldn't. That's something I never do with clients in parental rights cases.... In most of these cases, particularly with [A.W.], she had really nothing to lose by proceeding on with the default motion. She had

> everything to lose by withdrawing. So I'm certain that I did not in any way encourage her to withdraw the motion.

¶20 He also testified that he did not recall A.W. ever telling him after the March 23, 2015 hearing to revive the motion to vacate.

¶21 A.W. testified that she talked to her doctor but had not been hospitalized on March 17-19, 2015, that her trial counsel told her that the default could not be vacated without medical documentation, and that she decided to proceed because she could not provide that documentation. A.W. also testified that she did not understand what the default finding or the motion to vacate meant, and that she did not so inform the circuit court because the court "wasn't listening to" her.

¶22 The circuit court considered both the transcript of the March 23, 2015 hearing and the testimony at the post-disposition hearing, credited counsel's testimony over A.W.'s, and found that counsel did not advise A.W. to withdraw the motion to vacate but rather that A.W. herself decided to forego pursuing that motion and to proceed with the dispositional phase.

¶23 On appeal, A.W. argues that the post-disposition court "erred in placing too much weight on [counsel's] testimony and ignoring A.W.'s testimony," because counsel testified that he had a vague recollection of the March 23, 2015 hearing and A.W. testified that she remembered it clearly. A.W. essentially asks that this court weigh the evidence differently from the circuit court. However, the weight and credibility of the evidence are solely for the circuit court to determine. *See* ***Bonstores Realty One, LLC v. City of Wauwatosa***, 2013 WI App 131, ¶6, 351 Wis. 2d 439, 839 N.W. 2d 893; ***Lessor v. Wangelin***,

221 Wis. 2d 659, 665-66, 586 N.W. 2d 1 (Ct. App. 1998); ***State v. Jenkins***, 2014 WI 59, ¶64 n.31, 355 Wis. 2d 180, 848 N.W.2d 786 (at a post-trial hearing, a circuit court may weigh the credibility of the witnesses, including trial counsel, and make credibility findings in assessing the deficiency and reasonableness of the trial counsel's performance).

¶24 In sum, A.W. fails to show that the circuit court's finding that her trial counsel did *not* advise her to withdraw the motion to vacate the default was clearly erroneous. *See* WIS. STAT. § 805.17(2) ("Findings of fact shall not be set aside unless clearly erroneous ....) Therefore, her claim that counsel performed deficiently by advising her to withdraw the motion to vacate has no factual basis, and her ineffective assistance of counsel claim fails.

II. Perjury and False Information

¶25 A.W. argues that the circuit court "[erroneously exercised] its discretion in not vacating the default finding" so that she could refute the "perjury" and false information provided throughout the proceeding. A.W. asserts that the termination of parental rights proceeding would not have commenced but for the false information, and that had the circuit court vacated the default finding, she would have proved that she was not homeless, that her home had electricity, and that she had complied with the conditions for her children's safe return. There are at least two problems with this argument. First, A.W. does not explain how the circuit court erred in not vacating the default finding when she expressly asked it not to. *See* ***State v. Krancki***, 2014 WI App 80, ¶11, 355 Wis. 2d 503, 851 N.W.2d 824 (a party who selects a course of action "will not be heard later to allege error or defects precipitated by such action" (quoted source omitted)).

Second, A.W. fails to identify, with citations to the record, the "perjury" and false information of which she complains. Accordingly, this argument will not be considered 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"); ***State v. McMorris***, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322 (the appellate court may "choose not to consider … arguments that lack proper citations to the record").

CONCLUSION

¶26 For the reasons stated, I reject A.W.'s arguments based on ineffective assistance of counsel and perjury or false information, and, therefore, I affirm.

By the Court.—Orders affirmed.

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