STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1148, A13-1164

In the Matter of the Welfare of the Children of:
D.E.T., G.B.-W.T., and B.R.M., Parents

Filed November 27, 2013
Affirmed in part and reversed in part
Rodenberg, Judge
Dissenting, Chutich, Judge
Beltrami County District Court
File No. 04-JV-13-667

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Considered and decided by Rodenberg, Presiding Judge; Chutich, Judge; and Klaphake, Judge.[*]

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Appellant-parents appeal from the district court's termination of parental rights (TPR) to three children and its transfer of permanent custody of three other children to a relative. We conclude that the district court did not abuse its discretion in its evidentiary rulings at trial. Because appellant-parents agree on appeal that the TPR is proper as to the eldest two children, and because the transfer of legal custody to a relative is in the

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

best interests of the three involved children and should not be disturbed, we affirm that portion of the district court's order. But because the county failed to use reasonable efforts to reunify parents with the youngest child, we reverse that portion of the district court order terminating the parental rights to the youngest child.

FACTS

This case involves six children. Mother and father (collectively parents) married in 2008. J.M.T. was born to the marriage on August 27, 2009. Parents are still married.[1]

D.J.T. and A.J.T. are the adopted children of G.B.-W.T., to whom we refer herein as father (despite his not being the father of three of the other children, as discussed further below). D.J.T. and A.J.T. are members of the Leech Lake Band of Ojibwe. Before being adopted by father on December 9, 2004, both had been removed from the care of their biological parents and had experienced multiple out-of-home placements.

[1] The following table identifies the children involved in this appeal by initials, whether biological or adopted and by whom, date of birth, and present age:

Initials	**Biological/Adopted**	**Date of Birth**	**Age**
D.J.T.	Adopted by father	March 10, 1995	18
A.J.T.	Adopted by father	November 9, 1996	17
T.P.M.	Adopted by mother and B.R.M.	May 15, 1995	18
R.K.M.	Adopted by mother and B.R.M.	June 29, 1996	17
A.S.M.	Adopted by mother and B.R.M.	September 3, 1997	16
J.M.T.	Biological child of father and mother	August 27, 2009	4

T.P.M., R.K.M., and A.S.M. are the adopted children of D.E.T., to whom we refer herein as mother, and B.R.M., to whom mother was married at the time of adoption. Mother and B.R.M. also have four now-adult children. When mother's marriage to B.R.M. was dissolved, mother was granted custody of T.P.M., R.K.M., and A.S.M. After the dissolution of her marriage to B.R.M., and being a single mother raising seven children, mother was close with her brother and sister-in-law, who had frequent contact with the seven children. Mother home-schooled her four oldest children, who are adults and not involved in this proceeding, as well as T.P.M., R.K.M., and A.S.M.

Before parents married, father had a number of problems in caring for children, particularly D.J.T. and A.J.T, both of whom had several episodes of sexual misconduct, which father reported to professionals. Both A.J.T. and D.J.T. were in individual therapy before their formal adoption by father on December 9, 2004. The assigned social worker consistently advised father to keep a close eye on the boys, keep them in therapy, and report concerning incidents.

On December 12, 2006, father was charged with fifth-degree assault for spanking a foster child. He significantly bruised a young child's buttocks after striking the child with a ruler. He pleaded guilty to fifth-degree assault and his foster-care license was revoked.

Before the 2008 marriage of mother and father, several of the children opposed the marriage and displayed behavioral problems. Before the marriage, and at a family reunion, A.J.T. and D.J.T. had approached an adult relative and stated that they had asked

T.P.M. to have sexual intercourse.[2] The relative told father who, without conversation, began hitting and beating A.J.T.

Mother was aware of this incident, father's criminal conviction, and the history of sexual issues of D.J.T. and A.J.T. before she married father. There were problems in the blended family almost immediately.

On November 18, 2008, Beltrami County received a report by the family therapist that D.J.T. had touched T.P.M.'s breast. T.P.M. and D.J.T. were both 13 years old. Mother was aware of the incident and told the social worker assigned to the case that they were dealing with the situation within the home. Through discussions, it was revealed that A.J.T. had dared D.J.T. to touch T.P.M. Investigator Scott Hinners and a social worker spoke with both boys and told them that such behaviors were inappropriate. No finding of maltreatment was made at that time. Parents were advised that the children should continue with therapy. T.P.M. began meeting with the wife of the family's pastor to assist her in dealing with the sexual allegations. Their meetings stopped after about a year because the pastor's wife became too busy. The record shows no indication that mother and father reentered T.P.M. or the other children into individual therapy.

J.M.T. was born to the marriage on August 27, 2009. Both parents were protective of J.M.T., both publicly and privately. They instituted a safety plan for J.M.T. to ensure that J.M.T. was never left alone with any of the older children. J.M.T. would sleep in parents' bedroom with the door locked each night and was with one or both of

[2] Mother recalled this event in her testimony as follows: "I had heard in August of 2008 that [A.J.T.] had asked [T.P.M.] if she would have sex with him so that they could break up our marriage or break up the possibility of us getting married."

the parents nearly constantly. By all accounts at trial, J.M.T. received special—and better—treatment and attention than any of the other children.

At some time prior to 2010, T.P.M. and A.S.M. told father that A.J.T. had been masturbating in front of them. Father responded by removing the bathroom door. There were additional reports of exhibitionist masturbation by A.J.T. and parents then separated the children by gender for home-schooling. Despite several additional instances of A.J.T.'s nonprivate masturbation during this period, testimony indicated that neither parent informed the social worker of the problem(s).

Mother testified that late one evening in 2010, T.P.M. went to the bedroom of parents and reported that she had been raped in the bathroom by a stranger. Father checked the house and found that all of the doors were locked. Father concluded that the allegation was a dream. He did not pursue it further, and mother did not independently address her daughter's report. Again in 2010, T.P.M. and S.M. (one of mother's now-adult daughters) reported to father that D.J.T. had either tried to or did have sex with T.P.M. Parents concluded that this was a false allegation because T.P.M. had a history of seeing strangers in or around the house. Mother deferred to father in responding to the allegation and did not discuss the report further with her daughters. R.K.M. was aware of his sister's claims of sexual abuse and attempted to protect his sisters by following them around the home. Parents continued to sleep in a locked bedroom with J.M.T., claiming at trial that R.K.M. had a history of violence with knives and matches, which items were kept in the bedroom.

On March 25, 2012, T.P.M. approached a long-time church friend of mother after a regular church service and asked if she could speak with her privately. T.P.M. revealed that A.J.T. and D.J.T. had had sexual contact with her. T.P.M. told the church friend that she was worried someone would see T.P.M. talking to her and that she was not allowed to talk about the sexual contact. Mother's church friend reported the conversation to child protective services.

County Intervention

Beltrami County filed a petition alleging the children to be in need of protection or services (CHIPS) on April 4, 2012. The district court held an emergency protective care (EPC) hearing, Minn. R. Juv. Prot. P. 30, and granted temporary custody of all six children to Beltrami County. Parents were ordered to have no contact with D.J.T., A.J.T., T.P.M., R.K.M., or A.S.M., but they were granted supervised contact with J.M.T. The visits with J.M.T. were for half days, two to three times each week and typically occurred at J.M.T.'s grandparents' home. The children's aunt and uncle (mother's brother) took immediate temporary custody of J.M.T. Two weeks later, they also took custody of T.P.M., R.K.M., and A.S.M., who were then 14, 15, and 16 years of age. D.J.T. was initially placed at Evergreen Shelter and A.J.T. was placed at Northwest Minnesota Juvenile Center. The order required the county to file a case plan within 30 days of the filing of the petition as required by Minn. Stat. §§ 260C.178, subd. 7, .212, subd. 1 (2012). The case plan was not timely filed.

On July 19, 2012, parents were each charged with two counts of child neglect for knowingly permitting sexual abuse under Minn. Stat. § 609.378, subd. 1(a)(2) (2010).

On July 20, 2012, A.J.T. was charged by delinquency petition with fifth-degree criminal sexual conduct for his sexual abuse of T.P.M. The petition stated that T.P.M. reported A.J.T. "is obsessed with sex and [is] trying to rape [T.P.M.] and her sister," and alleged that T.P.M. had reported that she had confided in father "many times." In an interview with investigators, A.J.T. admitted asking T.P.M. and A.S.M. for sex, sucking on T.P.M.'s breasts, and having sexual intercourse with T.P.M. two times. A.J.T. pleaded guilty and was given a juvenile delinquency disposition in August 2012, including placement at KidsPeace Mesabi Academy. Since his placement, A.J.T. has continued to struggle with sexually deviant behavior, but he has made some progress.

On August 16, 2012, D.J.T. was charged by delinquency petition with fifth-degree criminal sexual conduct against T.P.M. The probable cause portion of the petition recited that D.J.T. "is obsessed with sex and [is] trying to rape [T.P.M.] and her sister." The petition alleged that T.P.M. and S.M. had confided in father together about T.P.M. having sexual relations with D.J.T. Father then allegedly directed T.P.M. and S.M. not to tell their pastor, who was a mandatory reporter. D.J.T. admitted to investigators that he had sexual relations with T.P.M., but "could not remember" what type of relations. He pleaded guilty to fifth-degree criminal sexual conduct and was adjudicated on October 18, 2012. D.J.T. was placed in a foster home and ordered to complete an outpatient sex offender program, as one of several conditions of probation.

Parents denied the CHIPS petition at the admit/deny hearing. Minn. R. Juv. Prot. P. 34. By order of July 9, 2012, the district court stayed the CHIPS proceeding until resolution of parents' respective criminal charges. Mother made several requests for

J.M.T. to be returned to her custody between the April removal and resolution of her criminal charge, but her requests were denied. Although the district court's several orders denying mother's requests recite that reasonable/active efforts had been made to prevent the placement, what those efforts were or what efforts at reunification were being attempted is unstated. And careful review of the record reveals no actual efforts at reunification between removal and resolution of mother's criminal charge.

Mother eventually pleaded guilty to one count of child neglect, by way of an *Alford* plea, on October 16, 2012. Father was tried and found guilty of two counts of child neglect by jury verdict on February 20, 2013.

After pleading guilty, mother admitted in the CHIPS file that the children were in need of protection or services. The case worker and guardian ad litem finally developed a case plan for each child, and the plans were filed with the district court on November 20, 2012. This was more than seven months after removal of the children and six months after the case plans were due. *See* Minn. Stat. §§ 260C.178, subd. 7, .212, subd. 1. Mother signed each case plan, including D.J.T. and A.J.T.'s case plans, on November 16, 2012. Father neither formally admitted the CHIPS petition nor signed any of the children's case plans.

The case plans' only requirement of parents was that they complete a parental capacity assessment to determine needs and strengths and that they follow the recommendations resulting from that evaluation. Deena McMahon, a private mental health professional, was engaged to complete the parenting assessment for mother. McMahon completed the assessment, which indicated that mother believed two of the

adopted children were attempting to sabotage her marriage through their acts and allegations. McMahon recommended that mother not be reunified with J.M.T. because of mother's disbelief of the reports of sexual abuse by T.P.M. and A.S.M., her inability to acknowledge any wrongdoing, her disinterest in reunifying with certain of the children, and her inability to make decisions independent of father. McMahon determined that mother failed to protect the children against A.J.T. and D.J.T. and would be unlikely to be able to protect her children in the future.

Petition for Permanency

On March 1, 2013, Beltrami County petitioned the district court to terminate the parental rights of both parents to J.M.T., grant permanent physical and legal custody of T.P.M., R.K.M., and A.S.M. to their maternal aunt and uncle, and terminate father's parental rights to D.J.T. and A.J.T.[3] The county alleged three statutory bases for termination of the parental rights of both parents to J.M.T. and for the termination of father's parental rights to D.J.T. and A.J.T.: that parents are palpably unfit, that the children suffered egregious harm in parents' care, and that reasonable efforts had failed to correct the conditions leading to out-of-home placement. Minn. Stat. § 260C.301 subd. 1(b)(4)-(6) (2012). The request for permanent transfer of the custody of T.P.M., R.K.M., and A.S.M. alleged that T.P.M., R.K.M., and A.S.M. suffered egregious harm and that mother was palpably unfit to parent the children. Minn. Stat. § 260C.515, subd. 4 (2012).

[3] A.J.T. and D.J.T. are subject to the Indian Child Welfare Act (ICWA), 21 U.S.C. §§ 1901-1963. Leech Lake Child Welfare did not take a position in the district court.

The three-day TPR/permanency trial commenced on April 11, 2013. D.J.T., through his attorney, expressed that he was not opposed to the termination of father's parental rights. A.J.T., through his attorney, stated that A.J.T. was "slightly leaning" toward termination at the inception of proceedings. T.P.M., R.K.M., A.S.M., through their attorney, indicated that they were also not opposed to having permanent custody transferred to their maternal aunt and uncle. B.R.M., the adoptive father of T.P.M., R.K.M., and A.S.M., was satisfied with and agreed to the plan for transfer of permanent custody of his three children to a relative, but he wanted to remain in contact with his children. At the time of trial, J.M.T. was three-and-a-half years old.

The record reflects some initial confusion about mother's position regarding the proposed transfer of permanent custody of T.P.M., R.K.M., and A.S.M. Mother expressed doubt of the possibility of reunification with T.P.M., R.K.M., and A.S.M. because of the time that had elapsed since their removal from the home over a year earlier and the age of the children. Through her attorney, mother explained that, although she was satisfied with the placement of T.P.M., R.K.M. and A.S.M., she did not agree to permanent transfer of custody because it would affect the TPR case concerning J.M.T.

At trial, mother's long-time church friend testified to the difference between the children's social abilities and behaviors before parents married, during the marriage, and after placement of the children out of the parental home. At the time of trial, she had known mother for ten years and had frequent contact with all of mother's older children until approximately five years earlier (around the time of mother's marriage to father). She testified about her recollection of T.P.M. reporting the sexual abuse to her and that

the children "really seemed like defeated kids for a lot of years." But after being placed with their maternal aunt and uncle, "they don't seem defeated anymore."

Mother's brother testified that, after parents married, he began to see the children less often than he had previously. The children were pulled out of extracurricular activities. Other than church activities, the children were no longer engaged in the community. He testified that the children became more withdrawn and sometimes voiced their unhappiness to him. He had no knowledge of any abuse of J.M.T. Instead, he testified that J.M.T. was overly protected, coddled, and in control of the rest of the family. In contrast, he testified that the other children had a "prison mentality," asking permission for things like going outside or eating a snack. He testified that, at the time of the proceeding, T.P.M., R.K.M., A.S.M., and J.M.T. were still residing with him, that several of the older children were in individual therapy, and that all of the children were doing well.

The guardian ad litem also testified about her reactions upon meeting with each child. She expressed concern for D.J.T. and A.J.T., adopted as special needs children with sexual issues, as father did not continue the services the boys needed. She considered father's parenting of D.J.T. and A.J.T. a "fundamental failure," and she testified that she was "blown away" by mother's parenting deficits. She also testified to the evolution of T.P.M., R.K.M. and A.S.M. after they were placed with their aunt and uncle. She stated that the children went from barely making eye contact and avoiding conversation to telling jokes, asking questions, and laughing. She also testified to the shift in J.M.T.'s behavior and maturation. The guardian ad litem concluded that it would

not be in the best interests of any of the children to be reunified with either parent, stating that "the best predictor of future behavior is relevant past behavior, and [parents] have done nothing to assure us that [they] are going to make good decisions for the safety and well-being of the children in their care."

The county case worker testified that she is responsible for putting services in place with the ultimate goal of reunifying children with their parents and that she does concurrent planning for alternatives if reunification is not possible. She testified that she had limited discussions with parents regarding reunification because of their then-pending criminal charges, and she did not discuss the facts of the sexual conduct between T.P.M., D.J.T., and A.J.T. because parents did not want to incriminate themselves. She sat down with mother to explain the CHIPS process in August 2012, prior to the entry of mother's guilty plea (four months after removal of the children). At that point, she had not developed or worked on a reunification plan. She testified that, on November 16, 2012, after mother's plea of guilty, she and the guardian ad litem again met with mother to discuss the possibility of reunification. She testified that mother claimed to have pleaded guilty to get the CHIPS case moving and to be reunited with J.M.T.

The case worker also testified about impediments to reunification, including mother's extreme deference to father. She testified that mother asked permission of father for things like getting a haircut or purchasing new clothes. The case worker testified that she was under the impression that mother and father intended to stay together regardless of the outcome of this case. She said, "We discussed [J.M.T.], and we asked her specifically what she would be willing to do were the county to decide that

[father] wasn't a safe option based on his now-second criminal charge involving children. And [mother] informed us that she would have to ask [father]." The case worker was concerned about the possibility of reunification of mother with J.M.T. because of mother's devotion to father in apparent disregard of J.M.T.'s needs. She testified that creating a case plan for reunification was very difficult because of the multiple children and parents' criminal convictions involving children. The case worker did not support reunification so long as parents did not accept responsibility or acknowledge any wrongdoing.

The case worker also testified that the permanent transfer of custody is in the best interests of T.P.M., R.K.M., and A.S.M. because they have resided with their aunt and uncle for 12 months and are living successfully with relatives who are very positive and supportive of them. She testified that it was not in D.J.T.'s or A.J.T.'s best interests to be reunited with father because they both have significant needs which were not addressed when they lived with father. She testified that it is not in J.M.T.'s best interests to be reunited with her parents because of parents' criminal convictions, their inability to protect J.M.T. from the future possibility of harm, and mother's inability to make decisions independent of father. That D.J.T. and A.J.T. were permanently removed from the home did not change her position on reunification of the children. She asserted that parents' improper handling of D.J.T. and A.J.T. would be indicative of how they would handle future risks of harm with J.M.T.

McMahon testified about her findings after the parental capacity assessment of mother and that she followed her standard protocol for conducting a parenting

assessment: two parent/child observations, one interview with the parent lasting between 60 and 150 minutes, and a review of collateral materials. During her testimony, her written report was received in evidence as Exhibit 28, without objection. McMahon testified about her observations of the interactions between mother and J.M.T. Overall, she found their interactions to be pleasant. She noted that J.M.T. retained control of the visits and J.M.T. directed her mother throughout the sessions. McMahon testified that, while mother had minimal empathy for J.M.T., she had no empathy for her older children. She explained that empathy is a critical factor in an adequate parental response to a child's trauma.

McMahon testified that she saw almost no acceptance of responsibility by mother for the abuse or neglect of T.P.M. and A.S.M. McMahon expressed concern about mother's extreme reliance on and deference to father. McMahon expressed surprise that mother's assessment showed no emotional or psychological distress and no anxiousness, depression, sadness, remorse, or grief given the severity of the family's situation. McMahon testified that this was a unique case for her because most TPRs involve only one offending parent. McMahon found mother's extreme deference to father and her severe lack of parenting capacity would amount to impossible hurdles to reunification. McMahon indicated that she did not think mother's deferential attitude could be improved with treatment or other services.

Mother testified at the TPR trial. She believes that D.J.T.'s masturbation issues were normal: "[A]s boys are going through puberty and such that they will have a tendency to do that." Mother testified that she only became aware of the sexual

intercourse between A.J.T. and T.P.M. after she was arrested. She does not dispute that the intercourse occurred but believes that the children were engaging in sexual activity and misbehaving in order to end her marriage. But when asked if, knowing what she knew at the time of trial, she would have done things differently, she stated that she would have talked to the girls more herself so she could hear their complaints firsthand and would have been more aware of their needs. Mother testified that she would like to reunify with all her of children, but she did not believe that T.P.M., R.K.M., and A.S.M. wanted to reunify with her. She also testified that if she had to choose between J.M.T. and father, she would choose to be reunified with J.M.T.

Father testified at trial and admitted having made parenting mistakes. With the benefit of hindsight, he agreed that he should have handled things differently. He stated that he had a hard time believing T.P.M.'s allegations, but now accepted as true the admissions made by D.J.T. and A.J.T. in their delinquency cases. Father testified that he believed A.J.T.'s motivation for having sexual contact with T.P.M. was to sabotage parents' marriage. Father did not testify to any reunification efforts by the county, and no parental capacity assessment was ever completed for or by father.

The district court ordered the termination of the parental rights of both parents to J.M.T. and of father's parental rights to D.J.T. and A.J.T., and it granted permanent custody of T.P.M., R.K.M., and A.S.M. to their maternal aunt and uncle. The district court found that father repeatedly used unreasonable physical punishment with his children, including D.J.T. and A.J.T. The district court found that both T.P.M. and A.S.M. were subjected to repeated sexual abuse by D.J.T. and A.J.T. and that, while

T.P.M. reported that abuse, father believed it was a false allegation and mother deferred to father in following up on the reported abuse. The district court discredited mother's testimony that parents slept behind locked doors in order to keep R.K.M. from dangerous materials. The district court further found that T.P.M., A.S.M., and R.K.M. suffered egregious harm, which affected all members of the family. The district court determined that both parents are palpably unfit to parent any of the children. It did not find that the county had made reasonable efforts at reunification, instead finding that "there are no reasonable efforts that could be made." Parents each filed a separate appeal from the district court's order, and the appeals were consolidated.

D E C I S I O N

I.

Evidentiary issues

Mother argues that exhibits 16, 18, 20, 22, 24, and 28 were improperly admitted at trial.[4] She focuses her analysis on exhibits 24 and 28.[5]

We review a district court's evidentiary rulings for a clear abuse of discretion. *In re Welfare of D.N.*, 523 N.W.2d 11, 13 (Minn. App. 1994), *review denied* (Minn. Nov. 29, 1994). "Absent an erroneous interpretation of the law, whether to admit or exclude evidence is a question within the district court's broad discretion." *In re Child of Simon*, 662 N.W.2d 155, 160 (Minn. App. 2003) (citation omitted). And "[e]ntitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's

[4] Father does not raise this issue on appeal. All other issues were raised by both parents.

[5] Mother provides no legal support for her argument regarding the admissibility of exhibits 16, 18, 20, and 22 and has thus waived the challenge to their admissibility on appeal. *In re Welfare of A.I.*, 779 N.W.2d 886, 894 (Minn. App. 2010).

ability to demonstrate prejudicial error." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted). "An evidentiary error is prejudicial if the error might reasonably have changed the result of the trial." *Cloverdale Foods of Minn., Inc. v. Pioneer Snacks*, 580 N.W.2d 46, 51 (Minn. App. 1998).

Exhibit 24 is a letter filed with court administration in mother's criminal case. The letter, with its numerous attachments, provides the basis for mother's *Alford* plea of guilty to criminal neglect of a child.[6] The district court received the exhibit over mother's objection because, when the *Alford* plea was entered, mother acknowledged that the evidence described in the exhibit would be presented at trial and would support her conviction of the offense to which she was pleading guilty. *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970); *State v. Goulette*, 258 N.W.2d 758 (Minn. 1977).

Exhibit 24 is admissible as a certified public record under Minnesota Rules of Evidence 803(8). However, the exhibit contains multiple levels of hearsay, including, most notably, statements made by the children concerning the sexual abuse in the home. Minn. R. Evid. 805 (regarding multiple hearsay statements). A hearsay statement otherwise inadmissible is admissible in a juvenile protection matter if

> the statement alleges, explains, denies, or describes:
>
> (1) any act of sexual penetration or contact performed with or on the child;
>
> (2) any act of sexual penetration or contact with or on another child observed by the child making the statement;
>
> (3) any act of physical abuse or neglect of the child by another; or

[6] The attachments included incident reports, T.P.M.'s journal entries, statements by D.J.T., A.J.T., and parents, a sex abuse summary, an interview with D.J.T., a report of A.J.T., and forensic interviews from T.P.M., R.K.M., and A.S.M.

> (4) any act of physical abuse or neglect of another child observed by the child making the statement[.]

Minn. R. Juv. Prot. P. 3.02, subd. 2(b). The district court did not abuse its discretion in admitting exhibit 24, as the children's statements therein are admissible under rule 3.02 to explain T.P.M.'s and A.S.M.'s sexual abuse. As part of her guilty plea, mother agreed that those statements had been made and that the making of them would support her conviction.

We observe that the substantive information contained in exhibit 24 was also received at trial through testimony and other exhibits. *See In re Welfare of Child of J.K.T.*, 814 N.W.2d 76, 93 (Minn. App. 2012) (ruling that any error in the admission of evidence was harmless because the challenged evidence was cumulative of other evidence that admission of which was not challenged). Our review of the record satisfies us that, to the extent that the district court found the facts that are contained in Exhibit 24 to be true, there was other evidence in the record upon which those findings of fact rested.

Concerning exhibit 28, the report of McMahon, parents did not object to her report. Mother is therefore precluded from raising objections to expert testimony for the first time on appeal. *Johnson v. S. Minn. Mach. Sales, Inc.*, 460 N.W.2d 68, 72 (Minn. App. 1990); *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *see also A.I.*, 779 N.W.2d at 894 (applying *Thiele* in a permanency proceeding).

Mother also argues that the admission of exhibit 28 deprived her of the right to confront the witnesses against her. The Constitutional right of confrontation exists in criminal cases. Minn. Const. art. I, § 6. Mother provides no legal support for her

argument that a confrontation right exists in a TPR trial, and her argument is therefore waived. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971); *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919-20 n.1 (Minn. App. 1994). Even if not waived, we also find no authority extending the right of confrontation to a child protection proceeding, which is a civil proceeding for evidentiary purposes. Minn. R. Juv. Prot. P. 3.02, subd. 1. And one other jurisdiction has refused to extend the federal constitutional right to confront witnesses to a civil child protection proceeding. *Cabinet for Health & Family Servs. v. A.G.G.*, 190 S.W.3d 338, 346-47 (Ky. 2006).

II.

Parental rights may be "terminated only for grave and weighty reasons." *In re Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990). Courts presume that a natural parent is a fit and suitable person to be entrusted with the care of the parent's child and that it is usually in the best interests of the child to be in the custody of a natural parent. *In re Welfare of Clausen*, 289 N.W.2d 153, 156 (Minn. 1980). "We review an order terminating parental rights to determine whether the district court's findings (1) address the statutory criteria and (2) are supported by substantial evidence." *J.K.T.*, 814 N.W.2d at 87. In doing so, we "review the district court's findings of the underlying or basic facts for clear error, but we review its determination of whether a particular statutory basis for involuntarily terminating parental rights is present for an abuse of discretion." *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 901 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012). "A finding is clearly erroneous if it is either manifestly

contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 660-61 (Minn. 2008) (quotation omitted). If at least one statutory ground alleged in the petition is supported by clear and convincing evidence and termination of parental rights is in the child's best interests, we will affirm. *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004). The county bears the burden of proving grounds for termination. *In re Welfare of M.H.*, 595 N.W.2d 223, 227 (Minn. App. 1999).

Termination of father's parental rights to D.J.T. and A.J.T.

The district court found that father is palpably unfit to parent D.J.T. and A.J.T.[7] Minn. Stat. § 260C.301, subd. 1(b)(4). Father concedes that the termination is appropriate and is in the best interests of both children. In addition, both D.J.T. and A.J.T., through their attorneys, expressed support for termination. In light of father's concession that termination is appropriate, D.J.T. and A.J.T.'s support of the termination, the substantial evidence supporting the district court's finding that father is palpably unfit to parent D.J.T. and A.J.T., and the finding that termination is in the best interests of D.J.T. and A.J.T., we conclude that the district court did not abuse its discretion in terminating father's parental rights to D.J.T. and A.J.T. Because this is a sufficient statutory ground for termination of father's parental rights to D.J.T. and A.J.T., we need not address the other grounds for termination relied upon by the district court as to those two children. *See R.W.*, 678 N.W.2d at 55.

[7] The evidentiary support for the finding of palpable unfitness is discussed in further detail below.

Permanent transfer of custody of T.P.M., R.K.M., and A.S.M.

The standard of proof for permanent transfer of custody by the district court upon petition is identical to the standard for termination of parental rights. "Consistent with the level of proof generally required in child protection proceedings," a permanent-placement determination must be supported by "clear and convincing evidence." *In re Welfare of A.R.G.-B.*, 551 N.W.2d 256, 261 (Minn. App. 1996). A district court may order transfer of permanent legal and physical custody to a relative if it is in the best interests of the child, the district court has determined the relative is a suitable custodian, the district court follows proper procedures, and the relative assumes "responsibility for the protection, education, care, and control of the child and decision making on behalf of the child . . . ." Minn. Stat. § 260C.515, subd. 4. Our standard of review of a permanent transfer of custody is also identical to that of a TPR proceeding. *A.R.G.-B.*, 551 N.W.2d at 261.

In permanently transferring the custody of T.P.M., R.K.M., and A.S.M. to their maternal aunt and uncle, the district court found that T.P.M., R.K.M., and A.S.M. suffered egregious harm while in the care of mother. Minn. Stat. § 260C.301, subd. 1(b)(6). T.P.M. and A.S.M. were subjected to sexual contact by their step-brothers, and their reports of sexual abuse were ignored. The district court found, and the record supports, that R.K.M. was aware of the conduct and felt forced to play the role of protector for his sisters. The district court reasoned that, because mother left her children unprotected from a harm of which she was aware, it is in the best interests of T.P.M., R.K.M., and A.S.M. to not be in her care. At oral argument on appeal, counsel for

mother agreed that mother does not "substantially dispute" the permanent transfer of custody, and she agrees that T.P.M., R.K.M., and A.S.M. are in a good placement with their aunt and uncle. T.P.M. is 18 years old, R.K.M. is 17 years old, and A.S.M. is 16 years old. All have voiced their desire to continue residing with their aunt and uncle. The record supports the district court's findings of fact regarding these three children, and we conclude that the district court did not abuse its discretion in transferring the permanent custody of T.P.M., R.K.M., and A.S.M. to their maternal aunt and uncle. Because this is a sufficient statutory ground for permanent transfer of custody, we need not address the other grounds for the permanent transfer relied upon by the district court as to those three children. *See R.W.*, 678 N.W.2d at 55.

Palpable parental unfitness concerning J.M.T.

The district court may terminate a parent's rights to a child if it finds

> that a parent is palpably unfit to be a party to the parent and child relationship because of a consistent pattern of specific conduct before the child or of specific conditions directly relating to the parent and child relationship either of which are determined by the [district] court to be of a duration or nature that renders the parent unable, for the reasonably foreseeable future, to care appropriately for the ongoing physical, mental, or emotional needs of the child.

Minn. Stat. § 260C.301, subd. 1(b)(4). "[The county] must prove a consistent pattern of specific conduct or specific conditions existing at the time of the hearing that, it appears, will continue for a prolonged, indefinite period and that are permanently detrimental to the welfare of the child." *T.R.*, 750 N.W.2d at 661.

The district court found both parents palpably unfit to be parties to the parent-child relationship with J.M.T. It based this finding on the fact that parents were aware of the

sexual contact between children and that both failed to protect T.P.M. and A.S.M. from further sexual abuse. Although the parents took some steps to protect the children from this sexual contact, the district court did not err in finding that a more formal intervention (therapy or law enforcement) was likely necessary given the severity and number of D.J.T. and A.J.T.'s sexually deviant behaviors. The district court found "a systemic family matter which profoundly affected all the children in the home." That finding is not clearly erroneous as it has substantial evidentiary support in the record. *See In re Welfare of S.Z.*, 547 N.W.2d 886, 893 (Minn. 1996).

There is also clear and convincing evidence supporting the district court's findings underlying its determination that parents' failure to protect J.M.T. would continue into the foreseeable future. We therefore conclude that the district court did not abuse its discretion by invoking this statutory basis for terminating the parental rights of both parents. Because the district court did not err in concluding that parents are palpably unfit to parent J.M.T., we need not address the other statutory bases for termination relied upon by the district court as to J.M.T. *See R.W.*, 678 N.W.2d at 55.

Reunification efforts

Parents argue that the county failed to make reasonable efforts to reunify them with J.M.T. after the child's removal from their home. If a statutory ground exists for termination of parental rights and termination is in the best interests of the child, the county must still demonstrate by clear and convincing evidence that it made reasonable efforts to reunite the family. Minn. Stat. § 260.012(h) (2012); Minn. R. Juv. Prot. P. 39.05, subd. 3(b)(1); *In re Children of T.A.A.*, 702 N.W.2d 703, 708 (Minn. 2005).

"Reasonable efforts at rehabilitation are services that go beyond mere matters of form so as to include real, genuine assistance. The quality and quantity of efforts to rehabilitate and reunify the family impact the reasonableness of those efforts." *In re Welfare of Children of S.W.*, 727 N.W.2d 144, 150 (Minn. App. 2007), *review denied* (Minn. Mar. 28, 2007) (quotation omitted). The district court is required to ensure that reasonable efforts are made by the social services agency to reunite the child with the child's family, unless the district court makes a formal finding otherwise. Minn. Stat. § 260.012(a) (2012); *S.Z.*, 547 N.W.2d at 892.

Mother signed a case plan created for each child. The only substantive and arguably rehabilitative requirement of the plans was that mother complete a parental capacity assessment and follow its recommendations. The county hired McMahon to assess only mother, and McMahon's only recommendation concerning reunification was that the county not reunify mother with her children. The assessment was completed in December 2012, ten months after the children were removed from the home.

Father never admitted the CHIPS petition, nor did he sign any of the case plans. However, the out-of-home placement plan for D.J.T., A.J.T., and J.M.T. provided that both parents were to complete a parental capacity assessment. No such assessment was completed by father, and the record fails to disclose that the county ever made arrangements for his assessment.

The county argues that it made reasonable efforts to reunify the family. The record establishes that the county's efforts to reunify here were insufficient, untimely, and not reasonable. The only "service" offered was a single parenting assessment of

mother, done many months after the children were removed, and the assessor recommended termination of mother's parental rights without any further offer of services. Although the district court found as a fact after the TPR trial that further reunification efforts would be futile, it did not find that the efforts of the county prior to the termination trial were reasonable.

Reasonable efforts up until the time of termination are always required, unless the district court permits a "by-pass." The "by-pass" is an available option in cases of egregious harm, where the rights of the parent to another child were previously terminated involuntarily, where the child is presumed abandoned, or in cases where the "provision of services . . . for the purpose of rehabilitation and reunification is futile." Minn. R. Juv. Prot. P. 30.09, subd. 3(a). Except in those cases, "[r]easonable efforts to prevent placement and for rehabilitation and reunification are always required *except upon a determination by the court*" that one of the "by-pass" circumstances exists. Minn. Stat. § 260.012(a) (emphasis added.)

Our supreme court discussed the requirement of reasonable efforts in *T.A.A.* 702 N.W.2d at 703. The *T.A.A.* court discussed the county's obligation to make reasonable efforts and that, before terminating parental rights, the district court must determine "whether reasonable efforts *have been made*." *Id.* at 709 (emphasis added). The *T.A.A.* court specifically discussed the requirement of Minn. Stat. § 260C.301, subd. 8(1) (2004), that the district court's focus in making this determination must be on the efforts toward reunification after removal but before the TPR trial. *Id.* "Alternatively, the district court may find that 'reasonable efforts at reunification are not required as provided under

[Minn. Stat. §] 260.012.'" *Id.* (alteration in original) (quoting Minn. Stat. § 260C.301, subd. 8(2) (2004)). But under section 260.012(h), allowing for this alternative determination of futility, reference is made back to paragraph (a) of section 260.012, which provides:

> Once a child alleged to be in need of protection or services is under the court's jurisdiction, *the court shall ensure* that reasonable efforts, including culturally appropriate services, by the social services agency are made to . . . reunite the child with the child's family at the earliest possible time, and *the court must ensure* that the responsible social services agency makes reasonable efforts to finalize an alternative permanent plan for the child . . . . Reasonable efforts to prevent placement and for rehabilitation and reunification are always required except upon a determination by the court that a petition has been filed stating a prima facie case that [one of the bases for bypass is present].

Minn. Stat. § 260.012(a) (2012) (emphasis added). The statutory scheme is clear: The agency must use reasonable efforts to reunify unless and until a finding of futility (or other applicable grounds for bypass) is made *by the district court*.

The county focuses its futility argument on *its own* allegation that reasonable reunification efforts were futile. But the statute requires that a finding of futility must first be made *by the district court* before the agency is excused from reunification efforts.

> The requirement that the parties follow the case plan is a two-way street: the county may not, as it did here, decide for itself that further efforts are futile. Rather, if the county decides that further efforts to rehabilitate a parent and reunify parent and child would be futile, its remedy is to seek . . . a court determination that reasonable efforts at reunification are no longer required. Until then, the statute requires the county to continue to provide services to the parent as outlined in the case plan or out-of-home placement plan.

T.R., 750 N.W.2d at 665-66 (citation omitted). In *T.R.*, the Minnesota Supreme Court held that a reunification plan solely consisting of periodic testing for substance abuse was insufficient to satisfy the county's reunification efforts. *Id.* at 665. Similarly, in *M.D.O.*, the supreme court reversed the termination of parental rights of a mother who murdered her adopted daughter. 462 N.W.2d at 377. The district court had terminated her parental rights to a child born after the murder because she refused to admit guilt. The court stated: "The county's expectations seem especially daunting considering the county's admitted failure to provide services, counseling or assistance to aid [the mother] in coming to grips with her conduct." *Id.* Because plans containing substantive elements like those in *T.R.* and *M.D.O.* were deemed insufficient, it follows that a plan that lacks *any* substantive requirements because it simply requires a parenting assessment and satisfaction of the resulting recommendations is also insufficient when there are *no* resulting recommendations. To rule otherwise would obviate the district court's ability to review and supervise the county's reunification efforts.

To like effect is the rule 30.09 "by-pass" procedure in cases where the "provision of . . . services for the purpose of rehabilitation and reunification is futile and therefore unreasonable under the circumstances." Minn. R. Juv. Prot. P. 30.09, subd. 3(a)(5). The subdivision of the rule immediately following that provision makes clear that "the court makes the determination." *Id.*, subd. 3(b).

The record here reveals not only a failure of the county to timely create or file a case plan and an absence of any reasonable efforts to reunify for many months after the children were removed from the home, but also a failure to properly by-pass the

requirement that it make reasonable efforts through a determination by the district court that further efforts would be futile. The case worker, guardian ad litem, and McMahon relied on parents' failure to acknowledge responsibility, their minimizing of the severity and significance of the intrafamilial sexual abuse, and mother's dependency on father as the bases for the contention that a reunification plan would be futile. Although providing services in these circumstances was doubtless difficult, the "services" provided by the county in the case plan were neither sufficient nor even designed to reunify J.M.T. with parents. And, in order to be relieved of the obligation to offer reasonable reunification services on account of futility, the county was required by statute and rule to obtain the district court's determination of futility. Minn. Stat. § 260.012; Minn. R. Juv. Prot. P. 30.09, subd. 3.

The self-evident purpose of the formal-petition requirement is to involve the district court in case planning before a determination is made that reasonable efforts to reunify are futile. This is not a decision for the county to make. The district court, after a hearing, must make that determination. Minn. Stat. § 260.012(a); Minn. R. Juv. Prot. P. 30.09, subd. 3(b).

Here, the district court made a prospective finding of futility upon hearing the TPR case. However, that future efforts at reunification may be futile does not excuse the county's past failure to exert or identify what might amount to even arguably reasonable efforts to reunify, or its failure to have requested release from its obligation to provide such efforts by making a prima facie showing of futility. Minn. Stat. § 260.012(a); Minn. R. Juv. Prot. P. 30.09, subd. 3.

The county's failures presented the district court with a situation without a solution consistent both with J.M.T.'s legitimate need for timely permanency and the enforcement of the requirements placed on the county by law. Having not been presented with a request for by-pass prior to the permanency trial (and it was not until December that the county actually asserted the futility of reunification efforts despite there having been no such efforts until many months after removal), the district court was left only with the question of whether future efforts to reunify were reasonably possible. The district court itself characterized the county's reunification efforts as "minimal." But the law requires more than that before the state may legally and permanently sever the parent-child bond.

Our careful review of the record also convinces us that the county's complete failure to either make reasonable efforts to reunify with respect to J.M.T. or to petition the district court for relief from that duty, is not harmless in context. If a petition had been filed under section 260.012(a) and rule 30.09 requesting a "by-pass," the district court would have had the statutorily envisioned opportunity to determine whether reunification efforts were indeed futile, Minn. Stat. § 260.012(a), or whether a reasonable service plan could be designed to address or remove the obstacles to reunification, Minn. R. Juv. Prot. P. 30.09, subds. 2-3. Parents have shown parenting inadequacies. Both resisted the county's efforts. But absent reasonable efforts on the county's part to reunify or a court determination that such efforts were not required, termination is not statutorily permitted. Minn. Stat. § 260.012(h); Minn. R. Juv. Prot. P. 39.05, subd. 3(b)(1); *T.A.A.*, 702 N.W.2d at 708. And because reasonable efforts to reunify J.M.T. with parents were

neither expended nor excused by the district court, review of the district court's best interest determination concerning J.M.T. is neither necessary nor even possible.[8] The county's failure to either use reasonable efforts to reunify or request timely release from the obligation to attempt reunification under section 260.012(a) and rule 30.09 mandates that we reverse the termination of parents' rights to J.M.T.[9]

Affirmed in part and reversed in part.

[8] We note that a factor in determining the best interests of the child is the *child's interest* in preserving the parent-child relationship. *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992). Here, because there were no reasonable efforts at reunification, the district court was not able to sufficiently assess J.M.T.'s best interests. And, of course, the county is not relieved of compliance with its statutory obligations regarding attempts to terminate parental rights solely upon a finding that termination would be in a child's best interests. *R.W.* 678 N.W.2d at 52 (holding that termination cannot be based solely on the fact that termination was in children's best interests); *M.D.O.*, 462 N.W.2d at 379 (stating that child's best interests cannot be sole justification for terminating parental rights).

[9] We are mindful that the obligation to attempt reunification under Minnesota Statutes section 260.012 applies as well to the termination of father's rights to D.J.T. and A.J.T. and to the transfer of custody of T.P.M., R.K.M., and A.S.M. And in the case of D.J.T. and A.J.T., who are members of the Leech Lake Band of Ojibwe, "active efforts" are required under ICWA. 25 U.S.C. § 1912(d) (2006); *S.W.*, 727 N.W.2d at 150 (defining "active efforts"). But, as discussed above, father conceded, and the boys agreed, that termination of father's parental rights to the older boys was appropriate and in their bests interests. And at oral argument, mother's attorney agreed that she does not "substantially dispute" that the transfer of T.P.M., R.K.M., and A.S.M. was erroneous. In the interests of safety and permanency for the children, and in light of the ages of those children, we conclude that the county's failure to attempt their reunification with parents was harmless in this context.

CHUTICH, Judge (dissenting)

Because the record substantially supports the district court's findings that, under the circumstances present here, the county's efforts to reunify the family were not unreasonable and "[f]urther efforts at reunification would jeopardize the psychological and developmental well-being of all the children[,]" I respectfully dissent from the portion of the majority's opinion that discusses reunification efforts. For the reasons explained below, I would affirm the district court's decision to terminate the parents' rights to J.M.T.

After a three-day trial in which the district court evaluated 28 exhibits, heard testimony from 22 witnesses, including both parents, and assessed their credibility, the district court made detailed findings that T.P.M., R.K.M., and A.S.M. suffered egregious harm in their parents' care; the acts of sexual abuse were "a systemic family matter which profoundly affected all the children in the home"; and the parents' utter failure to protect their children from this harm—despite their awareness of it—demonstrates that being in the parents' care is "contrary to the best interest . . . of any child[.]" The district court further found that the parents were palpably unfit to parent D.J.T., A.J.T., and J.M.T. The majority properly concludes that substantial evidence supports these findings of egregious harm and palpable unfitness to parent.

Despite these substantiated findings of egregious harm and palpable unfitness, the majority concludes that the county should have asked the district court to "by-pass" its obligation to provide reasonable efforts before the permanency trial and that the county's efforts to reunify were "insufficient, untimely, and not reasonable." While the county

could have, and maybe even should have, sought a "by-pass" here after its initial efforts at reunification were unavailing, its decision not to do so does not contribute to reversible error where the district court's ultimate findings, including that the parents subjected three of their children to egregious harm, justify excusing the county from its obligation to provide reasonable services to reunify. *See In re Welfare of S.R.A.*, 527 N.W.2d 835, 838 (Minn. App. 1996) (finding harmless error in a child protection context).

When this case is put into proper context, clear and convincing evidence supports the district court's factual findings that the county attempted to make reasonable efforts, but that it was thwarted by the actions of the parents, and that, in any event, any effort to attempt reunification was unreasonable under the circumstances. The procedural history shows that a petition, alleging that all the children were in need of protection or services, was filed in close conjunction with criminal charges of gross misdemeanor neglect of a child against each parent. As allowed by the Rules of Juvenile Protection Procedure, the district court issued an order stating that the criminal cases would be heard before the child protection case. The parents did not object to this ruling and, in fact, the ruling assuaged their concerns about self-incrimination.

Both parents were then convicted of gross misdemeanor neglect of a child for failure to protect their children from sexual abuse. In father's case, a jury found beyond a reasonable doubt that he was aware of the sexual abuse that was occurring in his home and permitted the abuse to continue. Mother pleaded guilty on an *Alford* basis to one count. The district court then ordered a parental-capacity assessment to "determine whether [mother] had the capacity to parent her children and what services should be

provided to [mother]." A parental assessment was also ordered for father, but he never completed one. At this time, father had three criminal convictions relating to his care of children because he was convicted in 2007 of fifth-degree assault for hitting a foster child with a ruler with "such force and violence to leave significant bruising and marks on the child."

Concerning mother's assessment, the district court credited the report and testimony of the experienced mental-health professional and child-custody expert, Deena McMahon, who found that "[t]he absence of [mother's] role as a protective parent" was "alarming" and that mother "lacks insight into how to keep children safe." McMahon further testified that through her many years of experience, this case stood out because of the severity of the sexual abuse and mother's utter lack of capacity to parent. She stated, "[I]f I were the psychotherapist involved, I wouldn't know how to reach out and say, 'Your children matter. You['ve] got to do this and it's hard, but you['ve] got to do it.'"

The district court further heard and credited the testimony of the guardian ad litem who stated that she was "blown away" at mother's parenting deficit. She testified that her "meetings with [mother] were shocking [because of mother's] lack of insight as to what was going on in her home, her lack of ability to make decisions independent of her husband, [and] her outright disinterest in reunifying with some of her children."

Similarly, the case worker testified that although she and the guardian ad litem attempted to develop case plans to assist in reunification, it was "extremely difficult" because parents were criminally convicted of child neglect but refused to acknowledge their roles in the child abuse. The county met with mother several times, but found

mother unwilling to make even the slightest effort toward accepting responsibility and acknowledging her failure in protecting her children.

Relying upon this testimony and finding it credible, the district court discussed the reasonable efforts that the county made to reunify the parents with the children, finding that it "was very difficult" to "draw up a case plan with [mother] . . . because [mother] provided no acceptance of wrongdoing or understanding of her behavior contributing to the abuse of her children." The district court acknowledged that the efforts of the county to correct the conditions that caused the children to suffer harm "were minimal[,]" but it placed responsibility for that level of services on the mother's unwillingness "to accept responsibility, to believe the children and to understand a need for change . . . ."

The district court specifically found that "Beltrami County Health and Human Services was stopped from being able to work toward meaningful change on the part of [mother] by her unwillingness to move forward on her own, deferring even basic decisions to her husband." It further found that the county relied upon the parental-capacity assessment of mother to "determine what services should be provided to reunify the family and ensure the safety of the children." The parental-capacity assessment determined, however, that "[mother] would not be able to keep her children safe." The district court noted that, despite their criminal convictions for neglect of a child, the parents "do not believe they have done anything wrong."

Accordingly, the district court made the following findings, which can be reasonably read to encompass past, present, and future efforts by the county: "There are no reasonable efforts that could be made to correct the conditions that led to the out-of-

home placement of [T.P.M., R.K.M., A.S.M. and J.M.T.] Further efforts by the social services agency would be futile."

After discussing the various services that the county had provided to father since the two oldest boys were placed in his home, the district court concluded:

> Based upon the attitudes observed in court, the testimony provided and the exhibits submitted, there are no efforts, active and/or reasonable, that could be provided to correct the conditions that jeopardized the safety and emotional well-being of children in the care of [the parents]. Further efforts at reunification would jeopardize the psychological and developmental well-being of all the children.

The record substantially supports the district court's findings.

Critically, these findings satisfy the district court's obligation under section 260.012(h) to make, at the termination proceedings, "findings and conclusions as to the provision of reasonable efforts." Minn. Stat. § 260.012(h). In making these findings, the statute specifically allows the district court to determine "that provision of services or further services for the purpose of rehabilitation is futile and therefore unreasonable under the circumstances or that reasonable efforts are not required as provided in paragraph (a)." *Id.* And the "nature of the services which constitute 'reasonable efforts' depends on the problem presented." *In re Welfare of S.Z.*, 547 N.W.2d 886, 892 (Minn. 1996).

The district court found that three children suffered egregious harm here, and the majority concludes that substantial evidence supports that finding. Thus, although the district court was never asked before the permanency hearing to apply section 260.012 (a)

(1), the district court's factual findings at trial satisfy the provision's substantive requirements.

Nothing in the cases cited by the majority requires a different result because they are factually and procedurally distinguishable. In *Matter of Welfare of M.D.O.*, for example, despite the mother's previous conviction for unintentional second-degree murder of a child, after the termination trial, the district court made "specific findings of fact" that the mother was in fact *not* palpably unfit to be a party to the parent-child relationship. 462 N.W.2d 370, 374 (Minn. 1990). The district court specifically found that the mother did not fit the "pattern of an abusive parent likely to repeat abusive acts"; that an admission of culpability was not necessary before mother could benefit from therapy; and that it was in the child's best interest to maintain and to strengthen the relationship with mother. *Id.* at 378.

Despite these findings, the court of appeals reversed, ordering termination and reasoning that mother was palpably unfit to parent because the criminal conviction showed a "consistent pattern of abuse" of the child and mother refused "to admit her culpability" for the child's death "even though there was no threat of self-incrimination." *Id.* at 374. The supreme court reversed the termination of parental rights, finding that the criminal conviction did not support a finding of "a consistent pattern of abuse" because it is not an element of the crime for which mother was convicted. *Id.* at 376. The supreme court also concluded that, even though it was reluctant to enter "the psychological debate on whether an initial admission of culpability is a prerequisite to rehabilitative therapy," the trial court's finding that an admission of culpability was not necessary to complete

other case plan goals was "supported by the substantial testimonial evidence of several psychologists and psychiatrists." *Id.* at 377–78. Accordingly, the supreme court concluded that the evidence supported the trial court's findings and that the court of appeals "erred in substituting its findings for those of the trial court." *Id.*

In this case, by contrast, the district court, who heard the testimony and saw the witnesses, specifically found that the parents are substantially unfit; three of their six children suffered egregious harm while in the parents' care; J.M.T. "would not be safe if returned to the care of [mother]"; and it is in the best interest of J.M.T. to terminate parental rights. In addition, the criminal convictions here related directly to the children involved in the termination proceeding, and the elements of the criminal case raised issues almost identical to the finding of egregious harm in this termination case. *See Travelers Ins. Co. v. Thompson*, 281 Minn. 547, 550, 163 N.W.2d 289, 291 (1968) (holding that criminal conviction is conclusive evidence of facts upon which conviction is based). And, of course, no expert testified here that an admission of culpability was unnecessary before rehabilitation could occur. In fact, the mental health expert testified to the opposite in her report: "[Mother's] lack of feeling responsible and her outright denial of having known what was going on in her home for years is a tremendous risk factor for parenting." The district court properly credited this testimony. *See In re Welfare of J.W.*, 415 N.W.2d 879, 884 (Minn. 1987) (holding that therapy that does not include admission may be ineffective and impair parents' chance of regaining children).

Similarly, the facts of *In re Children of T.R.* are distinguishable. The supreme court in that case reversed the district court determination that the father was palpably

unfit because he struggled with maintaining sobriety. *In re Children of T.R.*, 750 N.W.2d 656, 664 (Minn. 2008). In that case, the non-custodial father's actions did not contribute in any way to the child's out-of-home placement. *Id.* at 666. In addition, the supreme court held that "substance or alcohol use alone does not render a parent palpably unfit[.]" *Id.* at 663. Because the district court did not find that "a causal connection [existed] between [father's] alcohol and drug use and his inability to care for [the child,]" the supreme court concluded that the record did not support the district court's determination that the father was palpably unfit to parent the child. *Id.* at 663–64.

In the interests of judicial economy, the supreme court then discussed whether the county had made reasonable efforts to rehabilitate the father and to reunify him with the child. *Id.* at 664. It found that the county's testing of father for substance use was not "realistic under the circumstances to rehabilitate a parent who . . . suffers from chemical dependency issues." *Id.* at 665. The supreme court also found that the services were "not reasonable because no services were offered to address [the father's] lack of verbal skills and acknowledged difficulty in understanding the proceedings." *Id.* at 666.

By contrast, both parents here failed to keep children in their household safe from sexual abuse and failed to provide necessary care for the children's emotional health, development, and safety. The district court made specific findings that these parents are palpably unfit to parent and that they subjected three of their six children to egregious harm, and the majority agrees that sufficient evidence supports these factual findings. Concerning reasonable efforts, the record shows that the county attempted to develop a case plan for both parents and desired a parental-capacity assessment to determine what

services should be provided. Father never completed the parental assessment, making it difficult to know what further services could be offered. When the eldest boys were placed in his home, father had previously been offered "counseling, in-home counseling, recommendations on how to address sexual acting out of his children, a diagnostic assessment and an anger management assessment." The district court found that father "ignored their needs" and failed to "follow through with needed interventions."

Mother completed the assessment, but the results suggested that she "would not be able to keep her children safe." Given these results, an experienced mental health professional was at a loss to recommend further services that could be useful. In addition, neither father nor mother objected to their case plans or asked the district court to revise them.

It is well-established in Minnesota law that "[i]n every termination proceeding, 'the best interests of the child must be the paramount consideration.'" *In re Welfare of Children of K.S.F.*, 823 N.W.2d 656, 668 (Minn. App. 2012) (quoting Minn. Stat. § 260C.301, subd. 7 (2010)); *see also M.D.O.*, 462 N.W.2d at 378 ("The best interests of the child is a paramount consideration and our ultimate focus remains on the best interests of the child balanced against the parental rights."). Efforts at reunification "must be consistent with a child's best interests and may be terminated if the efforts are futile and unreasonable under the circumstances." *In re A.R.M.*, 611 N.W.2d 43, 49–50 (Minn. App. 2000).

Here the district court determined that termination of the parents' right to J.M.T. was in J.M.T.'s best interest, explaining:

> [The parents] have failed to keep [J.M.T.'s] siblings safe and have displayed no understanding or desire to understand that sexual abuse within a home is damaging to all who reside in the home. [Father] has used violent physical discipline on foster children and his own children. [Mother] would not step in to protect her child, instead deferring to her husband . . . .

Careful review of the record confirms that the district court's findings as to the best interests of J.M.T. are supported by substantial evidence and are not clearly erroneous. Viewing this case from the child's perspective, it is hard to understand the decision to reinstate rights of parents found palpably unfit—a mother who essentially abandoned three adopted children she raised from young ages because she believed they were sabotaging her marriage, and a father who has three criminal convictions relating to abuse and neglect of children. Neither parent has taken any responsibility for the sexual abuse which occurred in their home while they were safely asleep behind a locked door. Because the district court appropriately determined that the county attempted to provide services; those services were undermined by the parents' actions; under the unique circumstances presented here, further services for the purpose of rehabilitation were futile and excused; and the best interests of J.M.T. are furthered by a termination of parental rights, I would affirm the district court's order in full.