

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 3, 2014

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. 2014AP361
2014AP362
2014AP363**

**Cir. Ct. Nos. 2012JC590
2012JC591
2012JC592**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN THE INTEREST OF TARON P.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

EUGENE P.,

RESPONDENT-APPELLANT.

**IN THE INTEREST OF TRAVIS P.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

EUGENE P.,

RESPONDENT-APPELLANT.

**IN THE INTEREST OF JADEN P.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

EUGENE P.,

RESPONDENT-APPELLANT.

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

¶1 CURLEY, P.J.¹ Eugene P. appeals the orders finding his sons Taron P. and Jaden P. in need of protection or services pursuant to WIS. STAT. § 48.13(3), (3m), and (10), and the order finding his son Travis P. in need of protection or services pursuant to § 48.13(3m) and (10). On appeal, Eugene P. contends that the trial court erred in allowing testimony from Dr. Lynn Sheets, who opined, among other things, that the kinds of injuries suffered by Jaden P. after Eugene P. hit him on the back with a belt were consistent with child abuse. This court disagrees and affirms.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12).

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

BACKGROUND

¶2 Eugene P. is the adoptive father of three boys: Taron P., born July 21, 2002; Travis P., born May 18, 2003; and Jaden P., born April 3, 2004.² On August 9, 2012, Eugene P. was charged with felony child abuse, contrary to WIS. STAT. § 948.03(2)(b). Four days later, the petitions for the instant case, alleging that the boys were children in need of protection or services (“CHIPS”), were filed.

¶3 The CHIPS petitions for this case alleged that all three of Eugene P.’s children were in need of protective services under WIS. STAT. § 48.13 because they were: victims of abuse, *see* § 48.13(3); at substantial risk of being abused, *see* § 48.13(3m); receiving inadequate care during the time that Eugene P. was incarcerated, *see* § 48.13(8); and neglected, *see* § 48.13(10). The allegations filed pursuant to § 48.13(8) were later dismissed.

¶4 According to the disposition report that was filed in September 2012, Glendale police arrested Eugene P. on August 6, 2012, based on their suspicion that he physically abused the boys. Police were called to Eugene P.’s house that day by the next door neighbor, who heard the children screaming and crying, along with loud slapping noises. Jaden, who was eight years old, told a social worker that Eugene P. hit him on the back and on the lip with a belt. Jaden also saw Eugene P. throw Taron, then ten years old, to the ground. Travis, who was nine, explained that he did not witness the incident firsthand because he was in the basement, but knew that Eugene P. was angry. Travis also told the social worker

² The children do not have an adoptive mother.

Eugene P. had hit him in the arm with a belt the day before. Taron told the social worker that Eugene P. got upset at him and Jaden because they had made pancakes while Eugene P. took Travis to an appointment. Taron explained that Eugene P. tried to hit him with the belt, but only made contact once because he tried to hide. When Taron did try to hide, however, Eugene P. pushed him, causing him to hit his head against a cabinet.

¶5 In March 2013, Eugene P. stood trial for the felony child abuse charges and was acquitted, and in April 2013, he stood trial for the grounds phase of the termination of parental rights (“TPR”) case.

¶6 At the TPR trial, Rachel Cass, Eugene P.’s next door neighbor, testified that she called police on August 6, 2012 because she heard the boys screaming and crying and Jaden saying, “no, daddy, please don’t, I’m so scared,” and also heard repetitive slapping sounds followed by a loud thud. Cass said she was in her garage when she heard the noise coming from an open window in Eugene P.’s house, and that she recognized Jaden’s and Taron’s voices. She also heard Eugene P. yelling “shut your mouth.” She testified that she called police because she wanted someone to check on the boys to make sure they were okay. Cass also testified that she observed that the three boys were regularly left home alone all day while Eugene P. went to work.

¶7 Glendale police officer Michael O’Keefe, who was dispatched to Eugene P.’s house following Cass’s call, also testified. Officer O’Keefe testified that when Eugene P. answered the door, he initially stopped O’Keefe from entering the house and asked him to remain on the front step. When O’Keefe explained that he had received a report of a disturbance and needed to check on the children to make sure they were okay, Eugene P. seemed “incredulous,” “kind

of guarded,” and “almost disbelieving.” According to Officer O’Keefe, Eugene P.’s behavior seemed to be “kind of an act.” O’Keefe then proceeded to talk with Eugene P. and Taron, while another officer talked with Jaden, Travis, and Ashante—Travis’s eleven-year-old biological brother who sometimes stayed at the house.³ O’Keefe noticed that Jaden had a very swollen lip and that the back of Taron’s neck was “wet and red with blood.” There was blood on a towel in the bathroom and on the floor of one of the bedrooms. Officer O’Keefe also noticed that both Jaden and Taron were fully dressed and completely dry, even though Eugene P. had said that one of the boys was in the shower.

¶18 Lieutenant Daniel Herlache, who also investigated the scene, testified as well. Lieutenant Herlache photographed Jaden’s and Taron’s injuries. He testified that in addition to having swollen lips, Jaden had “three abrasions on his back, looping type,” and broken skin, which, given his many years of training and twenty-five years of police experience, were “indicative of being struck with a cord or a belt,” which, he explained, was “a very common injury in child abuse cases.” As for Taron, Herlache noticed a bleeding wound on the back of his head and a trail of blood coming down his neck. Taron also had a cut on his elbow and marks on his thigh which were also “indicative of some type of looped cord or belt.” Herlache also testified about the photos he took of the blood in the bathroom and on the bedroom floor.

¶19 There was, additionally, testimony by Cara Dempski, a social worker who interviewed the children, and from Dr. Matthew Gray, a specialist in

³ In various portions of the record Ashante is referred to as “Ashante” and “Ashanti.” We will use “Ashante,” as that is the spelling used by Eugene P.

pediatric emergency medicine who examined and treated Jaden and Taron following the August 6, 2012 incident. Dr. Gray testified about Jaden's wounds in great detail, and opined that his injuries were "essentially pathognomonic for child abuse in that they are typically seen when a child is struck with a belt or a cord or another implement of that nature." Dr. Gray also testified in great detail about Taron's wounds, explaining that the cut on his head was so deep that it required sutures, and that his left elbow—which Taron said was hit when he fell into the cabinet—"was tender enough that we felt that obtaining x-rays was important to rule out underlying fracture or dislocation." According to Dr. Gray, Taron's injuries were "somewhat more nonspecific," in that they could have been obtained in "any manner of ways," but were consistent with Taron's description of what happened to him. Dr. Gray also treated Travis for some abrasions.

¶10 The three boys also testified. Travis testified that, on the day that police came to his home, Eugene P. had hit his brothers with a belt. He said that he did not see what happened beyond seeing Eugene P. with the belt because he fled to the basement, but did hear his brothers crying and heard what sounded like banging on the floor. Travis also saw blood on Taron after the beating, and saw marks on his brother's leg. Travis further testified that the day before the police came, Eugene P. gave him a "whopping." Jaden testified that the marks on his back and bottom lip were from the "whopping" Eugene P. gave him, but that the marks from his top lip were from a pillow fight. Jaden also testified that the pain from the incident for which police were called lasted for days. Taron testified that Eugene P. slapped him with a belt, and then threw him into a cabinet, where he bumped his head and got cut. Taron said that he screamed when this happened. All three boys testified that Eugene P. frequently left them home alone when he would go to work.

¶11 Dr. Joan Gill, a pediatric hematologist, testified that Jaden has Von Willebrand’s disease, a bleeding disorder which affects the blood’s ability to clot. Dr. Gill explained that she told Eugene P. about Jaden’s Von Willebrand’s disease in 2005 and recommended that he not partake in any contact sports. She also testified that as a general matter she provides information cautioning against corporal punishment for children with the disorder.

¶12 Dr. Sheryl Dolezal, who conducted psychological evaluations of the three boys, also testified. Dr. Dolezal diagnosed all three boys—Travis, Taron, and Jaden—with a number of disorders, including “physical abuse of a child victim.” She explained in detail what the boys told her during their evaluations, including that Eugene P. would often try to cover up bruises he inflicted on the boys “with Band-Aids or things.”

¶13 Eugene P. testified, too. Eugene P. admitted that he uses a belt to discipline his sons, and that he used a belt on them on August 6, 2012. He also admitted to “looping” the belt when hitting the boys. According to Eugene P., however, his use of the belt did not constitute abuse; rather he makes sure he is “in an emotional place where [he is] not angry, ... not upset, [and] ... not lashing out.”

¶14 In addition, after the State had elicited testimony from about ten witnesses, there was testimony from Dr. Lynn Sheets, a medical doctor and the director of the Child Advocacy and Protection Services child abuse program at Children’s Hospital of Wisconsin. Dr. Sheets had testified at Eugene P.’s criminal trial the month before, and Eugene P. had objected to her testifying at the TPR trial in a motion *in limine*. Eugene P. argued that Dr. Sheets’ testimony was not necessary at the TPR trial given that Eugene P. admitted striking his children with a belt, Dr. Sheets’ conclusions were legal, not medical in nature, and were “faulty

because she didn't actually examine these children." At trial, however, Eugene P. appeared to object not to Dr. Sheets' testimony in its entirety, but rather, seemed to concede that her testimony would not be objectionable so long as it complied with the ruling made at the felony trial:

... [W]e would like to maintain our objection to excluding her understanding the law in the case, but also have the same ruling which the [court in the criminal case] maintained was correct.

... [W]e think ... Dr. Sheets could testify consistent to the criminal action, and in fact it was a diagnostic for child abuse in her opinion, but that she was not allowed to offer the legal conclusion that this is child abuse. I understand from my conversations with [the State's attorney] that she agrees with that limitation.

¶15 The trial court allowed Dr. Sheets to testify, determining that she could not testify that the children were in fact abused, but could testify that her opinion was that the children's injuries were consistent with severe child abuse:

I will ... allow the testimony of Dr. Sheets into the record. Her testimony shall be limited; that is to say, I don't want Dr. Sheets to say, I examined these pictures. These children were ... the subjects of severe child abuse. It is appropriate, though, in response to the question: Do you have an opinion to a reasonable degree of scientific certainty as to whether the images you looked at were consistent with anything? For the answer to be yes. What is that opinion? It is my opinion that these injuries are indicative of severe child abuse.

¶16 Dr. Sheets opined that Jaden's injuries were "diagnostic for severe child abuse." She explained that kind of injuries Jaden suffered to his back—which occurred from severe force from an object such as a cord or a belt, and which caused the skin to tear—do not happen "any other way than [from] a severe force kind of beating."

¶17 The jury found that Jaden and Taron were both in need of protection or services pursuant to WIS. STAT. § 48.13(3) (abuse), (3m) (substantial risk of abuse), and (10) (neglect). The jury also found that Travis was in need of protection or services pursuant to § 48.13(3m) (substantial risk of abuse) and (10) (neglect), but did not find grounds as to § 48.13(3) (abuse). Dispositional orders to this effect were entered for each of the three children, and Eugene P. now appeals.

ANALYSIS

¶18 On appeal, Eugene P. takes issue with the admission of Dr. Sheets' testimony at the TPR trial. First, even though Eugene P. appears ultimately not to have objected to Dr. Sheets' testimony in its entirety, but instead, wanted to narrow it to opining that Jaden's injuries were consistent with child abuse, he now argues that the trial court erred in allowing Dr. Sheets to testify at all—contending that the trial court erroneously went along with the criminal court's ruling regarding Dr. Sheets' testimony without exercising its discretion. Second, Eugene P. argues that Dr. Sheets' testimony was unfairly prejudicial because it was unnecessary and “imbue[d] [the State's case] with an undeserved aura of infallibility.” Third, Eugene P. argues that Dr. Sheets' testimony went beyond the scope of the trial court's limited ruling when Dr. Sheets opined that the kind of injuries Jaden suffered to his back do not happen “any other way than [from] a severe force kind of beating.” Fourth, Eugene P. argues that any error was not harmless.

¶19 We review the trial court's decision to admit Dr. Sheets' testimony under the “erroneous exercise of discretion” standard. *See State v. LaCount*, 2008 WI 59, ¶15, 310 Wis. 2d 85, 750 N.W.2d 780. Evidentiary errors also require a

harmless error analysis. See *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶¶27-32, 246 Wis. 2d 1, 629 N.W.2d 768 (applying harmless error analysis to errors in TPR case); see also *Town of Geneva v. Tills*, 129 Wis. 2d 167, 184-85, 384 N.W.2d 701 (1986) (harmless error standard applies in civil cases as well as criminal cases). We consider an error harmless when no reasonable probability exists that the error contributed to the jury’s verdict. See *State v. Dyess*, 124 Wis. 2d 525, 542-43, 370 N.W.2d 22 (1985). A reasonable probability is a probability sufficient to undermine our confidence in the outcome. *Id.* at 544-45. “If the error at issue is not sufficient to undermine the reviewing court’s confidence in the outcome of the proceeding, the error is harmless.” *Evelyn C.R.*, 246 Wis. 2d 1, ¶28, 629 N.W.2d 768. Thus, even if the trial court in the case at hand may have erred in permitting Dr. Sheets to testify, this court “nonetheless must examine the entire record to determine whether it provides a factual basis to support the [jury’s] finding of grounds for termination.” See *id.*, ¶32.

¶20 This court need not delve into a lengthy analysis of Eugene P.’s alleged errors regarding the admission of Dr. Sheets’ testimony because any error was harmless. See *State v. Zien*, 2008 WI App 153, ¶3, 314 Wis. 2d 340, 761 N.W.2d 15 (cases should be decided on narrowest possible ground). There is no dispute that Dr. Sheets was highly credentialed. Her testimony, that the kind of injuries Jaden received do not happen “any other way than [from] a severe force kind of beating,” was extremely serious in nature. In this case, however, Dr. Sheets’ testimony was merely an echo of a message that the jury had by that point already heard many times before by numerous experienced, well-credentialed sources. For example, Lieutenant Herlache, who had worked as a police officer for twenty-five years, testified that Jaden’s injuries were “very common ... in child abuse cases.” Similarly, Dr. Gray, a specialist in pediatric

emergency medicine, testified that Jaden’s injuries were “essentially pathognomonic for child abuse,” and that Taron’s wounds were so deep they required sutures and were consistent with his testimony that Eugene P. threw him into a cabinet. In addition, Dr. Dolezal testified that all three boys suffered from a number of psychological disorders, including “physical abuse of a child victim.” Furthermore, shortly after Dr. Sheets testified, Dr. Gill explained that Jaden had a serious condition in which he bled more easily than other children, and also testified that she relayed this information—including recommending no contact sports for Jaden—to Eugene P. Yet Eugene P. freely admitted that he chose to discipline all three of his children with a looped belt. The message conveyed by this testimony—that the kinds of injuries Jaden, and likewise, Taron, received were consistent *not* with well-thought-out discipline, but with child abuse—was not only reiterated by all of the aforementioned witnesses, but was also corroborated by the testimony of all three boys, the next door neighbor, and the police officers and social worker who interviewed them. The evidence that Eugene P. abused Jaden and Taron, and that all three boys were at risk for being abused, was overwhelming and compelling even without Dr. Sheets’ testimony. Thus, this court concludes that any error that may have occurred due to the admission of Dr. Sheets’ testimony does not undermine the court’s confidence in the outcome of Eugene P.’s trial, and was therefore harmless. *See Evelyn C.R.*, 246 Wis. 2d 1, ¶28.

¶21 Consequently, the jury’s verdict will be upheld and the dispositional orders for Travis P., Taron P., and Jaden P. will be affirmed.

By the Court.—Orders affirmed.

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

