COURT OF APPEALS DECISION DATED AND FILED

August 18, 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. 2016AP735
2016AP736

Cir. Ct. Nos. 2014TP86
2014TP87

STATE OF WISCONSIN

IN COURT OF APPEALS

DISTRICT I

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

D. L.,

RESPONDENT-APPELLANT.

IN RE THE TERMINATION OF PARENTAL RIGHTS TO J. K. L., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

D. L.,

RESPONDENT-APPELLANT.

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

¶1 CURLEY, P.J.[1] D.L. appeals from orders terminating her parental rights to her son, J.S., and her daughter, J.L.[2] She raises two issues on appeal: (1) whether the trial court erred in allowing the State to present multiple hearsay statements to establish that D.L. had engaged in a pattern of abuse of J.S. and J.L.; and (2) whether the trial court erroneously exercised its discretion in admitting certain expert testimony under WIS. STAT. § 907.02. She further argues that

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Additionally, pursuant to WIS. STAT. RULE 809.107(6)(e), this court is required to issue a decision resolving TPR appeals within thirty days after the filing of the reply brief. In an order dated July 1, 2016, we requested that the State and Guardian *Ad Litem* ("GAL") file letter briefs in response to D.L.'s request in her reply brief that we defer ruling on her argument that the trial court erred in admitting certain expert testimony in light of our supreme court having granted review of ***Seifert ex rel. Scoptur v. Balink***, 2015 WI App 59, 364 Wis. 2d 692, 869 N.W.2d 493, *review granted sub nom.* ***State v. Balink***, 2016 WI 2, 365 Wis. 2d 741, 872 N.W.2d 668, which both the State and GAL had cited in their respective response briefs. We received the State's letter brief on July 15, 2016, and the GAL's letter brief on July 20, 2016. In the July 1 order, we extended the decisional deadline pending further order from this court, and on our own motion, we now extend the decisional deadline in this matter through the date of this decision. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995) (we may extend the decisional deadline pursuant to WIS. STAT. RULE 809.82(2)(a) upon our own motion or for good cause).

[2] In an order dated May 9, 2016, we consolidated these appeals for briefing and dispositional purposes.

neither of these alleged errors was harmless. For the reasons that follow, we affirm.

BACKGROUND

¶2 Only a brief background is necessary in light of the issues D.L. raises. D.L. is the mother of J.S., who was born on May 6, 2007, and J.L., who was born on August 6, 2008.[3] J.S. and J.L. have spent the majority of their lives under various Child In Need of Protection or Services ("CHIPS") orders. J.S. was first detained and removed from D.L.'s home in September 2007 when he was approximately four months old after allegations that D.L. had abused J.S.'s and J.L.'s older sibling, J.J., and a CHIPS order was entered on December 12, 2007. J.L. was detained from the hospital at birth in light of the then-existing CHIPS order for D.L.'s two older children, and a CHIPS order placing J.L. outside of the home was entered on November 11, 2008. D.L. was eventually reunified with her children under those CHIPS orders, with J.S. returning to D.L.'s care and physical custody in August 2011 and J.L. returning to D.L.'s care and physical custody in April 2012. The 2007 CHIPS order for J.S. and the 2008 CHIPS order for J.L. were allowed to lapse on November 11, 2012.

¶3 Just four months later, on March 5, 2013, J.L. appeared at school with a mark on her cheek, and J.L. reported to her teacher that her mother had slapped her. J.L. was taken to the Child Protection Center, where Dr. Judy Guinn, a Child Abuse Pediatrician, concluded that J.L.'s injuries were diagnostic for inflicted trauma and physical abuse. At trial, Dr. Guinn described the mark on the

[3] D.L. has two other children; however, her parental rights to those children are not at issue in this appeal.

right side of J.L.'s face as "three linear-shaped, red-to-blue bruises" with "red-to-blue bruising underneath the right eye" and explained that "the pattern of the injury is consistent with the child's report of being slapped on the face with an open hand." Sensitive Crimes Officer Shannon Orvis, who interviewed D.L. on March 5, 2013, in regard to the alleged abuse, also testified at the court trial that D.L. eventually admitted she had slapped J.L. in the face after initially denying she had done so.

¶4 As a result of the allegations that D.L. had physically abused J.L., J.S and J.L. were detained and taken into protective custody, and on March 7, 2013, an Order for Temporary Physical Custody was entered for each child.[4] CHIPS orders placing J.S. and J.L. outside of the home were thereafter entered on October 21, 2013, and the CHIPS orders included numerous conditions of return, with the conditions also having numerous corresponding goals.

¶5 The alleged child abuse also had criminal consequences for D.L.: a criminal complaint was filed on March 7, 2013, charging her with one count of physical abuse of a child (intentional causation of bodily harm). As a result of the criminal proceedings, a no contact order between D.L. and J.S. and J.L. was entered on March 7, 2013. The criminal trial court modified the no contact order on September 3, 2013, to allow for supervised therapeutic visits between D.L. and her children, and the court then later modified the no contact order on September 27, 2013, to allow for visitations supervised by the Bureau of Milwaukee Child Welfare (the "Bureau") but not in a therapeutic setting. D.L. ultimately pled guilty

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[4] D.L.'s oldest son, J.J., was also removed from the home at that time. D.L.'s youngest son was briefly detained, but he was then placed with his father, who is the protective caregiver.

to three amended counts of misdemeanor battery based on the incident with J.L. However, despite having pled guilty to the criminal charges, at the TPR grounds hearing, D.L. denied that the event had occurred.

¶6 During the pendency of the CHIPS orders, D.L., J.S., and J.L. participated in therapy. After the no contact order was modified, D.L. also had multiple supervised visits with J.S. and J.L. Ultimately, however, the State filed involuntary Petitions for Termination of Parental Rights ("TPR") as to J.S. and J.L. on April 23, 2014, asserting they remained in need of protection or services.[5] The 2013 CHIPS orders are the basis for the TPR petitions.

¶7 A court trial as to whether grounds existed to terminate D.L.'s parental rights to J.S. and J.L. began on December 1, 2014, and continued through December 4, 2014. Numerous witnesses testified, including the case managers, the children's therapists, D.L.'s therapist, and psychologist Dr. Michelle Iyamah. The trial court ultimately concluded that the State had established by clear and convincing evidence that D.L. had failed to meet the first two goals of condition one for return, that D.L. had failed to meet condition two for return, and that D.L. had failed to meet the second and third goals of condition three for return.[6] Accordingly, the trial court found that grounds existed to terminate D.L.'s parental rights and entered a finding that D.L. was unfit. After multiple delays, the

[5] K.W., the father of J.S. and J.L., was also named in the involuntary TPR petitions. He did not participate in the underlying proceedings, and his parental rights were terminated. His parental rights to J.S. and J.L. are not at issue in these appeals.

[6] Condition one required D.L. to meet certain "Goals for Behavioral Change," condition two required D.L. to "maintain a relationship with [J.S. and J.L.] by regularly participating in successful visitation with the child/ren unless the parent's visits are limited by the court," and condition three required D.L. to "demonstrate an ability and willingness to provide a safe level of care for the child."

disposition hearing occurred on June 16, 2015, and September 16, 2015, and the trial court found that termination of D.L.'s parental rights was in the children's best interests. Written orders terminating D.L.'s parental rights to J.S. and J.L. were filed on September 16, 2015. This appeal follows.

¶8 Additional facts relevant to the issues raised on appeal will be developed below as necessary.

ANALYSIS

¶9 Termination of parental rights cases consist of two phases: a grounds phase, at which the factfinder determines whether there are grounds to terminate a parent's rights, and a dispositional phase, at which the factfinder determines whether termination is in the child's best interest. *See* ***Sheboygan Cty. DHHS v. Julie A.B.***, 2002 WI 95, ¶¶24-28, 255 Wis. 2d 170, 648 N.W.2d 402. During the grounds phase, "'the parent's rights are paramount.'" *See* ***id.***, ¶24 (citation omitted). "If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit." WIS. STAT. § 48.424(4). "Once the court has declared a parent unfit, the proceeding moves to the second, or dispositional phase, at which the child's best interests are paramount." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶26, 271 Wis. 2d 1, 678 N.W.2d 856.

¶10 Where, as here, a petition for TPR alleges that a child remains in need of protection or services, the State must prove the following at the grounds stage: (1) that the child has been adjudged in need of protection or services and placed outside the home for a period of six months or longer under an Order containing TPR warnings; (2) that that the Bureau has made a reasonable effort to provide the services ordered by the court; (3) that the parent has failed to meet the conditions for returning the child to the home; and (4) that there is a substantial

likelihood that the parent will not meet the conditions for return of the child within the next nine months. *See* WIS. STAT. § 48.415(2).

¶11 On appeal, D.L. challenges the termination of her parental rights, arguing that: (1) the trial court erred in allowing the State to present multiple hearsay statements to establish D.L. had engaged in a pattern of abuse of J.S. and J.L.; and (2) the trial court erroneously exercised its discretion in admitting certain aspects of Dr. Iyamah's testimony under WIS. STAT. § 907.02. She also asserts the alleged errors were not harmless and that the orders terminating her parental rights to J.S. and J.L. must therefore be reversed. We address each argument in turn.

I. The trial court did not err in allowing hearsay statements regarding a pattern of abuse of J.S. and J.L.

¶12 D.L. first argues that the trial court erred when it allowed various witnesses to testify about statements J.S. and J.L. made during therapy regarding alleged abuse by D.L. for the purpose of establishing that D.L. had engaged in a pattern of physical abuse. According to D.L., this testimony was not admissible under WIS. STAT. § 908.03(24).

¶13 The admissibility of evidence generally falls within the trial court's discretion. ***State v. Peters***, 166 Wis. 2d 168, 175, 479 N.W.2d 198 (Ct. App. 1991). We will affirm a trial court's discretionary decision if the court applied the correct law to the facts of record and the decision is reasonable. ***La Crosse Cty. DHS v. Tara P.***, 2002 WI App 84, ¶6, 252 Wis. 2d 179, 643 N.W.2d 194. However, whether a trial court erroneously applied the law in admitting evidence under WIS. STAT. §§ 908.01 or 908.03 is a question of law we review *de novo*. ***Peters***, 166 Wis. 2d at 175. Absent an error of law, we will not find an erroneous exercise of discretion if there is some reasonable basis for the trial court's

determination. ***State ex rel. T.L.S. v. L.F.E.***, 125 Wis. 2d 399, 373 N.W.2d 55 (Ct. App. 1985); ***State v. Sorenson***, 143 Wis. 2d 226, 240, 421 N.W.2d 77 (1988).

¶14 Whether an out-of-court statement falls within a hearsay exception is generally left to the trial court's discretion because the trial court is in a better position to determine the reliability of the statement. *See* ***State v. Huntington***, 216 Wis. 2d 671, 680-81, 575 N.W.2d 268 (1998). WISCONSIN STAT. § 908.03(24), the "residual exception" to the rule against hearsay, provides that "[a] statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness" is not excluded by the hearsay rule. "The residual hearsay exception is designed as a catch-all exception that allows hearsay statements that may not comport with established exceptions, but which still demonstrate sufficient indicia of reliability to be admitted." ***Huntington***, 216 Wis. 2d at 687. Use of the residual exception is not restricted "to situations which are completely different from those covered by the specifically enumerated hearsay exceptions." *See* ***Mitchell v. State***, 84 Wis. 2d 325, 331, 267 N.W.2d 349 (1978). Rather, hearsay admitted under the residual exception will likely be similar to the enumerated exceptions. *See* ***id.*** at 332.

¶15 In determining whether a child's statements are admissible pursuant to WIS. STAT. § 908.03(24), we consider the following factors set forth in ***Sorenson***: (1) the child's age, ability to communicate, familial relationship with the defendant, and knowledge of the difference between truth and falsehood; (2) the person to whom the child made the statement and that person's relationship to the child; (3) the circumstances under which the child made the statement, including length of time elapsed since the alleged assault; (4) the content of the statement itself, including any signs of deceit or falsity, as well as whether the statement reveals knowledge of matters a child of that age would not generally

know; and (5) the existence of other corroborating evidence. *See* ***Huntington***, 216 Wis. 2d at 687-88; *see also* ***Sorenson***, 143 Wis. 2d at 245-46. All factors must be evaluated in determining whether the requisite circumstantial guarantees of trustworthiness are present; however, the weight accorded each factor may vary, and no single factor is dispositive. *See* ***State v. Jagielski***, 161 Wis. 2d 67, 74, 467 N.W.2d 196 (Ct. App. 1991).

¶16 We initially address D.L.'s argument that the ***Sorenson*** factors should not be applied in TPR cases. She argues that "there appear to be no appellate cases in which the application of the expansive ***Sorenson*** rationale to TPR cases is discussed, let alone endorsed." She further argues that applying the ***Sorenson*** factors to a child's testimony in the TPR context "would result in the residual exception virtually swallowing the hearsay rule in TPR cases" because there is always a close familial relationship between the child declarant and the parent, who presumably is the subject of the statements, and that it would be virtually impossible to prove whether a therapist or caseworker had motive to falsify what a child stated. We disagree that application of the ***Sorenson*** factors is inappropriate in the TPR context. Before a hearsay statement may be admitted under the residual exception, the statement must "demonstrate sufficient indicia of reliability to be admitted." *See* ***Huntington***, 216 Wis. 2d at 687. The factors set forth in ***Sorenson*** provide a mechanism for establishing whether a child's hearsay statement contains such indicia of reliability and trustworthiness. *See* ***Jagielski***, 161 Wis. 2d 67 at 74; *see also* ***State v. Oliver***, 161 Wis. 2d 140, 144, 467 N.W.2d 211 (Ct. App 1991) (applying the ***Sorenson*** factors to evaluate admissibility of a child's hearsay statement under the residual exception in a case alleging physical abuse of a child). We see no compelling reason to formulate a different test to be

applied to the admissibility of a child's hearsay statement under the residual exception in TPR cases.

¶17 D.L.'s hearsay challenge is directed primarily at testimony elicited from Crystal Simpson, a family therapist and clinical supervisor, and Tricia Wollin, a psychotherapist, that was admitted at trial pursuant to the residual exception over D.L.'s objection.[7] Simpson was the family's therapist from approximately September 2011 through November 2012 during J.S.'s and J.L.'s first removal from D.L's home, and she then became involved with the family again from March 2013 through August 2013 after J.S. and J.L. were removed from D.L.'s home the second time. Wollin was the children's therapist from September 2013 through the time of the grounds trial in December 2014.

¶18 Statements specifically identified by D.L. on appeal as having been attributed to the children, as testified to by Simpson and Wollin at trial, include: (1) that they get "whooped" when they do not go to bed; (2) that J.S. was "hit with things on his butt such as a belt or being hit with his mom's hand repeatedly on his butt" or lower back area and that this occurred when he lied or fought with his sister; (3) that J.S. was afraid of D.L.; and (4) that J.S. wanted D.L.'s hands cut off so she could not hurt him. Wollin further testified that "[b]oth children have discussed being whooped" and explained that J.S. described being "whooped" as being hit on his butt or lower back with a belt or by his mother's hand. D.L. also points to a letter, which was introduced at trial, that J.S. wrote to his mother while

[7] The trial court initially admitted certain hearsay testimony during Simpson's testimony under the "statements for purposes of medical diagnosis or treatment" exception. *See* WIS. STAT. § 908.03(4). Because it appears from D.L.'s brief that she is only challenging admission of the specifically identified testimony under § 908.03(24), we address only that issue.

in therapy in which J.S. stated that he did not like when D.L. "whooped" him and that he did not know if he would be safe when D.L. got mad.

¶19 Upon our review of the record and consideration of the ***Sorenson*** factors, we conclude that the trial court properly considered and applied the appropriate analysis in admitting the testimony under the residual exception. First, at the time the statements were made, J.S. was approximately five or six years old and J.L. was approximately four or five years old, and the record suggests that the children were communicating at an age-appropriate level. According to Wollin, she discussed the difference between the truth and a fib with the children and that a truth is something that happened whereas a fib is a story, and she indicated her belief that they understood. She also testified that J.S. had a certain "tell"—for example, a slight grin and turning his body away from her—when he was not telling the truth and that he did not exhibit a "tell" when he made statements about "whoopings" and punishments. Additionally, there is a parent-child familial relationship here, and it is unlikely that children of this age would say something negative about their mother if it was not true.

¶20 The second ***Sorenson*** factor considers to whom the child made the statement in question and the relationship between the child and that person. Here, J.S. and J.L. made the statements to Simpson and Wollin, who were their therapists for a significant period of time. There is no indication that either therapist had or would have a motive to fabricate the statements, and Wollin even testified that in large part, the children did not discuss "whoopings" and punishments with her until a trusting relationship had been developed.

¶21 We next consider the circumstances under which the statements were made. Here, it is difficult to discern precisely when the alleged "whoopings"

and other physical acts and punishments occurred, making it somewhat difficult to determine the exact proximity between when those events occurred and when J.S. and J.L. made the statements. There is some indication, however, that the alleged acts occurred after the first CHIPS case closed because when specifically asked what J.S. and J.L. told her had occurred between November 2012 and March 2013, Simpson testified that they talked about physical discipline and getting "whooped" when they did not go to bed. Despite the lack of specificity regarding when the alleged acts occurred and when the statements were made, the statements were made during therapy sessions, and that, along with the apparent fact that the children did not disclose this information until after developing trust with their therapists, contributes to the trustworthiness of the statements.

¶22 Fourth, we consider the content of the statement, including whether the statement includes knowledge of matters a child of that age generally would not know. Here, the content of the statements generally revealed that J.S. and J.L. had received "whoopings" as punishment when D.L. was upset with them, and J.S. also told Wollin that when D.L. gave him a time out, he had to stand in the corner while raising one leg and holding something in the air. Wollin testified that J.L. also described timeouts and having to hold cans while standing on one foot. We agree with the trial court that it seems unlikely that a child would think of such a punishment on his or her own.

¶23 Finally, we consider the existence of other corroborating evidence, such as physical evidence, statements made by others, and the opportunity or motive of a defendant. In this case, there is some corroborating evidence. J.S.'s statements regarding the type of timeouts he received—standing in a corner on one leg while holding objects up—was generally corroborated by D.L.'s testimony that she would punish her children by making them stand in the corner and hold things

above their heads in "stress positions," and J.L. also described similar timeouts to Wollin. Likewise, both J.S. and J.L. independently described receiving "whoopings" during their therapy sessions. Accordingly, there is consistency between the statements and testimony adduced at trial, particularly in regard to the "stress positions" D.L. used to punish J.S. and J.L.

¶24 Considering the five factors as a whole, we conclude that the challenged statements contain circumstantial guarantees of trustworthiness consistent with the other hearsay exceptions enumerated in WIS. STAT. § 908.03. The trial court therefore did not err in admitting these statements under § 908.03(24).

¶25 Even assuming the trial court erred in admitting such testimony, we conclude the error was harmless. WISCONSIN STAT. § 805.18(2) provides that where an improper admission of evidence is claimed, "[n]o judgment shall be reversed or set aside or new trial granted … unless … the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial." An error affects the substantial rights of a party if there is "a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768. "A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome." ***Id.*** "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." ***Id.***

¶26 The sole ground alleged for termination of D.L.'s parental rights was that J.S. and J.L. remained children in need of protection or services. Of the elements the State was required to prove, only the third and fourth—that D.L.

failed to meet the conditions for return and that there is a substantial likelihood D.L. would not meet the conditions for return within the next nine months—are arguably relevant to the testimony at issue. *See* WIS. STAT. § 48.415(2).

¶27 D.L. was required to meet three conditions of return: (1) meet specific goals for behavioral change; (2) maintain a relationship with J.S. and J.L. by regularly participating in successful visitation with J.S. and J.L.; and (3) demonstrate an ability and willingness to provide a safe level of care for her children. The trial court found that D.L. did not meet condition two and only partially met conditions one and three. As to condition one, the trial court found that D.L. had failed to meet goal one, which required her to set aside her own needs for her children, make their safety and well being her top priority, to display concern for her children and their experience, and to develop healthy coping skills for addressing her mental health needs that do not negatively impact her children. The trial court also found she had failed to meet the second goal of condition one, which required her, in part, to be able to identify, understand, and discuss her children's behavior and special needs and to meet their ongoing special needs and following through with necessary services. As to condition three, the trial court found that D.L. did not meet the requirement that she not abuse J.S. and J.L. or subject them to the risk of abuse and that she did not demonstrate that she was able and willing to care for J.S. and J.L. and their special needs on a full-time basis.

¶28 D.L. emphasizes that the challenged testimony was introduced for the purpose of establishing a "pattern of abuse." However, the State was not required to prove a pattern of abuse—it was required to prove that D.L. had, *inter alia*, failed to meet the conditions for return. While the existence of a pattern of abuse may have been relevant to whether D.L. had met some of the conditions for return, it was not relevant to all of the conditions. Condition two, for example,

required that D.L. have regular and successful visits with her children. The trial court found that D.L. failed to meet that condition for return because, although she regularly participated in visitation, the evidence established that those visitations were ultimately not successful.

¶29 In regard to condition one, the trial court emphasized that D.L.'s failure to meet goal one rested primarily on her failure to develop healthy coping skills for addressing *her own* mental health needs that did not negatively impact her children. While the trial court recognized that D.L. had made some progress in that regard, the trial court concluded that that progress had come *after* the date the TPR petition was filed, which was the relevant date for determining whether D.L. had met the conditions for return. The court also concluded that as of the date the petitions were filed, D.L. was "still struggling with setting aside her own needs," which was an additional component of condition one, goal one. The challenged hearsay statements were generally unrelated to this condition, and our review confirms that the record supports the trial court's conclusion.

¶30 Likewise, in regard to condition one, goal two, the court focused on whether D.L. had identified, understood, and discussed J.S.'s and J.L.'s behavioral and special needs and whether she had met their ongoing needs and followed through with the necessary services they needed, and concluded that she had not. In fact, the trial court did not believe D.L. fully understood "where her kids are on things" *as of the date of the trial*. The trial court simply did not believe D.L. had accepted that her children were, for whatever reason, afraid of her—regardless of whether there was a pattern of abuse. As the trial court aptly stated: "[w]hether the fear is justified or not justified is not important. It's that they have the fear and what needs to be done to ameliorate that fear." Whether D.L. had actually "whooped" J.S. and J.L. or whether D.L. had engaged in or admitted to any pattern

of abuse was not the issue—whether D.L. had simply acknowledged the fear her children had, for whatever reason, was.

¶31 We need not summarize each of the trial court's conclusions in our harmless error analysis in this case. The examples discussed are sufficient to establish that any error in admitting the challenged statements do not present a reasonable possibility of a different outcome had they been excluded. To the contrary, the trial court thoroughly explained its decision and the multiple ways that D.L. failed to meet the conditions of return that were wholly unrelated to whether or not she had engaged in a pattern of abuse. Accordingly, even assuming the challenged statements were not admissible under the residual exception, any error in admitting those statements was harmless.

II. The trial court did not erroneously exercise its discretion in admitting Dr. Michelle Iyamah's testimony about the bond and relationship between D.L. and J.S. and J.L. under WIS. STAT. § 907.02.

¶32 D.L. next argues that the trial court erroneously exercised its discretion in admitting Dr. Michelle Iyamah's testimony regarding the bond and relationship between D.L. and her children under WIS. STAT. § 907.02. However, in the second-to-last paragraph of her reply brief, D.L. requested that we "defer a ruling on this issue" pending our supreme court's decision in its review of ***Seifert ex rel. Scoptur v. Balink***, 2015 WI App 59, 364 Wis. 2d 692, 869 N.W.2d 493, *review granted sub nom.* ***State v. Balink***, 2016 WI 2, 365 Wis. 2d 741, 872 N.W.2d 668. We invited the State and GAL to submit letter briefs in response, and both the State and GAL argued that a deferred ruling on this issue is unnecessary for multiple reasons, including that it would further delay resolution and permanency of these TPR actions, that the testimony at issue in ***Seifert*** is distinguishable from the expert testimony at issue here and the ruling in ***Seifert***

therefore will not impact this case, and that even if it was error to admit the testimony at issue, any such error was harmless.

¶33 We have reviewed the arguments presented regarding deferral on this issue, as well as the cited case law, and we conclude that deferral on this issue is unnecessary and would simply prolong resolution and permanency of this TPR action. Moreover, as we will explain, even assuming the trial court did erroneously exercise its discretion in admitting Dr. Iyamah's testimony, the error was harmless. We will therefore address this issue as presented in D.L.'s appeal.

¶34 D.L.'s argument requires us to interpret and apply WIS. STAT. § 907.02(1). Interpretation of a statute is a question of law we review *de novo*. ***State v. Steffes***, 2013 WI 53, ¶15, 347 Wis. 2d 683, 832 N.W.2d 101. In interpreting § 907.02(1), we are guided by cases such as ***Daubert v. Merrell Dow Pharmaceutical, Inc.***, 509 U.S. 579 (1993), and its progeny, which interpret and apply the standard for admissibility of expert testimony under Federal Rule of Evidence 702.[8] *See* ***State v. Poly-America, Inc.***, 164 Wis. 2d 238, 246, 474 N.W.2d 770 (Ct. App. 1991) ("When a state statute is modeled after a federal rule, we look to the federal interpretation of that rule for guidance and assistance."). After independently considering the applicable legal framework governing the admission of expert testimony, we "review a [trial] court's decision to admit or exclude expert testimony under an erroneous exercise of discretion standard." ***State v. Giese***, 2014 WI App 92, ¶16, 356 Wis. 2d 796, 854 N.W.2d 687. We will not overturn the trial court's discretionary decision "if it has a rational basis and

[8] The Wisconsin Legislature amended WIS. STAT. § 907.02, effective February 1, 2011, by adopting the standard for admission of expert witness testimony set forth in ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993).

was made in accordance with accepted legal standards in light of the facts in the record." ***Id.***

¶35 WISCONSIN STAT. § 907.02(1) governs the admissibility of evidence at trial. It provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Id. In ***Daubert***, the United States Supreme Court explained that under Federal Rule 702, the federal equivalent to § 907.02, the trial court serves as a gatekeeper to ensure that scientific testimony is both relevant and reliable. *See* ***Daubert***, 509 U.S. at 597. In order to meet this responsibility, the trial court must determine "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." ***Id.*** at 592. In assessing these questions, the trial court *may* utilize the following factors: (1) whether the expert's theory or technique "can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "the known or potential rate of error" of a particular scientific technique; and (4) whether the subject of the testimony has been generally accepted. ***Id.*** at 593-94. However, these factors do not constitute "a definitive checklist or test," and the Court emphasized that the reliability test must be "flexible." ***Id.***

¶36 While a trial court's gate-keeping obligation under ***Daubert*** extends to all expert testimony, the applicability of the above-listed factors depends upon

the circumstances of the particular case at issue. ***Kumho Tire Co., Ltd. v. Carmichael***, 526 U.S. 137, 149-50 (1999). The factors are "meant to be helpful, not definitive," and trial courts should have "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." ***Id.*** at 151-52. The Supreme Court also clarified in ***Kumho Tire*** that an expert may "draw a conclusion from a set of observations based on extensive and specialized experience." ***Id.*** at 156.

¶37 During pretrial motions, there was discussion regarding Dr. Iyamah's ability to offer expert opinion testimony. The subject was revisited prior to Dr. Iyamah's testimony, and D.L.'s trial counsel challenged Dr. Iyamah's ability to provide expert testimony concerning three topics, including Dr. Iyamah's opinion about the bond and relationship between D.L. and her children. The trial court indicated it would incorporate the ***Daubert*** testimony into Dr. Iyamah's overall testimony and that it would then make a WIS. STAT. § 907.02 ruling as to each of the challenged opinions. The State thereafter introduced testimony from Dr. Iyamah, a licensed clinical psychologist who specializes in parenting capacity assessments and performed a "Psychological Evaluation and Parenting Capacity Assessment" of D.L. in November and December 2013. This assessment included a one hour "bonding assessment" between D.L. and her children.

¶38 On appeal, D.L. does not challenge the admissibility of the entirety of Dr. Iyamah's testimony; rather, D.L. challenges only Dr. Iyamah's testimony concerning her observations during the bonding assessment and her conclusions that D.L. did not have a "strong bond" or "positive and healthy relationships" with J.S. and J.L. Specifically, she argues that: (1) Dr. Iyamah did not explain what scientific methodology she applied to reach the opinion that D.L. did not have a strong bond or positive, healthy relationship with J.S. and J.L.; and (2) Dr. Iyamah

did not explain what aspects of her education and experience she applied to the observations she made during the bonding assessment to arrive at her opinion.

¶39 Like the trial court, we conclude Dr. Iyamah's testimony concerning the bond and relationship between D.L. and her children is admissible under WIS. STAT. § 907.02(1). Dr. Iyamah offered extensive testimony concerning her educational background, her experience, the types of tests she performs and the specific tests and examinations she performed on D.L., her observations, and the quality assurance peer review process that is applied to this type of testing when she performs the same type of examination in Illinois. Specifically, Dr. Iyamah, testified that she has been a licensed clinical psychologist for over twenty years, has a doctoral degree, and with her doctoral degree, she had two years of full-time training, specifically in family therapy practice. When she obtained her doctorate degree, Dr. Iyamah's emphasis was on clinical psychology with families and children and testing. Dr. Iyamah has been doing parenting capacity assessments since 1993, she is trained in performing bonding assessments, and she has completed "upwards of a thousand" assessments like the one she did on D.L.

¶40 In regard to the peer review process employed in Illinois, Dr. Iyamah explained that Illinois has significantly more stringent standards for who can offer the types of assessments Dr. Iyamah described during her testimony. Dr. Iyamah is licensed in Illinois to perform these assessments, which includes parenting capacity assessments. She further explained that when she performs parenting capacity assessments for the State of Illinois, every single report she completes is submitted to Quality Assurance, which reviews everything submitted, and according to Dr. Iyamah, she has never had any questions about her assessments and she is considered to be one of the top psychologists for parenting capacity assessments in Illinois. Dr. Iyamah testified that in performing the bonding

assessment and related assessments on D.L., she followed the standards that she follows in her specialized practice in Illinois. According to Dr. Iyamah, these assessments are regarded as valid in the field of psychology.

¶41 Testimony concerning the existence of a bond and healthy relationship between a parent and child is not particularly amenable to analysis under the specific factors identified in ***Daubert***. However, although this type of testimony may not be susceptible to testing or peer review in the same manner we might consider for fields where scientific testing occurs in a laboratory, Dr. Iyamah did testify that her work is subject to a form of peer review in Illinois, where her reports and conclusions are submitted to a quality assurance program. She further explained that the assessments she performed on D.L., including the bonding and parenting capacity assessments, are of the same nature as those she performs and submits for peer review in Illinois and that she relied on her over twenty years of experience performing these types of assessments. Dr. Iyamah also explained her observations and how her observations impacted her conclusions. Under these circumstances, we are sufficiently convinced this provided a basis for the trial court to conclude that Dr. Iyamah's testimony met the reliability standard set forth in WIS. STAT. § 907.02(1). *See, e.g.*, ***Kumho Tire***, 526 at 151-52, 156 (trial courts should have considerable leeway in determining whether expert testimony is reliable based on the facts of a particular case, and an expert may "draw a conclusion from a set of observations based on extensive and specialized experience."). Accordingly, the trial court did not erroneously exercise its discretion.

¶42 As with D.L.'s first argument, we further conclude that even if the trial court erred in admitting this testimony, any such error was ultimately harmless. As previously explained, the trial court found that D.L. failed to meet

condition two of return and had partially failed to meet conditions one and three for return. Some of the aspects of those conditions included participating in regular and successful visitation and the requirement that D.L. develop healthy coping skills for addressing her own mental health needs. Dr. Iyamah's testimony regarding the bonding assessment was generally unrelated to these and other conditions. Moreover, to the extent the trial court even discussed Dr. Iyamah's testimony in its grounds decision, it only mentioned that testimony in passing. Thus, to the extent the trial court even considered Dr. Iyamah's testimony regarding the bond and relationship between D.L. and her children, the record reflects that her testimony played a very limited role, at best, in the trial court's decision.

¶43 Accordingly, even were we to conclude the trial court erroneously exercised its discretion in admitting Dr. Iyamah's testimony regarding the bond and relationship between D.L. and her children, and we do not, we would find that the error was harmless.

By the Court.—Orders affirmed.

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