COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 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. 2016AP892
2016AP893

Cir. Ct. Nos. 2014TP247
2014TP248

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

J. M. P.,

RESPONDENT,

B. H.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

J. M. P.,

RESPONDENT,

B. H.,

RESPONDENT-APPELLANT.

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

¶1 BRENNAN, P.J.[1] B.H. appeals orders terminating her parental rights to two children, B. and J. She asks this court to vacate the orders and either dismiss the petitions or remand the matter for a new fact-finding hearing.[2] She argues that inadmissible hearsay and opinion evidence was submitted at the grounds trial, and trial counsel's failure to object to it constituted prejudicial

[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.

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. We may extend that deadline pursuant to WIS. STAT. RULE 809.82(2)(a) upon our own motion or for good cause. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995). On our own motion, we now extend the decisional deadline in this matter through the date of this decision.

[2] A TPR proceeding is a two-step process. ***Steven V. v. Kelley H.***, 2003 WI App 110, ¶18, 263 Wis. 2d 241, 663 N.W.2d 817. "[T]he first step is a fact-finding hearing to determine whether grounds exist, and the second step is the dispositional hearing." ***Id.*** At the dispositional stage, the trial court determines whether termination of a parent's rights is in the child's best interests. WIS. STAT. § 48.426(2).

ineffective assistance of counsel. She further argues that the evidence was insufficient to support the finding that grounds exist for termination on the two grounds asserted here: continuing need of protection or services and failure to assume parental responsibility. *See* WIS. STAT. §§ 48.415(2) and (6)(a).

¶2 This court concludes B.H. did not receive ineffective assistance of counsel because the evidence she challenges is admissible under applicable hearsay exceptions or is otherwise deemed not prejudicial because she has not shown that the trial court relied on it. This court also concludes that the record contains evidence sufficient to support the trial court's determination that there were grounds for termination given that the children were in continuing need of protection or services and that B.H. had failed to assume parental responsibility. *See* WIS. STAT. §§ 48.415(2) and (6). The orders are therefore affirmed.

BACKGROUND

¶3 B. and J., the twin daughters of B.H., were born in November 2012. In May 2013, child welfare authorities investigated a report of violence between B.H. and the babies' father, and as a result of that investigation, at the age of six months, the infants were placed in out-of-home care, and a protective plan was put into effect. From that point on, B. and J. were continuously in out-of-home care. Initial efforts by the Bureau of Milwaukee Child Welfare (BMCW) to implement intensive in-home services were not successful because the informal caregivers B.H. identified who were willing were unsafe, and the caregivers she identified who were safe were unwilling.

¶4 On June 20, 2013, CHIPS petitions were filed for B. and J. On September 3, 2013, CHIPS dispositional orders were entered as to each of the

girls. On September 19, 2014, petitions were filed for termination of B.H.'s and the father's parental rights.

Grounds Trial.

¶5 The matter was tried August 10-13, 2015.[3] Witnesses who testified included B.H., the father, social workers from BMCW and Saint A's who had worked with the family and the twins' current foster mother, who is also a trained treatment foster parent and the adoptive resource. The testimony generally concerned the medical needs of B. and J., both of whom are deaf and have experienced significant developmental delays. B. has been diagnosed with autism. The evidence showed that both require intensive rehabilitative care in light of their disabilities, delays and behavioral problems. There was also testimony concerning the BMCW efforts to reunite the family over the period from June 2013 to September 19, 2014 and the lack of progress made by B.H. Following three days of testimony, the trial court issued a detailed and thorough ruling from the bench.

[3] The Hon. Mark S. Sanders presided over the grounds trial and entered the grounds and unfitness orders appealed from here.

First ground: Continuing need of protective services.

¶6 The trial court noted that as to the first ground—continuing need of protection or services—a couple of the required findings were not in dispute.[4] The two disputed questions for this ground at the trial were: (1) whether B.H. had failed to meet the conditions established for the safe return of the children to the home; and (2) whether there is a substantial likelihood that B.H. would not meet these conditions within the nine-month period following the fact-finding hearing. *See* WIS. STAT. § 48.415(2)(a)3. The trial court answered both of those questions in the affirmative.

1. The trial court found B.H. failed to meet conditions for return.

¶7 The trial court, after noting that the question of compliance with conditions of return is considered as of *the date the petition* was filed, methodically went through the list of conditions set forth in the CHIPS order for B.H. along with each condition's corresponding list of goals. The court found that some conditions had been met but concluded that Condition 1, Goals 2 and 6, and Condition 3 had not been met. The court read each of those Conditions and Goals into the record in explaining its noncompliance conclusion as follows:

[4] In order to satisfy the requirements of the "continuing need of protection or services" category, the court must find that the child has "been adjudged to be a child or an unborn child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders[.]" WIS. STAT. § 48.415(2)(2b). The court must find that the responsible agency "has made a reasonable effort to provide the services ordered by the court." ***Id.*** No party disputes that these requirements were met here. The court must also find the following three facts to be true: 1) that the child has been "outside the home for a cumulative total period of 6 months or longer pursuant to such orders[,]" 2) that the parent has failed to meet the conditions established for the safe return of the child to the home, and 3) and there is a substantial likelihood that the parent will not meet these conditions within the 9-month period following the fact-finding hearing[.]" ***Id.*** The last two are at issue here.

¶8 Regarding Condition 1, the CHIPS order explicitly states that Condition 1 requires B.H. to meet the Goals listed therein. As to Goal 2 the trial court found:

> Goal 2 [of Condition 1], [that] [B.H.] understand her role as [B.] and [J.]'s mother, requires her to meet all of [B.] and [J.]'s basic needs on a daily basis, including but not limited to food, clothing, appropriate shelter, medical and dental care, education, and appropriate adult supervision, and she demonstrate this understanding by meeting all those needs consistently. She maintains contact with [B.] and [J.]'s foster parents and attends all of [B.] and [J.]'s medical appointments, even when [B.] and [J.] are not in her care. Okay. The State has been able to demonstrate by clear, satisfactory, and convincing evidence that as of September, *this goal was not met*. That's because of a number of reasons.
>
> The second part of that goal requires a couple of things. First, that [B.H.] maintain contact with the foster parents. Now, she did that to the point that it annoyed the crap out of them, to be direct, and they had to ask that she not contact them anymore. That is not an example of an appropriate level of contact. Additionally, [B.H.] has admittedly not attended … all medical appointments for [B.] and [J.], even when they were not in her care. …. [B]us tickets or gas cards were offered to her to facilitate her ability to go to those [appointments in Madison], and she wasn't able to go to those. So just based on that alone, *the State has been able to demonstrate … by clear, satisfactory and convincing evidence that Goal 2 was not met as of September of last year*.

(Emphasis added.)

….

¶9 Regarding Condition 1, Goal 6, the trial court found:

> Goal 6 relates to [B.H.] and [the father], and it is that they will have a healthy, functional, positive and safe relationship with each other and their children. I think they're pretty close to achieving that now. That's not what I'm asked. What I'm asked is whether they were able to achieve that last September. The testimony is sufficient that I think that by clear, satisfactory and convincing

> evidence that they had not met Goal 6 as of last September. They had been discharged [from couples therapy] because … they were verbally fighting amongst themselves and blaming each other. Even though they had experienced, taken some domestic violence classes, each of them at that point--progress wasn't being made then. *Goal 6 was not met as of September*.

(Emphasis added.)

….

¶10 Regarding Condition 3, the trial court found:

> Condition 3, [that] all parents must demonstrate an ability and willingness to provide a safe level of care for the children. Safe level of care is described as follows: One, parents demonstrate the ability to have a safe, suitable and stable home. As of September, that had not been met. They didn't--neither [the father] nor [B.H.] had stable housing then. In fact, candidly, stable housing was only recently developed and [it will be] a matter of determining over time whether that stability will continue.
>
> The second part of Condition 3 is, the parent does not abuse or subject them, that is the children, to risk of abuse. There's no testimony that [B.H.] or [the father] abused the kids at any point after detention…. Three, the parents demonstrate they are able and also willing to care for the children and their special needs on a full-time basis. The State has been able to demonstrate that [B.H.] and [the father] are not--had not become able to care for the children and their special needs on a full-time basis. Neither [B.H.] nor [the father] have sufficiently investigated and learned about the hearing loss for the girls or where I believe it is [B.] is on the autism spectrum. That's important, particularly the autism.
>
> There were opportunities and occasion for that education to occur for [B.H.] and [the father] to become able. Those opportunities were sometimes difficult; going to Madison. Though, as I mentioned earlier, [B.H.] was transported to Madison on at least one occasion and was given other opportunities where she can go…. There was information provided about other local contacts, some of which cost money, some of which didn't cost money, that were never fully taken up by [B.H.] or [the father]. There was the information about the Center for the Deaf and Hard of Hearing, which is described in the testimony as the best

> resource available. That was never taken advantage of by [B.H.] and [the father].
>
> Now, [B.H.] in particular has made steps on her own to try to learn about in particular the hearing loss. She's gone to the library and watched YouTube videos about signs. She has even made a book where she identifies the signs that each of the girls knew, and that certainly is part of it. Knowing sign language is part of the--what would be necessary to be able to meet their special needs, but it's not all; it's not understanding how the hearing aids work;[5] its not understanding the depth of hearing loss; it's not understanding how that hearing loss affects their cognition, how they think about and interact with the world around them. There are all sorts of things in addition to sign language that need to be learned in order to be able to care for their special needs, and that doesn't even begin to mention how to deal with [B.]'s autism, where there's been even less education…. My comments should not be seen as faulting [B.H.] for the steps that she did take, but more steps could have in any way and should have been taken.
>
> ….
>
> … *What this amounts to is, with respect to Question 3, has [B.H.] and [the father] failed to meet the conditions established for the safety return of the children as of September 19th of last year? The answer is, yes*.

(Emphasis added.)

[5] There was testimony from the foster mother that it was necessary for B. and J. to wear their hearing aids as much as possible; however, her testimony was that the hearing aids were regularly disassembled or missing pieces when the children returned from a visit with B.H. It was her testimony that the hearing aids cost $3,000 each, and that the insurance company would replace lost devices only one time per six years. It therefore was requested by the children's hearing doctors that they not wear the devices to the parent visits. B.H. disputed any accusation that she broke the hearing aids.

2. The trial court found that there was no substantial likelihood that B.H. would meet conditions for return within nine-months.

¶11 The court concluded there was not a substantial likelihood, defined as a real and significant probability, rather than a mere possibility, that the parents will meet the conditions for a safe return within nine months. The trial court then noted that B.H. had made some progress, but not to the level of substantial likelihood:

> The last chunk of conditions for return would be understanding special needs. It is this question that I flipped back and forth on…. With respect to [B.H.], there's a mixed bag of evidence…. She's taken a lot of steps on her own; making the book about what signs the girls know; making--doing things on YouTube to learn how to sign; practicing those signs with … the girls. Though I'll note, the foster mother's view is that some of the signs were incorrect and that the girls would sometimes have to look to her to figure out what was going on, but that effort goes toward education. The evidence that is available to me, *I think there is clear, satisfactory and convincing evidence that there is a significant probability, rather than a possibility, that the conditions about special needs of the girls would not be met in the next nine months*…. Many of the conditions I think could be met within the next nine months, if not met already, but as to their special needs, a significant component of the case, I don't think they would be met within the next nine months.

Second ground: Failure to assume parental responsibility.

¶12 The trial court then addressed the second ground for termination, the failure-to-assume grounds. The court summarized the evidence concerning the home environment and the history of the parents' care from pre-natal care onward, the history of violence and conflict, the developmental delays of the babies, the "hazardous living environment" that had been their home. The court noted that even shortly after the babies were removed from the home, the babies showed signs of improvement:

> Now, what that means is this, it means that whatever delays they had weren't being caused by the hearing loss or autism, but being caused by not getting the stimulation, by not being sufficiently attended to in those areas by [the father] and [B.H.].
>
> ….
>
> The question here isn't whether there was some level of acceptance or some level of exercise of responsibility for daily supervision, education, protection and care, but whether there was acceptance and exercise of significant responsib[ility] for supervision, education, protection and care. I think the State has been able to demonstrate by clear, satisfactory and convincing evidence that while there was some exercise and some acceptance, that there was not acceptance of significant responsibility in any of those areas, daily supervision, education, protection or care. *As a result of that, I think that the answer to the question asked of a finder of fact with respect to failure to assume parental responsibility would be, yes*….
>
> ….
>
> Having found two grounds to terminate the rights of [B.H.] and [the father], I will[,] as I am required to do, make the unfitness finding as well.

¶13 On August 18, 2015, the trial court entered orders terminating B.H.'s parental rights to B. and J. This appeal followed.[6]

Post-judgment proceedings[7]

¶14 B.H. moved for permission to file a post-judgment motion and remand, which the court of appeals granted. At a hearing on B.H.'s motion, B.H. argued that she received constitutionally ineffective assistance of counsel because

[6] The father abandoned his appeal, and accordingly we do not discuss him in this decision.

[7] The Hon. Christopher R. Foley presided over the post-judgment proceedings and entered the order denying B.H.'s motion.

hearsay had been admitted without any objection to establish that the children had special needs, experienced developmental delays while in B.H.'s custody or improved while in foster care. B.H. argued she was prejudiced by this evidence. The evidence she disputed was as follows: (1) testimony of the foster mother about the girls' hearing loss and one girl's autism; (2) testimony of the foster mother about the girl's developmental delays and improvements; (3) testimony from a social worker about the children's developmental delays at the time of their initial detention; and (4) a letter from a social worker to B.H., written at the request of the court.

¶15 The post-judgment court rejected B.H.'s argument that the evidence was inadmissible and concluded that the disputed evidence was all admissible; the post-judgment court also concluded that the finding of two grounds for termination was supported by "competent evidence."

DISCUSSION

¶16 B.H. argues that the trial court erred in admitting certain hearsay testimony, and that she received ineffective assistance of counsel due to her trial counsel's failure to object to this prejudicial testimony. Relatedly she argues that the evidence at the grounds trial was insufficient to support unfitness because expert testimony was required to prove the grounds for termination under WIS. STAT. §§ 48.415(2) and (6).[8] The State and guardian *ad litem* (GAL) argue that counsel was not ineffective because the evidence was all admissible, and that

[8] Although proof of only one ground is necessary for termination of parental rights, *see* WIS. STAT. § 48.415, the disputed evidence here was used by the trial court as the basis for both grounds.

the order should be affirmed because the decision is supported by sufficient evidence.

I. B.H. is not entitled to a new fact-finding hearing because she did not receive ineffective assistance of counsel.

STANDARDS OF REVIEW

¶17 A parent in a termination of parental rights case is entitled to effective assistance of counsel. ***In the interest of M.D.(S.)***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). To prove ineffective assistance of counsel, a party must show that counsel's performance was both deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Performance is deficient if it falls below an objective standard of reasonableness. ***Id.*** at 688. To show prejudice, a party must show a reasonable probability that, but for counsel's unprofessional conduct, the result of the proceedings would have been different. ***Id.*** at 669. "A reasonable probability is a probability sufficient to undermine any confidence in the outcome" of the proceeding. ***Id***. at 694.

¶18 We review the trial court's historical findings of fact under a clearly erroneous standard. We review whether counsel's performance was deficient and prejudicial independently. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

¶19 B.H. argues that her trial counsel was ineffective for failing to object to four pieces of evidence: (1) testimony from the foster mother about the children's hearing loss and autism; (2) testimony from the foster mother about the children's developmental delays and improvements; (3) testimony of a social worker about the delays; and (4) a letter from a social worker to B.H. We address each in turn and conclude, like the post-judgment court, that there was no deficient

performance and therefore B.H.'s claim fails the first prong of the ***Strickland*** analysis.

¶20 Because B. H.'s claim involves a challenge to the admissibility of evidence, several rules about evidentiary challenges should be noted before we proceed. First, in a trial to the court, even if evidence is improperly admitted, it is presumed that the error is harmless unless it is clear that, but for such evidence, the court's decision would probably have been different. *See* ***Ray v. State***, 33 Wis. 2d 685, 689, 148 N.W.2d 31 (1967).

¶21 Second, appellate review of evidentiary decisions is generally deferential: the decision regarding the admission of evidence rests in the trial court's discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶29, 246 Wis. 2d 67, 629 N.W.2d 698. A trial court's error in admitting certain evidence does not necessarily require a new trial unless the error "affected the substantial rights of the party" that is seeking the new trial. ***Id.*** *See also* WIS. STAT. § 805.18(2). "For an error 'to affect the substantial rights' of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Martindale***, 246 Wis. 2d at ¶32.

A. The foster parent's testimony about the children's special needs and their improvement in foster care was admissible.

¶22 B.H. argued that the foster mother's testimony with regard to the hearing loss of both children and B.'s autism diagnosis was inadmissible hearsay because she repeated a diagnosis made by others. Additionally, B. H argues that the foster mother is not an expert and expert evidence was required at trial to prove that either child suffered from hearing loss or autism. We disagree.

¶23 First we note that there is not any dispute about the children's medical diagnoses, and it was generally and repeatedly corroborated by the testimony of other witnesses. In her testimony, B.H. herself admitted that B. and J. both suffered hearing loss, and used hearing aids and sign language. B.H. testified that her daughter, B., was autistic. B.H. also testified that she had taken steps to learn to care for those conditions. She is therefore estopped from arguing that the foster mother's testimony about their conditions is inadmissible hearsay or that an expert was required at trial to establish the existence of the conditions and special needs. *See* ***Zindell v. Central Mut. Ins. Co. of Chicago***, 222 Wis. 575, 582, 269 N.W. 327 (1936) (a party is estopped from coming to an appellate court and complaining of an error that it participated in at the trial court).

¶24 But even absent forfeiture of the issue, the foster mother's testimony on the children's special needs was admissible under WIS. STAT. §§ 908.03(8), 908.03(24), 907.01,[9] and 907.02.[10] First, as to WIS. STAT. § 908.03(8), "… statements … setting forth … matters observed pursuant to duty imposed by law … or factual findings resulting from an investigation made pursuant to authority

[9] WIS. STAT. § 907.01: "Opinion testimony by lay witnesses. If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are all of the following: (1) Rationally based on the perception of the witness. (2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. (3) Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02 (1)."

[10] WIS. STAT. § 907.02: "Testimony by experts. 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."

granted by law" are exceptions to the hearsay prohibition.[11] As the post-judgment court noted.

> Child welfare agencies have a legal obligation to assure the health and safety of children that are in their care…. So statements from medical professionals as to the health conditions and needs of children made to representatives of that child welfare agency are substantively admissible to prove the condition of the child….

Therefore it rejected B.H.'s argument concerning the evidence from the social workers on the grounds that the evidence was admissible under WIS. STAT. § 908.03(8). We agree.

¶25 The Bureau's statements to the foster mother were exceptions to hearsay under WIS. STAT. § 908.03(8). The Bureau initial assessment worker made the initial assessment of the children's deafness. The Bureau then assigned the children to this particular foster mother because she was specially trained and had special experience as a treatment foster parent. The Bureau communicated the children's special needs to the foster parent as they must due to their legal obligation to assure the health and safety of children in their care. Thus, the statements about the health conditions and needs of children made to representatives of that child welfare agency fall under WIS. STAT. § 908.03(8).

[11] "Hearsay exceptions; availability of declarant immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness: … (8) PUBLIC RECORDS AND REPORTS. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. … (24) OTHER EXCEPTIONS. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness."

¶26 As to the testimony of the foster mother about those statements of fact made to her from the Bureau workers, they are likewise admissible both because they were corroborated at trial by the Bureau workers and because they are otherwise trustworthy statements under WIS. STAT. § 908.03(24). Significantly, the general trustworthiness of these statements as to the special needs and improvements while in foster care were observed by and testified to by all of the other witnesses. Additionally, the foster mother was competent to testify to the children's special needs and development as a lay witness under WIS. STAT. § 907.01 due to her own training and experience as a treatment foster mother. Certainly, hearing loss, hearing aids and sign language are all readily observable to a lay person. She testified to her special training and had the unique experience of taking the children to all of their medical appointments and would have heard each treatment provider's diagnosis and treatment recommendations. No greater professional expertise than hers and the Bureau's was needed for the trial court to make sufficient findings of special needs and ability to provide safe and constant care to the children. The post-judgment court agreed and found that the testimony that concerned the children's medical conditions fell within WIS. STAT. §§ 907.01 or 907.02.

> [A] person who has observed a child who when they are upset bangs their head on the floor or compulsively rocks back and forth and they've had experience with autism and autistic children and they've consulted with their medical care providers, either under 907.01 or 907.02, that person is fully competent to offer opinions about how autism is impacting that child's life, how autism is affecting that child's behavior, what that child needs to address those circumstances. … She's competent to offer those opinions.

¶27 The court also described her as "a highly skilled treatment foster care provider." The Bureau lists her as a special needs foster home. According to the record, no placement was available within sixty miles of the children's home

that could respond to all their issues and needs. A permanency plan filed in this case April 17, 2015, stated: "A Statewide search went out for a treatment foster care provider in January 2014. [The foster parent] came forward …. [The foster family is] also familiar in working with special needs children[.]"

B. The foster parent's testimony about the children's developmental test results and improvements was admissible.

¶28 With regard to the foster mother's testimony concerning the results of neonatal testing and medical checkups to which she had taken the children,[12] the trial court noted that the testimony was admissible because it pertained to matters the Bureau had a duty to investigate and determine pursuant to WIS. STAT. § 907.03(8). We agree. And additionally, under the "global exception" of WIS. STAT. § 907.03(24)[13] it was admissible as information with "comparable circumstantial guarantees of trustworthiness." Finally, as the trial court noted, even if that evidence was inadmissible, and trial counsel's failure to object was deficient performance, the ineffective assistance claim would still fail because B.H. would be unable to show that this error prejudiced her such that she is entitled to a new fact-finding hearing. The children's conditions were readily observable to all, and the testimony of the foster mother and Bureau workers

[12] The court stated, "[t]here was some testimony from [the foster mother] that I thought was offered exclusively to prove the truth of the matter asserted. And she appeared to be reiterating information either from social service personnel or from medical care providers--and I couldn't tell which--the developmental milestone stuff.… If the information is coming from the social service agency, then I think we're right back to 908.03(8). If it's coming from medical professionals, then I think it's probably not admissible other than under the sub 24 … exception. And I would admit it under that standard."

[13] WIS. STAT. § 907.03(24) provides an exception for "[a] statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness."

established even without test results, B.H. failed to safely care for her children's special needs on a full time basis.

C. Social worker McLaughlin's testimony regarding developmental delays and subsequent improvement of B. and J. soon after removal from B.H.'s home is admissible under a hearsay exception.

¶29 Bureau initial assessment worker McLaughlin was the worker who assessed the children's needs at the time of their detention as deaf and suffering from developmental delays. She noted the babies could not roll over or hold a bottle at six months old, which she knew from her bachelor's degree in social work and specialized six month training at the Bureau to be delayed development.

¶30 B.H. does not really dispute the factual accuracy of the testimony of the social worker; she just disputes her level of expertise and competence to testify as to infant development. For the same reasons that the foster parent's testimony concerning the children's medical conditions is admissible, this testimony is also admissible. It is for the finder of fact to determine the weight of this evidence and to determine what the cause of the delays is and the likely cause of the improvement. It was not deficient performance for trial counsel not to object to the social worker's testimony.

D. We presume that even if the letter from social worker Conley detailing the things B.H. was supposed to do is inadmissible, it did not make the difference in the trial court's decision.

¶31 The trial court requested that Bureau worker Conley provide the court with a letter of what services and behavioral changes were necessary for B.H. to have unsupervised or partially supervised visits. She provided the letter pursuant to court order. This alone excepts it from a hearsay prohibition. But even if it did not, the letter falls under the "otherwise trustworthy" exception of

WIS. STAT. § 908.03(24). And, as noted above, it is further admissible as a matter observed by the Bureau under a duty imposed by law pursuant to WIS. STAT. § 908.03(8). Finally, B.H. does not show how this letter could have possibly prejudiced her as the trial court's findings were controlled by its conclusions as to whether B.H. complied with the Continuing CHIPS order, not this letter.

II. The evidence was sufficient to support the trial court's determination that grounds existed to terminate B.H.'s parental rights.

¶32 The sufficiency of the evidence test for an appellate court is well established. An appellate court will sustain a decision if any credible evidence exists to support it. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507 451 N.W.2d 752 (1990).

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have reached the result.
>
> If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Id.

¶33 B.H.'s argument against sufficiency of the evidence is based on the absence of expert testimony, which B.H. argues is necessary to establish grounds and unfitness. We disagree. The children's special needs and B.H.'s failure to provide safe full-time care for them were shown by admissible evidence. As we noted above, in response to B.H.'s admissibility arguments, the trial court's findings on noncompliance with the CHIPS order and Failure to Assume did not

require an expert. The Bureau workers and foster mother provided strong lay opinion which, along with readily observable behavior of the children, supported the trial court's findings on both grounds.

¶34 Here, the trial court made a long list of findings: that B.H. did not learn very much sign language despite being given access to many resources over the year that the children were in foster care, did not make all the medical appointments despite being provided transportation or gas cards, did not fully accept the toxicity of the violence in the home despite having access to ongoing counseling, did not progress to more independent visitation, and did not exhibit the competence or comprehension required to deal with the children's extensive special needs. The question was whether B.H. was able, as of the filing date of September 19, 2015, to substantially meet all of the children's needs. We cannot say that no trier of fact, acting reasonably, could have reached the result reached by the trial court. Because we conclude that there was sufficient evidence, we affirm.

By the Court.—Orders affirmed.

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