COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Nos. 01-1281, 01-1282, 01-1283

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

01-1281

IN THE INTEREST OF WESLEY H., JR., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

WESLEY H.,

RESPONDENT-APPELLANT.

01-1282

IN THE INTEREST OF BRITTANY H., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

WESLEY H.,

RESPONDENT-APPELLANT.

01-1283

IN THE INTEREST OF WENDY H., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

WESLEY H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL J. DWYER, Judge. *Affirmed.*

¶1 SCHUDSON, J.[1] Wesley H. (Wesley), appeals from the circuit court dispositional order, following a trial in which the jury found, among other things, that Wesley's children, Wesley Jr., Brittany, and Wendy, were "at substantial risk of becoming the victim[s] of abuse," and that Wesley did "neglect, refuse or was … unable for reasons other than poverty to provide the necessary

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e), (3) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

care, food, clothing, medical or dental care or shelter for [the children] so as to seriously endanger [their] physical health."

¶2 Wesley argues that the circuit court erred: (1) in denying his motion to dismiss the State's amended CHIPS (children in need of protection or services) petition as insufficient under WIS. STAT. § 48.13(10); (2) in denying his motion to strike those portions of the amended petition referring to information received more than forty days before the filing of the original petition; (3) in denying his motion *in limine* to exclude from the trial any evidence of information received more than forty days before the filing, because such evidence was (a) unsubstantiated and had not previously resulted in legal action, (b) "temporally remote," under ***State v. Hollingsworth***, 160 Wis. 2d 883, 467 N.W.2d 555 (Ct. App. 1991), and (c) improper proof of character, under WIS. STAT. § 904.04(2); and (4) in denying his motion for cautionary jury instructions regarding such evidence. This court rejects his arguments and affirms.

I. THE AMENDED PETITION

¶3 The amended petition alleged that Wesley's children, Wesley Jr., Brittany, and Wendy, and their half-siblings, Robert and Candice, were children in need of protection or services. The amended petition alleged that Wesley had sexually abused Candice and, therefore, that the other children were at substantial risk of becoming victims of abuse, under WIS. STAT. § 48.13(3m).[2] Wesley does

[2] WISCONSIN STAT. § 48.13(3m) provides, in part, that the court "has exclusive original jurisdiction over a child alleged to be in need of protection or services … [w]ho is at substantial risk of becoming the victim of abuse … based on reliable and credible information that another child in the home has been the victim of such abuse."

not challenge the sufficiency of the amended petition with respect to the allegations under that statute.

¶4 The amended petition also alleged that Wesley Jr., Brittany, and Wendy were children in need of protection or services under WIS. STAT. § 48.13(10) which, in relevant part, establishes the circuit court's CHIPS jurisdiction over a child whose parent "neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child." Challenging the sufficiency of the amended petition's allegations under § 48.13(10), Wesley presents two distinct arguments. This court rejects them both.

¶5 To be sufficient, a WIS. STAT. § 48.13 CHIPS petition must contain allegations that give rise to reasonable inferences establishing probable cause that a child is in need of protection or services. ***State v. Courtney E.***, 184 Wis. 2d 592, 595-96, 516 N.W.2d 422 (1994); WIS. STAT. § 48.255(1)(e). The principles governing the analysis of the sufficiency of a criminal complaint apply to the analysis of the sufficiency of a CHIPS petition. ***Sheboygan County v. D.T.***, 167 Wis. 2d 276, 283, 481 N.W.2d 493 (Ct. App. 1992). In providing the analysis in the instant case, this court is permitted to draw logical inferences from the allegations in the petition. *See* ***State ex rel. Evanow v. Seraphim***, 40 Wis. 2d 223, 228, 161 N.W.2d 369 (1968). Whether a petition is sufficient is a matter of law subject to this court's *de novo* review. *See* ***State v. Adams***, 152 Wis. 2d 68, 74, 447 N.W.2d 90 (Ct. App. 1989).

A. The Amended Petition — As Filed

¶6 Wesley first argues that the amended petition, as it was written and filed, is insufficient to establish, under WIS. STAT. § 48.13(10), that the children "were seriously endangered or that concerns about their physical health were anything more than trivial and hypothetical." He contends that, even assuming the sufficiency of the amended petition under § 48.13(3m), the potential sexual abuse of the other children, and harm to the "mental or emotional health of the child" resulting from the kind of sexual abuse alleged, the amended petition still falls short of establishing that the children "were in physical danger, harmed, or in peril in any way."

¶7 This court disagrees. The amended petition, as Wesley concedes, sufficiently alleged that Wesley Jr., Brittany, and Wendy were at substantial risk of being sexually abused. The amended petition specified that Candice had suffered "oral copulation." Wesley offers no authority to support his implicit theory that oral copulation would not "seriously endanger the physical health" of a child, under WIS. STAT. § 48.13(10), except for a fleeting reference to the dissenting opinion in ***State ex rel. Angela M.W. v. Kruzicki***, 209 Wis. 2d 112, 158, 561 N.W.2d 729 (1997). *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" argument); *see also* ***State v. Jackson***, 229 Wis. 2d 328, 340 n.2, 600 N.W.2d 39 (Ct. App. 1999) ("[A] dissent is what the law is not.").

Potentially, oral copulation does indeed seriously endanger the physical health of a child.[3]

¶8 Wesley contends that the amended petition's allegations of filth and disarray in the children's home, and of inadequate supervision of Candice and Robert, are insufficient to establish that the physical health of Wesley Jr., Brittany, and Wendy were seriously endangered. Again, this court disagrees.

¶9 Wesley, dissecting each paragraph, reads the amended petition too narrowly. A commonsense reading allows for the logical inference that the dangerous or neglectful conditions affecting one child in the household are likely to affect the other children living there. The amended petition alleged numerous conditions that, in all likelihood, would similarly affect all five children, who ranged in age from nine months to six years at the time the amended petition was filed. These conditions included: a filthy, roach-infested home; a steep stairway without a safety gate; a five-year-old child outside without adult supervision; the mother leaving the children at daycare for days at a time, despite concerns expressed by the daycare provider; a history of nineteen referrals for abuse or neglect, some of which had been substantiated for neglect; severe diaper rash leading to blisters and bleeding; lack of appropriate medication; and a parental failure to provide for proper hygienic and medical care. Clearly, these conditions seriously endanger the physical health of the children. The amended petition, as written, is sufficient under WIS. STAT. § 48.13(10).

[3] Sexually transmitted diseases such as genital warts, gonorrhea, hepatitis A, herpes, HIV, intestinal parasites, and syphilis may be spread through oral sex with an infected partner. Centers for Disease Control and Prevention, *Preventing the Sexual Transmission of HIV, the Virus that Causes AIDS—What You Should Know about Oral Sex*, Dec. 2000, *at* ftp://ftp.cdcnpin.org/Updates/oralsex.pdf.

B. The Amended Petition — As Challenged

¶10 Wesley maintains, however, that the amended petition's sufficiency should be measured only after excluding all references to information received more than forty days before the filing of the original petition. He contends the circuit court erred in denying his motion to strike those portions. Once again, this court disagrees.

¶11 Ironically, Wesley *relies* on WIS. STAT. § 48.24(5), which provides, in relevant part, that a children's court intake worker must act on a referral within forty days and that, should a CHIPS petition be filed, "information received more than 40 days before filing the petition may be included to establish a condition or pattern which, together with information received within the 40-day period, provides a basis for conferring jurisdiction on the court." This statute, it would seem, establishes the very basis for *inclusion* of the information Wesley challenges in the amended complaint. Wesley, however, in a hypertechnical argument, invokes dictionary definitions of "condition" and "pattern" and then argues that those definitions do not encompass the allegations contained in the amended petition. Additionally, he maintains that because these allegations "are not distinctively similar[—]do not look alike[] or share the same characteristics," they do not "establish a condition or pattern."

¶12 Once again, Wesley, dissecting words and phrases, fails to focus on the full context. As the State argues:

> The information received more than forty days prior to the filing of the [original] petition, together with the information received within the forty day period [about the sexual abuse and the mother leaving the children at daycare for days at a time] established that [the mother] and Wesley H. had been consistently unable to adequately provide for the children's needs for more than two years despite the

> Bureau[of Milwaukee Child Welfare]'s efforts to improve the situation without removing the children from the home.

The State is correct, and the circuit court was correct in denying Wesley's motion to strike the amended petition's references to information received more than forty days prior to the filing of the original petition.

II. TRIAL EVIDENCE

¶13 Wesley next argues that the trial court erred

> by denying [his] motion *in limine* to exclude evidence contained in prior referrals beyond the 40-day time limit of [WIS. STAT. §] 48.24(5) when the prior referrals did not establish a condition or pattern together with the information received within the 40-day period that provided a basis for conferring jurisdiction on the court.

This court disagrees.

¶14 A trial court's decision to admit or exclude evidence is a discretionary one; it will not be reversed if it had "a reasonable basis" and was made "'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). Here, the trial court's decision to admit the challenged evidence was reasonable, and it was consistent with the latitude allowed by WIS. STAT. § 48.24(5).

¶15 Denying Wesley's motion, the trial court reasoned that the allegations of neglect based upon information received within the forty days preceding the filing of the original petition did not have to be "of the same nature and quality" as those based upon information received prior to the forty-day period, for the evidence of that prior neglect to be admissible. Instead, the trial court concluded, the evidence "need only be under the general umbrella" of neglect. The court explained that the jurors were "entitled to know the

circumstance[s] of the children so that they can make their decisions based upon what really went on in their lives." This court agrees.

¶16 Challenging the trial court's ruling, Wesley first supports his argument by again focusing on the definitions of "condition" and "pattern." He maintains:

> The trial court's view that the prior referrals need only fall under the general umbrella of the jurisdictional basis was wrong on two accounts.
>
> First, the trial court's view overlooks the clear language of the statute and the accepted and ordinary meaning of the words "condition or pattern." The words "condition or pattern" have a definitive meaning and application. When courts compare the prior referrals to the jurisdictional basis, the two must be consistent, accordant, and adhere to the same distinctive form in order for the prior referrals to establish a condition or pattern together with the jurisdictional basis. The prior referrals and jurisdictional basis must appear remarkably similar, agree with each other, and adhere to the same form.
>
> This means that the prior referrals and the jurisdictional basis must be of the same nature and quality. The evidence in the prior referrals must correlate with the evidence in the jurisdictional basis. The words, "condition or pattern" require a determination that in fact the prior referrals and the jurisdictional basis are remarkably similar, not just under the general umbrella of a jurisdictional basis, such as [WIS. STAT. §] 48.13(10). The trial court's view of the statutory language was overly broad and too generalized.
>
> Second, the trial court's general umbrella analysis ignores the words "condition or pattern" completely. If the test is that the prior referral need only fit under the general umbrella of the jurisdictional basis, then there is no need to determine if the prior referral establishes a condition or pattern because almost any prior referral involving neglect would fit under [WIS. STAT. §] 48.13(10). The examples of neglect that could fit under [§] 48.13(10) are practically infinite and diverse. To allow different examples of neglect contained in prior referrals to be included as evidence to shore up a jurisdictional basis for neglect involving facts unrelated and dissimilar to the prior referrals is contrary to the clear meaning of the words "condition or pattern" and

> ultimately makes the words "condition or pattern" superfluous.

¶17 Wesley offers no legal authority to support his premise that, to be admissible, the allegations of abuse or neglect based upon information received more than forty days prior to the filing of the petition must be "remarkably similar" to those based upon information received within forty days of a petition's filing. Appellate arguments must be supported by legal authority, WIS. STAT. RULE 809.19(1)(e) & (3)(a), and this court need not consider arguments lacking such support, ***Murphy v. Droessler***, 188 Wis. 2d 420, 432, 525 N.W.2d 117 (Ct. App. 1994).

¶18 More importantly, Wesley's argument makes no sense. As the State responds:

> The information received more than forty days prior to the filing of the petition, together with the information received within the forty[-]day period established that [Wesley and the children's mother] had been consistently unable to adequately provide for the children's needs for more than two years despite the Bureau's efforts to improve the situation without removing the children from the home. Wesley H.'s alleged sexual assault of Candace and [the mother]'s refusal to force Wesley H. to leave the family home, was the final straw.

Indeed, in a given home, the deterioration of care or the escalation of abuse could very well render neglect or abuse that is far more serious than, and qualitatively different from, the prior neglect or abuse. Logically, however, any such differences certainly should not shield evidence of the prior conditions from the jury's view.

¶19 Wesley goes on to offer three more theories challenging the admissibility of the evidence: (1) that because many of the prior referrals were unsubstantiated and thus had not previously resulted in legal action, they had little

probative value; (2) that the prior incidents were "temporally remote," under ***Hollingsworth***; and (3) that the evidence constituted improper proof of character, under WIS. STAT. § 904.04(2). This court rejects each theory.

A. Probative Value

¶20 Wesley claims that, initially, the trial court "recognized the first argument that because many of the prior referrals were unsubstantiated they had little probative value."[4] He goes on to explain that the State presented six prior referrals in its offer of proof, three of which were unsubstantiated. He fails, however, to clarify whether or to what extent the trial court allowed introduction of what he considered inadmissible evidence, and he fails to elaborate any argument challenging the introduction of any specific evidence on the grounds that its "probative value [was] substantially outweighed by the danger of unfair prejudice … or misleading the jury." *See* WIS. STAT. § 904.03; *see also* ***Barakat***, 191 Wis. 2d at 786 (appellate court need not consider "amorphous and insufficiently developed" argument).

B. Temporal Remoteness

¶21 Wesley argues that the trial court "committed reversible error by allowing into evidence prior referrals in 1996, 1997, and 1998." He relies on ***Hollingsworth***, a case involving a defendant convicted of child neglect. *See* ***Hollingsworth***, 160 Wis. 2d at 888.

[4] The record reveals that at a motion hearing about five weeks prior to the State's offer of proof, the trial court stated its view that "an unsubstantiated report of neglect whereupon the Bureau takes no action" is of "very little probative value," and "[a]n unsubstantiated report that results in voluntarily accepting services doesn't prove much, but it does explain how the Bureau got into the house and … under what circumstances."

¶22 Regrettably, on the issue arguably related to the argument Wesley attempts to present, this court's decision in ***Hollingsworth*** is so factually sketchy and legally undeveloped that it offers little, if any, guidance. The court said only this:

> Hollingsworth also sought to establish her lack of intent because her previous DHSS contacts did not result in action or consultation. She claims that based on prior contacts with DHSS that failed to result in prosecution or removal of the children, DHSS led her to believe that her parenting was minimally acceptable and certainly did not fall to the level of criminality. The trial court, however, admitted evidence of contacts for a period of several weeks before the date of the charged crimes, July 17. We conclude that the trial court did not abuse its discretion in its ruling that evidence of contacts before that period were [sic] irrelevant because temporally remote.

Id. at 897. Wesley fails to explain how this fragment from ***Hollingsworth*** forms any foundation to support his assertion that admission of evidence of the 1996-98 referrals was improper. Indeed, for the reasons already discussed, such evidence was relevant to the "condition or pattern" of neglect, under WIS. STAT. § 48.24(5).

C. Character Evidence

¶23 Wesley argues that the evidence of prior referrals constituted improper character evidence under WIS. STAT. § 904.04(2). He maintains that the State's witnesses "described the generalized behavior of the parents, their traits, and their dispositions over and over in a very unflattering way," and that "[t]he evidence of a dirty house and inadequate supervision of children was also character evidence" because "[t]he inference from the prior referrals that the parents were bad housekeepers was then used to show that they had a propensity for bad housekeeping and therefore were neglectful" at about the time just before the filing of the original petition.

¶24 WISCONSIN STAT. § 904.04(2) "precludes proof that an accused committed some other act for purposes of showing that the accused had a corresponding character trait and acted in conformity with that trait." ***State v. Sullivan***, 216 Wis. 2d 768, 782, 576 N.W.2d 30 (1998). But here, however, even if the evidence of prior referrals was probative of Wesley's character, it was introduced not to establish that *he* acted in conformity with any trait but, rather, to establish that *the children* were in need of protection or services. Accordingly, this court concludes that Wesley has failed to demonstrate that the trial court erroneously exercised discretion in admitting the evidence he challenges.

III. JURY INSTRUCTIONS

¶25 Wesley requested jury instructions cautioning the jury regarding its consideration of what he considered character evidence. He asked for a jury instruction "based upon" ***Whitty v. State***, 34 Wis. 2d 278, 149 N.W.2d 557 (1967), and WIS JI—CRIMINAL 275, CAUTIONARY INSTRUCTION: EVIDENCE OF OTHER CRIMES, WRONGS, ACTS, under WIS. STAT. § 904.04(2). That instruction provides, in part: "Evidence has been received regarding other (crimes committed by) (conduct of) (incidents involving) the defendant for which the defendant is not on trial." He proposed the following instruction:

> Evidence has been received regarding incidents involving respondents that occurred more than 40 days before the information received in this case. Ordinarily such evidence would not be admissible. However, Wisconsin law allows evidence of incidents beyond 40 days in CHIPS cases only if the evidence establishes a "condition" or "pattern" which, together with information received within the 40 day period, provides a basis for conferring jurisdiction on the court.
>
> You may not consider this evidence to answer "yes" to any of the verdicts in the special verdict. You may not consider this evidence as proof that any of the respondents has a certain character, certain character trait, or that any of

> the respondents acted in conformity with that trait or character with respect to the information received within the 40 day period.
>
> The evidence may only be considered in so far as it establishes a "condition" or "pattern" with the information received within 40 days and which provides a basis for conferring jurisdiction on the court.
>
> You may consider this evidence only for the purposes I have described, giving it the weight it deserves. It is not to used to conclude that the respondents are bad people or that you are to prematurely conclude your proper and careful deliberations in answering the special verdict. [sic]

The trial court rejected Wesley's request, concluding that the challenged evidence was "not character evidence," but, rather, was "primary evidence as to the care of the child."

¶26 This court has explained:

> The acceptance or rejection of a requested jury instruction and the admission or exclusion of evidence lie[s] within the sound discretion of the circuit court. When we review a discretionary decision, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. In considering whether the proper legal standard was applied, however, no deference is due. This court's function is to correct legal errors. Therefore, we review *de novo* whether the evidence before the circuit court was legally sufficient to support its rulings.

Ansani v. Cascade Mountain, Inc., 223 Wis. 2d 39, 45-46, 588 N.W.2d 321 (Ct. App. 1998) (citations omitted). Additionally, if the trial court's instructions "adequately cover the law, we will not find error in its refusal to give a requested instruction even where the proposed instruction is equally error-free." ***M.P. v. Dane County Dep't of Human Servs.***, 170 Wis. 2d 313, 331, 488 N.W.2d 133 (Ct. App. 1992). Here, Wesley has offered nothing to establish that the trial court erred in denying his request.

¶27 A special instruction, "based upon" ***Whitty*** and WIS JI—CRIMINAL 275, could have been tailored to the facts and law of this case and might have given fair guidance to the jury. Wesley's proposed instruction, however, while accurate and potentially helpful in some ways, included at least one confusing and possibly misleading statement: "Ordinarily such evidence would not be admissible." This simply is not so. Such evidence, highly relevant and probative of "a condition or pattern," ordinarily would be admissible. *See* WIS. STAT. §§ 904.04(2) & 904.06. Even the next sentence of the proposed instruction, apparently attempting to qualify the instruction's inaccurate assertion, was confusing. It merged the standards for sufficiency of a CHIPS petition, under WIS. STAT. § 48.24(5), with the standards for admission of evidence.

¶28 Thus this court concludes that the trial court correctly denied Wesley's request for the additional jury instruction.

By the Court.—Order affirmed.

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