COURT OF APPEALS
DECISION
DATED AND FILED

August 14, 2002

Cornelia G. Clark
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. 02-1151-FT
02-1152-FT

Cir. Ct. Nos. 02-JC-20
02-JC-21

STATE OF WISCONSIN

IN COURT OF APPEALS

DISTRICT II

NO. 02-1151-FT

IN THE INTEREST OF COLE J.D.,
A PERSON UNDER THE AGE OF 18:

OZAUKEE COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-APPELLANT,

V.

JOHN D. AND KELLY D.,

RESPONDENTS-RESPONDENTS.

NO. 02-1152-FT

IN THE INTEREST OF HARRISON A.D.,
A PERSON UNDER THE AGE OF 18:

OZAUKEE COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-APPELLANT,

V.

JOHN D. AND KELLY D.,

RESPONDENTS-RESPONDENTS.

APPEAL from orders of the circuit court for Ozaukee County: RICHARD T. BECKER, Reserve Judge. *Reversed and causes remanded with directions*.

¶1 BROWN, J.[1] The Ozaukee County Department of Social Services appeals from orders dismissing its petitions alleging that Cole J.D. and Harrison A.D. are children in need of protection or services (CHIPS).[2] The department asserts that the trial court misinterpreted and misapplied WIS. STAT. § 48.24(5) to the facts of this case when it excluded evidence of prior incidents of abuse. We agree with the trial court's interpretation of the statute, but disagree on how it was applied in this case. We therefore reverse the orders dismissing the petitions and remand the cases for further proceedings consistent with this opinion.

¶2 The department requested the corporation counsel's office to file a CHIPS petition for three-year-old Cole based on WIS. STAT. § 48.13(3), child abuse, and to file a CHIPS petition for the child's brother, ten-month-old Harrison, based on § 48.13(3m), risk of abuse. The allegations in the petitions concern in part an incident that occurred on January 20, 2002. On that day, Kelly D., the children's mother, placed a 911 call to the Grafton police department reporting

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

[2] The guardian ad litem also filed a brief in this consolidated appeal.

that her husband, John D., had slapped Cole, causing his lip to bleed. The police department conducted an investigation. During an interview, Kelly stated that her husband has a severe temper and reacts violently to the children when they cry excessively or behave badly. Kelly also informed the police that she was currently on probation for an incident in which Cole became a victim of shaken baby syndrome, although she expressed the belief that her husband had committed the act. Kelly produced a paper towel with blood on it as evidence of the lip injury. She also filed a written statement. Later on January 20, 2002, and after speaking to her husband, Kelly contacted the police department to withdraw her statement. She did not deny the child's lip was cut but claimed he had "lost his footing and fell and hit his mouth."

¶3 The petitions also contained allegations of prior incidents of abuse. On August 3, 2001, the Washington County Department of Social Services received a referral that Cole had extensive facial and arm bruising. As part of the Jackson police department's investigation, Dr. Jordan Greenbaum of Children's Hospital of Wisconsin evaluated photographs of the child's facial and arm bruises. Dr. Greenbaum concluded the bruising was highly suspicious for abuse. His opinion was based on the fact that the bruises occurred in places where children do not ordinarily get bruises by accidental means, the bruises were numerous and John gave contradictory explanations for the injuries.

¶4 The petition alleged another incident of abuse occurring sometime in November 2001. The parents refused to cooperate with the investigation and no charges were filed for either the August or November incidents.

¶5 At the fact-finding hearing held on March 27, 2002, the trial court admitted evidence from the 2001 incidents over the objection of Kelly and John's

attorney. This evidence included testimony from Dr. Greenbaum and the investigators from the Jackson and Grafton police departments. It also included photographs of Cole taken after the August incident. The trial court overruled the parents' objection on the ground that the evidence could be cumulative evidence forming the basis of a CHIPS petition and possibly an exception to the rule against prior bad acts evidence.

¶6 Nevertheless, at the end of the hearing, the trial court refused to consider the evidence from the August 2001 incident as part of a condition or pattern of abuse because there was no "good proof" of abuse in the January 2002 incident that occurred in Grafton. The trial court then found the department had not met its burden of proving physical abuse and dismissed both petitions.

¶7 The first issue we address on appeal is the appropriate standard of review. Ordinarily, when a trial court makes findings of fact based on the weight and credibility of the evidence, we defer to the decision of that court unless it is clearly erroneous. In this case, the trial court stated that there was no "good proof" of the January 2002 incident, which indicates to us that the trial court believed the department had failed to sustain its burden of proof with respect to the issue of physical abuse.

¶8 The concept of burden of proof has two aspects: the burden of producing some probative evidence on a particular issue and the burden of persuading the fact finder with respect to that issue. ***State v. Velez***, 224 Wis. 2d 1, 15-16, 589 N.W.2d 9 (1999). With respect to the burden of persuasion, our careful review of the record indicates that the trial court did not make any explicit credibility findings concerning the evidence of the January 2002 incident. Nowhere in the record, for example, does the trial court determine that the

department failed to provide "clear and convincing" evidence of the allegations in the petitions. We therefore do not view the orders dismissing the petitions as based on the lack of credible evidence—rather, we view the orders as based on the department's failure to present evidence sufficient to meet the burden of production. In other words, the issue on appeal is whether there were sufficient facts in the record to establish a prima facie case.[3] This issue is a question of law that we review independently of the trial court. ***Currie v. DILHR***, 210 Wis. 2d 380, 387, 565 N.W.2d 253 (Ct. App. 1997) (whether a party has satisfied the requisite burden of proof is a question of law). Statutory construction is also a question of law. ***State v. Setagord***, 211 Wis. 2d 397, 405-06, 565 N.W.2d 506 (1997).

¶9 The trial court clearly expressed its conclusion that the department had failed to produce probative evidence of the January 2002 incident. "There was no proof at all of any kind of injury to Cole other than [Kelly's] statement about his lip and she didn't retract, the fact that he had a bloody lip, but she did retract the statement as to how it happened." The court concluded that the "only abuse proof" presented was from the August 2001 incident. The court further reasoned that the August 2001 incident, standing alone, could not justify the petitions in this case.

¶10 The department argues that the trial court erred by interpreting WIS. STAT. § 48.24(5) to disallow consideration of all the abuse evidence together. The

[3] The term "prima facie" is ambiguous; it is sometimes used to describe evidence that is sufficient to meet the burden of production and sometimes used to denote situations in which the evidence offered by a party is so compelling that the burden of production shifts to the opposing party. 2 MCCORMICK ON EVIDENCE § 342, at 433 n.4 (5th ed. 1999). The term is used here in its former sense.

department argues that the plain language of the statute negates such an interpretation. However, we agree with the court's reasoning that if the department failed to meet the burden of production on the January 2002 incident, then the August 2001 incident cannot be used to provide a basis for jurisdiction.

¶11 Under WIS. STAT. § 48.24(5), the intake worker has forty days to collect information to be used in a petition. The information collected during this forty-day time period then becomes the basis for the petition. Thus, the forty-day time limitation refers to the amount of time in which the intake worker must act following receipt of referral information. However, information concerning other instances of abuse that is received outside the time period may be included in the petition to establish a condition or pattern of abuse:

> With respect to petitioning a child or unborn child to be in need of protection or services, 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 of the court.

Id. This section allows inclusion of information of prior instances of abuse only if the information establishes a "condition or pattern" to an incident that is referred within the forty-day period. If the department fails to meet its burden to prove the original referral incident, the other instances cannot come in—they are outside the mandatory time frame.

¶12 Where we part ways with the trial court is in its conclusion that the department failed to carry its burden to produce evidence of the January 2002 incident. The department provided the following evidence probative of whether Cole was a victim of abuse in January 2002: a tape of Kelly's frantic 911 call reporting that John had slapped Cole causing his lip to bleed, the observations of

the police officer called to the scene and Kelly's original written statement corroborating the phone call. This production of evidence, as a matter of law, satisfies the department's burden to produce evidence probative of the ultimate fact to be proved, that Cole is the victim of child abuse. The fact that Kelly recanted her statement the same day is relevant to the persuasiveness, or credibility, of the evidence, but does not preclude the department from establishing its prima facie case for production of the evidence.

¶13 Because the department has made a prima facie case with respect to the January 2002 incident, the information regarding the August 2001 incident of abuse can be and should be considered by the trial court to determine whether there is a condition or pattern of conduct to provide a basis for jurisdiction. The trial court erred by concluding otherwise.

¶14 As we previously stated, in addition to the burden of producing probative evidence of Cole's physical abuse, the department also bears the burden of persuading the trial court with respect to that issue. The statute provides that the department must prove its facts by clear and convincing evidence. WIS. STAT. § 48.31(1). Consequently, we remand this case back to the trial court with the instruction that the trial court make the necessary credibility determinations as to the weight of the evidence presented, including the evidence of the past instances of abuse. We are particularly concerned that the health and welfare of Cole and Harrison may be in jeopardy and, while we cannot oversee the trial court docket, we strongly recommend the trial court expedite the resolution of this matter as quickly as possible.

By the Court.—Orders reversed and causes remanded with directions.

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