COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2003

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. 03-1248
03-1249
03-1250

Cir. Ct. Nos. 02TP000179
02TP000180
02TP000181

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

NO. 03-1248
CIR. CT. NO. 02TP000179

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

WESLEY H., SR.,

RESPONDENT-APPELLANT.

NO. 03-1249
CIR. CT. NO. 02TP000180

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

WESLEY H., SR.,

RESPONDENT-APPELLANT.

NO. 03-1250
CIR. CT. NO. 02TP000181

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

WESLEY H., SR.,

RESPONDENT-APPELLANT.

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

¶1 FINE, J. Wesley H., Sr., appeals from an order, entered after a bench-trial fact-finding hearing, terminating his parental rights to Wesley, Jr., Brittany, and Wendy on the ground that they were children in continuing need of protection or services because: they had been outside of Wesley H.'s parental

home for a cumulative period of six months or longer; Wesley H. had not met conditions of return that were previously imposed; Wesley H. was "substantially unlikely to meet the conditions of return" within the twelve months following the fact-finding hearing; and the applicable social services agency had "made reasonable efforts to provide appropriate services to" Wesley H. to help him regain the custody of his children. *See* WIS. STAT. § 48.415(2). The only issue on this appeal is whether the trial court erroneously exercised its discretion when it denied Wesley H.'s motion for a mistrial after a probation-parole agent employed by the Department of Corrections indicated in response to the trial court's questions that Wesley H. was considered to be a high-risk sex-offender. We affirm.

I.

¶2 During the fact-finding hearing, a probation and parole agent testified that Wesley H. had been on "extended supervision" following his release from prison in May of 2002. Although there had been some failed efforts to find a suitable place for Wesley H. to live, resulting in his being taken back into custody for various periods, he was ultimately released into the community on electronic monitoring, and was "going to be on the bracelet for five years." When the trial court asked, appropriately, whether the decision to place Wesley H. on electronic monitoring was "based upon just the nature of the conviction or something particular to his offense," the agent replied that Wesley H. was considered to be a high-risk sex offender, although not sufficiently high for the Department to seek his commitment under WIS. STAT. ch. 980. Although Wesley H. did not object to this testimony at the time, he later, as noted, asked the trial court to declare a mistrial, indicating that the parties had agreed that the nature of Wesley H.'s crimes would not be disclosed during the fact-finding hearing.

¶3 In denying the motion for a mistrial, the trial court explained that "the only way I will use [the evidence about the electronic monitoring] is the limitations that the department has placed upon [Wesley H.] as those limitations affect his ability to have his children with him." The trial court indicated specifically that it was not going to "wildly speculate about" the reasoning underlying the Department's assessment of Wesley H. or why he was on electronic monitoring because that was not relevant to the trial court's decision under WIS. STAT. § 48.415(2).

II.

¶4 Whether to grant or deny a motion for a mistrial is within the trial court's discretion. ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). In a jury trial, we presume that the jury follows instructions. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989). In bench trials, we assume that the trial court also adheres to the rules of evidence in reaching its decision. ***McCoy v. May***, 255 Wis. 20, 24–25, 38 N.W.2d 15, 17 (1949) (presumed that trial court "disregards any evidence improperly admitted"). Here, the trial court noted that it was "perfectly capable of putting things where they belong," and that it was "not going to consider" why Wesley H. was on electronic monitoring. Although Wesley H. contends that judges "'are human'" (quoted source omitted) and that a bell once struck "cannot be unrung," the presumption that juries follow instructions and that trial courts adhere to the rules of evidence are "pragmatic" rules, "rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant." ***Richardson v. Marsh***, 481 U.S. 200, 211 (1987). Given the narrow inquiry under WIS. STAT. § 48.415(2), the trial court appropriately limited its use of the electronic

monitoring evidence, and did not erroneously exercise its discretion in denying Wesley H.'s motion for a mistrial.[1]

By the Court.—Order affirmed.

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

[1] The trial court's question was, however, as noted, appropriate. It might have elicited information material to Wesley H.'s relationship with his children that would have been material to the inquiry under WIS. STAT. § 48.415(2).