COURT OF APPEALS
DECISION
DATED AND RELEASED

April 25, 1996

No. 95-2997

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

In the Interest of Skylar V.,
A Person Under the Age of 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

JENNIFER V.,

Respondent-Appellant.

APPEAL from orders of the circuit court for Monroe County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

EICH, C.J.[1] Jennifer V. appeals from an order finding her child, Skylar V., to be in need of protection or services and placing her with her paternal grandmother. The order was based on § 48.13(3m), STATS., which, among other things, defines a child in need of protection or services as one

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

> [w]ho is at substantial risk of becoming the victim of ... physical abuse, including injury that is ... inflicted by another by other than accidental means, based on reliable and credible information that another child in the home has been the victim of ... physical abuse.

Jennifer V. appeals from the order, and from a subsequent order denying her motion for postjudgment relief. She argues that: (1) the trial court lacked jurisdiction to enter the order because the facts upon which it was based occurred prior to the effective date of § 48.13(3m), STATS.; (2) the trial court erroneously exercised its discretion when it declined to strike a prospective juror for cause, requiring Jennifer V. to use one of her preemptive strikes to do so; and (3) the court improperly took judicial notice of other judgments involving Jennifer V. We reject her arguments and affirm the order.

The facts are not in serious dispute and will be discussed as they relate to the individual issues.

I. Jurisdiction

In January 1994, Monroe County filed a petition alleging that Jennifer V. had neglected Skylar. The petition referred to a contemporaneous, but as-yet-unresolved CHIPS proceeding involving Skylar's younger brother, Kody, based on charges of abuse and failure to provide medical care. The petition also alleged that, in the opinion of the social worker assigned to the family, Skylar was at risk of harm due to a past history of abuse and neglect, and also due to the events involving Kody, who was then hospitalized as a result of abuse. Skylar was temporarily placed with her paternal grandmother.

On May 4, 1994, § 48.13(3m), STATS., became effective, creating a new basis for CHIPS jurisdiction on grounds that another child in the home had been abused or neglected.

On May 10, 1994, Jennifer V. and her husband filed their own CHIPS petition, alleging that they were unable to care for Kody and provide for his medical needs. The following day the county moved to dismiss the CHIPS petition it had filed regarding Kody, and he was found to be in need of

protection or services pursuant to his parents' petition. On the same day, the parties entered into a consent decree in Skylar's case, continuing her placement with her grandmother.

On November 12, 1994, Jennifer V. was convicted of three counts of felony abuse of her children--two involving abuse of Skylar in 1991 and 1992, and one involving abuse of Kody in 1993-94. The count involving Kody was based on the facts that had been mentioned in the earlier CHIPS proceeding, which had been resolved by the consent decree.

Following Jennifer V.'s convictions, the county filed the petition that is the subject of this appeal, alleging that Skylar was at risk of abuse in the home on the basis of information that her younger brother, Kody, had been abused. The factual basis for the petition was Jennifer V.'s conviction for abusing Kody.

The jury found Skylar to be in need of protection or services within the meaning of § 48.13(3m), STATS., and, as indicated, the court entered a dispositional order placing Skylar under the supervision of the Department of Human Services, with placement continuing with her paternal grandmother.

Jennifer V., claiming that the county's petition was based on facts occurring prior to the enactment of § 48.13(3m), STATS., argues that because the statute may not be applied retroactively, the court lacked jurisdiction to proceed with the petition.

We agree with the county, however, that the petition was based not on allegations of abuse of Kody occurring prior to the effective date of the statute but on Jennifer V.'s conviction of abuse in November 1994. We conclude that, while the injuries suffered by Kody (and Skylar) which were the subject of those convictions occurred prior to that date, the convictions themselves--the actual determination that the abuse had in fact occurred--constitute a separate and distinct determination which may be utilized as a separate factual basis for a petition under the statute. Taking that view, the trial court did not apply the statute retroactively and did not lack jurisdiction to proceed in the case.

II. Impartial Jury

During the voir dire, Jennifer V.'s attorney explained to the jury panel that she had been convicted of three counts of child abuse and described the facts giving rise to those convictions, which included injuries causing brain damage to Kody, who was approximately one year old at the time. The following exchange then occurred between counsel and one of the prospective jurors, Calvin Oium:

MR. BEATTY (defense counsel): Hearing that, how many of you have your minds made up? Mr. Oium?

JUROR: Yes.

MR. BEATTY: And can you say how your mind is made up?

JUROR: Guilty.

MR. BEATTY: Would you like me to ask the Judge to excuse you?

THE COURT: I'm not going to excuse him, Mr. Beatty. You have strikes for that purpose.

MR. BEATTY: Mr. Oium, do you think you can be an impartial juror in this case given your view on that?

JUROR: Not from what I know.

MR. BEATTY: Your Honor, I'm --

THE COURT: That's going to be part of the evidence in the case. If the evidence in the case persuades him, then I don't think that he's indicated that he can't be impartial. He indicated that the evidence that you suggest [is going to be offered] then he's likely to find that the child is in need of protection or services. I don't think it's a bias.

Jennifer V. then used one of her peremptory strikes to eliminate the juror from the panel.

Jennifer V. correctly cites the admonition of § 805.08(1), STATS., that "[i]f a juror is not indifferent in the case, the juror shall be excused." It is equally true, we think, that Mr. Oium was not "indifferent."

She does not, however, discuss the line of cases, culminating in ***State v. Traylor***, 170 Wis.2d 393, 400, 489 N.W.2d 626, 629 (Ct. App. 1992), recognizing "Wisconsin's longstanding rule ... that where a fair and impartial jury is impaneled, there is no basis for concluding that a defendant was wrongly required to use peremptory challenges." As we noted in ***Traylor***, "There is no constitutional right to peremptory challenges; there is only a constitutional right to an impartial jury." ***Id***. (citing ***Ross v. Oklahoma***, 487 U.S. 81, 85, 88 (1988)). Thus,

> [w]here there is no showing that any of the actual jurors were biased, it would be speculative for a court to conclude that the jury would have been fairer if counsel had been allowed to preserve peremptory challenges on other, unspecified members of the jury venire. Moreover, there would be no stopping point if the deprivation of such speculative benefit, standing by itself, could establish prejudice.
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> ***Id***.

A claim, such as that made by Jennifer V. in this case, that a jury is not impartial must focus not on the jurors who were removed by peremptory challenges but on the jury that actually heard the case. ***Ross***, 487 U.S. at 85-86. Jennifer V. neither argues nor offers any evidence that the jury, as empaneled--or any of its members--was biased. We thus reject her argument.

III. Judicial Notice

Prior to trial, the court took judicial notice of the verdicts and information in Jennifer V.'s felony abuse case. It also noticed the 1991 CHIPS proceeding and the fact that Skylar had been adjudged in need of protection or services. The documents were read to the jury and the court instructed the jurors that they were to accept those facts as having been established.

In ***Perkins v. State***, 61 Wis.2d 341, 346, 212 N.W.2d 141, 144 (1973), the supreme court, without discussion, noted the existence of an earlier rule--stemming, apparently, from ***McCormick v. Herndon***, 67 Wis. 648, 652-53, 31 N.W. 303, 306 (1887)[2]--that "a circuit court cannot take judicial notice of its own records in another case." We need not decide whether that rule, considered in context, would apply here so as to render erroneous the trial court's action because (a) defense counsel never offered a specific objection to the court's taking notice of the documents, and (b) even if it could be considered error under ***Perkins*** to notice them, we are satisfied that any such error would be harmless.

At the time the county attorney asked the court to take notice of the convictions and other documents, defense counsel made no objection, asking only clarifying questions about the judgments and petitions. Then, just before the jury was brought in, counsel made the following general statement: "Judge, I would like to preserve an ongoing objection to the admission of all the evidence that's been discussed here at this time."

Objections must be specific. "In order to preserve his [or her] right to appeal on a question of admissibility of evidence, a defendant must apprise the trial court of the specific grounds upon which the objection is based." ***State v. Peters***, 166 Wis.2d 168, 174, 479 N.W.2d 198, 200 (Ct. App. 1991) (citation omitted). The purpose of the rule is, of course, to allow the trial court to remedy any possible error and thus avoid creation of an issue for appeal. ***State v. Barthels***, 166 Wis.2d 876, 884, 480 N.W.2d 814, 818 (Ct. App. 1992), *aff'd*, 174 Wis.2d 173, 495 N.W.2d 341 (1993). Defense counsel never made the type of specific objection that would entitle Jennifer V. to review of the court's decision to take judicial notice of the documents.[3]

Even if the objection was not waived, the test for harmless error is whether the result of the proceeding would have been otherwise had the error

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[2] The reference to ***McCormick*** is found in a case cited by the ***Perkins*** court, ***State ex rel. Mengel v. Steber***, 158 Wis. 309, 311, 149 N.W. 32, 33 (1914).

[3] Additionally, as we have noted above and note below, defense counsel himself brought the convictions to the attention of the jurors during voir dire, and also attempted to limit a witness's discussion of them by informing the court (and jury) that they were already "in evidence."

not been committed. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). The social worker, Ann Garrity, testified that she was aware of Jennifer V.'s convictions and began to discuss her knowledge of the conviction relating to Kody--only to be cut off by defense counsel, who stated: "Your Honor, this is already in evidence." The court directed Garrity to continue and she went on to tell how she had discussed the convictions with Jennifer V.'s husband and with Jennifer V. herself. Defense counsel then cross-examined Garrity about the convictions and the facts upon which they were based.

We cannot say on this record that there is any reasonable possibility that, had the judgments of conviction themselves not been judicially noticed, the result of the proceeding would have been different. ***Dyess***, 124 Wis.2d at 543, 370 N.W.2d at 231-32.

By the Court.—Orders affirmed.

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